

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

EDMUND R. NOWAK and )  
ANNE-MARIE NOWAK, )  
 )  
Petitioners, )  
 )  
v. ) C.A. No. 210-N  
 )  
NONANTUM MILLS MAINTENANCE )  
CORPORATION, )  
 )  
Respondent. )

***MEMORANDUM OPINION AND ORDER***

**Submitted: March 23, 2005**

**Decided: May 18, 2005**

Donald L. Gouge, Jr., Esquire, Wilmington, Delaware, *Attorney for the Petitioners.*

Thomas P. Leff, Esquire, CASARINO, CHRISTMAN & SHALK, P.A.,  
Wilmington, Delaware, *Attorneys for the Respondent.*

LAMB, Vice Chancellor.

## **I.**

The parties to a minor dispute over the governance of a neighborhood maintenance corporation resolved their differences by written stipulation. Their agreement disposed of the substance of the dispute, but left open the possibility that the petitioners would apply for a court-ordered allowance of costs and attorneys' fees, which they did.

The court concludes that the petitioners are entitled to their costs as a matter of course as the prevailing parties. However, the court denies the application for an award of attorneys' fees as the matter does not present any circumstance justifying a deviation from the usual American Rule that a party to a litigation, even a prevailing party, is responsible for his or her own attorneys' fees.

## **II.**

The respondent, Nonantum Mills Maintenance Corp. ("NMMC"), is a maintenance corporation dedicated to the improvement and maintenance of the Nonantum Mills and Chapel Woods residential developments in Newark, Delaware. The board of directors (the "Board") of NMMC is comprised of volunteers elected by NMMC shareholders of record who are property owners in the two developments. The petitioners, Edward and Anne-Marie Nowak, are property owners in Nonantum Mills.

On or about March 21, 2003, NMMC issued a mandatory assessment of \$30 to the record owners of Nonantum Mills, but not Chapel Woods,<sup>1</sup> to cover excess snow removal costs due to unusually high snowfall during the winter. Although the by-laws required a meeting and vote to approve the assessment, none occurred. Edward Nowak objected to the levying of this assessment, claiming its adoption violated the by-laws. Nowak contacted several government agencies and complained about the actions taken by the Board but was unable to obtain relief.

On August 2, 2003, NMMC posted a sign in the developments providing notice of the annual meeting to be held on August 6, 2003. Previously, and according to the by-laws, the annual meeting was held in June and the record owners were afforded 15 days notice by mail. Possibly as a result of the short notice, the annual meeting lacked a quorum of record holders as required by the by-laws. At the meeting, Nowak informed the Board that the meeting was not being held in accordance with the by-laws. The Board, nevertheless, decided to continue with the meeting and hold elections as planned. Following the Board meeting, the Nowaks' counsel contacted the Board concerning the violations of the by-laws. After efforts at reaching a resolution proved fruitless, the Nowaks filed a

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<sup>1</sup> Section 5 of Article IX of the by-laws reads: "Both annual and special assessments must be fixed at a uniform rate for all lots." The by-laws do not differentiate between Nonantum Mills and Chapel Woods in the allocation of assessments.

complaint against NMMC on February 21, 2004. The complaint outlined the by-laws violations and sought a refund of the \$30 assessment.

On July 20, 2004, the parties reached a settlement of the underlying issues as expressed in a Stipulation and Consent Order (the “Order”). In the Order, NMMC stipulated to most of the Nowaks’ demands, including a refund of the \$30 assessment and a promise to follow the by-laws in the future. In the Order, the Nowaks also retained the right to seek costs and attorneys’ fees, and NMMC retained its right to dispute responsibility for any costs or fees.

The Nowaks then filed this motion for reimbursement of their reasonable costs and attorneys’ fees from the NMMC.

### **III.**

#### **A. Costs**

“The determination to shift costs is far less significant than a decision to shift fees.”<sup>2</sup> According to Court of Chancery Rule 54(d) “costs shall be allowed as of course to the prevailing party unless the court otherwise directs.” While court costs are usually allowed to the prevailing party, such an award is at the discretion of the court.<sup>3</sup>

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<sup>2</sup> *Brandin v. Gottlieb*, 2000 Del. Ch. LEXIS 97, at \*88 (Del. Ch. July 13, 2000).

<sup>3</sup> *See id.* at \*87.

The Nowaks claim to be the prevailing parties as the NMMC stipulated to all major concessions sought. The court agrees. “The term ‘prevailing party’ as used in Rule 54(d) refers to a party for whom final judgment has been entered in any civil action.”<sup>4</sup> In the settlement, the NMMC stipulated to all the major concessions sought by the Nowaks. By any reasonable interpretation of the rule, the Nowaks are the prevailing parties and are entitled to their taxable costs. The lack of a judicial decision does not negate their right to recover. “A party . . . who has prevailed on most of her claims, is appropriately deemed a prevailing party, and the court may award costs to her.”<sup>5</sup>

B. Attorneys’ Fees

The demand for attorneys’ fees raises very different considerations. Under the prevailing American Rule, each party to a suit is obligated to pay its own attorneys’ fees.<sup>6</sup> “However, this court has the power to award attorneys’ fees where the party against whom the fees are assessed has acted, *inter alia*, in bad faith or vexatiously.”<sup>7</sup> The burden of proving such bad faith rests squarely on the shoulders of the party seeking the fees.<sup>8</sup> “A finding of bad faith involves a higher

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<sup>4</sup> *Graham v. Keene Corp.*, 616 A.2d 827, 828 (Del. 1992).

<sup>5</sup> *Brandin*, 2000 Del. Ch. LEXIS at \*87.

<sup>6</sup> See *Weinberger v. UOP, Inc.*, 517 A.2d 653, 656 (Del. Ch. 1986).

<sup>7</sup> *Abex Inc. v. Koll Real Estate Group, Inc.*, 1994 Del. Ch. LEXIS 213, at \*61 (Del. Ch. Dec. 22, 1994).

<sup>8</sup> See *Shapiro v. Healthcare Acquisition, Inc.*, 2004 Del. Ch. LEXIS 45, at \*1 (Del. Ch. Apr. 20, 2004).

or more stringent standard of proof, *i.e.*, ‘clear evidence.’”<sup>9</sup> “Even without a showing of the existence of bad faith, however, this court, as a Court of Equity, has jurisdiction to assess attorneys’ fees . . . in an appropriate matter although such an award is unusual . . . .”<sup>10</sup>

In this case, the Nowaks argue that NMMC, by disregarding the by-laws and forcing them to file this action, acted in bad faith. Although the court finds that the Board of NMMC did not conduct itself properly, its actions were not so egregious as to justify the awarding of fees.<sup>11</sup>

The Nowaks’ claim for fees rests largely on the off-handed response they received from NMMC between March 2003 and February 2004, when the suit was filed. NMMC continually disregarded the Nowaks’ persistent complaints concerning the \$30 snow removal fee and NMMC’s actions. And, when the Nowaks’ counsel contacted the president of NMMC, he received a chilly response. NMMC failed to retain counsel in this matter until the suit was filed, preferring to take a “wait and see” approach to the complaint. Upon service of the complaint, NMMC negotiated

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<sup>9</sup> *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 232 (Del. Ch. 1997), *aff’d*, 720 A.2d 542 (Del. 1998).

<sup>10</sup> *Loretto Literary & Benevolent Inst. v. Blue Diamond Coal Co.*, 444 A.2d 256, 260 (Del. Ch. 1982).

<sup>11</sup> *See Arbitrium*, 705 A.2d at 231 (“This . . . narrow exception is applied in only the most egregious instances of fraud or overreaching.”).

a settlement in which they stipulated to refund the \$30, and promised to follow the by-laws in the future.

The Board of NMMC is composed of volunteer property owners in Nonantum Mills and Chapel Woods. They are not necessarily professionals or lawyers knowledgeable in proper procedure, but they do have an obligation to follow the rules established in the by-laws of NMMC. In the matter under contention, they admittedly failed to follow the by-laws. Nevertheless, their conduct was not sufficiently egregious to warrant shifting fees. The purpose of NMMC is to maintain the public areas of Nonantum Mills and Chapel Woods. Presumably, this would include snow removal. With more snowfall in winter 2003 than expected, snow removal expenses exceeded the funds set aside for this purpose in the budget. To remedy this shortfall, NMMC assessed a small additional fee on Nonantum Mills residents, but not Chapel Woods, due to a discrepancy in how the snow removal company charged the two developments. The court finds that, even though the assessment of the fee and the later annual meeting did not follow the by-laws of NMMC, the Board acted in good faith.<sup>12</sup>

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<sup>12</sup> The bad faith exception “also includes cases where the litigation process itself is conducted in bad faith.” *Id.* Following the filing of the suit, the parties reached a settlement with sufficient expediency to demonstrate to the court a lack of bad faith in negotiations.

Certainly, animosity exists on both sides, but this animosity does not amount to bad faith justifying fee shifting.<sup>13</sup>

For these reasons the court is satisfied that NMMC's actions do not justify the awarding of fees.

#### **IV. CONCLUSION**

For the foregoing reasons, costs are awarded and attorneys' fees are denied.

IT IS SO ORDERED.

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<sup>13</sup> Notably, this application is not grounded on the corporate benefit doctrine, which allows a shareholder to recover fees from a corporation when his or her litigation resulted in a benefit to the corporation or its stockholders. *See Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1163 (Del. 1989) (“[U]nder certain circumstances, counsel fees may be awarded to an individual shareholder whose litigation effort confers a benefit upon the corporation, or its shareholders, notwithstanding the absence of a class or derivative component.”).