

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

AFH HOLDING & ADVISORY, LLC,)
GRIFFIN VENTURES, LTD., and THE)
AMIR & KATHY HESHMATPOUR)
FAMILY FOUNDATION,)
Plaintiffs,)

v.)

EMMAUS LIFE SCIENCES, INC., a)
Delaware corporation,)
Defendant.)

C.A. No. N12C-09-045 MMJ
CCLD

EMMAUS LIFE SCIENCES, INC., a)
Delaware corporation,)
Counterclaim and Third-Party)
Claim Plaintiff,)

v.)

AFH HOLDING & ADVISORY, LLC,)
GRIFFIN VENTURES, LTD., and THE)
AMIR & KATHY HESHMATPOUR)
FAMILY FOUNDATION,)
Counterclaim Defendants,)
and)
AMIR HESHMATPOUR,)
Third-Party Claim Defendant.)

EMMAUS LIFE SCIENCES, INC., a)
Delaware corporation,)
Plaintiff,)

v.)

AFH HOLDING & ADVISORY, LLC,)
GRIFFIN VENTURES, LTD., and THE)
AMIR & KATHY HESHMATPOUR)
FAMILY FOUNDATION,)
Defendants.)

C.A. No. 8005-JJ

Submitted: February 25, 2014

Decided: April 16, 2014

Upon Emmaus' Motion for Attorneys' Fees, Costs, and Expenses

GRANTED

Upon AFH Holding & Advisory, LLC and Amir Heshmatpour's Motion
for a Contractual Award of Attorneys' Fees, Costs, and Expenses

DENIED

OPINION

David A. Felice, Esquire, Bailey & Glasser LLP, Attorney for the AFH Parties and
Amir Heshmatpour

Chad M. Shandler, Esquire, Brock E. Czeschin, Esquire, Jason J. Rawnsley,
Esquire, Richards, Layton & Finger, P.A., Daniel Y. Zohar, Zohar Law Firm, P.C.,
Attorneys for Emmaus

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Plaintiffs AFH Holding & Advisory, LLC (“AFH”), Griffin Ventures, Ltd. (“Griffin”), and The Amir & Kathy Heshmatpour Foundation (“Foundation”), (collectively “AFH Group”) filed an action against Defendant Emmaus Life Sciences, Inc. (“Emmaus”) on September 7, 2012. This litigation arose out of a contract dispute.

AFH is a Delaware limited liability company engaged in the business of providing financial advisory services. Griffin is a Nevada corporation. The Foundation is a Delaware non-profit corporation. Amir Heshmatpour is AFH's managing director, and also owns and operates Griffin.

Emmaus is a Delaware corporation that conducts research and development of treatments for rare diseases. In January 2010, Emmaus received FDA approval to begin a clinical trial of an experimental treatment for sickle cell disease. Emmaus began exploring options for raising the funds necessary to bring the sickle cell treatment to market.

Emmaus and AFH entered into a business relationship for the purpose of raising capital for Emmaus. The relationship was memorialized by a series of letters of intent. Each letter of intent included a clause stating that it superseded all prior letters of intent between AFH and Emmaus. The third and final letter of

intent (“LOI III”) has been the focus of this litigation. LOI III provides for the shifting of attorneys’ fees:

All disputes, controversies or claims arising out of or relating to this LOI shall be brought in Federal Court of the Central District of Delaware or in a Superior Court located in Delaware. The parties hereby irrevocably waive any objection to jurisdiction and venue or any action instituted hereunder and shall not assert any defense based on lack of jurisdiction or venue or based upon *forum non conveniens*. The parties agree to submit to the *in personam* jurisdiction of such courts. The prevailing party in any such dispute shall be entitled to recover from the other party its reasonable attorneys’ fees, costs and expenses.

The AFH Group filed this action on September 7, 2012, seeking declaratory judgment, *quantum meruit* relief, and alleging breach of contract claims. Emmaus filed counterclaims against the AFH Group. Emmaus brought claims for breach of contract, fraudulent inducement, fraud, and a declaration that it had: (1) properly terminated the offering; (2) canceled the Advisor Shares; and (3) terminated LOI III. Emmaus also filed the fraud and fraud in the inducement claims against Heshmatpour as a third-party defendant. The parties agreed to an expedited case schedule.

Emmaus filed a Motion for Partial Summary Judgment on March 13, 2013. Emmaus requested the Court, as a matter of law, rule: (1) that the Offering had been terminated; (2) the Advisor Shares had been properly cancelled; (3) LOI III had been properly terminated by Emmaus; and (4) the AFH Group and

Heshmatpour must return all advisor share certificates. Heshmatpour filed a Motion for Summary Judgment on the same day, which the AFH Group later joined. The motion requested that the Court dismiss Emmaus' fraud and fraud in the inducement claims.

The Court granted Emmaus' Motion for Partial Summary Judgment in its May 15, 2013 Memorandum Opinion. The AFH Group and Heshmatpour's Motion for Summary Judgment was granted in part and denied in part. Partial summary judgment was granted in favor of the AFH Group and Heshmatpour on the grounds that Emmaus is not entitled to compensatory damages on its fraud and fraud in the inducement claims. Such damages would be duplicative of Emmaus' damages on its breach of contract claims. The Court denied partial summary judgment against the AFH Group and Heshmatpour on the grounds that Emmaus established a *prima facie* case for entitlement to punitive damages based on the AFH Group and Heshmatpour's alleged fraud in the inducement and fraud. However, the Court noted that Emmaus did not have a likelihood of success on the merits for an award of punitive damages.

The Court issued the implementing order on June 27, 2013. Subsequently, the parties conferred about how to conclude the Delaware action but could not reach an agreement.

Emmaus filed this Motion for Attorneys' Fees, Costs and Expenses on December 30, 2013. Emmaus is requesting an award in excess of \$871,406.74. On February 5, 2014, AFH and Heshmatpour filed a Motion for Attorneys' Fees, Costs and Expenses requesting that AFH and Emmaus' fees be deemed offsetting and that Heshmatpour be granted an award in excess of \$153,297. On the same day, AFH and Heshmatpour filed a Motion to Dismiss Emmaus' Fraud Claims. The Court will hold the Motion to Dismiss in abeyance as requested by AFH and Heshmatpour.

ANALYSIS

Delaware law generally follows the American Rule, under which each party pays for its own legal fees regardless of the outcome.¹ “An exception to this rule is found in contract litigation that involves a fee shifting provision.”² Where the parties have determined an allocation of fees by private agreement, “deference to [the] agreement is warranted.”³ Emmaus and AFH are parties to LOI III, which includes the following fee-shifting clause: “[t]he prevailing party in any such dispute shall be entitled to recover from the other party its reasonable attorneys’ fees, costs and expenses.”

¹ *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *8 (Del. Ch.).

² *Mahani v. Edix Media Group, Inc.*, 935 A.2d 242, 245 (Del. 2007).

³ *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *8.

Fee-Shifting Provision is not Applied on a Claim-by-Claim Basis

The parties dispute how the fee-shifting provision applies to this litigation. Emmaus argues that the Court should apply the fee-shifting provision in an all-or-nothing manner. AFH contends that the fee-shifting provision does not apply to the litigation as a whole. AFH argues that the fee-shifting provision should be applied by “dispute.” AFH interprets “dispute” to mean that the provision should be applied to each of Emmaus’ four substantive claims individually.

In the absence of “any qualifying language that fees are to be awarded claim-by-claim or on some other partial basis, a contractual provision entitling the prevailing party to fees will usually be applied in an all-or-nothing manner.”⁴ The Court finds that the contractually agreed upon language of “the prevailing party in any such dispute” does not mandate that the fee-shifting provision must be applied on a claim-by-claim basis.

Emmaus is Entitled to an Award as the Prevailing Party

Both AFH and Emmaus contend that they are the “prevailing party” for purposes of an award of attorneys’ fees, costs and expenses.

⁴ *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *8; see *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *2 (Del. Ch.).

AFH requests that Emmaus' Motion for Attorneys' Fees be denied or that AFH and Emmaus' fees be deemed to be offsetting. AFH, Griffin, and the Foundation incurred more than \$300,000 in attorneys' fees, costs and expenses in this litigation. AFH contends that it is the prevailing party on three of the four substantive claims and that Heshmatpour is a prevailing party for successfully defending against the fraud claims.

Emmaus contends the phrase "prevailing party" is a term of art under Delaware law. Emmaus cites *World-Win Marketing, Inc. v. Ganley Management Co.*, in which the Delaware Court of Chancery found that "the 'prevailing party' under Delaware law is the party that predominates in the litigation."⁵ Emmaus contends that it is the prevailing party and therefore is entitled to an award of reasonable fees.

Delaware courts "typically look[] to the substance of a litigation to determine which party predominated."⁶ There were two sets of issues in this litigation—breach of contract and fraud. The Court finds that Emmaus predominated in the litigation regarding breach of contract issues. The Court granted Emmaus' Motion for Partial Summary Judgment and declared as a matter of law that:

⁵ 2009 WL 2534874, at *3 (Del. Ch.).

⁶ *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *8; see *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at **2-3.

- (1) the Offering had been terminated;
- (2) the Advisor Shares have been properly canceled;
- (3) LOI III has been properly terminated by Emmaus; and
- (4) the AFH Group and Amir Heshmatpour must return all Advisor Share Certificates.⁷

Therefore, Emmaus is the prevailing party regarding the breach of contract issues and is entitled to reasonable fees under the fee-shifting agreement.

The ‘prevailing party’ regarding the fraud claims is more complicated. In the May 15, 2013 Memorandum Opinion, the Court denied Partial Summary Judgment against the AFH Group and Heshmatpour on the grounds that Emmaus set forth a *prima facie* case for entitlement to punitive damages based on the AFH Group and Heshmatpour’s alleged fraud in the inducement and fraud. Summary judgment could not be granted on the narrow issue of punitive damages at that stage in the proceedings, due to the existence of genuine issues of material fact.

The Court finds that neither party predominated regarding the fraud claims. However, this does not alter Emmaus’ status as the prevailing party under the fee-shifting provision. “Having chosen the common term ‘prevailing party,’ the parties can be presumed to have intended that the term would be applied by the

⁷ *AFH Holding Advisory, LLC v. Emmaus Life Sciences, Inc.*, 2013 WL 2149993, at *14 (Del. Super.).

court as it has traditionally done so.”⁸ The traditional analysis “is an all-or-nothing approach involving an inquiry into which party predominated in the litigation.”⁹ The breach of contract claims are the substantive crux of this litigation. The Court finds that a voluntary dismissal of the fraud claims by Emmaus, or a dismissal by the Court, would not alter Emmaus’ status as the prevailing party.

The Court further finds that Heshmatpour is not entitled to an award under the fee-shifting provision. Heshmatpour contends that he should be awarded his attorneys’ fees, costs and expenses for defending the fraud claims. Heshmatpour, as an individual, was not a party to LOI III. The Court finds that Heshmatpour cannot invoke the fee-shifting provision in his individual capacity. Additionally, the Court finds Heshmatpour’s contention that he is the prevailing party regarding the fraud claims to be without merit.

Reasonableness of Fees

To analyze the reasonableness of fees in a particular case, a judge must consider the factors enumerated in the Delaware Lawyers’ Rules of Professional Conduct:¹⁰

⁸ *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *2 (quoting *Brandin v. Gottlieb*, 2000 WL 1005954, at *28 (Del. Ch.)).

⁹ *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *2.

¹⁰ *Mahani v. Edix Media Group, Inc.*, 935 A.2d at 245-46.

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.¹¹

In a contractual fee shifting case, “reasonableness should be assessed by reference to legal services purchased by those fees, not by reference to the degree of success achieved in the litigation.”¹² The Court also will consider “whether the number of hours devoted to litigation was ‘excessive, redundant, duplicative or otherwise unnecessary.’”¹³ The Court has discretion in determining a reasonable fee award.¹⁴

Emmaus retained three law firms for representation in this matter: Zohar Law Firm, P.C. (“ZLF”); Richards, Layton and Finger, P.A. (“RLF”); and The

¹¹ DLRPC 1.5(a)(1).

¹² *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *3 (Del. Ch.).

¹³ *Mahani v. Edix Media Group, Inc.*, 935 A.2d at 247-48 (citing *All Pro Maids, Inc. v. Layton*, 2004 WL 3029869, at *5 (Del. Ch.)).

¹⁴ *Mahani v. Edix Media Group, Inc.*, 935 A.2d at 245; *Swann Keys Civic Ass’n v. Shamp*, 971 A.2d 163, 170 (Del. 2009).

McKinney Law Group (“MLG”). RLF and ZLF served as Emmaus’ lead trial counsel during the litigation.

Emmaus retained ZLF in August 2012. ZLF billed 543.10 hours to this matter during the period from September 4, 2012 through December 15, 2013.¹⁵ Emmaus incurred ZLF fees and expenses in the Delaware action totaling \$286,996.31.¹⁶ This figure is comprised of \$271,550.00 in attorneys’ fees and \$15,443.31 in costs and expenses.¹⁷

Emmaus retained RLF in September 2012. RLF devoted 1,129.60 hours to this matter during the period from September 11, 2012 through November 30, 2013.¹⁸ RLF, among other responsibilities as co-lead counsel, reviewed 56,700 pages of documents for production to the AFH Group and Heshmatpour.¹⁹ RLF reviewed approximately 155,700 pages of documents produced by the opposing parties. Emmaus incurred RLF fees and expenses totaling \$493,716.43 through November 30, 2013. This figure is comprised of \$467,964.45 in attorneys’ fees and \$25,751.98 in costs and expenses.²⁰

¹⁵ Zohar Aff. ¶ 4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Shandler Aff. ¶ 4.

¹⁹ *Id.* at ¶ 5.

²⁰ *Id.* at ¶ 4.

Emmaus retained MLG in July 2012. MLG devoted 301 hours to this matter during the period from July 2012 through November 2013.²¹ Emmaus incurred MLG fees and expenses totaling \$90,697.²² This figure is comprised of \$90,300 in attorneys' fees and \$397 in costs and expenses.²³

Emmaus incurred more than \$91,272.78 in fees and expenses arising from the dispute with AFH and Heshmatpour prior to the lawsuit. Emmaus is not seeking to recover the pre-suit fees and expenses.

The Court considers the factors enumerated in Delaware Lawyers' Rule of Professional Conduct 1.5(a)(1). The time and labor required in this suit were significant. The ownership and control of Emmaus was at stake, reasonably justifying the counterclaims as well as discovery and motion practice. The Court finds that the fees are similar to fees charged by comparable law firms in these firms' respective locations. The suit proceeded on an expedited schedule. Emmaus' attorneys are experienced practitioners. This is not a contingent fee case; Emmaus was billed on an hourly-rate basis.

The Court finds that Emmaus' award must be reduced to account for fees, costs and expenses incurred in pursuing the fraud claims against Heshmatpour as an individual. Heshmatpour, as an individual, is not a party to LOI III containing

²¹ *Id.*

²² Wallen Aff. ¶ 4.

²³ *Id.*

the fee-shifting provision. However, the Court finds that the additional expense of litigating against Heshmatpour in his individual capacity was relatively minimal due to Heshmatpour's overlapping integral role in the AFH Group entities.

The Court further reduces Emmaus' award upon consideration of litigation expenses that are duplicative or redundant.²⁴ Emmaus' prayers for relief on the basis of its counterclaims and third-party claims were not specifically delineated among Emmaus' causes of action. The only relief unique to the fraud claims was for punitive damages. The Court found in its May 15, 2013 Memorandum Opinion that the breach of contract claims and the fraud claims were based on the same operative facts. The Court reduces Emmaus' award to address that the fraud claims were partially duplicative of the compensatory damages or declaratory relief to which Emmaus might have been entitled for breach of contract or unjust enrichment.

The Court has reviewed the case docket and the affidavits accompanying the fee application. Reductions have been made in accordance with the Court's previously-stated findings. Total fees, costs and expenses sought by Emmaus are \$871,409.74. The Court rules that Emmaus is entitled to \$700,000.00 in attorneys' fees, costs and expenses.

²⁴ *Mahani v. Edix Media Group, Inc.*, 935 A.2d at 247-48 (citing *All Pro Maids, Inc. v. Layton*, 2004 WL 3029869, at *5).

CONCLUSION

The Court finds that the language in the fee-shifting provision does not mandate that the provision should be applied on a claim-by-claim basis. The Court finds that Emmaus substantively predominated in the litigation. Emmaus is the prevailing party under the fee-shifting provision, entitled to reasonable fees, costs and expenses.

THEREFORE, Emmaus' Motion for Attorneys' Fees, Costs and Expenses is hereby **GRANTED**. Emmaus is entitled to an award of \$700,000 for attorneys' fees, costs and expenses. AFH Holding & Advisory, LLC and Amir Heshmatpour's Motion for a Contractual Award of Attorneys' Fees, Costs and Expenses is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston

The Honorable Mary M. Johnston