

Cohen v Cohen

2010 NY Slip Op 33005(U)

October 14, 2010

Sup Ct, Suffolk County

Docket Number: 10934-2010

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

PRESENT:**HON. EMILY PINES**

J. S. C.

Original Motion Dates: 05-26-2010 & 07-06-2010
 Motion Submit Date: 08-17-2010
 Motion Sequence No's.: 001 MOTD
 002 MD

[] FINAL
 [X] NONFINAL

_____ X

**DAVID M. COHEN, Individually and Derivatively as
 a Settlor and Beneficiary of the FIVE TOWNS
 COLLEGE REAL PROPERTY TRUST, et al,**

Plaintiffs,**-against-**

**STANLEY COHEN, Individually and as Trustee of
 FIVE TOWNS COLLEGE REAL PROPERTY
 TRUST, et al,**

Defendants.

_____ X

ORDERED, that the motion (motion sequence number001) by plaintiff, David M. Cohen brought on by Order to Show Cause (PINES, J.) dated May 12, 2010, for a temporary restraining Order and other relief is granted to the extent indicated herein below and otherwise denied; and it is further

ORDERED, that the cross-motion (motion sequence number 002) by defendant Stanley Cohen brought on by Notice of Motion dated June 22, 2010, seeking indemnification and advance payment of legal fees, is denied; and it is further

ORDERED, that a compliance conference is scheduled for November 30, 2010 at 9:30 a.m. before the undersigned.

This is the latest series of motions in these six (6) related actions arising over the ownership, operation and governance of Five Towns College (the "College") as set forth in related trust and

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partnership agreements. The parties familiarity with the factual and procedural history is presumed on these motions. Now, plaintiff, David Cohen, and defendant, Stanley Cohen seek Court intervention regarding the payment of Stanley Cohen's counsel fees in these actions. David Cohen moves, by Order to Show Cause for an Order, *inter alia*, enjoining the advance payment of attorneys' fees, costs and related expenses by the College on behalf of Stanley Cohen, Patricia Schmidt, Robert Sherman and any current or former members of the Board of Trustees in any of the six related actions; directing Certilman Balin Adler & Hyman, LLP and Bond Schoeneck & King, PLLC and/or the individual defendants to disgorge and/or repay the College all legal expenses paid by the College on behalf of said defendants from January 2008 to the present date; and enjoining the defendants from adopting new by-laws which would attempt to impose a requirement on the part of the College to indemnify the defendants, *nunc pro tunc*.

Stanley opposes the motion and cross-moves for an Order pursuant to Not-for-Profit Corporation Law §724(a)(1) and §724(c) awarding Stanley Cohen, *nunc pro tunc* as of December 15, 2008 indemnification and advancement of legal fees by the College to defend three of the six lawsuits, as relates to all causes of action except promissory note matters.

As relates solely to the motions *sub judice*, the following facts are undisputed. Between January 28, 2008 and March 10, 2010, the College has advanced at least \$654,636.00 to Certilman Balin Adler & Hyman, LLP ("Certilman") and Bond Schoeneck & King, PLLC ("Bond"), for legal services rendered to defendants. Stanley Cohen has now agreed to reimburse the College for its payment of his legal fees in connection with the various Surrogate Court proceedings and the promissory note claims and has already written a check in the amount of \$138,055.98 to reimburse the College for legal fees related to the Surrogate's Court proceedings. Neither the by-laws nor the College's charter provide for the advance payment of legal fees or indemnification. Thus, the gravamen of these motions is whether defendants, and specifically Stanley Cohen, is entitled to the advance payment of his legal fees and expenses and/or indemnification. Resolution of these questions requires an analysis of BCL §721 et seq and Not-for-Profit Corporation Law §721 et seq.¹

¹Although David Cohen moves pursuant to the Business Corporation Law and Stanley Cohen argues that the Not-for-Profit Corporation Law applies, both statutes contain identical provisions. Moreover, in these actions, the Court finds that some causes of action of the various Complaints would fall under the BCL and some under the Not-for-Profit Corporation Law and the analysis is the same. The provisions will be referred to interchangeably herein.

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BCL §721 states:

The indemnification and advancement of expenses granted pursuant to, or provided by, this article shall not be deemed exclusive of any other rights to which a director or officer seeking indemnification or advancement of expenses may be entitled, whether contained in the certificate of incorporation or the by-laws or, when authorized by such certificate of incorporation or by-laws, (i) a resolution of shareholders, (ii) a resolution of directors, or (iii) an agreement providing for such indemnification, provided 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. Nothing contained in this article shall affect any rights to indemnification to which corporate personnel other than directors and officers may be entitled by contract or otherwise under law.

BCL §722 provides in relevant part:

(a) A corporation may indemnify any person made, or threatened to be made, a party to an action or proceeding (other than one by or in the right of the corporation to procure a judgment in its favor), whether civil or criminal, including an action by or in the right of any corporation of any type or kind, domestic or foreign, or any partnership, joint venture, trust, employee benefit plan or enterprise, which any director or officer of the corporation, by reason of the fact that he, his testator or intestate, was a director or officer of the corporation, or served such other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise in any capacity, against judgments, fines, amounts paid in settlement 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 partnership, joint venture, trust, employee benefit plan 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.

(c) A corporation may indemnify any person made, or threatened to be made, a party to an action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he, his testator or intestate, is or was a director or officer of the corporation, or is or was serving at the request of the corporation as a director or officer of any other corporation of any type or kind, domestic or foreign, of any partnership, joint venture, trust, employee benefit plan or other enterprise, against amounts paid in settlement and reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense or settlement of such action, or in connection with an 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, joint venture, trust, employee benefit

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plan or other enterprise, not opposed to, the best interests of the corporation, except that no indemnification under this paragraph shall be made in respect of (1) a threatened action, or a pending action which is settled or otherwise disposed of, or (2) any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation, unless and only to the extent that the court in which the action was brought, or, if no action was brought, any court of competent jurisdiction, determines upon application that, in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such portion of the settlement amount and expenses as the court deems proper.

BCL §723 states in part:

(a) 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.

(b) Except as provided in paragraph (a), any indemnification under section 722 or otherwise permitted by section 721, unless ordered by a court under section 724 (Indemnification of directors and officers by a court), shall be made by the corporation, only if authorized in the specific case:

(1) By the board acting by a quorum consisting of directors who are not parties to such action or proceeding upon a finding that the director or officer has met the standard of conduct set forth in section 722 or established pursuant to section 721, as the case may be, or,

(2) If a quorum under subparagraph (1) is not obtainable or, even if obtainable, a quorum of disinterested directors so directs;

Finally, BCL §724 provides that:

(a) 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. Application therefor may be made, in every case, either:

(1) In the civil action or proceeding in which the expenses were incurred or other amounts were paid.

(c) 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.

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Essentially, David Cohen argues that because the corporate documents do not provide for the indemnification of officers, the actions by the College in paying Stanley Cohen's legal fees were *ultra vires*, a preliminary injunction should be granted enjoining further payments and further an Order directing disgorgement of the legal fees paid to Certilman, Balin.² David Cohen argues that BCL §724 does not permit the Court to indemnify Stanley Cohen and direct the advance payment of legal fees but rather, that Stanley Cohen could seek repayment at the conclusion of the actions pursuant to BCL §725. David Cohen further asserts that because several claims are asserted against Stanley Cohen in his individual capacity, he is not entitled to indemnification.

These exact issues were addressed by the United States District Court for the Western District of New York in an opinion containing a thorough analysis of this statute. In *Booth Oil Site Administrative Group v. Saftey-Kleen Corp.*, 137 F.Supp.2d 228 (W.D.N.Y. 2000), the Court confirmed a determination by Magistrate Judge Foschio, which granted in part an application for indemnification by certain directors of the plaintiff corporation. As in the instant case, no corporate documents provided for the indemnification of officers or directors and thus, the corporation argued that they were not entitled to indemnification. Moreover, the corporation argued that the directors were being sued in their individual capacity and were thus not entitled to indemnification. Addressing the lack of corporate documents providing for the indemnification (which the directors admitted was lacking), the Court found that pursuant to BCL §724(a), it (the Court) was still permitted to award full indemnification to the extent permitted under BCL §722. However, since there was a dispute over whether the directors participated in the alleged wrongful conduct and acted in good faith, the Court found that it was barred from awarding complete indemnification during the litigation. But, the Court did find that pursuant to BCL §724(c), it was permitted to award "limited relief of litigation expenses", including attorneys' fees, since there was a genuine issue of fact as to whether indemnification was required. This preliminary award however, is subject to reallocation at the end of the action pursuant to BCL §725(a).

Here, in the plethora of causes of action asserted against Stanley Cohen, David Cohen and the other plaintiffs, raise claims that he did not act in the best interest of Five Towns College, the trust and

²Although initially David Cohen also sought disgorgement by Bond Schoeneck, since the legal expenses of Five Towns College's trustees are being paid by its insurance carrier, this claim is not being pursued.

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the partnership and did not act in good faith in his dealings. Notwithstanding such claims, the Court disagrees with David Cohen, and agrees with the Court in *Booth, supra*, that it is permitted to grant indemnification, despite the lack of corporate documents permitting same. In this case, the claims raised regarding Stanley Cohen's conduct preclude the Court from granting full indemnification at this time and thus, David Cohen's motion for a preliminary injunction is granted to the extent that Five Towns College is enjoined and restrained from paying the legal fees and expenses of Stanley Cohen in the six related actions described above. To the extent David Cohen seeks disgorgement of the fees previously paid to Certilman, Balin, in light of Stanley Cohen's repayment of more than \$130,000.00 to Five Towns College, such application is deferred to the trial of these actions and will be considered under BCL §725.³ The cross-motion by Stanley Cohen for indemnification and advance payment of legal fees is denied for the reasons set forth herein.

Counsel are reminded that a compliance conference is scheduled for November 30, 2010 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: October 14, 2010
 Riverhead, New York


 EMILY PINES
 J. S. C.

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 NONFINAL

³ This Order also applies to enjoin payment of advance attorneys' fees to Patricia Schmidt and Robert Sherman.

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