IN THE SUPREME COURT OF THE STATE OF DELAWARE

BURTON R. ABRAMS,	)	
	)	No. 564, 2006
Defendant Below,	)	
Appellant,	)	Court Below: Court of Chancery
	)	of the State of Delaware in
v.	)	and for New Castle County
	)	
SACHNOFF & WEAVER, LTD., an	)	C.A. No. 2173-N
Illinois limited liability corporation,	)	
LOWELL E. SACHNOFF and	)	
DAVID SCHACHMAN,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: February 28, 2007
Decided: April 4, 2007

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

O R D E R

This 4th day of April, 2007, it appears to the Court that:

(1) Appellant Burton R. Abrams appeals the Court of Chancery's decision granting summary judgment in favor of Appellee Sachnoff & Weaver, Ltd and finding that any alleged contract between Abrams and Sachnoff & Weaver, Ltd. is unenforceable as a matter of law. After assuming that a contract between Abrams and Sachnoff & Weaver existed pursuant to Rule 56,[1] the Court of Chancery

[1] Ch. Ct. R. 56. The Court of Chancery may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any,

determined that the alleged contract for legal fees between Burton and Sachnoff & Weaver violated Delaware public policy because the contract would be "contrary to the principles governing stockholder class and derivative litigation in Delaware."[2] Therefore, it was unenforceable as a matter of law. Burton contends that the Chancellor committed reversible error when he concluded that Delaware public policy rendered an alleged contract between him and Sachnoff & Weaver unenforceable for three reasons: (1) the Chancellor ignored our holding in *Potter v. Peirce*[3] that a lawyer may not avoid contractual obligations because of a violation of the Delaware Rules of Professional Responsibility;[4] (2) the Chancellor impermissibly weighed the evidence in violation of the Rule 56 standard;[5] and (3) the Chancellor improperly determined that *Emerald Partners v. Berlin*[6] applies to the facts of this case. After consideration of the record, we hold that the

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show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. R. 56(c).

2 *In re Fuqua Indus., Inc. S'holder Litig.*, 2006 WL 2640967, at *1 (Del. Ch. 2006).

3 688 A.2d 894 (Del. 1997).

4 *Id.* at 897 ("[A] Delaware lawyer's violation of a disciplinary rule may not be interposed as a shield to avoid a contractual duty."). Burton argues that Sachnoff & Weaver, Ltd. committed an ethical violation by failing to disclose this alleged agreement to the Chancellor during the course of the *Fuqua* litigation. Whether Sachnoff & Weaver, Ltd. did commit an ethical violation is irrelevant to our determination that the Chancellor determined correctly that the contract violates Delaware public policy, and we decline to address it.

5 Ch. Ct. R. 56.

6 *Emerald Partners v. Berlin*, 564 A.2d 670 (Del. Ch. 1989).

Chancellor did not ignore *Potter v. Peirce* because the concerns underlying that case are not present here. We also hold that the Chancellor did not impermissibly weigh the evidence because the Chancellor expressly assumed, for purposes of the summary judgment motion, that the alleged contract existed. Finally, we hold that the Chancellor correctly applied *Emerald Partners* because Burton, like the attorney in *Emerald Partners*, sought to recover legal fees from the derivative class action while serving as the representative plaintiff against Delaware public policy. Accordingly, we affirm.

(2) Burton R. Abrams is a trial attorney in Illinois. In 1991, his wife, Virginia E. Abrams, retained the legal services of Sachnoff & Weaver, Ltd., an Illinois professional corporation. Specifically, Virginia retained Lowell E. Sachnoff and David Schachman of Sachnoff & Weaver to file a derivative action in the Court of Chancery, captioned *In re Fuqua Industries Shareholder Litigation*,[7] to pursue claims on behalf of the Virginia Abrams Trust, for which she was sole Trustee.[8] Burton, as Virginia's husband, had a personal financial interest in the Trust as a principal remainderman of the Trust and, when Virginia died, Burton became the principal beneficiary.

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[7] 752 A.2d 126 (Del. Ch. 1999).

[8] *In re Fuqua Indus., Inc. S'holder Litig.*, 2006 WL 2640967, at *1 (Del. Ch. 2006).

(3) Sachnoff also retained Burton to assist with the case as a consultant. Both parties agreed that Burton would be "fully compensated" for his efforts in the case. Neither party disclosed this agreement to the Court.

(4) In 2003, Virginia died. The Court substituted Burton as the representative plaintiff for the *Fuqua* class action. The parties later settled.

(5) Burton sought a plaintiff's award in the amount of $50,000 from Sachnoff & Weaver's legal fees award.[9] The Chancellor relied upon three letters between Burton and Sachnoff & Weaver that, Burton argues, formed a contract entitling him to compensation. In the first letter, dated July 30, 1992, Burton wrote to Sachnoff and stated "the value of my efforts should be incorporated as part of your billing when fees are considered in the course of any settlement negotiations and in the event of a successful resolution, upon presentation to the court." In the second letter, dated July 31, 1992, Sachnoff responded that he was "in full accord with what you say" and that "the valuable time you spent working on the case will be fully compensated." In the third letter, dated March 10, 1999, Sachnoff advised Burton that "consistent with the law governing the payment of attorneys fees in a representative action . . . I will not object to any application [to the Court] . . . for

[9] "In Delaware, representative plaintiffs typically receive no compensation for their services other than their pro-rata share of the class recovery and their reasonable out-of-pocket costs and expenses. A 'plaintiff's award' is an additional sum intended to reward and incentivize extraordinary service to the class performed by the class representative." *In re Fuqua Indus., Inc. S'holder Litig*., 2006 WL 2640967, at *2 (Del. Ch. 2006).

compensation either as fees or as a consultant." The letter further advised Burton that he should not bring the billing issue to the Court's attention "when we have no settlement of the litigation" because it would be "premature and seriously counterproductive."

(6) Burton also submitted three affidavits in support of his motion for a plaintiff's award. The affidavit stated:

> Over the fourteen year history of the litigation, my wife and I were continuously and actively involved in monitoring the litigation through numerous contacts with co-lead counsel. I have had more than 150 contacts with co-lead counsel over the course of the litigation by telephone, correspondence and through in-person meetings. In connection with the careful and continuous monitoring of the litigation, I have requested, received and reviewed significant filings and actively assisted co-lead counsel in the preparation of Virginia Abrams for her deposition. . . . Although I have not maintained formal and detailed time sheets, a review of my records reveals hundreds of hours of effort and assistance to counsel over the fourteen-year history of this litigation.[10]

(7) Relying upon the affidavits and letters, the Chancellor permitted Abrams a plaintiff's allowance of $50,000, to be paid from Sachnoff & Weaver's legal fees.

(8) On May 21, 2006, Burton filed a lawsuit against Sachnoff & Weaver in Illinois alleging that "Sachnoff & Weaver agreed to split its legal fees with Burton Abrams in order to compensate him for his assistance in *In re Fuqua*."[11]

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[10] *In re Fuqua Indus., Inc. S'holder Litig.*, 2006 WL 2640967 at *3.

[11] *Id.* at *4.

(9) In response, on May 22, 2006, Sachnoff filed a complaint for injunctive and declaratory relief and sought:

> (1) an injunction barring Burton Abrams from filing suit for additional compensation in another jurisdiction;
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> (2) a declaratory judgment that any purported contract authorizing Burton Abrams to act as counsel in *In re Fuqua* would be in violation of principles applicable to representative actions in Delaware and, therefore, unenforceable; and
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> (3) alternatively, a declaratory judgment that no contract exists between Sachnoff & Weaver and Burton Abrams to pay legal fees to Burton Abrams that the alleged contract did not exist, and, in the alternative, that the contract was unenforceable.[12]

(10) The Illinois Court dismissed the complaint on June 7, 2006 to respect the Delaware Court of Chancery's jurisdiction over the matter. Burton also filed a counterclaim with five counts. In response, Sachnoff & Weaver filed a motion for partial summary judgment.

(11) The Chancellor assumed, for the purposes of the summary judgment motion, that a contract existed between Abrams and Sachnoff & Weaver. The Chancellor determined, however, that even if the contract existed, it "would be unethical and in violation of the principles governing representative actions in Delaware" and "would be void and unenforceable."[13] Specifically, the Chancellor

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12 *Id.*

13 *Id.* at *8.

determined that the purported contract violated Rule 1.5 of the Delaware Rules of Professional Responsibility[14] because Abrams did not advise the class of the alleged fee-sharing agreement. The contract also violated Rule 1.7 of the Delaware Rules of Professional Responsibility[15] because "there is an inherent conflict of interest when one person serves both as class representative and as attorney for the class."[16]

(12) The Chancellor also determined that, under *Emerald Partners v. Berlin*[17] and *Goodrich v. E.F. Hutton Group, Inc.*,[18] the contract was void:

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[14] DEL. RULES OF PROF'L RESPONSIBILITY R. 1.5. Rule 1.5(e) states: "(e) A division of fee between lawyers who are not in the same firm may be made only if: (1) the client is advised in writing of and does not object to the participation of all the lawyers involved; and (2) the total fee is reasonable." *Id.*

[15] *Id.* R. 1.7. Rule 1.7(a) states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyers responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Id.

[16] *In re Fuqua Indus., Inc. S'holder Litig.*, 2006 WL 2640967 at *8 (quoting *Goodrich v. E.F. Hutton Group, Inc.*, 1993 WL 94456, at *2 (Del. Ch. 1993) (citing *Emerald Partners v. Berlin*, 564 A.2d 670, 676-80 (Del. Ch. 1989)). The Chancellor also noted that he would have disqualified Abrams from serving as class counsel, had he known about the fee-sharing agreement earlier, because a conflict of interest arises "when the class representative and the attorney for the class are married to one another." *In re Fuqua Indus., Inc. S'holder Litig.*, 2006 WL 2640967 at *8 n.53.

[17] 564 A.2d 670 (Del. Ch. 1989).

[18] 681 A.2d 1039 (Del. 1996), *aff'g* 1996 WL 76161 (Del. Ch. 1996).

> By giving the class representative a claim for a portion of the fees, Mr. Abrams' alleged contract gives the representative an incentive to be overly generous in approving fees and to accede to settlement too readily when continuing the litigation would be in the best interests of the class. The contract impugns the representative's objectivity and independence at precisely the point when they become useful. Because the alleged contract in this case conflicts with the strong public policy articulated in *Emerald Partners* and *Goodrich*, I hold that, assuming it existed, it would be unenforceable as a matter of law. Mr. Abrams' counterclaims in this action, predicated on the same unenforceable contract, are without merit.[19]

(13) Burton argues on appeal that the Chancellor erred when he ignored our holding in *Potter v. Peirce*[20] that a lawyer may not avoid contractual obligations because of a violation of the Delaware Rules of Professional Responsibility.[21] Burton also contends that the Chancellor impermissibly weighed the evidence in violation of the Rule 56 standard[22] by discounting Abrams' affidavits and doubting the existence of the contract.[23] Finally, Burton argues that

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19 *In re Fuqua Indus., Inc. S'holder Litig.*, 2006 WL 2640967 at *9.

20 688 A.2d 894 (Del. 1997).

21 *Id.* at 897 ("[A] Delaware lawyer's violation of a disciplinary rule may not be interposed as a shield to avoid a contractual duty.").

22 Ch. Ct. R. 56.

23 The specific language that Abrams refers to in the trial court's Memorandum Opinion is as follows:

> At the outset, I note that based on the record before me it is highly doubtful (in my opinion) that a contract or agreement ever existed between Burton Abrams and Sachnoff & Weaver regarding a fee splitting arrangement in the *Fuqua* litigation. If I believed otherwise, it would be a far more serious matter. It would,

the alleged contract is enforceable under Delaware law because *Emerald Partners* does not apply to the facts of this case.

(14) We review a Chancellor's grant of summary judgment *de novo*.[24] We must determine "whether the record shows that there is no genuine, material issue of fact and the moving party is entitled to judgment as a matter of law."[25] "The facts of record, including any reasonable hypotheses or inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party."[26]

(15) *Potter v. Peirce* did not address the issues of a class or derivative action involving a fiduciary duty of undivided loyalty present here.[27] This Court held that "[a]s a matter of public policy, this Court will not allow a Delaware

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> for example, seem unlikely that a court of equity would entertain a law firm's argument that an illegal and unethical contract it had entered into should be held unenforceable, thereby enriching the firm that had conspired to commit a fraud on the Court and the stockholder in the first place. In such circumstances, it seems more likely that a court would order disgorgement of *all* of the attorney's fees awarded to the offending law firm. Given that I do not determine whether a contract was formed here (as I assume it's [sic] existence for purposes of the present motion only), however, I obviously need not reach these more serious questions.

In re Fuqua Indus., Inc. S'holder Litig., 2006 WL 2640967 at *7.

[24] *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

[25] *Id.*

[26] *Id.*

[27] The underling case in *Potter* was an automobile accident that resulted in injury. *Potter*, 688 A.2d at 895. As a result, the issue in this case – whether a class representative in a derivative suit may enforce an alleged contract for fee sharing where he has a stake in the outcome – differs from the issues in *Potter*.

lawyer to be rewarded for violating Delaware Lawyers' Rule of Conduct 1.5(e) by using it to avoid a contractual obligation."[28] We reasoned that "[t]o hold otherwise would encourage non-compliance with the Rule and create incentives for malfeasance among Delaware lawyers at the expense of unwary out-of-state lawyers."[29] This Court also noted that "a Delaware lawyer may not assert his noncompliance with Delaware Lawyers' Rule of Conduct 1.5(e) as a defense to an agreement with an out-of-state lawyer, *not charged with compliance with that rule or a similar rule in his own jurisdiction*."[30] The prohibition against a plaintiff class representative serving as counsel for the class applies in both Delaware and Illinois. Thus, the concern in *Potter*, taking advantage of out-of-state counsel who was unfamiliar with the rule, is not present here.

(16) Contrary to Burton's argument, the record and the Chancellor's opinion clearly reflect that the Chancellor did not impermissibly weigh evidence and that he did apply the Rule 56 standard correctly. Burton argues that the Chancellor's statement that "it is highly doubtful (in my opinion) that a contract or agreement ever existed between Burton Abrams and Sachnoff & Weaver regarding

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[28] *Potter*, 688 A.2d at 897.

[29] *Id.*

[30] *Id.* (emphasis added).

a fee splitting arrangement in the *Fuqua* litigation"[31] indicates that the Chancellor made a credibility determination and weighed the evidence in contravention of Rule 56. Though the Chancellor doubted the existence of the contract that Burton alleged existed in *dicta*, the Chancellor followed the Rule 56 standard correctly and stated that he did not determine "whether a contract was formed here (*as I assume it's* [sic] *existence for purposes of the present motion only*). . . ."[32] Thus, under the Rule 56 standard, the Chancellor drew all reasonable inferences in favor of the non-moving party (Burton). Further, the Chancellor stated "assuming there was a contract by which class counsel engaged Mr. Abrams to perform legal work in connection with *In re Fuqua*, I hold that any purported contract would be unethical and in violation of the principles governing representative actions in Delaware."[33] As a result, the Chancellor gave all inferences to the non-moving party (Burton) and assumed that the contract existed. Therefore, the Chancellor correctly applied the Rule 56 standard.

(17) *Emerald Partners v. Berlin* controls the outcome of this case. In *Emerald Partners*, the Vice Chancellor disqualified an attorney and a law firm from representing a class in a derivative suit where the attorney was the general

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[31] *In re Fuqua Indus., Inc. S'holder Litig.*, 2006 WL 2640967 at *7.

[32] *Id.* (emphasis added).

[33] *Id.*

partner of the representative plaintiff.[34] The Vice Chancellor in *Emerald Partners* noted:

> where a person serving as both lawyer and representative for the class stands to recover attorneys fees from a class fund created by the litigation, even the cases rejecting per se disqualification have generally held that it would be inappropriate for the lawyer to serve in a dual capacity because of the inherent conflict of interest presented.[35]

(18) In *Goodrich v. E.F. Hutton Group, Inc.*, the Vice Chancellor stated that the "concerns" present in *Emerald Partners* "are equally applicable when the class representative and the attorney for the class are married to one another."[36] Because Burton's spouse was the original plaintiff and because he did not obtain the "necessary consent of all the class members to waive the conflict of interest pursuant to [Rule 1.7(b)(2) of the Delaware Rules of Professional Responsibility],"[37] the Chancellor correctly determined that *Emerald Partners* prevents enforcement of the alleged contract as a matter of public policy.[38]

(19) Similarly, Burton's contention that the alleged contract should be enforced because he did not have a stake in the ultimate recovery is legally and

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34 *Emerald Partners*, 564 A.2d at 679.

35 *Id.* at 677.

36 *Goodrich*, 1993 WL 94456 at *2.

37 *Emerald Partners*, 564 A.2d at 679.

38 *See Burns v. Ferro*, 1991 WL 53834, at *2 (Del. Super. Ct.) ("[I]t is well-settled law that a court will not aid a contractual claim founded on a violation of the law. . . . Where parties to a contract are in *pari delicto*, a court will 'leave them where it finds them,' and will refuse to enforce the contract.") (citations omitted).

factually inaccurate. Under *Emerald Partners*, because Burton's wife was the representative plaintiff of the derivative suit, he is barred from collecting additional fees. Also, before his wife passed away, Burton had a remainder interest in her trust. After Virginia passed away in 2003, Burton was named as the sole successor trustee of the Trust and substituted as the representative plaintiff in the lawsuit. As a result, the Chancellor correctly determined that Burton had a financial stake in the recovery in the *Fuqua* litigation.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice