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Court of Chancery of Delaware.

HOVDE ACQUISITION, LLC, a Nevada Limited Liability Company, and B & I Lending, LLC, a Delaware Limited Liability Company, Plaintiffs,
v.
Michael R. THOMAS, and the Bank Network, Inc., a Georgia Corporation, Defendants.

No. CIV.A. 19032. | Submitted: May 10, 2002. | Decided: June 5, 2002.

Attorneys and Law Firms

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MEMORANDUM OPINION

LAMB, Vice Chancellor.

I.

***1** This is an action for declaratory judgment relating to the contractual and fiduciary duties of defendant Michael R. Thomas ("Thomas") with regard to plaintiff B & I Lending, LLC ("B & I"), a Delaware limited liability corporation. Also named as a defendant on the contract claim is The Bank Network, Inc. ("TBN"), a Georgia corporation controlled by Thomas. The defendants filed a motion, pursuant to Court of Chancery Rule 12(b), to dismiss on the basis of, among other things, insufficiency of service of process.

The plaintiffs did not manage to serve defendant Thomas correctly until seven months after filing the complaint and they have still not managed to serve defendant TBN correctly after ten months of trying. The defendants maintain that, in TBN's case, service cannot be properly effected and, with respect to both defendants, any service after December 31, 2001 should be time barred. This court finds that it can order a special method of service on TBN and it will allow service on both defendants to relate back to the date of the original attempt. With regard to the issue of the claim being time barred, the court finds that the defendants are relying on the indemnification section of the contract when the complaint alleges a breach of contract. Three years is the proper time period for bringing a breach of contract claim and therefore, given the ability of the plaintiffs to relate back to August 2001, neither claim is time barred.

II.

Before December 31, 1998, B & I had two members, Mortgage Management, LP ("MMLP"), a Tennessee limited partnership that owned two-thirds of the membership interest of B & I, and TBN, which owned the other one-third. Effective as of December 31, 1998, B & I, MMLP, TBN and plaintiff Hovde Acquisition LLC ("HACQ") entered into the Membership Purchase Agreement ("Purchase Agreement"). Pursuant to the Purchase Agreement, HACQ purchased MMLP's membership interest in B & I. The Purchase Agreement contains the following choice of law provision:

> Section 11.10 Choice of Law. This Agreement and each and every related document is to be governed by, and construed in accordance with, the internal laws of the State of Delaware. All parties hereto consent to the jurisdiction of the courts of the State of Delaware, State and Federal. All parties waive the right to assert that such venue is *forum non-conveniens*. [1]

[1] Purchase Agreement § 11.10.

The Purchase Agreement further provides that:

> Section 11.1 Notices. All notices, consents and approvals required by this Agreement shall be in writing and

> shall be either personally delivered ... or sent by United States mail, certified with return receipt requested, properly addressed and with the full postage prepaid. [2]

2 *Id.* § 11.1.

This provision then lists an address for each party, as well as a delivery address for a copy of each notice. [3] For TBN, the delivery address is 3553 Peachtree Road, Suite 1130, Atlanta, GA 30326, and the Purchase Agreement further provides that a copy of any notice should be sent to Thomas at the same address. [4]

3 *Id.* § 11.1.

4 *Id.* § 11.1.

***2** Effective as of January 1, 1999, TBN and HACQ entered into the Operating Agreement for B & I ("Operating Agreement"). The Operating Agreement provides that the initial Board of Managers shall consist of three people: Thomas, representing TBN, Irving Beimler ("Beimler"), representing HACQ, and a mutually agreed upon third party. [5] The Operating Agreement also provides that the Chief Executive Officer should manage the day-to-day operation of B & I. [6]

5 Operating Agreement § 3.1.

6 *Id.* (stating that "the Chief Executive Officer shall have the power to make and execute contracts on behalf of the Company and to delegate such powers to others").

The Operating Agreement stipulates that it is "governed by, construed under, and enforced and interpreted in accordance with the laws of the State of Delaware" [7] and lists the location of B & I's principal place of business as 3553 Peachtree Road, Suite 1130, Atlanta, GA 30326. [8]

7 *Id.* § 15.7.

8 *Id.* § 2.4.

Finally, effective as of December 31, 1998, B & I entered into the Employment Agreement with Thomas ("Employment Agreement"). In accordance therewith, Thomas was to hold the offices of Chairman, President and Chief Executive Officer of B & I for the four-year term of that contract. [9] The Employment Agreement was to be "construed and enforced in accordance with the laws of the State of Georgia" [10] and lists the notice address for Thomas as 3553 Peachtree Road, Suite 1130, Atlanta, GA 30326. [11] It also indicates that a copy of any notice should be sent to 3053 Andrews Drive, Atlanta, GA 30305, [12] Thomas's home address.

9 Employment Agreement § 1(b). The combination of the Operating Agreement § 3.1 and Employment Agreement § 1(b) effectively creates the situation in which Thomas is managing the day-to-day operation of B & I.

10 *Id.* § 12.

11 *Id.* § 14 (Apparently, some of the agreements have a typographical error relating to the street address. The Purchase Agreement and the Operating Agreement list the street number as 3553, but the Employment Agreement lists the street number as 3353. Additionally, the defendants' Consolidated Opening Brief refers to the street number as 3353. Regardless of which is the correct number, the parties seem to agree that the location being discussed is the same).

12 *Id.* § 14.

A. The Dispute

The plaintiffs' complaint alleges that, beginning in the fall of 2000, they became aware of B & I's deteriorating financial condition, which they blame on Thomas not properly accounting for capital contributions, misappropriating company funds for personal use, and making unsound loans. At the December 5, 2000 meeting of the board, the plaintiffs voted to accept Thomas's "resignation" as Chairman. Thomas disputed that he had resigned as Chairman and said that he would not do so. The parties spent the next several months arguing over control of B & I, whether or not payments to Thomas were authorized, and whether or not either party would provide B & I with additional funding.

The board met again on April 16, 2001, and gave Thomas a letter ("Termination Letter"), removing him as Chairman pursuant to the Operating Agreement and terminating his employment pursuant to the Employment Agreement. The board also informed Thomas that it had authorized suit against him. Nevertheless, in order to proceed with ongoing efforts to sell B & I, the parties entered into a standstill agreement ("Standstill Agreement") that, among other things, excluded Thomas from B & I's principal place of business, as follows:

> 6. *No Entry on B & I Premises:* Thomas agrees that neither he nor any person acting on his behalf will enter the B & I premises at any time without the express prior permission in each instance of Irving R. Beimler, the Acting CEO of B & I, and then only subject to such conditions and/or limitations as Beimler may establish. [13]

13 Standstill Agreement § 6. Since B & I's principal place of business is located at the same address as TBN, Thomas was effectively excluded from receiving any mail that was sent to TBN at the delivery address required by the Purchase Agreement.

***3** The efforts to sell B & I resulted in a merger that closed in late June 2001.

Plaintiffs began this action on August 1, 2001, and attempted to serve Thomas, pursuant to 6 *Del. C.* § 18-105, Delaware's service of process statute for domestic *limited liability companies.* Plaintiffs initially attempted to serve TBN (which is sued for breach of the Purchase Agreement) in two different ways. First, plaintiffs served TBN by hand delivering a copy of the summons and complaint to The Corporation Trust Company ("CT") at its offices in Wilmington, Delaware. CT is the registered agent for B & I. Second, they sent process by certified mail, return receipt requested, to TBN and to Thomas in his capacity as TBN's registered agent. The mail was sent to both defendants at the address of B & I's office in Atlanta, Georgia that appears in the notice section of the Purchase Agreement. This is the same address from which Thomas was expressly excluded in the Standstill Agreement. Neither of these methods of service expressly relied on any provision of Delaware law governing the service of process on foreign corporations.

There is no record that any of these efforts at service resulted in actual notice to Thomas or TBN. Nevertheless, it is conceded that both of them received actual notice of the existence of this action as a result of proceedings in a related action initiated by them in Georgia state court. As a result, on September 5, 2001, Thomas and TBN moved to quash service.

Plaintiffs somewhat belatedly realized that service of process on Thomas should have been made pursuant to 6 *Del. C.* § 18-109, Delaware's implied consent statute for serving *managers* of limited liability companies, not Section 18-105. They then re-served Thomas in accordance with the correct provision on March 5, 2002. Also recognizing that their efforts to serve TBN were defective, plaintiffs attempted to re-serve TBN under the long-arm service provisions of Section 3104 by personally serving the Delaware Secretary of State on October 23, 2001 and February 12, 2002. Nevertheless, there is no record that the October 23 service was followed by the notification by registered mail prescribed in 10 *Del. C.* § 3104(d). The record as to the February 12 service is also unclear. The docket does contain an affidavit of mailing showing that, on February 15, 2002, a copy of the summons and complaint was mailed to TBN c/o Thomas at Thomas's home address and that Thomas received this mailing on February 25, 2002. Nevertheless, the affidavit does not indicate whether or not this mailing was done to comply with Section 3104 or for some other reason.

III.

Although there is no question that both Thomas and TBN received actual notice of this proceeding shortly after it was filed, [14] they both moved on September 5, 2001 to quash service of process. Because there is no real dispute about the ineffectiveness of the service to date on TBN, the motion will be granted as to it. By contrast, because Thomas concedes that he was properly served on March 5, 2002, the motion to dismiss for ineffectiveness of service of process will be denied.

14 The defendants acknowledge that they have received actual notice, a copy of which was attached to a pleading in a related action in Georgia that has since been dismissed. Transcript of April 25, 2002 Argument ("Tr.") at 21.

***4** The remaining areas of dispute are whether there is any available method to effect service of process upon TBN and the timeliness of the claim asserted in Count I of the Complaint against both TBN and Thomas for breach of the Purchase Agreement. TBN argues that neither 10 *Del. C.* § 3104, the general long-arm statute, nor any other recognized method is available to effect serve on it. Plaintiffs do not contest the inapplicability of Section 3104 but suggest that some other mode of service can be utilized to give effect to the consent to jurisdiction provision found in the Purchase Agreement.

TBN also argues that, even if a method to effect service were available, the court should not permit re-service on it because the only claim alleged against it (Count I for breach of the Purchase Agreement) is time barred. This argument consists of two propositions. First, TBN posits that claims under the Purchase Agreement are subject to a two-year contractual limitation period that expired at the end of 2000. Thus, the claim against TBN was time barred even if measured by the date of filing, August 1, 2001. Second, assuming a normal three-year statute of limitations is applied to the contract-based claim asserted in Count I, TBN argues that any such claim is now time barred because more than three years have passed and the summons and complaint have still not been served on it. In this connection, TBN maintains that, even if there is a method available to serve it, the court should not permit re-service because plaintiffs' failure to effectuate timely service in the ten months since the complaint was filed was due to a lack of diligence, and is not excused by good cause. Thomas joins this argument. Although service has been accomplished on Thomas, that did not occur until March 5, 2002, more than seven months after the complaint was filed.

A. Service of Process on TBN

TBN consented to suit in Delaware in the Purchase Agreement. Similar provisions consenting to jurisdiction over disputes arising out of commercial contracts are common and will be enforced by the courts of this state. [15] The problem presented is that the contract does not expressly include a consent to service of process issued by Delaware courts nor does it prescribe the manner of such process. [16]

15 *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286 (Del.1999); *see also*, Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 5-4(a), at 5-46 to 5-47 (2001).

16 The same is true of Thomas; however, in his case, service of the complaint may be effected pursuant to 6 *Del. C.* § 18-109. Since the claim asserted for breach of the Purchase Agreement in Count I arises out of the same nucleus of operative facts underlying the claims relating to Thomas's activities as a manager of the B & I, that form of service is adequate to obtain personal jurisdiction over Thomas as to Count I. *Cf. Manchester v. Narragansett, Inc.*, Del. Ch., C.A. No. 10822, mem. op. at 10, Chandler, V.C. (Oct. 18, 1989) ("Given the fact that the individual defendants are all employees, shareholders, officers, and directors of corporation, it would be artificial to distinguish their actions as having been taken in different guises when, as directors, they control the corporation. In that capacity, they should expect to answer in a Delaware court for the contract actions related to Plaintiff's breach of fiduciary duty claims."); *see also*, Wolfe § 3-5(a), at 3-61 at nn. 361-2.

In *Chrysler Capital Corp. v. Woehling*, the District Court held that by contractually consenting to personal jurisdiction, a party may also be found to have implicitly consented to venue. [17] The court implied a venue term in a consent to jurisdictional provision because that provision would be useless without it. [18] This same reasoning may be applied here to imply a term consenting to service of process. Without the ability to serve process, TBN's express consent to Delaware jurisdiction and venue found in the Purchase Agreement would be equally useless. The parties to the Purchase Agreement expressly intended that litigation arising out of that contract should take place in this state. Those parties must have reasonably expected to be served by some method of service that is appropriate under Delaware law. The question then is how such service can be effected since TBN is neither found in Delaware nor subject to service under Delaware's general long-arm service statute.

17 *Chrysler Capital Corp. v. Woehling*, 663 F.Supp. 478, 481 (D.Del.1987).

18 *Id.* at 481.

***5** It makes sense to first examine the notice provision of the Purchase Agreement to see if it provides a permissible method for serving process relating to this suit. It provides that notice to TBN be sent to B & I's office, with a copy to Thomas at that same address. Obviously, neither address is adequate for service of process on TBN since TBN maintains no presence at that address and Thomas, who is TBN's registered agent, was excluded from that address by the terms of the Standstill Agreement. Nor is there any evidence that the notice provision of the contract was ever amended or updated. Thus, the court concludes that the notice provision of the contract does not provide a useful means of serving process.

Under Court of Chancery Rule 4(d)(7), this court has the power to enter "[a]n order directing another or an additional mode of service of a summons in a special case ...." [19] Since TBN expressly consented to the exercise of this court's personal jurisdiction over it in all actions arising under the Purchase Agreement and there is no other available method of service prescribed by statute or rule, this would appear to be an appropriate "special case" in which to fashion an

order providing for "another or additional mode of service of a summons" on TBN. Here, the record reflects that Thomas acts as the registered agent for TBN and that he can be served at his home address. Because TBN consented to the jurisdiction of this court, there can be no substantial constitutional objection to service of process in this manner, which is well suited to give TBN actual notice of the pendency of this action. [20]

19 DEL. CH. CT. R. 4(d)(7).

20 As the court in *Chrysler* explained:

> "[i]t is well settled that a party can consent to the personal jurisdiction of a court. Unlike the requirement that federal courts have subject matter jurisdiction, which flows from the Article III limitations on federal judicial power and thus cannot be waived, the personal jurisdiction requirement is based on individual liberty interests protected by the due process clause and thus can be waived by any legal arrangement that demonstrates a party's expressed or implied consent to that jurisdiction."

663 F.Supp. 481 (citations omitted).

Thus, unless TBN succeeds in its argument that the court should not allow re-service due to plaintiffs' dilatory conduct, the court will enter an order permitting plaintiffs to re-serve TBN pursuant to the special provisions of Rule 4(d)(7).

B. Statute of Limitations Issues

Defendants suggest that Count I was subject to a two-year contractual limitations period. Paragraph 9 of the Purchase Agreement provides a mechanism for the assertion of claims for indemnification by parties to the contract for damages for breach of any representation or warranty made therein. Pursuant to paragraph 9 .4, "the right of the parties to seek indemnification ... shall survive for two (2) years from the date of the Closing." [21] Obviously, to have been timely, any contractual claim for indemnification for breach of a representation or warranty needed to have been filed by December 31, 2000. Nevertheless, paragraph 9.1 expressly preserved plaintiffs' other remedies, as follows: "[n]otwithstanding the foregoing right of indemnification, in the event of any default hereunder by any of the members or B & I, Hovde may avail itself of any and all rights or remedies available to it either at law or equity ...." [22] Plaintiffs argue that this clause preserved any claim they have for breach of contract under common law, including one based on the representations and warranties in the contract, which claim is subject to the general three-year limitations period found in 10 *Del. C.* § 8106. A review of the complaint shows that plaintiffs attempt to state a claim for breach of contract apart from the indemnification mechanism found in paragraph 9 of the Purchase Agreement. For the purposes of this motion, the court will assume, without deciding, that such a claim is properly alleged and that the limitations period for asserting such a claim ran until the end of 2001.

21 Purchase Agreement § 9.4.

22 *Id.* § 9.1.

***6** Thus the dispositive issue is whether the plaintiffs, despite their failure to effect service of process on TBN in the ten months since this action was filed, should be allowed to send a newly authorized service that would relate back to the August 1, 2001 filing date. For the reasons that follow, the court concludes that they should, assuming the newly authorized service is promptly effectuated.

The rules of this court prescribe no definite time limit for effecting service of process. [23] Other courts, however, have instituted by rule a 120-day limit for service of process. [24] If the plaintiff fails to serve within 120 days, courts have used a good cause standard to determine if the court should allow a time extension. [25] Without the benefit of a fixed time period, this court will look to the actions of both parties in order to determine if service of process has been made in a timely manner. In particular, the court will consider whether the failure to make service is the result of dilatory conduct on the part of the person obliged to make service, whether the party to be served received actual notice of the suit and whether the failure to make timely service has resulted in prejudice.

23 See DEL. CH. CT. R. 4.

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