SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5264

Victoria K. Petrone, Esquire
Logan and Petrone, LLC
One Corporate Commons
100 W. Commons Blvd., Suite 300
New Castle, Delaware 19720

Natalie M. Ippolito, Esquire
Benjamin C. Wetzel, III, Esquire
Wetzel & Associates, P.A.
2201 W. 11th Street
Wilmington, Delaware 19805

RE: *The Council of Unit Owners of Windswept Condo. Ass'n v. Schumm v. Ocean Atlantic Assocs., VII, LLC*
C.A. No. S12C-08-011RFS

Date Submitted: May 29, 2014
Date Decided: August 12, 2014

Dear Counsel:

I have reviewed Defendant Robert W. Schumm's ("Schumm's") Motion for Reargument on the issue of attorneys' fees pursuant to Superior Court Civil Rule 59(e). Schumm disagrees with this Court's decision of May 19, 2014, denying his request for attorneys' fees and costs. On May 22, 2014, the Court received Schumm's Motion for Reargument under this Court's Civil Rule 59(e). For the reasons explained below, this Motion is **DENIED**.

STANDARD OF REVIEW

A motion for reargument is appropriate where the Court has overlooked a decision or legal principle that would have controlling effect, or has misapplied the law or facts in a way that affects the outcome.[1] The Superior Court has recently stated that "[a] motion for reargument should not be used merely to rehash the arguments already decided by the Court, nor will the Court consider new arguments that the movant could have previously raised."[2]

SCHUMM'S CONTENTIONS

First, Schumm contends that the Court has misapprehended the law in failing to award him reasonable attorneys' fees as the prevailing party. Specifically, of the six factors set forth in *General Motors Corp. v. Cox*,[3] none require the Court to consider the source of payment of the prevailing party's fees. Schumm argues that no case law has been provided to support the source of payment as a relevant factor; therefore, using this justification as the basis for denial of a fee award was incorrect.

Second, Schumm argues that, in declining to award reasonable attorneys' fees,

---

[1] *Sweiger v. Delaware Park, L.L.C.*, 2014 WL 594118, at *2 (Del. Super. Jan. 27, 2014).

[2] *CNH Am., LLC v. Am. Cas. Co. of Reading, Pennsylvania*, 2014 WL 1724844, at *1 (Del. Super Apr. 29, 2014) (internal quotation marks omitted).

[3] 304 A.2d 55 (Del. 1973).

the Court effectively invalidated the parties' clear fee-shifting provision. Schumm submits that the Court is obligated to award fee's to the prevailing party based on the parties' contractual agreement, the validity of which has never been challenged.

Lastly, Schumm argues that the Court has misapprehended the facts as they relate to Schumm's out of pocket expenses, as well as Travelers' interest in reimbursement of defense costs paid on Schumm's behalf. According to Schumm, both he and Travelers have paid defense costs in this litigation. In line with the subrogation clause of the contract, Schumm claims that he is obligated to repay his carrier. Thus, Schumm's recovery of attorneys' fees would not be a windfall to Schumm, and should be granted.

DISCUSSION

The court rejects Schumm's arguments based on the following reasons. First, Schumm cites to the *General Motors* decision pertaining to the evaluation for the reasonableness of fees, and argues that none of the six factors call for examination of the source of payment. However, the Court has previously noted that before the reasonableness of the fees can be considered there must be entitlement to such fees. The question here concerns whether Schumm is entitled to receipt of the fees; therefore, the six *General Motors* factors are irrelevant.

With respect to Schumm's argument regarding the payment of defense costs by both the defendant and his insurance carrier, Schumm is arguing facts that are not present on the record. In footnote seven of Schumms's Motion for Reargument, he explains that funds would be dispersed to both him and Travelers in proportion to the amount each had paid. This is the first mention of such an arrangement. The Superior Court has been abundantly clear in stating that a motion for reargument is not a proper place for the claimant to raise argument that could have previously been made.[4] This is precisely what Schumm has done here. Additionally, there is no support for Schumm's argument other than his bare assertion that such an arrangement exists.

Additionally, the Court rejects Schumm's argument that his insurance policy required an assignment of rights, and that this obligation to reimburse his insurer would justify his request for attorney's fees. The first reference to such an agreement appears in footnote 6 in the Motion for Reargument. The actual language is "...If not waived, we *may* require an assignment of rights for a loss to the extent that payment is made by us..." Not only is this argument too late, but the policy language is permissive, not mandatory. It covers the word "loss". Loss in the indemnity sense means payments arising from covered hazards such as

[4] *CNH Am., LLC v. Am. Cas. Co. of Reading, Pennsylvania*, 2014 WL 1724844, at *1 (Del. Super) (internal quotation marks omitted).

fire losses and the like. Even assuming attorneys' fees are included, there was nothing presented earlier in these proceedings to show an assignment. This easily could have been accomplished because personal contract rights like those in the Code of Regulations are fully assignable.[5] Indeed, the Court's letter of January 23, 2014 raised the subject matter whether the carrier had an assigned and subrogated interest but Schumm denied that any such fees should be paid to the carrier and lost this possible avenue of relief. In order to ensure that the Court would recognize the fee-shifting provision, Schumm should have explicitly entered into such an agreement and made that information available to the Court before the Motion for Reargument. Moreover, nothing has ever been presented to demonstrate the carrier's actual demand for any reimbursement.

CONCLUSION

Considering the foregoing, Schumm's Motion for Reargument is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Cc: Judicial Case Manager
Prothonotary

[5]Apparently, Schumm paid money to Mr. David J. Ferry, Esquire to obtain insurance defense of the suit. The litigation fees were paid by the carrier. Mr. Ferry's prelitigation fees are not within the language or intent of the pertinent Code provision.