COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *Peter Tafeen v. Homestore, Inc.*
Civil Action No. 023-N

Dear Counsel:

In a March 22, 2004, opinion on cross-motions for summary judgment as to plaintiff Tafeen's entitlement to advancement, I denied defendant Homestore's motion for summary judgment as to all defenses but its unclean hands defense.[1] Although I did not grant Homestore's motion with regard to that defense, I denied plaintiff's motion for summary judgment because I decided that trial is necessary on the merits of Homestore's unclean hands defense. This letter contains my decision on plaintiff's later motion for

[1] *Tafeen v. Homestore, Inc.*, 2004 WL 556733 (Del. Ch. Mar. 22, 2004).

reargument. In this letter, I also address concerns raised by plaintiff regarding discovery requests served on him.

Plaintiff has moved for reargument pursuant to Court of Chancery Rule 59(f).[2] In evaluating this motion, the Court considers whether it "overlooked a decision or principle of law that would have a controlling effect or [whether] the court has misapprehended the law or the facts so that the outcome of the decision would be affected."[3]

Since an unclean hands defense is an affirmative defense, defendant would have the burden of proof as to this defense at trial.[4] As plaintiff notes, "[i]t is well settled that where the opponent of summary judgment has the burden of proof at trial, he must show specific facts demonstrating a plausible ground for his claim, and cannot rely merely upon allegations in the pleadings or conclusory assertions in affidavits" in order to avoid summary judgment being granted in favor of the proponent of the motion.[5]

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[2] Court of Chancery Rule 59(f) provides, "[a] motion for reargument setting forth briefly and distinctly the grounds therefor may be served and filed within 5 days after the filing of the Court's opinion or the receipt of the Court's decision." Ct. Ch. R. 59(f).

[3] *Niehenke v. Right O Way Transp., Inc.*, 1996 WL 74724, at *1 (Del. Ch. Feb. 13, 1996) (citations and internal quotations omitted).

[4] *See id.* at *2 ("Defendants bear the burden of pleading and proving 'unclean hands' as an affirmative defense.").

[5] *In re Tri-Star Pictures, Inc. Litig.*, 1992 WL 37304, at *4 (Del. Ch. Feb. 21, 1992), *aff'd in part, rev'd in part*, 364 A.2d 319 (Del. 1993); *see also Burkhart v. Davies*, 602 A.2d 56, 60 (Del. 1991) ("[W]hen the nonmoving party bears the ultimate burden of proof [on a claim], summary judgment is proper if the moving party can show a failure of proof concerning an element that is essential to the non-moving party's case.").

Defendant has met this burden by "adduc[ing] evidence to establish *prima facie* each element of its claim."[6]

Plaintiff states that "[t]he only affidavit or evidence to support Homestore's unclean hands theory is the single 'information and belief' assertion by Michael Douglas . . . ."[7] This is simply not true. Without deciding whether this assertion in the affidavit is properly considered under Court of Chancery Rule 56,[8] other evidence submitted on the summary judgment motion establishes defendant's *prima facie* case.

First, Douglas, in sworn testimony undoubtedly within the scope of that contemplated by Rule 56, stated, "On December 21, 2001, Homestore announced that the Audit Committee of the Company's Board of Directors was conducting an inquiry into potential improprieties in the Company's accounting practices and financial statements."[9] The Board's inquiry revealed that Homestore had overstated its revenues by $41.4 million for the 2000 fiscal year and by $199 million for the first three quarters of the 2001

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[6] *In re Tri-Star Pictures, Inc. Litig.*, 1992 WL 37304, at *4 (emphasis in original); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (discussing the standard for summary judgment under the Federal Rules of Civil Procedure).

[7] Pl.'s Mot. for Reargument at 5.

[8] Court of Chancery Rule 56(e) states, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

[9] Aff. of Michael R. Douglas ¶ 6 (Dec. 8, 2003).

fiscal year.[10] Tafeen "was employed by Homestore during the period September 22, 1997 through November 30, 2001," the very time period that Homestore overstated its earnings.[11] An exhibit submitted to the Court *by the plaintiff* shows that Tafeen purchased a home in Florida recorded on June 29, 2001.[12] The purchase price, according to this exhibit, was $1.45 million and the property does fall within Florida's Homestead exception for tax purposes.[13] Finally, the parties agree that Florida's Homestead laws are extremely protective.

In evaluating a motion for summary judgment, all reasonable inferences that can be drawn from the court submissions will be drawn in favor of the nonmoving party.[14] Based on the above facts, one may infer that Tafeen, as a high-level officer of Homestore during the time the company overstated its revenues, and seeing other corporate officers being prosecuted in connection with similar overstatements, decided to protect his assets by buying the home in Florida.[15] The question of Tafeen's intent in buying the house is a triable issue of fact. Homestore, as a nonmoving party

[10] *Id.* Exs. A, B (reporting Homestore's restatement of earnings).
[11] *Id.* ¶ 4.
[12] Aff. of Charles D. Reed Ex. A (Dec. 29, 2003).
[13] *Id.*
[14] *See Scureman v. Judge*, 626 A.2d 5, 10-11 (Del. Ch. 1992), *aff'd sub nom.*, *Wilmington Trust Co. v. Judge*, 628 A.2d 85 (Del. 1993) (mem.).
[15] *See* Trial Tr. at 21-23 (discussing inferences that may be drawn from the facts presented to the Court).

that would have the burden of proof at trial, satisfied its requirement to "show specific facts demonstrating a plausible ground for [its] claim" under *In re Tri-Star Pictures, Inc. Litigation*.[16] Tafeen, as the moving party, had the burden to establish that there was no material triable question of fact. He did not do so. Plaintiff's motion for reargument is therefore denied.[17]

In the interest of judicial economy, I also address letters sent to this Court regarding defendant's discovery requests. In defendant's briefing to the Court, its unclean hands defense was tied specifically to Tafeen's purchase of a home in Florida. Indeed, the Court's March 22 opinion states, "Specifically the [unclean hands] defense [is] based on the allegation that 'Tafeen purchased an expensive home in Florida, a state that has extremely protective "homestead" provisions against creditor claims,' in order to shelter assets, thus avoiding repayment should Tafeen's claims ultimately be

[16] 1992 WL 37304, at *4.

[17] I acknowledge bankruptcy court cases cited by plaintiff indicating that the conversion of assets from a status of nonexempt from creditors to one of exempt from creditors is not enough to constitute unclean hands. Those cases, however, do not invoke the same concerns that are present in advancement cases, or any cases in which a fiduciary of *stockholders* takes action with the intent to potentially defraud them. (While Tafeen was not an officer of Homestore when he sought advancement, he was an officer when he purchased the home.) This Court simply will not allow corporate fiduciaries to *ex ante* shelter assets with the intent to hinder possible repayment of expenses advanced either under the provisions of, or under bylaws allowed by, section 145 of the General Corporation Law.

found to be nonindemnifiable."[18] Having tied its unclean hands defense to the purchase of the home, and having only presented affidavits related to that purchase, the Court will not permit Homestore to undertake a fishing expedition regarding its recently raised allegations about Tafeen's purported disposition of other assets. Defendant's discovery requests shall be limited to its allegation that Tafeen *purchased his home in Florida* with the intent to shelter assets from Homestore.

Finally, I acknowledge Tafeen's seeming offer of compromise in his motion to reargue. I take this opportunity to impress upon both parties the time and expense even limited discovery and expedited proceedings present. Although I express no opinion on substantive issues other than those discussed above, I remind Homestore that the mere fact that it satisfied its burden of production at the summary judgment stage does not necessarily mean that it will ultimately satisfy its burden of persuasion at trial and, if it fails to meet that burden, it may also incur expenses beyond its own as per the Supreme Court's teachings in *Stifel Financial Corporation v. Cochran*.[19]

The parties shall confer and inform the Court, within ten days from the date of this letter, whether a protective order need be entered and whether a compromise has been reached or a scheduling order filed.

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[18] 2004 WL 556733, at *6.
[19] 809 A.2d 555, 560-62 (Del. 2002).

IT IS SO ORDERED.

Very truly yours,

/S/ William B. Chandler III

William B. Chandler III

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