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SUPREME COURT OF DELAWARE

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Re: Fitzgerald v. Cantor, et. al.
C.A. No. 16297-NC

Submitted: March 15, 2001
Decided: April 17, 2001.

Counsel:

On June 2, 2000, defendants Cantor Fitzgerald, Inc. and Mrs. Iris Cantor (“defendants”) filed a motion under Court of Chancery Rule 60(b) to re-open the record in this action to introduce evidence of Cantor Fitzgerald, L.P.’s May 8, 2000, Offer to Exchange. Defendants argue that this is new evidence that the Court should consider when (1) crafting its declaratory judgment order in this case

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and (2) ruling on defendants' pending motions challenging the attorney's fee remedy articulated in the Court's March 13, 2000, Opinion.' For the reasons discussed below, I deny the defendants' Motion to Introduce.

Court of Chancery Rule 60(b), by its terms, states that "the Court may relieve a party . . . from **a final judgment, order, or proceeding**" ² Here, there has been no final order and a motion under Rule 60(b) is procedurally improper at this juncture.

Even if the motion were properly before the Court, I find that the present litigation landscape upon which these parties stand obviates any need to introduce these new matters into this action. The information defendants seek to introduce has no bearing on my ultimate decision. Moreover, since the filing of this motion, the issue of the exchange offer has spawned its own separate litigation.


CFLP has filed a declaratory judgment action in this Court asking the Court to rule on the validity of the exchange offer and the amendments to the partnership

¹ Defendants point to a then-proposed, now-enacted, amendment to the Partnership Agreement that squarely shifts the burden of attorney's fees to a breaching partner as evidence that the pre-amendment Partnership Agreement did not allow such fee-shifting. CFLP argues that the Court should not accept the defendants' argument because it violates the policy behind Delaware Rules of Evidence, Rule 407 which, as a general matter, prohibits consideration of subsequent remedial measures. While this is not the common setting for DRE 40'7, the policy behind the rule is applicable. My consideration of the attorney's fee remedy at the time of my original decision on March 13, 2000, and in considering the defendants' pending motions to revisit the issue will be based on the Partnership Agreement between the parties before the amendments. Thus, I will not allow evidence of the amendments to be introduced in this action for the purpose defendants now propose.

² **Court of Chancery Rule 60(b)** (emphasis added).

agreement that accompanied the offer. The ultimate result of this new case will be a declaratory judgment concerning the validity of the exchange offer. Because the Court's March 13, 2000, Opinion and the resulting declaratory judgment in this action will provide the backdrop for any decision in the new action, I am convinced that the defendants will not be deprived of any argument or evidence to support their position on the law or the appropriate balancing of the equities between the parties. Denying the present motion will, therefore, cause them no harm. It is axiomatic that where parties, such as these, engage in a lengthy process of litigation involving multiple individual actions, the Court's decisions in each action are cumulative in defining the rights and responsibilities of the parties. For these reasons, the defendants' Motion to Introduce CFLP's May 8, 2000, Offer to Exchange is **DENIED**.

IT IS SO ORDERED.



Justice

MTS/rm

oc: Register in Chancery