

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILLIAM WESTBROOK,	:	JUDGES:
	:	
Plaintiff-Appellee	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
-vs-	:	Hon. Patricia A. Delaney, J.
	:	
VALERIE SWIATEK, ET AL.	:	Case No. 2009 CAE 05 0048
	:	
	:	
Defendants-Appellants	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of
Common Pleas Case No. 2006-CV-08-
0683

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: June 16, 2010

APPEARANCES:

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Delaney, J.

{¶1} Defendants-Appellants Valerie Swiatek, Victoria Bonner, Deborah Bonner, Whittington, Inc., Alum Creek, Inc., Rennob, Inc. and ABL Group, Ltd. (collectively “Appellants”) appeal an order of contempt entered by the Delaware County Court of Common Pleas on May 15, 2009. Appellants also appeal two prior judgment entries of the trial court which form the basis of the contempt order, specifically the October 2, 2008 entry granting Plaintiff-Appellee William Westbrook’s motion for hearing on interim award of legal fees and the December 10, 2008 entry awarding advancement of litigation expenses to Appellee.

{¶2} In this appeal, we are asked to address several issues related to the advancement of litigation expenses to corporate officers for legal claims brought against them in that capacity.

{¶3} In order to address the issues presented by the parties, an overview of the relevant procedural history is necessary.

{¶4} On August 1, 2006, Westbrook commenced an action in the Delaware County Court of Common Pleas, Case No. 06 CVH-08-683 (the “Westbrook Action”) against Appellants in regards to a business relationship between the parties for real estate development projects in Central Ohio. On February 26, 2007, and August 8, 2007, Appellants asserted counterclaims including claims for breach of fiduciary duty and breach of contract against Westbrook for actions he took as an officer of Alum Creek, Rennob, ABL Group and/or Whittington.

{¶5} On August 8, 2007, the corporate Appellants also filed a separate suit against Westbrook and another individual, Michael Suhovecky, in their role as corporate

officers and asserted claims of fraud, breach of contract and breach of fiduciary duty. This action was filed in the Franklin County Court of Common Pleas, Case No. 07 CVH-08-10524 (the “Whittington Action”). On February 14, 2008, the Franklin County Court of Common Pleas transferred the Whittington Action to Delaware County, which in turn consolidated the actions, realigned the claims and ordered all filings to bear the caption and case number 06-CV-H-08-0683 (the Westbrook Action) by judgment entry, filed July 21, 2008.

{¶6} On August 9, 2007, Westbrook filed an amended complaint in the Westbrook Action adding claims, in part, for indemnification and advancement of legal expenses for defense of Appellants’ counterclaims.

{¶7} Pertinent to this appeal was a motion¹ filed by Westbrook on August 28, 2007 in the Westbrook Action entitled “Motion for Hearing on Interim Award of Legal Fees.” Westbrook contends he is due advancement of his attorney’s fees and expenses under Appellants’ corporate regulations for defense of the counterclaims which accuse him of misconduct as a corporate officer.

{¶8} On October 16, 2007, the trial court deferred ruling on Westbrook’s motion, due to Appellants appealing the trial court’s order appointing a receiver. Ultimately, this case was remanded back to the trial court in December 2007.

¹ The court file is voluminous and the parties have engaged in extensive pleading, discovery and motion practice. Several appeals to this Court have occurred, as well as to the Ohio Supreme Court, and the underlying case was stayed while the appeals were undertaken and resolved.

{¶9} On October 2, 2008, the trial court granted Westbrook's motion. The trial court, citing law from the State of Delaware,² noted that the construction and interpretation of the corporate regulations is a question of law. Second, the trial court determined that whether a corporate official is entitled to advancement of legal expenses can be brought before the court by motion. The trial court proceeded to examine the corporate regulations and Ohio law, specifically R.C. 1701.13(E), which permits an Ohio corporation to establish indemnification and advancement provisions for its officers and directors. The trial court concluded that Westbrook was entitled to advancement of attorney fees and expenses from the corporations. In this ruling, the trial court also granted partial summary judgment in favor of Suhovecky, who instead of filing a motion for advancement of fees and expenses, had filed a counterclaim seeking these in the Whittington Action.³

{¶10} On August 12, 2008, and October 31, 2008, the Appellants voluntarily dismissed without prejudice the officer-related counterclaims in the Westbrook Action and the Whittington Action, respectively.

{¶11} The trial court held a hearing on November 5, 2008, to determine the amount of legal expenses to be advanced by the corporations. The trial court permitted the parties to file post-hearing briefs.

{¶12} By entry filed December 11, 2008, the trial court awarded \$227,975.75 in attorney fees and \$12,976.31 in expenses to Westbrook. Appellants were ordered to

² The Delaware indemnification statute has served as the pattern for indemnification statutes in many states, including Ohio, and has received the most judicial interpretation in light of the large number of companies incorporated in Delaware. Ohio courts have had little opportunity to address advancement issues. *Acquisition v. Myers*, 173 Ohio App.3d 247, 878 N.E.2d 37, 2007-Ohio-3521, ¶7.

³ The claims between Suhovecky and Appellants were voluntarily dismissed.

pay these amounts by January 12, 2009. The trial court deferred the final hearing on indemnification until after the trial occurred in the case.

{¶13} On April 27, 2009, Westbrook filed a motion for show cause for Appellants' failure to comply with the December 11, 2008 entry. A hearing was held on May 13, 2009.

{¶14} On May 15, 2009, the trial court sustained Westbrook's show cause motion and entered a finding of contempt against Appellants. Appellants were ordered to pay the sum of \$240,952.06 on or before May 29, 2009. Failure to do so would result in a \$50,000 fine and Appellant Valerie Swiatek was to report to jail on that date by 6:00 p.m. and incarcerated until the contempt was cured by full payment.

{¶15} On the same day, Appellants filed a notice of appeal and the matter was stayed upon the posting of a bond by Appellants. The matter is now before this Court for consideration of Appellants' four Assignments of Error:

{¶16} "I. THE TRIAL COURT ERRED IN AWARDING FEES AND EXPENSES IN THE WESTBROOK ACTION WHERE APPELLEE HAD THE EVIDENTIARY BURDEN OF PROOF AND WHERE HE PRESENTED LITERALLY NO EVIDENCE, SO THAT THE ENTIRE APPLICATION SHOULD HAVE BEEN DISALLOWED.

{¶17} "II. THE TRIAL COURT ERRED IN AWARDING FEES AND EXPENSES INCURRED BY WESTBROOK IN HIS DEFENSE IN THE WHITTINGTON ACTION WHERE WESTBROOK NEVER FILED A COUNTERCLAIM FOR EITHER ADVANCEMENT OR REIMBURSEMENT UNDER THE COMPANIES' BY-LAWS AND DID NOT FILE ANY MOTION FOR ADVANCEMENT OR REIMBURSEMENT.

{¶18} “III. THE TRIAL COURT ERRED IN FINDING THE DEFENDANTS TO BE IN CONTEMPT OF A COURT ORDER WHERE THE ORDER ITSELF WAS ERRONEOUSLY ISSUED.

{¶19} “IV. THE TRIAL COURT ERRED IN ISSUING A FINDING OF CONTEMPT FOR WHAT WAS SUBSTANTIALLY NON-PAYMENT OF A MONEY JUDGMENT.”

I., II.

{¶20} For ease of discussion, we will address the first and second assignments of error together.

{¶21} R.C. 1701.13(E)(2) provides for indemnification of corporate officers. It states:

{¶22} “A corporation may indemnify or agree to indemnify any person who was or is party . . . to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor, by reason of the fact that he is or was a director, officer, employee, or agent of the corporation . . . against expenses, including attorney’s fees, actually and reasonably incurred by him in connection with the defense or settlement of such action or suit, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation . . .”

{¶23} The statute further provides that the corporation may agree to pay these fees and expenses in such proceedings “in advance of the final disposition of the action, suit or proceeding, as authorized by the directors in the specific case, upon receipt of an undertaking by or behalf of such . . . officer . . . to repay such amount if it shall

ultimately be determined that he is not entitled to be indemnified by the corporation.” R.C. 1701.13(E)(5). This right is commonly referred to as “advancement.”

{¶24} Indemnification and advancement statutes were enacted to attract qualified candidates into corporate service by protecting their personal assets from depletion by litigation that results from that service and to develop sound corporate management. William Knepper & Dan Bailey, *Liability of Corporate Officers and Directors*, (7th ed.), Volume 2, Section 22.01. Advancement is a corollary remedy to indemnification by providing immediate funds to officers for ongoing litigation expenses, which may become significant, prior to the outcome on the merits. The right to indemnification or recoupment is established after the merits are determined by a jury or court. Under some circumstances, such as here, a corporation may be reluctant to advance funds to an officer who is perceived by the corporation as being unfaithful, or fear the funds will never be paid back.

{¶25} Ohio law does not require corporations to provide indemnification or advancement: it just gives them the power to do so. It is undisputed that the corporate Appellants opted to do so in this case.

{¶26} Section 5.05 of the corporate regulations in the present case includes a rather broad mandatory advancement provision, which reads as follows:

{¶27} “ * * * Expenses (including, without limitation, attorneys’ fees, filing fees, court reporters’ fees and transcript costs) incurred in defending any action . . . shall be paid by the corporation in advance of the final disposition of such action . . . to or on behalf of the officer or director promptly as such expenses are incurred by him, but only if such officer or director shall first agree, in writing, to repay all amounts so paid in

respect of any claim . . . in defense of which he shall not have been successful on the merits or otherwise if it is proved by clear and convincing evidence in a court of competent jurisdiction that, in respect of any such claim . . . , his relevant action or failure to act was occasioned by his deliberate intent to cause injury to the corporation or his reckless disregard for the best interest of the corporation, unless and only to the extent that the Court of Common Pleas of Delaware County, Ohio or the court in which such action or suit was brought shall determine upon application that despite such determination, and in view of all the circumstances, he is fairly and reasonably entitled to all or part of such indemnification.”

{¶28} The Ohio Supreme Court has held that the rules and regulations of an Ohio corporation, not in contravention of any statutory provision, have the force of “contracts” as between the corporation and its members and as between the members themselves. *Knight v. Shutz* (1943) 141 Ohio St. 267, 47 N.E.2d 886, citing with approval *State ex. Rel. Schwab , Pros. Atty., v. Price* (1929) 121 Ohio St. 114, 167 N.E. 366, syllabus.

{¶29} Therefore, this is essentially a matter concerning the contractual interpretation of the indemnification and advancement provisions to be followed by the parties as set forth in the corporate regulations.

{¶30} Appellants initially assert that the trial court lacked jurisdiction to award Westbrook legal expenses in defending the Whittington Action because no counterclaim or motion was specifically filed in the Whittington Action seeking that recovery. This jurisdictional argument was raised before the trial court, which addressed the issue at length in its December 10, 2008, decision:

{¶31} “The Defendants argue that there is no lawful basis to award Westbrook his legal fees in the *Whittington* action because Westbrook did not file a counterclaim seeking recovery in that action. The claims originally filed in the *Whittington* action have now been dismissed. The Plaintiff argues that the *Whittington* action was transferred to Delaware County and consolidated with the instant action. This all took place before Westbrook even filed an answer to the claims. There was already pending before the Court a motion for advancement of legal fees in the instant case when the *Whittington* case was transferred and consolidated. Thus, when the Court rendered its Judgment Entry on October 8, 2008 granting the Plaintiff’s Motion for Hearing on Interim Award of Legal Fees and Expenses, the Court determined that Westbrook was entitled to advancement of litigation fees and expenses related to his defense of the counterclaims asserted by the Defendants. The Defendants had asserted counterclaims against Westbrook in the instant action and in the *Whittington* action. Since the *Whittington* action was consolidated with the instant action and the claims against Westbrook were re-classified as counterclaims, the Court’s October 2, 2008 Judgment Entry clearly and properly awarded Westbrook advancement of litigation fees and expenses for his defense of all counterclaims against him in the action, which at the time included those claims originally filed in the *Whittington* action. Therefore, in clarification of the Court’s October 2, 2008 Judgment Entry, Westbrook is entitled to advancement of litigation fees and expenses for his defense of the counterclaims filed against him in both the instant action and in the former *Whittington* action.”

{¶32} The question before this Court is whether it was proper for the trial court to “clarify” its October 2, 2008 entry to include the granting of attorney’s fees and expenses due to Westbrook’s defense of the Whittington Action.

{¶33} We find the trial court acted properly. As the trial court noted in its July 21, 2008 entry granting consolidation of both the Westbrook Action and the Whittington Action, “[t]he [Westbrook] case involves many more causes of action and requests for relief than the Whittington case. However, one claim is specifically alleged by the corporations in both cases – breach of fiduciary duty arising out of Westbrook’s position with the corporations. The corporations allege breach of fiduciary duty in their first amended counterclaim in the [Westbrook] case, and again in their complaint in the Whittington case. Thus, common questions of law and fact are present in both cases with regard to this substantially similar claim.”

{¶34} The record reflects both cases created a claim by Westbrook for indemnification and/or advancement of defense costs. When the cases were consolidated in July, 2008, the breach of fiduciary duty claims asserted in the Whittington Action became counterclaims, albeit separate and distinct, against Westbrook. The August 9, 2007 amended complaint filed by Westbrook, however, expressly sought indemnification and advancement from the corporations pursuant to Section 5 for his actions as a corporate officer. Thus, the trial court had jurisdiction to award advancement of fees and expenses in both the Westbrook and Whittington cases, based upon the claims asserted in this amended complaint.

{¶35} We reject Appellants’ argument that Westbrook was required to file yet another claim or motion specifically in the context of the Whittington case as it would

have been duplicative of its amended complaint. The amended complaint clearly put Appellants on notice of Westbrook's claim for indemnification and advancement pursuant to the regulations. Upon transfer and consolidation, both cases became within the trial court's purview, and in the interest of judicial economy in this complex and contentious litigation, we find the trial court was within its jurisdiction to proceed as such.

{¶36} The second assignment of error is overruled.

{¶37} In the first assignment of error, Appellants contend the trial court's award of \$227,975.75 in attorney fees and \$12,976.31 in expenses (the "fee award") was not supported by any evidence.

{¶38} It is axiomatic that a party seeking an award of attorney fees based on either a contractual obligation or statute has the burden of demonstrating the reasonable value of such services. *Stonehedge Land Co. v. Beazer Homes Invests, L.L.C.*, 177 Ohio App.3d 7, 893 N.E.2d 855, 2008-Ohio-148, ¶45 (citations omitted).

{¶39} We believe that advancement proceedings must be summary in nature if they are to serve their intended purpose of covering the officer's legal expenses while the underlying merits of the litigation are determined by the trial court, many of whom are under the weight of heavy dockets.

{¶40} By necessity, an officer's right to advancement must be determined before his or her ultimate right to indemnification. This reality is reflected in the corporate regulations at issue, which mandate advancement upon the officer's written promise to repay the money if certain findings are made in the underlying litigation. The record reflects that Westbrook voluntarily signed an undertaking that acknowledged his

responsibility for repayment of advances if it was ultimately determined that he was not entitled to indemnification.

{¶41} After granting Westbrook's motion for award of fees and expenses, the trial court scheduled an evidentiary hearing on November 5, 2008, to determine the appropriate fee award. On that day, the attorneys for the parties appeared in court. The trial court stated it was limiting the hearing to two hours and limiting the fees to the time period from when the Appellants first filed a counterclaim to when the counterclaims were dismissed. Westbrook's attorneys also filed a hearing brief. Attached to the brief was a certification by counsel that the fees incurred in the defense of the counterclaims totaled \$227,975.75 and the expenses incurred totaled \$12,976.31. Counsel further certified the same in open court. The trial court indicated expert testimony was not necessary although Westbrook had an expert available to testify. The Appellants were provided an opportunity to challenge these amounts, by submitting post-hearing objections, which they did. The Appellants color-coded the fee statement to indicate which fees the Appellants contended were not recoverable.

{¶42} We find the procedural approach and substantive review by the trial court was reasonable and appropriate at the advancement stage. Although Appellants protest that an "affidavit" of counsel and expert testimony was necessary, we find Appellants' position to be contrary to the purpose of advancement, which is to provide prompt relief to the officer from the burdensome cost of litigation. In addition, it would be an inefficient use of limited judicial resources in such a preliminary proceeding, when the final claim for indemnification has yet to be heard. We also find that none of the arguments presented by Appellants are supported by the contractual language of the corporate

regulations. Appellants crafted the corporate regulations, and could have conferred conditions and limitations upon the right of advancement, but chose not to do so.

{¶43} Appellants also maintain that, as a matter law, Westbrook's motion for advancement should have been converted to a claim for indemnification because by the time of the hearing on November 5, 2008, the counterclaims had been voluntarily dismissed by Appellants. We disagree.

{¶44} The record demonstrates that Westbrook's advancement motion was filed on August 28, 2007, and granted by the trial court before the counterclaims in the Whittington Action were dismissed. The trial court found Westbrook was entitled to advancement of litigation expenses, not indemnification, and set an evidentiary hearing on "advancement of litigation" expenses for November 5, 2008. The Appellants' dismissal of the counterclaims did not convert the trial court's rulings into a ruling on Westbrook's claim for indemnification, which is a separate and distinct legal claim. In addition, the trial court stated: "[t]he Court hereby defers the final hearing on indemnification until after the trial occurs in this case." Judgment Entry, December 10, 2008. The approach is supported by the corporate regulations, which state that an officer may have to repay advanced fees or may not be entitled to indemnification if "he shall not have been successful on the merits" or intended to cause injury to the corporation.

{¶45} The first assignment of error is overruled.

III.

{¶46} As stated earlier, Appellants were found in contempt of the trial court's December 10, 2008 entry, which ordered the payment of the fee award under the advancement provision of the corporate regulations.

{¶47} In the third assignment of error, Appellants claim the trial court's order was erroneously issued for the reasons set forth in their first and second assignments of error.

{¶48} Having overruled the first and second assignments of error, we find the trial court's order to be a valid, lawful order.

{¶49} The third assignment of error is overruled.

IV.

{¶50} In the fourth assignment of error, Appellants contend the trial court erred in enforcing the fee award by the sanction of contempt. Rather, Appellants argue the trial court's order is a "court-imposed money judgment," so the appropriate remedy is writ of execution, not a finding of contempt, or the dismissal of the claims against the officer. We disagree.

{¶51} R.C. 2705.02 provides that a person guilty of the disobedience of a lawful order may be punished for contempt. Above, we found the trial court's order to be a valid, lawful order. Therefore, the trial court was within its discretion to use its contempt powers. Here the trial court found that Appellant Swiatek, as the corporations' representative, had not complied with the court's December 10, 2008 order and therefore was in contempt. It gave her seven days within which to purge the contempt or be fined and face jail time.

{¶52} Upon review of the record, the trial court did not abuse its discretion in its decision that Appellants were in contempt. There was sufficient evidence offered to support the trial court's decision.

{¶53} The fourth assignment of error is overruled.

{¶54} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILLIAM WESTBROOK	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
VALERIE SWIATEK, ET AL.	:	
	:	
Defendants-Appellants	:	Case No. 09 CAE 05 0048
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to Appellants.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE