



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SUSAN A. MARTINEZ, :
 :
 Plaintiff, :
 :
 v. : C.A. No. 4128-VCP
 :
 REGIONS FINANCIAL CORPORATION :
 a Delaware Corporation, as successor in :
 interest to AMSOUTH BANCORPORATION, :
 a Delaware Corporation, :
 :
 Defendant. :

**REPLY BRIEF IN FURTHER SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Dated: January 30, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
ARGUMENT	1
I. LEGAL STANDARD ON SUMMARY JUDGMENT	2
II. MARTINEZ IS ENTITLED TO ADVANCEMENT OF HER FEES BEFORE THE CASE IS DECIDED ON ITS MERITS	3
III. MARTINEZ’S CLAIMS ARE NOT UNREASONABLE NOR HAVE THEY BEEN BROUGHT IN BAD FAITH	8
CONCLUSION	10

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Bergonzi v. Rite Aid Corp.</i> , 2003 WL 22407303 (Del. Ch.).....	4
<i>Deal v. Consumer Programs, Inc.</i> , 470 F.3d 1225 (8th Cir.2006)	7, 8
<i>Delta and Pine Land Co. v. Monsanto Co.</i> , 2006 WL 1510417 (Del. Ch.).....	6
<i>Fasciana v. Elec. Data Sys. Corp.</i> , 829 A.2d 160 (Del. Ch. 2003)	5
<i>Fuisz v. Biovail Techs., Ltd.</i> , 2000 WL 1277369 (Del. Ch.).....	4
<i>Gerow v. Rohm & Haas Co.</i> , 308 F.3d 721 (7th Cir. 2002)	8
<i>Homestore, Inc. v. Tafeen</i> , 886 A.2d 502 (Del. 2005).....	2, 4
<i>Jackson Walker L.L.P. v. Spira Footware, Inc.</i> , 2008 WL 2487256 (Del. Ch.).....	2
<i>Judah v. Delaware Trust Co.</i> , 378 A.2d 624 (Del. 1977).....	2
<i>Kaung v. Cole Nat’l Corp.</i> , 884 A.2d 500 (Del. 2005).....	5
<i>Lillis v. AT&T Corp.</i> , 904 A.2d 325 (Del. Ch. 2006)	7
<i>Miller v. U.S. Foodservice, Inc.</i> , 405 F. Supp. 2d 607 (D. Md. 2005)	7
<i>Ridder v. CityFed Fin. Corp.</i> , 47 F.3d 85 (3d Cir. 1995)	4
<i>Senior Tour Players 207 Mgmt. Co., LLC v. Golftown 207 Holding Co., LLC</i> , 853 A.2d 124 (Del. Ch. 2004).....	4
<i>Sun-Times Media Group, Inc. v. Black</i> , 954 A.2d 380 (Del. Ch. 2008).....	5
<i>Tanzer v. Int’l Gen. Indus., Inc.</i> , 402 A.2d 382 (Del. Ch. 1979)	2
<i>United Rentals, Inc., v. Ram Holdings, Inc.</i> , 937 A.3d 810 (Del. Ch. 2007).....	2
<i>Williams v. Geier</i> , 671 A.2d 1368 (Del. 1996).....	2
 <u>STATUTES AND ADMINISTRATIVE MATERIALS</u>	
8 <i>Del. C.</i> § 145	4

PRELIMINARY STATEMENT

Plaintiff Susan A. Martinez (“Martinez”) moved for partial summary judgment with respect to her claim for advancement of litigation expenses (Verified Complaint (“Complaint” or “Compl.”), Count IV) in accordance with the unambiguous terms of her employment agreement (the “Employment Agreement”)¹ with defendant Regions Financial Corporation’s (“Regions”). Regions filed its opposition to Martinez’s Motion for Partial Summary Judgment combined within its own Motion for Summary Judgment (“Answering Brief” or “Ans. Br.”).²

Regions’ sole argument as to why Martinez is not entitled to advancement of her fees, despite the clear wording of the Employment Agreement, is that Martinez’s litigation position is unreasonable and, therefore, under the terms of the advancement provision she is not entitled to advancement of her fees. As outlined below, Regions’ argument fails on both procedural and factual bases. First, Regions’ position that the Court should look to the merits of the case before deciding whether the advancement provision applies is contrary to clear Delaware case law and, if followed, would effectively negate the purpose for which the advancement provision was included in the Employment Agreement. Second, contrary to Regions’ assertions, Martinez’s claims against Regions are reasonable and brought in good faith and support the enforcement of the advancement provision of Martinez’s Employment Agreement.

¹ The Employment Agreement is attached as Exhibit A to the Affidavit of Susan A. Martinez, which was filed with Plaintiff’s Opening Brief in support of her Motion for Partial Summary Judgment (“Opening Brief” or “Op. Br.”).

² Only Regions’ arguments raised in opposition to Martinez’s Motion for Partial Summary Judgment are addressed herein as Martinez intends to file a separate brief opposing Regions’ Motion for Summary Judgment.

ARGUMENT

I. LEGAL STANDARD ON SUMMARY JUDGMENT

As outlined in Martinez’s Opening Brief, summary judgment is appropriate when there are no questions of material fact and the moving party is entitled to judgment as a matter of law. *See Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996). In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party, and the moving party generally has the burden of demonstrating that there is no material question of fact. *Tanzer v. Int’l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979) (citing *Judah v. Delaware Trust Co.*, 378 A.2d 624, 632 (Del. 1977)). Here, Martinez’s advancement claim is ripe for adjudication on summary judgment as it involves an unambiguous contract provision. *See United Rentals, Inc. v. Ram Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

“Summary judgment practice is an efficient and appropriate method to decide advancement disputes, because ‘the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought.’” *Jackson Walker L.L.P. v. Spira Footwear, Inc.*, 2008 WL 2487256, *3 (Del. Ch.) (Op. Br. Ex. 1) (citations omitted). Prompt summary adjudication is particularly appropriate in advancement actions because “to be of any value to the executive or director, advancement must be made promptly, otherwise its benefit is forever lost because the failure to advance fees affects the counsel the director may choose and litigation strategy that the executive or director will be able to afford. . . . Delaware’s policy [is to] resolv[e] advancement issues as quickly as possible.” *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 505 (Del. 2005) (quoting with approval Chancellor Chandler’s decision below).

Regions has raised no argument that there are any questions of material fact which preclude deciding Martinez's advancement claim on the record before the Court, accordingly, the claim is ripe for adjudication.³

II. MARTINEZ IS ENTITLED TO ADVANCEMENT OF HER FEES BEFORE THE CASE IS DECIDED ON ITS MERITS

Regions' sole argument regarding why Martinez is not entitled to partial summary judgment on her advancement claim is that her claim must fail because her position in the litigation is patently unreasonable and brought in bad faith. (Ans. Br. 21-24). Specifically, Regions contends that the below wording of Martinez's Employment Agreement requires that in order for Martinez to obtain advancement of her fees and expenses, Martinez's litigation position must be reasonable. (*Id.* at 22).

The Company agrees to pay as incurred, to the full extent permitted by law, all legal fees and expense which the Employee may reasonably incur as a result of any contest (regardless of the outcome thereof) by the Company, the Executive, or others of the validity or enforceability of, or liability under, any provision of this Agreement or any guarantee of performance thereof (including as a result of any contest by the Executive about the amount of any payment pursuant to this Agreement)...

(Employment Agreement, § 8).

Thus, Regions' interpretation of the advancement provision requires Martinez to prove the reasonableness of her claims at this point in the proceeding, prior to receiving any advancement of her legal expenses. This interpretation is meritless as it would render the advancement provision illusory and would thwart the intent of including the advancement provision in the Employment Agreement.

³ Martinez disputes Regions' contentions in Regions' Motion for Summary Judgment that there are no disputed material facts relating to Martinez's other claims. However, as indicated previously, these issues will be addressed in Martinez's separate brief filed in opposition to Regions' Motion for Summary Judgment.

Significantly, Regions cites to no Delaware case in which the Court, in ruling on the enforceability of a mandatory advancement provision, engaged in an analysis of the merits of the underlying litigation to determine if the party entitled to advancement had an “unreasonable” litigation position. This lack of citation to any such authority is understandable as Delaware courts have consistently held that such an analysis would serve to undermine the purpose of an advancement provision. In fact, under Delaware law, resolution of an advancement proceeding does not depend on the merits of the underlying claims but involves whether the claimant is entitled to advancement under the applicable terms of the parties agreement or applicable statute. *See Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co., LLC*, 853 A.2d 124, 126-127 (Del. Ch. 2004); *Ridder v. CityFed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1995).

For an advancement provision to be meaningful, the claimant’s entitlement to advancement must be decided quickly as the failure to advance fees can impact the counsel the executive chooses and the litigation strategy the executive can afford. *Homestore, Inc. v. Tafien*, 886 A.2d 502, 505 (Del. 2005). Moreover, Section 145(k) of the Delaware General Corporation Law, which provides that the Court of Chancery may summarily determine a corporation’s obligation to advance expenses “reflects a policy determination by the General Assembly that the Court of Chancery should be receptive to and accord expedited treatment to claims for advancement of expenses...” *Bergonzi v. Rite Aid Corp.*, 2003 WL 22407303, *4 (Del. Ch.) (Ex. A) (quoting *Fuisz v. Biovail Techs., Ltd.*, 2000 WL 1277369 (Del. Ch.) (Ex. B)). Additionally, “the scope of an advancement proceeding under Section 145(k) of the DGCL is limited to determining ‘the issue of entitlement according to the corporation’s advancement provisions and not to issues regarding the movant’s alleged conduct in the underlying

litigation.’’ *Kaung v. Cole Nat’l Corp.*, 884 A.2d 500, 509 (Del. 2005) (quoting *Homestore*, 886 A.2d at 502).

As the above cases illustrate, the benefit of a mandatory advancement provision is lost if the party seeking advancement is forced to litigate or defend the merits of its underlying position prior to its claim for advancement being decided. Consequently, in deciding whether Martinez is entitled to advancement, the Court should look only at the advancement provision and whether the claims raised in Martinez’s Complaint are subject to her advancement right under the Employment Agreement provision. *See Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 167 (Del. Ch. 2003). To hold otherwise allows Regions to force Martinez to fully prove her case without the benefit of advancement of her legal costs.

Upon reading Martinez’s Complaint and the Employment Agreement, it is clear the subject matter of the claims in Martinez’s Complaint is expressly covered by the advancement provision in the Employment Agreement. Here, Martinez has disputed the amount of compensation she has received pursuant to her Employment Agreement. (*See* Compl. Counts I & II). This exact dispute is expressly covered by the terms of the advancement provision in the Employment Agreement. (*See* Employment Agreement, § 8). Thus, Regions attempts to avoid its responsibilities under the mandatory advancement provision by arguing Martinez’s position is “unreasonable” is a transparent attempt to force Martinez to litigate the entire case without receiving the benefits of the advancement provision in her Employment Agreement. *See Sun-Times Media Group, Inc., v. Black*, 954 A.2d 380, 399 n.75 (Del. Ch. 2008) (“companies are being forced to search even harder for increasingly strained arguments that will allow them to delay living up to seemingly clear advancement obligations”).

Significantly, Regions has not contended that the subject matter of the disputes brought by Martinez related to her compensation under the Employment Agreement is not covered by the advancement provision. Rather, Regions has only contended that the specific claims Martinez has brought are not subject to the advancement provision because they are unreasonable. It is hard to imagine any dispute between an employer and employee related to unpaid compensation where the employer would admit that the employee's position was reasonable. Consequently, under Regions' proposed interpretation of the advancement provision, every dispute would likely require an inquiry on the merits of the case by the Court before an employee could receive the advancement she is entitled to under her contract. Regions' interpretation nullifies the very purpose for the inclusion of the advancement provision in the Employment Agreement and would render its protections illusory; therefore, Regions' interpretation fails under normal rules of contract construction. *See Delta and Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, *4 (Del. Ch.) ("contracts must be interpreted in a manner that does not render any provision 'illusory or meaningless'") (Ex. C) (citations omitted).

Moreover, the fact that Regions combined its opposition to Martinez's Motion for Partial Summary Judgment with its own Motion for Summary Judgment is telling as to Regions' strategy in this litigation. Rather than opposing Martinez's Motion for Partial Summary Judgment in a separate pleading, Regions has chosen to set forth all its arguments against Martinez's claims and then, argue that based on these alleged defenses to Martinez's claims, Martinez's request for advancement is unreasonable. (*See* Ans. Br. 21-24). Regions' very Motion illustrates that its entire basis for disputing Martinez's advancement arises from Regions' position that it believes Martinez's underlying claims are not "reasonable." This attempt to

bootstrap and connect Martinez's right to advancement to the eventual resolution of Martinez's other claims is clearly precluded by the wording of the Employment Agreement which provides:

The Company agrees to pay as incurred, to the full extent permitted by law, all legal fees and expense which the Employee may reasonably incur as a result of any contest (**regardless of the outcome thereof**) by the Company....

(Employment Agreement, § 8) (emphasis added).

The parties contemplated that in any dispute, regardless of the outcome thereof, related to Martinez's compensation under the Employment Agreement, Martinez would be entitled to advancement of her legal fees and expenses. That is what was bargained for and that is what the Court should enforce. Regions' attempts to force Martinez to defend the merits of her claims without the benefit of the advancement of her fees places a burden on Martinez that the advancement provision of the Employment Agreement specifically sought to avoid. Therefore, Regions' contention that Martinez is not entitled to advancement because Regions believes her litigation position to be unreasonable must fail. To hold otherwise would rewrite the unambiguous terms of the advancement provision in § 8 of the Employment Agreement and would leave Martinez without the protections specifically provided to her by her Employment Agreement. *See Lillis v. AT & T Corp.*, 904 A.2d, 325, 334 (Del. Ch. 2006).

Finally, if Regions truly believes that Martinez's litigation position is patently unreasonable and brought in bad faith, Delaware law provides adequate remedies available to Regions. However, this is not the stage of the proceedings for Regions to require the Court make that determination. *See Miller v. U.S. Foodservice, Inc.*, 405 F. Supp. 2d 607, 618 (D. Md. 2005) (officer was entitled to advancement and the court made no determination whether the corporation would later be entitled to repayment if it was ultimately found that the officer did not act in good faith). Accordingly, Regions' arguments that Martinez's litigation position is

unreasonable are not a basis for Region's to avoid enforcement of the unambiguous advancement provision in Martinez's Employment Agreement and Martinez's Motion for Partial Summary Judgment must be granted.

III. MARTINEZ'S CLAIMS ARE NOT UNREASONABLE NOR HAVE THEY BEEN BROUGHT IN BAD FAITH

As indicated above, Martinez is not required to refute Regions' contentions that her litigation position is unreasonable to be entitled to advancement of her legal costs and the Court should not consider Region's contentions in ruling on Martinez's right to advancement. However, in an abundance of caution, Martinez will briefly address Regions' assertion that her position is unreasonable.

In asserting that Martinez's litigation position is unreasonable, Regions relies almost exclusively on *Gerow v. Rohm & Haas Co.*, 308 F.3d 721 (7th Cir. 2002). (Ans. Br. 21-24). As a preliminary problem with Regions' analysis, *Gerow*, which is not binding authority for this Court, involved the Seventh Circuit's denial of advancement of the costs incurred in appealing a district court's decision. Regions fails to note that the court found that the plaintiff in *Gerow* was entitled to and did receive advancement of his legal fees in the lower court action. *Gerow*, 308 F.3d at 725-726. Thus, the primary authority Regions relies upon specifically found that the plaintiff in *Gerow* was entitled to advancement of his fees when his case was in a similar posture to this case.

Moreover, although Regions alleges that the *Gerow* contract contained "virtually identical contract language" as Martinez's Employment Agreement, the language in Martinez's Agreement is more similar to the contract in *Deal v. Consumer Programs, Inc.*, 470 F.3d 1225

(8th Cir. 2006),⁴ which reached a different conclusion than the *Gerow* court regarding the amounts the employee was entitled to under his employment agreement. Therefore, Regions' simplified construction of this case as one that is ripe for adjudication based on the wording of the Employment Agreement does not hold up to scrutiny. In short, in regards to Count II of Martinez's Complaint, this is a situation where there is no binding Delaware authority available construing the language of Martinez's Employment Agreement. Instead, there are two decisions from two different federal appellate courts that reached arguably conflicting decisions. Under such circumstances, Regions' claims that Martinez's litigation position is unreasonable due to *Gerow* ring hollow.

Finally, as much as Regions would like to construe that all Martinez's claims are ripe for adjudication on summary judgment, there are issues of material fact that still must be resolved. Based on Regions' Motion for Summary Judgment, it is clear the parties disagree on some of the most basic facts at issue in this lawsuit. These facts will be addressed in more detail in Martinez's response to Regions' Motion for Summary Judgment, but one example is that the parties clearly disagree as to the date when Martinez was actually terminated. (*See* Ans. Br. 8 n.5). This fact is clearly significant in determining the amount of bonus Martinez was entitled to for 2007 (Compl., Count I), and precludes a determination related to the reasonableness of Martinez's litigation position at this time. This disputed fact alone illustrates that Regions' arguments that Martinez's litigation position is unreasonable lacks meaningful foundation in fact.

⁴ In *Deal*, the court found that a terminated executive was entitled to both salary and severance under the terms of the employment agreement at issue in that case. The language of the *Deal* agreement and the Martinez Employment Agreement is similar in that Martinez's Agreement states that unless explicitly limited by the agreement, the terminated executive is entitled to all amounts payable pursuant to any contract or agreement and the *Deal* agreement provides that the terminated executive is entitled to all remedies available under this agreement or at law.

Thus, pursuant to the clear terms of her Employment Agreement, Martinez should be advanced her reasonable legal fees and expenses related to this matter.

CONCLUSION

In closing, the unambiguous terms of the advancement provision in § 8 of the Employment Agreement expressly provide that in any contest regarding Regions' liability under any provision of the Employment Agreement, Regions will advance Martinez's legal fees regardless of the outcome of the contest. Regions makes absolutely no argument that the subject matter of the claims raised by Martinez are not covered by the express terms of the Employment Agreement's advancement provision. Instead, in an attempt to avoid its express contractual obligations, Regions has argued that Martinez's claims are unreasonable because Regions asserts a different version and interpretation of the facts and contract at issue. The purpose of the advancement provision was that Martinez would be advanced her litigation expenses in the event the parties disagreed and had a dispute related to facts and interpretation of the Employment Agreement. That is exactly what has occurred here, and no amount of hindsight logic by Regions can change the clear terms of the advancement provision and the obligations it imposes on Regions. Accordingly, Martinez is entitled to partial summary judgment and an order compelling Regions to reimburse Martinez for her attorneys' fees accrued to date, in addition to her fees incurred in the future and in bringing her Motion for Partial Summary Judgment.

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