

**Barrett v Toroyan**

2006 NY Slip Op 30080(U)

Supreme Court, New York County

Decided: March 21, 2006

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III  
*Justice*

PART 56

PATRICK D. BARRETT

INDEX NO. 112012/04

- v -

KEVORK TOROYAN

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

MAR 22 2006

NEW YORK COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

Dated: 3/21/2006

RICHARD B. LOWE III J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 56

-----X  
PATRICK D. BARRETT, Individually and as a Limited  
Partner of Delma Associates, LP, for the benefit of Delma  
Associates, LP,

Index No. 112012/2004

Plaintiff,

- against -

KEVORK TOROYAN, DELMA ASSOCIATES, LP, DELMA  
PROPERTIES INC., DELMA ASSOCIATES II, LLC,  
NABIL SHAWWA, WA'EL KHOURY, and  
ISSAM HOURANI,

**DECISION  
AND ORDER**

Defendants.  
-----X

**RICHARD B. LOWE, III, J.:**

Plaintiff Patrick D. Barrett (Barrett) moves this court to prohibit defendants Kevork Toroyan (Toroyan), Delma Associates, LP (Delma), Delma Properties Inc. (Delma Properties), Delma Associates II, LLC (Delma II), Nabil Shawwa (Shawwa), Wa'el Khoury (Khoury), and Issam Hourani (Hourani) from advancing litigation expenses to the firm of LeBeouf, Lamb, Greene & MacRae, LLP, from funds belonging to Delma, and to restore all funds previously advanced.

**BACKGROUND**

The underlying dispute and facts have been discussed in the decision of the court entered June 25, 2005 and, as such, will not be reiterated here.

**DISCUSSION**

Barrett moves to prohibit the defendants from advancing litigation expenses to defendants' attorney from funds belonging to Delma, and to restore all funds previously paid by Delma to

defendants' attorney back to Delma. The plaintiff argues that under Delaware law and under the Limited Partnership Agreement, the defendants are prohibited from "advancing" such funds. Furthermore, the plaintiff argues that there is self-dealing. The defendants counter that because Delma is run by general partner Delma Properties, and since litigation costs may be advanced pursuant to the Bylaws of Delma Properties, the plaintiff cannot make such an application. Because Delma is incorporated under Delaware law and because the agreement provides that Delaware law governs (*see* Rohback Aff, Ex. 1), the court interprets the documents according to Delaware law.

The Limited Partnership Agreement and Bylaws are interpreted "using standard rules of contract interpretation which require a court to determine from the language of the contract the intent of the parties" (*Kaiser Aluminum Corp. v Matheson*, 681 A2d 392, 395 [Del 1996]). "In discerning the intent of the parties, the [documents] should be read as a whole and, if possible, interpreted to reconcile all of the provisions of the document[s]" (*id.*) "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language (*Eagle Indus. v DeVilbiss Health Care*, 702 A2d 1228, 1232 [Del 1997], citing *Rhone-Poulenc v American Motorists Ins.*, 616 A2d 1192, 1196 [Del 1992]). However, when provisions "are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity" (*id.*), and, accordingly, the court "must look beyond the language of the contract to ascertain the parties' intentions" (*id.*).

The specific section at issue is Section 5.05 of the Limited Partnership Agreement of Delma, which states:

Section 5.05. Indemnification of General Partner. The General

Partner shall be indemnified by the Partnership on account of any loss which it may incur in its capacity as a General Partner, and on account of any claim, liability, action or damage for any act performed or omitted to be performed by it within the scope of the authority conferred by this Agreement and made or omitted to be made in good faith or based on the opinion of counsel, and on account of all reasonable attorney's fees incurred in connection therewith, except for acts of fraud, malfeasance or gross negligence, provided that any indemnity under this Section shall be paid out of and to the extent of Partnership assets only. The General Partner shall not be obligated to the Limited Partners for the repayment of all or any part of their capital contributions.

(See Hoffman Aff, Ex. 1 at 10).

The plaintiff argues that, under the Partnership Agreement, the defendants may not advance litigation funds, but may only seek indemnification for litigation expenses, after this litigation is complete. Indeed, there is no dispute that the terms "indemnification" and "advancement" are different (see *Homestore, Inc. v Tafien*, 888 A2d 204, 211 [Del 2005]). As the Delaware Supreme Court explains, indemnification protects individuals from depletion of "personal financial resources" that "they incur during an investigation or litigation that results by reason of" their corporate service, but "cannot be established [] until *after* the defense to legal proceedings has been successful on the merits or otherwise" (*id.* [emphasis added]). Advancement, on the other hand, "provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant *on-going* expenses inevitably involved with investigations and legal proceedings" (*id.* [emphasis added]). Here, there is no dispute that, under this Limited Partnership Agreement, there is an indemnification provision, but no advancement provision.

However, there is also no dispute that Delma, the limited partnership, has no employees or operations of its own (see Hoffman Aff ¶ 13). Indeed, both parties concede that Delma is run

through Delma Properties as general partner of Delma (*see id.*; *see also* Def Memo in Opposition at 1). Thus, pursuant to Section 5.02 of the Limited Partnership Agreement, it is Delma Property's responsibility as general partner to "bring and defend actions at law or in equity" (*see* Hoffman Aff, Ex. 1 at 8), "to employ or retain persons" such as accountants and attorneys (*id.*), and "to do and perform all such other things as may be in furtherance of the Partnership purposes and necessary or appropriate to the conduct of its business" (*id.* at 9).

Furthermore, the Bylaws of Delma Properties, through the Board of Directors, specifically allow for the advancement of litigation costs prior to the completion of a litigation. Pursuant to the Article VII, Section 1 (b) of the Bylaws of Delma Properties:

The Corporation [Delma Properties] shall indemnify . . . *any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit* by or in the right of the Corporation . . . by reason of the fact that he is or was a director, officer, employee or agent of the Corporation . . . against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Corporation....

(*See* Rohback Aff, Ex. 1 at 7 [emphasis added]). Section 1 (e) of the Bylaws of Delma Properties provides that:

Expenses incurred by a director, officer, employee or agent in defending a civil or criminal action, suit or proceeding may be paid by the Corporation [Delma Properties] *in advance* of the disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the Corporation as authorized in this Section. Such expenses incurred by other employees and agents may be so paid upon such terms and conditions, if any, as the Board of Directors deems appropriate.

(*See id.*, Ex. 1 at 8 [emphasis added]). As well, Section 1 (f) notes:

The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this Section shall not limit the Corporation from providing any other indemnification or advancement of expenses permitted by law nor shall they be deemed exclusive of any other rights to which a person seeking indemnification or advancement of expenses may be entitled under any by-law, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office.

(*See id.*).

Indeed, it is uncontroverted that, pursuant to the Bylaws of Delma Properties, Delma Properties has the authority to advance litigation expenses to its directors, officers, and to the corporation, where there is a pending lawsuit against them. That Delma Properties is advancing litigation funds to the defendants is not outside the scope and range of authority granted by the Bylaws to Delma Properties and Delma. As such, Delma Associates, through Delma Properties, is empowered to make these advancements of litigation expenses.

The plaintiff also argues that, even if Delma is authorized to make these advancements, such advancements constitute self-dealing because there are no disinterested directors to authorize such payment. As the Delaware Supreme Court in *Merritt v Colonial Foods, Inc.*, provides, “[s]elf-dealing transactions by corporate officers, directors or controlling shareholders are not prohibited by Delaware law” (505 A2d 757, 763-64 [1985]). However, in order to remove the taint of self-dealing, the transaction must either be disclosed to and approved by a majority of disinterested directors, disclosed to and approved by the shareholders, or the contract or transaction is found to be fair as to the corporation (*see Cede & Co. v Technicolor, Inc.*, 634 A2d 345 [Del 1993]). “Classic examples of director self-interest in a business transaction involve either a director appearing on both sides of a transaction or *a director receiving a personal benefit from a transaction*

not received by the shareholders generally” (*id.* at 362 [emphasis added]). Indeed, a director is “independent only when the director’s decision is based entirely on the corporate merits of the transaction and *is not influenced by personal or extraneous considerations*” (*id.* [emphasis added]).

Here, the court finds that the plaintiff has made a valid point that, at least as to the individual directors, there is the taint of self-dealing. While the Bylaws provide that the Delma Properties may advance litigation expenses to the officers and directors of the corporation, nonetheless that decision to advance litigation expenses is based on “personal” considerations on the part of the directors, who approved such advancements. Furthermore, there is nothing provided by the defendants to rebut this taint (*accord Mills Acquisition Co. v Macmillian, Inc.*, 559 A2d 1261, 1280 [Del 1988] [finding that the directors in a self-interested transaction “are required to demonstrate their utmost good faith as well as the most scrupulous inherent fairness of transactions in which they possess a financial, business or other personal interest”]). Because all the directors are self-interested in the transaction at issue, and because the defendants have failed to otherwise demonstrate that this transaction is fair to the corporation, the court finds that litigation expenses advanced to Toroyan, Shawwa, Khoury, and Hourani must be returned to the corporation. Furthermore, these defendants are prohibited from utilizing Delma funds to advance any further costs associated with this litigation.

As to the corporation itself, because Delma is the subject of litigation, that litigation costs are advanced for its representation is not outside the scope or range of the Bylaws and the Limited Partnership Agreement. The plaintiff has also not shown that there is self-dealing, especially where the plaintiff, as a limited partner of Delma, is bringing action against Delma. Accordingly, as to defendants Delma, Delma Properties, and Delma II, the court finds that advancing litigation costs to defend against the plaintiff’s actions are proper and do not constitute self-dealing. As such, as to

defendants Delma, Delma Properties, and Delma II, funds advanced to counsel for expenses and fees need not be returned, and these defendants may continue to utilize Delma funds for such litigation expenses.

### CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff Patrick Barrett's motion to prohibit and restore funds advanced by defendant Delma Associates, LP is granted to the extent that funds advanced for the litigation costs of individual defendants Kevork Toroyan, Nabil Shawwa, Wa'el Khoury, and Issam Hourani shall be returned to Delma and that no funds shall forthwith be advanced for costs associated with this litigation as to these defendants, and is otherwise denied; and it is further


ORDERED that unless the parties stipulate as to an amount to be returned to Delma by the individual defendants within 30 days of notice of entry, it is ORDERED that the issue of moneys advanced for the litigation costs of individual defendants Kevork Toroyan, Nabil Shawwa, Wa'el Khoury, and Issam Hourani is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that, unless the parties stipulate within 30 days of notice of entry as to an amount to be returned to Delma by the individual defendants for advanced litigation costs, a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office to arrange a date for the reference to a Special Referee.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

**Dated:** March 21, 2006

ENTER:

  
RICHARD B. LOWE, III  
**RICHARD B. LOWE, III**

**FILED**  
MAR 22 2006  
NEW YORK  
COUNTY CLERK'S OFFICE