

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

VIVIAN L. MEDINILLA
JUDGE

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Re: *CONSOL'D Beyond Building, Inc. et al., v. Mark Fiss, et al.*
C.A. No.: N16L-09-081

Dear Counsel:

On October 7, this Court signed an Order and entered judgment in favor of Plaintiffs for the unpaid arbitrator's award, plus costs and expenses, and post-judgment interest. It also awarded attorney's fees for \$920 for Mr. Schachtman and \$2007.50 for Mr. Lee. During oral arguments on Plaintiffs' Motion to Compel Enforcement of Arbitration Award, the Court addressed some concerns about why this matter has derailed, and decided to consider awarding attorney's fees. Because Mr. Kuhl opposed the request for attorney's fees on September 13, I offer the following to clarify the Court's Order to make sure there is no confusion.

First, asked why Beyond Building, Inc. (BBI) failed to pay the binding arbitration award, Defendant's counsel explained that his client has no funds. This Court expressed concern about why BBI entered into—and its counsel drafted—a binding agreement that it had no intention of honoring. If BBI does not argue “to invalidate or nullify the arbitration award” per Mr. Kuhl's letter dated September 13, then judgment should be entered against BBI.

Second, the Court is troubled that not only were Plaintiffs forced to file motions in this Court to compel compliance with the parties' agreement, BBI

formally opposed these motions as well. BBI argues that regardless of what it agreed to (*i.e.*, that an award would be entered as a judgment in the Superior Court) or ordered by the arbitrator (*i.e.*, in favor of Plaintiffs), this Court has no jurisdiction to enforce the arbitration award, and any relief that Plaintiffs seek must be litigated in the Court of Chancery. Query why a party would seek additional litigation in another court when it has no money. Nevertheless, asked for the basis of this new position, Defendant's counsel stated that, "someone in my office told me" and conceded that he did not reach out to opposing counsel to address this issue. For the reasons stated on the record, this Court disagrees with the position of BBI.

The Court ordered ADR through the Trial Scheduling Order, and compliance is expected. The parties elected binding arbitration as the more appropriate ADR tool. BBI, through counsel, drafted the arbitration agreement, and agreed that one of the terms would be to have the judgment entered in this Court. The case remains pending in this Court. It has the authority to address a party's failure to comply with its TSO or its failure to participate in good faith via motion or *sua sponte*, under Rule 16.¹ BBI may have complied with the TSO by going through the motions of the binding arbitration but either BBI or its attorney, or both, has failed to participate in good faith under Rule 16. Under Rule 16, in addition to any other sanction (not requested here), the Court *shall* require the party *or the attorney* representing the party, or both, to pay the reasonable expenses incurred, including attorney's fees. Both Plaintiffs' counsel made their respective requests for attorney's fees incurred for the preparation and presentation of their motions.

BBI now objects to the award of attorney's fees, arguing in part that "preparation and presentation of the motions" was insufficient. This Court disagrees and is satisfied that the affidavits from each Plaintiff's attorney suffices. Both have provided documentation specifying the hours spent on the case, the hourly

¹ See Del. Super Ct. Civil. R. 16(f) ("Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order . . . , or if a party or party's attorney *fails to participate in good faith, the judge, upon motion or the judge's own initiative*, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this Rule, including attorneys' fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.") (emphasis added).

rate charged, and any other costs or expenses incurred.² Defendant further objects to the award of attorney's fees, suggesting that they would have been incurred regardless, where BBI's "response to the motion . . . simply raised and argued the issue as to if the Superior Court had jurisdiction over an arbitration award"³ For the reasons already stated, this Court disagrees.

Rule 16 mandates that the party or the attorney representing the party, or both, pay the reasonable expenses incurred because of any noncompliance with this Rule, including attorneys' fees. BBI and its attorney participated in every aspect of this litigation, including accepting the terms of an agreement that it has decided not to honor, and forcing Plaintiffs to incur unexpected costs of further litigation in this Court and potentially others. The Court finds it appropriate to award attorneys' fees for \$920 to Mr. Shachtman and \$2007.50 to Mr. Lee. The fees are to be borne by BBI. If BBI is unable or unwilling to pay, they are to be paid by Defendant's counsel.

Hopefully, the parties will resolve their differences and put this matter to rest. Any additional sanctions or consequences will be again be considered via motion or *sua sponte* under Rule 16 to avoid any further delay.

SO ORDERED.

/s/Vivian L. Medinilla
Vivian L. Medinilla
Superior Court Judge

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² *Speidel v. St. Francis Hosp., Inc.*, No. CIV.A. 98C-05-227RRC, 2003 WL 21524694, at *5 (Del. Super. Ct. July 3, 2003) (denying Plaintiffs' "Motion to Enforce Arbitration Agreement," as it related to interest and attorneys' fees where Plaintiffs failed to specify the sources under which relief could be sought).

³ BBI's letter dated September 13, 2019.