EFiled: Feb 16 2006 3:14PM EST
Transaction ID 10598070

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February 16, 2006

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Re: In re Cencom Cable Income Partners, L.P.
C.A. No. 14634-NC
Date Submitted: November 17, 2005

Dear Counsel:

The Plaintiffs filed this breach of fiduciary duty action on October 20, 1995. Now—more than ten years later—the case remains to be resolved. The Defendants contend that the delay is due to the Plaintiffs' failure to prosecute and, pursuant to Court of Chancery Rules 41(b) and (e), have moved to dismiss the action.

> This Court has numerous tools to control its docket and to encourage the timely resolution of matters before it. Among those tools are Chancery Rule 41(b), which authorizes dismissal 'for failure of the plaintiff to prosecute,' and Chancery Rule 41(e), which authorizes dismissal of any 'cause pending where no action has been taken for a period of 1 year' and where there has been no 'good reason for the inaction.' The decision to dismiss for failure to prosecute is committed to the Court's discretion. Because both Chancery Rules 41(b) and 41(e) deal with inexcusable delay, they overlap somewhat.[1]

Review of the docket reveals that before the pending Motion to Dismiss, the last filing with the Court (other than status reports) in this case was on August 16, 2000, when one of the Plaintiffs' counsel filed a notice of withdrawal. The most recent substantive order was entered on May 9, 2000; it denied in part the Defendants' Motion for Summary Judgment.[2]

After the Court's ruling on summary judgment, the parties participated in an unsuccessful mediation in June of 2000. Following mediation, the Plaintiffs contacted the Defendants in October of 2000 with a settlement offer. Several letters and emails were exchanged between the parties in 2002, but a settlement was not reached. In January of 2005, approximately three years after their last correspondence, Plaintiffs' counsel contacted Defendants' counsel with a proposed

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[1] *Lane v. Cancer Treatment Ctrs. of Am., Inc.*, 2001 WL 432445, at *1 (Del. Ch. April 11, 2001).
[2] *See In re Cencom Cable Income Partners, L.P. Litig.*, 2000 WL 640676 (Del. Ch. May 5, 2000).

trial schedule. In response, the Defendants filed their Motion to Dismiss for Failure to Prosecute.

Under these circumstances, *i.e.*, where there has been no action taken in a pending suit for more than one year, a plaintiff must establish a good reason for the delay and demonstrate an absence of prejudice to the Defendants in order to survive the motion.[3] Here, the Plaintiffs contend that their settlement negotiations and trial preparation (where they allegedly experienced some difficulty in retaining an expert witness) constitute a diligent pursuit of their claims. Furthermore, the Plaintiffs assert that the Defendants would not be prejudiced by proceeding to trial, and thus urge the Court to deny the motion to dismiss.

It is difficult to characterize the Plaintiffs' efforts, thus far, as having been "diligent." The settlement efforts to which the Plaintiffs cling as proof of their earnest prosecution of this matter appear to be no more than scanty communications that began in October of 2000. To date, the Plaintiffs have not received, at least from their perspective, a meaningful response from the Defendants regarding settlement. The Plaintiffs waited nearly four years after proposing settlement, and two years after any communication with the Defendants,

[3] Del. Ct. Ch. R. 41(e); *Orgel v. Cappelli*, 2001 WL 1045627, at *3 (Del. Ch. Aug. 31, 2001).

to make their next move and hire an expert in preparation for trial. The Court acknowledges that the Plaintiffs did encounter some difficulty in retaining their expert witness. However, like the settlement negotiations, this saga seems exaggerated and arguably falls short of creating excusable delay.

The Defendants have explained that it would be difficult, at this point, to locate several key witnesses and are concerned that some witnesses, who are now working for the Defendants' competitors, have developed conflicts of interest that may bias their testimony in these proceedings. It is also likely (and wholly understandable) that the witnesses' once lucid recollection of the events has become somewhat muddled with the passage of time. The Defendants also point out that their former insurance carrier is now defunct and is therefore unable to indemnify the defendant directors should they be found liable. Lastly, the Defendants claim they have been prejudiced by the fact that the expert witness they originally retained in this matter, now works for the firm that the Plaintiffs have retained.

Despite the sluggish pace at which this case had been proceeding, the Defendants' Motion to Dismiss for Failure to Prosecute is denied. The Court acknowledges the Defendants' arguments that the delay in this litigation has had, at

least to some extent, an adverse effect.[4] No matter what the circumstances, (*i.e.*, whether the delay is justifiable or simply due to neglect) some prejudice is inevitable in light of the fact that over a decade has gone by since the events surrounding this suit first occurred. Nonetheless, the Court is not persuaded that dismissal is warranted under the circumstances.

This decision is based, primarily, on three factors: (1) a preference for resolving decisions on the merits;[5] (2) a desire to proceed cautiously in light of the due process issues that are unique to a class action;[6] and (3) deference to the fact that, while their efforts may have been dilatory in the past, at the time of the

[4] The Court notes that the Defendants' arguments premised on the defunct insurance company are less than compelling. Summary judgment was denied in 2000; the insurer failed sometime in 2001. Defs.' Mot. to Dismiss for Failure to Prosecute, Ex. A ¶ 6 (Aff. of Curtis S. Shaw). Even if the Plaintiffs had engaged in the swiftest of prosecution following denial of the summary judgment motion, it is unlikely that there would have been a trial and decision in time for the Defendants to have been indemnified by their insurer.

[5] *See, e.g.*, *Midland Interiors, Inc. v. Burleigh*, 2006 WL 279137, at *3 (Del. Ch. Jan. 27, 2006) (The Court, in the context of denying an application for entry of a default judgment to sanction repeated and substantial violations of the Court's discovery rules, explained that "[i]f possible, I strongly prefer resolving matters on the facts.").

[6] *See, generally*, *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985); *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989); DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 9-3[c] at 9-145 to 49 (2005).

Rule 41 motion, the Plaintiffs appear to have resumed diligent prosecution of their claims.[7]

In short, even though this matter has dragged on far too long, I conclude that the proper approach to management of this case is not to dismiss it, but instead to enter a scheduling order setting a prompt trial date.

For the foregoing reasons, Defendants' Motion to Dismiss for Failure to Prosecute is denied. Counsel are requested to confer and to propose a schedule for resolving this matter.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC

[7] *See, e.g., Ayers v. D.F. Quillen & Sons, Inc.*, 188 A.2d 510 (Del. 1963) (applying Superior Court Rule 41(b)). The Defendants did not file the Motion to Dismiss for Failure to Prosecute until after the Plaintiffs had resumed their efforts in the litigation. Instead, the Defendants' filed their motion just one month after the Plaintiffs contacted them with a proposed scheduling order and suggested trial date. The Defendants recognize, in their Reply Brief at 1-2, that the Plaintiffs' efforts to schedule trial may diminish the appropriateness of a Rule 41(b) dismissal.