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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: September 22, 2004
Decided: December 20, 2004
Revised: December 27, 2004

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Re: *All Pro Maids, Inc. v. Susan Layton, et al.,* Civil Action No. 058-N

Dear Counsel:

This action for breach of contract and tortious interference with business relations is before the Court on Plaintiff, All Pro Maids, Inc.'s ("APM"), application for costs and attorneys' fees pursuant to the Memorandum Opinion entered on August 9, 2004. In the Memorandum Opinion, the Court held after a full trial on the merits that Defendant Susan Layton was liable for breach of contract, Defendants Layton and Mama's Maids, LLC ("MM") were liable for tortious interference with APM's contractual and prospective business relations, and Defendant Layton was liable for APM's reasonable attorneys' fees and costs in pursuing enforcement of its rights under an Employment Agreement with

Layton (the "Agreement"). Defendants oppose APM's request for costs and fees on a number of grounds. For the reasons stated in this Letter Opinion, the Court will grant APM's request, in part, and award it fees and court costs in the amount of $40,764.25.

I. BACKGROUND

APM's Complaint asserted several causes of action: breach of the Agreement, tortious interference with APM's contractual relations and prospective business relations, and violations of Delaware's Deceptive Trade Practices Act and Uniform Trade Secrets Act. Before trial, APM withdrew its claims under the Deceptive Trade Practices and Trade Secrets Acts. The named Defendants were Layton and MM, a cleaning services company Layton formed with Rebecca Truitt and her husband shortly after Layton left APM.

After trial, the Court ruled that Layton breached an Agreement she had with APM that contained a covenant not to compete in the business of providing cleaning services for commercial and residential properties for a period of one year in a specified geographic region.[1] The Agreement expressly provides: "[e]mployee will be responsible for all court costs and attorney's fees necessary to enforce this Agreement." Based on that provision, the Court held Layton liable to APM for its court costs and attorney's fees

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[1] The facts of the underlying dispute are set forth in the Memorandum Opinion, *All Pro Maids, Inc. v. Layton*, 2004 Del. Ch. LEXIS 116 (Aug. 9, 2004).

"in accordance with the Agreement."[2] The Court also directed APM to submit appropriate documentation to show the amount and reasonableness of any fees and costs it claims.

MM was not a party to the Agreement between Layton and APM, and was not held liable, either directly or indirectly, for Layton's breach of that Agreement.[3] The Court did hold both Layton and MM liable for tortious interference with certain other contracts APM had with specific customers and with APM's prospective business relations with those and other customers. The Court awarded damages to APM in the amount of $51,433 based on its projected lost profits from customers who switched to MM.

APM filed its application for costs and attorneys' fees on August 17, 2004. Defendants objected to the application on several grounds, and APM replied to those objections. The total amount APM seeks in costs and attorneys' fees is $51,193.73.

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[2] *Id.* at *49.

[3] *Id.* at *16 & n.19. For that reason, the Court rejects the argument first articulated in APM's Reply to Defendants' Opposition to the Application for Costs and Reasonable Attorneys' Fees ("APM's Reply") that MM, as well as Layton, should be held liable for its court costs and attorneys' fees. APM Reply at 2. In support of their argument, Defendants noted that the Court had found MM vicariously liable for Layton's actions under the doctrine of respondant superior. The Court explicitly limited that finding, however, to Layton's tortious conduct. It therefore provides no basis for awarding attorneys' fees against MM under the Agreement.

II. DEFENDANTS' OBJECTIONS

A. Challenges To The Scope Of The Fees Requested

Defendants contend that the scope of any award of court costs and attorneys' fees should be quite limited. They assert two separate arguments based on the provision in the Agreement that states: "[e]mployee will be responsible for all court costs and attorney's fees necessary to enforce this Agreement." First, they argue that the fees and costs sought were not "necessary to enforce the Agreement," because the Court denied APM's request for an injunction requiring Defendants to abide by the restrictive covenant in the future. Second, Defendants contend that the term "court costs" used in the Agreement has a narrowly circumscribed meaning and does not include, for example, expert fees or the costs of transcripts or computer research. In addition, Defendants object to the temporal scope of APM's request for fees. I now address each of those objections.

1. Whether the actions were necessary to enforce the Agreement?

Defendants' objection that the fees and costs sought by APM were not necessary to enforce the Agreement is not persuasive. Defendants argue that only the injunctive relief sought by APM against Layton concerned enforcement of the Agreement's covenant not to compete. The Court disagrees. In seeking and obtaining an award of damages for the harm caused by Layton's breach of the Agreement and by both Defendants' tortious interference with its business relations, APM unquestionably was enforcing its rights under the Agreement. To construe the Agreement as Defendants

suggest, the Court would have to read into it a requirement that APM obtain specific performance of the restrictive covenant as a prerequisite to recovering its attendant fees. Nothing in the Agreement or the evidence presented at trial supports such a construction.

The case cited by Defendants also fails to support their position. Specifically, in *Bethany Village Owners Ass'n v. Fontana*, the Court held that a restrictive covenant regarding the height of buildings in a development was "unclear, imprecise and incapable of evenhanded application," and therefore unenforceable.[4] Having held the restrictive covenant unenforceable, the Court predictably refused to award the plaintiff attorneys' fees under a similar fee-shifting contractual provision. In contrast, in this case, I rejected Defendants' challenge to the enforceability of the covenant not to compete and awarded damages based on Layton's breach of that covenant.

2. The construction of "court costs"

Turning to Defendants' argument that the term "court costs" in the operative provision of the Agreement should be narrowly construed, the Court notes first that the Agreement is one for employment. In a similar context, former Chancellor Allen observed:

> With respect to contracts it is settled that a provision by which one party undertakes to pay counsel fees of the other in the event of his own breach is not void as against public policy. While no Delaware case has been found in which a fee shifting provision in an employment contract has been

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[4] 1997 Del. Ch. LEXIS 149, at *20-21 (Del. Ch. Oct. 9, 1997).

> directed against an employee, cases in other jurisdictions have enforced such provisions in this way.[5]

In the Memorandum Opinion, I held that the fee shifting provision in the Agreement warranted an award of attorneys' fees and court costs in favor of APM. The proper construction of "court costs," however, remains subject to legitimate dispute.

Both sides rely on a recent decision by Vice Chancellor Lamb in a case involving a fee shifting clause in a contract for the sale of a business.[6] The provision at issue in *Comrie* stated, "in any action or suit to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party shall be entitled to recover its costs, including reasonable attorneys' fees."[7] The plaintiffs prevailed and sought to recover a variety of disbursements and other costs, including "court costs totaling $4,983" and expert witness fees.[8] The defendants argued that the term "costs" in the contract did not include certain of the ordinary disbursements made by the plaintiffs' attorneys or the portion of their expert witness and litigation support fees beyond those

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[5] *Research & Trading Corp. v. Pfuhl*, 1992 Del. Ch. LEXIS 234, at *40 (Nov. 19, 1992).

[6] *Comrie v. Enterasys Networks, Inc.*, 2004 Del. Ch. LEXIS 53 (Apr. 27, 2004).

[7] *Comrie,* 2004 Del. Ch. LEXIS 53, at *3.

[8] *Id.*

permitted by 10 *Del. C.* § 8906. The plaintiffs contended that "costs" should be construed broadly to "include all expenditures made by them in pursuing the litigation."[9]

The Court in *Comrie* began its analysis by noting that Court of Chancery Rule 54 provides that "costs shall be allowed as of course to the prevailing party unless the Court otherwise directs," and that 10 *Del. C.* § 5106 provides that "the Court of Chancery shall make such order concerning costs in every case as is agreeable to equity."[10] The Court also cited precedent that "costs" and "expenses," although seemingly synonymous in everyday usage, are not identical for purposes of Rule 54(d).[11] The term "expenses" generally is recognized as being broader in scope.[12] Costs under Rule 54 have been defined as "allowances in the nature of incidental damages awarded by law to reimburse the prevailing party for *expenses necessarily incurred in the assertion of his rights in court."*[13] Delaware courts have refused to award costs under Rule 54 for certain items, such as photocopying, transcripts, travel expense, and computer research.[14]

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9 *Id.* at *15.

10 *Id.* at *16 n.24.

11 *Id*. at *16 (citing *Gaffin v. Teledyne, Inc.*, 1993 *Del. Ch.* LEXIS 117 (July 13, 1993)).

12 *See id.* at *19.

13 *Id.* at *16 (quoting *Peyton v. William C. Peyton Corp.*, 8 A.2d 89, 91 (Del. 1939)).

14 *Id*. at *16-17.

By agreement, however, parties may expand the scope of recoverable "costs."[15] In *Comrie*, one issue was whether the language of the contract was broad enough to include litigation expenses beyond those allowed by Rule 54. Because the contract in that case had been heavily negotiated between sophisticated parties represented by counsel, the Court charged the parties with knowledge of the "detailed and long-established usage of the word 'cost'" and interpreted that term narrowly in accordance with the established precedent under Rule 54(d).[16]

The circumstances surrounding the Employment Agreement between APM and Layton, likewise, are important in construing the term "court costs" for purposes of APM's application for fees and costs. "Court costs" usually refers to costs associated with filing papers in court, obtaining service and so on. It is at least arguably narrower than the "costs" referred to in Rule 54. Unlike the sophisticated parties in *Comrie*, APM is a small family owned business. Nevertheless, it is reasonable to infer that APM had the assistance of counsel in preparing the form Agreement that it required all of its employees to sign. Furthermore, while there may not have been a wide disparity in the bargaining positions of APM and Layton, the evidence suggests that APM enjoyed a

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15 *Id*. at *17 & n.30 (citing *J.J. White, Inc. v. Metro. Merch. Mart, Inc.*, 107 A.2d 892, 894 (Del. Super. 1954)).

16 *Id*. at *18-20.

slightly superior position and was responsible for the language used in the Agreement. Based on these factors, the Court concludes that the term "court costs" in the provision making Layton "responsible for all court costs and attorney's fees necessary to enforce the Agreement," should be construed to have its ordinary meaning and to exclude expert fees and expenses and other litigation related costs that were not directly related to interactions with the Court.

Accordingly, the Court will disallow APM's request for the following types of costs: Federal Express, long distance telephone, photocopying, postage, computer research, litigation support in the form of conversion of images, digital prints and document retrieval, expert fees and transcript and other costs associated with depositions or the trial. The Court will grant APM's request to recover court costs charged by the Register in Chancery, Courtlink eFile, and the $335.00 fee of Brandywine Process Servers, Ltd. related to the service of summons or subpoenas. The Court has decided to award the process server costs under both the Agreement and the Court's equitable powers under 10 *Del. C.* § 5106. The record shows that APM had to cause service to be attempted on Defendant Layton nine times between November 17 and December 15, 2003, and that Layton may have attempted to avoid service on at least some of those occasions.

3. Other challenges to the temporal scope of fees sought

Defendants also challenge the temporal scope of APM's request on two grounds. First, they contend that any fees awarded should not extend beyond December 16, 2003, when Defendants unilaterally *offered* to begin abiding by the restrictive covenant. Had Defendants taken some action to bind themselves legally to adhere to that restriction, such as by filing an undertaking or entering into a stipulation to that effect, the argument might have some appeal. In fact, however, Defendants simply made a conditional offer as part of a settlement overture that was never accepted. That action did not render APM's continuing efforts to enforce its rights under the Agreement with Layton unnecessary. To the extent Defendants voluntarily complied with the restrictive covenant after December 16, 2003, their actions presumably minimized their exposure to APM's damages claims and improved their chances of avoiding an injunction. Those actions do not, however, provide any basis for limiting APM's right to recover its fees and costs.

Second, Defendants contend that APM failed to mitigate its damages by not suing until November 2003, rather than in June 2003, when it allegedly first learned about Defendants' activities. This argument is a rehash of the laches argument the Court rejected in the Memorandum Opinion.[17] I find it unpersuasive for the same reasons stated as to the laches defense.

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17 *All Pro Maids*, 2004 Del. Ch. LEXIS 116, at *8.

B. Challenges To The Reasonableness Of The Requested Fees

1. APM's counsel's hourly rate

All of the fees sought by APM are for time spent by its primary counsel, Chase T. Brockstedt. APM does not seek reimbursement for the time spent by more senior attorneys at Brockstedt's firm consulting with him about the case[18] or for any work by paralegals. Brockstedt's hourly billing rate is $225. Defendants contend that rate is excessive and unreasonably high, because Brockstedt was only admitted to the Delaware Bar approximately four years at the time he commenced this litigation. According to Defendants, the fees customarily charged in Sussex County, where the parties reside, for similar legal services provided by an attorney of Brockstedt's experience would be only $175 per hour.

Before he retained Brockstedt, James Sprinkle, the owner of APM, made three unsuccessful attempts to retain an attorney in Sussex County to prosecute this matter. Thus, Sprinkle's action in hiring a Wilmington attorney was reasonable. Defendants presented no evidence that the rate charged by Brockstedt for his services as APM's primary litigation counsel was unusually high in the Wilmington legal market. I

[18] APM's counsel Brockstedt avers that his senior partners Frank Murphy, John Spadaro and most significantly, Roger Landon, provided him "with many hours worth of advice and guidance on an array of issues including whether to take the case, strategic planning, issues related to settlement, reviewing of briefs and correspondence, and assistance with trial preparation." Application of Counsel for Plaintiff, All Pro Maids, Inc., for Costs and Reasonable Attorneys' Fees ("APM's Application") ¶ 6.

therefore reject Defendants argument that Brockstedt's rate was excessive and unreasonably high.

2. Objections to specific time entries

Defendants also contend that several factors identified in Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct and caselaw relevant to the reasonableness of a fee demonstrate that APM's fee request is excessive. Those factors include: the amount of the fee in relation to the relief obtained, the fact that the issues in the case were not novel, difficult or complex and were governed by settled law, and APM's failure to show that Brockstedt's acceptance of this case prevented him from working on other matters. Based on the circumstances, however, none of those factors justify a reduction in the fee award sought by APM.

Under the Agreement, APM has a contractual right to recover "all court costs and attorney's fees necessary to enforce [its] Agreement [with Layton]." Although courts generally exclude excessive, redundant, duplicative or otherwise unnecessary hours,[19] Defendants have not shown that any of those problems exist here. Rather, Defendants argue that the benefit achieved in this litigation does not warrant the fee claimed. In addition to yielding a damage award of $51,433, APM's prosecution of this action

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[19] *See Richmont Capital Partners I, L.P. v. J.R. Investments Corp.*, 2004 Del. Ch. LEXIS 73, at *10-11 & n.21 (citing *Am. Civil Liberties Union v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999) and *Judge v. City of Rehoboth Beach*, 1994 Del. Ch. LEXIS 55, at *7 (Apr. 29, 1994).

resulted in Defendants' complying with the covenant not to compete, albeit only unilaterally and informally, since December 16, 2003. In my opinion, both of these items represent positive results obtained by APM's actions, through its attorney, to enforce the Agreement. Therefore, the fact that APM's request for attorneys' fees and costs approximately equals the damages award it obtained does not render those fees unreasonable.

Similarly, the absence of novel or complex questions of law or any prior relationship between Brockstedt and APM provides no basis for reducing the fees sought. The same is true for the fact that Brockstedt's involvement in this case may not have prevented him from accepting employment with other clients. Brockstedt is the only legal professional for whose services APM seeks to be reimbursed. He ably handled this litigation case from its inception with the filing of a complaint and motions for a temporary restraining order and a preliminary injunction, through discovery, full briefing on Defendants' motion to dismiss, preparation of a damages expert and of the pretrial order, trial, post-trial briefing and argument, and briefing on the pending motion for attorneys' fees and costs. The fees sought by APM reasonably reflect the value of the legal services rendered to them by Brockstedt, and therefore are generally appropriate.[20]

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[20] *See Richmont*, 2004 Del. Ch. Lexis 73, at *10-11 & n.19.

Lastly, Defendants "question and object" to a number of the specific charges set forth in Exhibit B of APM's Application.[21] First, Defendants object to a number of charges for services rendered between November 10 and November 26, 2003, relating to APM's motions for a TRO and a preliminary injunction. After an early telephone conference with the Court, APM elected to proceed toward a prompt trial on the merits, rather than pursue either of its motions for preliminary relief. Thus, some of the time spent on those motions was not reasonably necessary to the enforcement of the Agreement. Nevertheless, at least some of the legal research and brief drafting performed in November 2003 probably was useful to APM during discovery and in the later briefing relating to the motion to dismiss and the trial. Thus, the Court will reduce the fees sought for that work by one-half (from 12.9 hours of Brockstedt's time to 6.45 hours).

Defendants also challenge the fees APM seeks for the deposition of an attorney Layton consulted, Larry Fifer, as unnecessary and not relevant. I consider APM's decision to depose Fifer reasonable under the circumstances. I cannot conclude, however, that APM's request for 3.0 hours in fees for the travel time to Rehoboth for the deposition of such a secondary witness is reasonable, because APM failed to show that

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[21] Defendants' Response in Opposition to Application of Counsel for Plaintiff, All Pro Maids, Inc., for Costs and Reasonable Attorneys' Fees ("Defendants' Opposition") ¶ 8.

the deposition could not have been conducted by less costly means, such as by telephone. Therefore, the Court will reduce the time charged for February 5, 2004 from 3.0 hours to 1.0 hour.

In addition, Defendants dispute a number of specific time charges "due to a general objection."[22] Some of those objections appear to be based on APM's attempt to recover fees on fees -- *i.e.*, the fees it incurred in pursuing its fee application. Because I consider those efforts related to APM's efforts to enforce its Agreement with Layton, I overrule that objection. As to the remaining charges to which Defendants raised a "general objection" without further explanation, the Court has reviewed those charges and finds Defendants' conclusory objection insufficient to warrant reducing them. Thus, the Court denies those objections, as well.

Finally, the Court notes that APM did not include in its fee request 4.2 hours of time Brockstedt spent between October 15 and November 26, 2003, on work related to its ultimately abandoned claims for violations of the Delaware Uniform Trade Secrets Act and the Deceptive Trade Practices Act. APM dropped those claims in response to Defendants' motion to dismiss. Based on the filings and proceedings in this case and the more attenuated connection between those claims and APM's enforcement of the Agreement, I believe the amount of that reduction is too low. The Court therefore will

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22 *Id.*

reduce the hours claimed for the period beginning on October 15, 2003, by an additional 3.0 hours to account for the abandonment of the trade secret and deceptive trade practices claims.

III. CONCLUSION

For the reasons stated, the Court hereby grants in part and denies in part APM's application for costs and attorneys' fees. The Court grants APM's application for attorneys' fees in the amount of $37,676.25 and for court costs in the amount of $3,088.50 as against Defendant Layton. In all other respects, the application is denied, including to the extent it seeks an award of fees against MM.

APM's counsel shall file a proposed form of Final Judgment incorporating the rulings in the Memorandum Opinion and this Letter Opinion, on notice to Defendants, within ten days of the date of this Order.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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