

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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Kurt M. Heyman, Esquire
Proctor Heyman LLP
1116 N. West Street
Wilmington, DE 19801

Robert S. Saunders, Esquire
Skadden, Arps, Slate, Meagher & Flom LLP
One Rodney Square
Wilmington, DE 19801

Re: *Sutherland v. Sutherland*
C.A. No. 2399-VCN
Date submitted: September 21, 2011

Dear Counsel:

At this morning's pretrial conference, the question arose as to whether tomorrow's trial is limited to the sums paid by Dardanelle and Southwest to Cimarron for Choctaw matters.¹

At paragraph 104 of the Amended Derivative Complaint, the Plaintiff alleged that "Cimarron performed substantial work on the Choctaw audit or

¹ Nomenclature is generally drawn from Amended Derivative Complaint.

examination and the bills for that work were paid by Dardanelle and/or Southwest.” Later in the same paragraph, she alleged that “based upon all of the facts alleged herein, there were also substantial other services provided by Cimarron that were done at the direction of Perry and/or that personally benefited Perry, that were billed to and paid for by Dardanelle and/or Southwest despite that the services were not for the Companies or their business.” Thus, the Amended Derivative Complaint’s challenge to payments made to Cimarron for accounting services was not limited to Choctaw matters.

The Defendants moved for summary judgment and, at pages 11-15 of their opening brief, attacked Martha’s claims based on Cimarron’s work with respect to the Choctaw Audit. In her answering brief, the Plaintiff also devoted most of her attention to Choctaw matters. Her brief, however, can fairly be read as not limiting her claim to the Choctaw Audit. At page 17, the brief states:

Martha’s challenge is clear and undisputed. Defendants have failed entirely to account for the funds paid to Cimarron for tax and accounting work, despite admitted knowledge that the Companies were “absorbing” and thus paying for personal work on the Choctaw Audit *and otherwise*. . . . Defendants did not do so because they know

the Companies were paying for personal tax and accounting work by Cimarron on the Choctaw Audit *and otherwise*.²

The Court, in denying the Defendants' motion for summary judgment on this issue, used "Choctaw Audit" as the subsection's caption and stated that the claim "involves work performed by Cimarron . . . for . . . Choctaw." The Court did not address evidence regarding other payments to Cimarron for non-Choctaw matters. That may have been because the Plaintiff's answering brief did not address other potential payments, other than in passing.³

The Court's opinion on summary judgment concluded with the request that counsel confer and submit an implementing form of order. For whatever reason, and the record is not clear, no form of order was submitted and the Court did not insist that one be provided.

That leaves the question of what remains for trial. It is clear that payments for the Choctaw Audit (and that fairly includes other Choctaw matters) are properly before the Court. The Plaintiff, perhaps carefully or perhaps fortuitously,

² One could argue that the "and otherwise" language merely extends the Choctaw Audit to other Choctaw-related matters, but no further. Limiting the broad language in that fashion seems unwarranted.

³ The Court, of course, could have (and perhaps should have) made clear that only claims involving Choctaw auditing expenses survived summary judgment.

both in her Amended Derivative Complaint and in her Answering Brief opposing summary judgment, did not limit her Cimarron expense claim to Choctaw matters. The Court denied summary judgment on the payments to Cimarron by focusing on one issue. It did not affirmatively grant summary judgment with respect to any other aspect of the Cimarron accounting payments claim, however sparsely pled.

Because the Court did not dismiss the claims of Plaintiff with respect to payments to Cimarron in any way, it cannot now conclude that it dismissed, by way of summary judgment, Cimarron-related matters other than Choctaw accounting services.

The Court understands why, given the history of this matter, the Defendants only anticipated the Choctaw Audit or, perhaps more generally, Choctaw matters, as the topic at trial. Both sides perhaps should have sought clarification of the Court's summary judgment decision. That, however, did not happen and the Court is left with the simple fact that it did not dismiss all (or any) of the Plaintiff's Cimarron-payment claims that were not related to Choctaw.⁴

⁴ Defendants did make a passing reference to Plaintiff's answer to "contentions interrogatories," but the text of those answers was not submitted.

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This decision is also reached in recognition of Plaintiff's acknowledgment that she does not have a separate claim for any specific expenses paid to Cimarron for audit services other than those relating to Choctaw matters, and that, in Plaintiff's view, this is as much a matter of burden of proof as it is one of scope of substantive liability.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Jay N. Moffitt, Esquire
Register in Chancery-K