IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TRACKER MARINE, L.L.C., d/b/a TRACKER MARINE GROUP and TMBC, L.L.C. d/b/a TRACKER MARINE BOAT CENTER, LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2017-0350-AGB
DANIEL PENA,	)	
Defendant.	)	

ORDER DENYING CERTIFICATION OF INTERLOCUTORY APPEAL

WHEREAS:

A. On September 30, 2015, Daniel Pena took his boat to TMBC, LLC ("TMBC") in Port St. Lucie, Florida to have it repaired. Mr. Pena signed a one-page repair order (the "Repair Order") authorizing TMBC to fix the boat, which had been manufactured by its sister company, Tracker Marine, L.L.C. ("Tracker Marine"). TMBC and Tracker Marine are referred to together as the "Tracker Companies."

B. The Repair Order is a one-page form contract that was created for TMBC's benefit.[1] In fine print, the Repair Order contains a forum selection clause

[1] The Repair Order contains a provision purporting to disclaim any warranties by TMBC and a one-sided provision purporting to entitle it to recover attorneys' fees from the customer if court proceedings result from the work done, apparently without regard to the outcome of the litigation.

providing that jurisdiction and venue for any legal action arising out of it shall be brought in a state or federal court of proper jurisdiction in Delaware.

C. On June 27, 2016, after sustaining injuries in a boating accident several months earlier, Mr. Pena sued the Tracker Companies in Florida state court asserting six claims: three for strict liability and three for negligence.

D. On May 8, 2017, ***more than ten months after Mr. Pena filed the Florida action,*** and facing a potential trial in Florida in November 2017,[2] the Tracker Companies filed this action seeking an anti-suit injunction to prevent Mr. Pena from litigating his negligence claims in the Florida action as a result of the forum selection clause in the Repair Order. The Tracker Companies did not seek to enjoin the prosecution of the strict liability claims, which they acknowledge "would not be subject to the forum selection clause."[3]

E. Since the Florida action was filed, the parties have been engaged in active litigation in Florida. As of May 25, 2017, the docket in the Florida action contained 191 entries. The parties in Florida action have exchanged written discovery requests and taken thirteen depositions, eight of which were taken by the Tracker Companies. The Tracker Companies also filed notice of intent to serve 21

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[2] As noted in the Tracker Companies' application for interlocutory review, an individual defendant in the Florida action filed a motion on June 20, after the Order was entered in this case, contending that the trial should be rescheduled to a later date.

[3] Motion for Expedited Proceedings ¶ 14.

subpoenas, a majority of which have been served, and filed at least four motions seeking affirmative relief.

F. When they filed this action on May 8, 2017, the Tracker Companies simultaneously filed a motion for expedited proceedings and a motion for a preliminary injunction to enjoin Mr. Pena from further litigating his negligence claims in the Florida action. Mr. Pena opposed the motion for expedition, asserting that the Tracker Companies had waived the forum selection clause in the Repair Order and that their claims in this action were barred under the doctrine of laches.

G. On June 14, 2017, after full briefing, I denied the motion for expedited proceedings after finding that the Tracker Companies had failed to demonstrate good cause for expedited proceedings (the "Order"). More specifically, I concluded that, given the compelling case that had been made for the application of laches, the Tracker Companies had failed to demonstrate the existence of a colorable claim or to make a sufficient showing of imminent irreparable harm so as to warrant imposing on the parties and the Court the burden and expense of expedited proceedings.[4] Given my reliance on the doctrine of laches, I did not address the merits of Mr. Pena's waiver argument.

H. On June 26, 2017, the Tracker Companies applied for an interlocutory appeal of the Order. Mr. Pena filed an opposition on July 6, 2017.

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[4] Trans. at 47 (June 14, 2017).

NOW THEREFORE, the Court having considered the parties' submissions, IT IS HEREBY ORDERED, this 17th day of July, 2017, as follows:

1. Supreme Court Rule 42(b)(1) provides that an interlocutory appeal will not be certified "unless the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment." In deciding whether to certify an interlocutory appeal, the trial court should examine the applicability of eight criteria enumerated in Supreme Court Rule 42(b)(iii).

2. "Interlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources."[5] As a result, the trial court must assess "the most efficient and just schedule to resolve the case," and then "identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice. If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal."[6]

3. I assume for purposes of this ruling that the Order decided a substantial issue of material importance, albeit on a preliminary basis, given that application of the doctrine of laches would serve as a complete defense to the Tracker Companies'

[5] Del. S. Ct. Rule 42(b)(ii).

[6] Del. S. Ct. Rule 42(b)(iii).

sole claim for relief under the Repair Order.[7] Nevertheless, the Order does not merit appellate review before entry of a final judgment in my opinion because it did not decide any issue with finality, other issues remain for decision in the case (including Mr. Pena's waiver defense), none of the criteria set forth in Rule 42(b)(iii) have been satisfied, and, at bottom, the Order simply implicates an exercise of the Court's discretion in the management of its docket.

4. The only issue the Court decided in entering the Order was whether the Tracker Companies had made a sufficient showing of good cause to warrant imposing on the parties and the Court the burden and expense of expedited proceedings. Given the Tracker Companies' concededly unreasonable delay in seeking to enforce the forum selection clause in the Repair Order, the facts presented made out a compelling case for a laches defense that negated any legitimate basis for expedition.

5. "[L]aches generally requires the establishment of three things: first, knowledge by the claimant; second, unreasonable delay in bringing the claim, and third, resulting prejudice to the defendant."[8]

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[7] *See Lisowski v. Bayhealth Medical Center, Inc.*, 2016 WL 7477606, at *5 (Del. Super. Dec. 29, 2016) (ORDER) (a "substantial issue under Rule 42 involves a main question of law and relates to the merits of the case, not to collateral matters.").

[8] *Reid v. Spazio*, 970 A.2d 176, 182–83 (Del. 2009).

6. Although the subject of some dispute when the Order was entered, the Tracker Companies now concede the first two elements. They would be hard-pressed to do otherwise. The Tracker Companies' knowledge of the forum selection clause in the Repair Order is indisputable because it appears in TMBC's own form contract. And a delay of more than ten months in seeking to enforce the clause is plainly unreasonable and by itself undermines the notion that any alleged harm to the Tracker Companies was "imminent"—a predicate for obtaining preliminary injunctive relief.

7. As for the third element, the prejudice of forcing Mr. Pena, an individual litigant, to incur the burden and expense of litigating a second action in Delaware after having engaged in active litigation in Florida over the same subject matter for more than ten months before this action was filed, seems self-evident. If the Tracker Companies had sought relief in Delaware promptly, Mr. Pena may have chosen to litigate all of his claims here, obviating the need to pay for Florida counsel and to incur other expenses in Florida. It seems equally obvious that different tactical decisions may have been made in conducting discovery for purposes of a jury trial in Florida as opposed to a non-jury trial in Delaware, which the Tracker Companies now seek. It also is hard to imagine that Mr. Pena would not be prejudiced by having to pay for additional counsel in order to litigate parallel

proceedings in Delaware (for the negligence claims) and Florida (for the strict liability claims) if his claims are split into two proceedings at this juncture.

8. Of the eight factors listed in Rule 42(b)(iii), the Tracker Companies argue that only one applies here, namely that interlocutory review "may serve considerations of justice." Two theories are advanced in support of this argument: (1) that the interlocutory order "effectively terminates [their] rights under the Repair Order" and (2) that "Delaware has a strong policy preference for enforcing forum selection clauses and the Order appealed from may be used [as] precedent in the future to undermine this important Delaware public policy." [9] Neither theory is meritorious in my opinion.

9. The first theory is incorrect because the Order did not resolve with finality the Tracker Companies' claim for relief or any of Mr. Pena's affirmative defenses. The Order only considered the merits of one of Mr. Pena's affirmative defenses for purposes of deciding whether the standard for obtaining expedition had been satisfied. The Tracker Companies remain free to press their claim under the Repair Order and to challenge Mr. Pena's waiver and laches defenses, just not on an expedited schedule. Any hardship caused by proceeding in this manner is of the Tracker Companies' own making as a result of their concededly unreasonable delay. Additionally, as a matter of equity and common sense, the Tracker Companies

[9] Application at 12.

cannot be heard to deny that Mr. Pena has been prejudiced by their lengthy delay while at the same time implying that they will be prejudiced if this case is not expedited and does not proceed in tandem with the Florida action.

10. The second theory is without merit because, although Delaware case law supports the enforcement of forum selection clauses, Delaware law also requires that parties proceed with alacrity when seeking preliminary injunctive relief. Because the reasons for Court's denial of expedition are highly fact specific, the Order will not undermine any policy favoring the timely enforcement of forum selection clauses.

11. Taking into account the foregoing considerations, the costs of interlocutory review and the piecemeal litigation it will cause outweigh the benefits of interlocutory review in my judgment. Accordingly, the Tracker Companies' application for certification of an interlocutory appeal is denied.

Chancellor