

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

WILLIAM J. LaPOINT and JOHN M.)	
NEHRA, in their capacity as Stockholder)	
Representatives,)	
)	
Plaintiffs,)	C.A. No. 07C-11-152-MJB
)	
v.)	
)	
AMERISOURCEBERGEN)	
CORPORATION,)	
)	
Defendant.)	

Submitted: April 25, 2008
Decided: July 25, 2008

Upon Defendant's Motion for Summary Judgment, **GRANTED.**

OPINION AND ORDER

BRADY, J.

FACTUAL BACKGROUND

This is an action for declaratory judgment in Plaintiffs' contractual indemnification claim for attorneys' fees and costs. Plaintiffs are suing in a representative capacity on behalf of the former shareholders of Bridge Medical, Inc. ("Bridge"). The undisputed facts are as follows:

On January 3, 2003, Bridge merged with Defendant Amerisourcebergen Corp. ("ABC"), and Bridge is now a wholly owned subsidiary of ABC. By way of the Merger Agreement, ABC was contractually obligated, among other things, to furnish "earnout payments" to former shareholders of Bridge. The earnout payments were to be based upon the future performance of Bridge.

The Merger Agreement also included an indemnification clause, pursuant to which ABC was required to "indemnify, defend, and hold harmless the Company Shareholders... from and against any and all Damages incurred, in connection with, arising out of, resulting from or incident to any breach of any covenant, representation, warranty or agreement."¹

Eventually, the relationship between Bridge and ABC soured, and the former Bridge shareholders filed suit in Chancery Court alleging that ABC

¹ Compl. Ex. A at 58.

breached the Merger Agreement. The Chancery Court Complaint included four enumerated prayers for relief. The third Prayer for Relief requested “reimbursement to plaintiffs of their attorneys’ fees and costs.”² Plaintiffs’ pretrial brief requested damages “not less than \$44 million, plus attorneys’ fees and costs.”³ The Pretrial Order also included a request for attorneys’ fees and costs.⁴

On September 4, 2007, Chancellor Chandler found in Plaintiffs favor and awarded them \$21 million dollars in damages.⁵ The Court’s final Order did not address the issue of attorneys’ fees and costs. ABC appealed the decision on grounds not related to fees and costs, and on April 8, 2008 the Delaware Supreme Court affirmed the decision.⁶

Subsequently, Plaintiffs sent two demand letters to ABC. Together, the letters demanded that ABC reimburse Plaintiffs in the amount of \$5,394,034.57 in legal fees associated with the Chancery Court litigation. ABC refused to pay, and Plaintiffs filed the instant action on Nov. 20, 2007.

On January 3, 2008, ABC filed the instant Motion for Summary Judgment. ABC argues that it is entitled to summary judgment because the

² Def.’s Ex. C at 16.

³ Def.’s Ex. D at 25.

⁴ Def.’s Ex. E at 15.

⁵ *LaPoint v. Amerisourcebergen Corp.*, 2007 WL 2565709 (Del. Ch. Sept. 4, 2007).

⁶ *Amerisourcebergen Corp. v. LaPoint*, 2008 WL 931670 (Del. April 8, 2008).

action for legal fees is barred by the doctrine of *res judicata* and by the statute of limitations.

Plaintiffs argue that ABC's refusal to indemnify the shareholders is a separate and independent breach of the Merger Agreement, and, as such, they are entitled to file another action based upon this breach.

STANDARD OF REVIEW

The standard for granting summary judgment is high.⁷ Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.⁸ “In determining whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the non-moving party.”⁹ “When taking all of the facts in a light most favorable to the non-moving party, if there remains a genuine issue of material fact requiring trial, summary judgment may not be granted.”¹⁰

I. RES JUDICATA

PARTIES' CONTENTIONS

In its Motion for Summary Judgment, ABC contends Plaintiffs' claim for attorneys' fees is barred by *res judicata*. ABC argues the issue before

⁷ *Mumford & Miller Concrete, Inc. v. Burns*, 682 A.2d 627 (Del. 1996).

⁸ Super.Ct.Civ.R. 56(c).

⁹ *Muggleworth v. Fierro*, 877 A.2d 81, 83-84 (Del. Super. 2005).

¹⁰ *Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005).

this Court was decided during three years of litigation in the Court of Chancery. Specifically, ABC contends the Plaintiffs pled the issue of attorneys' fees in their Complaint and Amended Complaint and thus the issue before this court has been adjudicated. Furthermore, ABC contends the indemnification claim is a component of the same transaction, the breach of the Merger Agreement, and thus cannot be heard even if the claim was never expressly decided in the prior litigation.

In response to ABC's Motion, Plaintiffs argue they did not raise, nor were they required to raise, the issue of their entitlement to attorneys' fees under the Merger Agreement in the previous action and thus it was not decided. Specifically, the Plaintiff claims their entitlement to attorneys' fees was only adjudicated regarding equitable fee shifting principles. Moreover, Plaintiffs contend their claim in the present action does not arise from Defendant's breach of the Merger Agreement but from ABC's wrongful rejection to pay for attorneys' fees in a September 20, 2007 letter.

DISCUSSION

“The doctrine of *res judicata*, briefly stated, is that a final judgment upon the merits rendered by a court of competent jurisdiction may, in the absence of fraud or collusion, be raised as an absolute bar to the

maintenance of a second suit in a different court upon the same matter by the same party, or his privies.”¹¹ The purpose of requiring a litigant to seek all legal remedies and theories of recovery in one proceeding is to prevent multiplicity of litigation and inconsistent results.¹²

Plaintiffs do not dispute the Court of Chancery’s jurisdiction to order a final judgment between the two parties. Subject matter jurisdiction was established under 8 Del. C. § 111 and personal jurisdiction established by way of the Merger Agreement (“Consent to Jurisdiction and Forum Selection”).¹³ Therefore, the application of *res judicata* is proper if the issue in the present action was actually decided or could have been decided in the Court of Chancery.¹⁴

Plaintiffs argue the issue of indemnification was never litigated and thus never decided in the previous action by the Court of Chancery. This Court disagrees and finds all Plaintiffs’ claims against ABC for breach of the Merger Agreement were adjudicated in the prior action.

Since Plaintiffs contend the issue of contractual indemnification was not already decided, the Court must determine whether the assertion in this proceeding stems from the same transaction as the claim from the first

¹¹ *Maldonado v. Flynn*, 417 A.2d 378 (Del. Ch. 1980).

¹² *Id.*

¹³ Def.’s Ex. H.

¹⁴ 47 Am. Jur. 2d *Judgments* § 475.

proceeding.¹⁵ “A contract is typically considered to be a ‘transaction’ so that all claims arising from the breach of the contract must be brought in the original action.”¹⁶ In *Ambase Corp. v. City Investing Co. Liquidating Trust*, the Second Circuit Court of Appeals, interpreting Delaware law, applied *res judicata* to bar a contractual indemnification claim because it was not pled in Delaware’s Chancery Court and arose out of a common nucleus of operative facts as the Chancery Court action. Similarly, the Plaintiffs’ indemnification claim in this case should be precluded. A plaintiff is allowed one opportunity to pursue all legal substantive theories of relief for one transaction.¹⁷ All claims incident to the breach of the Merger Agreement were, or could have been, decided in the Chancery Court action, and, therefore, are barred by *res judicata*.

Plaintiffs maintain the indemnification claim is based upon Defendant’s denial of their demand for attorneys’ fees in a September 20, 2007 letter and, therefore, did not arise from the same transaction as the previous litigation. According to the language of the Merger Agreement, Defendants were required to “indemnify...the Company Stockholders...from and against any and all Damages incurred in connection with, arising out of, resulting from or incident to any breach of any

¹⁵ *Maldonado*, 417 A.2d 378.

¹⁶ *Ambase Corp. v. City Investing Co. Liquidating Trust*, 326 F.3d 63 (2nd Cir. 2003).

¹⁷ *Id.*

covenant.”¹⁸ This provision proves Plaintiffs’ right to indemnification was created by the breach of contract rather than the denial letter sent from the Defendants after the Court of Chancery action. In fact, the Delaware Supreme Court barred a claim for attorneys’ fees in a similar situation.¹⁹ In *Kossol*, the Plaintiff sought condominium assessments and attorneys’ fees pursuant to contractual terms. The Plaintiff later withdrew its claim for attorneys’ fees during trial and was awarded a favorable judgment for the condominium assessments. Subsequently, Plaintiff sent a letter demanding the defendant pay for attorneys’ fees incurred during the previous litigation.²⁰ The Defendant refused to pay the fees, and the Plaintiff brought a second suit. The Delaware Supreme Court concluded the right to attorneys’ fees was created by the contract, the breach of which was the subject of the prior litigation, and that a subsequent claim was barred.

Plaintiffs rely on *Dover Historical Society Inc. v. City of Dover Planning Commission*, in which the Plaintiff successfully asserted a previously denied claim for attorneys’ fees in a second proceeding involving the same parties.²¹ However, the Delaware Supreme Court permitted the Plaintiff in that case to assert a claim for attorneys’ fees because “the second

¹⁸ Compl. Ex. A at 58.

¹⁹ *Kossol v. Ashton Condominium Ass’n, Inc.*, 637 A.2d 827 (Del. 1994).

²⁰ *Id.*

²¹ *Dover Historical Society Inc. v. City of Dover Planning Commission*, 902 A.2d 1084 (Del. 2006).

application rested entirely upon facts that did not arise until after the first application had been denied.”²² Specifically, in the first suit the Petitioners sought an injunction to prevent a developer from destroying historical buildings, and attorneys’ fees based upon equitable fee shifting principles. The Court set forth guidelines for the Dover Planning Commission to follow in reviewing the Respondent’s application for an architectural certificate, and denied the request for attorneys’ fees. The Commission re-approved the certificate and the Petitioners filed another claim for an injunction based upon the second approval by the Dover Planning Commission. While the second petition was pending, the Respondent destroyed the historical buildings, which the Petitioners were attempting to protect. The Petitioners sought attorneys’ fees in the second litigation, under a different theory, based entirely upon the Respondent’s bad faith destruction of the buildings.²³ The Supreme Court concluded the Petitioners’ second claim for attorneys’ fees was not barred by *res judicata* because the claim was based upon events which occurred subsequent to the previous litigation.

In the case at bar, the Plaintiffs contend the demand letter is a subsequent event giving rise to a second application for attorneys’ fees. Unlike the *Dover Historical* case, however, there has been no additional

²² *Id.* at 1092.

²³ *Id.*

conduct by the opposing party and no new, substantive basis upon which Plaintiffs claim to be entitled to relief. The demand letter does not constitute a transaction, based upon which Plaintiffs can claim a right to attorneys' fees.²⁴ There are no new, relevant facts from which Plaintiffs may leverage a new claim, and therefore, the action is barred.

In addition, the doctrine of *res judicata* precludes Plaintiffs from litigating issues not previously raised but which could have been raised in the prior litigation.²⁵

If the pleadings framing the issues in the first action would have permitted the raising of the issue sought to be raised in the second action, and if the facts were known, or could have been known to the plaintiff in the second action at the time of the first action then the claims in the second action are precluded.²⁶

Consequently, all claims arising out of the breach of the Merger Agreement must have been litigated in the Court of Chancery action. Plaintiffs sought reimbursement of attorneys' fees in their pleadings and Pretrial Order and failed to pursue the claim during trial or in their post-trial brief, "thereby waiving their claim."²⁷

²⁴ *Kossol v. Ashton Condo. Ass'n.*, 637 A.2d 827 (Del. 1994).

²⁵ *Taylor v. Desmond*, 1990 Del. Super. LEXIS 62 (Del. Super. Jan. 25., 1990).

²⁶ *Ambase*, 326 F.3d at 73-74.

²⁷ *Kosachuk v. Harper*, 2002 Del. Ch. LEXIS 16 (Jan. 6, 1994).

Moreover, *res judicata* precludes a plaintiff from splitting its claim and seeking the same relief in subsequent litigation under a different substantive theory.²⁸ “The common law rule against splitting of one cause of action is rooted in the need to protect a defendant from a multiplicity of suits and their attendant harassment.”²⁹ In their Complaint, Amended Complaint, and Pretrial Order, Plaintiffs demanded reimbursement for attorneys’ fees and costs. Clearly, Plaintiffs are seeking in this Court, as they did in the Court of Chancery, the same relief, based upon the same events, simply under a different substantive theory. “The doctrine permits a litigant to press his claims but once, and requires him to be bound by the determination of the forum he has chosen, so that he ‘may have one day in court but not two.’”³⁰

“*Res judicata* bars the litigation of not only issues that were actually litigated, but also issues that could have been litigated, might have been litigated, or should have been litigated in the original suit.”³¹ Therefore, all claims regarding ABC’s breach of the Merger Agreement have been adjudicated and Plaintiffs are not entitled to further remedies.

²⁸ *Kossol*, 637 A.2d 827

²⁹ *Kossol*; citing *Webster v. State Farm Mutual Automobile Ins. Co.*, 348A.2d 329 (Del. Super. 1975).

³⁰ *Epstein v. Chatham Park, Inc.*, 153 A.2d 180, 184 (Del. Super. 1959) quoting, *Malone Freight Lines, Inc. v. Johnson Motor Lines, Inc.* 148 A.2d 770, 775 (Del. 1959).

³¹ 47 Am. Jur. 2d Judgments § 475.

II. STATUTE OF LIMITATIONS

The Court has granted ABC's Motion for Summary Judgment on the basis of *res judicata*, nevertheless, the Court will address whether the claim is barred by the statute of limitations.

Plaintiffs contend the indemnification claim is not barred by the statute of limitations because accrual of the action did not begin until the Court of Chancery resolved the underlying breach of contract action.

In its Motion for Summary Judgment, ABC contends this action is barred by Delaware's three year statute of limitations for breach of contract claims.³² In particular, the ABC asserts the claim for indemnification of attorneys' fees began to accrue when the alleged breach of the Merger Agreement occurred in February 2004. The Court agrees.

"Statutes of limitations are designed to bar stale claims when the plaintiff has failed to assert his or her rights in a timely manner."³³ An action for breach of contract accrues at the time of the breach.³⁴ Therefore, Plaintiffs' claim began to accrue in February 2004, and pursuant to 10 Del. C. § 8106, the three year statute of limitations for breach of contract actions, this Court is precluded from hearing this claim.

³² 10 Del. C. § 8106.

³³ Am. Jur. 2d Limitation of Actions § 8.

³⁴ *Getty Oil Co. v. Catalytic, Inc.*, 509 A.2d 1123 (Del. Super. 1986).

Plaintiffs rely on *Scharf v. Edgecomb Corp.* to support its position. However, this reliance is misguided. In that case, a corporate officer sought indemnification of attorneys' fees he incurred during an SEC investigation.³⁵ Pursuant to a Delaware corporate statute, indemnification rights accrued when the officer showed success of his underlying claim.³⁶ Conversely, in this case there is no statute requiring the Plaintiffs to wait for the liabilities to be determined for the underlying breach of contract action. The language in the contract states the Plaintiffs are entitled to reimbursement from the Defendant for any and all damages resulting from a breach of the Merger Agreement. The indemnification provision does not qualify Plaintiffs' right to damages only if their breach of contract claim is successful on the merits. The indemnification provision simply allocated bargained risks and liabilities, but it did not give rise to a separate action accruing at a different time. Furthermore, Plaintiffs' pleadings in the previous action, in which they demanded attorneys' fees, convey their understanding of when their right to attorneys' fees accrued.

³⁵ *Scharf v. Edgecomb Corp.*, 864 A.2d 909 (Del. 2004).

³⁶ *Id.*

CONCLUSION

For the foregoing reasons, this Court finds all claims incident to the Defendant's breach of contract must have been brought in the prior litigation, and must have been filed by February 2007. Therefore, Plaintiffs' claim is both barred by *res judicata*, and is untimely and barred by 10 Del.C. § 8106. Accordingly, ABC's Motion for Summary Judgment is hereby **GRANTED.**

IT IS SO ORDERED.

J.