

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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VICE CHANCELLOR

New Castle County Courthouse
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January 18, 2011

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RE: *Laura A. Lavi v. Wideawake Deathrow Entertainment, LLC*
C.A. No. 5779-VCS

Dear Counsel:

Oral argument is scheduled on January 26 concerning the defendant's motion to dismiss the plaintiff's complaint made under 6 *Del. C.* § 18-305 of the Delaware Limited Liability Company Act to compel inspection of the books and records of defendant Wideawake Deathrow Entertainment, LLC, a limited liability company. I have now read all the papers carefully. Regrettably, the defendant chose to make a motion for summary judgment in the guise of a Rule 12(b)(6) motion to dismiss. The defendant larded its opening brief with multiple exhibits, ranging from pleadings in other cases to exchanges between the dueling equity holders and their lawyers. The defendant then asks the court to draw favorable inferences from those documents. In response, the plaintiff provides another load of documents and makes the point, appropriately, that the defendant's

approach is procedurally improper.¹ In reply, the defendant says that I can simply take judicial notice of all of its exhibits. Although that may be the case as to certain of the documents, it does not mean that I can read those documents in anything other than the most plaintiff-friendly way.² And as to many of the documents submitted, I cannot simply take judicial notice.³

Under our law, books and records actions are summary proceedings.⁴ What that means is that they are to be promptly tried.⁵ Rarely is dispositive motion practice efficient when the case can be tried within two months of filing. That is especially the

¹ Pl. Ans. Br. at 2 (citing *West Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 641 (Del. Ch. 2006)). See also *Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. 2002) (quoting *Vanderbilt Income & Growth Assocs., LLC v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) (internal citations omitted)) (“As a general rule, when deciding a Rule 12(b)(6) motion, the Court is limited to considering only the facts alleged in the complaint and normally may not consider documents extrinsic to it. There are two exceptions, however, to this general rule. ‘The first exception is when the document is integral to a plaintiff’s claim and incorporated into the complaint. The second exception is when the document is not being relied upon to prove the truth of its contents.’”).

² *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007).

³ The clearest example of this is the defendant’s reliance on an email exchange between the parties’ counsel that the defendant argues shows that it offered to make available many of the books and records the plaintiff is seeking in this action. Def. Op. Br. at 21-23. These documents were not referred to in the complaint, nor are they publicly filed and are thus not the proper subject of judicial notice. See *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004) (“Here, Wal-Mart’s complaint did not refer to any newspaper articles or TAMs, and the record does not otherwise establish that these documents were publicly filed. Accordingly, the Court could not properly consider those materials, under judicial notice principles, to resolve conflicting factual inferences on a Rule 12(b)(6) motion to dismiss.”).

⁴ 6 *Del. C.* § 18-305(f); *Maitland v. Int’l Registries, LLC*, 2008 WL 2440521, at *2 (Del. Ch. June 6, 2008).

⁵ Cf. *NiSource Capital Markets Inc. v. Columbia Energy Group*, 1999 WL 33318815, at *1 (Del. Ch. June 25, 1999) (quoting *Box v. Box*, 697 A.2d 395, 398 (Del. 1997)) (noting that summary proceedings under 8 *Del. C.* § 211 “are designed ‘to provide a quick method of review . . . to prevent a Delaware corporation from being immobilized by controversies.’”).

case if dispositive motion practice is to turn on consideration of an abundance of factual evidence.

Here, the defendant has created a problem of its own making. It appears to have some potentially powerful defenses to this action, particularly because of the pendency of related prior proceedings. But instead of seeking a prompt trial and presenting its evidence properly, the defendant asks me to ignore the procedural rules of this court and to draw inferences in its favor from documents supportive of divergent inferences. As burdensome, the defendant in its reply asks me to pick through a huge pile of exhibits — many of which are in no way subject to judicial notice — and choose what might be appropriate for consideration on a Rule 12(b)(6) motion. Again, the defendant's failure to properly consider the procedural framework for its own motion is its own. It is neither fair to the plaintiff nor to the judicial process for it to expect that failure to be ignored.

The motion to dismiss is therefore denied because it is procedurally defective and does not address the viability of the plaintiff's pleading. The parties shall confer and present a scheduling order providing for a prompt trial, as is contemplated in books and records actions under our state's entity laws.

IT IS SO ORDERED.

Very truly yours,

/s/ Leo E. Strine, Jr.

Vice Chancellor