

**Lovitt v Nobok, Inc.**

2007 NY Slip Op 33119(U)

September 27, 2007

Supreme Court, New York County

Docket Number: 0115475/2006

Judge: Edward H. Lehner

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10-1-07  
cc

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

PRESENT: EDWARD H. LEHNER  
*Justice*

PART 19

LOVITT

- v -

NOBOK, INC.

INDEX NO.

115475/06

MOTION DATE

7/27/07

MOTION SEQ. NO.

MOTION CAL. NO.

3

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 is resolved as per attached memorandum decision.

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

**FILED**

OCT 01 2007

NEW YORK  
COUNTY CLERK'S OFFICE

**RECEIVED**

OCT 1 2007

MOTION SUPPORT  
OFFICE

Dated: SEP 27 2007



J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19

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KEVIN D. LOVITT,

Plaintiff,

Index No. 115475/06

-against-

NOBOK, INC. And NOBOK LTD.,  
Defendants.

-----x

**FILED**  
OCT 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**LEHNER, J.:**

Defendant Nobok, Inc. (Nobok) moves, pursuant to CPLR 3215 (b), for leave to amend its Answer and Counterclaims in the form set forth in the Proposed Amended Answer and Counterclaims annexed to Nobok's motion.

Plaintiff Kevin D. Lovitt opposes the motion and cross-moves for an order, pursuant to Section 145 of the Delaware General Corporation Law (8 Del Code Ann § 145 ) (DGCL) as well as Nobok's by-laws and Charter of Incorporation: (a) directing Nobok to advance the attorneys' fees and costs to Lovitt for his defense of Nobok's claims; (b) awarding Lovitt \$15,000 in attorneys' fees and costs in connection with this cross motion; (c) awarding Lovitt \$39,505.14 as indemnification for attorneys' fees and costs relating to his defense of Nobok's claim for breach of fiduciary duty, and awarding Lovitt fees and costs.

For the reasons discussed herein: (a) Nobok's motion to amend is granted; and (b) plaintiff's cross motion is granted to the extent that he is entitled to an advancement of a reasonable sum representing his past and future fees and costs (including attorneys' fees) relative to his defense of Nobok's claims against him, including the costs relative to this motion, upon his posting of an undertaking. His request for indemnification is however denied as premature.

**BACKGROUND**

Nobok is a Delaware Corporation engaged in the sporting legends marketing business. Plaintiff was Nobok's Chief Operating Officer (COO), pursuant to a written employment contract, dated "as of" May 1, 2005 (Employment Agreement) at a base salary of \$300,000 per annum. Essentially, the Employment Agreement was for a term of two years, unless terminated earlier in accordance with the procedures set forth therein.

In mid-2006, Nobok terminated plaintiff's employment. Plaintiff commenced this action in October 2006 to collect compensation and severance he claimed was owed pursuant to the Employment Agreement.<sup>1</sup> Nobok, in turn, claimed that plaintiff breached the Employment Agreement and his fiduciary duties to Nobok.

By letter, dated March 16, 2007, Lovitt made a claim to Nobok seeking advancement of legal fees and costs to defend Nobok's counterclaims against him. By letter dated April 5, 2007, Nobok rejected Lovitt's demand, claiming, inter alia, that Lovitt was not an officer of Nobok, was acting in his personal capacity, and, in any event, the request for an advancement was defective because plaintiff failed to proffer an undertaking.

### DISCUSSION

Nobok's motion seeking leave to amend, pursuant to CPLR 3025 (b), is granted. In the proposed Answer and Counterclaims, Nobok, among other things, seeks to withdraw its Second Counterclaim for breach of fiduciary duty, and to interpose a new claim against plaintiff based on the faithless servant doctrine. Although plaintiff opposes Nobok's motion to amend,<sup>2</sup>

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<sup>1</sup> In the complaint, in addition to asserting a breach of contract cause claim, plaintiff also asserted a labor law claim. The labor law claim was dismissed by the court on May 9, 2007.

<sup>2</sup> Plaintiff asserts that Nobok's purported revamping of its Answer and Counterclaims is part of Nobok's overall strategy to cleanse the pleading of any reference to Lovitt being a

given the liberal standard in favor of permitting amendment of pleadings, the motion to amend is granted.

The cross motion concerns plaintiff's right to indemnification and/or advancement of defense costs. Plaintiff contends that, pursuant to Delaware law, Nobok's Certificate of Incorporation and Nobok's by-laws, Nobok is required to indemnify him for a successful defense of claims brought against him by Nobok, and, in the interim, that Nobok must advance to plaintiff, the fees to defend the claims asserted against him by Nobok. Nobok takes the position that plaintiff is not entitled to the requested relief because: (a) plaintiff was not an officer of Nobok; (b) even if plaintiff was an officer of Nobok, the counterclaims asserted against him concern actions allegedly undertaken by him outside the sphere of his role as officer; (c) plaintiff failed to proffer an undertaking; and (d) in any event, any request for advancement and/or indemnification must be brought in Delaware.

Section 145 (a) and (b) of the DGCL gives corporations the power to indemnify current and former corporate officials for expenses incurred in legal proceedings "by reason of the fact that the person is or was a director, officer, employee or agent of the corporation." Section 145 (c) allows corporate officials to defend themselves in legal proceedings, secure in the knowledge that, if vindicated, the corporation will bear the expense of litigation (Homestore, Inc. v Tafeen, 888 A2d 204, 211 [Del 2005]; VonFeldt v Stifel Fin. Corp., 714 A2d 79, 84 [Del 1998]). The mandatory right to indemnification under section 145 (c) requires a successful defense on the merits or otherwise, and thus, cannot be determined until the conclusion of the underlying action. The right to the advancement of legal expenses, however, is not dependent on

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corporate officer of Nobok.

the right to indemnification (Homestore, Inc. v Tafeen, 888 A2d at 212; Citadel Holding Corp. v Roven, 603 A2d 818, 822 [Del 1992]). With respect to the advancement of legal costs prior to the conclusion of the underlying action, the Delaware statute is permissive, allowing corporations to provide for the payment of advance expenses to officers and directors and others on such terms as the corporation deems appropriate and upon receipt of an undertaking (DGCL § 145[e], [f]; Homestore, Inc. v Tafeen, 888 A2d at 211-12; Reddy v Electronic Data Systems Corp., 2002 WL 1358761, \*4 [Del Ch 2002]). Section 145 (e) provides as follows:

(e) Expenses (including attorneys' fees) incurred by an officer or director in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final 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 such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

Paragraph "Eighth" of Nobok's Certificate of Incorporation provides that "(t)he Corporation shall, to the fullest extent permitted by Section 145 of the DGCL . . . indemnify and advance expenses to (i) its directors and officers. . . from and against any and all of the expenses, liabilities, or other matters referred to in or covered by said section. . . ." Section 7.1 of Nobok's by-laws state, in pertinent part:

(b) (E)ach person who was or is made a party or is threatened to be made a party to or is otherwise involved in any . . . action, suit or proceeding, whether civil, criminal, administrative or investigative. . . by reason of the fact that he or she is or was a director, officer or employee of the Corporation or is or was serving at the request of the Corporation as a director, officer or employee of another corporation. . . whether the basis of such proceeding is alleged action in an official capacity while serving as a director, officer or employee, shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the DGCL, as the same exists or may hereafter be amended (but, in the case of any such

amendment, only to the extent that such amendment permits the Corporation to provide broader indemnification rights...), against all expense, liability and loss (including attorneys' fees, judgments, fines....and amounts paid in settlement) reasonably incurred or suffered by such indemnitee in connection therewith and such indemnification shall continue as to an indemnitee who has ceased to be a director, officer or employee and shall inure to the benefit of his or her heirs, executors and administrators. . . .

Nobok's by-laws further provide that:

The right to indemnification conferred in this Article VII shall be a contract right and shall include the right to be paid by the Corporation the expenses incurred in defending any such proceeding in advance of its final disposition (hereinafter an "advancement of expenses"); provided, however, that if the DGCL requires, an advancement of expenses incurred by an indemnitee in his capacity as a director or officer . . . shall be made only upon delivery to the Corporation of an undertaking . . . by or on behalf of such indemnitee, to repay all amounts so advanced if it shall ultimately be determined . . . that such indemnitee is not entitled to be indemnified for such expenses under this Section or otherwise.

Thus, although the DGCL may be permissive with respect to the payment of advance costs and attorneys' fees to an officer or director, Nobok's by-laws are not, conferring a mandatory right to the advancement of costs and fees to directors and officers (see Homestore, Inc. v Tafeen, 888 A2d at 212 [although section is permissive, corporation's by-laws provided corporate officials with unconditional and mandatory right to advancement]; see also Molyneux-Petraglia v Northbridge Capital Mgmt. Inc., 15 Misc 3d 1125 (A), 2007 NY Slip Op 50845 [U] [Supreme Ct, NY County 2007, Fried, J.]).

Here, since the right to indemnification under Section 145 (c), requires a successful defense on the merits or otherwise, plaintiff's request for indemnification cannot be decided until after the resolution of this action, and is therefore denied as premature (see Homestore, Inc. v Tafeen, 888 A2d at 211). However, a review of the applicable statute as well as Nobok's Certificate of Incorporation and its by-laws confirms that plaintiff is entitled to

advancement of the requested costs and attorneys fees. Nobok has failed to raise a triable issue of fact that would refute plaintiff's right to such advancement. Nobok's argument that plaintiff - as Chief Operating Officer - was not an "officer" of Nobok, and, hence, not entitled to the requested relief, is implausible. Nobok's "new" stand on this issue is contradicted by its prior position, thus supporting plaintiff's claim that Nobok crafted this argument in an attempt to avoid advancement and/or indemnification to him. Thus, although the court makes no definitive or ultimate ruling on the issue, the court is satisfied, for purposes of this motion, that plaintiff has made a sufficient showing of his status as corporate officer of Nobok, and Nobok has failed to refute same.

Since, under Delaware law, if there is a nexus or causal connection between any of the underlying proceedings and one's official capacity, those proceedings are "by reason of the fact" that one was a corporate officer, without regard to one's motivation for engaging in that conduct (Homestore, Inc. v Tafeen, 888 A2d 204, 214 [Del 2005]; Perconti v Thornton Oil Corp., 2002 WL 982419, \*4 [Del Ch 2002]). Nobok has failed to refute the nexus between the claims it asserts (or asserted) against plaintiff and plaintiff's status as an officer of Nobok. As such, Nobok's claim that plaintiff was not acting in his official capacity does not negate Nobok's advancement obligation to plaintiff.

The court likewise rejects Nobok's claim that the issues of indemnification and advancement cannot be litigated in this forum. While DGCL § 145 (k) vests exclusive jurisdiction to the Delaware Court of Chancery "to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise," paragraph 16 of the

Employment Agreement, entitled “Consent to Jurisdiction; Dispute Resolution” provides:

The parties hereto agree that any action or proceeding arising directly, indirectly or otherwise in connection with, out of, related to or from this Agreement, any breach hereof or any transaction covered hereby, shall be resolved within New York, New York. Disputes may not be resolved in any other forum or venue unless by mutual written agreement of the parties.

Here, plaintiff chose to litigate his claim for advancement and indemnification in this forum and the court will not disturb that choice (see generally Fuisz v Biovail Technologies, Ltd., 2000 WL 1277369 [Del Ch 2000]).

Accordingly, plaintiff’s cross motion is granted to the extent that plaintiff is entitled to advancement of expenses and costs, including attorneys’ fees, reasonably incurred and to be incurred in defending the counterclaims asserted against him (Homestore, Inc. v Tafeen, 888 A2d at 218; Citadel Holding Corp. v Roven, 603 A2d at 823-24 [Delaware law implicitly limits contracts for advancement of expenses to those expenses that are reasonably incurred]; see also Molyneux-Petraglia v Northbridge Capital Mgmt. Inc., supra ). The issue of the amount of the advancement, as well as the amount of the undertaking which plaintiff is required to post, pursuant to DGCL §145 (e), is referred to a Special Referee to hear and report.

#### CONCLUSION

Accordingly, for the reasons set forth above, it is:

ORDERED, that Nobok’s motion for leave to amend the Answer and Counterclaims is granted; and it is further

ORDERED, that plaintiff’s cross motion, to the extent it seeks indemnification from Nobok is denied as premature, and to the extent that it seeks advancement of reasonable costs and attorneys’ fees incurred and to be incurred herein in defending the counterclaims asserted


against him (including those withdrawn by Nobok in the Amended Answer and Counterclaims) as well as those incurred with respect to this motion is granted; and it is further

ORDERED that the issue of the amount of such reasonable costs and attorneys fees payable as an advancement by Nobok to plaintiff, and the amount of the corresponding undertaking, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties enlarging the reference, as permitted by CPLR § 4317 (a), to include the reasonable amount of costs and attorneys' fees incurred in this action, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue(s); and, it is further

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to a Special Referee.

Dated: SEP 27 2007

ENTER:

  
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J.S.C.

**FILED**  
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