

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

PATRICIA W. GRIFFIN
MASTER IN CHANCERY

CHANCERY COURTHOUSE
34 The Circle
GEORGETOWN, DELAWARE 19947

Date Submitted: September 7, 2022
Final Report: October 18, 2022

Jeffrey M. Weiner, Esquire
Law Offices of Jeffrey M. Weiner, P.A.
1332 King Street
Wilmington, Delaware 19801

Mark M. Billion, Esquire
Billion Law
1073 South Governors Ave.
Dover, Delaware 19904

Robert Penza, Esquire
Christina Vavala, Esquire
Polsinelli PC
222 Delaware Avenue, Suite 1101
Wilmington, Delaware 19801

Peter K. Schaeffer, Jr., Esquire
Avenue Law
1073 South Governors Ave.
Dover, Delaware 19904

Via U.S. Mail

Patricia E. Gibbs
3431 S. DuPont Blvd.
Smyrna, Delaware 19977

RE: *Twin Willows, LLC v. Lewis Pritzkur, Trustee for Patricia E. Gibbs, Dawn R. Ellery, Gwen D. Rinaldi, Patricia E. Gibbs, and Robin Silverman*
C.A. No. 2020-0199-PWG

Dear Counsel and Mrs. Gibbs:

This highly litigated dispute involved an agreement between a buyer developer and a partition trustee to purchase approximately 81.9 acres located in Smyrna, Delaware. Following my final master's report resolving this dispute, the partition trustee seeks clarification of the attorneys' fees finding in the report, an award of damages and attorneys' fees under the lis pendens statute, and costs under Court of

Chancery Rule 54(d). I recommend that the Court grant the motion for clarification but deny the motion for damages, attorneys' fees, and costs under the *lis pendens* statute. I recommend that the Court grant certain costs under Rule 54(d). This is a final report.

I. BACKGROUND

On August 2, 2022, I filed a final master's report ("Report") recommending that the Court enter judgment for Respondents Lewis Pritzkur ("Trustee"), trustee for Patricia E. Gibbs, and Dawn R. Ellery, Gwen D. Rinaldi, and Robin Silverman (collectively "Lawrence Respondents," and together with the Trustee, "Respondents") and against Petitioner Twin Willows, LLC ("Twin Willows") denying specific performance of a sales agreement ("Agreement") for property located at 3431 South Dupont Boulevard, Smyrna, Delaware ("Property").¹ In the Report, I also declined to award attorneys' fees to either party, finding that "there is no basis in this case to justify the extraordinary action of fee shifting and that each party should [bear] their own fees in this litigation."² I noted that, although I ultimately found against Twin Willows, I determined its position was not frivolous,

¹ Docket Item ("D.I.") 165, at 1-2. Extensive background for this case can be found in the Report. *Id.*, at 1-17.

² *Id.*, at 42.

and “the record is clear that fee shifting would not be appropriate in this matter.”³

No exceptions were filed to the Report, which was approved by the Court on August 18, 2022.⁴

On August 9, 2022, the Trustee filed a motion for clarification (“Motion”) whether the Report precludes Respondents from seeking a statutory award of attorneys’ fees and costs under 25 *Del. C.* §1611 (“Section 1611”) related to the lis pendens (“Lis Pendens”) filed by Twin Willows on July 10, 2020.⁵ Later on August 9, 2022, Twin Willows filed a notice that it was voluntarily cancelling the Lis Pendens.⁶ In reply to my letter asking the parties’ position whether the Motion was moot following the voluntary cancellation,⁷ Twin Willows responded that the Motion was moot because the Lis Pendens had been vacated,⁸ and Respondents argued that it was not moot under Section 1611.⁹ On August 22, 2022, the Trustee also moved for damages, attorneys’ fees and costs (“Fees Motion”) based on Section

³ *Id.*, at 42 n. 203.

⁴ D.I. 169.

⁵ D.I. 166.

⁶ D.I. 167.

⁷ D.I. 168.

⁸ D.I. 170. The copy of the recorded document cancelling the Lis Pendens attached to Twin Willows’ response shows that it was recorded on August 19, 2022. *Id.*

⁹ D.I. 171; D.I. 172; D.I. 174.

1611, which was supported by Lawrence Respondents.¹⁰ On August 31, 2022, the Trustee applied for \$10,817.76 in court costs under Court of Chancery Rule 54(d).¹¹

On September 7, 2022, Twin Willows filed in opposition to the Fees Motion, arguing that the Court has no jurisdiction to award attorneys' fees or damages under the lis pendens statute, since no motion to cancel the Lis Pendens was filed and the Court has already determined there is no bad faith in this action.¹² It further asserts that good cause, the interest of justice, or damages have not been shown; this is not an exceptional case that would warrant imposing attorneys' fees related to a lis pendens matter; and any fee award would be limited to fees incurred seeking a cancellation of the lis pendens.¹³ Twin Willows also asks the Court to deny certain costs claimed by the Trustee under Rule 54(d).¹⁴

II.

¹⁰ D.I. 171. The Trustee alleges damages in the form of an impediment on his ability to sell the Property, and denial of return of the Property's value, during this litigation, and \$150,000.00 in attorneys' fees and costs. *Id.*, at 7.

¹¹ D.I. 176.

¹² D.I. 177, at 4-6. It also contends that the cleanup doctrine cannot apply because there is no legal cause of action advanced by the Trustee. *Id.*, at 5-6.

¹³ *Id.*, at 7-11. In addition, Twin Willows argues that equity does not support a fee award here since the Trustee never objected to the lis pendens during the litigation. *Id.*, at 11-12. Twin Willows also claims there is no basis to pierce the corporate veil to find Henry Mast personally liable for any fee/damage award. *Id.*, at 12; *see also* D.I. 171, at 7. I do not address these arguments since I decide the matter on other grounds.

¹⁴ D.I. 179. Twin Willows asks the Court to disallow \$4,970.46 in deposition transcript costs and \$675.00 in trial subpoena costs. *Id.*, at 2.

III. ANALYSIS

First, I consider the Motion seeking clarification whether the Report’s denial of fee shifting precludes Respondents from requesting attorneys’ fees and costs under Section 1611. “A motion for clarification may be granted where the meaning of what the Court has written is unclear, and such a motion is treated, procedurally, as a motion for reargument under Court of Chancery Rule 59(f).”¹⁵ “A motion for reargument under Rule 59(f) will be denied ‘unless the Court has overlooked a decision or principle of law that would have controlling effect or the Court has misapprehended the law or facts so the outcome of the decision would be affected.’”¹⁶ Because I believe that additional guidance is warranted, I grant the Motion and clarify the portion of the ruling pertaining to attorneys’ fees.

In the Report, I noted that the parties did not address attorneys’ fees in their briefing but determined that the extraordinary circumstances did not exist, such as bad faith, that would warrant the award of attorneys’ fees in this case.¹⁷ I held that

¹⁵ *Naughty Monkey LLC v. MarineMax Ne. LLC*, 2011 WL 684626, at *1 (Del. Ch. Feb. 17, 2011); *see also Gore v. Al Jazeera Am. Holdings I, Inc.*, 2015 WL 721068, at *1 (Del. Ch. Feb. 19, 2015).

¹⁶ *Neurvana Med., LLC v. Balt USA, LLC*, 2019 WL 5092894, at *1 (Del. Ch. Oct. 10, 2019) (citations omitted); *Brown v. Wiltbank*, 2012 WL 5503832, at *1 (Del. Ch. Nov. 14, 2012) (citations omitted).

¹⁷ D.I. 165, at 41-42.

each party should bear their own fees in this litigation.¹⁸ In the Motion, the Trustee requests clarification whether, because no application for mandatory cancellation of the Lis Pendens had been filed, he can request a statutory fee award against Twin Willows under Section 1611.¹⁹ Twin Willows voluntarily cancelled the Lis Pendens shortly after the Motion was filed. In response to my question whether the Motion was moot following the Lis Pendens' cancellation, Twin Willows argued it was moot;²⁰ the Trustee denied that it was moot and filed the Fees Motion, asserting that Section 1611 allows the Court discretion to award damages and attorneys' fees to the prevailing party in the interest of justice;²¹ and Lawrence Respondents concurred with the Trustee's position arguing that Twin Willows caused unnecessary delay in the potential sale of the Property.²²

“Mootness arises when controversy between the parties no longer exists such that a court can no longer grant relief in the matter.”²³ “A proceeding may become moot in one of two ways: if the legal issue in dispute is no longer amenable

¹⁸ *Id.*, at 42.

¹⁹ D.I. 166.

²⁰ D.I. 170, at 3-4.

²¹ D.I. 171.

²² D.I. 172.

²³ *OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 716 (Del. Ch. 2014) (citation omitted).

to a judicial resolution; or, if a party has been divested of standing.”²⁴ Recognizing that I did not consider whether Section 1611 applies to permit a fee award in this situation as part of the Report,²⁵ I find that there remains a controversy between the parties concerning that issue and grant the Motion so that I can determine whether Section 1611 allows the award of attorneys’ fees and damages in this instance. Section 1611 provides:

In an order either upholding a notice of pendency or cancelling a notice of pendency, the court may, for good cause shown, and in the interest of justice, direct a party to pay the prevailing party’s damages, if any, together with court costs of the action. In addition, the court, in exceptional cases, may award reasonable attorneys’ fees to the prevailing party. Attorneys’ fees may be assessed against a party only if the court finds that such party has wilfully asserted a claim or defense thereof without foundation in law or fact and/or not supported by a good faith request for an extension of the law, or for an improper purpose such as to harass or cause unnecessary delay in a legal proceeding or transaction.²⁶

Respondents argue that, despite Twin Willows’ cancellation of the Lis Pendens, the Court can award damages and attorneys’ fees under this statute “in the interest of justice” because, otherwise, a plaintiff can escape damages and fees by a much later recording of a cancellation of lis pendens.²⁷

²⁴ *Id.* (citation omitted).

²⁵ D.I. 165, at 41.

²⁶ 25 *Del. C.* § 1611.

²⁷ D.I. 171, at 4-5; D.I. 172.

“The principles of statutory interpretation under Delaware law are clear. When interpreting a statute, the Court’s priority is to ‘determine and give effect to legislative intent.’”²⁸ “[I]f a statute is clear and unambiguous, the plain meaning of the statutory language controls.”²⁹ If a statute is ambiguous, “it is susceptible of two reasonable interpretations,” and “[Delaware courts] consider the statute as a whole, rather than in parts, and [they] read each section in light of all the others to produce a harmonious whole.”³⁰

Here, the plain language of Section 1611 provides that “[i]n an order either upholding a notice of pendency or cancelling a notice of pendency, the court may, for good cause shown, and in the interest of justice, direct a party to pay the prevailing party’s damages, if any, together with court costs of the action.”³¹ It also states that the Court, “in exceptional cases, may award reasonable attorneys’ fees to the prevailing party.”³²

²⁸ *Jud. Watch, Inc. v. Univ. of Delaware*, 267 A.3d 996, 1003–04 (Del. 2021) (citation omitted).

²⁹ *In re F. Mobile, Inc.*, 270 A.3d 878, 887 (Del. Ch. 2022) (internal quotation marks and citations omitted).

³⁰ *Id.*, at 887-88 (internal quotation marks and citations omitted).

³¹ 25 *Del. C.* § 1611.

³² *Id.*

Respondents argue that the use of “and” in the first sentence is intended as a several use of “the interest of justice” so that the Court may award damages and attorneys’ fees even if a motion to cancel the Lis Pendens is not pending.³³ I am unpersuaded by that argument and find the language is not ambiguous. The reasonable interpretation of the meaning of “and” in that sentence is that the several meaning applies and permits the Court to award damages either “for good cause shown,” or “in the interest of justice” if a lis pendens matter is pending. Contrary to the Respondents’ argument, it does not eliminate the effect of any language before “in the interest of justice” in that sentence. I consider that “[t]he cancellation proceeding is itself a separate proceeding from the underlying lawsuit.”³⁴ In this case, Twin Willows voluntarily cancelled the Lis Pendens by recording the cancellation of the notice of pendency in the recorder of deeds so there remains no notice of pendency for the Court to consider or to serve as the basis for ordering damages, costs and/or attorneys’ fees under Section 1611. The Lis Pendens was in place for much of this litigation, and no motion for discretionary or

³³ D.I. 171; D.I. 172; D.I. 178. The Trustee refers to Vice Chancellor Glasscock’s explanation of the use of “and” and whether it is intended as joint or several in *Weinberg v. Waystar, Inc.* 2022 WL 24552141 (Del. Ch. July 6, 2022); *see also* D.I. 172, at 2.

³⁴ *DiSabatino v. Salicete*, 695 A.2d 1118, 1121 (Del. 1997).

mandatory cancellation was filed. Under Respondents' interpretation, a court could award damages or attorneys' fees whenever a lis pendens is filed in an action, even if nothing was brought before it about the lis pendens, or if the lis pendens had been cancelled previously.

Even assuming *arguendo* that I would consider this request for damages and attorneys' fees under Section 1611, I would decline to grant the request. Respondents assert that they have been denied any return of the value of the Agreement during the litigation but have failed to show that any damages have occurred. It is undetermined whether, when the Property is ultimately sold, the return from that sale will differ from what they would have received under the Agreement or during litigation.

Further, Section 1611 provides that "in exceptional cases," the Court may award reasonable attorneys' fees to the prevailing party where the other party asserted a claim or defense "without foundation in law or fact and/or not supported by a good faith request for an extension of the law, or for an improper purpose such as to harass or cause unnecessary delay in a legal proceeding ..."³⁵ For the same reason that I did not award attorneys' fees based upon the bad faith exception in the Report, I would not award attorneys'

³⁵ 25 *Del. C.* § 1611.

fees under Section 1611. In the Report, I noted that Delaware courts have awarded attorneys' fees for bad faith in "extraordinary circumstances" when parties have "unnecessarily prolonged or delayed litigation ... or knowingly asserted frivolous claims," and declined to award fees, finding that Twin Willows' position was not frivolous.³⁶ The same considerations apply here.³⁷ The evidence does not show that Twin Willows filed the Lis Pendens to harass or cause unnecessary delay.³⁸

Finally, I address the Trustee's application for court costs under Rule 54(d).³⁹ His request includes filing and e-filing costs, trial subpoena costs, trial transcript costs, and deposition transcript costs produced as exhibits at trial, for a total of

³⁶ D.I. 165, at 42. Although I did not specifically state that Twin Willows did not unnecessarily prolong or delay the litigation in the Report, my refusal to award attorneys' fees meant that I also considered whether there was evidence to show bad faith for those reasons.

³⁷ In addition, Twin Willows contends that attorneys' fees awarded under Section 1611 include only fees incurred relating to the cancellation of the notice of pendency, citing to *Davis v. Bilski*, 2016 WL 4197916, at *1-2 (Del. Ch. Aug. 9, 2016), *adopted*, (Del. Ch. 2016). In *Davis*, the Court granted the order directing plaintiffs to pay reasonable attorneys' fees and costs to defendant but limited fees and costs to those relating to the cancellation of the notice of pendency. *Id.*, at *2. I do not address this issue since I decide this matter on other grounds.

³⁸ *See supra note 37* and accompanying text; *see generally In re Est. of Reed*, 1995 WL 694423, at *13 (Del. Ch. Oct. 25, 1995).

³⁹ D.I. 176.

\$10,817.76.⁴⁰ Twin Willows responds that expenditures on deposition transcripts or trial subpoenas should be excluded.⁴¹

Rule 54(d) provides that “costs shall be allowed as of course to the prevailing party unless the Court otherwise directs.”⁴² It specifically excludes charges for “the Court’s copy of the transcript of the testimony or any depositions.”⁴³ Rule 54(d) “does not amount to an attempt by the court to fully compensate a litigant for all the expenses the litigant incurred.”⁴⁴ Permitted costs include “fees remitted to the Court of Chancery, including those pursuant to Court of Chancery Rule 3(bb), and those fees paid to LexisNexis for use of File & ServeXpress,”⁴⁵ and the cost of serving trial subpoenas.⁴⁶ “Costs do not include ‘the expense of computer legal research, transcript fees, miscellaneous expenses (such as travel and meals), and the cost of photocopying.’”⁴⁷

⁴⁰ *Id.*

⁴¹ D.I. 179.

⁴² *See Lynch v. Gonzalez*, 2020 WL 5587716, at *6 (Del. Ch. Sept. 18, 2020), *judgment entered* (Del. Ch. 2020) (citing Ct. Ch. R. 54(d)).

⁴³ Ct. Ch. R. 54(d).

⁴⁴ *Lynch*, 2020 WL 5587716 at *6. (citation omitted).

⁴⁵ *Id.* (internal quotation marks and citation omitted).

⁴⁶ *See Adams v. Calvarese Farms Maint. Corp.*, 2011 WL 383862, at *6 n. 61 (Del. Ch. Jan. 13, 2011).

⁴⁷ *Braga Inv. & Advisory, LLC v. Yenni Income Opportunities Fund I, L.P.* [“*Braga*”], 2020 WL 5416516, at *1 (Del. Ch. Sept. 8, 2020) (ORDER) (citations omitted).

I did not address court costs in the Report, so it is appropriate for me to address the Trustee's request for court costs under Rule 54(d).⁴⁸ I award requested court costs under Rule 54(d) to the prevailing party, the Trustee, and against Twin Willows in the amount of \$2,839.00, including filing fees (\$1,050.00), File & ServeXpress fees (\$1,114.00) and trial subpoena service (\$675.00).⁴⁹

IV. CONCLUSION

For the reasons set forth above, I recommend that the Court grant the Trustee's motion for clarification but deny his motion for damages, attorneys' fees, and costs under the lis pendens statute. I recommend that the Court grant costs under Rule 54(d) in the amount of \$2,839.00. Within 15 days after this report becomes final, counsel for the Trustee shall file an implementing order with the Court. This is a final report and exceptions may be taken under Court of Chancery Rule 144.

/s/ Patricia W. Griffin
Master Patricia W. Griffin

⁴⁸ See D.I. 165. Court costs were initially requested by the Trustee in his answer to the Complaint. D.I. 6.

⁴⁹ I disallow the Trustee's requests for the cost of trial and deposition transcripts, consistent with this Court's decisions regarding other Rule 54(d) awards. See D.I. 176; see also *Braga*, 2020 WL 5416516, at *2; *Dewey Beach Lions Club v. Longacre*, 2006 WL 2987052, at *1 (Del. Ch. Oct. 11, 2006).