



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRASCENT MANAGEMENT	:	
CONSULTING, LLC,	:	
	:	
Plaintiff-Below,	:	No. 126,2016
Appellant,	:	
	:	Court Below:
v.	:	Court of Chancery
	:	Case No. 10915-VCMR
	:	
GEORGE BOURI,	:	
	:	
Defendant-Below,	:	
Appellee.	:	

APPELLANT’S REPLY BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
I. PRELIMINARY STATEMENT	1
II. SUMMARY OF REPLY	2
III. ARGUMENT.....	4
A. Bouri’s Fraudulent Inducement Directly Affects His Entitlement To Contractual Advancement And, Therefore, Is Not A So-Called “Peripheral” Issue That May Be Ignored In An Advancement Proceeding.....	4
B. There Is No Support For Bouri’s Position That Delaware Public Policy Regarding Advancement Invalidates Legitimate Affirmative Defenses To Contractual Advancement Claims.	7
C. Bouri’s Newly-Raised Contention That Trascent’s Fraudulent Inducement Defense Was Untimely Is Without Merit And, In Any Event, Is Waived.	10
IV. CONCLUSION.....	11

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE(S)</u>
<i>DeLucca v. KKAT Mgmt., LLC</i> , 2006 WL 224058 (Del. Ch. Jan. 23, 2006).....	4
<i>Homestore, Inc. v. Tafeen</i> , 888 A.2d 204 (Del. 2005)	4
<i>Kuang v. Cole Nat’l Corp.</i> , 884 A.2d 500 (Del. 2005)	4
<i>Reserves Mgmt., LLC v. Am. Acquisition Prop. I, LLC</i> , 86 A.3d 1119 (Del. 2014)	10
<i>Tafeen v. Homestore, Inc.</i> , 2004 Del. Ch. LEXIS 38 (Del. Ch. Mar. 22, 2004).....	5, 7, 8
<u>COURT RULES</u>	<u>PAGE(S)</u>
Delaware Supreme Court Rule 8	10

I.

PRELIMINARY STATEMENT

This appeal arises out of Bouri's attempt to obtain advancement of his legal fees and expenses incurred in this action based on contracts that he procured by fraud. Based on notions of public policy and the limited nature of advancement proceedings, Bouri asks this Court to affirm the Court of Chancery's summary judgment order by ignoring basic legal principles, summary judgment standards, and un rebutted evidence that the Employment Agreement and LLC Agreement – the contracts containing the advancement provisions Bouri seeks to enforce – were induced by fraud.¹

For the reasons stated herein and in Trascent's Opening Brief, the Court should reverse the Chancery Court's ruling, which in effect establishes an irrebuttable presumption that contracts containing advancement provisions are valid and enforceable on a motion for summary judgment notwithstanding overwhelming and un rebutted evidence that such contracts were procured by fraud. Accordingly, Trascent respectfully requests that the Court reverse the Order entered by the Court of Chancery on Bouri's motion for summary judgment.

¹ There are many instances of fraud by Bouri that give rise to Trascent's affirmative claims in this action, but this appeal concerns only the effect of Bouri's fraudulent inducement of the Employment Agreement and LLC Agreement on Bouri's counterclaim for contractual advancement under those Agreements.

II.

SUMMARY OF REPLY

In his Answering Brief, Bouri asserts that the Court of Chancery properly rejected Trascient's fraudulent inducement defense to Bouri's claim for contractual advancement. In support of that position, Bouri contends that Trascient's defense of fraudulent inducement concerns "underlying conduct" that is purportedly outside the scope of an advancement proceeding. According to Bouri, fraudulent inducement can never be a defense to a claim for advancement arising out of a fraudulently-procured conduct – a result he touts as supported by Delaware law and public policy. Bouri further seeks to justify the Chancery Court's advancement ruling by characterizing Trascient's fraudulent inducement defense as "untimely."

Each of those arguments is without merit. First, Bouri's fraudulent inducement of the contracts from which his purported advancement right arises is determinative of his entitlement to advancement, which is the relevant issue presented by Bouri's motion for summary judgment on his counterclaim for contractual advancement. The fact that Bouri's fraudulent inducement *also* gives rise to affirmative claims in the underlying case does not invalidate the defense in the contractual advancement context. Second, Delaware law and public policy regarding advancement does not abrogate legitimate affirmative defenses to

Bouri's contract claim. Indeed, Bouri's own cited authorities demonstrate that public policy does not trump valid defenses to claims for advancement. Third, not only did Trascent timely raise (and support with summary evidence) its fraudulent inducement defense to Bouri's contractual advancement counterclaim, but Bouri's new argument that the defense was "belatedly" asserted was not raised in the Chancery Court proceedings and, therefore, is waived on appeal.

In sum, the Court of Chancery's Order granting summary judgment on Bouri's contractual advancement claim was erroneous and should be reversed.

III.

ARGUMENT

A. Bouri’s Fraudulent Inducement Directly Affects His Entitlement To Contractual Advancement And, Therefore, Is Not A So-Called “Peripheral” Issue That May Be Ignored In An Advancement Proceeding.

In the Answering Brief, Bouri brushes aside well-settled legal principles relating to breach of contract claims, fraudulent inducement, and summary judgment as inapplicable here due to the “narrow scope” of advancement proceedings. According to Bouri, his fraudulent inducement of the Agreements giving rise to the advancement right at issue “cannot be considered in an advancement proceeding.”²

However, as Bouri’s own authorities demonstrate, the relevant issue in an advancement proceeding is the movant’s “entitlement” to advancement.³ Naturally, fraud that vitiates the contractual advancement right at issue is a critical factor in determining entitlement to advancement. After all, a contract procured by fraud cannot be enforced against the defrauded party.⁴ Such fraudulent inducement

² See Appellee’s Answering Brief at 23 (citing *DeLucca v. KKAT Mgmt., LLC*, 2006 WL 224058, at *6 (Del. Ch. Jan. 23, 2006)).

³ *Id.* at 23-24 (citing *DeLucca*, 2006 WL 224058, at *6; *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 213 (Del. 2005); *Kuang v. Cole Nat’l Corp.*, 884 A.2d 500, 509 (Del. 2005)).

⁴ See Appellant’s Opening Brief at 18, n. 10 (citing decisions).

of the very contracts containing the advancement provisions at issue is anything but “peripheral” to the question whether there is entitlement to advancement. To the contrary, Bouri’s claim for contractual advancement in this case is wholly dependent upon the validity and enforceability of the very Agreements that Bouri procured by fraud. Trascent submitted substantial evidence that the Agreement were procured by fraud and, therefore, were not enforceable against Trascent. That evidence, unrebutted by Bouri, raises a disputed issue of fact precluding summary judgment on Bouri’s counterclaim for contractual advancement.

Bouri nevertheless asserts that advancement proceedings must exclude “issues regarding the movant’s alleged conduct in the underlying litigation,” even if that conduct impacts entitlement to advancement. In support of that position, Bouri relies upon *Tafeen v. Homestore, Inc.*, C.A. No. 023-N, 2004 Del. Ch. LEXIS 38 (Del. Ch. Mar. 22, 2004), which is addressed in detail in Trascent’s Opening Brief.⁵ That case, however, did not involve a situation where, as here, the underlying fraud induced the very contract containing the advancement provision. Rather, *Tafeen* concerned allegations that a former officer’s employment with the company was the product of fraudulent inducement and, as a result, the former officer was not entitled to the benefits – including advancement – granted by the corporate bylaws. That is not the case here.

⁵ *Id.* at 21-23.

In any event, the mere fact that Bouri's fraudulent inducement of the advancement-granting Agreements also gives rise to separate claims in the underlying action should not strip the fraudulent inducement defense of its efficacy in the advancement context. Bouri's effort to conflate affirmative defenses with affirmative claims should be rejected. Bouri is not entitled to advancement, because that contractual right was procured by fraud. In considering Bouri's motion for summary judgment on his contractual advancement claim, the Court of Chancery should have considered, rather than ignored, Trascen's fraudulent inducement defense. Trascen's evidence, at a minimum, raises a genuine issue of material fact as to Bouri's right to advancement under the Agreements. Accordingly, summary judgment on Bouri's claim for contractual advancement was not proper.

B. There Is No Support For Bouri's Position That Delaware Public Policy Regarding Advancement Invalidates Legitimate Affirmative Defenses To Contractual Advancement Claims.

Bouri seeks to justify the Court of Chancery's departure from settled legal precepts on the ground that Delaware public policy favors advancement. Citing the need for prompt resolution of advancement disputes and the use of advancement to attract qualified employees, Bouri takes the position that, given those policies, fraudulent inducement can never be a defense to a claim for contractual advancement. Contrary to Bouri's arguments, public policy does not justify the complete abrogation of valid affirmative defenses to contractual advancement claims on a motion for summary judgment.

As an initial matter, this is not a situation where advancement was used as a tool to entice an individual to join a company. Rather, the advancement provisions at issue only arose as a direct result of Bouri's fraudulent inducement of the Agreements. More importantly, as demonstrated by the *Tafeen* decision upon which Bouri relies, public policy does not invalidate affirmative defenses to claims for advancement. Specifically, in *Tafeen*, the Court of Chancery recognized that an affirmative defense (under the facts of that case, unclean hands) may preclude the entry of summary judgment on a claim for advancement.⁶ Tellingly, Bouri's

⁶ See *Tafeen*, 2004 Del. Ch. LEXIS 38, at *24-29, *45 (recognizing unclean hands as defense to advancement claim and denying summary judgment to former officer on advancement claim due to questions of facts regarding that defense).

Answering Brief glosses over that inconsistency with his position.⁷ In essence, Bouri's position implicitly adopts an "unclean hands defense" exception to Bouri's proposition that contractual advancement claims may never be defeated by otherwise-applicable affirmative defenses. That distinction makes no sense. Put simply, there is no rational or appropriate basis for allowing the assertion of some, but not all, affirmative defenses to a claim for advancement.

Bouri should have no right to advancement in the first place, as that alleged right was the direct product of Bouri's fraudulent inducement of the Agreements upon which Bouri bases his advancement claim. Having defrauded Trascient and its founder into executing the Agreements, Bouri now seeks to benefit from his fraud. Delaware public policy does not mandate advancement under these circumstances,⁸ nor does it relieve Bouri of his burden to establish, under the applicable summary judgment standards, his entitlement to contractual advancement under the Agreements. Bouri failed to meet that burden and,

⁷ Indeed, Bouri only acknowledges the *Tafeen* court's unclean hands ruling in a footnote to his brief. *See* Appellee's Answering Brief at 24, n. 16.

⁸ The impact of unwarranted advancement is no trivial matter to a relatively-small company such as Trascient – especially given the reality that Trascient will unlikely be able to ever recover the fees and expenses advanced to Bouri's lawyers, in light of Bouri's relocation to Beirut, Lebanon, and his perpetual inability (or unwillingness) to meet his ongoing financial obligations. *See* Appellant's Opening Brief at 16, n. 3.

therefore, the Court of Chancery erred in granting summary judgment on Bouri's claim for contractual advancement.

C. Bouri’s Newly-Raised Contention That Trascent’s Fraudulent Inducement Defense Was Untimely Is Without Merit And, In Any Event, Is Waived.

Bouri’s Answering Brief is rife with characterizations of Trascent’s fraudulent inducement defense as “untimely” and “belated.” Although not made an express basis for his argument on appeal, it appears that Bouri contends that Trascent did not timely raise its fraudulent inducement defense to Bouri’s advancement counterclaim. That position is without merit.

Trascent’s defense of fraudulent inducement to Bouri’s advancement counterclaim was timely asserted – as demonstrated by the fact that the defense was the subject of extensive summary judgment briefing and argument in the Chancery Court.⁹ In contrast, Bouri’s suggestion that the defense was “belatedly” asserted was never raised in the Court of Chancery. Instead, Bouri’s allegations in that regard were raised for the first time in Bouri’s Answering Brief on appeal.¹⁰ Accordingly, that argument is waived on appeal.¹¹

⁹ See Appellant’s Opening Brief at 15 (identifying portions of the record reflecting that the fraudulent inducement-related issue raised on appeal was presented to the Court of Chancery); Appellee’s Answering Brief at 20 (same).

¹⁰ Tellingly, Bouri’s Answering Brief does not specifically identify any part of the record below where he made and preserved that argument.

¹¹ See DEL. SUPR. CT. R. 8 (“Only questions fairly presented to the trial court may be presented for review . . .”); *Reserves Mgmt., LLC v. Am. Acquisition Prop. I, LLC*, 86 A.3d 1119, 2014 Del. LEXIS 90, at *13 (Del. 2014) (argument not made to the court below not considered on appeal).

IV.

CONCLUSION

For the foregoing reasons, Trascent respectfully asks this Court to reverse the Court of Chancery's Order granting summary judgment to Bouri on his claim for contractual advancement.

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