

**Zuckerman v Goldstein**

2009 NY Slip Op 32267(U)

September 30, 2009

Supreme Court, New York County

Docket Number: 113633/07

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 113633/2007

**ZUCKERMAN, MYRON**

vs.

**GOLDSTEIN, SYDELL**

SEQUENCE NUMBER : 010

COUNSEL FEES, EXPENSES

INDEX NO. \_\_\_\_\_

MOTION DATE 9/4/09

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

Based on the foregoing, it is hereby

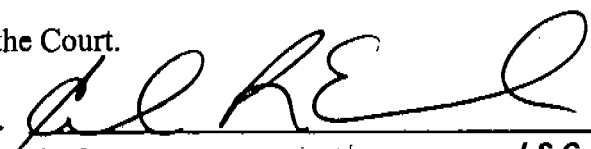
ORDERED that plaintiff's motion for indemnification for his legal expenses incurred in connection with his defense of defendants' claims asserted against him as a former officer of defendant Sam-Fay Realty Corp. in the amount of \$196,110.76. is granted to the extent that the plaintiff is entitled to a hearing as to the issues of (1) whether the challenged actions subject to and up through the June 23, 2008 Order were undertaken by plaintiff in good faith and under a reasonable belief that they were in the best interests of Sam-Fay, and if so, the amount so incurred; and (2) as to the amount of attorneys' fees plaintiff actually and necessarily incurred from June 23, 2008 in connection with his defense against those counterclaims resulting in the June 29, 2009 Order; and it is further

ORDERED that plaintiff shall file a note of issue within 30 days of the date of this order for hearing directed above; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 9/30/2009



**HON. CAROL EDMEAD** 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):

**FILED**  
OCT 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
MYRON ZUCKERMAN,

Index No. 113633/07

Plaintiff,

-against-

SYDELL GOLDSTEIN, AUDREY SILLER,  
BARBARA ZUCKERMAN, LANCE LANDERS,  
SAM-FAY REALTY, CORP.,

Defendants.

-----X  
HON. CAROL EDMEAD, J.S.C.

**FILED**  
OCT 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

MEMORANDUM DECISION

Plaintiff, Myron Zuckerman ("plaintiff") moves pursuant to New York Business Corporation Law ("BCL") 724 (a) and (c) for indemnification for his legal expenses incurred in connection with his defense of defendants' claims asserted against him as a former officer of defendant Sam-Fay Realty Corp. ("Sam-Fay") in the amount of \$196,110.76.

*Background*

Sam-Fay is a corporation, of which Sydell Goldstein ("Sydell"), Audrey Siller ("Audrey") and Barbara Zuckerman ("Barbara") are each directors and 25% stockholders, and plaintiff holds the remaining 25%. In 2006, Sydell, Audrey and Barbara commenced an action in this Court for the dissolution of Sam-Fay (Index No. 600054/06). At that time, Sam-Fay owned property located on 29<sup>th</sup> Street in New York City (the "29<sup>th</sup> Street Property").

In August 2007, Sydell, Audrey and Barbara, as majority stockholders and directors of Sam-Fay, voted to distribute to themselves their share of the proceeds of the sale of the 29<sup>th</sup> Street Property, but not to distribute anything to plaintiff. Thereafter, the 29<sup>th</sup> Street Property was

sold<sup>1</sup> and Sydell, Audrey and Barbara sought to reactivate the dissolution matter, and accused plaintiff of multiple acts of wrongdoing. The claims on behalf of Sam-Fay involved a mortgage placed on the Sam-Fay property in 1988 and a 1988 management agreement between Sam-Fay and another family corporation.

Plaintiff's counsel was retained to represent plaintiff on September 20, 2007, and counsel's initial services were performed in the dissolution proceeding. However, that proceeding was a special proceeding brought pursuant to BCL 1102 and 1104-a and did not appear to be an appropriate vehicle to resolve all of the issues among the parties. Accordingly, plaintiff commenced this action in October 2007 seeking to recover his share of the proceeds of the sale of the Sam-Fay property and to assert claims against the individual defendants for breach of fiduciary duty.

Plaintiff contends that defendants asserted counterclaims against plaintiff, alleging substantially the same matters which had been alleged in the dissolution proceeding. Because defendants asserted these claims as reasons not to distribute to plaintiff his share of the proceeds, it was necessary to defeat such claims in order to recover those proceeds. The prosecution of plaintiff's claims and the defense against the counterclaims were thoroughly intertwined.

Plaintiff moved for summary judgment dismissing the counterclaims, which was granted.

Defendants sought reargument of that motion. Reargument was granted but the Court adhered to its original decision.

Thereafter, defendants appealed from both Orders, and the Appellate Division affirmed. Defendants sought reargument and leave to appeal to the Court of Appeals, but those motions

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<sup>1</sup> Said property sold for approximately \$12 million.

[ 4 ]  
were denied.

Defendants then asserted various new claims against plaintiff.

Plaintiff then moved for partial summary judgment, arguing that the new claims were invalid. The Court granted plaintiff's motion, awarded judgment and statutory interest in plaintiff's favor, and defendants moved to renew and reargue and filed a Notice of Appeal.<sup>2</sup>

Plaintiff contends that his counsel has thus far billed him \$208,087.53 at an hourly rate of \$500 per hour. Plaintiff's counsel graduated from Columbia Law School in 1965 and practiced law continuously since then, except for a period of approximately four and one-half months of military service in 1967. All of counsel's bills through July 31, 2009 have been paid in full in the amount of \$190,250.81, and a bill for an additional \$17,836.72 was sent on August 10, 2009. Counsel made a demand for indemnification on behalf of plaintiff, but did not receive a response.

Plaintiff argues that BCL 723(a) provides that a person who has been successful in the defense of an action or proceeding of the character described in BCL 722 "shall" be entitled to indemnification as authorized in such section. Section 724(a) provides that indemnification "shall be awarded" by the Court to the extent authorized under BCL 723(a) where the corporation fails to indemnify. Section 724(c) permits the Court to allow reasonable expenses, including attorneys' fees, during the pendency of the action.

The disposition of the claims in defendants' counterclaims appears to be final. Plaintiff

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<sup>2</sup> Defendants then moved to renew and reargue this Court's grant of partial summary judgment in plaintiff's favor. On reargument, the Court issued an order granting defendants' motion, to the extent of referring two issues: (1) what amount of interest should be awarded plaintiff and (2) whether the Court should vacate the judgment and instead direct an escrow agent to release the funds in escrow to the plaintiff or instead, issue a judgment against plaintiffs. Plaintiff, in turn, moved to reargue and renew the Court's decision. By order dated September 28, 2009, the Court granted reargument and renewal, found that plaintiff was entitled to prejudgment interest at the statutory rate, and vacated the portions of its prior order referring the two issues to the Special Referee.

[\* 5 ]

argues that the disposition of the claims in Defendants' Answers to Interrogatories which were resolved by this Court's June 29, 2009 Order is also final, notwithstanding a motion to renew and reargue and an appeal, because the only ground asserted which could have resulted in a reversal - an incorrect statement in the April 28, 2009 Order of the Appellate Division-is moot now that the Appellate Division has corrected its Order. In any event, in accordance with BCL 724(c), this Court need not await the disposition of the motion to renew and reargue or the appeal to grant plaintiff's application.

Plaintiff asserts that approximately \$28,000.00 of the fees and expenses charged to him were applicable to a proceeding to compel Sam-Fay to permit plaintiff to inspect its financial records and to other matters not related to the defense of the claims against him. Accordingly, plaintiff requests that the Court order indemnification in the amount of \$180,000.00 for the legal services provided to plaintiff.

In addition, plaintiff requests that the Court order indemnification in the amount of \$16,110.76 for the services provided by Schwartz & Salomon, P.C. in the dissolution proceeding. Plaintiff claims that the dissolution proceeding is now moot, as the issues raised therein have been determined in this action.

#### *Opposition*

Plaintiff fails to establish entitlement to attorney fees and expenses under BCL 722, 723 and 724, and the reasonableness and necessity of any fees and expenses claimed; no supporting documentation of any type upon which the reasonableness and necessity of the fees and expenses claimed may be judged and challenged is submitted with the motion. The statutes make no provision for an award of attorneys' fees or expenses to a plaintiff in an action. Nor is there any

[\* 6 ]

basis for an award under the statutes for any fees or expenses incurred by plaintiff's efforts to secure an award, either against the corporation or the other defendants, nor to defend against any claims against him as an officer or director of other corporations, as the trustee of the trust, or for the claims of his actions which were *ultra vires* or taken against the interests of the corporation.

In the pending dissolution proceeding, plaintiff effectively "settled" certain of the claims therein by resigning as president of the corporation, and turning management over to others, which allowed for the sale of the corporate property - all of which would preclude an award of attorneys' fees under the statute. BCL 724 (a) provides for an award only to the "extent authorized under section 722"; BCL 723 (a) provides for indemnification only as authorized in section 722. The fact of "success" is not dispositive or sufficient, as BCL 722 only authorizes "reasonable" fees and expenses if the "director or officer acted, in good faith, for a purpose which he reasonably believed to be in ... the best interests of the corporation." Plaintiff offers no evidence on his motion that the actions he took were in good faith and in the best interests of the corporation, nor, as a matter of law, can he, nor should he be permitted to attempt to do so in a reply to which defendants have no opportunity to respond. In a supplemental affirmation, defendants add that BCL 723 (a) refers to, and only applies to "proceedings of the character described in" BCL 722, and not to BCL 720. BCL 720 is the governing statute for actions against directors and officers for misconduct which is in effect the companion proceeding or about which the counterclaims herein complain; therefore BCL 722, 723 and 724 are inapplicable to the instant action, and are not the basis for an award for attorneys' fees or expenses in the instant action.

BCL 721 is instructive on this point, is consistent with BCL 722, and provides in

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pertinent part that "no indemnification may be made to or on behalf of any director or officer if a judgment or other final adjudication adverse to the director or officer establishes that his acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated, or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled."

Defendants argue that the finding of this Court that defendants' claims, including the corporate defendant, are barred by the release is not definitive for the purposes of an award of attorneys' fees under the statute inasmuch the same does not require or imply a finding that the plaintiff acted in good faith for the benefit of the corporation; in fact, the release is proof that plaintiff acted for his own benefit. Also, attorneys' fees cannot be awarded if the plaintiff personally gained a financial profit to which he was not legally entitled. Nothing in plaintiff's conduct can be construed as being undertaken in good faith, for a purpose reasonably believed to be in the best interests of Sam-Fay. Moreover, the claims against plaintiff, and his defense thereof based on plaintiff's obtaining a release in his favor from Sam-Fay, do not arise out of his actions as a director or officer of the corporation engaged in the business of the corporation to benefit the corporation, but his personal actions taken to benefit himself personally at the expense of the corporation. Also, defendants' Petition for Dissolution contains allegations against plaintiff of waste of and diversion of corporate assets. This Court upheld the validity of a release obtained by plaintiff against the corporation for his acts which, by his own admissions, were not in the interest of the corporation and by which he personally benefitted.

Further, the plaintiff admitted in his March 2, 2006 affidavit in the Dissolution proceeding that he had used the revenues from Sam-Fay to pay the expenses of I.M.S.A. Realty,

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Inc.,<sup>3</sup> and that the mortgage placed against the Sam-Fay property was to benefit his brother. However, plaintiff, through his corporation, Myron Zuckerman Sewing Machine and Equipment Corp., had, through the execution of a sublease agreement dated as of November 1, 1988, assumed all the obligations of I.M.S.A. Realty, Inc. to pay all monies due under the lease, all financing costs, including all costs, such as the mortgage placed against the Sam-Fay property, associated with the I.M.S.A. property, Section 3 (f), and to assume all of I.M.S.A.'s obligations under the lease, including rental payments. Thus, plaintiff personally benefitted financially by diverting the funds from Sam-Fay to pay the "expenses" of I.M.S.A. rather than paying the same from his own corporation. Sam-Fay received no consideration for these payments; these payments were made to pay plaintiffs' own debts; the Board of Directors of Sam-Fay could not consent to or ratify these payments.

Despite having agreed in writing to sell the I.M.S.A. property, plaintiff insisted on obtaining the release from Sam-Fay before he would do so. The same constituted economic duress as a matter of law. Plaintiff cannot show that his actions, in obtaining the release from Sam-Fay for his personal benefit, and in using Sam-Fay to pay obligations of his own corporation, were done in good faith and in the best interests of Sam-Fay.

Further, plaintiff also failed to demonstrate any reasonable fees and expenses necessarily incurred to defend himself, as opposed to prosecute his claims, thus precluding any award were the Court to determine that plaintiff's actions were done in good faith and in the best interests of Sam-Fay.

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<sup>3</sup> I.M.S.A. Realty, Inc. was formed to acquire property for Spreading Machine Exchange, Inc., which was primarily the business of plaintiff's, Audrey and Sydell's now deceased brother, Ira Zuckerman.

Finally, a claim for attorneys' fees and expenses in this action under the BCL could simply set up a round robin situation which could ultimately prove pointless and a waste of this Court's resources; the defendants are being sued for actions they took as Directors, which actions were clearly taken in good faith in the best interests of Sam-Fay. As all parties have an equal ownership in the corporation, and as any award for fees can only be against the corporation, and as the standard is reasonable fees, the Court could award each party the same amount - something they will receive upon the dissolution of the corporation without the necessity of this motion.

*Reply*

Defendants misconstrue the applicable law on indemnification. Good faith is not an issue where the former director or officer has been successful, on the merits or otherwise, in the defense of a civil or criminal action or proceeding. Indemnification is mandatory in such circumstances. Good faith is only relevant where the former officer or director is not successful in the action, and indemnification is permissive rather than mandatory. And, the caselaw cited by defendants is inapplicable.

Where the corporation fails to indemnify a former officer or director, the Court must do so pursuant to BCL 724(a).

Defendants are also seeking to relitigate the issues raised on plaintiff's summary judgment motion, making the same arguments they made in opposition to that motion. Plaintiff intends to prove at the trial that defendants have acted in bad faith, and that their endless baseless claims of wrongdoing by plaintiff have been motivated by malice. In fact, each of the other directors of Sam-Fay admits in paragraph 3 of her affidavit to her hostility and will-will towards plaintiff.

Further, the exhibits to the motion and opposition papers show that this matter has been extensively litigated, and that there have been numerous motions and an appeal. The exhibits to the moving papers show the amounts billed, the basis therefor and the amounts paid.

Although the indemnification provisions do not cover expenses of a plaintiff to secure an award, defendants first commenced the dissolution proceeding against plaintiff, asserting claims against him, and the expenses for which reimbursement is sought were necessarily incurred to defeat defendants' counterclaims and thereafter to defeat the new claims asserted in answers to Interrogatories.

Finally, BCL 724(c) authorizes the Court to require the corporation to advance a former officer's reasonable expenses, including attorneys' fees, during the pendency of the action, if the Court finds that the officer has by his pleadings or during the course of the litigation raised genuine issues of fact or law. Plaintiff requests that the Court order Sam-Fay to advance plaintiff's expenses until this action and the dissolution proceeding are concluded.

#### *Discussion*

BCL 723(a) provides that

A person who has been successful, on the merits or otherwise, in the defense of a civil or criminal *action or proceeding of the character described in section 722* shall be entitled to indemnification as authorized in such section.

BCL 724 (a) provides, in pertinent part, that:

Notwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board or of the shareholders in the specific case under section 723 (Payment of indemnification other than by court award), indemnification shall be awarded by a court *to the extent authorized under section 722 (Authorization for indemnification of directors and officers), and paragraph (a) of section 723. . . .*

Thus, both BCL 723(a) and 724(a) permit a person to obtain indemnification for attorneys' fees in an action or proceeding provided such action or proceeding falls within the scope of BCL 722 (*see Mercado v Coes FX, Inc.*, 12 Misc 3d 766, 815 NYS2d 806 [Sup Ct Nassau County 2006] [noting that "if the action is not of the kind covered under § 722, then neither BCL § 723 nor § 724 are applicable, and the court has no statutory basis to order such indemnification]). BCL 722, which permits corporations to indemnify its officers and directors against judgments and legal expenses incurred by them, provides that

(a) A corporation may indemnify any person made . . . a party to an action or proceeding . . . which any director or officer of the corporation served in any capacity at the request of the corporation . . . against judgments . . . and reasonable expenses, including attorneys' fees actually and necessarily incurred as a result of such action or proceeding, or any appeal therein, *if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in, or, in the case of service for any other corporation or any partnership . . . or other enterprise, not opposed to, the best interests of the corporation* and, in criminal actions or proceedings, in addition, had no reasonable cause to believe that his conduct was unlawful. (Emphasis added).

By a plain reading of section 722, in order for plaintiff to obtain indemnification from Sam-Fay for the legal fees he incurred in this action under BCL 723 and 724, plaintiff must have acted in good faith, and for a purpose he believed to be in the best interests of Sam-Fay (*see Donovan v Rothman*, 253 AD2d 627, 677 NYS2d 327 [1<sup>st</sup> Dept 1998] [stating that BCL 722(a) provides for indemnification of corporate officers and directors for expenses incurred in connection with litigation, once it has been concluded, where they have acted in good faith and in the best interests of the corporation]; *see also Biondi v Beekman Hill House Apartment Corp.*, 94 NY2d 659, 709 NYS2d 861, 863-865 [2000] [noting that under section 722(a), a corporation may indemnify a director who acts "in good faith, for a purpose which he reasonably believed to

be in the best interests of the corporation"). Plaintiff's contention that good faith is not an issue where the former director or officer has been successful, on the merits or otherwise, in the defense of a civil or criminal action or proceeding ignores the statutory language in 723(a) which expressly applies to an "*action or proceeding of the character described in section 722*" (emphasis added); *Qantel Corp. v Niemuller*, 771 F Supp 1372, 1374 n. 2 [SDNY 1991] [stating that section 723(a) applies only to persons who have been "successful on the merits or otherwise," and incorporates the conduct requirements of § 722]). Plaintiff is entitled to indemnification for attorneys' fees to the extent the underlying, challenged actions of the plaintiff were undertaken in "good faith" and in his corporate capacity for the benefit of Sam-Fay (*see Booth Oil Site Administrative Group v Safety-Kleen Corp.*, 137 F Supp 2d 228 [WDNY 2000] [stating that section "724(a)(1) refers to indemnification being awarded after resolution of the issue whether the requesting defendant is entitled to such indemnification, *i.e.*, upon a finding that the challenged conduct was undertaken by the defendant both in good faith and in his corporate capacity] citing *Donovan v Rothman*, 253 AD2d 627, 677 NYS2d 327, 329 [1st Dept 1998] [holding indemnification award could not be made under BCL 722 where defendants' "good faith" and motives were at issue until litigation concluded]).

The good faith requirement is related to the duty of loyalty a director or officer owes to the corporation (*see Waltuch v Conticommodity Servs., Inc.*, 88 F 3d 87 [2d Cir 1996]).

In his Complaint, plaintiff sought to recover his *pro-rata* share of the proceeds of the sale of the 29<sup>th</sup> Street property and punitive damages against defendants "for their willful and wanton violations of Plaintiff's rights and their [fiduciary] duties *to him*." Under no interpretation of the Complaint, or the positions taken by plaintiff in pursuit of his *pro-rata* share of the proceeds can

it said that same was undertaken for the benefit of Sam-Fay.

Plaintiff was, however, required to defend against defendants' counterclaims of breach of fiduciary duty and corporate waste and mismanagement, which he ultimately defeated.

Initially, by Order dated June 23, 2008, the Court severed and dismissed the counterclaims, to the extent of any counterclaims based upon actions that occurred prior to October 17, 2002, on the grounds that (1) they were barred by an October 2002 Agreement (the "Release") executed by the parties in which all claims against the other, except those purely personal in nature, were released; (2) Sydell, Audrey and Barbara lacked standing to assert corporate claims of waste and mismanagement, Sam-Fay lacked standing to assert claims belonging to other corporations, and any additional claims arising out of events prior to October 2002, were likewise barred by the Release; and (3) defendant Lance Landers did not oppose dismissal of his counterclaim for abuse of process. Defendants were directed to distribute to plaintiff his share of the proceeds, and any counterclaims based on actions occurring after October 17, 2002 remained for further litigation. Therefore, the *merits* of defendants' counterclaim for breach of fiduciary duty and corporate waste and mismanagement were not addressed, and thus, not decided, even though a portion of the counterclaims were disposed of in plaintiff's favor. Consequently, the Court's decision in favor of plaintiff did not necessarily result in a finding, nor can a finding be inferred from such decision, that the plaintiff's handling of the affairs of Sam-Fay were done in good faith and in the best interest of Sam-Fay. In this regard, plaintiff failed to meet his burden of establishing that the costs he incurred in defending the counterclaims at this juncture of the litigation pertained to actions he undertook in good faith for the best interests of Sam-Fay. Plaintiff's actions cannot be construed, at as matter of law at

this juncture, as being undertaken in good faith, for a purpose "reasonably believed" to be in the best interests of Sam-Fay. However, plaintiff is entitled to attorneys' fees incurred to defend against the counterclaims up to this juncture (June 23, 2008), to the extent he establishes, at a hearing, that his challenged actions were undertaken in good faith and for a purpose he reasonably believed to be in the best interests of Sam-Fay.

Thereafter, plaintiff moved again for partial summary judgment and defeated the defendants' counterclaims entirely. This time, the Court addressed the counterclaims "that arose after October 17, 2002 that pertain solely to Myron" (June 29, 2009 Decision, p. 5). In this Decision, the Court found that defendants' counterclaims were insufficient to establish any basis to continue withholding plaintiff's *pro-rata* share of the proceeds of the sale of the 29<sup>th</sup> Street property. Such finding includes a finding that plaintiff did not commit corporate waste or mismanagement, and thus, did not breach his fiduciary duty to Sam-Fay. Therefore, plaintiff is entitled to indemnification for the reasonable expenses, including attorneys' fees plaintiff actually and necessarily incurred from June 23, 2008 in connection with his defense against the counterclaims resulting in the June 29, 2009 Order.<sup>4</sup>

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<sup>4</sup> The Court notes that BCL 724(c) does not apply. BCL 724(c) provides:

Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys' fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.

This litigation is concluded by Order dated June 29, 2009, and subsequent orders resolving defendants' and plaintiff's renewal and reargument motions. Thus, BCL 724(c), which permits the Court to advance legal fees to an officer or director during the pendency of an action, is inapplicable (see Booth Oil Site Administrative Group at 236 [stating that BCL 724(c) provides for limited relief of litigation expenses, including attorney fees, to be awarded during the pendency of an action upon a showing that such fees and expenses are reasonable and necessary in connection with the defense, and that the movant has raised a genuine issue of fact or law as to whether indemnification is required. . . and an advance award of litigation expenses and attorney fees under § 724(c) is preliminary and must be repaid if "the person receiving such advancement or allowance is ultimately found . . . not to

Further, to the extent plaintiff requests indemnification for the services provided by another law firm in the dissolution proceeding, such request is denied, at this juncture. The issue of determining that the dissolution action is moot has not been properly raised or resolved in an order by this Court. Any request for indemnification for attorneys' fees resulting from the dissolution action can be made in that action pursuant to the BCL, either during its pendency or at the conclusion thereof.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for indemnification for his legal expenses incurred in connection with his defense of defendants' claims asserted against him as a former officer of defendant Sam-Fay Realty Corp. in the amount of \$196,110.76. is granted to the extent that the plaintiff is entitled to a hearing as to the issues of (1) whether the challenged actions subject to and up through the June 23, 2008 Order were undertaken by plaintiff in good faith and under a reasonable belief that they were in the best interests of Sam-Fay, and if so, the amount so incurred; and (2) as to the *amount* of attorneys' fees plaintiff actually and necessarily incurred from June 23, 2008 in connection with his defense against those counterclaims resulting in the June 29, 2009 Order; and it is further

ORDERED that plaintiff shall file a note of issue within 30 days of the date of this order for hearing directed above; and it is further

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footnote 3 cont'd.

be entitled to indemnification or, where indemnification is granted, to the extent the expenses so advanced by the corporation or allowed by the court exceed the indemnification to which he is entitled (GBL725(a))).

ORDERED that plaintiff shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 30, 2009

  
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Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**  
OCT 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK