

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No.: 883-9-19 Cnev

VICTORIA BENNETT,)
Plaintiff,)
)
v.)
)
MARI SANDERSON, KATE KIRSCH,)
CLARENCE A. "TONY" LEE, III,)
CAROL FLETCHER, HARLAN GRUNDEN,)
KRIS BREYER, TERRI STURM,)
STEVEN HANDY, WILLIAM)
"MIKE" GOEBIG, JR., CINDY MUGNIER,)
SHARON "SHERRY" COLE, GEORGIE)
GREEN, JEFF GOVE, and CARRIE)
MORTENSEN,)
Defendants.)

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION
FOR ADVANCEMENT OF ATTORNEYS' FEES**

Plaintiff Victoria Bennett, by and through her counsel, Sheehey Furlong and Behm P.C., opposes Defendants' Motion for Advancement of Attorneys' Fees. The Court should deny Defendants' request for an advancement of attorneys' fees because Defendants fail to provide the required affirmative evidence showing that they acted in good faith and fail to demonstrate that they are unable to pay their legal fees, either through insurance or personal funds. Granting Defendants' request would compound the grave harms done by Defendants to the American Morgan Horse Association, Inc. ("AMHA") and its Membership by requiring the victims to pay for the legal defense of those who have stolen from them or facilitated such theft.

Relevant Factual Background

Plaintiff Bennett brings the present legal action to prevent Defendants from stripping the AMHA of assets and revenues, damaging AMHA, its Membership and ultimately the Morgan

horse breed. Almost all Defendants have been or are Directors of AMHA and, at all relevant times, Defendants have been members of AMHA.¹ [Amended Complaint ¶¶ 8–21.] AMHA is a New York not-for-profit corporation located in Shelburne, Vermont, which was formed to preserve, promote, and perpetuate the Morgan horse. [Amended Complaint ¶¶ 1–3.]

As detailed in the Amended Complaint, Defendants have overlapping and conflicting roles as AMHA Directors, Trustees of the American Morgan Horse Educational Charitable Trust (“AMHECT”), Directors of Morgan World Championship, Inc., (“WMC”), and Members of the Grand National Show Committee (“GNSC”), which is merely a committee of AMHECT deceptively operating as an independent legal entity. [See Amended Complaint ¶¶ 28, 43.] In these roles, Defendants have engaged in a series of self-dealing transactions causing AMHA to lose control of AMHECT, to be stripped of more than \$750,000 from AMHA’s Registry, Museum and Epperson trusts, and to convey, without adequate consideration, the rights of the Grand National & World Championship Morgan Horse Show, the associated trademarks, and revenues generated by the Show. [See Amended Complaint ¶¶ 28, 38, 39, 53, 55.] Because these self-dealing transactions between companies controlled by Defendants were intended to strip AMHA’s assets, the Court should not allow Defendants to further raid AMHA’s coffers to provide for their own defense.

Argument

I. The Court Should Not Advance Legal Fees Because Defendants Fail To Provide Affirmative Evidence Showing That They Acted In Good Faith.

Indemnification is available under New York law if a director or officer of a corporation “acted, in *good faith*, for a purpose which he reasonably believed to be in . . . the best interests of

¹ Defendant Carrie Mortensen is an officer, Secretary, and Executive Director of AMHA and Executive Director of AMHECT.

the corporation.” N.Y. N-PCL § 722(a) (emphasis added). Further, N.Y. N-PCL § 724(c) allows a director or officer of a not-for-profit corporation to seek advancement of legal fees even if the director or officer may not be ultimately be entitled to indemnification. To establish a basis for the advancement of legal fees, a director or officer need not “establish as a matter of law that his [or her] actions comported with the conduct standard set forth in N-PCL § 722, but only . . . raise a genuine question of fact or law that he [or she] so comported himself [or herself]” in good faith. *Kaloyeros v. Fort Schuyler Mgmt. Corp.*, 157 A.D.3d 1152, 1153–54, 69 N.Y.S.3d 739, 741 (N.Y. App. Div. 2018). Although this is not a demanding standard, the director or officer seeking advancement of fees must provide “some affirmative showing” of his or her good faith. *Kaloyeros v. Fort Schuyler Mgmt. Corp.*, 55 Misc. 3d 1082, 1088, 49 N.Y.S.3d 867, 873 (N.Y. Sup. 2017), *aff’d*, 157 A.D.3d 1152, 69 N.Y.S.3d 739 (N.Y. App. Div. 2018).

Here, none of the various Defendants has made any affirmative showing that they acted in good faith. As the court in *Kaloyeros v. Fort Schuyler Mgmt. Corp.* concluded, a failure to make such an affirmative showing is generally fatal to a request for advancement of attorneys’ fees. 157 A.D.3d at 1153–54, 69 N.Y.S.3d at 741 (denying request for advancement of attorneys’ fees because plaintiff did not provide an affidavit). Indeed, in almost every case, courts have required an “affirmed statement” by the director or officer that he or she acted in good faith. *See Levy v. Young Adult Inst., Inc.*, No. 13-CV-02861 JPO SN, 2015 WL 5333536, at *3 (S.D.N.Y. Sept. 14, 2015) (allowing advancement of attorneys’ fees where plaintiff “submitted a detailed affidavit refuting [defendant’s] counterclaims, along with accompanying documentation demonstrating a genuine factual dispute”); *Booth Oil Site Admin. Grp. v. Safety-Kleen Corp.*, 137 F. Supp. 2d 228, 238 (W.D.N.Y. 2000) (concluding affidavits denying any liability were sufficient); *Sequa Corp. v. Gelmin*, 828 F. Supp. 203, 207 (S.D.N.Y. 1993)

(determining defendant's affidavit denying corporation's allegation of fraud raised genuine issue).

Moreover, such an affirmative showing is particularly important here, because the Amended Complaint sets forth specific allegations that Defendants have engaged in a series of self-dealing transactions causing AMHA to lose valuable assets. For that reason, Defendants cannot rely on their Motion to Dismiss as a basis for advancing legal fees because nothing in the Motion to Dismiss raises a genuine issue as to Defendants' good faith. As described above, Plaintiff Bennett's Amended Complaint makes clear that Defendants have engaged in self-dealing as a result of their overlapping roles as directors, officers and/or committee members in AMHA, AMHECT, GNSC, and MWC. [See, e.g., Amended Complaint ¶¶ 28, 43, 44, 53, 54.] Rather than refute these claims in their Motion to Dismiss, Defendants argue that Plaintiff Bennett does not have standing, that the statute of limitations bars Plaintiff Bennett's claims, and that Plaintiff Bennett's claims are legally inadequate. These claims do not raise genuine issues of law or fact as to Defendants' good faith. *Cf. Kaloyeros*, 157 A.D.3d at 1153–54, 69 N.Y.S.3d at 741. Accordingly, the Court cannot advance legal fees based on Defendants' Motion to Dismiss.

In short, Defendants fail to assert that they acted in good faith and such a failure is fatal to their request for an advancement of attorneys' fees.

II. The Court Should Not Advance Legal Fees Because Defendants Fail To Demonstrate That They Are Unable To Pay Their Legal Fees.

Courts analyzing whether legal fees should be advanced have also considered whether the directors or officers have demonstrated that they are unable to pay or offered proof that insurance is not available to pay fees. *See Kaloyeros*, 157 A.D.3d at 1154, 69 N.Y.S.3d at 741 (discussing plaintiff's ability to pay and the availability of insurance coverage). Here, beyond counsel's

assertions on behalf of Defendants, nothing shows that Defendants are unable to pay for their legal fees. More importantly, AMHA's bylaws require AMHA to purchase and maintain all necessary insurance coverage for indemnification and reimbursement of directors and officers, and its Directors' Guide affirmatively states that AMHA has purchased such coverage. Defs. Mot. Ex. A at Bylaw 6.1 ("The Corporation shall purchase and maintain all necessary insurance coverage to the extent permitted by Section 726 of the New York Not-For-Profit Corporation Law."); Ex. 1 (AMHA Directors' Guide) at 9 ("Board Liability[:] The AMHA has Directors' and Officers' insurance that covers errors and omissions of the board."). Defendants have provided no proof that AMHA's insurance company cannot advance their attorneys' fees. Not only do Defendants fail to demonstrate a lack of Directors' and Officers' (D&O) insurance coverage, but they also conceal from the Court the existence of such coverage. In their Motion, Defendants rely on and quote Bylaw 6.1 regarding indemnification, but they omit the final sentence—and only the final sentence—which requires the purchase of D&O insurance. *See* Defs' Mot. at 3. Why do Defendants hide this fact from the Court? Have Defendants or AMHA made a claim under such policy? Was such a claim denied by the insurer because Defendants have engaged in self-dealing? And, if so, would not the denial be relevant to the Court's consideration of Defendants' request to use AMHA funds for their personal benefit? Given these unanswered questions regarding D&O insurance coverage and Defendants' personal funding, it is not appropriate for the Court to advance legal fees.

Conclusion

For the reasons set forth above, the Court should deny Defendants' Motion for Advancement of Attorneys' Fees.

Dated at Burlington, Vermont this 30th day of December 2019.

VICTORIA BENNETT

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EXHIBIT 1



**AMHA
DIRECTORS'
GUIDE
2019**

FOREWARD

The purpose of this guidebook is to provide directors with guidance on their roles and responsibilities, to familiarize them with the procedures and principles of the organization, and to maximize their level of participation. Directors are required to act within their authority, to exercise stewardship for the organization, and to carry out their fiduciary responsibilities.

The AMHA Director's Handbook is compiled from non-profit, business, government, and professional resources. Feedback and suggestions for additional content or clarifications are solicited from the AMHA Board of Directors.

The reference folder found on the board extranet has supporting information that may be more easily updated, outside of this reference guide (e.g. director contact info, forms)

Reading through the summary of motions gives history; directors must be familiar with this document.

5. Other Potential Issues

- A. Any ownership position held in any vendor/supplier firm must be disclosed to the board president and/or the executive director.
- B. Any family member employed by a vendor/supplier, or who has a financial interest in a vendor/supplier must be reported to the board president and/or the executive director.
- C. Any situation, or involvement with a vendor/supplier that could be construed, by a reasonable person, as a potential conflict of interest must be reported to the board president and/or the executive director.

6. Political Contributions and Activities

- A. The use of AMHA funds for political contributions, whether direct or indirect, is prohibited.
- B. Political activities: Both the free democratic process and the AMHA encourage individual employees to be active participants in public affairs and to support the party and candidates of their choice. Occasions may arise when these actions may appear to be in conflict with the prohibition of political contributions by the AMHA. Directors must be alert to this situation and obtain formal approval from the executive director or president before giving authorization in any instance where there is the slightest question as to the propriety or legality of an action.

7. Financial Statements

The AMHA has high standards for achieving its operating and financial objectives. These results must be achieved with the same high standards for accounting and financial reporting methods. Accounting and financial reporting practices must be fair and proper, in accordance with generally accepted accounting principles (GAAP), and using the board's best judgments.

The AMHA does not condone practices that might lead to fraudulent or deceptive financial reporting. While difficult to give an all-inclusive definition of fraudulent or deceptive financial reporting, it is, in general, any intentional or reckless conduct, whether by act or omission, that results in materially misleading financial statements. Clear, open, and frequent communication on all significant financial and operating matters will substantially reduce the risk of problems in accounting and financial reporting areas and will help us achieve operating goals of the AMHA. All board members, directors, emeriti, and officers are expected to be aware of these risks and to communicate accordingly.

8. Responsibility

The board president has the responsibility for the oversight of this policy throughout the organization. The executive director has responsibility for the administration of this policy.

On at least an annual basis, the executive director will conduct a survey of all AMHA employees, officers, board members, and directors' emeriti falling within the scope of this policy and give the Executive Committee a report of declared conflicts, if any, or a statement that no conflicts were declared.

9. Board Liability

The AMHA has Directors' and Officers' insurance that covers errors and omissions of the board.