COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LEO E. STRINE, JR.
VICE-CHANCELLOR

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April 25, 2003

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Constance Tanter
358 Greenwich Ave.
Greenwich, CT 06830

Microbyx Corporation
3 12 Kinderkamack Rd.
Westwood, NJ 07675

Re: *Mainiero v. Tanter.* C.A. No. 18128

Dear Parties:

This is the final chapter in a case that proceeded arduously in fits and starts almost from its inception. Relatively late in the course of this litigation, defendant Constance Tanter brought a motion to disqualify plaintiffs' counsel, John A. Faraone. That motion was granted in a December 4, 2002 letter opinion, and Faraone was thereby disqualified from representing the plaintiffs in this case pursuant to Delaware Professional Conduct Rule 3.7.'

[1] *Mainiero v. Tanter,* C.A. No. 18 128 NC (Del. Ch. Dec. 4, 2002).

In that December 4 letter opinion, I conditioned the further progression of this case on the plaintiffs' retention of substitute counsel:

> The plaintiffs and Mrs. Tanter shall, within two weeks of the plaintiffs' retention of substitute counsel, schedule a status conference with the court to set a tight schedule for the completion of this case and for the expeditious resolution of any motion regarding discovery that may be filed by the plaintiffs.[2]

The plaintiffs have not communicated to the court, at least not in any way that is cognizable by the court, that they have retained substitute counsel to prosecute this derivative action. As a result, this case has not progressed — at least not in any helpful or substantive way — since I issued my December 4 letter opinion.

On April 14, 2003, a call of the calendar session was held pursuant to Court of Chancery Rule 40. The Register in Chancery notified Faraone and Tanter that the parties (or counsel) were to appear at this call of the calendar session, *Mr. Faraone 's notice indicated that the notice should be forwarded to the plaint@* or *to successor counsel.* This notice also advised its recipients that failure to appear at the call of the calendar could result in the imposition of sanctions. Although Tanter appeared for the call of the calendar, the plaintiffs (either as individuals or through designated counsel)

[2] Id., slip op. at 10.

failed to so appear. On April 14, Tanter filed a motion with this court seeking, among other things, a dismissal of this action.

I.

Court of Chancery Rule 40(a) provides that, in New Castle County, a call of the calendar shall be held on the second Monday of April. Rule 40(c) provides that "[a]t the call of the calendar the attorneys will be expected to be present and explain the status of the case and any apparently unusual delay." And, Rule 41 (b) provides that "[f]or failure of the plaintiff. . . to comply with these Rules . . . a defendant may move for dismissal of an action or of any claim against the defendant." On the day of the call of the calendar, Tanter filed a motion to dismiss this action.

By failing to appear through an attorney at the April 14 call of the calendar, the plaintiffs have violated a rule of this court — i.e., Rule 40(c) — and, therefore, a dismissal is in order. While the plaintiffs may claim that they were unable to comply with Rule 40(c) because they were not represented by counsel at the time of the call of the calendar, any responsibility for failing to so retain counsel lies squarely with the plaintiffs. On December 4, 2002 — over four months before the April 14 call of the calendar — I disqualified the plaintiffs' former counsel, John A. Faraone, pursuant to Delaware Professional Conduct Rule 3.7. In my December 4

letter opinion, I clearly conditioned the further progression of this derivative case on the plaintiffs' retention of substitute counsel.[3] To my knowledge, the plaintiffs have failed to retain substitute counsel, and this case has, as a result of the plaintiffs' inaction, arrived at an impasse. While the plaintiffs' failure to comply with Rule 40(c) alone clearly supports a dismissal of this action, my conclusion in that regard is only buttressed by the plaintiffs' four-month-long period of inaction that prevented both sides from complying with my December 4 order regarding the orderly progression of this case.[4] That delay was unwarranted, and the plaintiffs' failure to even attempt to explain their inaction at the call of the calendar is even more unwarranted.

For the above-stated reasons, I conclude that Tanter is entitled to a dismissal of this action.

II.

In addition to her request for a dismissal of this action, Tanter also sought various other forms of relief by way of her April 14, 2003 motion. Among these is a request for an award of attorneys' fees and other litigation expenses.

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[3] *See id.*

[4] *Cf. J & P Recovery, Inc. v. R.C. Dolner, Inc., 2002 WL* 1774058, at *1 (E.D. Pa. Aug. 1, 2002) ("A court . . . has the inherent power to dismiss a case that cannot be disposed of expeditiously because of the willful inaction or dilatoriousness of a party. A failure to comply with a court order to engage counsel may also fairly be viewed as a failure to defend which justifies an entry of a default judgment . . ." (citations omitted)).

A.

As an initial matter, I note that Tanter seemingly raises a number of claims as part of her motion to dismiss — e.g., a § 2 11 stockholders meeting request,[5] an intentional infliction of emotional distress claim, etc. Notably, Tanter's answer to the plaintiffs' amended complaint contained no counterclaims. I will only say what I have said before with respect to these types of claims. If Tanter wishes to bring such claims, she should assert them properly in a new, separate action in a court of competent jurisdiction.[6] As such, these requests for miscellaneous relief are denied.

B.

With respect to Tanter's request for an award of attorneys' fees and other litigation expenses, this request is also denied.

Delaware adheres to the "American Rule," which generally requires each party to a case to bear its own litigation expenses.[7] While this State recognizes a bad faith exception to the American Rule,* permitting a litigant to collect her fees from an adversary when those litigation expenses were

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[5] 8 *Del. C.* § 211.
[6] *Cf. Mainiero,* C.A. No. 18128 NC, slip op. at 9 ("If Mrs. Tanter wishes to proceed with that claim, she is free to file a complaint under 8 *Del. C.* § 211 *in a new case.")*.
[7] *See Johnson v. Arbitrium (Cayman Islands) Handels AG, 720* A.2d 542, 545-46 (Del. 1998).
[8] *See id.*

incurred as a result of the adversary's improper litigation conduct, that exception is only applied in "unusual" cases.[9]

In light of the facts of this case, I conclude that Tanter has not provided clear evidence of bad faith on the plaintiffs' part to justify breaking with the generally-applied American Rule." Indeed, Tanter has made no showing that the plaintiffs' litigation conduct was frivolous or otherwise in bad faith. This is not, for instance, a case where the complaint was dismissed because it was meritless. Indeed, Mrs. Tanter — when represented by highly competent counsel — answered the amended complaint, suggesting that the complaint was certainly not frivolous." Instead of being dismissed on its merits, this action is being dismissed because the plaintiffs failed to appear at the call of the calendar and because they failed to secure substitute counsel for over four months, thus needlessly delaying an already aged case.

Tanter, in her motion to dismiss also makes much of my disqualification of Faraone and cites this disqualification as evidence to

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[9] *See Union Fire Ins. Co. v. Pan Am. Energy LLC, 2003 WL* 1432419, at *7 (Del. Ch. Mar. 19, 2003).

[10] *See Kosachuk v. Harper, 2002* WL 1767542, at *7 (Del. Ch. July 25, 2002) ("[A] finding of bad faith [for American Rule purposes] is subject to a clear evidence standard.").

[11] In this regard, an awkward fact bears mentioning: Mrs. Tanter served prison time for crimes relating to her activities in regard to the company, Microbyx Corporation, that is the supposed beneficiary of this derivative action.

support fee-shifting. The basis on which I disqualified Faraone was Delaware Professional Conduct Rule 3.7 — *i.e.,* I perceived that it was likely that Faraone would be a necessary witness in a trial in this action. The fact that I disqualified the plaintiffs' attorney on Rule 3.7 grounds does not support the conclusion that the plaintiffs acted in bad faith in bringing this action. And, therefore, Tanter has not met her burden of proving the appropriateness of fee-shifting in this case merely by pointing to my December 4 letter opinion.

My decision not to award fees to Tanter is also buttressed by Tanter's own litigation conduct. Tanter inappropriately resisted the plaintiffs' discovery requests for months, which led to my April 30, 2002 order compelling Tanter to comply with the plaintiffs' reasonable discovery requests. Because Tanter disobeyed my April 30 order, I again advised her as to her discovery obligations in my December 4, 2002 letter opinion. And, finally, on December 16, 2002, in yet another letter opinion from this court, I warned Tanter that if she remained in default of her discovery obligations, she would be subject to sanctions, including, but not limited to, a default judgment under Court of Chancery Rule 37(b)(2)(C).

And, **Tanter** has ignored my clear instructions with regard to how to proceed in this litigation. On October 25, 2002, in a letter to each side in

this litigation, I warned Tanter that "[r]epeated telephone calls [to my chambers] . . . are not productive nor welcome." Notwithstanding this instruction, Tanter has continued, up to this very week, to place telephone calls to my chambers in which she essentially — and repeatedly — attempts to plead her case to my staff.

Finally, and as earlier noted, Tanter continues to press claims in the context of the present litigation that I have clearly indicated would not be addressed by me in this case. For instance, as part of her April 14, 2003 motion to dismiss, Tanter seemingly raises a § 211 stockholders meeting claim, even though I decided as part of my December 4, 2002 letter opinion that I would not consider such a claim in this derivative case, but only if she filed a proper complaint in a separate action. And, even though I similarly informed Tanter that this court was not equipped to respond to alleged acts of criminal harassment occurring in the State of Connecticut,[12] she nonetheless raised the harassment issue as part of her April 14, 2003 motion to dismiss. Put simply, even though Tanter knew that certain arguments advanced in her April 14 motion to dismiss should not be pressed in this case, she nevertheless decided to include them in that motion.

[12] ***See Mainiero v. Tanter,*** C.A. No. 18128 NC, slip op. at 2 (Del. Ch. Dec. 16, 2002).

III.

For the foregoing reasons, the plaintiffs' action is DISMISSED, Tanter's request for an award of attorneys' fees and other litigation expenses is DENIED, and Tanter's requests for relief in her April 14, 2003 motion to dismiss, other than a dismissal of this action, are DENIED. IT IS SO ORDERED.[13]

Very truly yours,

Leo E. Strine, Jr.

oc: Register in Chancery
cc: John A. Faraone, Esquire

[13] The Register in Chancery's office does not have in its records any current address information for the individual plaintiffs in this action. Thus, the plaintiffs' respective copies of this letter opinion are being sent to 1213 King Street, Wilmington, Delaware, care of John A. Faraone, Esquire. I expect that Mr. Faraone will forward these copies to the respective plaintiffs as quickly as is practicable. In a separate letter to Mr. Faraone, I have ordered him to certify that he has forwarded to the plaintiffs (or to successor counsel) all correspondence intended for the plaintiffs sent from my chambers, including this letter opinion.

A copy of this letter opinion is being sent to Microbyx Corporation at the address provided in the July 12, 2000 Register in Chancery's certificate. That address is 312 Kindermack Road, Westwood, New Jersey. It is unclear as to whether that address remains correct in light of the fact that Microbyx appears to be in default of certain state franchise taxes.