

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

KIM E. AYVAZIAN
MASTER IN CHANCERY

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Date Submitted: February 20, 2014
Date Decided: March 12, 2014

Jeffrey M. Weiner
1332 King Street
Wilmington, DE 19801

Lois J. Dawson
1525 Delaware Avenue
Wilmington, DE 19806

Re: *Wilmington Medical Associates PA v. Charles A Esham*,
Civil Action No. 8184-VCG

Dear Counsel:

As the parties may be aware, Vice Chancellor Glasscock is on medical leave and has referred all non-dispositive motions to me for consideration. I have reviewed the Plaintiff's Motion for an Award of Attorney's Fees dated February 10, 2014, and the Defendant's Response to that Motion dated February 20. For the reasons explained below, that Motion is denied.

This action involves the valuation of the Defendant's interest in the Plaintiff Company pursuant to an Employment Agreement, which provides the Company a contractual right to purchase, and the Defendant a contractual right to sell, his interest in the Company. The parties are in the process of discovery, and on July 10, 2013, the Plaintiff filed a Motion for Protective Order, requesting that the Court limit the scope of discovery to those documents implicating the appraisal

provisions of the Employment Agreement. Specifically, the Employment Agreement provides that:

- (a) The independent accountant then employed by the Company . . . shall prepare a balance sheet as of the end of the Company's last fiscal year immediately preceding the happening of the event which requires a valuation of the Company's stock. From the balance sheet . . . there shall be determined the unadjusted net book value of the stock to be valued.
- (b) Such unadjusted net book value shall then be adjusted as follows:
 - (i) All real and personal property owned by the Company shall be restated on the balance sheet to reflect fair market value as of the balance sheet date. If the interested parties cannot agree with respect to such fair market value, the determination of fair market value shall be made by appraisers [appointed by the Plaintiff and Defendant]¹

The Plaintiff sought to limit discovery to the fair market value of real and personal property as of the balance sheet date, while the Defendant wished to obtain additional discovery in order to challenge the accuracy of the underlying books and records used by the Company's independent accountant in preparing the balance sheet.

On January 30, 2014, Vice Chancellor Glasscock granted the Plaintiff's Motion for Protective Order, explaining that, under his reading of the appraisal provisions in the Employment Agreement:

The information relevant in discovery is any information pertaining to the fair market value of any real or personal property owned by the

¹ Employment Agreement § 3(1).

Company together with what [he] already described, the books of the Company as they existed on the date certain and the work papers of the accountant. . . . To the extent that the Defendant's request for documents relates to any issue other than the books as of the date certain, the calculation by the accountant, or the valuation of real and personal property, those requests are denied, and the Plaintiff's Motion for Protective Order is granted.²

The Plaintiff now requests attorney's fees for the successful prosecution of that Motion. The basis for that request, however, is not presented in the Plaintiff's brief. Instead, the Plaintiff simply summarizes the proceedings and states that \$2,664 in fees was incurred in the prosecution of the Motion for Protective Order.

“Although this Court has discretion to award attorneys' and expert witness fees, under the 'American Rule' courts do not award attorneys' fees to a prevailing party absent some special circumstance.”³ Special circumstances in which an award of attorney's fees may be appropriate include “cases where fees are authorized by statute” or “where the court finds that the litigation was brought in bad faith or that a party's bad faith conduct increased the costs of litigation.”⁴

With respect to discovery motions, Court of Chancery Rule 37 provides that the Court:

. . . shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order,

² Jan. 30, 2014 Tr. 5:20-6:14.

³ *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997).

⁴ *Id.*

including the attorney's fees, *unless the Court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.*⁵

This Court has understood the Rule to require fees “only . . . when a discovery request which no reasonable attorney would file is propounded, forcing attorneys to act to protect their client from harassment or abuse.”⁶

Here, the Defendant correctly points out that “[t]he Defendant’s request for discovery was not requesting information in bad faith nor did they do anything that would be considered inappropriate in the request”⁷ Rather, the dispute regarding the scope of discovery was premised on differing interpretations of the applicable language in the Employment Agreement, which language Vice Chancellor Glasscock clarified in his January 30 bench ruling. The Defendant’s argument that the appraisal procedure at issue permitted challenges to the Company’s underlying books and records, though ultimately unsuccessful, does not rise to a level of bad faith conduct which would justify an award of attorney’s fees. In other words, because I find that the Defendant’s opposition to the Plaintiff’s Motion for Protective Order was substantially justified—premiered on an interpretation of contractual language that required Court clarification—the Plaintiff’s Motion for Attorney’s Fees is denied.

⁵ Ct. Ch. R. 37(a)(4)(A) (emphasis added).

⁶ *U.S. Die Casting & Dev. Co. v. Sec. First Corp.*, 1995 WL 301414, at *4 (Del. Ch. Apr. 28, 1995).

⁷ Def.’s Reply at ¶ 4.

To the extent the foregoing requires an Order to take effect, IT IS SO ORDERED.

Sincerely,

/s/ Kim E. Ayvazian

Kim E. Ayvazian

Master in Chancery