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May 25, 2007

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Re: Dryden v. Estate of Joseph A. Gallucio, Jr., et al.
C.A. No. 442-VCN
Date Submitted: January 29, 2007

Dear Counsel:

Before the Court is a Motion for Reargument (the "Motion") under Court of Chancery Rule 59(f) of a decision embodied in a letter opinion issued January 11, 2007.¹ What is unusual and unfortunate is that the losing party, Ann Gallucio ("Gallucio"), the Defendant in both her individual capacity and as personal representative of the Estate of Joseph A. Gallucio, Jr. (the "Decedent"), died that

¹ *Dryden v. Estate of Joseph A. Gallucio, Jr.*, 2007 WL 185467 (Del. Ch. Jan. 11, 2007) (the "Letter Opinion"). The Court presumes familiarity with the Letter Opinion.

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very day. Counsel for Gallucio filed the motion in her individual capacity. He did not file it for her in the representative capacity because the personal representative of the Defendant Estate was expected to be a son of Plaintiff Barbara G. Dryden (“Dryden”). The Court will treat the motion as filed on behalf all interests previously represented by Gallucio.²

As developed more fully in the Letter Opinion, the Decedent and Dryden were married for more than three decades until their divorce in 1995. Gallucio married the Decedent in 1998; he died in 2003. The dispute arose over the Decedent’s obligation to Dryden, memorialized in the Agreement,³ that resolved ancillary matters in the Family Court, to maintain a life insurance policy in the amount of \$10,000 for her benefit and to obtain a life insurance policy that would pay a monthly income of \$400 per month.⁴ The Court found that the Decedent’s transfer in 2000 of a brokerage account to joint ownership with Gallucio constituted a fraudulent transfer.

² Suggestion of death upon the record was filed on January 18, 2007, in accordance with Court of Chancery Rule 25(a)(1). No motion for substitution has been made.

³ Certain defined terms used in the Letter Opinion are employed here for convenience.

⁴ The disposition of the \$10,000 life insurance policy in the Letter Opinion is not challenged in the Motion.

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A party seeking to prevail on a motion for reargument must demonstrate that the Court “overlooked a decision or principle of law that would have [had] controlling effect or that the Court . . . misapprehended the law or the facts so that the outcome of the decision would be affected.”⁵ Moreover, “new arguments that have not previously been raised cannot be considered for reargument.”⁶

The Motion focuses on the Court’s treatment of Gallucio’s defense of laches and its relationship to a statutory limitations period under a provision of the Uniform Fraudulent Transfer Act (the “Act”), 6 *Del. C.* § 1309, and a statutory limitation on the amount by which a transferee of a fraudulent transfer may be held liable established by 6 *Del. C.* § 1308(b).

⁵ *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995); *see also VGS, Inc. v. Castiel*, 2003 WL 1794210, at *1 (Del. Ch. Mar. 27, 2003).

⁶ *Oliver v. Boston Univ.*, 2006 WL 3742598, at *1 (Del. Ch. Aug. 8, 2006); *see also In re HCA, Inc. S’holders Litig.*, 2006 WL 3480273, at *3 (Del. Ch. Nov. 20, 2006) (“It is a tad presumptuous, in my opinion, to critique the Court for not considering an argument that was never made to it.”).

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Dryden prevailed under the Act and the Motion criticizes the Court for not considering that statute's prescribed limitation period as part of its laches analysis.⁷

Under 6 *Del. C.* § 1309,

A cause of action with respect to a fraudulent transfer . . . is extinguished unless the action is brought: (1) Under § 1304(a)(1) of this title, within 4 years after the transfer was made . . . or, if later, within 1 year after the transfer . . . was or could reasonably have been discovered by the claimant[.]

The Court addressed the defense of laches in some detail. In assessing a defense of laches, a court of equity may "borrow" the corresponding legal limitations period.⁸ Here, however, Gallucio never asked the Court to do so. Instead, she focused on the traditional equitable analysis including undue delay and prejudice. Nothing in the Pretrial Stipulation or Gallucio's post-trial letter memorandum touched upon 6 *Del. C.* § 1309.⁹ Thus, the Motion asks the Court to consider an argument that was not fairly presented to it before, something that the Court may not do.

⁷ At note 40 of the Letter Opinion, the Court pointed out that Gallucio had "interposed no time-bar defense under 6 *Del. C.* § 1309 to the fraudulent transfer claim."

⁸ See, e.g., *Ramunno v. Capano*, 2006 WL 510064, at *1 n.6 (Del. Ch. Feb. 23, 2006).

⁹ In addition, Gallucio's answer only invoked the equitable affirmative defense.

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In any event, in order to prevail under 6 *Del. C.* § 1309, Gallucio would have been required to prove that Dryden had discovered (or could reasonably have discovered) the transfer to the joint account more than a year before this action was filed. That Gallucio failed to do.¹⁰ The transfer to the joint account was made in 2000; it is not known when Dryden learned of it; there is no suggestion of any means by which she could “reasonably have . . . discovered” it.

The Motion next invokes 6 *Del. C.* § 1308(b), which provides in pertinent part:

Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under § 1307(a)(1) of this title, the creditor may recover judgment for the valuable asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor’s claim, whichever is less.

In essence, Gallucio, according to the Motion, could not have been held liable for more than \$42,619.45, the amount transferred by Dryden to the Decedent in accordance with the Agreement in 1996 to resolve their divorce proceedings. Again, this argument was not presented at the appropriate time. Yet again,

¹⁰ Indeed, the Motion does not set forth the facts necessary to evaluate a defense under 6 *Del. C.* § 1309.

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reference to the Pretrial Order or Gallucio's post-trial letter memorandum contains no argument along these lines. Perhaps more importantly, the Motion suffers from a fundamental flaw. The transfer to which the Motion refers is Dryden's transfer of her interest in an account to the Decedent as part of the marital settlement. The transfer which the Court concluded was fraudulent under 6 *Del. C.* Ch. 13 was the transfer to the joint account held by Gallucio and the Decedent; this occurred, not in 1996, but in 2000. Thus, the Motion has not focused on the proper transfer.¹¹

The Motion, at paragraph 2, asserts:

At page 19 the Court finds in part that the Defendant cannot avail herself of the defense of laches because she cannot prove the intent of the decedent, Joseph Gallucio in agreeing to certain contract provisions or refuting the Plaintiff's allegations.

The Motion conflates the defense of laches with the Decedent's intent in entering into the Agreement, as his intent might influence a construction of the Agreement. The Court recognized, in its consideration of Gallucio's laches argument, that she had been deprived of the Decedent's testimony which might have provided other extrinsic evidence to assist in analyzing ambiguous contract

¹¹ The Motion does not suggest that the value of the assets in the joint account as of the time of that account's creation was not sufficient to fund Gallucio's obligation under the Letter Opinion.

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terms. That fact weighed in favor of Gallucio; it, the Court concluded, did not outweigh other factors, such as recognition of Dryden's human decency in not harassing her ex-husband as he was dying of cancer. Moreover, although the Agreement is ambiguous, it is susceptible of interpretation, without serious difficulty, primarily by the reading of its provisions. The defense of laches raised by Gallucio was one of substance; it did not prevail. In short, the Motion simply reprises the arguments previously made, carefully considered, and rejected.

The other topic tendered by the Motion involves the income stream awarded by the Letter Opinion. The Motion accurately notes that Dryden sought a lump sum to replace, in effect, a life insurance policy that might have been available to satisfy the \$400 per month obligation (a policy that the Decedent soon allowed to lapse). The Court awarded what Dryden proved she was entitled to receive—\$400 per month for life. There was no evidence, based on the record, to reduce it to a lump sum.¹² The Court has substantial discretion in formulating equitable relief.

¹² The parties are obviously free to do so.

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Awarding a prevailing party precisely the cash flow to which she was contractually entitled falls within the scope of that discretion.¹³

In conclusion, the Motion fails to provide any ground for concluding that the Court either misapprehended the facts or misunderstood a principle of law. Accordingly, it is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Ralph F. Keil, Esquire
Register in Chancery-K

¹³ The Motion also posits a question of whether the award of a right to monthly payments was an award of alimony or was contractual in nature. It was contractual. The Decedent agreed, as a matter of contract, to acquire insurance that would pay a certain income stream monthly to Dryden. He breached that obligation by not maintaining the insurance. A reasonable remedy for that breach is to restore the benefit to be conferred by the obligation.