

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, Jr.,

Plaintiff,

vs.

Richard S.W. Stoney, individually and as member-manager of The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC,

Defendants.

Theodore Stoney, Jr., individually and as Trustee for Richard Stoney, Jr. and Gregory G. Holmes,

Third-Party Intervenors.

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-10-5463

ORDER

FILED
2019 MAY 20 PM 4:01
JULIE J. ARMSTRONG
CLERK OF COURT

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SC Court of Appeals

Date of Hearing/Trial:	December 13 – 14, 2018
Presiding Judge:	Clifton Newman
Attorneys for Plaintiff:	Stafford J. McQuillin III Scott Y. Barnes Tyler K. Gilliam
Attorney for Defendants:	Capers G. Barr III
Attorney for Intervenors:	George J. Kefalos
Court Reporter:	Karen V. Anderson

At the request of the parties, the Court held a preliminary hearing (the "Hearing") on the issue of whether the derivative-action plaintiff, Laurence Stoney, has standing to maintain this derivative action filed on behalf of the plaintiff, The Boathouse at Breach Inlet, LLC (the "Company" or the "Boathouse"), a restaurant situated at Breach Inlet on the Isle of Palms. For the reasons set forth

below, the Court finds that the derivative-action plaintiff has standing to maintain this action on behalf of the Company.

With respect to the evidence presented at the Hearing, Plaintiff's counsel consented to Defendants' and Intervenors' counsel's request to call witnesses. Defendants' and Intervenors' counsel likewise consented to Plaintiff's counsel's request that the Court be permitted to consider the affidavit of Plaintiff's forensic accounting expert, Don Hollerbach.¹

BURDEN OF PROOF

The parties agree that where defendants to a derivative action challenge the plaintiff's standing, "[t]he burden is on defendants to show that the plaintiff will not fairly and adequately represent the company and its Members." *See Halstead Video, Inc. v. Guttillo*, 115 F.R.D. 177, 179 (N.D. Ill. 1987); *see also Guenther v. Pac. Telecom, Inc.*, 123 F.R.D. 341, 344 (D. Or. 1987) ("The burden is on defendants to show that [the representative-plaintiff] is an inadequate representative."); *Brandon v. Brandon Const. Co. Inc.*, 300 Ark. 44, 50, 776 S.W.2d 349, 353 (1989) ("The burden of showing that the party bringing a derivative action does not fairly and adequately represent the interests of the shareholders is always on the defendant.").

BACKGROUND

On October 9, 2015, Laurence Stoney, a minority member of the Boathouse, filed this derivative action on behalf of the Company against Defendants, Richard Stoney and Crew Carolina, LLC ("Crew Carolina"). The Defendant, Richard Stoney, is the Manager and majority member of the Boathouse. Richard Stoney is also the Manager of co-Defendant, Crew Carolina, a single member LLC owned by Richard Stoney that provides management services to the Boathouse and to other, unrelated restaurants. The complaint provides, "[t]he central allegation of this Complaint is that

¹ Defendants maintained a relevance objection regarding the Hollerbach affidavit. The Court, overruled this objection, finding that the affidavit was relevant on the issue of whether the Defendants and Intervenors have unclean hands.

Defendant R. Stoney misappropriated and converted in excess of \$4,000,000.00 from the Boathouse to Defendant Crew Carolina . . . for his own personal use and for use in separate business ventures.” (*Amended Complaint*, ¶ 6). As its sole remedy, Plaintiff “seeks repayment of the funds back to the Boathouse.” *Id.*

At the Hearing, Defendants and Third-Party Intervenors proffered numerous affirmative defenses concerning Laurence Stoney’s standing as a derivative-action Plaintiff. These included the equitable defenses of laches, unclean hands, and judicial estoppel, and the legal defense that Laurence Stoney is not “fairly and adequately” representing the Company’s interest in maintaining this derivative action, as required by Rule 23(b)(1), SCRPC.

PRELIMINARY FINDINGS OF FACT

1. Richard Stoney is the Manager and majority member of the Company. As the Company’s Manager, Richard Stoney exercised unilateral control over the Company’s finances, which he ran through his solely-owned management company, Crew Carolina.

2. Laurence Stoney is a minority member of the Company and had no control over the Company’s finances.

3. The parties stipulate that Laurence Stoney is not “similarly situated” to any other member of the Company. *Stipulation*, filed December 7, 2018.

4. The Court finds credible testimony supports a finding that Laurence Stoney is pursuing this derivative action because he believes that Defendants misappropriated Company assets, which he believes should be returned to the Company. As he testified, “[t]his case is about finding four and a quarter million dollars that’s missing that needs to go back to The Boathouse, sir. That’s what this case is about.” (December 13–14, 2018 Hearing Transcript (“Trans.”), p. 105:7-9). When asked why he filed this lawsuit, Laurence Stoney testified, “I seek to make [the] Boathouse at Breach Inlet whole. It will need to recover the [misappropriated] funds.” (Trans., p. 125:16-17).

5. The Court finds credible evidence that Laurence Stoney is not pursuing this derivative action primarily because of animus towards Richard Stoney. When asked at the Hearing if he had “animosities against [his] cousin Richard,” Laurence Stoney replied, “No, I don’t.” (Trans., p. 35:2-4). This testimony corroborates Laurence Stoney’s deposition testimony. (Laurence Stoney Dep., p. 10:2-4).

6. The Court does not find credible evidence that supports Defendants’ and Intervenors’ theories that Lori Stoney (the ex-wife of Richard Stoney) encouraged Laurence Stoney to file this action, that Lori Stoney is the driving force behind this action, or that Lori Stoney has colluded with Laurence Stoney in this action. When Lori Stoney was asked about her involvement in this litigation she testified, “I have not been involved in this litigation” (Trans., p. 86:15). She also testified with respect to this litigation, “I did not know what Laurence’s plan was. I did not know what he was going to do as far as filing a case. I did not read any complaint. I was not consulted about that. He did what he did. At some point, I found out he had filed the case.” (Trans., p. 82:20-24). Laurence Stoney also denied any collusion or involvement by Lori in the filing of this action. (Trans., p. 36:12, 126:2-4). Laurence Stoney was asked, “[h]as Lori Stoney . . . influenced you in any way to file this lawsuit”? He answered plainly, “No.” (Trans., p. 126:2-4).

7. Without making any findings of fact, the Court finds credible evidence sufficient to support the allegation that Richard Stoney misappropriated money from the Company. Richard Stoney admitted that he took money from the Boathouse, put it into Crew Carolina, and used that money to fund other, unrelated entities, and to pay for personal expenses. Specifically, at the Hearing Plaintiff’s counsel asked Richard Stoney, “[s]ir, you don’t dispute that you took money from the Boathouse at Breach Inlet to fund other businesses and personal matters; is that correct”? Richard Stoney replied, “I do not.” (Trans, p. 204:13-16). Plaintiff’s counsel also asked Richard Stoney, “[w]ere you taking money from the Boathouse and putting it in Crew and using it to fund other

entities”? Richard Stoney replied, “I admitted that.” (Trans., p. 206:3-6). The affidavit of Don Hollerbach corroborates Richard Stoney’s testimony. In his affidavit, Hollerbach writes:

[The Boathouse] and Richard Stoney commingled funds. [The Boathouse] appears to be the funding mechanism for other ventures and personal spending of Mr. Stoney.

Affidavit Don Hollerbach ¶ 4. Hollerbach then cites numerous examples of Richard Stoney using Company monies, filtered through Crew Carolina, to fund personal expenses and other, unrelated business.

8. Without making any findings of fact, the Court finds credible evidence sufficient to support the allegation that Intervenors knew that Richard Stoney was misappropriating Company assets, and that Intervenors benefitted financially from Richard Stoney’s misappropriations. With respect to Intervenor Theodore Stoney, Richard Stoney’s brother, Hollerbach writes, “[t]he Boathouse issued checks to Wells Fargo directly on Theodore Stoney’s behalf for Theodore Stoney’s mortgage.” *Affidavit Don Hollerbach* ¶ 4. Hollerbach also notes, “Crew [Carolina] also made . . . payments in excess of \$80,000 to or on behalf of Theodore Stoney and his company, the Stoney Company . . .” *Id.* With respect to the Intervenor Gregory Holmes, who did not attend the Hearing, Hollerbach’s affidavit provides, “Gregory Holmes, as a member of Holmes Capital Management, LLC, received \$173,458.95 in disproportionate distributions.” *Id.* Hollerbach notes:

Richard Stoney and Gregory Holmes were advised by a CPA that Richard Stoney was not permitted to make any disproportionate distributions to his friend and business partners, Gregory Holmes unless the purported operating agreement for the Boathouse was amended and signed by all members. . . . However, Richard Stoney ignored this advice, and proceeded with making improper disproportionate distributions to Gregory Holmes without amending the purported operating agreement.

Id.

9. Without making any findings of fact, the Court finds credible evidence sufficient to support the allegation that Laurence Stoney did not know that Richard Stoney was using Boathouse

monies to fund other business. Defense counsel elicited from Laurence Stoney the following testimony:

Q. You knew what Crew Carolina was doing, Crew Carolina was . . . managing the expenses of [multiple] restaurants?

A. I did not know what was going on and how the funds were being commingled or even if they were. All I knew was that the distributions were going down every year from Breach Inlet and the place seemed to be just rocking and rolling with customers. That's all I knew. I never got to see the numbers. Only thing is, at the end of the year, I get a, what is it, K1.

(Trans., p. 41:15-23). When asked about Richard Stoney's impetus for forming Crew Carolina and its operating practices, Laurence Stoney testified, "Richard formed [Crew Carolina] for his own devices. I have no idea why he formed it. And I didn't know that all of the finances and all would be comingled." (Trans., p. 32-33:25-02). Defense counsel also asked Laurence Stoney, "You knew that Crew was taking all the revenue from all of the restaurants into one account and paying the expenses of the restaurants"? In response, Laurence Stoney answered, "I did not know that for a fact, no." (Trans., p. 109:1-4).

10. It appears that Laurence Stoney developed suspicions that Richard Stoney was using Company monies improperly because the amount of Laurence Stoney's distributions decreased. As cited above, Laurence Stoney testified:

Q. You knew what Crew Carolina was doing, Crew Carolina was . . . managing the expenses of [multiple] restaurants?

A. I did not know what was going on and how the funds were being commingled or even if they were. *All I knew was that the distributions were going down every year from Breach Inlet and the place seemed to be just rocking and rolling with customers. That's all I knew. . . .*

(Trans., p. 41:15-23) (emphasis added).

11. Without making any findings of fact, the Court finds credible evidence sufficient to support the allegation that Laurence Stoney asked Richard Stoney for Company financial records

and that Richard Stoney did not provide those records. Defendants' Exhibit 1 to the Hearing is a letter addressed to Laurence Stoney from Richard Stoney, in which he writes, "it is my understanding . . . that you would like to see 'everything' that has impacted the two restaurants you are involved in . . . as well as Crew's books to the extent that Crew's expenses are passed along to the restaurants." Defendant's Hearing Exh. 1, August 9, 2005 Letter from Richard Stoney to Laurence Stoney ("Exh.1"); Trans. p.109:6-10). When Laurence Stoney was asked about requesting financial information from Richard Stoney at the Hearing, he confirmed that he sought—but never received—financial records. (Trans, p.109:6-10) ("I asked for the [financial] information which I was not given.").

12. The Court finds that Laurence Stoney asked Richard Stoney if he was misappropriating Company assets, and that Richard Stoney represented to Laurence Stoney that he was not misappropriating Company Assets. In Exhibit 1, the letter from Richard Stoney to Laurence Stoney, Richard Stoney writes, "I am . . . insulted by the insinuation that I have mismanaged or misappropriated funds in the restaurants and/or Crew." Exh. 1.

13. The Court finds that it was reasonable for Laurence Stoney to rely on Richard Stoney's attestations that he was not misappropriating Company assets. Richard Stoney was the manager of the Company and represented to his cousin, Laurence Stoney, a minority member of the Company, that the Company was struggling because of factors outside of Richard Stoney's control. Richard Stoney wrote:

Certainly I have had some decisions to make, as Managing Member and majority owner of the respective restaurants, that were necessary to the operations of the restaurants that were not necessarily 'profitable' . . . , but they were my judgment calls on the best way to manage the business functions of the locations in question for the long-term.

...

I know it is frustrating that increased competition and cost of goods has decreased our sales and profitability, but I cannot control the rapid expansion of dining options in

East Cooper any more than I can control beef and lobster prices. At the end of the day, you have to trust me. I'm not in business with my family and dear friends in an attempt to skim profits or benefits not available to them as well.

Exh. 1.

14. The Court finds that the attorneys representing the Plaintiff are qualified to conduct this litigation on behalf of the Company.

CONCLUSIONS OF LAW

I. This action to recover Company assets is properly brought in a derivative capacity.

Defendants and Intervenor argue that Laurence Stoney should sue for damages in his personal capacity rather than derivatively on behalf of the Company because Defendants and Intervenor allege that this action is about unpaid distributions. The evidence does not support this conclusion. Throughout this action the only remedy that Plaintiff has requested is the return of Company monies. Plaintiff's Complaint provides, "[t]he central allegation of this Complaint is that Defendant R. Stoney misappropriated and converted in excess of \$4,000,000.00 from the Boathouse This suit seeks repayment of the funds back to the Boathouse." (*Amended Complaint*, ¶ 6) (emphasis added).

Based upon the pleadings and the evidence presented at the Hearing, the Court finds that Laurence Stoney is not seeking to recover for any individualized loss. Instead, Plaintiff is attempting to recover a Company asset, Company monies, which Plaintiff claims that Richard Stoney misappropriated individually and through the vehicle of his single-member LLC, Crew Carolina. Accordingly, only the Company can maintain this lawsuit to recover its assets, and Laurence Stoney correctly brought this suit as a derivative action, and cannot sue to recover Company assets in his personal capacity.

II. Laches does not bar Laurence Stoney from maintaining this action.

A derivative action is one in equity, and only the doctrine of laches applies—not the statute of limitations. *Pelfrey v. Bank of Greer*, 270 S.C. 691, 695, 244 S.E.2d 315, 317 (1978); *McDuffie v. O'Neal*, 324 S.C. 297, 308, 476 S.E.2d 702, 707 (Ct. App. 1996). Laches is the negligent failure to act for an unreasonable period of time. *Gray v. South Carolina Public Service Authority*, 284 S.C. 397, 400, 325 S.E.2d 547, 549 (1985). But delay alone in the assertion of a right is not enough. A party asserting the laches defense also must prove that the opposing party had knowledge of the wrong committed, and that it was materially prejudiced by the opponent's unreasonable delay in bringing an action. See *Archambault v. Sprouse*, 218 S.C. 500, 63 S.E.2d 459 (1951); *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004) (both holding that the party to be lached must have had actual knowledge of the wrong committed or must have refused to embrace an opportunity to ascertain facts about the wrong committed); *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993) (holding that a party cannot maintain a laches defense unless it can prove that it was materially prejudiced by the opponent's unreasonable delay). Thus, to succeed, the party asserting laches bears the burden of proving (1) delay, (2) unreasonable delay based on knowledge of a known right, and (3) material prejudice caused by the delay in asserting the known right. *Emery*, 361 S.C. at 215, 603 S.E.2d at 602; *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 297, 519 S.E.2d 583, 599 (Ct. App. 1999).

Here, based on the evidence presented at the hearing, Defendants and Intervenor have not met their burden, and laches does not apply to bar Plaintiff's claim because (A) Defendants and Intervenor appear to have unclean hands, (B) Laurence Stoney did not rest on a known right, and (C) neither Defendants nor Intervenor were materially prejudiced by the timing of the filing this lawsuit. Each of these reasons, *alone*, is sufficient to find that Plaintiff's claim is not barred by the equitable defense of laches.

A. Neither Defendants nor Intervenor can assert the equitable defense of laches because Defendants and Intervenor appear to have unclean hands.

Laches is a defense in equity. It is a time honored maxim of equity that “he who seeks equity must do equity.” Accordingly, the equitable defense of laches is not available to those who come into the court with “unclean hands.” Put simply, a party has unclean hands, and cannot assert a laches defense, where they have acted in bad faith or unfairly with respect to the matter at issue.

1. Richard Stoney appears to have unclean hands.

Both Richard Stoney’s testimony and Don Hollerbach’s affidavit each credibly alleges that Richard Stoney acted in bad faith when he breached his statutorily prescribed fiduciary duties owed to the Company and its Members.

2. Intervenor appears to have unclean hands.

The Intervenor also appear to have unclean hands with respect to the matter at issue. Specifically, the testimony from the Hearing and Don Hollerbach’s affidavit each credibly support the allegation that Intervenor knew that Richard Stoney was misappropriating Company monies, but did not intercede on behalf of the Company as they were benefitting from Richard Stoney’s misappropriations from the Boathouse. Defendants and Intervenor did not present evidence at the Hearing to counter the evidence presented by Plaintiff in the form of Don Hollerbach’s affidavit that Intervenor appear to have unclean hands. Because the Court finds that Intervenor, Theodore Stoney and Gregory Holmes, appear to have unclean hands, Intervenor cannot assert the equitable defense of laches.

B. Laurence Stoney did not rest upon a known right.

“As with waiver, laches arises upon the failure to assert a known right” *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994), citing *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (1971); *Byars v. Cherokee County*, 237 S.C. 548, 118 S.E.2d 324 (1961). The party asserting the laches defense bears the burden of proof, and must prove that the

opposing party "had actual knowledge or inquiry notice of the facts forming the basis of its claim" *Provident Life & Acc. Ins. Co.*, 317 S.C. at 479, 451 S.E.2d at 929.

After weighing the evidence presented at the Hearing, the Court finds that Defendants have not sufficiently shown that Laurence Stoney *actually knew* that Richard Stoney was using Boathouse monies to fund other business and for personal expenses.

C. Defendants and Intervenors did not prove that they were materially prejudiced by the timing of the filing of this lawsuit.

In South Carolina, the party asserting laches bears the burden of proving that he was materially prejudiced by his opponent's delay in bringing suit. *Provident Life*, 317 S.C. at 479, 451 S.E.2d at 929. The Court of Appeals explained:

Prejudice is an essential element of laches. In order to constitute laches, the delay in bringing suit must have caused some injury, prejudice or disadvantage to the party claiming laches. It is reversible error to apply and bar relief to the plaintiff where defendant has enjoyed a benefit and not suffered a detrimental change of position attributable to the delay.

317 S.C. at 479, 451 S.E.2d at 929.

At the Hearing, Defendants and Intervenors did not offer evidence that any supposed delay in bringing this action by Laurence Stoney caused them to suffer a detrimental change in position.

III. Laurence Stoney does not appear to have unclean hands.

Defendants and Intervenors argue that Laurence Stoney cannot maintain this derivative action because he has unclean hands. Despite the fact that Laurence Stoney was a minority member in the Company with no control over the Company's finances, Defendants and Intervenors suggest that Laurence Stoney has unclean hands because they allege that he knew about and consented to Richard Stoney's misappropriations from the Company. The Court disagrees.

Without making any findings of fact, the Court finds credible evidence sufficient to support the allegation that Laurence Stoney did not know that Richard Stoney was using Boathouse profits to fund other unrelated businesses and to pay for personal expenses for himself and Intervenors.

IV. Plaintiff is not judicially estopped from arguing that Laurence Stoney is not similarly situated to other members of the Company and is a class of one.

Plaintiff amended its Complaint pursuant to Rule 15, SCRC, to remove this statement.

Therefore, this argument is without merit.

V. The Court finds that Laurence Stoney is fairly and adequately representing the interests of the Company.

Rule 23(b)(1) provides that a derivative-action plaintiff has standing to maintain a derivative suit where they “fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the [company].” Guided by Rule 23(b)(1), this Court must first determine which members of the Company, if any, are “similarly situated” to the representative-plaintiff to determine if Laurence Stoney is a suitable derivative-action plaintiff.


Where, as here, there are no members similarly situated to a derivative-action plaintiff, the derivative-action plaintiff is treated as a class of one and is not required to represent the interests of any other member in a company. *See e.g., Larson v. Dumke*, 900 F.2d 1363 (9th Cir. 1990), *cert. denied sub nom. Round Table Pizza, Inc. v. Larson*, 498 U.S. 1012, 111 S. Ct. 580 (1990) (finding that a shareholder can be a legitimate class of one where other shareholders are not similarly situated to the derivative-action plaintiff).

“The burden is on the defendants to show that the plaintiff will not fairly and adequately represent the corporation and its [similarly situated] shareholders.” *Halstead Video, Inc.*, 115 F.R.D. 177, 179 (N.D. Ill. 1987); *see also Guenther v. Pac. Telecom, Inc.*, 123 F.R.D. 341, 344 (D. Or. 1987) (“The burden is on defendants to show that [the representative-plaintiff] is an inadequate representative.”); *Brandon*, 300 Ark. 44, 50, 776 S.W.2d 349, 353 (1989) (“The burden of showing that the party bringing a derivative action does not fairly and adequately represent the interests of the shareholders is always on the defendant.”).

The Court finds that Defendants and Intervenors cannot meet their burden, and that Laurence Stoney can maintain this lawsuit on behalf of the Company because (A) Laurence Stoney is a class of one and is not required to represent the interests of other members of the Company, and (B) Laurence Stoney is fairly and adequately representing the interests of the Company in this derivative action.

AND IT IS SO ORDERED.

May 8, 2019



Clifton Newman
Presiding Judge

**HAYNSWORTH
SINKLER BOYD**

134 MEETING STREET, THIRD FLOOR (29401-2240)
POST OFFICE BOX 340 (29402-0340)
CHARLESTON, SOUTH CAROLINA
TELEPHONE 843.722.3366
FACSIMILE 843.722.2266
WEBSITE www.hsblawfirm.com

STAFFORD J. MCQUILLIN III
DIRECT DIAL NUMBER 843.724.1120
EMAIL mmcquillin@hsblawfirm.com

May 20, 2019

VIA HAND DELIVERY

Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

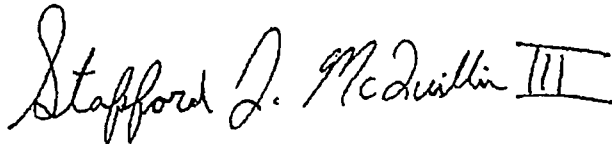
Re: The Boathouse at Breach Inlet, LLC by and through its member, Laurence O. Stoney, Jr. v.
Richard S.W. Stoney
Case No. 2015-CP-10-5463
HSB File No. 37631-1

Dear Ms. Armstrong:

Enclosed for filing please find an original and one copy of an Order signed by Judge Newman in the above-referenced matter. Please file the Order and return a file-stamped copy to me with my courier.

By copy of this letter, I am serving all counsel with a copy of the same.

Yours very truly,



Stafford J. McQuillin III

SJM/kmg

Enclosures

cc (w/encl.): Capers G. Barr III, Esq.
George J. Kefalos, Esq.