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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Mikael SALOVAARA, Plaintiff-Respondent/Cross-Appellant,
v.
Alfred C. ECKERT, III, SSP Advisors, L.P., a Delaware Limited Partnership, and
SSP Partners, L.P., a Delaware Limited Partnership, Defendants-
Appellants/Cross-Respondents.

Argued Jan. 24, 2006.
Decided April 13, 2006.

SYNOPSIS
On appeal from the Superior Court of New Jersey, Chancery Division, Morris County, C-126-96 and L-539-99.

Michael K. Furey argued the cause for appellants/ cross-respondents (Riker Danzig Scherer Hyland & Perretti, attorneys; Mr. Furey, of counsel; Mr. Furey and Michael E. Gogal, on the brief).

Joseph L. Buckley argued the cause for respondent/ cross-appellant (Sills Cummis Epstein & Gross, attorneys; Mr. Buckley, of counsel; Mr. Buckley, Richard H. Epstein and Jonathon S. Jemison, on the brief).

Before Judges COBURN, LISA and S.L. REISNER.

PER CURIAM.

***1** In 1991, Mikael Salovaara and Alfred C. Eckert, III, resigned from their partnerships in a major Wall Street investment banking firm to engage in various aspects of the securities and investment business as equal partners. In 1994, Salovaara sued Eckert for breach of their partnership agreements ("*Salovaara I* "). In 1996, Salovaara filed another complaint challenging Eckert's right to indemnification from two of the limited partnerships for his legal costs incurred in defending the first action ("*Salovaara II* "). After conducting a twenty-three day bench trial in *Salovaara I,* Judge MacKenzie rejected some of Salovaara's claims, but found others to be valid, and entered judgment against Eckert in the amount of $4 million plus interest and costs. The judgment was entered in July 1998, and Eckert appealed. In 1999, while that appeal was pending, Salovaara filed a third action against Eckert seeking disbursement of monies held by two of the partnerships controlled by Eckert ("*Salovaara III* "). The judge consolidated *Salovaara II* and *Salovaara III.* On Eckert's appeal in *Salovaara I,* we affirmed o.b., *Salovaara v. Eckert,* No. A-5283-99 (App.Div. Jan. 4, 2002), *certif. denied,* 172 N.J. 177 (2002).

In the consolidated action, Eckert applied to Judge MacKenzie for an order directing defendants SSP Advisors, L.P., and SSP Partners, L.P., both Delaware limited partnerships (the "SSP entities"), to pay the legal fees Eckert incurred in *Salovaara I.* Although his total legal fees appear to have been $3,017,134.17, he argued to Judge MacKenzie that he was entitled to seventy percent of that amount, or $2,111,993.91. Cross-motions for summary judgment resulted in the judge ordering that Eckert could be indemnified for claims on which he won, but not for those he lost, and the judge set the amount of the indemnification for Eckert's counsel fees at $360,336.51. The judge also dismissed *Salovaara III,* although that relief had not been requested. Eckert appealed, seeking a greater counsel fee award, and Salovaara cross-appealed, opposing the amount given, the increase sought by Eckert, and the dismissal of *Salovaara III.*

The main dispute is Eckert's claim for reimbursement for legal fees he incurred in defending *Salovaara I.* Although Eckert had argued below for a little over $2 million, on appeal he contends that he is entitled to $1,024,835. Salovaara contends that Eckert is entitled to nothing, or no more than $12,300.

The parties agree that Eckert's general entitlement to reimbursement of the legal fees he incurred in defending *Salovaara I* primarily depends on the judge's findings of fact and conclusions of law in *Salovaara I* and on the terms of the indemnification agreement, but Eckert claims that the judge's findings in *Salovaara II* are inconsistent with his findings in *Salovaara I* and that his conclusions of law are

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erroneous. The validity of the specific amount awarded by the judge turns on the nature of the opposing presentations respecting how the award should be calculated.

***2** After carefully considering the record and briefs, we affirm the counsel fee award substantially for the reasons expressed by Judge MacKenzie in his thorough and well-reasoned written opinions dated September 24, 2002, and May 25 and October 18, 2004. Nonetheless, we add the following comments.

Eckert's claim for reimbursement of the counsel fees he incurred in *Salovaara I* required interpretation of an indemnification clause in the parties' contracts. With one exception, the contracts provided for indemnification of the individuals by the partnerships "[t]o the fullest extent permitted by law" for, among other things, "all liabilities" and "expenses of defense ... in any way relating to or arising out of ... any and all suits ... relating to the" partnerships. The exception, for which there was to be no indemnification, was for a breach of a duty described in Section 10.2, which stated:

> The sole duty of the General Partner to the Partnership and to the Limited Partners shall be to act in a manner that does not ... constitute willful misconduct or bad faith in connection with the management of the business and assets of the Partnership.

The question that Judge MacKenzie had to decide was whether Eckert's conduct constituted "bad faith" or "willful misconduct."

In *Salovaara I,* Judge MacKenzie concluded that Eckert's conduct in accepting a leadership position with a competing company and ceasing to actively promote the parties' partnerships violated the "best efforts" clause of the parties' written partnership agreements; constituted a breach of his "fiduciary duty not to compete" with the partnerships; and violated "the implied covenant of good faith and fair dealing."

Eckert argues that three specific findings in the *Salovaara I* decision are critical to his appeal. The first finding occurred during the judge's discussion of his reasons for rejecting Salovaara's claim against Eckert for fraudulent inducement. The judge said that

> it is unclear as to whether Eckert was aware he could not continue on as a partner with [Salovaara] and an employee with Primerica [the competing entity]. Indeed, the evidence produced at trial seems to establish that Eckert, (wrongly, as it turns out) thought he could work in both positions.

But Judge MacKenzie made that finding in support of his conclusion that "Salovaara cannot establish that Eckert made a knowingly false representation about the results of signing the [partnership] agreement." That Eckert may have thought at the beginning that he could work for both entities hardly shows that his subsequent conduct accorded with his obligation to refrain from "willful misconduct or bad faith in connection with the management of the business and assets of the Partnership."

The second and third findings, which are in fact almost identical, occurred during the judge's discussion of Salovaara's claim that Eckert should forfeit his interest in their partnership and during his discussion of Salovaara's claim for punitive damages. The judge rejected both claims, in part, because "[Eckert's] actions appear ill-advised rather than ill-willed" or because "it seems that his actions were more ill-advised than ill-intended." Eckert argues that having described Eckert's actions as "ill-advised," the judge could not later determine that they were committed in "bad faith" or constituted "willful misconduct."

***3** The parties agree that this aspect of the case is controlled by the law of Delaware. In that state, bad faith has been described as hinging "on a party's tortious state of mind ... not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of a dishonest purpose or moral obliquity." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.,* 624 A.2d 1199, 1208 (Del.1993) (citations omitted). In *Salovaara I,* Judge MacKenzie found that "Eckert's attempt to serve both [the partnership] and Primerica was unprecedented (and unacceptable) in the financial business, and that ... [i]t [was] simply not credible to suggest that Eckert could serve both ... equally well at all times." He held that since "Eckert violated his best efforts duty" by taking leadership positions with both companies, "it [was] almost axiomatic that Eckert violated the implied covenant of good faith and fair dealing." In *Salovaara II,* Judge Mackenzie referred to those findings and asserted that "it is virtually inconceivable that Eckert was not aware he would be directly competing with [the partnership] given his vast knowledge of the industry and how it operates," and noted that "it [is] difficult to believe that Eckert did not 'know' he would not be applying his 'best efforts' to further the success of [the partnership]."

In *Strassburger v. Earley,* 752 A.2d 557, 581 (Del. Ch.2000), the court found three directors had

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breached their duty of loyalty to their corporation and held that one director had acted in bad faith because he unjustly enriched himself and "personally obtained a unique benefit paid for entirely with corporate assets," while the other two realized no personal benefit, nor took any affirmative action to enable the first to do so. The court found that the latter two directors breached their duty of loyalty by being "indifferen[t] to their duty to protect the interests of the corporation and its minority shareholders." *Ibid.* Eckert is like the first director who took affirmative steps in breach of his duty of loyalty and did so with only his self-interest in mind.

In the case of fiduciaries, willful misconduct occurs when the fiduciary knowingly takes a self-interested action that has no reasonable business or partnership purpose. *Gelfman v. Weeden Investors, L.P.,* 859 A.2d 89, 113-17 (Del. Ch.2004).

In *Salovaara II,* Judge MacKenzie had this to say about Eckert's willful misconduct:

> There is little doubt [Eckert] understood the implications of going to work for a company that directly competed with [the partnership]. His leaving to go to Primerica, his failure to provide his "best efforts" to [the partnership], and his direct solicitation of client[s] that could potentially have become [partnership] clients were all voluntary and knowing acts. Although his belief that he could service both may have been "ill-advised" as this Court has ruled, his act not to give his "best efforts" was willful, and thus was misconduct as well.

***4** The task before Judge MacKenzie was to interpret the indemnification clause of the parties' contract. Although the agreement did not itself define "bad faith" or "willful misconduct," he inferred, based in part on the meaning giving to those phrases by Delaware, that the parties' purpose here "was to prevent the indemnification of a partner who pursued his own self interest." Otherwise, as he noted, the indemnification clause, which provides for indemnity for both counsel fees and liability damages, would be "ineffective and illusory." We agree with Judge MacKenzie's interpretation of the principles of Delaware law and with his interpretation of the indemnification agreement.

We turn next to the criticisms of the amount of indemnification for counsel fees awarded by Judge MacKenzie with respect to those claims on which Eckert prevailed. The parties' agreement provided that "the indemnification obligation ... shall not apply to the portion of any liability ... cost, expense or disbursement that results from the breach of a duty expressly imposed by Section 10.2 hereof." On May 25, 2004, Judge MacKenzie issued a letter opinion, noting that he had previously ordered Eckert "to submit papers setting forth the specific amount of indemnification" to which he believed he was entitled. He also noted that the parties agreed that Eckert was entitled to indemnification with respect to three of Salovaara's claims on which he prevailed. Finally he observed that he could not determine from "Eckert's voluminous submissions" how much of the fees Eckert incurred were attributable to the issues on which he prevailed. Consequently, he directed Eckert "to submit ... fees and costs associated solely to the issues determined to be subject to indemnification."

Neither party describes in detail the submissions thereafter made to the judge on the counsel fee issue. By an order dated October 18, 2004, the judge resolved the issue by awarding Eckert $360,336.51. The judge's statement of reasons on the order reads as follows:

> In its last order, the Court refused to enter a final award to defendant Eckert on the indemnification issue because the parties failed to provide a satisfactory calculation of the hours expended on the issue he had prevailed upon. Each party has submitted a percentage generated methodology. The Court does not accept defendant Eckert's assertion that he won on 50% of the issues because he did not and thereby denies his application for 50% of the [approximately $2 million] fee paid. Plaintiff's approach is marginally better, which produces the result.

Eckert contends that the judge "ignored the well established case law that a partially successful claimant who is unable to specifically identify what services were performed solely on the successful claims should not be penalized and denied all fees." And in particular, he cites this proposition from *May v. Bigmar, Inc.,* 838 A.2d 285, 290 (Del. Ch.2003), *aff'd,* 854 A.2d 1158 (Del.2004):

> ***5** While greater detail in contemporaneous record keeping is obviously helpful where a claim for partial indemnification is made, the court is not persuaded that the failure to keep better records should lead to disallowance of the claim. There is enough information in the time records to get a general idea, and it is possible to make a good faith estimate, of proper allocation.

Although the trial judge did not cite any cases in his opinion on the amount of indemnification, it is perfectly obvious that he did not limit the award to compensation for items that Eckert had shown as

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related to specific hours devoted solely to claims on which he had prevailed. Indeed, as Salovaara points out, had the judge followed that course, the fee award would have been only $12,300. In short, the judge applied the principle cited above by making a good faith estimate of the proper allocation, and neither side has presented detailed arguments showing that the amount awarded was inconsistent with a reasonable assessment of that portion of the billing by Eckert's attorneys that applied to the claims on which he prevailed.

Salovaara argues that Eckert was not entitled to any indemnification "because he admits that all of his fees relate to his bad faith and willful misconduct." That argument is based on Eckert's contention that Salovaara's claims were so interrelated that his attorneys could not be expected to provide a breakdown of their hours with respect to the time spent on each claim. In support of this argument, Salovaara cites the proposition that "[t]he indemnitee bears the burden of persuasion on the allocation or apportionment." *Cent. Motor Parts Corp. v. E.I. du Pont de Nemours & Co., 251 N.J.Super. 5, 12 (App.Div.1991)*. Salovaara concludes that since Eckert's attorneys did not provide the breakdown sought by the judge, Eckert's claim for indemnification had to be rejected.

Quite obviously, Eckert did not concede that all of his fees related to his bad faith and willful misconduct. That is absurd since Eckert prevailed entirely on at least three of Salovaara's claims and was entitled to indemnification under the parties' agreement with respect to those claims. Moreover, the judge did not shift the burden of persuasion to Salovaara; rather, he followed the approach of *May, supra.* Therefore, we find no basis for interfering with this aspect of the judgment.[FN1]

FN1. Salovaara notes that although the award in the October 18, 2004, order was $360,336.51, the final judgment awarded Eckert $360,366.51. Therefore, he asks that the judgment "should be corrected on appeal." He is correct, but the error is de minimus, and we trust that the parties will be able to resolve it without further imposition on the trial court.

The last issue concerns the effect of the final judgment on *Salovaara III.* In that case, which was consolidated with *Salovaara II* by an order entered on June 25, 1999, the complaint alleged conversion, breach of contract, and two counts for breach of fiduciary duty. Those allegations concerned issues not litigated in either *Salovarra I* or *Salovaara II.* Implicitly, the judgment dismissed *Salovaara III* since it was described as a final judgment and the cases had been consolidated. In a note on the judgment, Judge MacKenzie observed that "[t]here is no remaining issue for determination in that portion of this consolidated case [referring to *Salovaara III*]." The judge's conclusion was incorrect. Indeed, on appeal Eckert does not take issue with the statement in Salovaara's brief that "[i]t is undisputed that these claims for conversion, breach of contract and breach of fiduciary duty have not been adjudicated." Rather, Eckert attempts to sustain this aspect of the judgment by arguing that Salovaara "waived his remaining claims in *Salovaara III* both expressly through his counsel and implicitly by his inactivity."

***6** As to the waiver by counsel, Eckert argues that during the October 15, 2004, oral argument "both parties told the trial court that there were no remaining issues in the case." Conceding, however, that "Salovaara's counsel's comment is absent from the transcript," Eckert argues that nonetheless "it is clear from the trial court's response and the lack of an objection thereto, that it occurred." The portion of the transcript in question reads as follows:

THE COURT: Thank you, sir. Do you also agree with something that Mr. Buckley said in passing: That this may be the final stage in this Court of the litigation?
MR. FUREY: I hope so. I hope so.
THE COURT: All right. That sounds slightly hedged.

In short, the transcript fails to provide adequate support for the proposition that Salovaara's counsel was agreeing to dismissal of *Salovaara III.*

Eckert also argues that because Salovaara delayed his pursuit of the third case, he was barred from pursuing it after the resolution of the *Salovaara II* issues by the doctrines of estoppel or laches. He cites to *Knorr v. Smeal, 178 N.J. 169, 178-81 (2003)*, but that case involved a delayed motion and is not on point. Here, there is no evidence of delay by Salovaara. All that "occurred" is that the judge did not list the matter for trial, concentrating instead on the fee issue that needed to be resolved in *Salovaara II.* The judge did not dismiss the case because of delay on Salovaara's part. Rather, it seems he took that action because he misunderstood a remark apparently made by Salovaara's counsel in an off-the-record discussion. That is far too thin a reed to support *sua sponte* dismissal of a viable cause of action. Therefore, we remand *Salovaara III* for such further proceedings as may be required for disposition.

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Affirmed in part; reversed in part; and remanded for further proceedings.

N.J.Super.A.D.,2006.
Salovaara v. Eckert
Not Reported in A.2d, 2006 WL 941792 (N.J.Super.A.D.)

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