

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

April 9, 2012

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**RE: C.A. No. S09C-09-013-ESB
Shore Investments, Inc. v. Bhole, Inc., et al.
Letter Opinion**

Date Submitted: December 28, 2011

Dear Counsel:

This is my decision on Plaintiff Shore Investments, Inc.'s (1) Motion to Amend Judgment, (2) Affidavit in Support of an Award of Expert Witness Fees, and (3) Affidavit in Support of an Award of Attorneys' Fees, Costs and Expenses.¹ I will address each matter separately.

(1) Motion to Amend Judgment

I will amend the principal amount of the two judgments to make them \$137,750.21, reflecting the fact that the mold remediation costs were actually \$10,655.00 instead of \$7,900.00. I will deny Shore's request to amend the two judgments to include a 5% late fee for each late rental payment. Shore did not raise this claim in its complaint, list it in the

¹ The factual background and my decision on the merits of this matter are set forth in *Shore Investments, Inc., v. Bhole, Inc., et al.*, 2011 WL 5967253 (Del.Super. Nov. 28, 2011).

pre-trial stipulation, or discuss it at trial or in the post-trial briefs. Thus, I have concluded that Shore waived this claim by not raising it in a timely manner.

(2) Expert Witness Fees

Shore seeks expert witness fees as the prevailing party under 10 *Del. C.* § 8906. Under that statute and Superior Court Civil Rule 54, “expert fees may be taxed as costs against the unsuccessful party.”² Awarding expert fees is not mandatory and the decision is left to the Court’s discretion.³ “The Court may decline to tax expert witness fees as costs where the expert’s testimony is unhelpful.”⁴ If the Court does not rely on an expert’s testimony, it may refuse to award fees for that witness.⁵ Shore seeks \$7,400.00 in expert witness fees as follows:

a) Patricia McDaniel - \$400.00. Ms. McDaniel is the president of Boardwalk Builders. She testified about the cost of converting the leased premises into a plain vanilla shell. I will not award her fee to Shore because I found that Shore was not entitled to conversion costs under its lease. Thus, her testimony was of no consequence.

² *Kesterson v. Royal Plus Elec., Inc.*, 2006 WL 3308359, at *2 (Del.Super. Nov. 2, 2006).

³ *Russo v. Medlab Clinical Testing, Inc.*, 2001 WL 34082277, at *3 (Del. Super. Nov. 14, 2001).

⁴ *Pharmathene, Inc. v. Siga Tech., Inc.*, 2011 WL 4390726, at *45 (Del.Ch. Sept. 22, 2011)(citing *Oliver v. Boston Univ.*, 2009 WL 1515607, at *3 (Del.Ch. May 29, 2009)); *Barrows v. Bowen*, 1994 WL 514868, at *3 (Del.Ch. Sept. 7, 1994); cf. *Weinberger v. U.O.P., Inc.*, 517 A.2d 653, 657 (Del.Ch. 1986)(awarding expert witness fees where the court had found the expert’s testimony to be helpful).

⁵ *Oliver*, 2009 WL 1515607, at *3 (“The Court did not rely upon Mr. Penny’s testimony and was not helped by Mr. Penny’s testimony in any way.”).

b) Eric Jones - \$3,000.00. Mr. Jones is the owner of G.T. Capital, Inc. He testified that Shore would suffer damages of \$880,000.00 for the 20-year-period of time following the end of the lease term because it would no longer have a liquor store as a tenant. I will not award his fee to Shore because I found that Shore would not incur, and was not entitled to, such damages. Thus, his testimony was of no consequence.

c) David Wilk - \$1,500.00. Mr. Wilk is a real estate appraiser with Greystone Realty Advisors, Inc. He testified that Shore's damages were in excess of \$200,000.00 for the balance of the lease term. I will not award his fee to Shore because I did not accept his opinion as an appropriate measure of Shore's damages. Thus, his testimony was of no consequence.

d) Jeffrey Jones - \$1,500.00. Mr. Jones is the owner of Georgia Pro Roofing & Construction, Inc. He testified about the cost to clean up the mold and demolish part of the interior of the leased premises. I will not award his fee to Shore because he was just a fact witness. Thus, his fee is not recoverable as an expert witness fee.

(3) Attorneys' Fees, Costs and Expenses

Shore seeks attorneys' fees of \$94,257.50, Court costs of \$4,762.24, and expenses (excluding expert witness fees) of \$2,576.11. Shore claims these monies pursuant to paragraph 19 of its lease with Bhole, which states:

Tenant and Landlord agree to pay to the prevailing party all reasonable costs, attorney's fees, and expenses which shall be made and incurred by the Tenant or Landlord as the case may be in enforcing the respective covenants and agreements of this lease.

Shore initially filed suit in the Court of Chancery. When the Court of Chancery dismissed Shore's claims, Shore then transferred the matter to the Superior Court.⁶ It is appropriate for Courts to consider the results obtained when deciding on how much to award in fees.⁷ "The idea that an award of attorneys' fees should be reduced to reflect the fact that a party only achieved limited or partial success is not a novel one."⁸ "But where the plaintiff achieved only limited success, the [] court should award only that amount of fees that is reasonable in relation to the results obtained."⁹ The breakdown of attorneys' fees, Court costs, and expenses that Shore incurred in each Court is as follows:

Court of Chancery

Attorneys' Fees	\$28,897.50
Court Costs	2,200.08
Expenses	<u>1,414.50</u>
Total	<u>\$ 32,512.08</u>

Superior Court

Attorneys' Fees	\$65,360.00
Court Costs	2,562.16
Expenses	<u>1,161.61</u>
Total	<u>\$69,083.77</u>

I will not award Shore any of the attorneys' fees, Court costs, and expenses that it incurred in the Court of Chancery because it was not the prevailing party there.

⁶ 2009 WL 2217744 (Del.Ch. July 14, 2009).

⁷ See Delaware Lawyers' Rules of Professional Conduct 1.5(a)(4).

⁸ *Fasciana v. Electronic Data Systems Corp.*, 829 A.2d 178, 185 (Del. Ch. 2003).

⁹ *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).

Shore did prevail on some of its claims in the Superior Court. Thus, the issue is how much it may recover of its Superior Court attorneys' fees, Court costs, and expenses. Shore pursued basically three claims against the defendants in the Superior Court. One, Shore claimed that Bhole breached its lease with Shore. Two, Shore claimed that the defendants conspired to tortiously interfere with Shore's lease with Bhole. Three, Shore claimed that the defendants conspired to tortiously interfere with Shore's business expectations. Shore prevailed on the first two claims. However, the breach of lease claim is the only one of the three claims that provides for the recovery of Shore's attorneys' fees, Court costs, and expenses. Thus, I will limit Shore's recovery of these expenses to the amount it incurred in pursuing its breach of lease claim. Shore, not surprisingly, did not record its expenses on a claim basis, making the allocation somewhat more difficult. Nevertheless, I have been able to make a reasonable allocation of Shore's expenses to its breach of lease claim.

A claim consists of various elements that must be proven and the damages that follow. After reviewing the pleadings, trial testimony, post-trial briefs and legal bills, I have concluded that Shore's attorneys spent 70% of their time on proving the three claims and 30% of their time on proving damages. Although Shore's three claims are different, Shore had to prove largely the same set of facts to establish all three claims. Given that Shore had to establish these facts in order to prove its breach of lease claim, I allocated 80% of the 70% for proving claims, making this amount 56% for proving Shore's breach of lease claim. As to damages, Shore tried to prove numerous damages arising out of its breach of lease claim, but it largely failed on most of them. The only ones that actually succeeded were the rental damages for the balance of the lease term and the mold remediation damages. The rental damages were simple to prove and easy to calculate. The mold

remediation damages were much more complicated to prove and required the use of an expert. Given this, I allocated 30% of the 30% for proving damages, making this amount 9% for proving Shore's breach of lease damages. Thus, I have awarded Shore 65% of its total attorneys' fees and expenses accrued in bringing this action in Superior Court. This amount comes to \$43,239.05. I have awarded Shore all of its Court costs because it had to incur these costs regardless of the nature or number of its claims. This amount is \$2,562.16. Thus, Shore's total award of attorneys' fees, Court costs, and expenses is \$45,801.21. Moreover, after considering all of the factors used to calculate reasonable attorneys' fees, I have concluded that this amount is reasonable and appropriate.¹⁰

I initially awarded Shore its attorneys' fees, Court costs, and expenses on its tortious interference with lease claim. However, upon further consideration of the matter, I have concluded that there is no basis for such an award. Thus, the only defendants responsible for attorneys' fees, Court costs, and expenses are Bhole, Inc. and Outlet Liquors, LLC.

I will allow Mr. Spence to prepare a proposed order of judgment making a total calculation of damages, including pre- and post-judgment interest. He shall submit his proposed order to Mr. Sergovic within 10 days of the date of this letter. If Messrs. Sergovic and Spence have not worked out an acceptable form of order within 10 days of that date, then both parties shall submit their respective orders to me and I will prepare the final order of judgment.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

¹⁰ Delaware Lawyers' Rules of Professional Conduct 1.5.