

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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|---------------------------------|---|--------------------------|
| S.D. DEACON CORPORATION         | ) |                          |
| OF WASHINGTON, a Washington     | ) | No. 66878-1-I            |
| corporation,                    | ) |                          |
|                                 | ) | DIVISION ONE             |
| Respondent,                     | ) |                          |
|                                 | ) |                          |
| v.                              | ) |                          |
|                                 | ) | UNPUBLISHED OPINION      |
| GASTON BROTHERS EXCAVATING,     | ) |                          |
| INC., a Washington corporation, | ) | FILED: November 19, 2012 |
|                                 | ) |                          |
| Appellant.                      | ) |                          |
| _____                           | ) |                          |

Becker, J. — This appeal is a sequel to S.D. Deacon Corp. of Washington v. Gaston Bros. Excavating, Inc., 150 Wn. App. 87, 206 P.3d 689 (2009). The present dispute concerns the amount of attorney fees awarded to the party who had prevailed on appeal when the matter went back to the trial court on remand from this court. We conclude the trial court inappropriately limited the award of fees.

Gaston Brothers Excavating Inc. entered into a subcontract to prepare the ground for a fitness center in North Seattle, a project for which respondent S.D. Deacon

Corporation of Washington was the general contractor. Gaston first began to perform services in May 2007. After a few months, a contractual dispute arose regarding the prices quoted by Gaston. The dispute came to a head in early October 2007 when Deacon refused to pay for all the work Gaston had invoiced.

On October 11, 2007, Gaston recorded a claim of lien for \$43,191.75. Deacon moved to resolve the dispute summarily by asking the court to release the lien under the provisions of the so-called frivolous lien statute, RCW 60.04.081. The trial court granted Deacon's motion and dismissed the lien. The court denied Gaston's motion for reconsideration on April 15, 2008. On May 16, 2008, the court awarded Deacon \$7,644.66 for fees and costs incurred between September 11, 2007, and March 18, 2008.<sup>1</sup>

Gaston appealed. This court reversed, holding that it was error for the court to conclude the lien was frivolous and made without reasonable cause. "This appeal involves an ordinary contract dispute with factual issues that should not have been decided on affidavits. We reverse and remand for reinstatement of the lien." S.D. Deacon Corp., 150 Wn. App. at 89.

We not only directed the court to reinstate the lien, we also reversed the trial court's award of fees to Deacon. We directed that, on remand, "the trial court shall award fees to Gaston for the earlier proceedings in that court." S.D. Deacon Corp., 150 Wn. App. at 96. This was because RCW 60.04.081(4) states that where the court

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<sup>1</sup> Clerk's Papers at 252-53.

“determines that the lien is not frivolous and was made with reasonable cause, and is not clearly excessive, the court shall issue an order so stating and awarding costs and reasonable attorneys’ fees to the lien claimant to be paid by the applicant.” Finally, we determined that Deacon was obliged to pay Gaston its costs and reasonable attorney fees for the appeal.

Our opinion issued on May 11, 2009. On July 20, 2009, a commissioner of this court awarded Gaston \$17,336.35 in appellate attorney fees and costs. Deacon did not pay this award until February 9, 2010, despite numerous letters and phone calls from counsel for Gaston.

The case was mandated on September 1, 2009. Gaston made informal efforts to secure Deacon’s compliance with the mandate. These efforts included trying to get Deacon to pay Gaston’s fees for the earlier proceedings in the trial court. These efforts were fruitless.

Gaston then took formal action to enforce the mandate. On November 16, 2010, Gaston moved in the trial court to vacate the previous order dismissing the lien (the order that had been reversed on appeal) and to enter an order reinstating the lien. Also requested in Gaston’s motion were related actions, including an order tolling the limitation period for foreclosing a lien, an order vacating the earlier court order that awarded fees and costs to Deacon, an order requiring Deacon to provide notice to third parties of the lien’s reinstatement and to record the order reinstating the lien, and providing a new case schedule for Gaston’s foreclosure action.

Deacon responded that the lien could not be reinstated because Gaston had failed to initiate a timely foreclosure action. One flaw in this argument, as the trial court ultimately recognized, was that Gaston could not initiate a foreclosure action with respect to a lien that had been dismissed. Gaston could not proceed with a foreclosure action until the trial court had complied with the mandate and ordered the lien to be reinstated and the public records corrected. Another flaw in Deacon's argument was its failure to recognize that this court's order to reinstate the lien had become the law of the case, notwithstanding Deacon's argument that this court's understanding of the law was "of no consequence."<sup>2</sup>

On January 3, 2011, the trial court entered all the orders requested by Gaston. Deacon then repeated the same arguments in a motion for reconsideration, which the court denied on February 28, 2011.

Deacon's aggressive litigation in opposition to the mandate forced Gaston to incur considerable attorney fees. Gaston claims to have incurred \$21,164 in attorney fees during the period from August 8, 2010, to December 13, 2010, in preparing to go back to court, preparing its motions, and defending against Gaston's efforts to nullify the effect of this court's decision with respect to the lien.<sup>3</sup>

Part of the discussions between the parties during this time period concerned

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<sup>2</sup> Clerk's Papers at 176, "Applicant's Opposition to Respondent's Motion to Reinstate Lien."

<sup>3</sup> Clerk's Papers at 415-27, Declaration of Lawrence B. Linville and attached billing records.

Deacon's obligation to pay Gaston's fees for the earlier proceedings in the trial court. On August 23, 2010, counsel for Gaston sent a letter suggesting payment in the amount of \$7,608, a figure very close to what the court had earlier awarded Deacon in attorney fees when Gaston was on the losing side. Deacon did not agree to pay this amount.

On January 7, 2011, Gaston filed a motion for an award for a total of \$31,770.65 in attorney fees, costs, and interest. The attorney fees sought by Gaston, totaling \$30,639.00, included \$1,323.00 for fees incurred by Gaston in pursuing Deacon's payment of Gaston's attorney fees awarded to Gaston by this court and \$8,152.00 for fees incurred by Gaston in the initial trial court proceedings in connection with Deacon's action to have the lien dismissed.<sup>4</sup> The request also included \$21,164.00 for fees incurred by Gaston from August to December 2010 to have the lien reinstated and the public records corrected, work that became inordinately expensive only because of Deacon's resistance to this court's mandate.

The costs sought, which were not specifically identified and are not at issue in this appeal, were \$30.80. The interest sought was the \$1,100.85 Gaston calculated as having accrued during the almost seven months Deacon made Gaston wait for payment of the attorney fees awarded on appeal.<sup>5</sup>

Deacon's response agreed that Gaston was entitled to attorney fees for the

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<sup>4</sup> Clerk's Papers at 367-75, Declaration of Sage A. Linn.

<sup>5</sup> Clerk's Papers at 343-44, Gaston's "Memorandum in Support of Motion for Attorney Fees, Costs, and Interest."

initial trial court proceeding, but argued that \$8,152 was too high. Deacon submitted documents indicating a recommendation of \$5,502. With respect to the \$21,164 in fees claimed by Gaston for work done after the mandate came down, Deacon viewed the vast majority of it as “either unnecessary or unreasonable.” Deacon pointed out that Gaston included no details for costs incurred. And Deacon claimed that interest was categorically not available on awards of attorney fees.

On February 28, 2011, the court entered an order awarding Gaston a total of \$7,608 in attorney fees, nothing for costs, and nothing for interest on the appellate attorney fees.

Gaston appeals.

1. Attorney fees for post-remand proceedings

It is apparent from the order that the court awarded Gaston attorney fees only for the initial proceedings in the trial court. The figure of \$7,608 is the exact amount that Gaston once proposed to accept in payment for the period of time from October 19, 2007 to April 22, 2008. The primary issue on appeal is whether Gaston was also entitled to an attorney fee award for the further trial court proceedings after remand, during which Deacon resisted the reinstatement of the lien.

Deacon claims the trial court had no discretion to award fees to Gaston for the proceedings after remand. Deacon relies on this court's opinion, in which we said, "On remand, the trial court shall award fees to Gaston for the earlier proceedings in that court." S.D. Deacon Corp, 150 Wn. App. at 96. Deacon claims that because of this language, the trial court had discretion to award fees only for the earlier proceedings, not for the post-remand proceedings.

Trial courts have discretion to set the amount of attorney fees. Trial courts "retain that discretion on remand unless expressly limited by the appellate courts or the exercise of discretion would be inconsistent with the ruling on appeal." Deep Water Brewing LLC v. Fairway Res. Ltd., \_\_\_ Wn. App. \_\_\_, 282 P.3d 146, 150 (2012). The clear intent of this court's opinion was to have Gaston put back in position to foreclose its lien. On remand, Deacon fought Gaston's requests to have the lien reinstated, requiring Gaston to incur substantial attorney fees to preserve the fruits of its appeal.

The proceedings after remand during which Gaston resisted having the lien reinstated were in effect a continuation of the earlier proceedings under RCW 60.04.081. That statute provides: "If the court determines that the lien is not frivolous and was made with reasonable cause, and is not clearly excessive, the court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the lien claimant to be paid by the applicant." RCW 60.04.081(4). It was not until January 3, 2011, that the trial court entered an order reinstating the lien, thereby determining that it was "not frivolous." Thus, Gaston's entitlement to fees under RCW 60.04.081 began on October 19, 2007, when Gaston attorney Sage Linn's billing records show that he first began to respond to Deacon's demand for release of the lien. And his work did not end until the denial of Deacon's motion for reconsideration on February 28, 2011. Not only did the trial court have discretion to award Gaston its attorney fees for this time period, there was no tenable basis for the trial court to deny these fees, which are mandatory under the statute.

Based on the documentation in the record, including evidence of the lodestar components of reasonable rates and reasonable time expended, we conclude the request for \$21,164 was reasonable and fees in that amount should have been awarded.

2. Attorney fees in the initial trial court proceeding

Gaston contends the court should have awarded Gaston attorney fees going back as far as March 6, 2007, when the contractual relationship between the parties



began, based on a prevailing party attorney fees provision in their contract.

We reject this argument. First, it does not appear the trial court was presented with evidence of billing records for work performed by counsel for Gaston before early October 2007 when the frivolous lien issue erupted. Second, the fee award Gaston is challenging was entered on February 28, 2011. At that time, Gaston had prevailed only to the extent of getting its lien reinstated. It had not yet proceeded with its lien foreclosure action and thus had not yet prevailed on any contractual dispute. The trial court award of \$7,608 for the initial trial court proceedings was reasonable based on evidence in the record, and it will remain undisturbed.

3. Interest on award of appellate attorney fees

Gaston contends the court erred in denying its request for interest on this court's award of appellate attorney fees. Deacon responds that Gaston failed to provide the trial court with any authority for such an award.

Deacon is mistaken. The court had before it, in Deacon's own submission, the case of Prier v. Refrigeration Engineering Co., 74 Wn.2d 25, 32-33, 442 P.2d 621 (1968). Prier includes the fundamental concept that a claim is liquidated where the exact amount of the sum claimed can be definitely fixed from the facts proved without depending on the exercise of discretion. Prier, 74 Wn.2d at 32-33.

The commissioner's award to Gaston of \$17,336.35 in appellate attorney fees and costs was included in the mandate. Issuance of a mandate means review has

been terminated. RAP 12.5(a). There was no longer any opportunity for any court to exercise discretion in determining the amount due. Under Prier, the award was a liquidated sum.

The appellate rules conclusively establish Gaston's entitlement to interest. "The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses, *including interest from the date of the award by the appellate court*, may be enforced in the trial court." RAP 18.1(h) (emphasis added). Gaston properly enforced its award in the trial court by bringing its motion to have interest included in the judgment.

The judgment is reversed. The matter is remanded for an amended judgment awarding Gaston \$7,608.00 for the initial trial court proceedings, \$21,164.00 for the trial court proceedings after remand, and \$1,100.85 for interest on the award of appellate attorney fees. The trial court may award additional attorney fees to Gaston if further foot-dragging by Deacon in the trial court makes such an award reasonable.

Gaston is awarded costs and reasonable attorney fees for this appeal pursuant to RCW 60.04.08, subject to compliance with RAP 18.1.

Becker, J.

WE CONCUR:

Leach, C. J.

Schiveller, J.