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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LEO E. STRINE, JR
"ICE-CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE 19801

March 22, 2000

Pamela S. Tikellis, Esquire
Chimicles & Tikellis
One Rodney Square
P.O. Box 1035
Wilmington, DE 19899

Alan J. Stone, Esquire
Morris, Nichols, Arsht & Tunnel1
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899- 1347

Andre G. Bouchard, Esquire
Bouchard Margules Friedlander & Maloneyhuss
222 Delaware Avenue, Suite 1102
Wilmington, DE 1980 1

RE: In re ML/EQ Real Estate Partnership Litigation,
Consolidated C.A. No. 15741

Dear Counsel:

The plaintiffs in this action are representatives of a putative class of unitholders ("Unitholders") of defendant ML/EQ Real Estate Partnership ("ML/EQ"). They seek reargument of my December 20, 1999 decision finding

that certain of their claims were time-barred.' In this letter opinion, I assume the reader's familiarity with my prior opinion.

In their motion for reargument, the plaintiffs make three major arguments:

(1) that I erred by treating the defendants' motion to dismiss as a motion for summary judgment without affording the plaintiffs an opportunity to take full discovery;

(2) that I was mistaken in holding that the plaintiffs could not challenge the decision of ML/EQ's general partner (the "General Partner") to treat distributions from the Merritt Loan as "Sale or Financing Proceeds" because the characterization of the Merritt Loan proceeds was fully disclosed on or before June 16, 1994 — three years before the original June 16, 1997 complaint was filed; and

(3) that I wrongly applied the relation back doctrine of Chancery Court Rule 15(c) in concluding that the allegations in the plaintiffs' amended complaint filed August 31, 1999 did not relate back to the original complaint.

In addition, the plaintiffs seek a clarification of whether I implicitly held that certain claims were time-barred which the defendants did not even allege were time-barred. As to this point, the simple answer to the plaintiffs' request is: I did no such thing.

Having dealt with that request, I now turn to the plaintiffs' other arguments, bearing in mind that the plaintiffs bear a heavy burden on a Rule 59 motion. Such

[1] *In re ML/EQ Real Estate Partnership Litig.*, Del. Ch., Cons. C.A. No. 15741, mem. op., Strine, V.C. (Dec. 20, 1999).

motions are not a mechanism for litigants to relitigate claims already considered by the court.[2] Rather, Rule 59 relief is available to prevent injustice and will be granted only when the moving party demonstrates that the court's decision "rested on a misunderstanding of a material fact or a misapplication of law."[3]

1. Was Is It Improper To Treat The Defendants' Motion To Dismiss As A Motion For Summary Judgment?

The plaintiffs contend that they were subjected to procedural prejudice because I, *in the alternative,* ruled that it was appropriate to treat the defendants' motion to dismiss as one for summary judgment. In moving for reargument, the plaintiffs ignore the fact that this holding was in the alternative. In my opinion, I noted that the plaintiffs had relied extensively in their complaint upon almost all of the public filings submitted by the defendants in support of their motion to dismiss. For example, the complaint cites to ML/EQ's 1993 IO-K, which is the key document the defendants relied upon to show that the plaintiffs were on notice of the characterization of the Merritt Loan proceeds as Sale or Financing Proceeds before June 16, 1994.

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[2] *Co-Executors of the Will of Mansfield*, C.A. No. 11340, let. op. at 2, Chandler, V.C. (Nov. 5, 1990).

[3] *Arnold v. Society for Savings Bancorp, et al.,* Del. Ch., C.A. No. 12883, let. op. at 1, Chandler, V.C. (June 30, 1995) (citation omitted).

As a result, even if were to disavow my view that it was appropriate to treat the defendants' motion as one for summary judgment, that would not change the result. My conclusion would still stand as an adjudication of the motion as one addressed to the pleadings and the documents integral thereto.

More fundamentally, my prior opinion dealt expressly with the question the plaintiffs now raise: recognizing that "normally" the non-movant "should have an opportunity for some discovery,"[4] was it fair to treat the defendants' motion as a Rule 56 motion unless the plaintiffs were given the opportunity to take full discovery? I stand by what I said at that time:

> This raises a broader issue: are defendants who are the subject of claims that on the face of the complaint appear to be time-barred therefore stuck with the unappetizing choice between litigating the motion without access to their most formidable weapon — evidence of inquiry notice — or acceding to discovery as the price of obtaining a dismissal of time-barred claims? I think not.
>
> Rather, resort to Chancery Court Rule 56 seems fair and appropriate in such circumstances. Treating a limitations motion in this manner does not prejudice the plaintiffs in any manner because the plaintiffs can easily rebut the defendants' proof without recourse to discovery. Put simply, if the defendants come forth with evidence demonstrating that the plaintiffs had access to information that should have put the plaintiffs on inquiry notice of claims, the plaintiffs can easily produce affidavits denying that they had access to such information or, as they have here, file briefs asserting that the information pointed to by the defendants was insufficient to provide inquiry notice. The plaintiffs

[4] *In re Santa Fe Pacific Corp. Shareholder Litig.*, *669* A.2d 59, 69 (1995).

> do not need discovery to develop additional evidence — evidence they obviously did not have at the time they filed their complaint — to prove that they did not possess, at times much earlier than filing, information sufficient to put them on inquiry notice.
>
> Where inquiry notice is the critical issue, the plaintiffs' access to and the sufficiency of the information pointed to by the defendants will usually be the only relevant issues. If there is no need for a further factual inquiry to resolve these issues, summary judgment can appropriately be granted to the party whose position is correct as a matter of law.[5]

My decision is in accord with other cases that recognize that it is not invariably the case that a non-movant must be accorded discovery before being required to respond to a summary judgment motion.[6] Indeed, were it otherwise, much of the utility of the summary judgment rule would be lost.

At oral argument, I also explored this issue in some depth with plaintiffs' counsel, focusing on this epistemological question:

> . . . [H]ow could something you didn't know about at the time bear on whether what you did know about at the time put[] you on inquiry notice?[7]

The plaintiffs have yet to provide me with any answer supportive of their position that they should be afforded the opportunity to take discovery — to find documents

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[5] *In re ML/EQ Real Estate Partnership Litig.*, mem. op. at 4-5.

[6] *See, e.g., von Opel v. Youbet.com*, Del. Ch., C.A. No. 17200, let. op. at 2-3, Steele, V.C. (Jan. 26, 2000) (where defendants could respond to summary judgment motion adequately through the presentation of affidavits, the court denied the defendants' request to take discovery).

[7] Tr. at 47.

they did not have at the relevant time — to convince me that the documents that they did have did not put them on inquiry notice.

In further support of this argument, the plaintiffs also claim that they had no idea that they could submit affidavits or additional evidence in responding to the defendants' motion and were thus prejudiced. In addition to the previous reasons why this could not have prejudiced them, it is important to note that in response to the defendants' motion to dismiss, the plaintiffs' counsel did in fact submit an affidavit transmitting an extremely thick appendix of documents that I should consider in ruling on that motion. Thus the inhibiting effect of my treatment of the motion on the plaintiffs' motion strategy, plaintiffs must concede, was less than comprehensive.

Finally, in handling this reargument motion, I afforded the plaintiffs an opportunity to make an offer of proof as to the type of factual information they would have produced had they known the defendants' motion would be treated under Rule 56. They took me up on my offer. For reasons I will explain in addressing the plaintiffs' argument regarding the Merritt Loan claim, the only "evidence" the plaintiffs contend would have been consequential on the defendants' dismissal motion would not have changed my decision had it been

presented because that evidence does not relate to any claim the plaintiffs have actually pled in either of their complaints.

II. Were The Plaintiffs' Merritt Loan Claims As Then Pled Properly Dismissed As Time-Barred?

As an example of how my procedural treatment of the defendants' motion supposedly prejudiced them, the plaintiffs have provided me with documents showing that *in* 1997 *and 1998,* the General Partner and the Associate General Partner of ML/EQ had different views regarding whether the approximately $7 million in Merritt Loan proceeds still held by ML/EQ at that time should be paid out as Sale or Financing Proceeds or as Distributable Cash. Apparently, the Associate General Partner felt that because a number of years had passed since the Merritt Loan proceeds had been received by ML/EQ, the passage of time could result in a change in their status at the time of actual distribution. Thus the plaintiffs ask: how could we have been on inquiry notice of this issue before June 16, 1994 when the General Partner and the Associate General Partner did not even discuss it until 1997 and 1998?

Put that way, it is hard to argue with the plaintiffs' position, But the problem with their position is much more fundamental: they have never filed a complaint in which they argue that the Merritt Loan proceeds should have been

distributed as Distributable Cash because the passage of time required those proceeds to be recharacterized as Distributable Cash from their original status as Sale or Financing Proceeds. Thus their motion ignores the fact that "the court's focus on a motion under Rule 59(f) is solely on the facts in the record at the time of the decision."[8]

The first complaint filed in this litigation did not challenge the characterization of the Merritt Loan proceeds at all. Instead, it challenged the General Partner's failure to distribute those proceeds in a timely manner." In the lexicon of this litigation, that challenge raised a "Hoarding Claim."

In the amended complaint, the plaintiffs did challenge the characterization of the Merritt Loan proceedsbut not because the characterization of those proceeds was influenced by whether they were distributed out to the Unitholders in a certain time period. Rather, the amended complaint says:

> Similarly, during the years 1993, 1994, 1995, 1996 and 1997 the Partnership made distributions of $542,448, $1,356,119, $1,355,970, $1,356,057 and $3,794,103 respectively, which were characterized as distributions of "sales or financing proceeds," related to the payoff of the Merritt Loan. . . . *Each of these distributions was improperly characterized as* "sales *or financing" proceeds* and should be recharacterized as distributions of distributable cash. . . .[10]

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[8] *Price v. The Continental Insurance* Co., Del. Ch., C.A. No. 17219-NC, let. op. at 2, Lamb, V.C. (Mar. 3, *2000)* (*citing Miles, Inc. v. Cookson America, Inc.,* Del. Ch., 677 A.2d 505, 506 (1995).

[9] Comp. ¶¶ 40, 43.

[10] Am. Comp. ¶ 60 (emphasis added).

In my previous opinion, I held that this claim was time-barred because ML/EQ's 1993 10-K — which was made public before June 16, 1994 — fully disclosed that the general partner regarded the Merritt Loan proceeds as Sale or Financing Proceeds. Furthermore, because the original complaint did not challenge the characterization of the Merritt Loan proceeds in any respect, I held that the amended complaint did not relate back and thus June 16, 1994 was the relevant filing benchmark.

The plaintiffs' motion tries to elide these problematic facts by arguing thusly:

> In ruling on defendants' motion to dismiss, the Court determined that plaintiffs could not challenge the characterization of distributions of the Merritt Loan proceeds because the loan had been paid off in 1993, at which time the limited partners were informed that the Partnership's share of the payoff represented Sale or Financing Proceeds as defined in the Partnership Agreement. See Memorandum Opinion dated Dec. 20 1999 at 27-28. The Court stated:
>
> > Unlike the issue of whether ML/EQ needs to retain certain reserves, which involves a continuing process of review by the General Partner, the General Partner's decision about the characterization of all the Merritt Loan proceeds was made and disclosed before June 16, 1994. However the plaintiffs try to look at it, they are challenging that initial decision, and an attack on that decision is untimely.
>
> *Id*. at 28. But in contrast to the foregoing observation, plaintiffs are not challenging the initial characterization of the proceeds made in 1993 when they were received by the Joint Venture. . . . Rather,

> plaintiffs challenge the characterization of certain distributions made to the limited partners thereafter. . . . *Because all of the Merritt Loan proceeds were not distributed within the required time frame of two months following the close of the Fiscal Six-Month Period, but rather were retained by the Partnership as reserves, once such proceeds were distributed they became "distributable cash "pursuant to the Partnership definitions.* . . . Nevertheless, the Managing General Partner continued to treat them as Sale or Financing Proceeds, so as to reduce the limited partners' adjusted capital accounts on which the guarantee was calculated, thereby reducing the amount of the ultimate guarantee payment to be made."

These arguments are insufficient to support plaintiffs' motion. *Indeed, it bears reiterating that these arguments are made in support of a claim that the plaintiffs have never made before this motion for reargument. Neither the original nor the amended complaint asserts that the Merritt Loan proceeds should have been distributed as Distributable Cash rather than Sale or Financing Proceeds as a result of the passage of time.* That the plaintiffs could have made this assertion is proven by the fact that they did allege that the failure to distribute the Merritt Loan proceeds in a timely manner was a breach of duty supporting a Hoarding Claim. Thus the plaintiffs clearly knew about the failure of the General Partner to distribute all of these proceeds earlier and could have asserted that the Partnership Agreement's terms required the recharacterization of the proceeds after a certain period of time elapsed, Yet the plaintiffs did not do so.

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[11] Pls. Reply Br. at 2-3 (emphasis added).

In this regard, the plaintiffs, I regret to say, misrepresent their own complaint. Their amended complaint clearly did challenge the 1993 distribution of Merritt Loan proceeds as improperly characterized. Therefore, the plaintiffs' argument that they did not challenge that distribution or the initial characterization on which that distribution was made is erroneous.

Finally, I daresay plaintiffs are correct when they argue that the statute of limitations cannot prevent them from challenging distributions of Merritt Loan proceeds made within the past three years *on the limited ground* that those proceeds should have been recharacterized because of the passage of time. In my prior opinion, I denied the plaintiffs the right to press claims regarding any of these distributions because I reasoned that once the Merritt Loan proceeds had been characterized as Sale or Financing Proceeds there was no basis for a re-evaluation of that question. I reasoned as much because the plaintiffs advanced no argument to the contrary; that is, their "recharacterization through the passage of time" argument (a "Recharacterization Claim") was not made until the present motion. It was simply absent from the case.

In contrast to their previous arguments, the plaintiffs now contend that Sale or Financing Proceeds which were not distributed to the Unitholders within the two months following the six-month period in which they were received become

Distributable Cash. The Merritt Loan proceeds were received in late 1993. According to the plaintiffs' new theory, therefore, any of the proceeds not paid out after February 28, 1994 became Distributable Cash.

On March 25, 1995, ML/EQ's 1994 10-K disclosed that Merritt Loan proceeds had been distributed to Unithholders in 1994 and 1995 as Sale or Financing Proceeds.[12] At that time, the Unitholders were also told that "[t]he amount and timing of distributions from Sale or Financing Proceeds depend upon payments of the Mortgage Loans and maturity schedules, the timing of disposition of Properties as well as the need to allocate such funds to increase reserves."[13] Put plainly, the plaintiffs were on inquiry notice of the facts necessary to bring a Recharacterization Claim more than three years before they filed their August 3 1, 1999 amended complaint. That the plaintiffs did not know that the General Partner and Associate General Partner were discussing the recharacterization issue in 1997 does not change the reality that the plaintiffs had all the information they needed to know to assert Recharacterization Claims as to distributions occurring more than three years ago, to wit: 1) the characterization of the distribution by the General

[12] Zeldin Aff. Ex. 17, at 17. An identical disclosure was made in ML/EQ's 1994 Annual Report dated April 28, 1995. Zeldin Aff. Ex. 18, at 8-9. The 1994 and 1995 Merritt Loan distributions occurred on August 3 1, 1994 and February 28, 1995 — each was thus made after February 28, 1994.

[13] Zeldin Aff. Ex. 18, at 9.

Partner; and 2) the terms of the Partnership Agreement. The fact that the plaintiffs' own lawyers did not read the Partnership Agreement as providing for a recharacterization of proceeds as a result of the progress of linear time when they tiled the original or amended complaint is something the plaintiffs can take up with their counsel. It is no fault of the defendants.

Lastly as to this issue, I technically need not, but as a practical matter must, deal with whether the plaintiffs can still challenge the characterization of Merritt Loan proceeds distributed out as Sale or Financing Proceeds within the three years prior to the filing of the amended complaint. While the amended complaint does not state this new Recharacterization Claim, the amended complaint does allege a different (and rather unclear) recharacterization argument relating to the Merritt Loan proceeds. As a result, the defendants cannot claim to be surprised that the plaintiffs are claiming that the two distributions of Merritt Loan proceeds within the three years before the amended complaint was filed were mischaracterized. Because I perceive no undue prejudice to the defendants, therefore, I will grant a motion to further amend the amended complaint and I will allow the amendment to relate back under Chancery Court Rule 15(c). Although this approach stretches the limits of Rule 15(c), my ruling is also premised on the fact that this reargument motion was filed before February 28, 2000 and would have been decided earlier

but for the court's decision to hear it along with several pending discovery motions in the case.

The amendment I will permit will have a very limited scope. Any Recharacterization Claim of the plaintiffs will be limited to Merritt Loan proceeds distributed within three years of the amended complaint.[14] Such a Recharacterization Claim will also have a narrow substantive aspect and will be limited to plaintiffs' contention that Sale or Financing Proceeds automatically become Distributable Cash unless such Proceeds are paid out within two months after the expiration of the six-month fiscal period in which they were received.

In this regard, I admit that it is possible to conclude that the plaintiffs ought to be barred from raising any claim regarding the Merritt Loan proceeds because the plaintiffs were clearly on inquiry notice of their Recharacterization Claim in 1995. Nonetheless, it is apparent that the General Partner and the Associate General Partner concluded that their treatment of the remaining Merritt Loan proceeds was a live issue in 1997 and 1998 and that they exercised discretion at that time about how to characterize the distributions of those proceeds. As a result, I think that the best way to balance the defendants' legitimate interest in repose and the plaintiffs' legitimate interest in challenging decisions of the defendants that are

[14] Other than the rather obscure one already set forth in the amended complaint.

less than three years old is to allow the plaintiffs to contest only the characterization of those distributions made within three years of the amended complaint on the limited basis I have described and to foreclose any challenge to the characterization of earlier distributions.

III. Did The Court Properly Decide That The Plaintiffs' Merritt Loan Proceeds Claim In The Amended Comnlaint Did Not Relate Back To The Original Comnlaint?

The plaintiffs' relation back arguments simply rehash their arguments in response to defendants' motion to dismiss. The plaintiffs disagree with the interpretation of Court of Chancery Rule 15(c)(2) made by then-Vice Chancellor Hartnett in *Atlantis Plastics* Corp. v. *Sammons*[15] and *Scott Fetzer Co. v. Douglas Components Corp.* [16] that a plaintiff seeking to invoke Rule 15(c)(2) must demonstrate that the "defendant should have had notice from the original pleadings that the plaintiffs new claim might be asserted against him."[17] Or, as the plaintiffs will probably put it to a higher court, the plaintiffs disagree with *my* application of the standard articulated by those cases.

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[15] Del. Ch., 558 A.2d 1062, 1065 (1989).

[16] Del. Ch., C.A. No. 11327, mem. op. at 17, Hartnett, V.C. (April 12, 1994).

[17] *Atlantis,* 558 A.2d at 1065 (citation omitted).

But I reviewed each of the claims the plaintiffs want to relate back against that standard and found that those claims did not relate back. I fail to see any error in that review. And I reject the plaintiffs' attempt to save their Merritt Loan claim by now asserting that the initial characterization of the Merritt Loan proceeds as Sale or Financing Proceeds was proper and that this propriety was the reason the original complaint did not challenge that characterization. The plaintiffs' argument fails the straight-face test because the plaintiffs' amended complaint clearly alleges that initial characterization of the Merritt Loan proceeds (and the characterizations of the 1993, 1994 and 1995 distributions publicly disclosed on March 25, 1995) was improper.

IV. Conclusion

For the foregoing reasons, the plaintiffs' motion for reargument is denied, but the plaintiffs may amend their amended complaint in the limited respect referred to in this letter opinion.

Very truly yours,

Leo E. Strine, Jr.

oc: Register in Chancery