

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

**DONALD M. DURKIN
CONTRACTING, INC.,**

Plaintiff,

v.

CITY OF NEWARK,

Defendant.

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C.A. No. N19C-09-206 DCS

Submitted: February 7, 2020
Decided: November 10, 2020

Upon Defendant's Motion for Indemnification, Sanctions, and Relief –
DENIED

OPINION

Paul A. Logan, Esquire, Attorney for Plaintiff.
Max B. Walton, Esquire, Attorney for Defendant.

STREETT, J.

Introduction

Donald M. Durkin Contracting, Inc. (the “Plaintiff”, “Durkin”) filed a Motion for Declaratory Judgment asking this Court to declare that the City of Newark (the “Defendant”) is obligated to cooperate with Plaintiff in Plaintiff’s lawsuit (the “Pennsylvania Litigation”) against Defendant’s former attorneys (“Cottrell”)¹. Plaintiff alleged that this obligation arose from a Settlement Agreement that ended Federal litigation² between Plaintiff and Defendant and that Defendant breached the Settlement Agreement by refusing to cooperate.

Defendant moved for dismissal asserting that the terms of the Settlement Agreement did not obligate it to cooperate with Plaintiff in the Pennsylvania litigation and that the statute of limitations bars Plaintiff’s Declaratory Judgment Action.³ This Court granted Defendant’s Motion to Dismiss⁴ and denied Plaintiff’s Motion for Reargument.⁵

¹ Paul Cottrell, Esquire, Victoria Patrone, Esquire, and the law firm Tighe, Cottrell and Logan, P.A.

² *Donald M. Durkin Contracting, Inc. v. City of Newark, et al.*, United States District Court for the District of Delaware, No. 04-163 GMS; *Durkin Contracting, Inc. v. City of Newark, et al.*, Third Circuit, Nos. 06-4762, 06-4761, and 06-4850.

³ Defendant contended that Plaintiff is attempting to compel Defendant to produce all attorney/client and work product communications between Defendant and Cottrell.

⁴ *Donald M. Durkin Contracting, Inc. v. City of Newark*, 2020 WL 2991778 (Del. Super. June 4, 2020).

⁵ *Donald M. Durkin Contracting, Inc. v. City of Newark*, 2020 WL 5797622 (Del. Super. Sept. 29, 2020).

The Court now reviews Defendant's Motion for Sanctions and Indemnification for attorneys' fees and costs of litigation. For the following reasons, the Court denies Defendant's Motion.

Statement of Facts

On March 16, 2004, Plaintiff brought an action against Defendant in the United States District Court for the District of Delaware for wrongful termination of a contract to erect a reservoir and for violation of Plaintiff's civil rights by depriving Plaintiff of property without due process (the "Federal litigation").⁶ Defendant was represented by Cottrell.

On October 12, 2006, following a jury trial, Plaintiff was awarded \$36,700,000.00.

On April 9, 2008, after post-trial motions, the District Court reduced the award to \$25,630,819.40. Both parties then filed appeals with the United States Court of Appeals for the Third Circuit.⁷ The parties also pursued mediation.

⁶ *Donald M. Durkin Contracting, Inc. v. City of Newark, et al.*, United States District Court for the District of Delaware, No. 04-163 GMS.

⁷ *Durkin Contracting, Inc. v. City of Newark, et al.*, Third Circuit, Nos. 06-4762, 06-4761, and 06-4850.

On May 14, 2008, Plaintiff filed a lawsuit against Cottrell in the Pennsylvania Court of Common Pleas (the “Pennsylvania Litigation”).⁸ Plaintiff’s litigation against Cottrell alleged claims of abuse of process, malicious prosecution, and intentional interference with contractual relations.

On June 23, 2008, prior to submitting briefs to the Third Circuit concerning the Federal Litigation, Plaintiff and Defendant entered into a Settlement Agreement and Mutual Release (the “Settlement Agreement”) which ended the Federal Litigation.

On July 18, 2012, Plaintiff sought discovery from Cottrell in the Pennsylvania Litigation. Cottrell refused to comply and invoked attorney/client privilege stemming from its representation of Defendant in the Federal Litigation.

In October 2013, Plaintiff then requested that Defendant divulge any and all communications between Defendant and Cottrell concerning the Federal Litigation. Plaintiff drafted and presented an affidavit to Defendant that would have waived any purported attorney/client privilege involving Cottrell. Defendant refused to sign the affidavit or provide those communications.

⁸ *Donald M. Durkin Contracting, Inc. v. Paul Cottrell, Esquire; Victoria K. Petrone, Esquire; and Tighe, Cottrell & Logan, P.A.*, Court of Common Pleas of Bucks County, Pennsylvania, No. 0804799-18-2.

On January 9, 2014, Plaintiff obtained an Out-of-State Subpoena from the Delaware Superior Court for Defendant to produce the communications between Defendant and Cottrell in the Federal Litigation for use in the Pennsylvania Litigation.⁹

On January 17, 2014, Defendant filed a Motion to Quash the subpoena.

On February 3, 2014, Plaintiff withdrew the subpoena.

On November 23, 2016, Plaintiff obtained a second Out-of-State Subpoena from the Delaware Superior Court for Defendant to produce the communications between Defendant and Cottrell in the Federal Litigation for use in the Pennsylvania Litigation.¹⁰

On December 8, 2016, Defendant filed a Motion to Quash the second subpoena.

On February 3, 2017, Plaintiff withdrew the second subpoena.

On January 15, 2019, Plaintiff obtained a third Out-of-State Subpoena from the Delaware Superior Court for Defendant to produce the communications between

⁹ *Donald M. Durkin Contracting, Inc. v. Paul Cottrell, Esquire; Victoria K. Petrone, Esquire; and Tighe, Cottrell & Logan, P.A.*, Delaware Superior Court, No. 14M-01-014 (2014).

¹⁰ *Donald M. Durkin Contracting, Inc. v. Paul Cottrell, Esquire; Victoria K. Petrone, Esquire; and Tighe, Cottrell & Logan, P.A.*, Delaware Superior Court, No. N16M-11-143 (2016).

Defendant and Cottrell in the Federal Litigation for use in the Pennsylvania Litigation.¹¹

On February 5, 2019, Defendant filed a Motion to Quash the third subpoena.

On March 28, 2019, Plaintiff withdrew the third subpoena.

Procedural History

On September 20, 2019, Plaintiff filed a Declaratory Judgment Action against Defendant in this Court. Plaintiff requested that this Court declare that the Settlement Agreement obligates Defendant to assist Plaintiff in its case against Cottrell (the Pennsylvania Litigation). Plaintiff also asked this Court to find that Defendant's refusal to assist was a material breach of the Settlement Agreement.

On October 28, 2019, Defendant filed a Motion to Dismiss. Defendant contended that the Settlement Agreement does not obligate Defendant to assist Plaintiff in the Pennsylvania Litigation, the Settlement Agreement released Defendant from claims related to the Pennsylvania Litigation, and the statute of limitations bars Plaintiff's Declaratory Judgment Action.

On February 7, 2020, Defendant filed the instant Motion for Indemnification, Sanctions, and Relief Against Donald M. Durkin Contracting, Inc. Pursuant to the Agreement and Superior Court Civil Rule 11 and asserted that Plaintiff's filing of

¹¹ *Donald M. Durkin Contracting, Inc. v. Paul Cottrell, Esquire; Victoria K. Petrone, Esquire; and Tighe, Cottrell & Logan, P.A.*, Delaware Superior Court, No. 19M-01-106 (2019).

several subpoenas and the Declaratory Judgment Action warrants sanctions. Defendant also contended that the Settlement Agreement obligates Plaintiff to indemnify Defendant for the costs of any litigation related to the Pennsylvania Action (including the Declaratory Judgment Action).

On March 4, 2020, Plaintiff filed its Responses to Defendant's Motion to Dismiss and Motion for Indemnification, Sanctions, and Relief. Concerning the Motion to Dismiss, Plaintiff maintained that the Settlement Agreement requires Defendant to cooperate with Plaintiff in the Pennsylvania Litigation, Defendant previously waived its attorney/client privilege in the Federal Litigation, and the Declaratory Judgment Action is not barred by the statute of limitations because the Settlement Agreement includes a continuing cooperation obligation. Concerning the Motion for Sanctions and Indemnification, Plaintiff argued that it should not be sanctioned and that it is not obligated to indemnify Defendant for the instant action because "[t]his litigation follows [Defendant's] refusal to cooperate in breach of the Settlement Agreement for which no indemnification is owed."¹²

On June 4, 2020, the Court granted Defendant's Motion to Dismiss.¹³ The Court rejected the applicability of the continuing obligation doctrine and held that the statute of limitations bars Plaintiff's action if there had been a breach.

¹² Plaintiff's Response to Defendant's Motion for Indemnification, Sanctions, and Relief, at 2.

¹³ *Donald M. Durkin Contracting, Inc. v. City of Newark*, 2020 WL 2991778 (Del. Super. June 4, 2020).

On June 9, 2020, Plaintiff filed a Motion for Reargument.

On June 15, 2020, Defendant filed its Response in Opposition.

On July 22, 2020, the Court held a hearing on Plaintiff's Motion for Reargument.

On September 28, 2020, this Court denied Plaintiff's Motion for Reargument.¹⁴

On October 5, 2020, this Court requested that the parties submit Supplemental Briefs addressing Defendant's Motion for Indemnification, Sanctions, and Relief.

On October 23, 2020, Defendant submitted its Supplemental Brief addressing Defendant's Motion for Indemnification, Sanctions, and Relief.

On October 23, 2020, Plaintiff submitted its Supplemental Brief addressing Defendant's Motion for Indemnification, Sanctions, and Relief.

Parties' Contentions

In its Motion for Indemnification, Sanctions, and Relief, Defendant requests the Court to impose sanctions pursuant to Delaware Superior Court Civil Rule 11(c)(2)¹⁵ which would include enforcement of the contractual indemnification

¹⁴ *Donald M. Durkin Contracting, Inc. v. City of Newark*, 2020 WL 5797622 (Del. Super. Sept. 29, 2020).

¹⁵ Delaware Superior Court Civil Rule 11(c)(2) states:

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist

provision in the Settlement Agreement. Pursuant to the indemnification provision and the sanctions, Defendant requests attorneys' fees and costs "and such other sanctions as this Court deems just and proper."¹⁶

In support of its request for sanctions, Defendant contends that Plaintiff's conduct was vexatious and deserving of sanctions. Although Defendant acknowledges that Delaware courts impose sanctions "only sparingly," it argues that, "in light of [Plaintiff's] history of curious subpoena practice and the facially untenable allegations in [Plaintiff's] Complaint, this case should represent the exception to the Delaware court's general reticence to grant Rule 11 relief."¹⁷

Defendant alleges that Plaintiff filed its Complaint with an intent to harass Defendant in violation of Delaware Superior Court Civil Rule 11(b)(1).¹⁸ Defendant

of, or include, directives of a non monetary nature, an order to pay a penalty into Court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the Court's initiative unless the Court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

¹⁶ Defendant's Motion for Indemnification, Sanctions, and Relief, at 6.

¹⁷ Defendant's Supplemental Brief in Support of Motion for Indemnification, Sanctions, and Relief, at Sec. I.

¹⁸ Delaware Superior Court Civil Rule 11(b)(1) states:

explains that Plaintiff has filed and withdrawn several subpoenas three times and then filed its Complaint for Declaratory Judgment “to subvert the obvious and plain meaning of the Settlement Agreement.”¹⁹ Defendant writes that Plaintiff “served nearly identical subpoenas on [Defendant] in 2014, 2016, and 2019” and, “[i]n a peculiar pattern, [Plaintiff] withdrew each subpoena just before oral argument on [Defendant’s] motion to quash.”²⁰ Defendant also argues that Plaintiff continued “a pattern of abusive litigation conduct” by filing the Complaint that “wholly lacked merit.”²¹

Defendant also asserts that the Court should impose sanctions on Plaintiff and its counsel because the claims made in the Complaint “were frivolous, and they were neither supported by existing law nor a good faith argument in favor of modifying or extending the existing law.”²² Defendant writes that, “[w]here a plaintiff is on

By representing to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

¹⁹ *Id.* at Sec. I, a.

²⁰ *Id.*

²¹ *Id.* at Sec. I, b.

²² *Id.*

notice that its claims are futile, but files a pleading notwithstanding that notice, sanctions can be appropriate.”²³ In addition, Defendant argues that “no amount of discovery would have provided [Plaintiff] evidentiary support” for its claim because the language of the Settlement Agreement is unambiguous (as the Court found).²⁴ Defendant contends that Plaintiff violated Rule 11 “when it offered its tortured interpretation of the Settlement Agreement to support its meritless complaint.”²⁵

Concerning the procedural requirements of initiating a Motion for Sanctions under Rule 11(c)(1)(A),²⁶ Defendant asserts that it has satisfied those requirements, arguing that it made the motion separately from other motions, its motion describes the specific conduct that violated Rule 11, the motion was served in accordance with

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Delaware Superior Court Civil Rule 11(c)(1)(A) states:

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the Court unless, within 21 days after service of the motion (or such other period as the Court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the Court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

Superior Court Rule 5, and Plaintiff was afforded more than 21 days to withdraw its Complaint before the motion was filed.

Concerning its request for indemnification, Defendant asserts that Section 7 of the Settlement Agreement entitles it to indemnification for costs related to the Declaratory Judgment Action and for Plaintiff's prior subpoenas. Defendant contends that Plaintiff obligated itself in the Settlement Agreement to indemnify Defendant for the cost (including attorneys' fees) of any litigation related to the Pennsylvania Litigation. Defendant points out that the Instant Action and the subpoenas are directly related to the Pennsylvania Litigation.

In addition, Defendant states that it "seeks to assert its contractual indemnification right *as part* of its Motion for Sanctions and not another procedural mechanism, such as a counterclaim."²⁷ Defendant argues that it "is merely moving the Court for an order stating that [Plaintiff] must indemnify [Defendant] pursuant to the plain and unambiguous terms of the Settlement Agreement."²⁸

Defendant posits that "the Court's adjudication of [Defendant's] request for indemnification as an inextricable part of its Motion for Sanctions promotes the interests of judicial economy and efficiency."²⁹ It argues that, by deciding the

²⁷ *Id.* at II, a. (emphasis added).

²⁸ *Id.*

²⁹ *Id.*

request for indemnification as part of the sanction, “the parties may bypass the burden and unnecessary delay of the pleading and discovery stages.”³⁰ Defendant also asserts that Plaintiff “is not prejudiced by the Court’s adjudication of [the indemnification request] via motion rather than a counterclaim because [Plaintiff] has had (and again will have) ample opportunity to respond and argue for its denial, which is the practical equivalent of a Rule 12 motion to dismiss.”³¹

Defendant further contends:

To mandate the initiation of a new action for the City to seek the relief to which it is clearly entitled (as Durkin seemingly contends) would unnecessarily delay the determination of the issue and create more fees and expenses for both parties.

...

To proscribe adjudication at this juncture and instead require the City to bring an entirely separate action to assert its rights under the Settlement Agreement would not promote judicial economy and efficiency. This Court has already dismissed Durkin’s Complaint. In doing so, the Court has opined on the construction and interpretation of the Settlement Agreement at issue. Initiating a new action simply to obtain a declaration that the City is entitled to indemnification under Paragraph 7 of the Settlement Agreement would be to belabor the obvious. On the other hand, by granting the City the indemnification it is entitled to as part of its request for sanctions, the Court would secure full, just, speedy, and inexpensive resolution of this matter.³²

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

In contrast, Plaintiff argues that sanctions are not appropriate. It maintains that it believed that it was entitled to Defendant's cooperation as a matter of agreement and law. Plaintiff asserts that it did not bring the cause of action against Defendant in bad faith and that its service and withdrawal of subpoenas were not done for nefarious purposes. It acknowledges that it made a procedural mistake with respect to one subpoena, requiring its withdrawal. It also posits that the filing and withdrawal of the other two subpoenas were done in reaction to decisions made in the Pennsylvania Litigation.

Concerning Defendant's request for indemnification, Plaintiff argues that its Declaratory Judgment Action is not the type of litigation contemplated in Paragraph 18 of the Settlement Agreement. In addition, Plaintiff argues that Defendant does not have an indemnity claim as a matter of law because it seeks to recover its own purported costs, not indemnification that it had to pay to a third-party. Plaintiff argues that "[i]ndemnity is a cause of action that applies to claims by a third party."³³

In addition, Plaintiff contends that Defendant's "Motion for Indemnification" is procedurally improper.³⁴ Plaintiff states that Defendant was required to raise the

³³ Plaintiff's Supplemental Brief in Opposition to the Motion for Indemnification, Sanctions, and Relief, at 4.

³⁴ *Id.*

indemnification claim as a separate cause of action. In support of this position, Plaintiff cites *LaPoint v. AmerisourceBergern Corp.* as stating:

In a contract such as the Merger Agreement, in which one party agrees to indemnify the other for damages, including attorneys' fees, arising from that party's breach of the contract, the term "indemnity" has a distinct legal meaning that permits the party seeking indemnification to bring a separate cause of action for indemnification after first bringing a successful action for breach of the contract.³⁵

Standard of Review

Upon review of a Motion for Sanctions, this Court must determine whether a party has engaged in specific conduct in violation of Superior Court Civil Rule 11(b).³⁶ Under Delaware law, “[m]atters presented to the Court must have factual evidentiary support, or are likely to have evidentiary support after a reasonable

³⁵ *LaPoint v. AmerisourceBergern Corp.*, 970 A.2d 185 (Del. 2009).

³⁶ Delaware Superior Court Civil Court Rule 11(b) states:

(b) Representations to Court. By representing to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

opportunity to investigate.”³⁷ The Court “should determine whether an attorney should be sanctioned under Rule 11 under an objective standard.”³⁸

Discussion

Defendant moves for Rule 11 sanctions and indemnification. Pursuant to sanctions, Defendant requests attorneys’ fees and costs incurred in this litigation and in opposing Plaintiff’s 2014, 2016, and 2019 subpoenas. For the following reasons, Defendant’s Motion is denied.

This Court has consistently recognized, and Defendant acknowledges, that “Delaware courts rarely impose Rule 11 sanctions.”³⁹ The Court has held that “[s]anctions should be reserved for those instances where the Court is reasonably confident that an attorney does not have an objective good faith belief in the legitimacy of a claim or defense” and should only be brought “to seek a remedy for clearly egregious and abusive conduct.”⁴⁰

The Court is not convinced that Plaintiff’s attorney did not have an objective good faith belief in the legitimacy of its Declaratory Judgment Action. Plaintiff

³⁷ *OmniMax International, Inc. v. Dowd*, 2019 WL 3545848, at *4 (Del. Super. July 17, 2019).

³⁸ *Crumplar v. Superior Court ex rel. New Castle County*, 56 A.3d 1000, 1008 (Del. 2012).

³⁹ *McLeod v. McLeod*, 2015 WL 1477968, at *1 (Del. Super. Mar. 31, 2015); *Anguilla RE, LLC v. Lubert-Adler Real Estate Fund IV, L.P.*, 2012 WL 5351229, at *7–8 (Del. Super. Oct. 16, 2012).

⁴⁰ *Anguilla RE, LLC v. Lubert-Adler Real Estate Fund IV, L.P.*, 2012 WL 5351229, at *8 (Del. Super. Oct. 16, 2012).

stated that it sought the declaratory judgment in order to resolve a disagreement concerning whether Defendant had an obligation to cooperate in the Pennsylvania Litigation. Plaintiff maintains that it did so in good faith. In addition, Plaintiff has explained why it filed and withdrew several subpoenas. The Defendant has not persuaded the Court that the Plaintiff filed the declaratory judgment action and the subpoenas for an improper purpose, such as harassment.

As to indemnification, Defendant clearly states that it is requesting indemnification as part of the sanction. Defendant writes that it “seeks to assert its contractual indemnification right as part of its Motion for Sanctions and not another procedural mechanism, such as a counterclaim...”⁴¹ Defendant contends that “the Court’s adjudication of [Defendant’s] request for indemnification as an inextricable part of its Motion for Sanctions, promotes the interest of judicial economy and efficiency.”⁴² To the extent that Defendant requests enforcement of the indemnification provision as a sanction, this Court denies Defendant’s request for the reasons the Court declined to impose sanctions.

Moreover, in the Instant Case, a claim for indemnification is not ripe. In *LaPoint v. AmerisourceBergern Corp.*,⁴³ the Delaware Supreme Court held that a

⁴¹ Defendant’s Supplement Brief, at II, b.

⁴² *Id.*

⁴³ *LaPoint v. AmerisourceBergern Corp.*, 970 A.2d 185 (Del. 2009).

claim for indemnification did not ripen until a demand for indemnification, pursuant to an indemnification provision of a contract, was refused.⁴⁴ Here, Paragraph 7 of the Settlement Agreement provides a procedure for initiating the request for indemnification. It states that “[t]he Durkin Parties shall pay fees and expenses as required by this Section within thirty days of submission of statements by the Newark Parties.” As such, an indemnification claim is not ripe until Defendant follows this procedure and then Plaintiff refuses to pay the requested fees.

Conclusion

Accordingly, for the foregoing reasons, Defendant’s Motion for Indemnification, Sanctions, and Relief Against Donald M. Durkin Contracting, Inc. Pursuant to the Agreement and Superior Court Civil Rule 11 is **DENIED**.

IT IS SO ORDERED.

/s/ Diane Clarke Streett
Diane Clarke Streett, Judge

⁴⁴ *Id.*