In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00069-CV

CHARLES JEFFREY KIRK AND WIFE CRISTY DE ANN KIRK, APPELLANTS

V.

THE CITY OF LUBBOCK, TEXAS APPELLEE

On Appeal from the 72nd District Court
Lubbock County, Texas
Trial Court No. 2018-530,240, Honorable Ruben G. Reyes, Presiding

September 17, 2020

MEMORANDUM OPINION

Before PIRTLE and PARKER and DOSS, JJ.

Appellants, Charles J. Kirk and Cristy D. Kirk, appearing pro se, appeal a final judgment in an annexation proceeding awarding attorney's fees against them and in favor of appellee, the City of Lubbock. We deny the City's threshold request to dismiss the appeal for alleged briefing deficiencies by the Kirks, overrule the Kirks' five issues on appeal, and affirm the judgment of the district court.

Background

The Kirks, along with SECA Partners, Ltd., filed suit to enjoin the City from annexing their property, alleging that the City did not comply with Texas law. To prevent the city council from voting on the measure and in an attempt to obtain additional time to seek an election, the Kirks and SECA sought a temporary restraining order, temporary injunction, and permanent injunction. They also requested an award of attorney's fees. The plaintiffs were represented in the district court by attorney Jeffrey S. Davis. Later, the petition was amended to name an additional 15 plaintiffs who purportedly joined with the Kirks and SECA.[1]

Initially, the district court granted a TRO that prohibited the city council from voting on the annexation plan until further order of the court, conditioned on the plaintiffs posting a $5,000 injunction bond. The Kirks and SECA joined as principals on the bond, while Chris Jackson and attorney Davis served as sureties. Six days after the bond was posted, the district court dissolved the TRO on the City's motion.

Thereafter, the City filed a motion for forfeiture of the injunction bond and an award of "interim" attorney's fees. A hearing on the City's forfeiture and attorney's fee motions took place on September 14, 2018. The district court's order notes that although plaintiffs' counsel was given proper notice, the plaintiffs failed to appear or answer the motion. The district court ordered the bond to be forfeited and awarded $22,912.50 in attorney's fees to the City and against plaintiffs, jointly and severally. The forfeited bond was ordered to serve "as a credit against the total amount of reasonable and necessary interim attorney's

[1] One of these plaintiffs was Pharr Partnership, Ltd.

fees awarded to the City of Lubbock in defending against" the application for TRO and temporary injunction.

After settling with SECA and Chris Jackson and recovering $12,000 (a sum which included the bond), the City held an unsatisfied award of $10,912.50 against the Kirks and fourteen other plaintiffs, jointly and severally. On October 3, 2018, most of the non-released plaintiffs, including the Kirks, took a nonsuit of claims against the City; the nonsuit was acknowledged by order of October 8.[2] Attorney Davis filed a motion to withdraw as counsel on October 25; it was denied.

On December 7, 2018, the City filed a motion for rendition of final judgment. At a January 11, 2019 hearing on the City's motion, Charles appeared, but Cristy did not.[3] Charles consented to attorney Davis' withdrawal from representation. Charles also orally requested that the district court permit him to "retry" the award of attorney's fees, saying he was not given notice of the hearing and that the City was legally not entitled to the award of fees. The district court declined to hear Charles' argument because no motion was pending before the court. The court also denied Charles' oral motion for continuance while Charles sought new counsel. The court then signed a final judgment, against the

[2] Pharr Partnership, Ltd. was not among the plaintiffs filing the notice of non-suit, nor were they identified as such in the court's October 8, 2018 order. The district court's grant of non-suit was therefore not a final judgment. "[I]f a court has dismissed all of the claims in a case but one, an order determining *the last claim* is final." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200, 206 (Tex. 2001) (emphasis added). *See also Crites v. Collins*, 284 S.W.3d 839, 841 (Tex. 2009) (holding that judgment was not final and that appellate deadlines did not begin to run when, despite order granting non-suit of plaintiff's claims, defendant had unresolved motion for sanctions.). That "last claim" was not disposed of until January 2019 with the signing of the final judgment.

[3] There is no signed order permitting Davis to withdraw as counsel for Cristy and Charles. To the extent that withdrawal was intended, Charles had a right to represent himself at the hearing. *Ex parte Shaffer*, 649 S.W.2d 300, 302 (Tex.1983). Charles, however, could not appear for Cristy because he is not an attorney. *See* TEX. R. CIV. P. 7.

Kirks jointly and severally for $10,912.50, plus post-judgment interest.[4] On Monday, February 11, 2019, the Kirks filed their notice of appeal.

Analysis

We begin with the City's request that we dismiss the Kirks' appeal for want of prosecution because of inartful briefing. We liberally construe the briefing rules as instructed and find the Kirks' brief sufficient to acquaint us with their issues and supporting argument. TEX. R. APP. P. 38.9. We deny the City's request for dismissal.

Notice of the Bond Forfeiture Motion and Hearing

In the Kirks' first and second issue, they argue they were not aware of the City's motion for bond forfeiture and award of interim attorney's fees and did not have notice of its hearing. They further argue the district court should have granted Charles' oral request to retry the issue. The record is clear that when the City filed its motion to forfeit the bond and for interim attorney's fees, the Kirks were represented by Davis. The City served Davis via electronic filing to Davis' designated email address. When Davis did not appear at the September 14 hearing on the City's motion for bond forfeiture and attorney's fees, the district court recessed to confirm that notice of the hearing had been sent to Davis. The court then summarized:

> The Court had previously asked [counsel for the City] to make sure that notice had been given to opposing counsel. It appears that notice was sent to the e-mail address . . . which was provided by Mr. Davis. Accordingly,

[4] The order also stated, "IT IS FURTHER ORDERED, ADJUDGED and DECREED that this judgment fully and finally disposes of all claims and all parties, is a final judgment, and is appealable." The Court holds that this language articulates with unmistakable clarity that it is a final judgment as to all claims and all parties, including Pharr Partnership Ltd. *See Lehmann*, 39 S.W.3d at 192-93, 206 (holding that a statement in an order that reads, "This judgment finally disposes of all parties and all claims and is appealable," leaves "no doubt" that the court intended to render a final judgment).

> the Court is going to proceed with having a hearing on this matter pertaining to the . . . the motion to forfeit Plaintiffs' bond and award attorney's fees.

Service on Davis imputes the same notice of the hearing to his clients. *See Prof'l Sec. Patrol v. Perez,* No. 01-12-00506-CV, 2013 Tex. App. LEXIS 10453, at *8 (Tex. App.—Houston [1st Dist.] Aug. 20, 2013, no pet.) (mem. op.); *Whitsel v. Hoover,* 120 S.W.2d 930, 933 (Tex. Civ. App.—Amarillo 1938, writ dism'd) ("Knowledge of or notice to the attorney, acquired during the existence of the relation of attorney and client, and while acting within the scope of his authority, is imputed to the client.") (citing 5 Tex. Jur. at 441). The Kirks presented no evidence that Davis failed to receive proper notice of the hearing of the City's motion. The City discharged its obligation to give notice by serving Davis. We overrule the Kirks' first two issues.

The Amount of Forfeited Bond and Award of Attorney's fees

The Kirks' third, fourth, and fifth issues concern the forfeited injunction bond and award of attorney's fees to the City. With regard to the forfeited bond, the Kirks argue that the City is not entitled to damages beyond the face value of the bond. They additionally argue that the "City failed to provide any evidence of any damages or injuries during that 7 day period" when the TRO was in effect. Because the question of authority for awarding attorney's fees in an annexation proceeding does not concern contested facts but whether the district court correctly applied the law, we will apply a de novo standard of review. *See Cremers v. Hallman,* 403 S.W.3d 878, 884 (Tex. App.—Texarkana 2013, pet. denied) (applying de novo standard in case of stipulated facts under rule of civil procedure 263).

With regard to the Kirks' complaint that the judgment constitutes an award of damages that impermissibly exceeds the amount of the bond, our state's supreme court has held that attorney's fees incurred in the prosecution or defense of claims generally do not constitute "damages." *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 171 (Tex. 2013) (orig. proceedings). The record makes clear that the entire judgment sum constitutes attorney's fees, not damages, and the bond was ordered forfeited to serve as a credit against a portion of those fees.

We also interpret the Kirks' brief as challenging the reasonableness and necessity of the attorney's fees awarded. Before the City was entitled to obtain an award of attorney's fees, it was required to prove: (1) recovery of fees is authorized by statute or contract, and (2) the requested fees are reasonable and necessary, "so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 487 (Tex. 2019).

As to the authority for recovering attorney's fees—the first element—Texas Local Government Code § 43.908(c) provides that "A court may award court costs and reasonable and necessary attorney's fees to the prevailing party in an action under this chapter." TEX. LOCAL GOV'T CODE ANN. § 43.908(c) (West Supp. 2019). Section 43.908 became effective December 1, 2017[5] and is therefore applicable in this case. The Kirks do not challenge that the City is the prevailing party. Texas law therefore authorizes the City to recover its attorney's fees.

That the attorneys who represented the City are employees does not bar the City from the recovery of attorney's fees. *Rohrmoos*, 578 S.W.3d at 488 (providing examples of legal representation outside of hourly rate attorney-client relationship in which a

[5] *See* Act of August 13, 2017, 85th Leg., 1st C.S., ch. 6, § 43, 2017 TEX. GEN. LAWS 4505, 4521 (codified at TEX. LOCAL GOV'T CODE § 43.908(c)).

prevailing party may recover fees); *Tesoro Pet. Corp. v. Coastal Ref. & Mktg., Inc.,* 754 S.W.2d 764, 766-67 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (describing decisions outside of Texas and holding, "the award of reasonable attorney's fees for services performed by in-house counsel compensates the prevailing party for time counsel could have spent on other corporate matters."). Because the statute does not limit recovery of fees to those "incurred," the City was not limited to those out-of-pocket expenses paid to its attorneys; our analysis looks to whether "legally sufficient evidence supports that the amount of attorney's fees awarded is reasonable and necessary for the legal representation, so that an award of such fees will compensate the prevailing party generally for its losses resulting from the litigation process." *Rohrmoos*, 578 S.W.3d at 489-90.

The Court next notes the second element—that the attorney's fees awarded are reasonable and necessary. For years, there was disagreement among courts regarding whether the reasonableness of attorney's fees should be analyzed under the "lodestar" method or per the factors articulated in Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct[6] and *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). In 2019, the Supreme Court of Texas clarified that the lodestar test was merely a "short hand version" of the *Arthur Andersen* test; the analysis is the same no matter the label. *Rohrmoos*, 578 S.W.3d at 488-89 (Tex. 2019) ("we intended the lodestar analysis to apply to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed."). At a minimum, therefore, a party

[6] TEX. DISC. R. PROF'L CONDUCT 1.04, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9) (West 2019).

seeking to recover reasonable attorney's fees is first required to prove a base lodestar figure by presenting evidence of:

> (1) the particular services performed;
>
> (2) who performed those services;
>
> (3) approximately when the services were performed;
>
> (4) the reasonable amount of time required to perform the services; and
>
> (5) the reasonable hourly rate for each person performing such services.

Id. at 498. After the factfinder multiples the reasonable hours expended in the case by a reasonable hourly rate to determine the base lodestar amount, the factfinder "may" then apply a multiplier to increase or reduce the amount depending on "other considerations." *Id.* at 501.[7]

In support of its evidentiary burden, the City introduced into evidence the itemized billing statements of three attorneys who worked on the matter. These billing statements detailed the specific legal tasks the attorneys were required to perform in response to the lawsuit. In addition, each attorney submitted an affidavit providing evidence of what a reasonable hourly attorney fee would constitute in the relevant locality, given the attorney's experience and the legal matter.[8] The Kirks presented no objection to such evidence, nor did they present controverting evidence to challenge the services provided or the hourly rates discussed. The Court holds that sufficient evidence supports the

[7] The *Arthur Andersen* factors provide examples of considerations that might justify an adjustment so long as they do not duplicate what was considered in determining the initial base. *Rohrmoos,* 578 S.W.3d 501.

[8] No party presented evidence of the "other considerations" that might increase or decrease the initial base lodestar. Accordingly, the district court simply added up the fees supported by the evidence and made an attorney's fee award of $22,912.50.

district court's determination of a reasonable and necessary attorney fee as being $22,912.50 in this case. The Kirks' third, fourth, and fifth issues are overruled.

Conclusion

Having overruled each of the Kirks' issues on appeal, we affirm the judgment of the district court.

Lawrence M. Doss
Justice