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

TRANSCHED SYSTEMS LIMITED, Plaintiff, v. VERSYSS TRANSIT SOLUTIONS, LLC; VERSYSS COMMERCIAL SYSTEMS, LLC; HOLBROOK SYSTEMS, INC.; and HENRY W. HOLBROOK, Defendants.	)	C.A. No. 07C-08-286 WCC

Submitted: August 17, 2011
Decided: March 29, 2012

On Plaintiff's Motion for Attorneys' Fees and Costs
GRANTED IN PART. DENIED IN PART.

On Defendant's Motion for Judgment as a Matter of Law - DENIED

OPINION

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CARPENTER, J.

On January 21, 2011, a jury found Defendants Versyss Transit Solutions, LLC, Versyss Commercial Systems, LLC, and Holbrook Systems, Inc. (collectively, "Versyss") liable to Plaintiff TranSched Systems Limited ("TranSched") in the amount of $500,000 for breaching the terms of the parties' asset purchase agreement ("APA"); breaching the implied covenant of good faith and fair dealing; and engaging in intentional misrepresentation. Following the verdict, TranSched submitted a motion for attorneys' fees and a bill of costs, and Versyss filed a motion for judgment as a matter of law. The Court will address each motion in turn.

1. Motion for Attorneys' Fees

TranSched argues that Section 7(a)(i) of the APA obligates Versyss to pay the attorneys' fees TranSched incurred in its original action against Versyss. The general rule in Delaware is that litigants must pay their own attorneys' fees.[1] This rule, followed in the vast majority of jurisdictions, is also known as the American rule. Delaware permits parties to avoid the American rule and to recover attorneys' fees from one another only when a statute or contract so provides.[2] No statute is involved in this case but TranSched asserts that Section 7(a)(i) of the APA allows recovery. That section states:

[1] *Maurer v. International Re-Insurance Corp.*, 95 A.2d 827, 830 (Del. Ch. 1953).
[2] *Honaker v. Farmers Mutual Ins. Co.,* 313 A.2d 900, 904 (Del. Super. 1973).

> In the event [Versyss] breaches (or in the event any third party alleges facts that, if true, would mean [Versyss] has breached) any of its representations, warranties, and covenants contained in this Agreement, and provided that [TranSched] makes a written claim for indemnification against [Versyss] within such survival period, then [Versyss] shall jointly and severally indemnify and hold harmless [TranSched] from and against the entirety of any Adverse Consequences [TranSched] may suffer through and after the date of the claim for indemnification (including any Adverse Consequences [TranSched] may suffer after the end of any applicable survival period) resulting from, arising out of, relating to, in the nature of, or caused by the breach (or the alleged breach).

The APA defines "Adverse Consequences" to include attorneys' fees.

The parties do not dispute that this clause was meant to apply in the event a third party sued TranSched on the basis of a breach of the APA by Versyss. In such a scenario, Section 7(a)(i) obligates Versyss to pay TranSched's attorneys' fees in TranSched's action against the third party. But the parties dispute whether this clause was meant to apply, and should apply, to first-party litigation.[3] In other words, the parties disagree as to whether Versyss must pay TranSched's attorneys' fees in an action TranSched brings against Versyss for breach of the APA.

Nationwide, there is no consensus on how courts should approach indemnity clauses in the context of first-party litigation. At least two courts—the Supreme Court of Iowa and the Court of Appeals of Maryland—have surveyed case law from around the country on this issue. The Iowa case, *NevadaCare, Inc. v.*

[3] A note on semantics: This opinion refers to first-party litigation interchangeably as *inter se* litigation, litigation between the indemnitor and indemnitee, and litigation between the signatories of the APA.

Department of Human Services, in describing the split of authority, cites cases in Massachusetts, Virginia, and the Ninth Circuit where indemnity clauses applied to claims between the parties, and cases in Utah, Tennessee, New York, and the Second Circuit where indemnity clauses were generally found only to relate to third-party claims.[4] Ultimately, the Supreme Court of Iowa held that "[i]n Iowa . . . an indemnification clause that uses the terms 'indemnify' and 'hold harmless' indicates an intent by the parties to protect a party from claims made by third parties rather than those brought by a party to the contract. . . . Therefore, a party to a contract cannot use an indemnity clause to shift attorney fees between the parties unless the language of the clause shows an intent to clearly and unambiguously shift the fees."[5]

The Court of Appeals of Maryland, in *Nova Research, Inc. v. Penske Truck Leasing Co.*, also reviewed the different opinions throughout the country as to whether indemnity clauses applied to *inter se* litigation.[6] The court ultimately concluded that it would not extend the American rule, which generally does not allow for prevailing parties to recover attorneys' fees, when the contract at issue provides no express provision for recovering attorneys' fees in first-party actions.[7]

[4] 783 N.W.2d 459, 470-71 (Iowa 2010).
[5] *Id.*
[6] 952 A.2d 275, 287-89 (Md. 2008).
[7] *Id.* at 285.

Helpfully, the *Nova Research* court went on to explain why it reached that conclusion. The court wrote that the American rule would be "gutted" if the court implied a fee-shifting provision in first-party actions.[8] This is because Maryland courts already greatly expand upon the exceptions to the American rule by allowing indemnitees to recover attorneys' fees incurred defending claims by third parties even when those fees are not expressly provided for in the indemnity clause.[9] The *Nova Research* court wrote that if it implied fee-shifting provisions in both third- and first-party actions, "the exception would swallow the [American] rule."[10]

The *Nova Research* court also noted that its holding comports with the generally accepted rule requiring that a contract provision must call for fee recovery expressly for establishing the right of indemnity in order to overcome the application of the American rule.[11] "Most courts distinguish between the recovery of attorney's fees incurred in defending against the third-party claim and those expended in prosecuting a claim against the indemnitor. Unless the indemnity provision expressly permits the recovery of fees incurred in prosecuting claims

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[8] *Id.*

[9] *Id.* This is the rule in Delaware too: "Where . . . the claim for attorneys' fees is grounded on a contract of indemnity, recovery is generally permitted even though the contract does not expressly mention attorneys' fees." *E. Mem'l Consultants, Inc. v. Gracelawn Mem'l Park, Inc.,* 364 A.2d 821, 825 (Del. 1976).

[10] *Nova Research*, 952 A.2d at 285.

[11] *Id.* at 286.

against the indemnitor, such fees are not recoverable."[12]

Courts have been able to identify language which would generally reflect that the indemnity clause is meant to apply exclusively to third-party actions. For example, in *DRR, L.L.C. v. Sears, Roebuck and Co.*, the court found the indemnity clause could not apply to *inter se* litigation because it gave the indemnitor the right to select counsel in indemnification actions.[13] And under Massachusetts and New York law, an obligation to notify the indemnitor of all claims indicates "that the indemnification provision was drafted with an eye toward third-party claims, for in the situation of a direct claim between the parties, the notice provision and the assumption of defense option would be rendered meaningless."[14]

Like the *Nova Research* court, this Court holds that indemnity agreements are presumed *not* to require reimbursement for attorneys' fees incurred as a result of substantive litigation between the parties to the agreement absent a clear and unequivocal articulation of that intent.[15] Unfortunately, there is no definitive

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[12] Philip L. Bruner & Patrick J. O'Connor, Jr., 3 Construction Law § 10:51 (2007).

[13] 949 F.Supp. 1132, 1143 (D. Del. 1996) ("Unless Sears anticipated the adversarial system of civil litigation would be jettisoned in the near future, there would be no reason to state explicitly it would retain the right to have its own representation in an action brought by DRR.").

[14] *Shan Indus., LLC v. Tyco Int'l (US), Inc.*, 2005 WL 3263866, at *8 (D.N.J. Nov. 30, 2005) (internal quotations omitted), *see also Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 (N.Y. 1989) ("To extend the indemnification clause to require defendant to reimburse plaintiff for attorney's fees in the breach of contract action against defendant would render these provisions meaningless because the requirement of notice and assumption of the defense has no logical application to a suit between the parties.").

[15] *See Nova Research*, 952 A.2d at 285 (declining to except the American rule "[w]here the contract provides no express provision for recovering attorney's fees in a first party action establishing the right to indemnity").

language that must be used or phrases that have been routinely held to allow for such recovery in first-party actions. Each provision is unique and must be decided under the facts of that particular case. While the Court cannot point litigants to bright-line language that will establish, in essence, a fee-shifting provision, it is critical when drafting agreements that counsel use clean and precise language to set forth the parties' intentions. Counsel should not expect the Court to deviate from the American rule if care has not been taken in drafting a contract's language.

When the Court considers the indemnity clause here, even if the Court was kind in its description, it would have to guess that it was written by counsel who never litigate, whose days are filled with the excitement of writing contract terms that only they will understand or can reasonably interpret, and who obviously have lost the ability to write in a clear and common-sense manner. While this may be a well-respected and sought-after art form, it does not help the client insure their expectations and demands are understood by all parties. Instead, the Court is left with the challenge of deciphering terms that were perhaps in vogue in the nineteenth century but whose days have clearly passed.

TranSched and Versyss' indemnity clause does not clearly and unequivocally indicate that the parties intended the indemnitor to pay the indemnitee's attorneys' fees in the event of *inter se* litigation. That intent is not

spelled out in Section 7(a)(i) of the APA, nor is there any reference to "prevailing parties," a hallmark term of fee-shifting provisions.[16] Yet the indemnity clause clearly applies to third-party actions, as indicated in the parenthetical: "In the event [Versyss] breaches (or in the event any third party alleges facts that, if true, would mean [Versyss] has breached) any of its representations . . . contained in this Agreement . . . then [Versyss] shall jointly and severally indemnify and hold harmless [TranSched] from . . . any Adverse Consequences." Moreover, this indemnity clause requires TranSched to make a written claim for indemnification in the event of a breach. This provision simply makes no sense in the context of a first-party action unless used as a threat by one party to enforce its will against another. To require TranSched to submit an indemnity claim before TranSched itself initiates legal action against Versyss would render such a claim a completely hollow gesture.

The Court will not enlarge an exception to the American rule in this case. TranSched and Versyss' indemnity clause plainly applies to third-party actions but does not unequivocally indicate an intent to apply to *inter se* litigation. Therefore, TranSched's request for attorneys' fees—or any other costs—pursuant to Section

[16] *See Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *2-3 (Del. Ch. Apr. 27, 2004) (noting that the inclusion of the term "prevailing parties" signals the parties' intent to adopt an all-or-nothing fee-shifting provision, but not disputing that plaintiff was entitled to at least some attorneys' fees under the provision).

7(a)(i) of the APA is denied. Having so found, the Court will next address whether TranSched may recover any costs under Delaware law.

2. Bill of Costs

TranSched, as the prevailing party, seeks to recover certain costs against Versyss and to recover pre- and post-judgment interest. Versyss argues that some of these costs are not recoverable under Delaware law; are excessive; or are incorrectly calculated by TranSched.

Superior Court Rule 54 provides, with certain exceptions, that "costs shall be allowed as of course to the prevailing party upon application to the Court."[17] Rule 54 does not define "costs," but case law explains that costs are "allowances in the nature of incidental damages awarded by law to reimburse the prevailing party for expenses necessarily incurred in the assertion of his rights in court."[18] Put differently, if a party cannot litigate its case without incurring a specific cost, that cost is most likely taxable. With these principles in the mind, the Court will examine each of TranSched's claimed costs in turn to determine whether they are taxable against Versyss.

[17] Super. Ct. Civ. R. 54.
[18] *Dewey Beach Lions Club v. Longacre*, 2006 WL 2987052, at *1 (Del. Ch. Oct. 11, 2006).

a. *Deposition Transcripts*

TranSched seeks to recover fees paid to court reporters for the cost of transcripts of four witnesses' depositions. Rule 54(f) provides that "fees paid court reporters for the Court's copy of transcripts of depositions shall not be taxable costs unless introduced into evidence. Fees for other copies of such transcripts shall not be taxable costs."[19] The depositions whose costs TranSched seeks to recoup were all were read into the record and submitted as Court exhibits. Therefore, the Court will permit TranSched to recover fees paid to court reporters for the costs of these transcripts.[20] The Court will not allow TranSched to recover costs for additional copies or for sales tax, delivery costs, or administrative fees associated with these transcripts. In sum, TranSched is granted $1,676.25 for the court copies of its deposition transcripts. The breakdown of this sum per witness is described at the end of this section.[21]

[19] Superior Court Rule of Civil Procedure 54(f).

[20] *See Summerhill v. Iannarella*, 2009 WL 891048, at *1-2 (Del. Super. Apr. 1, 2009) (finding Rule 54(f) covered the cost of transcribing deposition which was read into evidence), *Deardoff Associates, Inc. v. Paul*, 2000 WL 1211077, at *2 (Del. Super. Apr. 27, 2000) (awarding cost of deposition transcript which was read during trial even though the actual pages of the deposition were not introduced as evidence), *and Kanaga v. Gannett Co., Inc.*, 1998 WL 729585, at *16 (Del. Super. July 10, 1998) *aff'd in part, rev'd in part on other grounds*, 750 A.2d 1174 (Del. 2000) ("Even though another witness' deposition transcript was read and not entered into evidence, the cost of that transcription is both necessary and reasonable.").

[21] *See infra*. Part 2.g.

b. *Expert Witnesses*

Next, TranSched requests costs incurred for its expert, Philip Green, to prepare his report and to prepare for and testify at trial. Delaware permits the taxing of fees for witnesses testifying as experts in the Superior Court, but the Court fixes those fees in its discretion.[22] Even then, there are constraints to the Court's discretion: case law clarifies that expert fees should be limited to time spent attending court for the purpose of testifying.[23] It follows, then, that a party may not recover for time the expert may spend listening to other witnesses for orientation or consulting with a party, counsel, or other witnesses during trial.[24] And outside of trial, a party may not recover for the expert's preparation for trial.[25] However, a party may recoup reasonable costs the witness incurred traveling to and from the courthouse.[26]

The record shows that Green testified on one day only. While the submitted invoices show that Green spent a significant amount of time preparing for trial, none of that time is taxable. Similarly, TranSched may not recover costs for the time Green's support staff spent preparing for litigation. Accordingly, the only taxable costs are those associated with the time Green spent attending court for the purpose of testifying.

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[22] 10 *Del. C.* § 8906.
[23] *Spencer v. Wal-Mart Stores East, LP*, 2007 WL 4577579, at *1 (Del. Super. Dec. 5, 2007).
[24] *State ex rel. Price v. 0.0673 Acres of Land, More or Less, in Biltmore Hundred, Sussex County*, 224 A.2d 598, 602 (Del. 1966).
[25] *Spencer*, 2007 WL 4577579, at *1.
[26] *Id.*

Green testified on the fourth day of trial. His was the last testimony heard by the jury that day, so while his testimony did not span the entire day, the Court will infer that Green was present the entire day, waiting to testify if not actually testifying. Trial began at 9:00 a.m. that day and ended around 2:00 p.m. Green's hourly rate at the time was $495. Consequently, TranSched may recover $495 per hour for the five hours Green attended trial to testify, for a total of $2,475. Green reasonably expended $562 in travel expenses, and that amount is also taxable against Versyss. In sum, the Court allows TranSched to recover for costs associated with Green in the amount of $3,037.

c. *Filing Fees*

Court filing fees and costs for service of process are generally recoverable.[27] Versyss does not object to the costs of filing and service of process, and so the Court will allow them in the amount of $360.

d. *Copying Charges*

TranSched seeks to recover copying charges for highlighted copies of deposition transcripts. No statutory basis for the recovery of these costs exists. The Court may grant them in its discretion pursuant to 10 *Del. C.* § 8504, but case law shows that the Court has routinely rejected photocopying costs and the Court

[27] *Dewey Beach Lions Club*, 2006 WL 2987052, at *1.

sees no reason to stray from this precedent.[28] The cost of photocopying highlighted deposition transcripts may not be taxed against Versyss.

e. *Technical Support Staff*

While there is no statutory basis to recover these costs, the Court has discretion under 10 *Del. C.* § 8504 to award reasonable and appropriate costs to TranSched. TranSched's trial technology support person was critical to the trial presentation and the viewing of the numerous exhibits introduced in this case. For years the Court has encouraged counsel to expand their use of technology and to utilize support personnel to assist in that effort. The time has come to recognize that, at least in complex litigation, technology support expenses are reasonable and expected costs of litigation. As such, the Court will award $14,801 for the technology support person utilized in this case.

f. *Pre- and Post-judgment Interest*

Finally, TranSched asks for pre- and post-judgment interest on its $500,000 damages award. Versyss cites 6 *Del C.* § 2301(d) to argue that TranSched is not entitled to pre-judgment interest because TranSched did not extend a written settlement demand to Versyss prior to trial, valid for at least 30 days, for an amount less than the amount of damages awarded. But 6 *Del C.* § 2301(d) only

[28] *See James v. Collison*, 2006 WL 4010212, at *2 (Del. Super. Jan. 31, 2007) (citing that no authority supports taxing photocopying fees against the losing party), *Radka v. Irman*, 2001 WL 1222094, at *1 ("It is well settled in Delaware, that costs of photocopying are not recoverable under Rule 54(d).").

applies when a party is seeking monetary relief for bodily injuries, death, or property damages. Such is not the case here: TranSched only ever sought monetary relief for damages arising from contract. TranSched is therefore entitled to pre-judgment interest.

TranSched asserts that the period for pre-judgment interest should begin on January 11, 2007, when TranSched first provided formal notice of Versyss' breach of the APA and demanded payment. Versyss disagrees with this accrual date because, at trial, TranSched argued that it incurred damages through 2009; Versyss' contention, in essence, is that TranSched's period for pre-judgment interest should not begin until all the damage of Versyss' breach had been done. This argument is unpersuasive: When determining when a period for pre-judgment interest should begin, the Court asks when the plaintiff first suffered a loss at the hands of the defendant.[29] This is so regardless of the fact that the precise amount of the plaintiff's damages was determined upon entry of judgment.[30] In the instant case, the pre-judgment interest period should begin when TranSched alerted Versyss that Versyss breached the APA, on January 11, 2007. The pre-judgment period ends upon entry of judgment on January 21, 2011.

[29] *Rollins Env't. Servs., Inc. v. WSMW Indus., Inc.*, 426 A.2d 1363, 1367-8 (Del. Super. 1980).
[30] *Id.* at 1368.

The parties dispute the calculation of the pre- and post-judgment interest rate. As an initial matter, the relevant statute for this calculation does not distinguish between pre- and post-judgment interest.[31] The same interest rate, then, will apply to both pre- and post-judgment interest calculations. That rate of interest is 5% over the Federal Reserve discount rate as of the date of commencement of interest liability, here, January 11, 2007.[32] On that date, the Federal Reserve discount rate was 6.25%, and so the rate of interest to apply to both pre- and post-judgment interest in this case is 11.25%.

This interest rate remains fixed.[33] It does not, as Versyss contends, incorporate the steady decreases in the federal rate over the span of the pre-judgment period, nor is it recalculated on the day final judgment is entered to determine a different rate post-judgment. Rather, interest is a continuing liability which merely accumulates with the passage of time.[34] The Court acknowledges that, in light of the changing economic conditions since 2007, the statutory interest rate is not a fair reflection of the cost of money over the past five years, and common sense and logic would demand this rate be adjusted on a periodic basis. However, fixing the interest rate encourages parties to resolve disputes as quickly

[31] *See id.*at 1367 ("That sentence provides a formula for determining the legal rate of interest and makes no reference to judgment and hence does not distinguish between pre-judgment and post-judgment interest.").
[32] 6 *Del. C.* § 2301.
[33] *Rollins*, 426 A.2d at 1367.
[34] *Id.*

as possible to avoid accumulating interest on their judgments, and for this reason the Court has consistently refused to adjust the rate. To change this practice, the Court believes a legislative fix, and not a judicial one, is required. As a result, TranSched is entitled to pre-judgment interest in the amount of $170,268.75 and post-judgment interest in the amount of $154.11 per diem.

g. *Sum of Taxable Costs*

To conclude, in addition to the pre- and post-judgment interest, TranSched is entitled to the following costs:

Court reporter fees for the deposition of Neil Shafran	$ 195.00
Court reporter fee for the deposition of Jason Meretsky	$ 231.00
Court reporter fee for the deposition of Stuart Rosenfarb	$ 267.75
Court reporter fee for the deposition of Hank Holbrook	$ 982.50
Expert witness costs for Phil Green	$3,037.00
Filing fee for complaint, summons, documents necessary to commence action, and service on Versyss	$ 360.00
Fees for trial technology support person at trial	$14,801.00
Total	$19,874.25

3. Motion for Judgment as a Matter of Law

Versyss has filed a Motion for Judgment as a Matter of Law pursuant to Superior Court Civil Rule 58(b). Under this rule, the Court is required to view the evidence in the light most favorable to the non-moving party—in this case TranSched—and in order for the Court to find in favor of Versyss, it must find there is no legally sufficient evidentiary basis for a reasonable jury to find for TranSched. Based upon the rulings the Court made prior to trial, during trial, and after thoroughly considering the evidence again, the Court finds no basis to support the Rule 58 motion.

The Court has previously found a basis to allow TranSched's claims to proceed to the jury, and it continues to find that there is sufficient evidence to support the jury's verdict regarding those claims. To a large degree the Court finds Versyss' motion meaningless, since a single damage award encompassed the contract warranty claim even if that was the only claim remaining. To the extent Versyss felt compelled to file this motion to reserve some appeal grounds, it has done so, but the motion is denied by the Court. The arguments and positions taken by Versyss in this motion simply rehash the arguments that were previously made, and denied, during the litigation. Finally, the allegation that TranSched did not provide Versyss with notice of its Avail-ATA contract claim, as required by

Section 7(i) of the APA, is simply without merit. Clearly Versyss was on notice of the issues presented in this litigation within the applicable time frame.

Frankly, the Court is surprised by Versyss' decision to file this motion, as it would have thought it would view the jury's verdict of $500,000 a success when TranSched sought eight times that amount in damages. The Court suggests that Versyss should leave good enough alone since they run the risk of substantial additional damages if the case is forced to be retried.

The Court has, on numerous occasions, attempted to convince the parties to put this litigation behind them and settle their disagreements. The Court has even delayed action on the motions to allow some cooling off of tempers with the hope that calmer heads would prevail. Unfortunately, in spite of the Court's best efforts, its suggestions have been ignored. As evidenced by the submissions concerning attorneys' fees that are substantially more than the amount awarded by the jury, enough of the clients' time and money have been spent on this dispute.[35] It is time for both parties to move on.

In conclusion, the Motion for Judgment as a Matter of Law is hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[35] In its motion for attorneys' fees TranSched asserts that they expended fees in the amount of $920,167.50, and the Court would suspect that Versyss spent a comparable amount.