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

CHERYL ANNE REAGAN, Plaintiff, v. CORTES W. RANDELL, Defendant, -and- FEDERAL NEWS SERVICE, INC., a Delaware corporation, and FNS ACQUISITION CORPORATION, a Delaware corporation, Nominal Defendants.	)	C.A. No. 19338-NC

MEMORANDUM OPINION

Submitted Date: April 22, 2002
Date Decided: June 2 1, 2002

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CHANDLER, Chancellor

On March 11 and 12, 2002, an evidentiary hearing was held in this § 225 action to determine the merits of plaintiffs Motion for Attorneys' Fees and Litigation Expenses and Other Relief. This is my decision on that motion. For the reasons that follow, I grant plaintiffs application for fees and expenses.

I. BACKGROUND

In January 2001 plaintiff Cheryl A. Reagan and defendant Cortes W. Randell contributed approximately $2.5 million and $1.5 million, respectively, for their interests in FNS Acquisition Corporation ("FNSAC"), a Delaware corporation. FNSAC is a holding company that, with the funds contributed by the parties, purchased all of the issued and outstanding shares of stock of an operating company, Federal News Service, Inc., a Delaware corporation ("FNS" and, together with FNSAC, the "Companies").[1] As consideration for their investments, Reagan received 68.75% and Randell received 3 1.25% of the issued and outstanding shares of FNSAC.

From the time of the parties' investment, and continuing until December 3 1, 2001, FNSAC and FNS each had two-member boards of directors comprised of Reagan and Randell. In addition to their

[1] FNS is a wire service provider that specializes in recording and transcribing proceedings of Congress and federal agencies.

directorships, Reagan served as treasurer of both corporations and Randell served as president of each. By the end of 2001 ongoing disagreements between the parties, including allegations by Reagan that Randell had breached his fiduciary duties to the Companies, led to a complete break-down of relations between the parties. As a result of this situation, Reagan determined to take control of the Companies and, in her capacity as director, noticed and called a meeting of the FNSAC board. At that December 3 1, 2001 meeting, Reagan, in her capacities as the controlling shareholder of FNSAC and the indirect controlling stockholder of FNS, removed Randell from his positions as director and officer of both Companies. At the same meeting, Reagan elected herself president of both Companies. After the meeting, Reagan notified Randell, who failed to attend, of the actions she had taken.

Randell refused to recognize these actions and remained in ***de facto*** control of the two corporations. Randell based his refusal to acknowledge the validity of Reagan's actions on a shareholders agreement (the "Shareholders Agreement"), purportedly signed by Reagan and Randell on March 6, 2001. The Shareholders Agreement requires that Randell, or his designee, occupy one of the two board positions of each of the Companies and that an 85% super majority shareholder vote was necessary for any

requiring shareholder approval. In response to Randell's refusal to relinquish control of the Companies, Reagan filed an action pursuant to 8 *Del.* C. §225 seeking, *inter alia*, a declaratory judgment confirming the effectiveness of her removal of Randell from his positions with the Companies and affirming that she is now the sole officer and director of the Companies. Reagan asserted that she did not sign the Shareholders Agreement. Alternatively, Reagan argued that Randell's breaches of fiduciary duty would preclude enforcement of the Shareholders Agreement.

II. PROCEDURAL POSTURE

An expedited trial of Reagan's § 225 action began on February 11, 2002. Both in pre-trial briefing and at the beginning of the trial itself, the Shareholders Agreement was the foundation for Randell's position. During cross-examination of Reagan on February 11, 2002, the defendant moved to admit into evidence a photocopied version of the Shareholders Agreement. Randell's position was the Shareholders Agreement prevented unilateral action by Reagan and, therefore, the actions purportedly taken at the December 3 1, 2001 board meeting were ineffective. Reagan testified that she had never signed the Shareholders Agreement (or any other shareholders agreement with Randell). Randell was present in the courtroom and was expected to testify to the validity of the Shareholders Agreement and the

reason a photocopy and not the original document was offered into evidence. The trial, however, did not reach the defendant's case-in-chief on February 11, 2002 and was scheduled to continue on February 21 and 22, 2002.

On February 19, 2002, two days before trial was scheduled to resume, Reagan moved for leave to admit the testimony of an expert witness at trial and indicated she would not oppose a continuance if the Court deemed it appropriate in order to accommodate her motion. The motion detailed extensive evidence uncovered by the plaintiff during discovery, both prior to the commencement of trial on February 11 and during the adjournment of the trial, that led the plaintiff to believe that the Shareholders Agreement was a fraudulent document. The motion stated that this suspicion was confirmed by plaintiffs expert, Ronald N. Morris, who would testify that Reagan's signature on the photocopy of the Shareholders Agreement was a forgery created by copying Reagan's signature from another document and inserting that copy into the Shareholders Agreement. On February 20, 2002, the Court informed the parties that it would grant the plaintiffs motion but that it would postpone or enlarge the trial schedule to give Randell additional time to defend against this new evidence. Randell declined the offer to postpone the trial.

The next morning, February 2 1, 2002, just before trial was scheduled to commence, defendant's counsel informed the Court that Randell, who had been expected to testify that day but was not in the courthouse, was willing to concede that he was no longer a director or officer of either of the Companies. That same day the Court entered an Order granting the plaintiff "all the relief available to her in this proceeding under 8 *Del. C.* § 225."[2] The Order affirmed the actions taken by Reagan at the December 31, 200 1 board meeting whereby Randell was removed as director and officer of the Companies and Reagan became the sole director and officer of the Companies. The Court also:

> retain[ed] jurisdiction to hear applications by the parties for other and further relief as appropriate and consistent with its jurisdiction in this proceeding brought pursuant to 8 *Del.* C. § 225, including without limitation any petitions to the Court (a) for an award of attorneys' fees and expenses, (b) for relief arising from Randell's alleged presentation of fraudulent evidence, and (c) for any other bad faith or misconduct in this proceeding.[3]

Following issuance of the Order, a colloquy between counsel and the Court was entered into the record during which the Court made clear to the defendant the gravity of the allegation being made.

> [T]here's a very serious, very serious charge being made. The charge is that a fraud has been perpetrated on the Court. . . .

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[2] ***Reagan*** *v.* ***Randell,*** Del. Ch., C.A. No. 19938, Chandler, C. (Feb. 2 **1, 2002)** (ORDER).
[3] ***Id.***

> Courts in this state, if there is an allegation of that sort, . . . treat it very seriously because it rarely ever happens, and that charge has been lodged. I'm duty bound by oath to inquire into it to see if, in fact, [a fraud] has been perpetrated on the Court. If it has been, the consequences will be serious and severe. I'm not pre-judging it. I'm simply saying that I take an oath and I'm going to adhere to my oath. I've got to find out if there is any truth to this accusation. If there is none, I'll be the first to be pleased by that. But if there is, it will be a very serious problem.[4]

On February 25, 2002, Reagan moved for an award of attorneys' fees and litigation expenses, contempt, and other relief based upon Randell's use of the purportedly fraudulent Shareholders Agreement. An evidentiary hearing on the authenticity of that document was held on March 11 and 12, 2002. The parties submitted briefs following the hearing. Having considered all of the evidence before me, I make the following findings of fact and conclusions of law.

III. THE LEGAL STANDARD

The law of Delaware regarding the shifting of attorneys' fees is clear. Although this Court is authorized to "make an order concerning costs in every case as is agreeable to equity,"[5] the award of attorneys' fees constitutes "unusual relief."[6] Under the well-settled American Rule, "each

[4] Tr. of Statement of Counsel at 58:15-59:12 (Feb. 21, 2002).
[5] *See* 10 Del. C. § 5106.
[6] *See Weinberger* v. *UOP* Inc., 517 A.2d 653, 656 (Del. Ch. 1986) (refusing to shift attorneys' fees absent an explicit or implicit finding of bad faith conduct, even where defendant was an "adjudicated fiduciary wrongdoer").

litigant is responsible for defraying the fees of his or her own counsel"' and the shifting of attorneys' fees is confined to only a few, narrowly defined circumstances.[8] These circumstances are:

> 1) cases where fees are authorized by statute, 2) cases where the applicant creates a common fund or non-monetary benefit for the benefit of others, 3) cases where the underlying (pre-litigation) conduct of the losing party was so egregious as to justify an award of attorneys' fees as an element of damages, and 4) cases where the court finds that the litigation was brought in bad faith or that a party's bad faith conduct increased the costs of litigation.[9]

The facts of this case implicate the third or fourth circumstances. This Court has recognized that "a party's fraudulent behavior that underlies and forms the basis of the action may justify an award of attorneys fees against that party," and that fees have been awarded "where the defendant in bad faith has forced the plaintiff to bring the lawsuit to enforce a legal claim that the defendant knew was valid.""[10] In this context, a conclusion that a plaintiff acted in "bad faith" requires the Court to find conduct so fraudulent,

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[7] 1 DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 13-3[a], at 13-7.
[8] *See Weinberger, 517* A.2d at *654; see also Arbitrium (Cayman Islands) Handels AG v. Johnston, 705* A.2d 225 (Del. Ch. 1997).
[9] *Arbitrium, 705* A.2d at 231.
[10] *Id.*

frivolous, vexatious, wanton or oppressive" as to amount to egregiousness.[12] Moreover, the Court must conclude that the party against whom the fee award is sought has acted in *subjective* bad faith.[13] Finally, a finding of bad faith involves a more stringent "clear evidence" standard of proof.[14]

IV. FACTS

I am convinced that the Shareholders Agreement-relied upon by Randell as the justification for his refusal to recognize the validity of the actions taken by Reagan on December 3 1, 2001, relied upon as the foundation of his defense in this litigation, and offered to this Court as evidence to support that litigation position-was a forgery and that Randell *knew* it was a forgery when his counsel offered the document into evidence on February 11, 2002. Despite this knowledge, Randell brazenly continued his perpetration of fraud upon this Court in the face of Reagan's unwavering testimony that she never signed that document, evidence obtained through discovery supporting the fact that no such document was signed by

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[11] See WOLFE, § 13-3[a], at 13-7 9 (citing among other cases, ***Slawik v. State, 480*** A.2d ***636*** (Del. 1984); ***Nagy v. Bistricer,*** 770 A.2d 43, 64-65 (Del. Ch. 2000) (observing that "this [C]ourt does not lightly award attorneys' fees under the bad faith exception to the American Rule")).

[12] ***Arbitrium, 705*** A.2d at 232.

[13] ***Arbitrium,*** 705 A.2d at 232 (Del. Ch. 1997) (citing ***Chambers v. NASCO,*** 501 U.S. 32, ***47*** n.11 (1991)).

[14] ***In re Carver Bancorp, Inc.,*** Del. Ch., C.A. No. 17743, let. op. at 5, Steele, V.C. (Aug. 28, 2000) (citing ***Arbitrium, 705*** A.2d at 232 (Del. Ch. 1997)).

Reagan,[15] and a handwriting expert willing to testify that Reagan's signature on the Shareholders Agreement was a forgery.

Randell's actions at the conclusion of the § 225 trial and during the March 1 1- 12, 2002 evidentiary hearing indicate that he was aware his deceit would likely be revealed. Throughout the pendency of this litigation, Randell continually sought to delay and postpone these proceedings. Reagan, pursuant to her right to a summary proceeding under § 225, continually pushed for prompt resolution of the matter. The defendant changed tactics when confronted with plaintiffs motion to add an expert witness who would testify that the Shareholders Agreement was a forgery. On February 20, Randell refused to accept the Court's invitation of a continuance that would provide additional time for him to defend against this new evidence. Instead, counsel for the defendant represented to the

[15] This evidence includes the following. In February 2001 Randell instructed his attorneys to draft a shareholders agreement. Randell's attorneys then e-mailed him a draft agreement on February 13, 2001, but did not hear back from Randell with regard to that draft. Moreover, on March 8, 2001, only two days after Reagan purportedly signed the Shareholders Agreement, defendant met with one of the attorneys who prepared the draft agreement but failed to mention either that Randell had made revisions to the draft (as reflected in the final Shareholders Agreement) or that Reagan had signed the Shareholders Agreement. Reagan testified that months after the creation of the draft version, James Stuart, one of defendant's attorneys, advised plaintiff and her attorney, Tom Smith, that although he had drafted a shareholders agreement earlier in the year, he had never finalized it. According to deposition testimony and handwritten contemporaneous notes of plaintiffs accountant, Frank Waters, on September 27, 2001, Randell informed Waters that although a shareholders agreement was desired, none had yet been executed, but that his attorneys were in the process of drafting one.

Court that Randell desired that the trial recommence the next morning as scheduled.

The next morning, February 21, 2002, Randell was not present in the courtroom and counsel for the defendant informed the Court that his client was conceding the case and would now acknowledge that Reagan's December 3 1, 2001 actions were effective and that he was no longer a director or officer of the Companies.

Also on February 21, 2002, Reagan's expert, Morris, had been noticed for deposition in advance of his scheduled testimony at trial on February 22. Although Morris was willing and able to be deposed that day, Randell's attorney stated he no longer wanted to take the deposition saying, "I don't care about [Morris'] deposition. If he's going to testify [at a later evidentiary hearing], I'll take him without deposition."[16]

Most damning of all, however, is the lack of any effort by Randell, during the March 1 1- 12, 2002 evidentiary hearing, to contradict the testimony of Reagan's handwriting expert with a handwriting expert of his own. This is despite the fact that, earlier in the litigation, defendant represented that he had a handwriting expert who was prepared to "opine within a reasonable degree of certainty that the [Shareholders] Agreement

[16] Tr. Statement of Counsel at 57:14-17.

bears the signature of Cheryl A. Reagan and that the signature page of the copy of the Agreement made from the original document was not an altered document."[17] Neither that nor any other handwriting expert was offered by Randell to contradict Morris' testimony. The defendant attempted to counter Morris' testimony by pointing out that the terminal "n" of Reagan's last name in the purportedly forged signature on the Shareholders Agreement was clearly different from the terminal "n" of the original signature (the "Source Signature") that Morris testified was photocopied and inserted into the Shareholders Agreement. Morris responded by showing that the source of that different "n" was yet another Reagan signature (the "Second Signature"). Morris demonstrated that the forged signature on the Shareholders Agreement was a copy of the Source Signature with its terminal "n" replaced by the terminal "n" from the Second Signature. I found Morris' methodology sound. Morris' testimony was thorough and convincing and I agree with his unrebutted conclusion that Reagan's signature on the Shareholders Agreement is a forgery.

v. ANALYSIS

The plaintiff contends that Randell's actions rise to the level of egregiousness. First, Randell knew there was no basis for his refusal to

[17] Pl.'s Ex. 49, Defs.' Answers to First Set of Interrogatories, at 21.

accede to the actions taken by Reagan at the December 3 1, 2001 board meeting because he knew that the Shareholders Agreement was a forgery. Second, his bad faith insistence on remaining in de *facto* control of the Companies following that board meeting forced Reagan to unnecessarily expend personal and Court resources by bringing her § 225 action. Next, and most egregiously, Randell defended a position he knew to be meritless by perpetrating a fraud on this Court when he knowingly offered into evidence the forged Shareholders Agreement.

Just as Randell was unwilling, or unable, to produce a handwriting expert to counter the testimony of Reagan's expert at trial, the plaintiffs assertions regarding Randell's bad faith go completely unanswered in the defendant's post-hearing brief. Instead, Randell apparently concedes, without even feigned contrition, that he knowingly created, or caused to be created, a forged document for the purpose of usurping power from a majority shareholder and, in furtherance of that scheme, perpetrated a fraud on this Court by relying on that forgery in litigation before the Court. Randell then asks this Court not to award attorneys' fees to Reagan based on an "unclean hands" defense. Other than to say that I have thoroughly considered each of Randell's allegations of conduct purportedly demonstrating Reagan's, unclean hands, Randell's defense to the shifting of

fees is without merit when contrasted with his unrebutted and undeniable conduct. I find, by clear evidence, that defendant Cortes W. Randell's conduct has been an egregious example of bad faith warranting the shifting of attorneys' fees. Plaintiff is to submit a detailed final bill and Order implementing this ruling.

VI. **CONCLUSION**

For the reasons assigned above, plaintiffs motion for attorneys' fees and litigation expenses is GRANTED.