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**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: April 7, 2009
Decided: April 29, 2009

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Re: *Tooley v. AXA Financial, Inc., et al.*
Civil Action No. 18414-CC

Dear Counsel:

Before me is defendants' motion to dismiss for failure to prosecute pursuant to Court of Chancery Rules 41(b) and (e). Plaintiff Patrick Tooley,[1] a former shareholder of Donaldson, Lufkin & Jenrette, Inc. ("DLJ"), commenced this class action on behalf of minority shareholders who tendered their shares in a tender offer to Credit Suisse Group for $90 per share. Prior to the acquisition, AXA Financial, Inc. owned approximately 71% of the outstanding DLJ stock. Plaintiffs challenged the decision of the DLJ directors to approve the extension of Credit Suisse Group's cash tender offer for twenty-two days. Plaintiff contended in the complaint that the tendering shareholders were injured because of the lost time value of the consideration paid for their shares at the close of the tender offer.

[1] Kevin Lewis was also a plaintiff in this action, but withdrew in March 2007.

On January 21, 2003, this Court granted defendants' motion to dismiss the complaint.[2] Plaintiff appealed, and the Delaware Supreme Court held that the complaint should be dismissed without prejudice, thereby granting plaintiff an opportunity to replead if there existed a basis for doing so under Court of Chancery Rule 11.[3] On June 16, 2004, plaintiff filed an amended complaint, and on May 13, 2005, this Court denied defendants' motion to dismiss the amended complaint.[4] In denying the motion to dismiss, the Court held that although plaintiff did not have an enforceable expectancy interest in sale proceeds, plaintiff had "overcome the presumption of the business judgment rule" by presenting "facts suggesting (barely) that the defendants received an unjustified benefit to the exclusion and detriment of plaintiffs."[5]

From mid-2005 through early-2006, plaintiff languidly prosecuted the case, including seeking modest discovery from defendants. For example, plaintiff served a document request on June 7, 2005. Defendants responded with numerous objections on July 7, but produced responsive documents in August. On September 23, defendants served their requests for document production and interrogatories. Over the following months the parties exchanged e-mails and telephone calls regarding discovery and agreed to several extensions of the time the parties had to respond to discovery. Defendants assert that on January 30, 2006, they sent a waiver stipulation to plaintiff, under which defendants were to produce privileged documents on the condition that plaintiff would not contend that defendants thereby waived attorney client privilege broadly. Defendants note that plaintiff did not respond to the waiver. Defendants also note that on February 2, 2006 they sent to plaintiff their privilege log, and that on February 3 they made a supplemental document production. Defendants state that plaintiff did not respond to either of these events.

Plaintiff took no further substantive action in the case until March 31, 2008, when he sent a letter to counsel for defendants and Credit Suisse asking that they produce certain categories of documents that allegedly remained outstanding. Defendants claim that plaintiff ceased communications with defendants on January 25, 2006, and that the next communication defendants received from plaintiff was the March 31, 2008 letter.

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[2] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 2003 WL 203060 (Del. Ch. Jan. 21, 2003).
[3] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).
[4] *Tooley v. AXA Financial, Inc.*, 2005 WL 1252378 (Del. Ch. May 13, 2005).
[5] *Id.* at *7.

Other than several non-substantive filings,[6] the next activity reflected on the Court's docket is the January 13, 2009 letter I sent to counsel requesting an update on the status of the case. Plaintiff responded in a January 27 letter apologizing for the delay and explaining that the attorney at Abbey Spanier Rodd & Abrams, LLP in charge of the case changed firms, and that it was not until early-2008 that plaintiff ascertained that, in his view, defendants had not fulfilled their discovery obligations. In the letter, plaintiff also claimed to have sent a letter to defendants asking them to respond to plaintiff's document requests by January 30, 2009. Defendants responded with a letter sent the same day, noting that if the Court did not dismiss the case on its own motion, defendants were prepared to file a motion to dismiss for lack of activity. Plaintiff responded on February 17 by filing a motion to compel the production of documents. On March 11, defendants filed the instant motion to dismiss for failure to prosecute under Rules 41(b) and (e). On March 17, the Court entered an order setting a briefing schedule for the motion to dismiss and holding the motion to compel in abeyance pending the resolution of the motion to dismiss.

The Court of Chancery Rules reflect the inherent power of a court to manage its docket to prevent unnecessary and wasteful delay. Court of Chancery Rule 41(b) authorizes a defendant to move for dismissal of an action "[f]or failure of the plaintiff to prosecute." Rule 41(e) provides that the Court may, upon its own motion or that of any party, and after reasonable notice, dismiss a case "wherein no action has been taken for a period of 1 year," "unless good reason for the inaction is given." Even assuming the Court is satisfied that there has been a failure to prosecute under these rules, the decision to dismiss rests in the discretion of the Court.[7]

In this case, the first step of the analysis under Court of Chancery Rules 41(b) and (e) is straightforward. Plaintiff failed to take any substantive activity to prosecute this case for a period of well over one year. Indeed, it appears that

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[6] Plaintiff made several non-substantive filings during the period of inactivity. On March 16, 2007, plaintiff filed a notice of withdrawal of Kevin Lewis as a plaintiff. On March 20, plaintiff filed a Rule 23(aa) affidavit. On May 2, plaintiff filed a stipulated order providing for a change in the caption of the case to reflect the withdrawal of Kevin Lewis, which the Court granted on the same day. On September 26, plaintiff filed a notice of a change in the name of one of the law firms representing plaintiff.

[7] *Lane v. Cancer Treatment Ctrs. of Am., Inc.*, 2001 WL 432445, at *1 (Del. Ch. Apr. 11, 2001).

plaintiff took no steps to actively pursue his claim from January 2006 until March 2008—a period of over two years. Moreover, following a single letter sent to the defendants in March 2008, plaintiff again failed to prosecute this action until prompted to respond by a status letter from the Court in January 2009, a further delay of almost ten months. Plaintiff's only stated reason for the extended period of inactivity is that the attorney in charge of the case changed law firms.[8] To say the least, this is not a "good reason" for an over two-year delay in the prosecution of this case. Additionally, the non-substantive filings plaintiff made during the period of delay suggest that his attorneys were aware that the case was still pending, but chose not to actively prosecute it. These facts demonstrate that plaintiff has failed to diligently prosecute this case and has not proffered any "good reason for the inaction."[9]

Thus, whether this case should be dismissed under Court of Chancery Rules 41(b) and (e) rests in the sound discretion of the Court. I am not convinced that the circumstances of this case warrant dismissal. I therefore decline to dismiss this case, for substantially the same reasons as this Court articulated in *In re Cencom Cable Income Partners, L.P.*,[10] namely "(1) a preference for resolving decisions on the merits; (2) a desire to proceed cautiously in light of the due process issues that are unique to a class action; and (3) deference to the fact that, while their efforts may have been dilatory in the past, at the time of the Rule 41 motion, the Plaintiffs appear to have resumed diligent prosecution of their claims."[11] While I am convinced that the factors on which the Court based its decision in *Cencom* also warrant denying the motion to dismiss in this case, I must note that the circumstances of this case push the limit[12] of the Court's willingness to decline to

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[8] Plaintiff asserts that he was "lulled" into inaction by the defendants' own inaction and failure to comply with their discovery obligations. While I will not take this opportunity to attempt to provide a complete definition of "lulling," I am confident that mere inactivity by defendants would not constitute "lulling" that would excuse an extended delay by plaintiff. It is the responsibility of the plaintiff to prosecute an action, and mere inaction by a defendant does not excuse inaction by a plaintiff. Moreover, if plaintiff believed that defendants had not complied with their discovery obligations, then plaintiff could have filed a motion to compel (as he has now done).

[9] Ct. Ch. R. 41(e).

[10] 2006 WL 452775 (Del. Ch. Feb. 16, 2006).

[11] *Id.* at *2 (footnotes omitted).

[12] Although it appears that, as in *Cencom*, plaintiff resumed prosecution of the action before defendants filed the motion to dismiss under Rule 41, plaintiff's conduct came dangerously close to resulting in dismissal of this action. Plaintiff appears to have continued pursuing this matter only after prompted to do so by the letter I sent to counsel on January 13, 2009, inquiring about

exercise its discretion to dismiss under Rule 41. Indeed, the Court's decision today and the Court's decision in *Cencom* should not be seen as creating a "safe harbor" that would allow class action plaintiffs to fail to diligently prosecute actions and then avoid dismissal under Rule 41. To the contrary, if the requirements of Rules 41(b) or (e) are met, it is within the discretion of the Court to order dismissal.[13]

Although I am exercising my discretion to allow this case to continue, I must note that plaintiff's dilatory conduct occasioned this motion to dismiss and resulted in the unnecessary imposition of costs on defendants. Plaintiff and his attorneys have failed to provide any good reason for their dilatory conduct. Accordingly, and in light of the fiduciary nature of class actions and the unique responsibility of class action counsel,[14] I conclude that it is appropriate that plaintiff's attorneys personally pay to defendants the costs (including attorneys' fees) that defendants incurred in pursuing this motion to dismiss. If plaintiff's attorneys are not willing to pay these costs, the Court will revisit the question of whether plaintiff's attorneys are qualified to represent the class.

For the foregoing reasons, and on the conditions set forth above, the motion to dismiss for failure to prosecute pursuant to Court of Chancery Rules 41(b) and (e) is denied.

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the status of this case. Going forward, plaintiffs in this Court should note that merely filing a motion following inquiry from the Court will not necessarily save them from dismissal for failure to prosecute.

[13] *See Yancey v. Nat'l Trust Co.*, 633 A.2d 372, 1993 WL 370844, at *4 (Del. Aug. 30, 1993) (unpublished disposition) ("[U]nder the guidelines of Chancery Court Rule 41(e), a delay of only 1 year is enough to justify dismissal."); *Michaels v. Lesser*, 275 A.2d 797, 799 (Del. Ch. 1971) ("[I]f Rule 41(e) is to serve a purpose, and I think that it is essential to the orderly administration of the business of this Court, then there must be action to prosecute within the one year unless good reason for inaction is shown. Unless a plaintiff meets that test, then he runs the risk of a dismissal under the Rule.").

[14] *See generally In re M & F Worldwide Corp. S'holders Litig.*, 799 A.2d 1164, 1174 n.34 (Del. Ch. 2002) ("[I]t is well established that by asserting a representative role on behalf of a proposed class, representative plaintiffs and their counsel voluntarily accept a fiduciary obligation towards members of the putative class. Such a fiduciary obligation exists even before the class has been certified.").

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:jmb