

**THE TROTH CORPORATION
D/B/A PERSONNEL
CONSULTING GROUP**

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NO. 2006-CA-0457

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COURT OF APPEAL

VERSUS

*

FOURTH CIRCUIT

**DEUTSCH, KERRIGAN &
STILES, L.L.P.**

*

STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-7562, DIVISION "J"
HONORABLE NADINE M. RAMSEY, JUDGE

* * * * *

**JUDGE JAMES F. MCKAY III
JUDGE**

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(Court composed of Chief Judge Joan Bernard Armstrong, Judge James F. McKay III, Judge Terri F. Love, Judge Max N. Tobias, Jr., Judge Leon A. Cannizzaro, Jr.)

TOBIAS, J., CONCURS IN PART AND DISSENTS IN PART

CANNIZZARO, J., DISSENTS WITH REASONS

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AFFIRMED

The defendant, Deutsch, Kerrigan & Stiles, L.L.P. (“DKS”), appeals the trial court’s award of attorney fees and costs to the plaintiff, the Troth Corporation d/b/a Personnel Consulting Group (“PCG”). For the reasons assigned, we affirm.

FACTS AND PROCEDURAL HISTORY

PCG, a professional personnel placement firm, filed suit against DKS, a New Orleans law firm, for a fee owed PCG for placement of the director of administration at DKS. On November 7, 2003, the trial court rendered judgment in favor of PCG. The judgment rendered was in the amount of PCG’s claimed damages of \$33,000.00 plus costs and judicial interest, but did not include an award of attorney fees. PCG filed a motion for new trial, asking that the court reconsider its refusal to award attorney fees and that it also set the date from which interest was to run. The trial court declined to award attorney fees, but ruled that interest would run from the date suit was filed by PCG. DKS appealed the November 7, 2003 judgment.

In an unpublished opinion on January 26, 2005, this court affirmed the

trial

court's award of \$33,000.00 to PCG. We amended the judgment to order that judicial interest accrue from the date demand was first made on DKS. We reversed the trial court, however, with regard to the award of attorney fees, and remanded for a determination of reasonable attorney fees. DKS's motion for rehearing was denied. *The Troth Corporation d/b/a Personnel Consulting Group v. Deutsch, Kerrigan & Stiles, L.L.P.*, 2004-0605 (La. App. 4 Cir. 1/26/05), unpub.

After the matter was remanded, DKS paid the trial court's award of \$33,000.00 plus interest. Attorney fees were not paid. Pursuant to a motion to set fees and costs filed by PCG, the trial court rendered judgment on July 25, 2005, awarding PCG \$31,595.90 in attorney fees and costs as follows: \$22,654.65 in costs and fees up to the end of trial; \$2,140.58 for the motion for new trial; \$5,828.92 for the appeal; and \$971.78 for the motion for rehearing filed by DKS. Additionally, PCG was awarded \$500.00 in attorney fees for the motion to set fees and costs.

DKS's suspensive appeal of the July 25, 2005, judgment followed. PCG filed an answer to the appeal seeking additional attorney fees and damages against DKS for the filing of what PCG alleges to be a delaying and meritless appeal. On appeal, DKS asserts two assignments of error.

First, the trial court awarded unreasonable and excessive attorney fees and costs. Second, the trial court awarded attorney fees and costs not permitted under La. R.S. 9:2781, which limits fees to those incurred in the prosecution and collection of the plaintiff's claim.

DISCUSSION

This case is undisputedly a suit on open account. Pursuant to the open account statute, La. R.S. 9:2781(A), when any person fails to pay an open account within fifteen days after receipt of written demand therefore correctly setting forth the amount owed, that person shall be liable to the claimant for reasonable attorney fees for the prosecution and collection of such claim when judgment on the claim is rendered in favor of the claimant.

Because an award for attorney fees is exceptional and penal in nature, the statute must be strictly construed and its provisions fully complied with before an award of attorney fees may be made. *Montgomery Stire & Partners, Inc. v. London Livery, Ltd.*, 99-3145, p. 6 (La. App. 4 Cir. 9/20/00), 769 So.2d 703, 706, citing *Frank L. Beier Radio, Inc. v. Black Gold Marine*, 449 So.2d 1014 (La. 1984). In order to recover attorney fees in an action on open account, the party seeking the attorney fees is required to produce evidence to show that the amount owed was correctly set forth in a demand letter and was supported by invoice(s). *Id.*

The trial court is vested with great discretion in arriving at an award of attorney fees. The exercise of this discretion will not be reversed on appeal without a showing of clear abuse of discretion. *Kem Search, Inc. v. Sheffield*, 434 So.2d 1067, 1070 (La. 1983); *Walker, Tooke & Lyons, L.L.P.*, 37,966, p. 9 (La. App. 2 Cir. 12/10/03), 862 So.2d 414, 420; *Deutsch, Kerrigan & Stiles v. Fagan*, 95-0811, 95-0812 (La. App. 1 Cir.12/15/95), 665 So.2d 1316, 1323.

The factors to be considered by the trial court in making an award of attorney fees are: “ultimate result obtained; responsibility incurred; importance of the litigation; amount involved; extent and character of labor performed; legal knowledge; attainment and skill of the attorney; number of appearances made; intricacies of facts and law involved; diligence and skill of counsel; court's own knowledge; and ability of party liable to pay.” *S. Jackson & Son, Inc. v. Aljoma Lumber, Inc.*, 93-2531 (La. App. 4 Cir. 5/26/94), 637 So.2d 1311, 1313.

In the present case, PCG presented the trial court with a Ledger History prepared by its attorneys, Lowe, Stein, Hoffman, Allweiss & Hauver, L.L.P., showing fees and costs incurred in connection with PCG’s action against DKS in the amount of \$31,595.90. The trial court reviewed the evidence and awarded PCG the entire amount requested plus \$500.00

attorney fees and costs in connection with the motion to set. The billing records of PCG's attorneys reflect work performed from April 4, 2002 through March 7, 2005. PCG maintains that the award of attorney fees was not excessive considering the matter involved a two day trial, the taking of four depositions, at least two attempts at settlement meetings, and post-trial appearances on the motion for new trial and on DKS's first appeal. We agree.

It is clear from the record that DKS has not questioned the billing records presented by the attorneys for PCG. In fact, in its opposition to PCG's motion to set fees and costs, DKS specifically stated that it does not challenge the accuracy of the hours PCG's attorneys may have spent on this case.

After our own review of the record, we find that the evidence supports the award of attorney fees. Considering the time and effort involved in litigating this matter, we conclude that the award is not excessive. Moreover, the trial judge was involved in this lawsuit from the beginning and had extensive knowledge of the facts and the amount and quality of work performed by counsel for PCG when it ruled. Accordingly, we find no abuse of discretion.

DKS submits that the attorney fees award is also unreasonable

because it is not confined to attorney fees for the actual prosecution of PCG's claim as provided by La. R.S. 9:2781. More specifically, DKS asserts that the award should not have included attorney fees for PCG's motion for new trial, PCG's appeal of the trial court's denial of motion for new trial, and PCG's motion to set fees and costs. We note that DKS cites no authority in support of this argument.

La. R.S. 9:2781 provides that attorney fees are owed for the prosecution and collection of a claim due on open account. In the present case, the attorney fees awarded by the trial court were clearly rendered in connection of PCG's prosecution and collection of its claim against DKS. Accordingly, we find no merit in DKS's second assignment of error.

Finally, PCG filed an answer to this appeal, seeking additional attorney fees and costs in connection with this appeal. PCG asserts that it is also entitled to damages for having to defend a meritless appeal pursuant to La. C.C.P. 2164.

La. C.C.P. art. 2164, which allows damages for a frivolous appeal, is penal in nature and must be strictly construed in favor of the appellant. *Levy v. Levy*, 2002-0279, pp. 17-18 (La. App. 4 Cir. 10/2/02), 829 So.2d 640, 650. Appeals are favored in the law and no penalties should be awarded for a frivolous appeal unless it is manifestly clear that the appeal was taken solely

for delay or that the appealing counsel does not sincerely believe in the view of the law that he is advocating. *Haney v Davis*, 2004-1716, p. 11, (La. App. 4 Cir. 1/19/06), 925 So.2d 591, 598. Any doubt regarding the frivolous nature of an appeal must be resolved in favor of the appellant. *Id.*

As stated in *Tillmon v. Thrasher Waterproofing*, 2000-0395, p. 8 (La. App. 4 Cir. 3/28/01), 786 So.2d 131, 137, this court is reluctant to grant frivolous appeal damages because of the chilling effect it may have on the appellate process. Applying the rule of strict construction against PCG, and considering the record in the present case, we do not find that this appeal is unquestionably frivolous; and, under the circumstances, damages are not warranted.

CONCLUSION

The judgment of the trial court is affirmed.

AFFIRMED