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LAWRENCE B. SEIDMAN and ARTHUR WEIN, Plaintiffs, v. SPENCER SAVINGS BANK, S.L.A., JOSE B. GUERRERO, PETER J. HAYES, NICHOLAS LORUSSO, BARRY MINKIN, ALBERT D. CHAMBERLAIN, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: PASSAIC COUNTY DOCKET NO. PAS-C-25-19 Civil Action **ORDER GRANTING PARTIAL RECONSIDERATION**

THIS MATTER being opened to the Court by Pashman Stein Walder Hayden, P.C., co-counsel for Defendants Spencer Savings Bank, S.L.A., Jose Guerrero, Peter J. Hayes, Nicholas LoRusso, Barry Minkin, and Albert D. Chamberlain (Sean Mack, Esq. appearing) by way of motion for reconsideration of the Court's July 31, 2020 decision, and the Court having considered the submissions and arguments of the parties, and for good cause shown;

IT IS on this 29th day of April, 2021,

ORDERED that:

1. Defendants' Motion for Reconsideration is **GRANTED**;
2. The requirement that Defendants apply for the appointment of independent regulatory counsel in the event of any future board vote in favor of conversion to a mutual savings bank is hereby **VACATED**; and
3. The award of attorney's fees to Plaintiffs is hereby **VACATED**.
4. A copy of the within Order shall be served via email upon all counsel of record within seven (7) days of receipt by Defendants' counsel.

/s/ Frank Covello
HONORABLE FRANK COVELLO, J.S.C.

✓ Opposed

____ Unopposed

SEE ATTACHED STATEMENT OF REASONS

Lawrence B. Seidman and Arthur Wein v. Spencer Savings Bank, S.L.A. et. al.
PAS-C-25-19
Motion for Partial Reconsideration

STATEMENT OF REASONS

This motion comes before the Court by way of Defendants' Spencer Savings Bank Motion for Partial Reconsideration of the Court's July 31, 2020 Decision in this matter. And by way of Plaintiff's, Seidman and Wien, Cross Motion for Partial Reconsideration. For the reasons set forth below, the motion is GRANTED.

STANDARD OF REVIEW

Under Rule 4:49-2, "a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties . . ." R. 4:49-2. However, under Rule 4:42-2, when none of: (1) a complete adjudication of a separate claim; (2) complete adjudication of all the rights and liabilities asserted as to any party; or (3) where partial summary judgment or other order for payment of part of a claim are present, then the rule mandates that:

> any order or form of decision which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice.

R. 4:42-2; see Lombardi v. Masso, 207 N.J. 517, 534 (2011) ("the trial court has the inherent power [in its sound discretion] to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment."); Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250 (App. Div. 1987), certif. den'd. 110 N.J. 196 (1988) (holding that an order adjudicating fewer than all the claims is subject to revision in the interests of justice prior to entry of final judgment).

Yet, the power to reconsider interlocutory orders is "not subject to wanton invocation or unfettered judicial response." Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 264 (App. Div. 1987), certif. den'd. 110 N.J. 196 (1988). "It is only for good cause shown and in the service of the ultimate goal of substantial justice that the court's discretion should be exercised . . . [this standard] is endowed with an unmistakable substantive content by the common understanding [] of what is fair, right, and just in the circumstances." Ibid.

A court will reconsider its decision only in cases where: (1) it rested its initial decision upon a palpably incorrect or irrational bases; or (2) it is obvious that the Court neither considered nor appreciated the significance of probative, competent evidence. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). "If a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the court should [] consider the evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). However, "motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour . . . the [c]ourt must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration." Ibid.

ARGUMENTS

In support of its motion, Defendant argues that (1) The remedy of independent regulatory counsel was based on misunderstandings of fact and beyond the court's Authority to impose; (2) The Court lacks authority to award attorneys' fees in this non-derivative action; (3) The Fee Application does not comply with R. 4:42-9(b); and (4) Defendant seeks clarity pertaining to the reliance on the advice of counsel.

In further support of its motion via its letter brief in opposition to Plaintiff's cross-motion for partial reconsideration, Defendant argues that the new legislation is not relevant to

this lawsuit other than to show that the alternative charter Plaintiffs asserted Spencer should have pursued in 2019 did not exist at that time, and still does not exist.

In support of its cross motion, Plaintiff argues that the fee application complies with R. 4:42-9(b) and RPC 1.5(a). Additionally, Plaintiff is arguing that the Bill introduced in the New Jersey Senate to require member voting for directors of Savings Bank Mutual Holding Companies further validates the need for the appointment of independent regulatory counsel, but fails to give further explanation.

ANALYSIS

Vacate the Independent Regulatory Counsel

Proxy Materials and Misunderstanding of the Court

Defendant seeks reconsideration and asks the Court to vacate the requirement that it apply for the appointment of independent regulatory counsel should the Board adopt a plan to convert at any point in the future. This argument is based on an assertion that the Court holds a significant misunderstanding of facts. Defendant argues that its proxy materials advised its members that they would no longer vote on Spencer's directors if the conversion was approved. *See* Mack Cert., Ex. B (Complaint, Ex. G). Plaintiff's complaint did not allege otherwise, nor did Plaintiffs introduce any testimony at trial claiming the members were not advised that they would not have voting rights in a mutual savings bank. As such, Spencer did not address the contents of the proxy materials at trial, which is what it believes caused the Court's misconceptions about what was contained in them.

Defendant argues that the intent of the charge to the independent regulatory counselor is unclear. This court found that "it is clear that the solution offered by Mr. Seidman to preserve

member voting rights would not be successful," so Defendant questions if the intent is to bar conversion if member voting rights are not preserved, which would be tantamount to a permanent injunction on exercising a statutory right.

Plaintiffs' Argument using the New NJ Bill

On July 28, 2020 a Bill was introduced in the New Jersey Senate, which provides for member voting at Mutual Savings Bank Holding Companies. Plaintiffs allege that the decision to convert had to be entrenching because there were alternatives that would resolve Spencer's regulatory constraints while preserving the ability of members to vote. This Court found that Plaintiff's theory to preserve member voting rights would not be successful. As such, Plaintiff now seeks to portray new legislation as "newly discovered evidence" that is a "matter of public knowledge" to claim that Spencer had alternatives for conversion. Plaintiff also asserts that Defendants' regulatory counsel, Mr. Faucette, Esq., sent a warning notice about this new legislation. However, Mr. Faucette's email/notice is from July 22nd. As such, Plaintiff's argument that there somehow existed another means for conversion that was known and available to the Defendants is without merit.

Beyond the Power of the Court

Finally, in arguing that the requirement to apply for appointment of independent regulatory counsel is beyond the power of the Court to grant, Defendants assert that this appointment was not a prayer for relief in Plaintiffs' complaint, and was not sought until their post-trial brief. The Plaintiffs did not proved any legal support for this remedy. Also, not only is there no precedent for the requirement to require a bank to apply to the court for appointment of

independent regulatory counsel, in perpetuity, if it ever seeks to change its charter to a mutual savings bank, it is in fact contrary to established principles.

It is well-settled that "[a]n action terminates with the final decree of judgment, and the court loses jurisdiction over the cause and over the parties after the next term of court, or after the expiration of time for appeal, or some other certain period." Kase v. Kase, 18 N.J. Super. 12, 15 (App. Div. 1952); see also House of Fire Christian Church v. Zoning Bd. of Adjustment of Clifton, 370 N.J. Super. 526, 531 (App. Div. 2005) ("It is well-settled that an order of a trial court that retains jurisdiction pending the happening of a certain event is not, by definition a final judgment."). The Supreme Court has referred to ongoing court supervision as an "extreme remedy." Abbot ex rel. Abbot v. Burke, 170 N.J. 537, 541 (2002); see also Dover Shopping Center, Inc. v. Cushman's Sons, Inc., 63 N.J. Super. 384, 394 (App. Div. 1960) ("equity will not order specific performance where the duty to be enforced continues over a long period of time and is difficult of supervision"). Even in approving the appointment of special fiscal agents, a potentially analogous remedy, appellate courts have emphasized that it is a "pendente lite" device that must have a termination date. See Roach v. Marguiles, 42 N.J. Super. 243, 246 (App. Div. 1956); Kassover v. Kassover, 312 N.J. Super. 96, 101 (App. Div. 1998) (remanding to fix termination date for appointment of special fiscal agent).

Defendant asserts that the Commissioner is charged with broad oversight authority over savings associations, and thus such associations are required by statute to apply to the Commissioner—not to the Court—upon seeking to convert to a mutual savings bank. N.J.S.A. 17:16M-2. And once the Commissioner is satisfied that a savings association "has met all of the requirements of th[e] act and all conditions imposed on the commissioner's intent of approval," she is *required* to approve the conversion. N.J.S.A. 17:16M-6(b). Defendant has repeatedly

wrongly asserted that this Court is somehow making the conversion decision. It is not and has not done anything of the sort. This court addresses the issues of corporate governance that has been led by the desire to entrench the members of the board and prevent Seidman from running for a seat on the board at any cost.

If Spencer's Board at some point in the future decides for a legitimate reason that conversion is in the bank's best interest, it will present that to the members in an appropriate manner. Plaintiffs can again disagree with that decision, they would be entitled to seek judicial review of that determination, just as they did here, and continue with the seemingly unending litigation between these parties.

This court agrees that it was not within the scope of the relief sought, nor was there a justifiable basis for the imposition of a requirement for Spencer to appoint an independent regulatory counsel. Thus, this portion of the order is vacated.

Fee Application

Attorney's fees are not permitted in this non-derivative action.

This Court agrees with the analysis of Spencer's argument as to Plaintiff's fee application, and that argument is repeated below. "Under the American rule, 'which is the law of this State, a prevailing party may not be granted attorney's fees unless authorized by the parties' contract, court rule, or statute.'" Litton Indust. Inc. v. IMO Indust. Inc., 200 N.J. 372, 404 (2009) (quoting Rock Work, Inc. v. Pulaski Const. Co., 396 N.J. Super. 344, 350-51 (App. Div. 2007)); see also R. 4:42-9(a) ("No fee for legal services shall be allowed in the tax costs or otherwise" except in the exceptions set forth in the Rules).

Success on a breach of fiduciary claim does not, by itself, provide an entitlement to counsel fees. See, e.g., In re Estate of Lash, 169 N.J. 20, 34 (2001) ("the fact that a person owes another a fiduciary duty, in and of itself, does not justify an award of fees unless the wrongful conduct arose out of an attorney-client relationship"); In re Estate of Vayda, 184 N.J. 115, 123-124 (2005) (affirming "New Jersey's strong public policy against the shifting of counsel fees" and declining to award counsel fees in case where executor breached fiduciary duty). Rather, with respect to fiduciary duties owed to shareholders, courts have permitted attorney's fees only through derivative claims, relying on the payment of fees "out of a fund in court" provided for in R. 4:49-2(a)(2).

That exception provides:

> The court in its discretion may make an allowance out of such fund, but no allowance shall be made as to issues triable of right by a jury. A fiduciary may make payments on account of fees for legal services rendered out of a fund entrusted to the fiduciary for administration, subject to approval and allowance or to disallowance by the court upon settlement of the account.

As the Supreme Court has explained, "[t]he term 'fund in court' is one of art. It is applied where plaintiff's actions have created, preserved or increased property to the benefit of a class of which he is a member." Sarner v. Sarner, 38 N.J. 463, 467 (1962) (emphasis added); See also Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162 (1960) ("In general, allowances are payable from a 'fund' when it would be unfair to saddle the full cost upon the litigant for the reason that the litigant is doing more than merely advancing his own interests.").

"Thus, the Rule's exception allows for attorney fee awards when a shareholder's derivative action results in the conferral of benefits, whether of a pecuniary or non-pecuniary nature, upon the defendant, that the defendant may, in the exercise of the court's equitable discretion, be required to yield in the form of an award of attorney's fees." Trimarco v.

Trimarco, 396 N.J. Super. 207, 216 (App. Div. 2007). The Rule does not permit the award of fees in direct actions. See id. (affirming award of counsel fees that reflected "an articulated division of the time allocated to individual and derivative claims"); Sarner, 38 N.J. at 470-71 (remanding to trial court to parse out which fees were incurred on plaintiffs' derivative rather than personal causes of action).

This Court determined that Plaintiffs' claim was not derivative, stating that "the injuries alleged by Messrs. Seidman and Wein qualify as direct actions – their injuries are unique in contrast to the full membership of Spencer because they are seeking places on the board of directors. This endeavor is not something that the totality of the membership of Spencer seeks to do." Id. at 25. The Court further found that no derivative action could exist until and unless both Spencer's membership and the Commissioner approved a plan of conversion. Ibid.

Accordingly, because Plaintiffs claims were not derivative claims, the "fund in court" provision in R. 4:42-9(a)(2) does not authorize an award of attorney's fees to Plaintiffs in this lawsuit. Nor does any other provision of the Court Rules or New Jersey's statutes, and neither Plaintiffs' request for fees nor the Court's decision pointed to any authority for the fee award in the absence of a derivative action.

Spencer's analysis is correct and is correct that this Court based its fee award on a palpably incorrect basis. Reconsideration is therefore granted, and the award of fees to Plaintiffs vacated.

Plaintiff's Fee Application Fails to comply with R 4:42-9(b) and R.P.C. 1.5(1)

Defendants argue that Plaintiffs' Fee Application fees do not comply with Rule 4:42-9(b) and thus fails to provide the court with sufficient guidance to evaluate the claimed fees. The rule provides, in relevant part:

> all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a). The affidavit shall also include a recitation of other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought.

In addition, R.P.C. 1.5(a) states:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Defendants assert that Plaintiffs' Fee Application failed to address R. 4:42-9, RPC 1.5(a), or any of the general considerations set forth above. Plaintiffs' application does not analyze the eight factors set forth in RPC 1.5(a). Instead, the Fee Application only states that "the hourly rates are

reasonable and consistent with the amounts charged by counsel with similar experience and credentials."

The Fee Certification Includes Time Accrued for Unsuccessful Motions and Evidence Rejected by the Court

Defendant argues that Plaintiff's unsuccessful motion to disqualify counsel, motion to dismiss/motion for reconsideration, motions in limine, and time entries related to Plaintiffs' expert Richard Garabedian are improper.

In support of its argument, Defendant cites the Appellate Division's decision in Rendine, as well as RPC 1.5, which makes clear that "the results obtained" is a relevant consideration in determining a fee award. Rendine, supra 141 N.J. at 335. "[W]hen a plaintiff achieves only partial or limited success, the lodestar may be excessive even if plaintiff's claims were interrelated and raised in good faith." Silva v. Autos of Amboy, Inc., 267 N.J. Super. 546, 556 (App. Div. 1993). Although there is no precise formula, "a court can identify hours that should be eliminated, or simply reduce an award to accord with the limited success." Ibid.

Since the court has determined that Plaintiffs are not entitled to an award of attorney's fees in this matter, any adjustments based upon time spent would have no effect on the outcome and will not be discussed here.

Defendants Seek Clarity pertaining to the Reliance on the Advice of Counsel

This Court, in its decision, stated:

> Defendants point to the reliance upon advice of regulatory counsel to bolster their decision. A plaintiff challenging the good faith reliance must proffer facts that show the reliance upon advice was unreasonable and not in the company's best interest. *Scheidt*, supra, 424 N.J. Super. at 203–04; *Benihana of Tokyo, Inc.*, supra, 891 A.2d at 188. Absent such a showing by a plaintiff, this consideration will weigh in favor of the directors and in support of good faith and reasonable decision making. Ibid. In the

> instance of relying upon regulatory counsel, New Jersey case law does not require that counsel to be licensed in the State of New Jersey. *Scheidt*, supra, 424 N.J. Super. at 194; *but see* N.J.S.A. 17:12B-64 (outlining that the board can "retain or employ one or more attorneys-at-law or firm of attorneys-at-law of this State for a term not longer than 1 year. The board may employ, or authorize any officer to employ, any persons necessary for the conduct of the business of the State association). ***Here, plaintiffs have met their burden on this point***.

Defendants seek clarification of the court's decision which appears to have left out the word "not" from the last sentence above, based upon the reasoning of the decision. It appears that a critical link in this Court's analysis may not have been made in its original decision, and this court will therefore clarify it now. The statement, that the plaintiffs met their burden of proof is correct.

This court found as follows:

> Taking these facts and placing them with the law, the court holds that the primary purpose behind this proposal to convert was pretextual and was primarily aimed at entrenching the board of directors and ending the Seidman problem. See Scheidt, supra, 424 N.J. Super. at 202–04. The reliance upon the proposals of Faucette and Rey in the 2019 vote might otherwise constitute a good faith effort on the part of all directors, but it has been clear in this case and in prior cases between these parties, that the board members are entirely controlled by Jose Guerrero. There is no possibility that the malice Mr. Guerrero holds towards Seidman allowed him to operate in good faith. While there may have been a reasonable business purpose to convert, as shown in the testimony of Riggins and the failure of Garabedian's model, the basis for the conversion was a mere pretext to prevent Seidman from exercising any control over the board.

The missing connection is quite simple. While Douglas Faucette's testimony was credible, and there were sufficient facts in the case to demonstrate that there was a legitimate business purpose to convert, the board did not rely on Mr. Faucette. The entire conversion determination was pretextual, and Mr. Faucette's opinion like putting lipstick on a pig, was

generated to add legitimacy to the decision. But there is no doubt that that reason for the determination to convert was not for a valid business purpose, but to prevent the plaintiffs from any chance of obtaining a seat on the board.

Conclusion

For the reasons set forth above, the Defendants' Motion for Partial Reconsideration is GRANTED. The requirement that Defendants apply for the appointment of independent regulatory counsel in the event of any future board vote in favor of conversion to a mutual savings bank is hereby VACATED**.** The award of attorney's fees to Plaintiffs is vacated.