COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

SUPERIOR COURT DEPARTMENT
Civil Action No.: 2582CV00364

DANY ABOUELKHIER and SANDRA FERNANDEZ, *Pro Se*

Plaintiff,

v.
MARINA BAY RESIDENCES, LLC, BOZZUTO MANAGEMENT CO., and DELANEY BARRETT,

Defendants.

MARINA BAY RESIDENCES, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO STAY RULE 69 DISCOVERY

Plaintiff's fifth attempt to stay proceedings in this action should be denied as have all the other requests on which this Court has acted to date.[1] This latest request from plaintiff arises from his desire to avoid Rule 69 discovery in aid of judgment (MBR's counterclaim to recover unpaid rent) in the face of his motion to vacate and pending appeal. Neither, however, is a ground for staying such discovery. *See A.W. Farrell Associates, LLP v. Haddon*, 72 Mass. App. Ct. 1115, *3 (2008) (Rule 1:28 Decision) (Tab A) ("While execution of the judgment against the defendant is stayed, the judgment itself remain[s] … [as] the plaintiff's discovery requests … could be viewed as propounded '[i]n aid of the judgment…,' Mass. R. Civ. P. 69, to ascertain the availability and amount of funds or assets that might be used to satisfy the judgment at a later point when the appeal is resolved."). *See also Finnegan v. VBenx Corp.*, 2019 WL 1027893, *2 (Mass. Super. Ct. 2019) (Tab B) (noting that, after judgment entered for the defendants and while

[1] See orders dated May 1, 2025, and June 20, 2025.

the plaintiffs' appeal was pending, the defendant appropriately pursued discovery in aid of execution under Rule 69).

This principle is sensible. Permitting post-judgment discovery while an appeal or motion to vacate is pending helps preserve the status quo by enabling the judgment creditor to identify, monitor, and, if necessary, secure assets that might otherwise be transferred, concealed, or dissipated before the appeal is resolved and the judgment can be satisfied. *See Evans v. Multicon Constr. Corp.*, 30 Mass. App. Ct. 728, 732 (1991) (permitting Rule 69 discovery "to sniff for assets … from which the judgment could be realized.").

Plaintiff's motion is also untimely. The discovery sought to be avoided was served on March 2, 2026, the compliance dates have long since passed, and plaintiff's motion was only served *after* Marina Bay Residences moved to compel.

Abouelkhier's latest motion to stay should be denied.

Respectfully submitted,

MARINA BAY RESIDENCES, LLC

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CERTIFICATE OF SERVICE

I, Sarah J. McHale, do hereby certify that on this 17th day of June, 2026 I served a copy of the foregoing document on all counsel and / or parties of record by electronic mail:

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Sarah J. McHale

TAB A

72 Mass.App.Ct. 1115
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

A.W. FARRELL ASSOCIATES, LLP
v.
John HADDON.

No. 07-P-596.
|
Sept. 9, 2008.

West KeySummary

1 **Pretrial Procedure** ⇨ Default judgment

An owner of an automobile dealership failed to show he had a good reason to remove the default and vacate default judgment entered against him in the property owner's suit for the remediation of the contaminated site leased to the dealership. The affidavit of counsel inadequately explained an alleged conflict of interest that purportedly prevented him from immediately acting on the interrogatories. No explanation was provided as to why defense counsel had not, on a timely basis, sought answers from his client or additional time to do so, obtained a waiver of the conflict from his client, or sought to withdraw his appearance. Rules Civ.Proc., Rule 55(c), 43B M.G.L.A.

By the Court (GELINAS, VUONO & FECTEAU, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** At issue in this case is whether a judge of the Superior Court abused his discretion by refusing to remove a default and by refusing to vacate a subsequent default judgment entered against the defendant, personally, for $394,033.69, in damages for the remediation, pursuant to G.L. c. 21E, of a contaminated site owned by the plaintiff and leased to a Belmont automobile dealership previously operating there. The defendant also appeals from the order of a second Superior Court judge denying a stay of Mass.R.Civ.P. 69, 365 Mass. 836 (1974), postjudgment discovery. We affirm.

1. *The defendant's motion in response to the default.*[1] On appeal, the defendant argues that the judge abused his discretion in declining to remove the default and instead entering a default judgment against him for the full amount of damages sought. He contends that the judge erred in determining that he had not shown excusable neglect or a meritorious defense and in not imposing a lesser sanction. We disagree.

"Entry or, conversely, removal of default judgments has to do with the management of the case and, as such, is committed to the sound discretion of the trial judge.... We do not consider that discretion abused unless its exercise has been characterized by arbitrary determination, capricious disposition, whimsical thinking, or idiosyncratic choice." *Greenleaf v. Massachusetts Bay Transp. Authy.*, 22 Mass.App.Ct. 426, 429, 494 N.E.2d 402 (1986), and cases cited. This standard of review is one of "marked deference," *Tai v. Boston*, 45 Mass.App.Ct. 220, 224, 696 N.E.2d 958 (1998), not of substituted judgment, *Scannell v. Ed. Ferreirinha & Irmao, Lda.*, 401 Mass. 155, 160, 514 N.E.2d 1325 (1987).

The defendant invited the judge to proceed, not under Mass.R.Civ.P. 55(c), 365 Mass. 823 (1974), but under rule 60(b), 365 Mass. 828-829 (1974), as if a final judgment had entered; consequently, the judge applied that rule's more rigorous "excusable neglect" standard. See *MPV, Inc. v. Department of Rev.*, 26 Mass.App.Ct. 932, 932-933, 525 N.E.2d 442 (1988); *Buffum v. Rockport*, 36 Mass.App.Ct. 377, 379 n. 2, 632 N.E.2d 414 (1994).

Regardless of the rule under which the defendant proceeded, in order to obtain relief, he was required to show "both a good reason to remove the default and also the existence of meritorious claims or defenses." *Clamp-All Corp. v. Foresta*, 53 Mass.App.Ct. 795, 806, 763 N.E.2d 60 (2002).[2] We hold that the defendant failed to make either showing in his meager support of this motion, therefore "justif[ying] [a] discretionary denial of relief under either rule 55(c) (the 'good cause' standard) or rule 60(b)[(the 'excusable neglect' standard)]." *Buffum v. Rockport, supra* at 381, 632 N.E.2d 414.

The affidavit of counsel inadequately explained an alleged conflict of interest that purportedly prevented him from immediately acting on the interrogatories; moreover, he failed to provide reason why defense counsel had not, on a timely basis, sought answers from his client or additional time to do so, obtained a waiver of the conflict from his client, or sought to withdraw his appearance. See *Old Colony Bank & Trust Co. of Middlesex County v. Tacey Transp. Corp.*, 10 Mass.App.Ct. 825, 826, 406 N.E.2d 434 (1980). (A.210) Nor had the defendant produced, by the hearing, the delinquent interrogatories or a response to an overdue document request. (A.160, 165)

***2** In addition, the defendant provided no materials showing a meritorious defense to his alleged liability under G.L. c. 21E, § 5(*a*).[3] The defendant merely asserted that the plaintiff could not produce written documentation that the defendant was an owner/operator of Belmont Ford, an unsatisfactory response to the evidence presented by the plaintiff.[4] (A.253) Furthermore, the judge was not required to accept the conclusory and unsupported statement of the defendant's former counsel that he had a meritorious defense. (A.253-255)

Finally, the defendant argues that the judge's damage assessment was unsupported and improperly decided without an evidentiary hearing. At the hearing on damage assessment, however, the defendant failed to challenge the amount of damages sought: when asked by the judge if he disputed the damages evidenced in the papers submitted by the plaintiff, the defendant failed to offer any objection. (A.256-257) The judge did not err in ordering a damage award of an uncontested amount which was supported by affidavits. See *Caldwell v. A-1 Sales, Inc.*, 385 Mass. 753, 755, 434 N.E.2d 174 (1982) ("[A]n issue not fairly raised before the trial judge will not be considered for the first time on appeal").

2. *The defendant's motion in response to the default judgment.* Although the defendant's motion to vacate the default judgment, filed on September 22, 2006, was an improved effort, accompanied by the tardy discovery requests and affidavits from the defendant and his former counsel, he has not shown on appeal that its denial amounted to a "clear abuse" of the motion judge's broad discretion. *Scannell v. Ed. Ferreirinha & Irmao, Lda.*, 401 Mass. at 158, 514 N.E.2d 1325.[5] The defendant failed to satisfy his burden to submit affidavits or references to discovery materials that "flesh[ed] out the bare-bones claim" that he could "maintain a contest on the merits." *Tai v. Boston*, 45 Mass.App.Ct. at 222, 696 N.E.2d 958. The judge properly held the defendant to this standard, stating that he would reconsider the decision "if there were a showing that Haddon probably has a meritorious defense, so that an injustice would occur if the default judgment stands."[6] (A.358) The defendant failed to meet that standard, however, as his submission contained only unsupported and conclusory denials of an ownership interest in Belmont Ford or that he caused the contamination. (A.268, 289) We cannot say that the judge improperly decided that these bare assertions failed to raise a "real controversy as to essential facts arising from conflicting or doubtful evidence." *Ibid.*, quoting from *Berube v. McKesson Wine & Spirits Co.*, 7 Mass.App.Ct. 426, 433, 388 N.E.2d 309 (1979).

The judge was not constrained to conclude that the late, self-serving, and "equivocal" affidavits of the defendant and his former counsel (A.290-291), that were inconsistent with deposition testimony, created a real controversy as to Haddon's liability under G.L. c. 21E. These were not necessarily sufficient to undermine Haddon's earlier admissions, especially in light of the other evidence in the record.[7] See *Ng Bros. Constr., Inc. v. Cranney*, 436 Mass. 638, 648-649, 766 N.E.2d 864 (2002); *Litton Bus. Tel. Sys., Inc. v. Schwartz*, 13 Mass.App.Ct. 113, 118, 430 N.E.2d 862 (1982) ("[T]he judge did not abuse his discretion in not giving much weight to the affidavit produced at so late a date, and in relying ... primarily on the record that was [previously] before him"); *O'Brien v. Analog Devices, Inc.*, 34 Mass.App.Ct. 905, 906, 606 N.E.2d 937 (1993). (A.359)

***3** In addition to his failure to show a meritorious defense, in the view of the judge below, the defendant's inaction, if neglect, was not excusable. The judge questioned whether the defendant's failure to submit evidence on the merits at the August 14 hearing was intentional, perhaps related to his unwillingness to squarely deny ownership. See *Litton Bus. Tel. Sys., Inc. v. Schwartz, supra* at 117, 430 N.E.2d 862. (defendant's withholding of material was deliberate). (A.359) It was not unreasonable to infer that the default was consistent with a strategy of the defendant, not the neglect of his attorney, as suggested by the lack of participation in discovery and additional failures to respond to the plaintiff's document request and to otherwise advance the case since his response to a pre-suit demand letter. The judge's consideration of such factors was proper. See *Greenleaf v. Massachusetts Bay Transp. Authy.*, 22 Mass.App.Ct. at 429-430, 494 N.E.2d 402.

In sum, on the particular facts and circumstances of this case, we cannot say that the judge's balancing of the pertinent considerations amounted to a clear abuse of discretion, nor may we substitute our judgment for that of the motion judge, who thought that relief was inappropriate. Although "a default is an extreme sanction, a party cannot flout the requirements of rule 33(a)," assuming that he may "ignore with impunity" those procedures because the default sanction is reluctantly imposed. *Kenney v. Rust,* 17 Mass.App.Ct. 699, 703-704, 462 N.E.2d 333 (1984) (citations omitted). See *Greenleaf v. Massachusetts Bay Transp. Authy., supra.* The rule is explicit that such a disregard of the proper procedures 'shall' result in a default...." *Kenney v. Rust, supra.*

3. *Postjudgment discovery.* On January 12, 2007, a second Superior Court judge denied the defendant's motion to strike or stay requests for postjudgment discovery served pursuant to Mass.R.Civ.P. 69, 365 Mass. 836 (1974). (A.413) The defendant argues that the automatic stay of execution of judgment pending appeal pursuant to Mass.R.Civ.P. 62(d), as amended by 423 Mass. 1409-1410 (1996), is inclusive of discovery.

While execution of the judgment against the defendant is stayed, the judgment itself remained. The defendant has not convinced us that this automatic stay of execution necessarily precluded the plaintiff's discovery requests, which could be viewed as propounded "[i]n aid of the judgment ...," Mass.R.Civ.P. 69, to ascertain the availability and amount of funds or assets that might be used to satisfy a judgment at a later point when the appeal is resolved. See *Evans v. Multicon Constr. Corp.,* 30 Mass.App.Ct. 728, 732, 574 N.E.2d 395 (1991); *P & F Constr. Corp. v. Friend Lumber Corp. of Medford,* 31 Mass.App.Ct. 57, 63, 575 N.E.2d 61 (1991). We note prior characterizations have described rule 69 as "equip[ping] the court with 'all the traditional flexibility of a court of equity' " in connection with postjudgment discovery. *Evans v. Multicon Constr. Corp., supra,* quoting from *Geehan v. Trawler Arlington, Inc.,* 371 Mass. 815, 817-818, 359 N.E.2d 1276 (1977). The judge's orders with respect to the grant of the plaintiff's requests and the denial of the defendant's motion to strike or stay the requests were appropriate in his discretion.

***4** Lastly, we do not pass on the plaintiff's claim that it is entitled to costs under Mass.R.A.P. 25, as amended by 378 Mass. 925 (1979), for defending the defendant's appeal of the Single Justice's January 16, 2007, order permitting postjudgment discovery in case number 2007-P-0595. That claim is not properly before this panel because the two appeals were never consolidated. The plaintiff should have made its claim for costs and fees in connection with that action.

Judgment affirmed.

Order denying stay of postjudgment discovery affirmed.

All Citations

72 Mass.App.Ct. 1115, 893 N.E.2d 96 (Table), 2008 WL 4130828

Footnotes

1 At the outset, we note that the plaintiff's Mass.R.Civ.P. 33(a)(4), as amended by 436 Mass. 1403 (2002), "application for final judgment," on which the clerk acted, effectuated only the entry of a default. (A.192) As has been previously clarified, the "judgment" referred to in rule 33(a) is "not a true judgment." *Buffum v. Rockport,* 36 Mass.App.Ct. 377, 379 & n. 2, 632 N.E.2d 414 (1994). See, e.g., *Kenney v. Rust,* 17 Mass.App.Ct. 699, 702 n. 5, 462 N.E.2d 333 (1984); *Broome v. Broome,* 40 Mass.App.Ct. 148, 152, 662 N.E.2d 224 (1996). Accordingly, in order to obtain relief from the clerk's entry of the default, a motion to remove the default pursuant to Mass.R.Civ.P. 55(c), 365 Mass. 823 (1974), was appropriate under the

circumstances, requiring a showing of good cause. *Kenney v. Rust, supra* at 702-704, 462 N.E.2d 333. *Buffum v. Rockport, supra. Broome v. Broome, supra.*

2 "A defendant, trying to set aside a default or default judgment (whether under Rule 55[c] or Rule 60[b]) must ... accompany his motion with an affidavit setting forth the facts and circumstances (including the nature of his defense on the merits) upon which he rests his motion." *New England Allbank for Savings v. Rouleau,* 28 Mass.App.Ct. 135, 140, 547 N.E.2d 61 (1989), quoting from Smith & Zobel, Rules Practice § 55.8 (1977). See *Cicchese v. Tape Time Corp.,* 28 Mass.App.Ct. 72, 75, 546 N.E.2d 384 (1989); *Bissanti Design/Build Group v. McClay,* 32 Mass.App.Ct. 469, 470, 590 N.E.2d 1169 (1992).

3 Neither here nor below did the defendant present an argument as to why he was not "legally responsible" for the release ... of oil or hazardous material under G.L. c. 21E, § 5(*a*)(5). (A. 273; Blue Br. 31) A past owner/operator may be held liable without having caused the contamination. *Griffith v. New England Tel. & Tel. Co.,* 414 Mass. 824, 830, 610 N.E.2d 944 (1993). *Scott v. NG U.S. 1, Inc.,* 450 Mass. 760, 765, 881 N.E.2d 1125 (2008).

4 The plaintiff countered with admissions of the defendant that he was an owner/operator of Belmont Ford, and King's deposition testimony, given in November, 2005, that the defendant was a co-owner, officer, and manager/operator of the business and ran all of its day-to-day operations, which would include the handling and disposal of environmental contaminants on the property, as well as the defendant's role, admitted to King, in causing and/or concealing the contamination. (A.134-146, 229-231) The defendant's former counsel also told the judge that the defendant disclaimed ownership of Belmont Ford in his deposition, but that statement, disputed by the plaintiff at the hearing, is belied by the transcript of the defendant's deposition.

5 As noted above, being invited to treat the defendant's prior "rule 60" motion as a motion to vacate the rule 33(a) "final judgment," the judge properly treated the defendant's second motion as a motion to reconsider his decision not to vacate the "final judgment." The defendant's argument that the motion was not a motion to reconsider because it was supported by different reasons to vacate the judgment is without merit. See *Phoenix Home Life Mut. Ins. Co. v. Brown,* 49 Mass.App.Ct. 657, 661, 732 N.E.2d 901 (2000) ("there is no duty to reconsider an issue or a question of fact or law, once decided"). The judge thus was able to exercise his discretion in declining to address new arguments presented for the first time therein. See *Bjorklund v. Zoning Bd. of Appeals of Norwell,* 450 Mass. 357, 362, 878 N.E.2d 915 (2008), citing *Harley-Davidson Motor Co. v. Bank of New England-Old Colony, N.A.,* 897 F.2d 611, 616 (1st Cir.1990). On this basis, we hold that the judge did not abuse his discretion in declining to address the defendant's new contentions as to the amount of damages awarded.

6 The judge also did not abuse his discretion in declining to reconsider his decision on the issue of meritorious defense in light of the defendant's new arguments that he was not an operator of Belmont Ford and did not cause the contamination; in his first "rule 60" motion, the defendant only relied on his alleged nonownership.

7 Although the judge incorrectly labeled the former defense counsel's statement that the defendant was a minority stockholder as a "judicial admission" rather than an "evidentiary admission," see *Quinn v. Mar-Lees Seafood, LLC,* 69 Mass.App.Ct. 688, 697, 871 N.E.2d 511 (2007), (A.339, 359), the record shows that he did not treat it as conclusively establishing the issue of ownership; the judge remained open to further evidence supporting the merits of the defendant's case, evidence which was simply not forthcoming.

End of Document

TAB B

35 Mass.L.Rptr. 405
Superior Court of Massachusetts,
Suffolk County.

J. Brent FINNEGAN, and Others, Plaintiffs
v.
VBENX CORPORATION, and Others, Defendants
VBenx Corporation, and Others,
Plaintiffs-in-Counterclaim
v.
J. Brent Finnegan, and Others,
Defendants-in-Counterclaim

SUPERIOR COURT SUCV2009-03772-BLS1
|
February 6, 2019

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT-IN-COUNTERLCLAIM FINNIGAN'S MOTION FOR ADVANCEMENT OF FUNDS

Mitchell H. Kaplan, Justice of the Superior Court

***1** Notwithstanding two trials (one jury waived and one jury trial) and one previous decision of the Appeals Court affirming the dismissal of all of plaintiff and defendant-in-counterclaim J. Brent Finnegan's claims against all of the defendants (for simplicity collectively "VBenx") following the jury waived trial, this case is once again before the court--this time while Finnegan and co-defendant-in-counterclaim Kenneth F. Phillips appeal the judgment for monetary damages entered against them following the jury's verdict in favor of VBenx on its counterclaims. Presently before the court is Finnegan's motion for advancement from VBenx of attorney's fees and expenses that he has incurred in prosecuting his appeal of the jury's verdict and defending the discovery that VBenx has initiated in aid of recovery on its judgment. See M. R. Civ. P. 69. For the reasons that follow, Finnegan's right to further advancement of his litigation expenses can only be determined after an evidentiary hearing to consider whether Finnegan has unclean hands as a consequence of engaging in fraudulent transfers and other actions undertaken to render himself judgment proof.

PROCEDURAL BACKGROUND

Finnegan filed his claims on September 4, 2009; VBenx filed its counterclaims on October 28, 2009. After much pretrial sparring, the Finnegan claims were severed from VBenx' counterclaims and proceeded to trial, without a jury, on April 25, 2011 (Lauriat, J. presiding). The case was tried over twenty-five days, concluding on June 5, 2011. 819 exhibits were entered in evidence (6.5 feet of paper according to Judge Lauriat's Memorandum of Decision). On October 19, 2012, the Court issued extensive Findings of Fact and Rulings of Law in which it ruled in favor of VBenx, dismissing all claims asserted against it. After further motions and hearings, on March 26, 2013, the Court entered a Separate and Final Judgment consistent with its Findings and Rulings. On May 3, 2013, Finnegan appealed; the Superior Court's Judgment was affirmed by the Appeals Court on August 14, 2015. See *Finnegan v. Baker*, 88 Mass. App. Ct. 35 (2015).

Following the entry of judgment in favor of VBenx on Finnegan's claims, discovery and extensive motion practice commenced on VBenx' counterclaims asserted against Finnegan and Phillips. Beginning May 17, 2017, the counterclaims were tried to a jury. It proceeded day-to-day for nine days. Ultimately, two counts were submitted to the jury: a claim for malicious prosecution principally directed at the claims that Finnegan and Phillips that were the subject of the jury waived trial; and claims for breach of Finnegan's fiduciary duty due to VBenx and its shareholders during the period that Finnegan was the chief executive officer and a director of VBenx and Phillips was a director. As noted above, the jury found against Finnegan and Phillips on both claims. The amount of the judgment entered against them, plus accrued post-judgment interest, is approximately $ 1.8 million. Finnegan and Phillips filed notices of appeal from the judgment. It is the court's understanding that the appeal has been briefed and argued and is under advisement in the Appeals Court.

***2** While the appeal was pending, VBenx began discovery in aid of satisfaction of its judgment, as permitted under M. R. Civ. P. 69. It requested documents and took depositions of Finnegan and Phillipps.

THE ADVANCEMENT OF FINNEGAN'S LITIGATION COSTS

VBenx is a Delaware Corporation. Typical of many Delaware corporations, the VBenx by-laws contained a provision requiring VBenx to indemnify and hold harmless directors and officers from all losses incurred, including reasonable attorneys' fees and expenses, in defending claims brought against them by reason of the fact that such person is or was a director of officer of the corporation, provided such person acted in good faith and in a manner which the person reasonably believed to be in the best interest of the corporation. The by-laws also required VBenx to advance all costs of defense, if the officers/directors executed an undertaking to pay this money back if it is ultimately determined that the person is not entitled to indemnification —all as permitted by 8 Del. C. § 145. Finnegan and Phillips delivered such an undertaking in February, 2013.

Over the ensuing years, there has been much motion practice concerning Finnegan's right to advancement. Disputes arose regarding whether expenses were incurred in connection with claims that were premised on his having been an officer and director of VBenx, as opposed to other tortious conduct, and whether the expenses for which he sought advancement were reasonable. In all, VBenx has advanced approximately $ 1 million to Finnegan. Under Delaware law, whether Finnegan is liable to repay all of the funds advanced will be determined after the pending appeal is decided. See See *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380, 405 (Del. Ch. 2008) (where the Delaware Chancery Court held that the appropriate point at which to address whether and how much of funds previously advanced by a corporation under § 145 (e) of the DGCL must be repaid is after there has been "a final, non-appealable conclusion to [the] proceeding" which gave rise to the obligation to advance funds.)

Finnegan now demands further advancement of approximately $ 216,000. This includes roughly $ 180,000 of attorneys' fees allegedly incurred in prosecuting his appeal and $ 35,000 defending discovery in aid of execution.

EVIDENCE OF FRAUDULENT TRANSFERS AND CONCEALMENT OF ASSETS

As the court understands it, the motion to order advancement of fees is brought only by Finnegan. [1] VBenx contends that discovery has revealed that while Finnegan represented to a lender in or about 2010 that he and his wife had assets with a value of nearly $ 20 million, he presently appears to have no, or virtually no, assets in his own name. According to VBenx, the brokerage and bank statements produced in post-judgment discovery show very little cash or securities in his name. A home owned by he and his wife in Palm Beach was sold in 2013 and another Palm Beach condominium purchased; however, the deed to that condominium was only in his wife's name, although Finnigan appears to have paid the mortgage and tax on that property. It was recently sold for $ 3.5 million; but none of the proceeds of that sale appears to have gone to Finnegan. Finnegan recently also transferred a valuable property in Wolfeboro, New Hampshire to his wife for no consideration.

DISCUSSION

*3 The question of whether VBenx must continue to advance litigation expenses to Finnegan is governed by Delaware corporate law, more specifically 8 Del. Code § 145 (§ 145). In *Tafeen v. Homestore, Inc.*, 2004 Del. Ch. LEXIS 38 (Del. Ch., March 16, 2004) (*Tafeen*), Chancellor Chandler addressed a situation very much like that presented by Finnegan's pending request for advancement. In *Tafeen*, Chancellor Chandler quickly disposed of the defendant corporation's contention that plaintiff, the former CEO of defendant Homestore, had forfeited his right to advancement by virtue of the conduct that caused him to be a defendant in a number of civil actions and an SEC enforcement proceeding, all filed after it was revealed that Homestore had substantially overstated its revenues in the past reporting periods. However, Chancellor Chandler found that Homestore's allegations that the plaintiff's conduct in relation to his request for advancement constituted unclean hands and this deprived him of his right to advancement required further consideration.

The Chancellor explained that while a claim for indemnification of expenses incurred in defending claims that arose out of service as an officer or director was contractual, the right to advancement of expenses was an equitable claim and, therefore, subject to the defense of unclean hands. *Id.* at 22-23. See also *Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770, 793 (Del. Ch. 1998) ("advancement and indemnification are entirely distinct types of legal rights, and entitlement to one does not necessarily entail entitlement to the other"). He went to say that although § 145 was based on "the strong Delaware policy of encouraging able persons to become directors and officers" of Delaware corporations, "[w]here ... the allegations underlying the unclean hands defense involve conduct that, if true, would undermine the spirit of the statute, the balance is clearly in favor of not rewarding the alleged inequitable conduct." And, "[a]llowing an unclean hands defense based on alleged affirmative actions taken to shelter assets does not undermine this public policy." *Id.*

The specific act in question in *Tafeen* concerned the corporation's allegation that plaintiff had purchased an expensive home in Florida, a state with very protective homestead rights that defeat creditors' claims, at a time when the plaintiff's corporate conduct was likely to result in claims against him and requests for advancement of defense costs. The Court found that under these circumstances: "The case presents questions of fact as to whether Tafeen has acted in a way to avoid a potential obligation to repay advanced funds." *Id.* at 29. The Court then went on to explain that Delaware law contemplated a summary proceeding to resolve disputes on advancement and a prompt evidentiary hearing should therefore be convened to resolve this allegation.

In a more recent case, a United States District Court in Connecticut relied on *Tafeen* in ordering a summary evidentiary proceeding to address the corporate defendant's contention that advancement was not required because of the officer's unclean hands. See *SEC v. Illarramendi,* 2014 U.S. Dist. LEXIS 16459 at 36-37 (D. Ct., Feb. 10, 2014) ("Consistent with this approach, the Court determines that an evidentiary hearing is needed to adjudicate the limited issue of whether the Receiver can satisfy his burden of establishing that the unclean hands affirmative defense should apply.")

In the present case, VBenx' submissions, supported by its post-judgment discovery, raise significant questions concerning whether Finnegan has been fraudulently transferring or secreting assets to frustrate VBenx' right to recover funds advanced to him to defend the claims that VBenx has, so far, successfully litigated against him. The Delaware Chancery Court's discussion of the unclean hands doctrine in *Tafeen* certainly suggests that, if the plaintiff had purchased an expensive home in Florida, where Florida homestead law would make that asset immune to creditors' claims, at a time that he anticipated he would be subject of claims based on his management of the defendant corporation, his conduct would be sufficient to establish a defense to his equitable claim for advancement. Certainly, if purchasing a home in Florida under these circumstances will support an unclean hands defense, fraudulent transfer of assets—if that is established—after adverse trial court judgments have entered will as well.

ORDER

***4** For the foregoing reasons, defendant Finnegan's motion for an order of advancement is continued pending an evidentiary hearing in that nature of that suggested by 8 Del. Code § 145(k) and discussed in *Tafeen.* The parties shall contact the clerk of this session to schedule a conference to address the timing and conduct of such a hearing.

All Citations

Not Reported in N.E. Rptr., 35 Mass.L.Rptr. 405, 2019 WL 1027893

Footnotes

1 Phillips has apparently not joined in this motion. It may be noted that VBenx contends, based on post-judgment discovery, that while Phillips has previously presented himself as a successful businessman and entrepreneur, he appears, at present, to have only $ 20,000 in assets.