EFiled: Jan 20 2006 12:53PM EST
Transaction ID 10379391

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: November 10, 2005
Decided: January 20, 2006

Mr. Raphael F. Nevins
P.O. Box 1348
Las Cruces, NM 88004

Michael R. Ippoliti, Esquire
Law Office of Michael R. Ippoliti
824 Market Street, 4th Floor
P.O. Box 2284
Wilmington, DE 19899

Jennifer Hampton, Esquire
Spector Gadon & Rosen, P.C.
1000 Lenola Road
P.O. Box 1001
Moorestown, NJ 08057

Re: *Raphael F. Nevins v. George Bryan, et al.*,
Civil Action No. 19975-NC

Dear Mr. Nevins and Counsel:

Pending before me are several motions. First, pro se Plaintiff, Raphael F. Nevins, seeks reargument pursuant to Chancery Court Rule 59(f) as to certain aspects of the Judgment and Order entered on September 21, 2005. In particular, Nevins has moved for reargument on my decisions to deny his request to stay the judgment awarding costs to Defendants and to deny his motion for modification of the Order on the merits of this

litigation entered on May 4, 2005, and revised on May 17 (the "May Order"). Second, Nevins filed a motion for recusal requesting that I recuse myself from further proceedings in this case as a result of bias. Defendants oppose Plaintiff's motions for reargument and recusal and seek to recover their attorneys' fees and costs in defending against those motions.

On a parallel procedural track, Nevins appealed the May 4 Order on the merits to the Delaware Supreme Court. By Order dated October 6, 2005, the Supreme Court granted defendants/appellees' motion to affirm this Court's May 4 Order. The Supreme Court's mandate reflecting that affirmance issued on October 24, 2005.

On November 10, 2005, Nevins filed yet another motion. It seeks sanctions against Defendants' counsel for alleged misrepresentations in the proceedings that resulted in the Judgment and Order in September 2005.

For the reasons stated in this Letter Opinion, I deny all of the pending motions, as well as Defendants' request for attorneys' fees. Defendants are entitled, however, to recover their costs in responding to this latest round of motions by Plaintiff.

I. BACKGROUND AND PROCEDURAL HISTORY

Nevins brought this action under 8 *Del. C.* § 225 to determine the proper directors and members of the Center for the Advancement of Distance Education in Rural America

("CADERA").[1] After a lengthy trial I issued a Memorandum Opinion and Order on May 4, 2005 denying the relief sought by Plaintiff in its entirety, and granting declaratory judgment in favor of Defendants. I also denied both parties' requests for attorneys' fees in connection with the prosecution and defense of this action. In a letter dated May 5, 2005, Nevins sought two modifications to the Memorandum Opinion, including a change to footnote 76, which stated that Defendants "voluntarily dismissed" their counterclaim, to indicate that "it was dismissed with prejudice." On May 17, 2005, I issued a revised Memorandum Opinion and Order that incorporated one of the requested changes, but did not modify footnote 76.

On June 1, 2005, Nevins moved for modification of the May Order, seeking to amend the previous rulings to provide for an award to Nevins of his attorneys' fees, expenses and costs incurred in defending against Defendants' counterclaim. On June 3, 2005, Defendants, claiming to have prevailed on the merits of the action, filed a bill of costs under Chancery Court Rule 54(d) in the amount of $9,848.85.

On June 13, 2005, Plaintiff appealed the May Order to the Delaware Supreme Court.

On June 17, Defendants answered Plaintiff's motion for modification of the May Order and cross-moved for attorneys' fees in conjunction with defending against that

---

[1] The facts of the underlying dispute are set forth in my post-trial Memorandum Opinion, *Nevins v. Bryan*, 2005 WL 12001182 (Del. Ch. May 4, 2005).

motion. Subsequently, Nevins filed an opposition to Defendants' bill of costs and petitioned for a stay of any judgment regarding costs pending his appeal. On September 14, 2005, I heard argument on the various motions pending before me.

In a Judgment and Order entered on September 21, 2005 (the "September Order"), I denied Plaintiff's motion for modification as untimely[2] and stayed Defendants' cross motion for attorneys' fees and costs incurred in opposing Plaintiff's motion for modification pending resolution of Nevins' appeal. I also granted in part Defendants' motion for costs under Chancery Court Rule 54(d), awarding them a total of $7,386.64,[3] and denied Plaintiff's request to stay that award until his appeal was resolved.

On September 29, 2005, again dissatisfied with my rulings, Nevins moved for reargument pursuant to Rule 59(f) with respect to the September Order. Among other things, Nevins asserted that I erroneously retained jurisdiction as to the issue of costs and improperly denied him his costs in defending against Defendants' counterclaim.

---

[2] Court of Chancery Rule 59(e) provides a party ten days to file a motion to alter or amend a judgment. Under Rule 6, which excludes Saturdays, Sundays, and legal holidays, the deadline for Nevins to file such a motion was May 18, 2005. Having filed this motion sometime on or after May 24, 2005, Nevins failed to meet the deadline.

[3] After taking into consideration the parties' submissions and their arguments regarding Defendants' counterclaim, I awarded Defendants 75% of their costs. Transcript ("Tr.") at 18.

On October 3, 2005, Nevins filed a related motion for recusal requesting that I withdraw from future participation in this case based on statements I made during the September 14, 2005 teleconference. Specifically, Plaintiff contends that the language I used in explaining my denial of his motion to stay and my refusal of his request for costs reflects bias against him.

On October 6, 2005, the Supreme Court granted Defendants' motion to affirm and upheld the May Order on the merits of this matter. In its Order, the Supreme Court stated that:

> [It] finds it manifest on the face of the appellant's opening brief that the appeal is without merit for the reasons stated by the Court of Chancery in its well-reasoned decision dated May 4, 2005, and revised May 17, 2005. We find no error or abuse of discretion on the part of the Court of Chancery.

Defendants submitted papers in opposition to Nevins' request for reargument on the cost issues and his motion for recusal. In a supplemental letter memorandum filed on October 11, Defendants also requested reimbursement of their attorneys' fees and costs incurred in opposing Nevins' post-trial motions.

On November 18, 2005, Nevins' filed yet another motion, entitled "Plaintiff's Motion to Award Sanctions Against Defendants' Counsel." After reviewing that motion, I determined not to invite a response from Defendants.

II. ANALYSIS

A. Standards

The standard applicable to a motion for reargument is well settled. To obtain reargument, "the moving party [must] demonstrate that the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law."[4] In addition to the requirement that there be a misapprehension of fact or law, that misapprehension must be such that "the outcome of the decision would be affected."[5]

Reargument under Chancery Court Rule 59(f) is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion.[6] Further, a motion for reargument will not be granted when a party merely restates its prior arguments.[7]

B. Plaintiff's Motion for Reargument

One aspect of Nevins' motion for reargument questioned my denial of his request for a stay of the judgment for costs pending the resolution of his appeal. On October 6, 2005, the Supreme Court affirmed this Court's May Order regarding the merits of Nevins

---

4 *Goldman v. Pogo.com Inc.*, 2002 WL 1824910, at *1 (Del. Ch. July 16, 2002).

5 *Stein v. Orloff*, 1985 WL 21136, at *2 (Del. Ch. Sept. 26, 1985).

6 *Miles, Inc. v. Cookson America, Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995) (citing *Maldonado v. Flynn*, 1980 WL 272822 (Del. Ch. July 7, 1980)).

7 *Id*.

case. Thus, the issue of a stay of the September Order pending that appeal is now moot and Plaintiff's motion for reargument on that issue is moot, as well.

Plaintiff also moved for reargument on the September Order to the extent it denied his motion for modification of the portion of the May Order that denied his request for attorneys' fees and costs he incurred in defense of Defendants' counterclaim. I rejected that aspect of Nevin's motion for modification on the ground that it was not filed within ten days of the underlying May Order as required by Rule 59(e). Shortly thereafter, the Supreme Court affirmed the May Order in its entirety, including my decision denying Nevins' request for attorneys' fees. Therefore, the May Order that Plaintiff's motion for reargument ultimately seeks to modify is now a final, nonappealable order binding upon Nevins. This Court cannot modify that Order. Thus, the portion of Nevins' motion seeking to resurrect his claim for attorneys' fees and costs related to the counterclaim is denied.

To the extent Nevins' motion for reargument relates only to the question of court costs under Rule 54(d), it arguably is outside the scope of the Supreme Court's ruling. In connection with the September Order, however, I considered the question of court costs as it relates to both parties' positions. In particular, I concluded that Defendants, not Nevins, prevailed in this action and that only Defendants should receive costs under Rule 54(d). Furthermore, I reduced Defendants' requested costs of $9,848.85 to $7,386.64 based on my estimate of the claimed costs attributable to their unsuccessful counterclaim.

To establish a basis for reargument, Nevins must show that the Court has overlooked a decision or principle of law that would have a controlling effect or the court has misapprehended the law or the facts so that the outcome of the decision would be affected.[8] Nevins has made no such showing.

Rule 54(d) provides that a party prevailing on the merits of an action is generally entitled to recover the costs of suit from the nonprevailing party. A "prevailing party" is the one who successfully prosecutes or defends against the action, prevailing on the merits of the case.[9] I referred to that standard in my ruling on the issue of costs that led to the September Order.[10]

Nevins was unsuccessful at trial on the merits of every claim. Moreover, I granted Defendants' request to voluntarily withdraw their counterclaim with prejudice just before trial. I fully apprehended those facts and the applicable law when I entered the September Order. Therefore, Nevins has failed to demonstrate any basis for modifying that ruling, and his motion for reargument as to his costs is denied.

C. Plaintiff's Motion for Recusal

Contemporaneously with the filing of his motion for reargument, Nevins also moved for recusal. He alleges certain statements I made during the September 14, 2005

---

8 *Goldman*, 2002 WL 1824910, at *1.

9 *Brandin v. Gottlieb*, 2000 WL 1005954, at *27 (Del. Ch. July 13, 2000).

10 Tr. at 14-23.

telephone conference demonstrate that I am biased in favor of Defendants. As Defendants note in their opposition, Plaintiff has taken my statements out of context and has no reasonable basis for seeking recusal.

The touchstone for evaluating whether a judge should disqualify himself or herself is the Delaware Judges' Code of Judicial Conduct.[11] Canon 3(C)(1)(a) of the Code of Judicial Conduct states in pertinent part:

> C. Disqualification. (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) The judge has a personal bias or prejudice concerning a party . . . .

To determine whether disqualification is warranted, the Delaware Supreme Court has employed a two part analysis that includes both a subjective and objective consideration of bias.[12] The Supreme Court has noted, however, that there is a compelling policy reason for a judge not to disqualify him or herself unnecessarily, and in the absence of genuine bias, a litigant should not be permitted to "judge shop."[13]

---

11 *See, e.g.*, Canons 2 and 3(C).

12 "First, [the judge] must, as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party. Second, even if the judge believes that he has no bias, situations may arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge's impartiality." *Los v. Los*, 595 A.2d 381, 384-85 (Del. 1991).

13 *Id.*

The evidence and statements submitted by Nevins in support of his motion for recusal do not meet the subjective or objective standard of bias set forth by the Supreme Court. Nevins bases his motion in part on my use of the term "biased" to describe my beliefs that I had ruled correctly on the merits of his action and that the Supreme Court was not likely to overturn my decision. I made the statement in question while ruling on Nevins' motion to stay the judgment on costs until after his appeal had been resolved. The first factor in the four factor test for a stay involves an assessment of the movant's likelihood of success on the merits of the appeal.[14] In that context, I stated:

> [F]irst, the court has to consider the likelihood of success on the merits of [the] appeal. As the trial judge, and having spent a good deal of time myself wrestling with the issues presented by the case, obviously I am biased in this regard; but it is my belief that there is not a strong likelihood of success on the merits of the appeal.[15]

The reasonableness of my assessment was borne out a few weeks later in the Supreme Court's summary affirmance of the May Order.

It is hardly surprising that a judge who has invested their time and effort in considering the legal and factual issues presented in a case would stand behind their decision. In seizing upon the word "biased" in the statement quoted above as a basis for disqualifying me from continuing to preside over a case to which I have devoted so much

---

[14] *Kirpat, Inc. v. Del. Alcoholic Bev. Comm'n*, 741 A.2d 356, 357-58 (Del. 1998).

[15] Tr. at 18.

attention, Nevins has acted unreasonably. Viewed in context, that statement provides no basis whatsoever for a request for recusal.

Plaintiff also perceives bias in my analysis of the other factors relevant to evaluating his request for a stay of costs. The other three factors in the test for a stay articulated in *Kirpat* are: (2) whether the movant will suffer irreparable harm if the stay is not granted; (3) whether any other interested party will suffer substantial harm if the stay is granted; and (4) whether the public interest will be harmed if the stay is granted.[16] Regarding those factors, I made the following comments, among others, in explaining my decision to deny Nevins' request for a stay of the $7,386.64 judgment for costs.

> All that would happen is, there would be a money judgment outstanding against Mr. Nevins. Money judgments generally are not considered a basis for irreparable harm, and the size of this money judgment does not change that reasoning. It doesn't lend a basis to conclude that it would constitute irreparable harm.[17]

As to the potential harm to Defendants, I added:

> And I think the Defendants, they raise a legitimate point in that they have been litigating with Mr. Nevins on a number of different fronts, and somehow or other -- and to the exten[t] granting a stay defers the collection of those dollars and makes it more feasible to -- for Mr. Nevins to continue his

---

16 741 A.2d at 357-58.

17 Tr. at 19.

> litigation against them, it's a legitimate concern on behalf of the Defendants.[18]

Although one might disagree with these conclusions, I fail to see how they reasonably could lead someone to question my impartiality or to suspect a personal bias or prejudice against Nevins.

In summary, I do not find that any of the statements or conclusions cited by Nevins individually or collectively support a disqualification for bias in the circumstances of this case. The record supports the observations made and the resulting rulings were based on a straightforward application of law to the facts and an informed exercise of the Court's discretion. Therefore, Plaintiff's motion for recusal is denied.

D. Defendants' Request for Attorneys' Fees and Costs Associated with Plaintiff's Post Trial Motions

Defendants request that I award them their attorneys' fees and costs in connection with responding to Plaintiff's most recent motions for reargument and for recusal. Defendants argue that both of those motions are frivolous. At a minimum, Defendants contend they are entitled to their costs and request that the award of costs contained in the September Order be modified to include the filing fees they have incurred since the filing of their original bill of costs. Those filing fees total $143.31.[19]

---

[18] *Id.*

[19] Letter from Michael R. Ippoliti, Esq., to the Court dated October 11, 2005.

Notwithstanding their lack of merit, I do not believe that Nevins filed either his motion for reargument or for recusal in bad faith. I have reached the same conclusion as to his earlier post trial motions. Therefore, I deny Defendants' request for attorneys' fees in defending against those motions. Because Defendants prevailed on Nevins' post trial motions, however, as well as on the merits of this case, they are entitled to recover their costs. Accordingly, I hereby amend the September Order to add $143.31 to the award of costs in paragraph 1 thereof, bringing the total Judgment to $7,529.95.

E. Plaintiff's Motion to Award Sanctions Against Defendants' Counsel

Lastly, I have reviewed and considered Plaintiff's Motion to Award Sanctions Against Defendants' Counsel. In that motion, Nevins charges that Defendants' counsel misrepresented material facts during the September 14, 2005 telephone conference in this matter. The alleged misrepresentations pertain to a fear that Nevins sought to stay the judgment awarding costs to Defendants so that he would have funds to support ongoing litigation against them in other forums. Nevins argues that the misrepresentation contributed materially to the Court's decisions to grant Defendants' request for costs, to deny a stay of that award and to deny Nevins' request for costs.

I am not convinced that a misrepresentation occurred. Even if it did, there is no persuasive evidence that any misstatement was intentional. Furthermore, the alleged misrepresentation was not material to the key decisions challenged by Nevins, namely,

the award of costs to Defendants and the denial of Nevins' request for costs.[20] Thus, Plaintiff's Motion for sanctions has no basis, and is denied.

III. CONCLUSION

For the reasons stated, I deny Plaintiff's motion for reargument and motion for recusal and deny Defendants' request for attorneys' fees, but grant Defendants' request for costs incurred in defending against Plaintiff's post-trial motions. Finally, I deny Plaintiffs' motion for sanctions as clearly without merit.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

lef

[20] To the extent the challenged statement had relevance, it pertained to the denial of a stay. That aspect of the Court's ruling has been rendered moot by the Supreme Court's rejection of Nevins' appeal.