

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

WILLIAM B. CHANDLER III
CHANCELLOR

P.O. BOX 581
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5424
FACSIMILE (302) 856-5251

July 12, 2004

Brian E. Lutness
Silverman McDonald & Friedman
1010 N. Bancroft Parkway, Suite #22
Wilmington, DE 19805

James D. Griffin
Alix K. Robinson
Griffin & Hackett, P.A.
116 West Market Street
Georgetown, DE 19947

Re: *Kim Rice, et al. v. Kyle Herrigan-Ferro*
Civil Action No. 401-S

Dear Counsel:

Plaintiffs have moved for reconsideration of this Court's June 14 Order. The June 14 Order dismissed the complaint and awarded defendant \$2,689.70 in attorney's fees. The motion for reconsideration challenges the award of attorney's fees.

The Court will treat the motion for reconsideration as a motion to reargue under Chancery Rule 59(f). To succeed on a motion to reargue, a party must demonstrate the Court's decision was based on a misapprehension of the facts or was based on a mistaken understanding of the law. Neither basis for reargument exists here.

Ordinarily, each party to litigation pays attorney's fees. That is the American rule. An exception exists in equity, however, when it appears that a party, or its counsel, has proceeded in bad faith, has acted vexatiously, or has relied on misrepresentations of fact or law in connection with advancing a claim in litigation.

In this case, the Court concluded that plaintiffs or their counsel acted either in bad faith or vexatiously to harass or annoy the opposing party. First, the unverified complaint filed by plaintiffs' counsel falsely alleges that the individual plaintiffs were the sole owners of New Barn, Inc. This "fact" was false, and

defendant immediately filed an affidavit and supporting stock certificate demonstrating that defendant was the sole owner of New Barn, Inc. Second, during a teleconference with the Court on May 14, 2004, plaintiffs' counsel stated that he had filed a verified complaint or affidavit in support of plaintiffs' motion for a temporary restraining order. Counsel for defendant, as well as the Court, questioned whether an affidavit or verified complaint, as expressly required by Chancery Rule 65(b), actually had been filed because neither defendant's counsel nor the Court had seen such a verified complaint or affidavit. Plaintiffs' counsel insisted that he had filed an affidavit or verified complaint in conformity with Rule 65(b). In fact, however, no affidavit or verified complaint has ever been filed with the Court of Chancery in this proceeding.

Third, the complaint is facially deficient, and plainly fails to invoke Chancery jurisdiction, as it seeks money damages for loss of income and increased operating expenses.

Fourth, despite having been timely served with the defendant's counterclaim and the defendant's motion to dismiss, plaintiffs have failed to file a timely answer to either one. Nor have plaintiffs ever filed a proper motion to transfer this case to the Superior Court, notwithstanding the facially inadequate basis for equity jurisdiction.

In light of the facial deficiencies in the pleadings filed by plaintiffs, the misrepresentation to this Court regarding the filing of a pleading or affidavit required under Rule 65(b), and the abject failure to respond in a timely fashion to defendant's counterclaim and defendant's motion to dismiss (in a case that plaintiffs' counsel designated an expedited matter), the Court denies the motion for reargument. An award of attorney's fees is within this Court's discretion, and in the circumstances of this case, an award of attorney's fees is abundantly justified.

IT IS SO ORDERED.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII:meg