



Mikael Salovaara v. Alfred C. Eckert III,

Docket No. MRS-C-126-96

**SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, MORRIS
COUNTY**

2004 N.J. Super. LEXIS 497

May 25, 2004, Decided

COUNSEL: [*1] Michael K. Furey Esq., Riker Danzig Scherer Hyland Perretti, Morristown, NJ.

Joesph L. Buckley Esq., Sills Cummis Epstein & Gross, Newark, New Jersey.

JUDGES: Kenneth C. MacKenzie, P.J. Ch.

OPINION BY: Kenneth C. MacKenzie

OPINION

Gentlemen:

On January 13, 2003, Alfred C. Eckert ("Eckert") was ordered to submit papers setting forth the specific amount of indemnification he is entitled to for legal fees and expenses incurred in *Salovaara I* including supporting documents. After reviewing the submissions of both parties, the Court has issued this interim decision regarding the scope of Eckert's indemnification.

By Order dated October 8, 2002 the Court granted Eckert summary judgment and allowed indemnification by the SSP entities for the claims he prevailed upon in *Salovaara I*. SSP Partnerships advanced Eckert \$ 3,017,134.17 for legal fees and expenses incurred in *Salovaara I*. Eckert submits that he is entitled to 70% of that amount or \$ 2,111,993.91. In the alternative, Eckert argues that if he were to adopt Salovaara's methodology he would still be entitled to 64% of his defense costs.

The Court's decision of July 14, 1998 encompassed various issues decided for and against the parties. The issues decided in Eckert's [*2] favor were 1. the "Oral Umbrella Master Partnership issue and related Statute of Frauds issue; 2. the Corporate Opportunity issue; and 3. Salovaara's fraud allegation. The Court resolved the following issues in Salovaara's favor: 1. the "best efforts issue" 2. the "unlawful competition" issue and 3. the damages issue. However, the parties dispute the manner

in which the damages issue is to be resolved in regards to the pending application.

Eckert argues that Salovaara lumps all of the damage theories he asserted and characterizes it as a complete win. Eckert points out that the Court specifically addressed each of Salovaara's theories in the decision and issued separate and distinct rulings most of which were decided against Salovaara. Specifically, the Court considered and rejected the following: 1. damages equal to a forfeiture by Eckert of his interest in the partnership; 2. punitive damages; 3. Salovaara's lost profit argument which assumed that \$ 100 - \$ 150 million could have been raised with a reasonable degree of certainty and a 25% per annum return over a five year term. Instead, the Court performed its own damage analysis and allowed that only \$ 17 million more, for a total [*3] of \$ 50 million would have been raised for the SS2 Funds and applied a 15% per annum rate of return.

Eckert cites to *Singer v. State of New Jersey*, 95 NJ. 487, 500 (1984); *Rendine v. Pantzer*, 141 N.J. 292, 336 (1995) and *DePalma v. Building Inspection Underwriters*, 350 N.J. Super. 195, 219 (App. Div. 2002) for the proposition that the court can determine whether the expenditure of counsel's time on the entire litigation was reasonable in relation to the relief achieved by the party if it was only limited in comparison to the relief sought. In this instance Eckert is not the prevailing party, but merely entitled to indemnification. Eckert argues that he was required to defend against Salovaara's unrealistic and inflated damages, which ultimately were rejected by this Court when it awarded only \$ 4,000,000 in damages versus Salovaara's claim of between \$ 18.4 and \$ 33.75 million. Therefore, Eckert asserts that the damage issue was basically a "split decision" which went his way far more than Salovaara's. As such, Eckert argues that he is entitled to be indemnified for at least half of his costs in defending against Salovaara's damages claims.

In response, Salovaara argues that the agreements [*4] permit indemnification only for legal fees attribut-

able to claims that do not involve Eckert's willful misconduct and bad faith as found by the Court, (i) oral master partnership issue; (ii) corporate opportunity issue; and (iii) the fraud issue. Salovaara asserts that the Court awarded \$ 4 million in lost profits for Eckert's bad faith and willful conduct. Further, Salovaara points to the Limited Partnership Agreements for SSP Partners, L.P. and SSP Advisors, L.P., which forbids indemnification for: "the portion of any liability ... cost, expense, or disbursement that results from the breach of a duty expressly imposed by section 10.2 hereof." Section 10.2 imposes that duty to act "in a manner that does not constitute willful misconduct or bad faith." Moreover, Salovaara notes that this Court found and the Appellate Division affirmed that Eckert had breached his fiduciary duty not to compete with his business, Greycliff Partners. Specifically, the Court found that Eckert could not be indemnified for litigation expenses associated with those claims. Thus, Salovaara argues that fees attributable to Eckert's willful misconduct and bad faith include his defense to the damages that arose [*5] from this acts of disloyalty, here the lost profits.

The parties agree that Eckert is entitled to indemnification on legal expenses and costs associated with the (i) oral master partnership issue; (ii) corporate opportunity issue; and (iii) the fraud issue. As such, the Court only will address the issue of whether Eckert is entitled to partial indemnification on the damages issue.

WHETHER ECKERT IS ENTITLED TO INDEMNIFICATION ON ATTORNEY'S FEES AND COSTS ASSOCIATED WITH DAMAGES CLAIMED BY SALOVAARA

The Intermediate SSP Partnership agreements provide for indemnification for legal fees and expenses. Section 10.4(a) provides:

The Partnership ... shall indemnify and hold harmless the General Partner and each Affiliate ... from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, claims, proceeding, costs, expenses and disbursements of any kind or nature whatsoever ... that may be imposes upon, or incurred by, or asserted against the General Partner or any Affiliate ... in any way relating to or arising out of, or alleged to relate to or arise out of, any action or inaction on the part of the General Partner or any Affiliate ... that relates in any [*6] way to the Partnership or the business or assets thereof, provided, however, that the indemnification obligation ... shall not apply to the portion of the any liability ... cost, expense or disbursement that results from the breach of a duty expressly imposed by section 10.2 hereof.

However, Section 10.2 imposes on the General Partner and its Affiliates "the sale duty ... 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."

This Court's lost profits award was a direct result of Eckert's bad faith and willful misconduct. Eckert's argument that he "won" on the profits issue misses the point. Eckert could only have won on the profit issue if no profits were awarded to Salovaara. Here, because the Court found that Eckert had acted in bad faith and willful misconduct lost profits could be attributed to these actions. According, because the lost profits issue stems directly from the Court's finding that Eckert acted in bad faith and engaged in willful misconduct Eckert cannot be indemnified for attorneys fees and costs as enumerated under Section 10.4(a) and Section 10.2 of the Intermediate SSP Partnership Agreements.

Moreover, [*7] Eckert's appeal costs are also precluded from indemnification because they deal exclusively with the issues that he lost on. Further, any of the post-trial phase dealing with the lost profit judgment issue such as pre-judgment interest are also precluded because they stem directly from the award of lost profits due to Eckert's bad faith and willful misconduct; had lost profits not been awarded pre-judgment interest would not exist. Additionally, Eckert's counterclaims are also precluded from indemnification, as noted by Eckert in his reply brief. Eckert also notes that his costs on the Accounting are not at issue here, because the SSP Partnerships did not pay for them in the first place.

In sum, Eckert is entitled to indemnification on the following issues: the (i) oral master partnership issue; (ii) corporate opportunity issue; and (iii) the fraud issue. The Court finds unworkable Salovaara's counting of trial testimony and attributing every line to an issue. This case continued over many years and through much motion practice. Thus, Eckert spent \$ 2,049,671.99 through trial, however, the costs associated with the trial days themselves totaled less than \$ 200,000. Further, an overwhelming [*8] majority of Salovaara's attorney's fees were also incurred outside the Courtroom.

Furthermore, the Court cannot cull through Eckert's voluminous submissions and determine how much of the \$ 2,049,671.99 spent was attributable to the (i) oral master partnership issue; (ii) corporate opportunity issue; and (iii) the fraud issue. As such, an interim decision is advisable; the Court orders Eckert to submit to fees and costs associated solely to the issues determined to be subject to indemnification.

Very truly yours,

/s/ Kenneth C. MacKenzie

Kenneth C. MacKenzie, P.J. Ch.