

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 4936

MARK ERWIN,

Plaintiff,

v.

MYERS PARK COUNTRY CLUB,
INC.,

Defendant.

**ORDER ON MOTIONS FOR COSTS
AND ATTORNEYS' FEES**

1. This matter is before the Court following requests by both Plaintiff and Defendant for the taxation and award of costs associated with corporate document production ordered by the Court. (*See* Erwin's Mot. Costs Reasonable Fees, ECF No. 46 [Pl.'s Mot.]; Mot. Costs, ECF No. 49 [Def.'s Mot.].) On 27 July 2021, the Court entered its Order and Opinion on Plaintiff's Inspection Request ("Production Order"). (ECF No. 39 ["Production Or."].) The Production Order sets forth in detail the procedural history of this action, which involves a request by Plaintiff Mark Erwin ("Erwin"), a member and shareholder of Defendant Myers Park County Club ("Myers Park"), for inspection and copying of corporate records. (Production Or. ¶¶ 2–8.)

2. In the Production Order, the Court determined that Erwin was a qualified shareholder of Myers Park, (Production Or. ¶ 28), that he had made a proper demand for inspection and copying of corporate records, that Myers Park had failed and refused to comply with its statutory obligation to provide documents to Erwin, and therefore ordered production. (Production Or. ¶¶ 86–87.) The Production Order also directed the parties to provide a status report on or before 20 September 2021

“includ[ing] a proposed schedule for the resolution of any motion seeking recovery of fees and costs that Erwin intends to file pursuant to section 55-16-04(c) of the Corporation Act.” (Production Or. ¶ 89.)

3. In compliance with the Court’s directive, Erwin filed Erwin’s Motion for Costs and Reasonable Fees (“Erwin’s Motion”) on 18 October 2021, (ECF No. 46), accompanied by a brief and supporting documents. On the same day, Myers Park filed its Motion for Costs (“Myers Park’s Motion”) which was supported by the Declaration of John R. Buric, (ECF No. 49.1), and its Memorandum of Law in Support of Motion for Costs (ECF No. 50 [“Def.’s Br. Supp.”]). The parties each filed oppositions to the other party’s request for costs and fees. (Erwin’s Br. Opp. Myers Park’s Mot. Costs, ECF No. 54 [“Pl.’s Obj.”]; Def.’s Resp. Obj. to Pl.’s Mot. Costs and to Mod. Protective Or., ECF No. 55 [“Def.’s Obj.”].) Following full briefing by the parties on the two motions, the Court conducted a hearing on 2 December 2021 at which the parties provided oral argument regarding the pending motions. (See Notice of Hearing, ECF No. 60.) The motions are ripe for determination.

A. Plaintiff’s Motion

4. Erwin moves for the recovery of \$122,282.10 in attorneys’ fees and \$2,194.50 in costs. (David N. Allen Aff. Ex. 1, at 18, ECF No. 48.4.) The controlling statutory provision, N.C.G.S. § 55-16-04(c) provides that the Court shall order the corporation to pay the shareholder’s costs (including reasonable attorneys’ fees) incurred to obtain an order compelling production unless the corporation proves that it refused inspection in good faith because (1) it had a reasonable basis for doubt about

the right of the shareholder to inspect the records demanded or (2) it required reasonable restrictions on the confidentiality, use, or distribution of the records demanded to which the demanding qualified shareholder had been unwilling to agree.

5. As noted by Judge Bledsoe in *Beam v. Beam Rest Home, Inc.*, 2014 NCBC LEXIS 45, **12–13 (N.C. Super. Ct. Sep. 25, 2014):

If the Court orders inspection and copying of records for a shareholder under N.C.G.S. § 55-16-04, the Court must also “order the corporation to pay the shareholder’s costs (including reasonable attorneys’ fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.” N.C.G.S. § 55-16-04 (2014); N.C.G.S. § 55-16-04 cmt. 1 (“The phrase ‘in good faith because it had a reasonable basis for doubt’ establishes a partially objective standard, in that the corporation must be able to point to some objective basis for its doubt that the shareholder was acting in good faith or had a purpose that was proper.”)

6. The Court finds and concludes from the evidence presented to it, and based on its familiarity with the actions of the parties leading up to the entry of the Production Order (principally from the hearings conducted and documents provided to the Court), and thereafter, that Erwin acted in good faith, that he was entitled to the production of documents as requested and ordered by the Court, and that Myers Park has not proven that it refused inspection in good faith because it had a reasonable basis for doubt about the right of Erwin to inspect the documents demanded.

7. Because the Production Order details the Court’s findings and conclusions regarding Erwin’s entitlement to the documents in question, the Court focuses here

solely on Myers Park's conduct and failure to prove that it had a good faith basis for refusing to produce the documents in question.

8. Myers Park argues that Erwin's stated purpose for requesting the records inspection — i.e. mismanagement, misappropriation, conflict of interest or improper use of funds, was a façade, and that Erwin's true purpose was to second-guess the Board's decisions and continue to incite discord within the club. (Def.'s Obj. 18.) Specifically, Myers Park identifies Erwin's efforts to solicit, compile, and circulate documents entitled "Comments Circulated from the Women of the Club" and "Financial Analysis" using the anonymous email addresses mpccwomen1@gmail.com and mpccconcerned@gmail.com as proof-positive that Erwin had an improper purpose for his request. (Def.'s Obj. 16, 18–19.) Of particular concern to Myers Park is a chart sent by email to the membership of Myers Park on 25 October 2021 purporting to "reveal serious financial issues." (See Def.'s Opp. 15–16.) The chart in question contains information regarding Myers Park's revenues and expenses for the years 2017–2020, which Myers Park contends is incorrectly dated. (Decl. of Jean Zoutewelle Ex. 1 at 5, ECF No. 55.4; Def.'s Opp. 15–16.)

9. Myers Park further contends that Erwin's submission of his inspection demand while Martin White, counsel for Myers Park, was leaving for vacation, creates an objective reason to doubt that Erwin was acting with a proper purpose. (Def.'s Obj. 18.)

10. First, the Court finds that, while the alleged activities with anonymous email addresses are unusual, Myers Park's refusal to provide documents predated its

determination that Erwin was involved with the email accounts in question. Second, the “Comments Circulated from the Women of the Club” appear to contain facially legitimate criticisms of the Myers Park clubhouse renovations on the grounds that, if portions of the Myers Park clubhouse are converted into men’s-only areas, less space and amenities will be available for women to use. (*See* Dep. of Mark Erwin Ex. 4 at 1–15, ECF No. 55.3.) Third, while the documents circulated via email entitled “Financial Analysis” and “Charts for Financial Analysis,” assign incorrect dates to certain Myers Park financial information, this constitutes at most a mistake made by the creator of the document and not an objective reason to doubt Erwin’s purpose in demanding inspection.

11. As a result, the Court finds and concludes that Erwin’s activities involving the email accounts in question do not constitute a sufficient good faith basis for refusing to produce the documents in question. Nor does Erwin’s failure to work around the vacation schedule of Myers Park’s counsel when invoking his right of inspection indicate an improper purpose behind the demand.¹

12. Having concluded that that Myers Park has not carried its burden of demonstrating that it had a good faith basis for refusing to produce the documents in question, the Court must award reasonable attorneys’ fees and costs to Erwin.

¹ The second basis under which a corporation may refuse inspection in good faith — which Myers Park does not address in its brief — arises when “[t]he corporation requires reasonable restrictions on the confidentiality, use, or distribution of the records demanded to which the demanding qualified shareholder has been unwilling to agree.” N.C.G.S. § 55-16-04(c)(2). As the record adequately documents, the Court has put in place, and amended, a protective order that adequately protects Myers Park’s interests. (*See* Or. Renewed Mot. Modify Prot. Or., ECF No. 79.) Because Myers Park does not raise this issue as a basis for refusing production, the Court does not discuss it further.

13. Erwin supports his request for costs with documentation as to the expenses incurred and their purpose. (See Aff. of David N. Allen ¶¶ 25–26.) One of the costs, the Superior Court Filing Fee for initiating this action in the amount of \$200.00, is not a recoverable cost. *Priest v. Safety-Kleen Sys.*, 191 N.C. App. 341, 344 (2008) (“Filing fees are not an enumerated cost under section 305(d).”). Therefore, the Court finds and concludes that Erwin is entitled to recover its costs, except for that fee, in the total amount of \$1,994.50.²

14. With respect to Erwin’s request for attorneys’ fees, the Court notes that the Court is to award *reasonable* fees, a determination which is within the Court’s sound discretion. See *Morris v. Scenera Research, LLC*, 2017 NCBC LEXIS 48 at *13 (N.C. Super. Ct. May 31, 2017). As noted by Judge Gale:

[The United State Supreme Court in] *Hensley [v. Eckerhart]* directs that a trial court should exercise its discretion to grant an award of attorneys’ fees that is “reasonable in relation to the results obtained.” 461 U.S. at 44. To make a reasonable award of attorneys’ fees, the trial court should first eliminate all fees solely related to a claim on which the plaintiff did not prevail if that claim is “distinct in all respects from his successful claims,” and second, from the remaining fees, the court should award an amount that is reasonable in relation to the outcome of the litigation.

Morris, 2017 NCBC LEXIS 48, at *11.

² Erwin requests that the Court award the following costs: \$200.00 for the filing fee for initiating this action, \$1,100.00 for the designation of this matter to the North Carolina Business Court, \$622.15 for the court reporter and transcript fees from Myers Park’s Rule 30(b)(6) deposition, and \$272.35 for the transcript fee from Erwin’s deposition. (Aff. of David N. Allen ¶¶ 25–26.) All of the costs claimed, except for the filing fee for initiating this action, are expressly permitted by statute. See N.C.G.S. § 7A-305(d). As such, the Court finds that all of the costs, except for the initial filing fee, are properly taxable costs and should be taxed to Myers Park.

15. This Court has also interpreted precedent from the North Carolina Court of Appeals as permitting the trial court to exercise its discretion in reducing claimed attorneys' fees awarded "especially if such a reduction is necessary to make the award reasonable in relation to the plaintiff's overall success." *Morris*, 2017 NCBC LEXIS 48, at *12 (citing *Okwara v. Dillard's Dept. Stores, Inc.*, 136 N.C. App. 587, 595 (2000); *Whitesides Estates, Inc. v. Highlands Cove, LLC*, 146 N.C. App. 449, 467 (2001)).

16. Understanding its broad discretionary authority to reduce claimed fees to an amount the Court deems reasonable under the circumstances, the Court has carefully reviewed Erwin's request for, and documentation of, its counsel's efforts in obtaining the relief set forth in the Production Order, and in compelling Myers Park to comply with the Court's directives as set forth in the Production Order. In performing its review, the Court considered, among other things, the facts set forth below.

17. As an initial matter, Myers Park produced no records before the statutorily imposed deadline nor did it timely commit to a timeline whereby it would produce any particular documents. As the record before the Court adequately documents, Myers Park refused to commit to the production of any categories of documents Erwin was entitled to as a qualified shareholder nor did it commit to a defined timeline and, on a number of occasions, stated that it had complied with its statutory production obligations when later evidence proved conclusively that it had not. The Court is confident that the record before it discloses conduct by Myers Park of failing to

produce in a timely fashion relevant and directly responsive documents that should have been obvious to Myers Park.

18. Second, Myers Park in defending its conduct made at least one novel legal argument which is unsupported by law. Specifically, Myers Park claimed that it could withhold production of otherwise responsive documents on the basis of the business judgment rule, a legal position untethered to any North Carolina statute or case law. (*See* Def.'s Obj. 19.)

19. Third, only through Erwin's counsel's efforts, including the conduct of discovery in the form of a Rule 30(b)(6) deposition, was Erwin able to demonstrate to the Court that Myers Park had within its possession documents that had not been produced which the Court believes were clearly responsive to Erwin's requests. (30(b)(6) of Myers Park Country Club, Inc. 54:13–13, 67:1–12, ECF No. 30.6.) Further, even as late as the oral argument hearing on the underlying claim for production of documents, following discovery and full briefing, and based on admissions made at oral argument and leading to the entry of the Production Order, it became apparent that documents to which Erwin was absolutely entitled had not been produced. (*See* Production Or. ¶ 39.)

20. Fourth, even after entry of the Court's Production Order, Erwin's counsel had to demand correction of over-redaction by Myers Park of its production — which counsel for Myers Park ascribed in part to “human error” by its lawyers and non-lawyer staff reviewing its court-ordered production. The Court finds that, as a

practical matter, but for the tenacity and thorough review by Erwin's counsel, full production would not have been obtained.

21. Fifth, the hourly rates charged by Erwin's counsel are reasonable given their background, education, training, and experience, and the complexities of the legal and factual issues presented by this case.

22. Notwithstanding these findings by the Court, the Court also finds and concludes that the total amount claimed by Erwin in its motion is not reasonable. In its discretion, the Court has reviewed the time entries logged by Erwin's counsel. (*See* *Aff. of David N. Allen Ex. 1.*) These records disclose that three attorneys were principally involved in prosecuting Erwin's claim in this action. The time records before the Court disclose certain duplication of efforts and investment of time by Erwin's three attorneys that the Court, in its discretion, believes must be removed or reduced in order to make the award of attorneys' fees reasonable. The Court also finds and concludes that certain efforts by Erwin's attorneys, including time spent drafting and revising documents such as the one-count complaint filed in this action, (*Compl., ECF No. 3*), and communication with the client, while arguably necessary from an ethical standpoint, are either excessive or not reasonable under the circumstances.

23. The Court has attached hereto as Exhibit A to its Order the spreadsheet of time entries provided by Erwin. For each time entry, the Court has determined, in its discretion, a reasonable amount of time, if any, to be taxed to Myers Park for the tasks in question, removing unnecessary duplication. Based on its review of the tasks

undertaken by Erwin's counsel and its exercise of discretion regarding what the reasonable amount of fees to be properly recoverable in this action, the Court finds and concludes that total attorneys' fees in the amount of \$35,177.55³ should be awarded to Erwin and taxed to Myers Park.

24. THEREFORE, Erwin's Motion for Costs and Fees is GRANTED in part and DENIED in part as set forth above. The total award to Erwin representing his costs and attorneys' fees is in the total amount of \$37,172.05.

B. Myers Park's Motion

25. Myers Park seeks an award from Erwin of \$13,276.00 which Myers Park contends was "incurred by [it] in producing and transmitting documents to [Erwin] in compliance with the [Production] Order." (Def.'s Mot. 1.)

Myers Park bases its claim for costs on N.C.G.S. § 55-16-03(c), which provides:

The corporation may impose a reasonable charge to cover the costs of providing copies of documents to the qualified shareholder, which may be based on an estimate of the costs.

26. The record before the Court discloses that, \$7,501.00 — a majority of the amount requested by Myers Park — consists of charges levied by 4 individuals,⁴

³ This sum incorporates a discount of 5% applied by Erwin in its request to reflect that the Court granted Erwin the right to inspect most, but not all, of the records Erwin demanded. (See Erwin's Br. Supp. Mots. Costs and Fees and to Modify Prot. Or., 4 n.4, ECF No. 48 ["Pl.'s Br. Supp."].)

⁴ Myers Park counsel, in his declaration in support of taxation to Erwin of the costs of redaction, testifies that four individuals were involved redacting documents. (See Buric Decl. ¶ 18.) Three of the four named individuals are identified as being licensed attorneys. One individual is described only by name, is apparently not an attorney, and the Court is not provided any information about this individual's background, training, experience, or reasonableness of her hourly rate. In fact, in comparison to the fulsome information provided to the Court regarding the background of Erwin's counsel justifying the hourly rates claimed by Erwin in his request for taxation of attorneys' fees, Myers Park provides little similar information regarding its professional staff and attorneys.

including 3 of its attorneys, at hourly rates ranging from \$150.00 per hour to \$500.00 per hour for 29.1 hours spent by these individuals “reviewing and redacting documents to make them available for electronic transmission” pursuant to the Production Order. (*See* Decl. of John R. Buric ¶ 18, ECF No. 49.1 [“Buric Decl.”].)

27. While not totally clear from the evidence presented to the Court by Myers Park, it appears that to the extent the time in question was spent “redacting documents” to be produced to Erwin and his counsel, the information redacted by Myers Park was “personal information.” (Buric Decl. ¶ 23.)

28. As an initial matter, the Court does not interpret the statutory provision on which Myers Park relies to properly permit the taxation to Erwin of Myers Park’s attorneys’ fees. The statute refers to “the costs of providing copies of documents to the qualified shareholder[.]” Nowhere does the statute relied upon give Myers Park, or any other producing corporation, the unilateral authority to redact information and charge the shareholder for the cost of labor required to complete redaction. Myers Park cites no authority to indicate otherwise. (*See* Def.’s Br. Supp 4–5.)

29. Additionally, the Court concludes that, under the circumstances of this case, utilizing senior partner level attorneys, such as Mr. Buric (who reportedly spent 8.3 hours at \$500.00 per hour) for the review and redaction of personal information from documents is unreasonable.⁵ The Court has also reviewed some of the redacted

⁵ Myers Park counsel testified that, after receiving the Court’s Production Order, his firm received 33,000+ documents from Myers Park, redacted them “as necessary,” and produced them. (*See* Buric Decl. ¶¶ 14, 19.) In paragraph 14 of the same affidavit, counsel refers to “nearly 33,000 pieces of paper.” Based on the bates ranges of the production, as set forth in Exhibit A to Erwin’s Brief in Support of Motions for Costs and Reasonable Fees and to Modify Protective Order, (ECF No. 48.2), it appears that Myers Park ultimately produced documents

documents and finds that a significant portion of redactions are likely related to otherwise publicly available information, such as the identities of senior officials and board members of Myers Park. It does not appear to the Court from its review, and Myers Park has not provided information regarding what portion, if any, of the redactions involve “personal identifying information” as defined in N.C.G.S. § 132-1.10.⁶

30. Interestingly, the Corporations Act contains no provision expressly permitting a corporation like Myers Park to redact documents ordered to be produced before production. More importantly, there is no provision permitting reimbursement for redaction of such documents. The relevant statutory provisions permit only reimbursement for the reasonable cost of providing copies of documents to the qualified shareholder, and the Court is not inclined to tax Erwin with attorneys’ fees for questionable redactions. As such, the Court DENIES Myers Park’s request for taxation of attorneys’ fees for time spent by its law firm staff and attorneys.

31. Myers Park also seeks taxation of \$5,775.00 for the services of an “in-house IT/Litigation Support Manager” who was involved in “compiling, organizing, and redacting documents related to this matter.” Myers Park claims this individual’s time was billed at the rate of \$175.00 per hour.

containing a total of approximately 25,000 pages, a far cry from the 33,000+ pages (or documents) variously claimed by Myers Park.

⁶ Myers Park, in support of its claim of entitlement for time spent redacting documents, references a 20 September 2021 email sent to Erwin’s counsel regarding the issue of redaction where Myers Park counsel advised Erwin’s counsel that Myers Park did not owe an explanation for what information was redacted from the documents. (*See* Buric Decl., ¶ 23.)

32. Myers Park provides no information from which the Court can determine that the hourly rate presumably charged Myers Park for this individual's services was reasonable given a total absence of the individual's background, training, and experience. Further, it is clear that at least some unspecified portion of this person's time was spent redacting documents — a task the Court has already determined is not taxable.⁷ Myers Park similarly fails to provide any evidence or information regarding the date or dates on which the individual in question spent time as claimed, what the breakdown is between time spent redacting documents as opposed to providing other services, or what the specific tasks were.

33. Even if it were otherwise inclined to permit reimbursement of the cost to Myers Park of "providing copies of documents to the qualified shareholder," because Myers Park has failed to provide sufficient evidence from which the Court can determine the reasonableness of such charges, the Court DENIES Myers Park's request.

34. THEREFORE, the Court GRANTS in part Erwin's Motion for Costs and Reasonable Fees and awards a total of \$37,172.05 in costs and attorneys' fees to be paid to Plaintiff Mark Erwin by Defendant Myers Park County Club within thirty-

⁷ The Court notes that the Buric Decl. appears to be internally contradictory. In paragraph 18 of the declaration, Myers Park submits that four individuals, who do not include the "in-house IT/Litigation Support Manager," were involved in reviewing and redacting the documents produced pursuant to the Court's Production Order. In paragraph 28 of the same declaration, it is represented that the "in-house IT/Litigation Support Manager" was involved in (and his time includes his efforts) "redacting documents related to this matter." The Court further notes that the hourly rate claimed for this fifth person, who is presumably a non-lawyer, is higher than the hourly rate claimed for the non-lawyer referenced in paragraph 18.

three days of this order. Except as herein granted, Erwin's Motion for Costs and Reasonable Fees is DENIED.

35. IT IS FURTHER ORDERED that Myers Park's Motion for Costs is DENIED.

SO ORDERED, this the 9th day of June, 2022.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases