IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

LYONS TOWNSHIP TRUSTEES OF SCHOOLS, TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
Plaintiff and Counter-Defendant,	)	No. 2018 CH 08263
v.	)	
	)	Judge Eve M. Reilly
LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204,	)	Calendar 7
Defendant and Counter-Plaintiff.	)	

LT'S RESPONSE TO
THE TTO'S MOTION TO STRIKE LT'S AFFIRMATIVE DEFENSE

Introduction

Defendant Lyons Township High School District 204 ("LT"), by its counsel, respectfully asks this Court to deny the Motion of Plaintiff Lyons Township Trustees Of Schools Township 38 North, Range 12 East ("the TTO"), to strike the affirmative defense of LT. LT's affirmative defense, based on the American Rule governing the recovery of attorneys' fees in Illinois, asserts a new matter that bars that part of the TTO's claim seeking attorneys' fees – even if characterized as operating expenses – that the TTO attempted to charge LT under the School Code.

The TTO sued LT in 2013, in a case that still is pending, and again in this case filed in 2018. In this case, the TTO complains that LT paid part, but not all, of four invoices that LT sent LT during 2015-18 for LT's pro rata share of claimed expenses of the township treasurer's office. The TTO's Complaint alleges that Section 8-4 of the School Code requires full payment.

As LT told the TTO each year, LT refused to pay certain items in the invoices because they were improper. The biggest of the improperly billed expenses were millions of dollars in attorneys' fees and expenses that the TTO has incurred in suing LT.

In LT's answer to the Complaint in this case, LT denied that the TTO's attorneys' fees were expenses of the treasurer's office within the meaning of Section 8-4. In LT's Affirmative Defense, LT asserted an additional defense: even if the TTO's attorneys' fees could be considered expenses of the treasurer's office, this part of the TTO's Complaint is barred by a superseding legal principle – namely, the American Rule governing attorneys' fees. The American Rule, as adopted in Illinois, requires each party in a dispute to bear its own attorneys' fees and expenses, unless there is a statute or contract that specifically allows the party to recover fees – and expressly employs the words "attorneys' fees."

The American Rule is a proper affirmative defense that will bar the majority of the TTO's damages claim in this case. At this time, LT cannot quantify the exact amount because the TTO has not produced the relevant documentation. LT should be entitled to support and quantify its affirmative defense in the discovery process in this case. The TTO's attempt to mischaracterize the American Rule – by claiming that it only applies to "prevailing" parties in litigation, and thus not to the TTO's ongoing charges for attorneys' fees in pending litigation – is a straw man argument that should be rejected.

Factual Background

In the Complaint, the TTO bases its demand for full payment of four annual invoices on Section 8-4 of the School Code, 105 ILCS 5/8-4. Complaint, Ex. 1 to Motion, ¶ 10. Section 8-4 requires school districts to pay "a proportionate share of the expenses of the treasurer's office." *Id.* The Complaint does not state why LT did not pay the invoices in full, even though LT annually informed the TTO of these reasons.

In response to the Complaint, LT asserted a single Affirmative Defense. The gist of this defense is that even if the TTO's attorneys' fees could be considered "expenses" under the

provisions of Section 8-4 – and they are not – the American Rule constitutes new matter that supersedes the generalized reference to "expenses" in Section 8-4.

In the Affirmative Defense, LT alleges that "Illinois follows the American Rule regarding the award of attorneys' fees." Ex. 2 to Motion, p. 6, ¶ 1. The Affirmative Defense asserts that the American Rule requires each party in litigation to normally bear its own litigation expenses, unless a contract or statute expressly authorizes the recovery of attorneys' fees. *Id.*

The Affirmative Defense also alleges that the TTO attempted to recover its attorneys' fees incurred in litigation with LT "by including the TTO Attorneys' Fees in the annual pro rata expense bills that the Treasurer has sent to LT." *Id.* ¶ 4. These are the invoices issued under Section 8-4 of the School Code. The Affirmative Defense further alleges, "No Illinois statute expressly authorizes the TTO to recover any portion of the TTO's Attorneys' Fees from LT…." *Id.* ¶ 5. LT asserts that the Complaint's "claim relating to the recovery of a portion of the TTO's Attorneys' Fees through the annual pro rata expense bills sent to LT is barred by Illinois law adopting the American Rule on attorneys' fees." (*Id.* ¶ 7.) Thus, in the Affirmative Defense, LT asked this Court to determine that the American Rule superseded any rights the TTO otherwise might have to submit pro rata expenses bills to LT.

Argument

I. STANDARD FOR A MOTION TO STRIKE AFFIRMATIVE DEFENSE

A motion to strike an affirmative defense is subject to the standards of 735 ILCS 5/2-615. "In reviewing the sufficiency of a complaint [or affirmative defense], we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. We also construe the allegations in the complaint [or affirmative defense] in the light most favorable to the [non-movant]. Thus, a cause of action should not be dismissed pursuant to section 2-615 unless it is

clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Marshall v. Burger King Corp*., 222 Ill.2d 422, 429 (2006).

II. THE AMERICAN RULE: EACH SIDE BEARS ITS OWN ATTORNEYS' FEES.

A. The Controlling Illinois Law on Recovering Attorneys' Fees

According to long-standing precedent of the Supreme Court of Illinois, "Illinois generally follows the 'American Rule': absent statutory authority or a contractual agreement between the parties, each party to litigation must bear its own attorney fees and costs, and may not recover those fees and costs from an adversary." *Morris B. Chapman & Assoc. v. Kitzman*, 193 Ill.2d 560, 572 (2000) (citing cases); *see also Negro Nest, LLC v. Mid-Northern Mgt.*, 362 Ill.App.3d 640, 641-42 (4th Dist. 2005); *Village of Glenview v. Zwick*, 356 Ill.App.3d 630, 632 (1st Dist. 2005).

Furthermore, for a party to avoid the American Rule, "a statute or contract must allow for attorney fees by specific language, such that the provision at issue must specifically state that 'attorney fees' are recoverable." *Bank of America v. WS Mgt.*, 2015 IL App (1st) 132551 ¶ 120 (citing *Negro Nest*, 362 Ill.App.3d at 640, emphasis added).

For example, a Court held that a party could not recover attorneys' fees based on a contract provision allowing for recovery of "all costs of collection," because that term did not explicitly include the words "attorneys' fees." *Negro Nest*, 362 Ill.App.3d at 651. Likewise, even a statute that allows for the recovery of punitive damages in fraudulent transfer situations cannot support a recovery of attorneys' fees, absent an express reference in the statute to "attorneys' fees." *Bank of America*, 2015 IL App (1st) 132551 ¶ 121.

In addition, governmental entities are barred from creating ordinances (or, by logical extension, other rules or practices) that would purport to allow for a recovery of their attorneys' fees from their adversaries. In *Village of Glenview*, Glenview passed an ordinance allowing it to

recover attorneys' fees from its opponents in litigation if Glenview won. 356 Ill.App.3d at 632. The Court struck down the ordinance because it violated the American Rule on attorneys' fees. The Court ruled that "Glenview did not have the authority to create a fee-shifting ordinance," and that the Illinois Constitution barred "a local entity's imposition of a burden on our state's judicial system." *Id.* at 637.

B. The TTO's Attempt to Limit the American Rule to "Prevailing Parties"

In its motion to strike, the TTO seeks to avoid the application of the American Rule by mischaracterizing it. According to the TTO's Motion (at 5), the American Rule only prevents "prevailing parties" from seeking to recover their attorneys' fees from their opponent. Therefore, the TTO argues, because its cases against LT currently are pending, the TTO is not a "prevailing party" and thus not subject to the American Rule.

This is a straw man argument. As explained above, the American Rule generally requires each party to bear its own attorneys' fees. The TTO does not and cannot cite to a decision in which a court specifically restricted the application of the American Rule to parties seeking to recover attorneys' fees after a court victory. To the contrary, the Supreme Court in *Morris B. Chapman* broadly barred any attempt, in any time or manner, to "recover those fees and costs from an adversary." 193 Ill.2d at 572.

Naturally, there are cases – like the case that the TTO's motion cites, *Sandholm v. Kuecker*, 2012 IL 111443 – in which courts address an attorneys' fee claim made at the end of a case by a prevailing party. In *Sandholm*, a party sought to recover attorneys' fees based on a statute providing "that the court 'shall award a moving party who prevails in a motion under this Act reasonable attorney's fees and costs incurred in connection with the motion.' 735 ILCS 110/25 (West 2008)." 2012 IL 111443, ¶ 40.

In the Motion's reference to the *Sandholm* decision (at 5), the TTO cites to ¶ 64 of the opinion. That portion of the *Sandholm* opinion states, "Illinois follows the 'American rule,' which prohibits prevailing parties from recovering their attorney fees from the losing party, absent express statutory or contractual provisions. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill.2d 560, 572, 739 N.E.2d 1263, 251 Ill. Dec. 141 (2000)." Thus, while the *Sandholm* decision spoke in terms of a "prevailing party" for purposes of that case, the *Sandholm* Court relied on the Supreme Court's holding in *Morris B. Chapman.* The *Morris B. Chapman* Court, as cited above, did not restrict the American Rule's scope to "prevailing parties."

Accordingly, there is no merit to the TTO's argument that its conduct is outside of the American Rule simply because it attempted to bill its litigation adversary for its attorneys' fees while the litigation was ongoing.

C. <u>The TTO's Reliance on the School Code is Superseded by the American Rule</u>

The TTO's Motion (at 5) argues that it has an absolute right to invoice LT for the TTO's ongoing attorneys' fees under Section 8-4 of the School Code, which concerns the expenses of the treasurer's office. Essentially, the TTO contends that Section 8-4 empowers the TTO to bill LT for all of its expenses, and that some of those expenses just happen to be millions of dollars in attorneys' fees that the TTO incurred in suing LT. The TTO argues that because its attorneys' fees are alleged expenses of the township treasurer's office, they should be treated the same as any other office expense, like copier paper costs and staff salaries. LT, as the TTO's argument goes, just gets treated like every other school district that has to pay a pro rata share of its expenses.

The TTO's argument ignores the special treatment that Illinois Courts give to attorneys' fees under the American Rule. There is no question that the TTO is attempting to charge the TTO for attorneys' fees and expenses it incurred in litigation against LT. Under the American Rule, and

the *Bank of America* and *Negro Nest* cases, a party can recover attorneys' fees based on a statute only where the statute explicitly uses the phrase "attorneys' fees." Section 8-4, quite simply, does not include the necessary phrase "attorneys' fees," and only speaks about "expenses" of the "office."

Moreover, the American Rule contains no exception for governmental entities like the TTO that attempt to recover attorneys' fees from opponents in litigation by re-characterizing their attorneys' fees as "operating expenses." The *Village of Glenview* decision makes it clear that a governmental entity cannot legally attempt to recover its attorneys' fees, and thereby "balance its books," by sending a bill for its attorneys' fees to a Glenview resident and litigation opponent. This "recovery process" by Glenview, the Court held, would have placed an unconstitutional "burden on our state's judicial system." Just as the Glenview ordinance was struck down, the TTO's interpretation of Section 8-4 to provide a "recovery process" for its attorneys' fees from LT ultimately can and should be rejected under the American Rule.

Thus, the American Rule takes precedence over Section 8-4. Even if the TTO's attorneys' fees could be considered expenses of the treasurer's office under Section 8-4, the American Rule prohibits any recover of attorneys' fees from an adversary under Section 8-4 due to the non-specific language used in that statute, and the manner in which this "recovery process" would burden the judicial system. The Illinois legislature could have empowered the TTO to bill LT for either all or a pro rata share of attorneys' fees that the TTO incurred in litigating with school districts within its jurisdiction – but the legislature did not.

Accordingly, LT's affirmative defense is a proper affirmative defense. "An 'affirmative defense' is one in which the defendant gives color to his opponent's claim but asserts new matter which defeats an apparent right in the plaintiff." *Raprager v. Allstate Ins. Co.*, 183 Ill.App.3d 847,

(2nd Dist. 1989). In the present case, the opponent's "claim" is the TTO's demand for payment of its attorneys' fees under the expenses provision of Section 8-4 – and the "new matter" is the superseding American Rule that prohibits the TTO from recovering any attorneys' fees under Section 8-4.

D. That the TTO Attorneys' Fees are from the First Case is Irrelevant.

In 2018, the TTO billed LT for attorneys' fees that it incurred in the First Case during FY2017. In 2019, based on the TTO's position, the TTO will bill LT for the attorneys' fees it incurred in FY2018 in both the First Case and in the present case. LT's affirmative defense is properly asserted in the present case, because the TTO's Complaint in the present case that demands payment of attorneys' fees associated with the First Case. At some point this year, the TTO presumably will amend its Complaint to reflect LT's partial payment of the FY2017 invoice in 2018; the TTO's forthcoming invoice for FY2018, which will include attorneys' fees incurred in both cases against LT; and LT's expected partial payment of FY2018.

In other words, attorneys' fees are attorneys' fees, regardless of the case in which they were incurred. The TTO does not cite to any authority indicating that a party cannot raise the American Rule as a defense unless a party is seeking to recover attorneys' fees in the exact same proceeding in which it incurred the attorneys' fees. For example, a party seeking to recover attorneys' fees under a contract's fee provision allowing for recovery of "collection costs" (as in the *Negro Nest* case), could have asserted its fee claim for fees in a subsequent breach of contract case. The defendant, in that scenario, obviously would have a full right under the American Rule to assert a defense – as the defendant did in the *Negro Nest* case – that the contract provision was not specific enough and thereby violated the American Rule. There is no legal support for the TTO's attempt

to strike the affirmative defense based on the particular case in which the TTO incurred the disputed attorneys' fees.

E. The TTO's Authority to Hire Attorneys is Irrelevant.

In a footnote (Motion at 4, n.2), the TTO argues that because has the authority to hire attorneys to sue LT, it therefore must have the authority to bill LT and the other districts for its incurred attorneys' fees – equally and across the board – as operational expenses. While the TTO's Motion repeated says "so what," LT's response on this point is "not so fast."

The TTO cites to the decision in *Lynn v. Trustees of Schools,* 271 Ill.App. 539, 547 (4th Dist. 1933). Initially, Appellate Court decisions issued prior to 1935 "have no binding authority," but can be considered "as persuasive." *North Shore Cmty. Bank & Tr. Co. v. Kollar*, 304 Ill.App.3d 838, 844 (1st Dist. 1999). To be clear, though, LT takes no issue with the holding in *Lynn*, insofar as that holding goes.

However, the *Lynn* decision involves a very different scenario than the one presented in the present case. In *Lynn*, the Trustees hired private attorneys to sue several individuals who owed money to "the several school districts" in the township. *Id.* at 540. The individuals claimed that only the schools could sue them. The *Lynn* Court recognized that the School Code requires TTO organizations to serve as fiscal agents for their member districts: "trustees of schools are the fiscal agents for the business of their townships, of which the funds of the various school districts are a part, and, as such, have the management of such funds and financial affairs." 271 Ill.App. at 547. The Court concluded that the Trustees "are empowered to sue for moneys due the township or the school districts," and can hire attorneys "through whom they will act." *Id.*

What the *Lynn* case did not involve, however, is a situation like the one in the present case in which a TTO claimed to be suing one school district on behalf of one or more other school

districts. There was no issue in *Lynn* as to how the attorneys' fees were allocated, given the Court's finding that the Trustees sued outside individuals on behalf of all the township's school districts.

The standard for Section 2-615 motions requires that the Affirmative Defense be construed in a light most favorable to LT. This includes an understanding that the TTO had, at its disposal, more than one manner in which to recover its attorneys' fees incurred in suing LT – and that the TTO's view of its statutory authority is not the only possible view. In particular, through the discovery process in this case, and as augmented by facts already established in the First Case, LT will establish persuasive evidence supporting the following propositions:

(a) The other districts in the TTO's jurisdiction did not authorize the TTO to sue LT.

(b) Although the TTO purports to be acting on behalf of the other districts, in fact the TTO is acting on its own behalf, in furtherance of self-motivated political and financial objectives that violate the TTO's fiduciary duty to act as the school districts' fiscal agent.

(c) When the TTO incurs operational expenses on behalf of one, or fewer than all, of the school districts in its jurisdiction, the TTO can and does bill that district or those districts instead of blindly spreading those expenses across all of the districts.

(d) The TTO's repeated claim that is it a "zero-sum" office, and simply manages the school districts' collective funds for their benefit, is a false narrative, and the TTO has engaged in decades of misconduct, which has ranged from outright theft of public funds, to mismanagement of investment funds and office expenses, while retaining and exercising TTO control over monies that should have been credited to LT and the other school districts.

Under these circumstances, the TTO's ability to sue LT does not translate into an unfettered right to bill LT for TTO's attorneys' fees incurred in suing LT. The TTO's argument that it has no choice but to bill every school district within its authority for every expense it incurs – and thus is

immune from the American Rule governing the recovery of attorneys' fees – is not an argument suitable for resolution in a Section 2-615 motion.

Conclusion

For the reasons stated in this response, the American Rule is a valid affirmative defense, as it constitutes new matter that supersedes the TTO's claim for payment of attorneys' fees billed to LT under Section 8-4 of the School Code. LT should be permitted to support and quantify this defense with documents and testimony in the discovery process. The TTO's motion to strike the Affirmative Defense should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Jay R. Hoffman, an attorney, certifies that on February 27, 2019, he caused the foregoing pleading to be served by email on the following attorneys:

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