

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

MARIANNE GOULD,)	
)	C.A. No. 2004-10-009
Plaintiff,)	
)	
vs.)	
)	
DANIEL WIEN,)	
)	
Defendant.)	

Submitted: October 2, 2007
Decided: November 15, 2007

Norman C. Barnett, Esquire, Attorney for Plaintiff
John F. Brady, Esquire, Attorney for Defendant

DECISION ON ATTORNEY'S FEES

On June 27, 2007 the Court issued its decision after trial in this matter, and entered judgment against Defendant in the amount of \$16,500.00 plus interest and costs. The Court further found that, under the terms of the contract at issue, Plaintiff was entitled to an award of attorney's fees. The Court ordered Plaintiff to submit a fee affidavit, and gave Defendant the right to respond thereto. On July 12, 2007, Plaintiff submitted her attorney's fee affidavit. On July 20, 2007, prior to the final date for Defendant to respond to the fee affidavit, Defendant appealed this action to the Superior Court.

On September 7, 2007 the Superior Court dismissed Defendant's appeal as untimely, since this Court had yet to enter its final judgment on the issue of attorney's fees. Superior Court returned the file in this matter to this Court on October 2, 2007. The Court will now address the fee award.

DISCUSSION

Courts give great weight to contract clauses creating the right to payment of attorney's fees in subsequent litigation. The contracting parties have the opportunity to negotiate for provisions within the contract that would require one party to pay the attorney's fees of the other if they do not abide by the terms of the contract.¹ In Delaware, both courts of law and equity "routinely enforce provisions of a contract allocating costs of legal actions arising from the breach of a contract".²

Counsel for Plaintiff has submitted a fee affidavit attesting to fees incurred, at rates which have increased during the pendency of this litigation from \$175.00 per hour in 2004 to \$250.00 per hour in 2007, in the total amount of \$11,333.75. Plaintiff also seeks costs in the amount of \$670.13. The Court must decide the reasonableness of a grant of attorney's fees and costs in each particular case.

The *Delaware Lawyers Code of Professional Responsibility* DR-1.5 enumerates the factors to be considered in determining the reasonableness of a claim for attorney's fees:

- (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 fees 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.

¹ *Knight v. Grinnage*, 1997 WL 633299 at *3 (Del. Ch.).

² *Id.*

- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

These factors are applied by Delaware Courts in awarding attorney's fees.³

In addition, the Court also may consider the ability of the losing party to pay attorney's fees.⁴

No information has been provided the Court by either party in relation to factors (2), (5) or (6), and the Court will not apply them to its fee determination in this case. Further, no direct evidence has been provided of Defendant's ability to pay fees, or his lack thereof. However, based upon the evidence offered at trial, including the fact that Defendant subsequently sold the subject property to a third party at a profit, the Court finds Defendant is not unable to pay the fees sought.

In reviewing the fee affidavit, the Court finds the time and labor documented to be generally within the range of effort typically exerted by counsel in this jurisdiction to litigate cases of similar complexity. However, the Court is aware that some of the time counsel for plaintiff spent preparing for a previously scheduled trial date had to be later duplicated due to a continuance necessitated by counsel for plaintiff.

The Court had scheduled trial in this matter on four prior dates. The first two dates were continued at Defendant's request; the third date, February 22, 2006, was continued at Plaintiff's request. Trial was then scheduled for May 31, 2006. The parties and counsel were present in Court on that day. However, two of Plaintiff's out-of-state witnesses were not present. Plaintiff apparently made

³ *Husband S. v. Wife S.*, 294 A.2d 89, 93 (Del. 1972); *General Motors Corp. v. Cox*, 304 A.2d 57 (Del. 1973).

⁴ *General Motors Corp. v. Cox*, 304 A.2d 57 (Del. 1973).

no attempt to secure the testimony or presence of these witnesses until May 12. In addition, Plaintiff raised new issues in a pretrial memorandum filed the day before trial. As a result, the Court was compelled to continue the trial date yet again. Counsel for Plaintiff's fee affidavit includes 8 hours of trial preparation on May 30 for the May 31 trial date, and 2 hours for attendance at that aborted trial date. Inasmuch as the continuance of the May 31 trial was caused by Plaintiff, the Court disallows the 10 hours attributable to that continued date, at \$200.00 per hour, or \$2,000.00.

Defendant has not objected to the fee rates charged by Plaintiff, and the Court accepts that the rates charged in the affidavit are customary in this jurisdiction for similar legal services performed by attorneys of counsel for Plaintiff's competence, reputation and experience.

In considering the amount involved and the results obtained, the Court found for Plaintiff in the entire amount sought by her action; a good result for Plaintiff. However, the principal amount sought was \$16,500.00; the fees expended on obtaining this amount (after deduction of the disallowed fees) is \$9,333.75, or approximately 57% of the principal amount sought. Although no evidence has been presented regarding Plaintiff's fee arrangement with her attorney, and whether it is a fixed or contingent fee agreement, the Court recognizes that a typical 40% contingency agreement would have resulted in a fee of \$6,600.00. Inasmuch as the Court finds the fees sought to be somewhat out of proportion to the amount in controversy, the Court will reduce the fee award to \$7,000.00, which it finds reasonable in light of the factors enumerated above.

Finally, the Court has reviewed the costs submitted by Plaintiff, and finds them reasonably incurred.

CONCLUSION

In addition to the judgment entered in its June 27, 2007 decision, the Court further awards reasonable attorney's fees to Plaintiff Marianne Gould, and against Defendant Daniel Wien, in the amount of \$7,000.00, plus costs in the amount of \$670.13, plus post-judgment interest thereon from the date of this decision at the legal rate.

IT IS SO ORDERED this _____ day of November, 2007.

Kenneth S. Clark, Jr.
Judge