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CHANCELLOR

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

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: May 25, 2005
Decided: May 26, 2005

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Re: *Tafeen v. Homestore, Inc.*
Civil Action No. 023-N

Dear Counsel:

Before the Court is defendant Homestore's Motion For A Stay Pending Appeal of this Court's rulings in this matter dating from the Memorandum Opinion of March 16, 2004, through this Court's most recent decisions on April 27 and May 10, 2005, which respectively ordered Homestore to pay Tafeen's advancement fees and assessed the costs of the Special Master's services against Homestore. Stays pending appeal are governed by the four-part test articulated in *Kirpat, Inc. v. Del. Alcoholic*

Beverage Comm 'n,¹ and are subject to the discretion of the trial Court.² For the reasons stated below, I find that Homestore has not satisfied its burden for obtaining a stay pending appeal and, therefore, defendant's motion is denied.

Court of Chancery Rule 62(d) provides that “stays pending appeal and stay and cost bonds shall be governed by Article IV, § 24 of the Constitution of the State of Delaware and by Rules of the Supreme Court.” Article IV, § 24 of the Constitution of the State of Delaware, provides that there shall be “no stay of proceedings in the court below unless the [appellant] shall give sufficient security to be approved by the court below.” Delaware Supreme Court Rule 32(a) provides that “a stay or injunction pending appeal may be granted or denied in the discretion of the trial court, whose decision shall be reviewable by [the Supreme] Court.”

In exercising its discretion to grant a stay pending appeal, this Court considers four factors, often referred to as the *Kirpat* test, which are: (1) the likelihood of success on the merits of the appeal; (2) whether the movant will suffer irreparable harm if the stay is not granted; (3) whether any other interested party will suffer substantial harm if the stay is granted; and (4)

¹ 741 A.2d 356 (Del. 1998).

² Del. Supr. Ct. R. 32(a).

whether the public interest will be harmed if the stay is granted.³ Applying these factors, a Court must “balance all of the equities involved in the case together ... and ... [s]uch an approach means that the necessary degree of probability of success on the merits of the appeal will vary from case to case and will vary according to the court’s assessment of the other factors.”⁴ As will be explained in more detail below, Homestore has failed to demonstrate that any of these four factors weigh in their favor and, in fact, a balancing of the equities requires this Court to deny Homestore’s motion.

Primarily, I find that Homestore has failed to demonstrate in any meaningful way even the remotest likelihood of success on the merits of its appeal. Homestore’s motion contains a laundry list of decisions that this Court has made in the current matter, and Homestore then simply restates the arguments that it presented to this Court when these matters were first heard and when these decisions were first made. These arguments, which the Court has already thoughtfully considered, did not prevail when they were first presented and are no more persuasive now. Simply stating an intention to appeal is insufficient in this Court’s opinion to demonstrate a likelihood of success on the merits.

³ *Kirpat*, 741 A.2d at 357-8. See also *Loppert v. WindsorTech, Inc.*, 2004 WL 3092338, at *1 (Del. Ch. Sept. 21, 2004).

⁴ *Kirpat*, 741 A.2d at 358 (internal citations omitted).

Turning to the issue of irreparable harm to the movant, I am unpersuaded by Homestore's allegations of harm primarily because, as plaintiff points out, Homestore has provided the Court with no current evidence that it will suffer substantial and irreparable harm. Homestore correctly points out that unless this Court approves the current motion, that Tafeen will surely attempt to receive the advancement fees that this Court has ruled he is entitled to.⁵ To demonstrate irreparable harm, Homestore relies only upon the December 2003 affidavit of Homestore's General Counsel, Michael R. Douglas. This affidavit is more than a year and a half old, and is no longer sufficient to demonstrate to this Court that Homestore's financial condition is such that the payment of Tafeen's advancement would do irreparable harm to Homestore. In fact, as plaintiff points out, Homestore's financial condition is far less precarious than it was in December 2003, with Homestore now having cash and short-term investments of \$62.9 million versus the \$35.5 million it had as of December 31, 2003. Clearly, Homestore is financially much healthier than it was in 2003. In addition to Homestore's improved financial condition,

⁵ *Tafeen v. Homestore, Inc.*, 2004 WL 3053129 (Del. Ch. Oct. 27, 2004) (letter opinion deciding that Tafeen was entitled to the advancement of attorneys' fees and other expenses); *Tafeen v. Homestore, Inc.*, 2005 WL 789065 (Del. Ch. Mar. 29, 2005) (letter opinion upholding in part and modifying in part the Special Master's reasonableness determination).

Homestore's most recent quarterly report states that Homestore has "already recorded an accrual of \$7.2 million for its estimate of the potential advancement of legal costs to certain of its former officers, including Tafeen in the quarter ended September 30, 2004. It is clear to the Court that Homestore has failed to demonstrate that it will suffer any irreparable harm if the Court fails to approve its pending motion.

In addition to having failed to demonstrate that it will suffer irreparable harm, it is clear to the Court that Tafeen would suffer severe and irreparable harm as a result of the stay because it would prevent Tafeen from adequately defending himself in the numerous ongoing litigations in which Tafeen is a defendant. Tafeen has recently been indicted by the United States Department of Justice, the Securities and Exchange Commission has levied civil charges against him, and there are various other civil litigations in which he is a defendant. To date, Tafeen has incurred over \$4.5 million in legal fees and expenses defending these suits, and he still owes payment on roughly \$1.8 million more in legal fees. Additionally, Tafeen's criminal trial has been set to begin on July 12, 2005, and the government has estimated that it will take at least two months to put on its case. A stay, which would prevent Homestore's advancement payment from reaching Tafeen in time to pay for his defense, would serve not only to deny Tafeen

the very money that this Court believes he is contractually entitled to, but would also force Tafeen, who is severely short of funds, to selectively defend these various actions, a harm that could never be undone regardless of Homestore's supersedeas bond. Rather, the Court believes that the more equitable solution would be to allow Tafeen to claim the advancement that is due to him, and if on appeal the Supreme Court believes that he was not entitled to such monies, that he then be required to pay such monies back to the best of his ability.

Lastly, the Court concludes that granting Homestore's motion would be against Delaware's public policy. The express purpose of 8 *Del. C.* § 145, which provides advancement and indemnification rights to officers and directors, is to "promote the desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated."⁶ When the right to advancement is challenged by the corporation, 8 *Del. C.* § 145(k) provides that "[t]he Court of Chancery may summarily determine a corporation's obligation to advance expenses (including attorneys' fees)." The Court of Chancery has been

⁶ *Stifel Financial Corp. v. Cochran*, 809 A.2d 555, 561 (quoting R. Ward, Jr. et. al, Folk, On Delaware General Corporation Law sec. 145 (2001)).

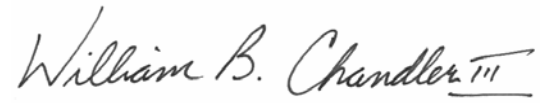
empowered to treat advancement rights as summary in nature because the immediate advancement of fees fulfills a real and legitimate need of those who serve as directors and officers of Delaware corporations when faced with the significant costs of defending legal actions against them.⁷ Clearly, to be of any value to the executive or director, advancement must be made promptly, otherwise its benefit is forever lost because the failure to advance fees affects the counsel the director may choose and litigation strategy that the executive or director will be able to afford. To grant Homestore's motion would allow it to continue to be derelict in its contractual protection of its directors/officers, and that would force its directors/officers to compromise their own litigations in the face of cost concerns, a result that is clearly against Delaware's policy of resolving advancement issues as quickly as possible.

For these reasons, I deny Homestore's Motion to Stay Pending Appeal. Of course, if Homestore is unsatisfied with this result, which I imagine it will be, it is free to seek a stay of the judgment during appeal from the Supreme Court under Del. Sup. Ct. R. 32 (a).

⁷ Pl.'s Opp'n to Def.'s Mot. to Stay Pending Appeal at 11. *See also Fuisz v. Biovail Techs., Ltd.*, 2000 WL 1277369 (Del. Ch. Sept. 6, 2000).

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned above the printed name.

William B. Chandler III

WBCIII:jsm