EFiled: Oct 20 2020 12:53PM EDT
Filing ID 66037209
Case Number 225,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KROENKE SPORTS & ENTERTAINMENT, LLC, OUTDOOR CHANNEL HOLDINGS, INC., SKYCAM, LLC and CABLECAM, LLC, Defendants-Below, Appellants, v. NICOLAS A. SALOMON, Plaintiff-Below, Appellee.	C.A. No. 225,2020 Court below: Court of Chancery, C.A. No. 2019-0858-JTL

REPLY BRIEF OF APPELLANTS

Of Counsel:
Kevin D. Evans
EVANS LAW PLLC
5613 DTC Parkway, Suite 850
Greenwood Village, CO 80111
(720) 738-3971
kdevans@evanspllc.law

BARNES & THORNBURG LLP
Thomas E. Hanson, Jr. (#4102)
1000 N. West Street
Suite 1500
Wilmington, DE 19801
(302) 300-3447
thanson@btlaw.com

Attorneys for Defendants-Below, Appellants

Dated: October 20, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

PRELIMINARY STATEMENT

Appellants[1] demonstrated in their Opening Brief that Salomon's purported undertaking was illusory and fraudulent and that advancement under the present circumstances would be against public policy. In his Answering Brief ("Ans. Br."), Salomon does not dispute – nor could he dispute – that he signed and filed with the United States Court of Appeals for the Fifth Circuit a sworn affidavit that he was insolvent at the time he provided the undertaking. Salomon also does not dispute that he admitted, through counsel in this action, that he spent almost all of his money on his prior, frivolous lawsuit. Thus, his undertaking was not worth the paper it was written on and certainly could not support a claim for advancement or the grant of summary judgment in his favor.

Appellants also demonstrated there were genuine issues of material fact that precluded the entry of summary judgment in Salomon's favor. If the Court below was not inclined to rule in Appellants' favor as a matter of law, there was a material dispute regarding whether Salomon's financial affidavit and his counsel's statement accurately reflected his financial position. As this genuine issue of material fact could not be resolved without discovery, it precluded entry of summary judgment in Salomon's favor.

[1] All capitalized terms not defined herein shall have the same meaning as set forth in Appellants' Opening Brief.

Appellants further demonstrated that the fees for advancement and indemnification awarded by the Court below, and paid by Appellants, were excessive and unreasonable. Despite being retained at the tail end of the underlying arbitration, Salomon's counsel sought the advancement of substantial amounts for tasks unrelated to any substantive work on Salomon's behalf. In this action, counsel staffed the litigation in a manner that resulted in significantly higher fees than what was reasonable, has billed unreasonable hours on given days, and has billed more than once for the same work. The Court of Chancery's award of the exorbitant amounts requested by Salomon was an abuse of discretion.

Each of the above arguments demonstrated that the Court below's rulings should be reversed. Instead of addressing Appellants' arguments, Salomon's Answering Brief focuses on Appellants' right to bring the present appeal. Even though the Court below entered a *Fitracks* Order, and awarded both advancement and indemnification thereunder, Salomon claims this appeal is premature. As found by the Court in *Homestore, Inc. v. Tafeen*, that is not the case. 888 A.2d 204, 209 (Del. 2005) (Supreme Court found the appellant properly appealed after Court of Chancery awarded specific fee amount for advancement and entered an order "establishing a procedure for Tafeen to obtain the advancement of his legal fees and expenses going forward"). This Court should reject Salomon's request that it

overturn *Tafeen* by dismissing this appeal, which is what Salomon is asking this Court to do.

Further, the Court's indemnification order is final and not subject to adjustment by the Court below. *See Fasciana v. Electronic Data Systems Corp.*, 829 A.2d 178, 184 (Del. Ch. 2003) ("Even if Fasciana is ultimately adjudged not to be entitled to indemnification for the criminal action and the civil action, that fact would not cure EDS's wrongful denial of Fasciana's advancement rights and the harm that denial caused to Fasciana."). Where a final order is entered, all prior orders are subject to appeal. *See Lewis v. Route 13 Outlet Market, Inc.,* 1996 WL 313498, at *1 (Del. May 30, 1996) (Table). Accordingly, the present appeal was properly filed and, as discussed in Appellants' Opening Brief and below, dictates reversal of the rulings by the Court below.[2]

[2] As discussed below, to the extent this Court looks to address the standard for an interlocutory appeal, it is plainly met on the present record.

ARGUMENT

I. Salomon's Illusory And Fraudulent "Undertaking" Could Not Support His Request For Advancement

Salomon promised in his undertaking to repay all of the attorneys' fees advanced in the underlying actions if he is ultimately not entitled to indemnification. The day after providing the undertaking, Salomon filed the Fifth Circuit sworn affidavit attesting to his insolvency. Salomon's counsel doubled down on Salomon's insolvency by representing at oral argument that Salomon "has spent all of his money, or the vast majority of it." (A0677:3–14). Thus, there is no argument that Salomon's undertaking was anything other than an illusory, false promise to make repayment.

Notwithstanding these facts, which Salomon does not deny, Salomon argues that his undertaking was appropriate because "the possibility of not being repaid for advancement of fees and expenses is not a matter of first impression in Delaware courts." (Ans. Br. at 19.) In support of this argument, Salomon attempts to liken the present facts to the argument by Hertz in *Sider v. Hertz Glob. Holdings, Inc.*, that it would suffer irreparable harm "if" the plaintiffs are unable to pay the amounts advanced. *Sider*, No. CV 2019-0237-KSJM, 2019 WL 2501481, at *2 (Del. Ch. June 17, 2019). Here, both Salomon and his counsel have confirmed that he is not able to.

Salomon next compares Appellants' position to the argument by the Trustee in *In re Central Banking Systems, Inc.*, that "the estate was entitled to be secured against the risk that 'Mr. Rafton would be unable to repay' the advancements." *Central Banking*, No. C.A. 12497, 1993 WL 183692 (Del. Ch. May 11, 1993). Salomon also speculates that if he "had posted security" that would have ended the inquiry. (Ans. Br. at 20.) This argument is a red herring. Appellants do not seek security, nor, based on his affidavit, can Salomon provide it. Salomon was required to provide a legitimate undertaking promising to repay the advancements, which he failed to do. If under the circumstances of this case Salomon's undertaking were deemed legitimate, it would read the undertaking requirement out of Delaware's statute.

It is further telling that Salomon fails to address the Court of Chancery's rationale for granting summary judgment. The Court below reasoned that, despite Salomon's insolvency, the undertaking was sufficient, because he might in the future "turn [himself] around" or strike it rich and become a "billionaire[ ] after declaring bankruptcy." (A0710:17–20). Salomon does not even attempt to justify this reasoning, which is contrary to Delaware law. *See, e.g., Fillip v. Centerstone Linen Servs., LLC*, 2013 WL 6671663, at *9 (Del. Ch. Dec. 11, 2013) ("a person who receives advancement always must repay those funds in the event he is not ultimately entitled to indemnification").

As Salomon's undertaking was illusory based on his own sworn statement, the Court of Chancery's ruling that Salomon is entitled to advancement based on such undertaking must be reversed.

II. The Award of Advancement Under The Present Facts Was Against Delaware Public Policy

There is no question that Delaware Courts recognize a strong public policy against fraud. *See, e.g., Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1035 (Del. Ch. 2006) ("The public policy against fraud is a strong and venerable one that is largely founded on the societal consensus that lying is wrong."). At the same time Salomon submitted his undertaking in the underlying arbitration, he filed a sworn affidavit with the Fifth Circuit attesting to the fact that he was insolvent. Under these circumstances, Salomon's promise to repay advancements with knowledge that he was insolvent and unable to do so, was fraudulent. Delaware public policy does not countenance such deceptive conduct. *See, e.g., Kainos Evolve, Inc. v. InTouch Techs., Inc.*, 2019 WL 7373796, at *2–3 (Del. Ch. Dec. 31, 2019). *See also FDG Logistics LLC*, 131 A.3d at 859 (noting "the venerable public policy to guard against fraud," and that Delaware "has consistently respected the law's traditional abhorrence of fraud").

Salomon responds in his Answering Brief that Appellants' argument should be rejected, because the Delaware policy in favor of advancement outweighs its policy against fraud. (Ans. Br. at 22-23.) Contrary to Salomon's argument, there is no conflict between Delaware's policy in favor of advancement and against fraud – just as there is no conflict between Delaware's policy of enforcing contracts as written, but rescinding a contract that is fraudulently induced. ***Indeed, fraud is***

recognized as a defense to a claim for advancement. *See Andrikopoulos v. Silicon Valley Innovation Co., Inc.*, 120 A.3d 19, 20 (Del. Ch. 2015) (advancement action set for trial on company's defense that the agreement providing for advancement was fraudulently obtained). Moreover, as discussed in Appellants' Opening Brief, denying fraudulent claims for advancement will only serve to further the availability of advancement, as companies will not find it necessary to restrict access to advancement rights. Thus, both Delaware policies are advanced by recognizing that Salomon has no right to advancement under the present circumstances.

Salomon also argues that Appellants cannot assert a defense of fraud without pleading a counterclaim. There is no support for such an argument. Appellants have plainly described the facts supporting their defense that Salomon's undertaking was fraudulent and deceptive. Appellants do no seek damages for such fraud, as would be expected under a counterclaim, but properly assert that Salomon's request for advancement should be denied on that basis. Salomon's arguments to the contrary are not compelling.

III. Genuine Issues Of Material Fact Precluded Entry Of Summary Judgment In Salomon's Favor

It is axiomatic that summary judgment should not be entered "[i]f the record before the Court 'reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.'" *See, e.g., Patton v. 24/7 Cable Co., LLC*, 2013 WL 1092147, at *2 (Del. Super. Ct. Jan. 30, 2013) (footnote omitted). Likewise, "[a]ny application for [summary] judgment must be denied if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom." *Vanaman*, 272 A.2d at 720. *Accord SLMSOFT.com, Inc. v. Cross Country Bank*, 2003 WL 1769770, at *6 (Del. Super. Ct. Apr. 2, 2003).

Appellants have demonstrated that Salomon's undertaking was illusory and fraudulent, because at the same time he provided it: (i) he submitted an affidavit to the Fifth Circuit that he was insolvent; (ii) he stated in that affidavit that he has had no income since March 2017; and (iii) his counsel admitted during oral argument below, that Salomon had "spent all of his money, or the vast majority of it, in his own personal lawsuit against the defendants in the District Court in Texas." If the Court below was not inclined to grant summary judgment in Appellants' favor, at a minimum, it should have denied Salomon's motion and allowed discovery regarding

whether Salomon's financial affidavit and his counsel's comments accurately reflect his financial situation. The Court below improperly did neither.

Ignoring these facts, Salomon argues in his Answering Brief that Appellants "did not identify or raise any issues of material fact." (Ans. Br. at 25.) According to Salomon, Appellants raise only a "specter of an issue of material fact" and did not explain before the Court of Chancery how the Fifth Circuit affidavit required denial of Salomon's motion for summary. (*Id.*) Salomon's argument ignores that Appellants detailed, before the Court of Chancery, Salomon's duplicitous conduct in providing the undertaking. (A0557-A0562.) Appellants also described the Arbitrator's findings that the undertaking was "illusory, lacking substance and not given in good faith" and that a promise made with knowledge that it cannot be performed is of no value and is "tantamount to no undertaking" at all. (A0559-A0560.) Notwithstanding these facts, the Court of Chancery concluded, "[t]here are no disputes of material fact relating to the contact issues as to the right to advancements." (A0712.) This ruling by the Court was in error.

IV. Appellants Properly Filed Their Appeal In This Matter

In an effort to divert attention from the merits of this appeal, Salomon argues this appeal should be dismissed as interlocutory. In so arguing, Salomon ignores this Court's decision in *Tafeen*, which expressly found that an appeal was appropriate after the Court of Chancery awarded a specific fee amount for advancement and entered an order "establishing a procedure for Tafeen to obtain the advancement of his legal fees and expenses going forward." *Tafeen*, 888 A.2d at 209. Here, as in *Tafeen*, the Court below entered a *Fitracks* Order and has awarded both advancement and indemnification thereunder. Indeed, Appellants to date have paid over $370,000 in advancement and indemnification. Salomon's request that this Court overturn *Tafeen* by dismissing this appeal should be rejected.

Further, the Court's indemnification order is final and not subject to adjustment by the Court below. *See Fasciana v. Electronic Data Systems Corp.*, 829 A.2d 178, 184 (Del. Ch. 2003) ("Even if Fasciana is ultimately adjudged not to be entitled to indemnification for the criminal action and the civil action, that fact would not cure EDS's wrongful denial of Fasciana's advancement rights and the harm that denial caused to Fasciana."). Where a final order is entered, all prior orders are subject to appeal. *See Lewis,* 1996 WL 313498, at *1. Therefore, the present appeal was properly filed, and this Court is empowered to review both the indemnification decision and the preceding summary judgment ruling on this basis.

V. Even If This Court Should Consider The Rule 42(b) Factors, They Weigh Decidedly In Appellants' Favor

Although the present appeal is not interlocutory, Salomon argues that it is. He also argues that the Delaware Supreme Court Rule 42(b) factors are not satisfied, which is not the case. Under Rule 42(b), the order from which the interlocutory appeal is sought must decide a "substantial issue of material importance that merits appellate review before a final judgment." Del. Supr. Ct. R. 42(b)(i). Next, it must be considered "whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice." Del. Supr. Ct. R. 42(b)(iii). In assessing whether an interlocutory appeal would be appropriate, the trial court should take into account whether the "interlocutory order involves a question of law resolved for the first time in this State;" whether the "decisions of the trial courts are conflicting upon the question of law;" and whether "[r]eview of the interlocutory order may serve considerations of justice." Each of these factors is satisfied with respect to the present appeal.

A. The Summary Judgment Order Determined Substantial Issues of Material Importance and Imposed a Significant, Immediate and Ongoing Financial Burden on Appellants

An order "satisfies the substantial issue requirement when it decides a main question of law relating to the merits of the case." *See Stewart v. Wilmington Trust SP Servs.,* 2015 WL 1898002, at *2 (Del. Ch. Apr. 27, 2015). In granting Salomon's Motion for Summary Judgment, the Court below decided the two main questions of

law in this case – whether the underlying arbitration has reached its final disposition and whether Salomon is entitled to advancement despite stating under oath that he is unable to make repayment. Salomon does not dispute that the award of advancement is a substantial issue. (Ans. Br. at 18.)

In addition to deciding a substantial issue of material importance, the summary judgement order imposes a significant, immediate and ongoing financial burden on Appellants. As noted above, Appellants have already paid over $370,000 in attorneys' fees and costs in connection with the underlying arbitration and for filing the complaint and motion for summary judgment in this action. As discussed below, Salomon's invoices show that the amounts billed were excessive, unreasonable and many times as much as Appellants' bills for the same work.

Salomon views Appellants as deep pockets who he can continue to bill indiscriminately and without regard to the necessity of the legal work. Adding insult to injury, Defendants will have no opportunity to obtain repayment of the hundreds of thousands of dollars in fees should it be determined that Salomon was not entitled to advancement, which is highly likely. There is no question that the summary judgment order determined issues that are "substantial" under Rule 42(b) and that Appellants will suffer significant, immediate and ongoing financial burden in the absence of relief.

B. Interlocutory Review of the Summary Judgment Order Serves the Interests of Justice

As advancement presents a substantial issue, this Court is to consider the additional factors under Delaware Supreme Court Rule 42(b)(iii), including whether the order involves a question of law of first impression, whether the order conflicts with decisions of other trial courts on a question of law and whether review of the order would serve considerations of justice. Del. Supr. Ct. R. 42(b)(iii). Under these factors, the Court should certify an interlocutory appeal where "the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice." *Id.* The order plainly meets these requirements.

1. The summary judgment order decides an original question of law

The summary judgment order "involves a question of law resolved for the first time in this State." Del. Supr. Ct. R. 42(b)(iii)(A). In granting Salomon's Motion for Summary Judgment, the Court below decided as a matter of law that Salomon is entitled to advancement despite having affirmed under oath that he is insolvent and unable to make repayment. No other Delaware decision has reached this conclusion, nor even considered this question. In his Answering Brief, Salomon argues that this issue was decided in decisions such as *In re Central Banking Systems*, which hold that an officer need not offer security for the undertaking. (Ans. Br. at 19-20.) But the Court in *Central Banking* expressly found that "there is no evidence that Mr.

Rafton would be unable to repay those amounts." 1993 WL 183692, at *2. The decisions Salomon relies on stand for a different proposition and do not address the matter at issue, which is whether an officer is entitled to advancement where he provides an undertaking, but admittedly is unable to make repayment. That question has not been decided in Delaware and meets the criteria set forth in Rule 42(b)(iii)(A).

2. The summary judgment order conflicts with other trial court rulings regarding a question of law

The summary judgment order also satisfies Rule 42(b)(iii)(B), because it conflicts with decisions of other Delaware trial courts regarding applicable questions of law. Del. Supr. Ct. R. 42(b)(iii)(B). Specifically, the Court of Chancery's determination, without the benefit of discovery, that Salomon's provision of the undertaking was, as a matter of law, not fraudulent, illusory or in bad faith is contrary to established Delaware precedent. Delaware case law holds that a promise to repay a financial obligation is illusory and fraudulent if the promise was made without the ability to honor it. *See, e.g.*, *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *7–10 (Del. Ch. Dec. 23, 2008) (a promise to repay with no intention of performing constitutes promissory fraud; such fraud is proven by an "observable, objective, external fact with which to divine the speaker's intent"—

such as Salomon's Fifth Circuit affidavit).[3]

Having found that Salomon is unable to repay sums advanced to him, the Court below was required to analyze whether he acted in a fraudulent or bad faith manner in providing the undertaking. The Court below could not reach a decision on this issue without discovery and possibly hearing live testimony. Instead of denying Salomon's motion so that appropriate discovery could be taken, the Court below concluded that Salomon did not act fraudulently or in bad faith. This result plainly conflicts with established Delaware case law.

3. Interlocutory review would serve considerations of justice

Finally, interlocutory review of the summary judgment order would serve considerations of justice in accordance with Rule 42(b)(iii)(H), because it would decide an issue of first impression regarding an officer's right to advancement under the unique circumstances of this case, facilitate the resolution of the parties' dispute and prevent potential harm to Appellants that cannot be remedied later. Del. Supr. Ct. R. 42(b)(iii)(H). In *Pontone v. Milso Indus. Corp.,* the Court recognized that certifying disputed issues regarding advancement for interlocutory review would serve the interests of justice, stating that:

[3] The order also conflicts with decisions from other jurisdictions that reach the same result. *See also Hamad v. Zhili*, 2010 WL 2352051, at **8–9 (Cal. Ct. App. June 14, 2010) (same); *Mullen v. Rice*, No. G039927, 2009 WL 1478100, at *4 (Cal. Ct. App. May 26, 2009) (same; the plaintiffs adequately pleaded promissory fraud).

> Advancement cases can be quite contentious, time-consuming, and expensive. A decision clarifying when counterclaims are advanceable would avoid unnecessary litigation and resolve at least some potential advancement disputes before they occur. As a practical matter, this problem seems capable of repetition, but easily could evade review because parties frequently settle these types of cases before completing a final and appealable accounting of the money owed in either direction at the indemnification phase. Thus, an interlocutory appeal may be the most effective method of ensuring resolution of the important questions the parties have moved to certify.

2014 WL 4967228, at *4.

The same rationale for certifying an interlocutory appeal applies here. Both the parties, and other similarly situated corporations and their officers, would benefit from greater clarity on whether an officer who has ***admitted under oath*** he cannot repay amounts to be advanced can submit a valid undertaking. The interests of justice would also be served by interlocutory review because the order imposes a significant, immediate, and ongoing economic burden on Appellants that Salomon is unable to repay. Accordingly, the Rule 42(b) factors are met on the present record.

VI. Salomon Fails Entirely To Address The Excessive And Unreasonable Nature Of His Attorneys' Fees

Delaware case law provides that the party seeking advancement "'bears the burden of justifying the amounts sought'" and must show that the fees requested are "reasonable" and estimated in "good faith." *See White v. Curo Texas Holdings, LLC*, 2017 WL 1369332, at *4 (Del. Ch. Feb. 21, 2017) (quoting *Citadel Hldg. Corp. v. Roven,* 603 A.2d 818, *823–24 (Del. 1992)); *see also Kuang v. Cole Nat'l Corp.*, 2004 WL 1921249, at *4–5 (Del. Ch. Aug. 27, 2004); *Danenberg v. Fitracks, Inc.*, 58 A.3d 991, *995 (Del.Ch. 2012) (quoting *Fasciana*, 829 A.2d at 177). The reasonableness standard also applies to requests for indemnification. *See Kuang*, 2004 WL 1921249, at *5; *Citadel,* 603 A.2d at *825, n.8.

Both in the Court below and in their Opening Brief, Appellants detailed the manner in which Salomon's attorneys' fees were excessive, unreasonable and significantly inflated. Among other things, Appellants plainly showed counsel had billed inordinate amounts for nonsubstantive work during a period of inactivity in the arbitration, assigned a team of lawyers to perform unnecessary tasks unrelated to substantive filings in the Texas Action, billed over 80 hours to a single 15-page filing in the California action, and billed unreasonable hours during given days. (Op. Br. at 19-23.) Appellants also showed that the Court below improperly allowed Salomon's counsel to bill twice for getting up to speed in the underlying arbitration. (Op. Br. at 42.) Finally, Appellants demonstrated that the *Mahani* factors weighed

heavily in favor of reducing Salomon's fee request. (Op. Br. at 42-44.) Each of the above arguments established that the fee awards should be reversed.

In his Answering Brief, Salomon fails to address any of Appellants' arguments with respect to the unreasonable fee awards, nor does he offer argument as to why such awards should be affirmed. Instead, Salomon rehashes his arguments that the present appeal is premature. Because this appeal was properly brought, and the fee requested were patently excessive and unreasonable, reversal is appropriate.

CONCLUSION

WHEREFORE, for the reasons noted above, Appellants respectfully request that the Court reverse the decision of the Court below and enter summary judgment in favor of Appellants. In the alternative, Appellants respectfully request that the Court reverse the summary judgment award in favor of Salomon and reverse the award of attorneys' fees.

Dated: October 20, 2020

BARNES & THORNBURG LLP

/s/ *Thomas E. Hanson, Jr.*

Thomas E. Hanson, Jr. (#4102)
1000 N. West Street, Suite 1500
Wilmington, DE 19801
Telephone: (302) 300-3447
E-mail: thanson@btlaw.com

Of Counsel:

Kevin D. Evans
EVANS LAW PLLC
5613 DTC Parkway, Suite 850
Greenwood Village, CO 80111
Telephone: (720) 738-3971 (direct)
E-mail: kdevans@evanspllc.law

Attorneys for Defendants-Below, Appellants