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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

FILED
APR 11 2007
STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY

RICHARD G. MCLELLAN, et al.
Plaintiff/Petitioner

vs.

ROGER L. CHARLY
Defendant/Respondent

ORDER ON MOTION FOR RECONSIDERATION

Case No. 05CV3412

On December 1, 2006, the defendant filed a motion to reconsider the decision made in this case on November 27, 2006. That motion has been fully briefed.

> To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir.2000). A "manifest error" is not demonstrated by the disappointment of the losing party. *Id.* It is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.* (citation omitted).

Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn wagons, Ltd., 275 Wis. 2d 397,416-417 (Ct. App. 2004).

The Motion for Reconsideration fails to establish manifest error. Therefore the motion is denied.

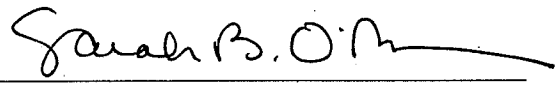
The issues raised in the Motion for Reconsideration were fully considered in the initial decision. The primary case on which the motion rests, *First Wisconsin National Bank v. Oby*, 52 Wis. 2d 1 (1971) can be distinguished because it did not involve an option contract. In the initial decision, I decided some issues in favor of the plaintiffs and some issues against them. I believe the outcome of the case is correct and supported by the law. If a court were to revisit that outcome I think it would be important for it to have all of the issues before it, as another court might reach the same outcome for a different reason. Thus I agree with plaintiffs that if this matter is to be reviewed, it is most appropriate for that to happen in an appellate court.

Conclusion

The Motion for Reconsideration is denied.

Dated: April 11, 2007

By the Court:



Sarah B. O'Brien

Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 16

DANE COUNTY

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STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY

RICHARD G. McLELLAN,
RICK BOGLE and
PRIMATE FREEDOM PROJECT,

Plaintiffs,

v.

ROGER L. CHARLY,

Defendant.

Case No.: 05-CV-3412

Case Code: 30303
Other Contracts

ORDER

Trial to the Court in the above-captioned action was held on August 23, 2006. Plaintiffs Richard G. McLellan, Rick Bogle and Primate Freedom Project (together, the "plaintiffs") were represented by Kendall W. Harrison and Steven A. Heinzen of LaFollette Godfrey & Kahn. Defendant Roger L. Charly was represented by Allen A. Arntsen of Foley & Lardner LLP and Jon C. Manzo. At the close of trial, the Court took the case under advisement. The parties then simultaneously filed and exchanged post-trial briefs. Defendant has filed a motion for reconsideration, which has been fully briefed and is pending before the Court.

Having considered the evidence at trial, the written submissions of the parties, as well as the arguments of counsel, together with this Court's Findings of Fact, and for the reasons set forth on the record during the Court's Oral Ruling on November 27, 2006, and in this Court's decision on defendant's motion for reconsideration, the Court makes the following Orders:

1. Defendant Roger L. Charly is ordered to convey the real property located at 26 North Charter Street to Richard G. McLellan under the terms of the May 10, 2005 Option to Purchase between Charly and McLellan (Tr. Ex. 7).

2. The claims for promissory estoppel asserted by all plaintiffs are dismissed on its merits and with prejudice.

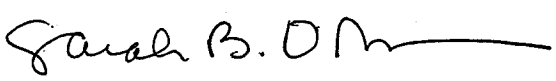
3. All claims asserted by plaintiffs Rick Bogle and Primate Freedom Project are dismissed on their merits and with prejudice.

4. The counterclaim of Roger L. Charly is dismissed on its merits and with prejudice.

5. Plaintiffs are awarded costs, disbursements and attorneys' fees, pursuant to paragraph 14 of the Option, in the amount of $ 90,002.00

SO ORDERED this 11th day of April 2007.

BY THE COURT



Honorable Sarah B. O'Brien
Dane County Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY

RICHARD G. MCLELLAN, et al.
Plaintiff/Petitioner
vs.
ROGER L. CHARLY,
Defendant/Respondent

ORDER FOR ATTORNEY FEES

Case No. 05CV3412

Plaintiffs filed this action on theories of breach of contract and promissory estoppel seeking an order that defendant Roger Charly must sell a parcel of real estate to Richard McLellan. Charly filed a counterclaim. In an oral decision on November 27, 2006, plaintiff McLellan was awarded judgment on his claim for breach of contract. All other claims were denied. A motion for reconsideration has now been denied. Plaintiffs seek attorneys' fees pursuant to a term in the option contract which says:

> A material failure to perform any obligation under this option is a default which may subject the defaulting party to liability for damages or other legal remedies. ... The prevailing party shall be entitled to his legal fees and costs from the non-prevailing party.[1]

Plaintiffs' attorneys' fees total $97,672.00. Charly opposes the request for attorney fees. In conjunction with an unsolicited reply brief, plaintiffs filed an affidavit of William Lueders. Adding evidentiary material with a reply brief is not appropriate and that affidavit will not be considered. However, the reply brief and a later response by Charly will be.

The starting point for an award of attorney's fees is to determine a reasonable hourly rate and a reasonable number of hours. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 275 Wis. 2d 1, 20 (2004); *Lynch v. Crossroads Counseling Center*, 275 Wis. 2d 171, 176 (Ct. App. 2004). The

[1] In a response brief, plaintiffs argue that under the language of the option, they are entitled to reimbursement of the full attorney's fees billed, rather than a reasonable amount determined by the court. Whether fees are awarded by contract or statute, the courts have generally determined what amount is reasonable, using the procedures set forth above.

task of determining fees in this case would have been much easier had plaintiffs' counsel presented the information regarding fees in this format, rather than arguing that doing so was not required by law. The affidavit of Kendall W. Harrison dated December 11, 2006, says that the hourly rates for legal work set forth on his statement "reflect hourly rates consistent with the customary rates of attorneys in our office and of other legal service providers with similar credentials and background in the Madison, Wisconsin legal community." ¶ 7. Although the hourly rates are not set forth in the affidavit, it is conceded that they could be computed by dividing total fees by hours billed. In plaintiffs' response brief counsel says these are $260/hour for Kendall Harrison, $235/hour for Attorney Steven Heinzen, and $185/hour for Attorney Linda Schmidt. Defendant does not take issue with that math in its brief dated January 25, 2007. No hourly rates are provided for Robert Drebs, Macy Shubak, Jeffrey Femrite, N. Talbott Settle, and Leah Schutz and so their charges will not be considered.[2] I find that the hourly rates for the three attorneys listed above are reasonable.

There is no information provided in plaintiffs' Motion or Affidavit about the number of hours that would be reasonable. It is, as Charly notes, difficult to determine how much time was spent on certain tasks because most entries consist of multiple tasks done with a cumulative time spent. After reviewing the charges, I estimate that approximately 125 hours was spent on research in preparation for drafting the complaint, the motion for temporary injunction and trial briefs. During my own work on this case I found that the research regarding enforceability of the contract took a great deal of time, even with the assistance of the parties' briefs, and so I don't find this number of research hours to be excessive. Charly suggests that fees should not be reimbursed for research on issues never actually litigated in the case, including tortious

[2] The following hours are deducted: 9/29/05 Dreps .5, 10/14/05 Shubak .7, 9/28/05 Femrite .8, 3/9/06 Settle 1.6, 3/9/06 Schutz 1.0. Total is 4.6 X $260 = $1196.

interference with contractual relations, condemnation authority of UW and the relationship between University Research Park Development and University of Wisconsin. Obviously there are a lot of dead ends in legal research but it is necessary to take them in order to arrive at the successful arguments. Given the facts of this case, this research was related to plaintiffs' goal of consummating the purchase of the real estate in question by defeating Charly's subsequent agreement to offer it to the University.

By my rough estimate, about 36 hours were spent drafting the complaint (equaling three hours per page), and another 24 hours drafting the lis pendens, temporary injunction, reviewing the answer and drafting discovery. The time spent drafting the complaint appears excessive and sixteen hours will be deducted from that time. A number of entries on the bill are covered and the word "redacted" is inserted. No explanation is given regarding what information was redacted, so I will assume the matters redacted were not related to this case. For each redaction, I have subtracted the smaller of one hour or the total billed for that entry. That totals 8.9 hours. All deductions are made at the hourly rate of $260 because plaintiff failed to supply sufficient information to determine what rate should be applied. (24.9 hours X $260 = $6474).

After these adjustments and the one described in footnote 1, I arrived at a lodestar amount of $90,002. ($97,672 - $7670). The next step is to consider whether any adjustments should be made to this amount. Charly suggests fees should not be awarded for issues on which plaintiffs were not successful, including promissory estoppel and third party beneficiary claims. If a claim is distinct in all respect from the successful claims, courts may deduct time spent on the unsuccessful claims. However if several legal theories were offered to support the same outcome, a deduction is not necessarily appropriate.

> Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Hensley v. Eckerhart, 461 U.S. 424, 435 (1983). Although I rejected the promissory estoppel theory in this case, the arguments made had merit and the ultimate goal for which those arguments were made was achieved. Plaintiffs had one outcome they wanted - specific performance of the option contract. Therefore a reduction based on the unsuccessful theories is not appropriate. Although plaintiffs Bogle and Primate Freedom Project didn't get any relief, no time was spent separately on their issues and again that fact doesn't warrant a fee reduction.

Finally Charly also objects to having to pay fees for numerous conferences between multiple attorneys on the case. He counts 90 entries for conferences among attorneys at plaintiffs' law firm. Charly cites two cases in support of this proposition: *Lynch, supra.* at ¶44 and *Beaudette v. Eau Claire County Sheriff's Dep't.*, 265 Wis. 2d 744 (Ct. App. 2003). *Lynch* uses *Beaudette* as an example of a reasonable deduction from attorney fees as the court found that "much of the time spent by three attorneys was devoted to research and interoffice conferences and, given the absence of case law in the area, the circuit court considered the time spent on research unreasonable." Thus the deduction was primarily based on the absence of case law and not on the conferences. The amount of time spent by the attorneys conferring with one another is a concern. However plaintiffs have been billed for and are responsible for paying for these conferences. Therefore it seems fair to shift that responsibility to defendant given the language in the option contract regarding fee-shifting.

I have reviewed each of the factors listed in SCR 20:1.5(a) and none provides a reason to deviate from the lodestar amount. The issues involved are somewhat novel and difficult and required substantial research, but those factors were considered in determining a reasonable

hourly rate for this case. I accept that the fees charged are similar to attorney fees in Dane County for attorneys with similar qualifications, and I have taken counsel's experience and ability into account. No information was provided about this case interfering with other employment by the attorneys. The result obtained was favorable to the client, but not a reason to increase the fees. No information was provided about time limitations imposed by the circumstances or the nature of the attorney-client relationship. The fee was neither fixed nor contingent but was an hourly rate.

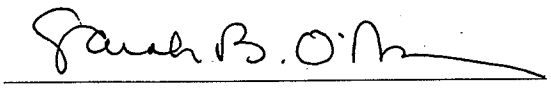
Conclusion

For all of the reasons set forth above,

IT IS ORDERED that defendant Charly pay costs and attorneys' fees to Richard McLellan in the amount of $90,002.00. Payment should be made within thirty days of this order.

Dated: April 11, 2007

By the Court:



Sarah B. O'Brien

Circuit Court Judge