SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

July 26, 2011

James D. Griffin, Esquire
Griffin & Hackett, P.A.
116 West Market Street
P.O. Box 612
Georgetown, DE 19947

William M. Chasanov, Esquire
Law Office of H. Clay Davis, III
303 North Bedford Street
P.O. Box 744
Georgetown, DE 19947

RE: Laurel School District v. William S. Hitch, Jr.
C.A. No. S10C-05-025-ESB
Letter Opinion

Date Submitted: May 20, 2011

Dear Counsel:

This is my decision on the Laurel School District's Motion for Summary Judgment on its $151,332.21 fraud claim against William S. Hitch, Jr. Hitch was Laurel's Director of Finance for over eight years. His position gave him access to the State of Delaware's payroll system. Hitch manipulated the payroll system to pay himself $151,332.21 in compensation that he was not due. When Laurel discovered the overpayment and confronted Hitch, he resigned his position as Director of Finance. The State of Delaware then filed criminal charges against Hitch. He pled guilty to Theft, Misuse of a Computer System, and Tampering with Public Records. Hitch was put on probation and ordered to pay restitution in the amount of $151,332.21. He has paid $4,743.67 in 12 months.

Laurel then filed a civil complaint against Hitch, claiming that he owes it $151,332.21. Laurel's complaint has four counts: Debt (Count I), Fraud (Count II),

Conversion (Count III), and Attorney's Fees (Count IV). Hitch filed an answer largely admitting that he had defrauded Laurel, but disputing the amount owed. Hitch now admits in his response to Laurel's Motion for Summary Judgment that Laurel is entitled to summary judgment on its fraud claim against him, but he still disputes the amount owed. He claims that he is entitled to a setoff of $36,633.52, representing monies he is due for unpaid salary and accrued sick and vacation time. Hitch did not raise these claims in his answer to Laurel's complaint. He did file a motion to amend his answer to raise them on April 21, 2011. Commissioner Alicia B. Howard entered a scheduling order in this case setting a cut-off date for amendments to the pleadings of October 11, 2010. Hitch never sought to amend the scheduling order before the deadline for amendments to the pleadings passed and has offered no satisfactory reason for seeking to amend it now. Therefore, I will enter summary judgment in favor of Laurel and against Hitch in the amount of $151,332.21.

STANDARD OF REVIEW

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.[1] Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.[2] The Court views the evidence in a light most favorable to the non-moving party.[3] Where the moving party produces an

[1] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[2] *Id.* at 681.

[3] *Id.* at 680.

affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[4] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, then summary judgment must be granted.[5] If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.[6]

DISCUSSION

1. Laurel's Fraud Claim

Laurel argues that Hitch owes it $151,332.21, representing monies that he fraudulently paid himself while he was serving as the Director of Finance. Hitch readily admits that Laurel is entitled to a judgment against him for his fraudulent actions. He also admits that he took $151,332.21. Hitch argues that Laurel's claim of $151,332.21 should be reduced by $36,633.52, representing monies he is due for unpaid salary and accrued sick and vacation time. Since there is no dispute as to the basis of, or amount due on, Laurel's fraud claim, Laurel is entitled to summary judgment in the amount of $151,332.21 on that claim. The issue is whether this claim should be reduced by Hitch's set-off claims.

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[4] Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[5] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 504 U.S. 912 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

[6] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

2. Hitch's Set-off Claims

Hitch argues that Laurel owes him $36,633.52, representing $10,097.36 for salary increases that he was entitled to but never received, $13,885.20 for accrued sick time, and $12,650.96 for accrued vacation time. However, Hitch never raised these as a set-off or counterclaim in his answer to Laurel's complaint. He did file a motion seeking to do that on April 21, 2011. Laurel objects to this, arguing that the time for amendments to the pleadings has long passed and Hitch has offered no good reason for seeking to do so now.

Laurel filed its complaint on May 18, 2010. Hitch filed his answer on June 18, 2010. Commissioner Alicia B. Howard issued a Pretrial Scheduling Order on August 11, 2010. It set forth a deadline for amendments to the pleadings of October 11, 2010, and a deadline for the completion of discovery of February 7, 2011. The Pretrial Scheduling Order advised the parties to contact the case manager within seven days of the issuance of the order if they did not agree with it. Laurel filed its Motion for Summary Judgment and Opening Brief on March 7, 2011. Hitch filed his Answering Brief and Motion to Amend on April 21, 2011. Laurel filed its Reply Brief on May 6, 2011.

Hitch argues that he should be allowed to amend his answer pursuant to Superior Court Civil Rule 13(f), which provides that when a "pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of the court set up the counterclaim by amendment." Hitch states that he was not aware of his $10,097.36 set-off claim until after he filed his answer on June 18, 2010. This may be correct, but it does not fully explain why Hitch did not raise this set-off claim sooner. When the State Auditor audited Laurel's records to see how much Hitch

owed in restitution, the Auditor determined that Hitch was entitled to $10,097.36 in salary increases for the 2003 to 2005 school years that he did not receive. The audit was completed on August 13, 2010. Thus, Hitch was aware of this set-off claim for nearly two months before the deadline for amendments to the pleadings passed, yet he did not raise it. He has offered no good reason for not doing so in time.

Hitch states that "it was oversight, inadvertence, and/or excusable neglect to fail to include" his set-offs for accrued sick time of $13,885.20 and accrued vacation time of $12,650.96. This information was prepared by the State Pension Office in April 2010. Thus, Hitch was aware of these set-off claims for almost two months before he filed his answer and almost six months before the deadline for amendments to the pleadings passed, yet he did not raise them. Once again, he has offered no good reason for not doing so in time.

The only thing that Hitch did do was to raise these claims in a letter that his attorney sent to Laurel's attorney on December 23, 2010. This was a full two months after the deadline for amendments to the pleadings. Hitch then did nothing with these claims until after Laurel filed its Motion for Summary Judgment. Discovery is now complete and this case is ready to be resolved either by a decision on Laurel's Motion for Summary Judgment or by trial. Hitch has clearly not complied with the Pretrial Scheduling Order. He failed to amend his answer before the deadline for doing so passed and has offered no good reason for not doing so in a timely manner. Superior Court Civil Rule 16(f) provides that if a party fails to obey a scheduling order, the Court may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). If Hitch's Motion to Amend is granted, then this case will have to be

continued for further proceedings. If it is not granted, then Hitch will, in all likelihood, not be able to raise these claims in a separate proceeding. Thus, the failure to allow Hitch to raise these claims now is tantamount to a dismissal of them. The sanction of dismissal is severe and courts are and have been reluctant to apply it except as a last resort.[7] However, I believe it is the only appropriate remedy in this case because of Hitch's financial circumstances. Despite taking over $150,000 from Laurel, Hitch has little to show for it and has only paid a small portion of his restitution. Based upon Hitch's most recent financial information, he only makes $12.50 per hour and only has $110 after paying his living expenses. Thus, if I ordered Hitch to pay any kind of meaningful financial sanction it would be no sanction at all because he can not pay it. Given that Hitch was well aware of his set-off claims long before the deadline to raise them passed and is unable to pay a meaningful financial sanction, I have concluded that the only appropriate sanction for his failure to comply with the Pretrial Scheduling Order is to deny his request to raise his set-off claims at this late stage of the proceedings.

3. Attorney's Fees

Laurel argues that it should be able to recover from Hitch the attorney's fees that it has incurred in pursuing its civil case against him because of his bad faith and egregious pre-litigation conduct. Hitch argues that his conduct does not rise to such a level so as to warrant this. Delaware follows the "American Rule" regarding attorney's fees, which provides that generally a prevailing party must pay its own attorney's fees and costs.[8]

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[7] *Drejka v. Hitchens Tire Service, Inc.,* 15 A.3d 1221, 1224 (Del. 2010).

[8] *Beneficial Delaware v. Waples*, 2006 WL 1880960, at *4 (Del. Super. July 3, 2006).

However, there are several exceptions to this rule.[9] They include bad faith and egregious pre-litigation conduct.[10] I have concluded that Hitch's actions warrant the shifting of attorney's fees in this case. Hitch was the Director of Finance for Laurel, a well-paid position. He was also the only person in the school district to have access to the State's payroll system. Hitch used his position and access to the payroll system to engage in a long-term fraudulent scheme to pay himself over $150,000 that he had not earned, all at the expense of the students in Laurel's school system. If any conduct warrants fee shifting, then this is it. Therefore, I will award Laurel its attorney's fees incurred in pursuing this civil action. Mr. Griffin should submit an affidavit regarding his fees and costs to me by August 9, 2011. Mr. Chasanov will have 10 days to file any objections to it. After that, I will issue a final Order of Judgment in this case.

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

oc: Prothonotary

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[9] *Id.*

[10] *Id.*