

Court Of Chancery Denies Application For Certification Of Interlocutory Appeal After Ruling That Judicial Dissolution Of The Limited Liability Company Is Warranted

Article By:

Scott E. Waxman

Rachel Cheasty Sanders

In *Acela Investments LLC v. Raymond DiFalco*, Case No. 2018-0558-AGB (Del. Ch. June 28, 2019), the Delaware Court of Chancery addressed an **application for certification of an interlocutory appeal** of the Court's decision in the underlying case (the "Memorandum Opinion") and a motion for stay pending appeal.

The Acela Court decision discusses Delaware Supreme Court Rule 42 ("Rule 42"), which sets forth the criteria for evaluating whether to grant a request for interlocutory appeal, and the considerations necessary to evaluate a motion for stay pending appeal. This case revolves around Inspirion Delivery Sciences, LLC, a Delaware limited liability company that develops abuse-deterrent pharmaceuticals (the "Company" or "Inspirion"), two members of the Company's board of managers (the "Board"), and one co-founder and former Board member. The Plaintiffs include Inspirion's Chief Executive Officer Stefan Aigner, who also serves on the Board, and entities that Aigner controls. The Defendants include the Company's co-founders Raymond DiFalco and Manish Shah. DiFalco is also a Board member and President of the Company. Shah was a Board member and Chief Science Officer, but resigned from both of those positions. Plaintiffs filed the underlying suit against Defendants asserting breach of fiduciary duties, breach of the Company's LLC Agreement, and declaratory relief, among other claims. DiFalco then filed counterclaims against Aigner and third party-claims against the Company seeking, among other things, judicial dissolution of the Company and the appointment of a liquidating trustee. The parties agreed to bifurcate the claims to expedite their claims regarding governance of the Company and hold their remaining claims for damages in abeyance.

The Company's Operating Agreement (the "Agreement") provided for a unique governance structure wherein the CEO and President must perform their duties subject to the "advice and consent" of the other. Additionally, the Agreement permitted (i) Aigner or (ii) DiFalco and Shah together to exercise veto power against any action of the Board. Moreover, the Agreement included a mechanism for an independent representative to vote in place of an interested manager in matters regarding conflicts of interest, notably because Defendants and their family members control a variety of entities with which the Company did business. This governance structure proved to be "a recipe

for deadlock” which occurred amongst management regarding many issues, including deciding with whom they should partner to manufacture their existing products and develop new drugs and whether the Company should focus on research and development or the creation of an internal sales force. The Court found that, pursuant to Section 18-802 of the Delaware Limited Liability Company Act, it was not reasonably practical for the Company to carry on its business in conformity with the Agreement and ordered the judicial dissolution of the Company and the appointment of a liquidation trustee. Thus, the Court ruled in favor of the Defendants and against the Plaintiffs on all claims regarding the governance of the Company. Subsequently Plaintiffs filed their application for certification of interlocutory appeal on which this decision rules and requested a stay to prevent particular actions on the part of the liquidating trustee.

Rule 42 states that interlocutory appeals should be certified only if “the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment.” Furthermore, Rule 42 indicates that “[i]nterlocutory appeals should be exceptional, not routine, because they disrupt the normal process of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources.” Plaintiffs cited only one of the eight criteria offered under Rule 42, claiming “review of the interlocutory order may serve considerations of justice.” Further Plaintiffs claimed they would “suffer significant harm” if forced to wait because their appeal “would be moot as a practical matter.”

The Court disagreed. The Court stated that, although the memorandum opinion did decide a substantial issue of material importance, appellate review of the Memorandum Opinion prior to the recommendation of a transaction or plan by the liquidating trustee and the subsequent approval by the court of the transaction or plan would “create the prospect of piecemeal appeals” instead of dealing with all issues in a single action. Additionally the Court disregarded Plaintiffs’ claim of a moot appeal, reminding the parties that the liquidating trustee needs court approval before it can finish a sale process. Plaintiffs could wait for their appeal until after a sale process, but before the closing of a transaction. Thus, the claims regarding governance of the Company and their remedies should be fully adjudicated before any appeal.

According to Delaware law, a reviewing court should consider the following when faced with a motion for stay pending appeal “(1) [] make a preliminary assessment of likelihood of success on the merits of the appeal; (2) [] assess whether the petitioner will suffer irreparable injury if the stay is not granted; (3) [] assess whether any other interested party will suffer substantial harm if the stay is granted; and (4) determine whether the public interest will be harmed if the stay is granted.” Plaintiffs requested that the trustee be prevented from soliciting interest or providing information regarding the sale of Company; consummating a sale, or terminating employees. In applying the required elements, the Court explored the deadlock of management and the detailed factual findings of the trial court, along with the abuse of discretion standard of review, to determine that it was unlikely that Plaintiffs would be successful on appeal. Further, the Court stated that Plaintiffs’ claim of injury regarding the termination of employees and soliciting interest from potential buyers was speculative and failed to rise to the level of an “irreparable injury.” As to the remaining elements, the Court noted that there was no showing regarding harm to interested third parties and that “the public interest would be served best by denying the stay . . . in order to maximize the chances of making the Company’s abuse-deterrent technology available to the public on a larger scale.” For these reasons, the Court of Chancery denied both the application for certification of interlocutory appeal and the motion to stay pending appeal.

[Acela Investments LLC et al. v. DiFalco and Shah and counterclaim](#)

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