

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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**Re: Citizens Bank v. Design-A-Drape, Inc., Joseph E. Bockrath
and Nancy L. Bockrath
C.A. No. 07C-03-385 RRC**

Submitted: June 19, 2008
Decided: July 30, 2008

Upon Defendant Nancy L. Bockrath’s Request
For Reimbursement of Counsel Fees.
GRANTED IN PART; DENIED IN PART.

Dear Counsel:

Before the Court is Defendant Nancy L. Bockrath’s Request for Reimbursement of Counsel Fees, set forth in her Response to Plaintiff’s Motion to Vacate Default Judgment. This request stems from her being named as a co-defendant along with her husband, Defendant Joseph E. Bockrath and his now-defunct business, Defendant Design-A-Drape, Inc., in an action brought by Plaintiff Citizen Bank to collect a loan in default. Defendant Nancy L. Bockrath prays for repayment of her attorney’s fees in the amount of \$1,500.00 after Plaintiff’s vacation of the default judgment it had previously obtained against her and her two co-defendants. For reasons

stated below, Defendant Nancy L. Bockrath's Request for Reimbursement of Counsel Fees is **GRANTED** in the amount of \$750.00.

I. FACTUAL AND PROCEDURAL HISTORY

On or about January 24, 2005, Defendant Joseph E. Bockrath, as President of Design-A-Drape, Inc., executed a Commercial Line Note and a Business Loan and Security Agreement with Plaintiff Citizens Bank ("Plaintiff") in order to secure a \$50,000 line of credit for use in his business.¹ On the signature page of the Commercial Line Note, Defendant Joseph E. Bockrath's name is typed as the sole borrower of the loan.² On the first page of both the Commercial Line Note and the Business Loan and Security Agreement, the borrower's name and address is listed as follows: Design A Drape, Inc. DBA Design A Drape/Adjust A Drape, 2 Lewis Circle, Wilmington, Delaware 19804.³ Defendant Nancy L. Bockrath did not personally execute either of the loan documents.⁴

In July 2006, Plaintiff declared a default on the loan executed by Defendant Joseph E. Bockrath and sent a written notice of default on October 11, 2006 to Defendants "Joseph E. Bockrath" and "Design A Drape, Inc. d/b/a Design A Drape/ Adjust A Drape."⁵ Plaintiff filed a Complaint against Defendants Design-A-Drape, Inc., Joseph E. Bockrath and Nancy L. Bockrath on March 30, 2007 to collect all remaining outstanding payments on the loan.⁶ Plaintiff served Defendant Joseph E. Bockrath with three copies of the Complaint at 2 Lewis Circle, Wilmington, Delaware 19804 on April 16, 2007.⁷ On June 21, 2007, pursuant to Superior Court Rule of Civil Procedure 55(b)(1), default judgment was entered against Defendants in the amount of \$47,514.95 as a result of Defendants' failure to answer, object or otherwise respond to the Complaint.⁸

On August 21, 2007, Plaintiff served all three Defendants with Interrogatories in Aid of Execution of Judgment to which no response was received.⁹ On April 9, 2008, Plaintiff served a Notice of Deposition upon

¹ Def. Resp., at ¶ 3.

² *Id.* at Ex. A, p.8

³ *Id.* at Ex. A, B, p.1

⁴ Pl. Reply, at ¶ 7.

⁵ Def. Resp., at ¶ 5.

⁶ Pl. Mot., at ¶ 1.

⁷ Docket 2.

⁸ Pl. Mot., at ¶ 3.

⁹ *Id.* at ¶ 4.

Defendant Nancy L. Bockrath for a deposition to take place on May 5, 2008.¹⁰ Defendant Joseph E. Bockrath accepted service of all relevant pleadings at all times on behalf of all three defendants.¹¹

On May 7, 2008, Plaintiff's counsel received a phone call from Defendant Nancy L. Bockrath, inquiring as to why she had been noticed for a deposition and indicating that she knew nothing about the action in which she had been named a defendant.¹² Subsequently, counsel for Plaintiff spoke with counsel for Defendant Nancy L. Bockrath, and some time later, Plaintiff's counsel filed a motion to vacate the default judgment against Defendant Nancy L. Bockrath only, which unopposed motion was granted by this Court without a hearing on May 27, 2008.¹³

II. THE PARTIES' CONTENTIONS¹⁴

Defendant Nancy L. Bockrath asserts that Plaintiff's counsel did not have a good faith basis to believe that she would be liable for the default of the loan at the time of the filing of the Complaint and the Direction of Default.¹⁵ In support of this claim, she submits that she has been continuously employed by AstraZeneca for the past 20 years and that she "is not now and has never been a shareholder, director, officer, or employee of [Defendant] Design[-A-Drape, Inc.]."¹⁶ Further, Defendant Nancy L. Bockrath argues that she did not attend the loan closing, did not sign the loan agreements with Plaintiff and that her name is not typed on any of the pre-printed agreement forms.¹⁷ As a result, Defendant Nancy L. Bockrath argues that Plaintiff's counsel's allegations against her were "knowingly false" and prays for reimbursement of her counsel fees under the "bad faith exception" to the American Rule.¹⁸

Plaintiff's counsel asserts that, at the time of filing the Complaint, he had "reason to believe that [Defendant] Mrs. [Nancy L.] Bockrath may have

¹⁰ *Id.* at ¶ 5. It is unclear from the briefs where Defendant Nancy L. Bockrath was served on April 9, 2008 or whether she was served personally.

¹¹ Pl. Reply, at ¶ 8.

¹² *Id.* at ¶ 14.

¹³ *Id.* at ¶ 16.

¹⁴ Defendant Nancy L. Bockrath's Response makes several arguments concerning the validity of the service against her in the action. As the default judgment against her has been vacated, the Court will not consider these arguments due to mootness.

¹⁵ Def. Resp., at ¶ 14.

¹⁶ *Id.* at ¶ 2.

¹⁷ *Id.* at ¶ 4.

¹⁸ *Id.* at ¶¶ 13, 14.

held an interest in [Defendant] Design-A-Drape[, Inc.]’s business.”¹⁹ Apparently, much of Plaintiff counsel’s belief on this point arose from representations by Defendant Joseph E. Bockrath who, aside from failing to respond to or otherwise misleading Plaintiff’s counsel, allegedly told Plaintiff’s counsel that Defendant Design-A-Drape, Inc. was a “family run business.”²⁰ Citing 10 Del. C. §3904 as statutory support for his naming Defendant Nancy L. Bockrath in the Complaint, Plaintiff’s counsel argues that “partners in a common law partnership may be liable for the debts of the business.”²¹ Before filing suit, Plaintiff allegedly discovered that Defendant Design-A-Drape, Inc. had not been “in good standing with the Delaware Division of Corporations” since June 2002.²² As of March 1, 2008, the Delaware Secretary of State declared that Defendant Design-A-Drape, Inc. had become “inoperative and void” for “non-payment of taxes.”²³

III. THE APPLICABLE LAW

Ordinarily, a court of law may not order the losing party in an action to pay the opponent’s attorneys’ fees.²⁴ This rule of law is often referred to as the American Rule. However, both statutory and common law exceptions to the American Rule have been created and recognized in this State. For example, under the bad faith exception to the American Rule, Delaware courts may shift attorneys’ fees when a “losing party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’”²⁵ Bad faith has been found to exist where “parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims[,]...mis[led] the court, alter[ed] testimony, or chang[ed] position on an issue.”²⁶

Absent either statutory authority or a contractual undertaking between the parties, courts of law in Delaware are generally without power to shift

¹⁹ Pl. Reply, at ¶ 18.

²⁰ *Id.* at ¶ 5.

²¹ *Id.* at ¶19.

²² *Id.* at ¶ 6.

²³ *Id.* at Ex. A.

²⁴ *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 545 (Del. 1998), *citing Arcambel v. Wiseman*, 3 U.S. 306 (1796) (disallowing an award of attorneys’ fees to the winning party).

²⁵ *Dover Historical Society, Inc. v. City of Dover Planning Commission*, 902 A.2d 1084, 1093 (Del. 2006), *citing Slawik v. State*, 480 A.2d 636, 639 n.5 (Del. 1984).

²⁶ *Id.*, *citing Beck v. Atlantic Coast PLC*, 868 A.2d 840, 850-851 (Del.Ch. 2005).

attorneys' fees among the parties.²⁷ This is to say that, ordinarily, equitable principles are often left to be applied by the Court of Chancery in this State.²⁸ However, when this Court hears cases in which equitable principles are an ancillary but intimately related issue, the Superior Court "has jurisdiction to award attorneys' fees even if no contract or statute requires it."²⁹

By Superior Court Rule of Civil Procedure 11, an attorney who signs a document and files it with the Court is making certain representations as to its contents.³⁰ If it is found that an attorney has violated the guidelines concerning representations to the Court, monetary sanctions are an available option to the Court.³¹

IV. DISCUSSION

A court's assessment on whether to shift attorneys' fees from a winning to a losing side is always extremely fact sensitive. From the bare facts of the record and from the Court's review of the loan applications that drove the initial action against Defendants, it is clear to the Court that Plaintiff's attorney could not have reasonably thought that Defendant Nancy L. Bockrath would have been responsible for the payment of the loan if it were in default. Her name does not appear on the loan documents in any form nor was there any indication in those documents of anything other than unilateral action by her husband to procure the loan from Plaintiff.

Plaintiff's attorney points to a statute in his defense, which provides, in relevant part, the following:

An unincorporated association of persons, including a partnership, using a common name may sue and be sued in such common name and a judgment recovered therein shall be a lien like other judgments, and may be executed upon by levy, seizure and sale of the personal and real estate of such association, and also that of the persons composing such

²⁷ *Burge v. Fidelity Bond and Mortgage Co.*, 648 A.2d 414, 421 (Del. 1994).

²⁸ 10 Del. C. §341.

²⁹ *Dover Historical Society, Inc. v. City of Dover Planning Commission*, 902 A.2d at 1090, citing *Burge v. Fidelity Bond and Mortgage Co.*, 648 A.2d at 422 (holding that the Superior Court's award of attorneys' fees was proper as the court had "exercised its inherent equitable authority to 'control its own process.'")

³⁰ Super.Ct.Civ.R. 11(a), 11(b).

³¹ Super.Ct.Civ.R. 11(c).

association in the same manner with respect to them as if they had been made parties defendant by their individual names.³²

Oddly, Plaintiff's counsel cites a statute that demonstrates that his naming Defendant Nancy L. Bockrath individually was unnecessary. 10 Del. C. §3904 is referred to as a "common name" statute, the purpose of which is to permit a plaintiff to file suit against an unincorporated association of persons using a common name without having to identify all the members of that group individually.³³

As the statute says nothing of incorporated associations, Plaintiff's counsel argues that 10 Del. C. §3904 ought to apply however as his alleged awareness of Defendant Design-A-Drape, Inc.'s tax troubles, which began in June 2002, made the company's corporate status uncertain. Indeed, the proclamation of Defendant Design-A-Drape, Inc.'s dissolution as a corporate entity came after the fact as of March 1, 2008. Nevertheless, Plaintiff's counsel's reliance on 10 Del. C. §3904 in defense of his actions here serve only to prove Defendant Nancy L. Bockrath's position that her being named individually in the Complaint was unwarranted. Plaintiff's counsel directs the court to nothing other than to this inapposite statute that demonstrates the rationality of his naming Defendant Nancy L. Bockrath in the Complaint at the time he did. Therefore, the Court holds that Defendant Nancy L. Bockrath is entitled to recover counsel fees under the bad faith exception to the American Rule. The Court does feel that the full amount of attorney's fees requested, \$1,500.00, need not be awarded

V. CONCLUSION

For the preceding reasons and in the exercise of the Court's discretion, Defendant Nancy L. Bockrath's Request for Reimbursement of Counsel Fees is **GRANTED** in the amount of \$750.00.

Very truly yours,

oc: Prothonotary

³² 10 Del. C. §3904.

³³ *Silliman v. F.I. DuPont*, 302 A.2d 327, 331 (Del. Super. 1972).