

14-0661

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IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

EDSON ARNEAULT,
Plaintiff,

vs.

Civil Action No. 09-C-175
Judge David J. Sims

MTR GAMING GROUP, INC., et al.,
Defendants.

CIRCUIT COURT
2014 JUN -6 AM 8:39
FILED
BRUCE L. JACKSON, CLERK
HANCOCK COUNTY

MEMORANDUM OF OPINION AND ORDER

This matter comes before this Court on Plaintiff's Motion for Attorney Fees following the denial of a Writ of Prohibition sought by Defendant, MTR Gaming Group, Inc. (hereinafter referred to as "MTR") by the West Virginia Supreme Court of Appeals in a Memorandum Decision issued June 18, 2013 and styled *State of West Virginia ex rel. MTR Gaming Group, Inc. v. The Honorable Arthur M. Recht, Judge of the Circuit Court of Hancock County; and Edson R. Arneault*, No. 12-0734. MTR requested that the Supreme Court issue a writ of prohibition to prevent this Court¹ from enforcing its order finding MTR in civil contempt for violating a previous order of the Court entered March 1, 2010.

I. Procedural History²

This case arises from a dispute between MTR and the respondent, Edson R. Arneault (hereinafter referred to as "Arneault"), related to his former employment with MTR. Arneault was employed by MTR in a variety of capacities. He last served as CEO for the company, stepping down in 2008. When Arneault left the company in 2008, he entered into a deferred compensation agreement and consulting agreement with MTR. In 2009, Arneault filed a suit against MTR, alleging claims arising from the contracts and other tort claims related to his deferred

¹ Senior Status Judge Arthur M. Recht was presiding over this matter at the time of the issuance of the contempt order.

² The Procedural History is largely lifted from the Supreme Court opinion in this matter.

compensation agreement. This lawsuit was ultimately resolved, and Arneault and MTR entered into an agreement (“Settlement Agreement”) that was incorporated into an order of the Circuit Court of Hancock County entered March 1, 2010.

The Settlement Agreement and order contained a clause stating, “[A]ny dispute arising from this agreement shall be interpreted pursuant to the laws of West Virginia and venue shall exclusively vest with the Circuit Court of Hancock County, West Virginia.” The Settlement Agreement also contained a confidentiality clause requiring that neither party disclose the terms of the underlying agreement. A portion of the agreement also provided that Arneault would be allowed access to non-privileged, non-confidential documents that he might need in dealing with claims by state bodies, law enforcement agencies, administrative agencies or in the course of obtaining additional gaming licenses.

On April 15, 2011, Arneault and co-plaintiffs filed an action based upon 42 U.S.C. §1983 (“Civil Rights Case”) in the United States District Court for the Western District of Pennsylvania (“District Court”) against MTR and other defendants. This complaint was later amended to include additional plaintiffs. Arneault’s allegations against MTR and the other defendants included violations of his federal civil rights that resulted in the denial of his request for a Pennsylvania gaming license. Actions alleged to have been performed by MTR included failure to provide necessary documentation within its control to gaming licensing authorities that hampered and hindered Arneault’s attempts to acquire a gaming license in Pennsylvania.

On September 26, 2011, MTR instituted a separate civil action in the District Court against Arneault. The complaint alleged six separate counts, including the breach of the consulting agreement; three breaches of the settlement agreement; tortious interference with contract; and one violation of Pennsylvania’s Uniform Trade Secret Act. Of these six counts, three directly alleged

breach of contract claims arising from the settlement agreement and were contained in Counts 2, 4 and 5 of MTR's complaint.

On November 11, 2011, Arneault filed a Petition for Rule to Show Cause in the Circuit Court of Hancock County alleging that MTR had violated the forum selection clause of the underlying settlement agreement by instituting this action in the United States District Court for the Western District of Pennsylvania. MTR responded, alleging that Arneault had himself violated the forum selection clause by filing the Civil Rights Case in the District Court.

MTR alleged that the new action was derivative of the settlement agreement that selected Hancock County, West Virginia, as the venue for any court action. Arneault disputed this contention, arguing that the relief requested by him contained no claims arising from the agreement, unlike the three counts of the complaint filed by MTR that were based upon language in the agreement itself.

This Court heard the parties' arguments on January 25, 2012. By order entered nunc pro tunc to January 25, 2012, ("contempt order") the Court found as follows:

- 1) that MTR and Arneault had entered into a Settlement Agreement containing a forum selection clause;
- 2) that the forum selection clause was violated by MTR when it filed a civil action in the District Court;
- 3) that counts 2, 4 and 5 arose directly from the Settlement Agreement;
- 4) that Arneault did not violate the forum selection clause in the underlying settlement agreement when he filed his action in federal court because his claims did not arise from the settlement agreement;
- 5) that Arneault's claims could only be pursued in the District Court

6) that a ruling by the District Court on any of the federal suits would not lead to inconsistent results;

7) that MTR was in contempt of the settlement agreement by filing the lawsuit in federal court, and imposed a \$500 per day fine, beginning January 25, 2012, until MTR dismissed Counts 2, 4 and 5 of its federal court complaint against Arneault.³

MTR filed a petition for writ of prohibition in the West Virginia Supreme Court challenging this Court's issuance of a contempt order against the MTR for violations of the underlying settlement agreement and order. The Supreme Court found that this Court did not exceed its legitimate powers by issuing the contempt order, and denied the requested writ of prohibition.

Arneault is now seeking attorneys' fees incurred in bringing the contempt action and defending against the writ of prohibition, as well as the fees incurred to defend against the allegations in a case filed in the District Court.

II. CONTENTIONS OF THE PARTIES

In support of his Motion for Attorneys' Fees, Arneault argues that attorneys' fees and costs may be awarded in a civil contempt proceeding under the bad faith exception. Arneault argues that even after this Court held MTR in contempt, MTR continued to assert its claim in the District Court and further filed the writ of prohibition with the Supreme Court.

Plaintiff argues that "MTR acted in bad faith by opposing Plaintiff's contempt petition, refusing to dismiss Counts II, IV, and V of the 'Contract Case' and bring them in the appropriate forum, and then filing a completely inappropriate writ of prohibition due to its stubborn and unreasonable refusal to simply bring Counts II, IV and V of the 'Contract Case' in the Hancock County Circuit Court." Arneault further asserts that as a result of MTR's "bad faith, vexatious

³ While MTR never voluntarily dismissed these counts, the District Court did dismiss those counts by order entered September 27, 2012.

and obdurate conduct”, he has unnecessarily incurred substantial attorneys’ fees including fees to prosecute the contempt proceeding, fees incurred in seeking to have counts 2, 4, and 5 dismissed in the District Court, fees incurred in defending against the petition for writ of prohibition, and fees in seeking to recover his attorneys’ fees.

In its response, MTR argues that it did not engage in bad faith but rather “acted reasonably under the set of circumstances presented, and pursued legal rights and protections available to it within the judicial system.” MTR further argues that Plaintiff filed first a complaint in the District Court against MTR and attached to his complaint the Settlement Agreement thereby placing the contract directly in issue. MTR argues that based upon the filing of Arneault’s complaint they reasonably believed that Arneault waived his right to enforce the forum selection clause. MTR, therefore, filed its claim in the same forum chosen by Arneault. MTR also argues that this Court “took no evidence as to [Arneault]’s actual injury or harm relating to the alleged contempt.”

MTR further argues that pursuant to *In re Frieda Q.*, 230 W.Va. 652, 742 S.E.2d 68 (2013), controlling law in West Virginia prohibits punitive civil contempt awards. MTR argues that this Court did not perform an analysis, provide for discussion or take evidence as to Arneault’s actual harm or damage. MTR argues that to add an award of attorneys’ fees as an additional sanction is an impermissible punitive penalty. Additionally, MTR argues although it did not win its pursuits before the District Court or the Supreme Court, “its beliefs and positions were reasonable and supported by good faith arguments under the application of existing law.” MTR finally asserts that not prevailing in “its arguments does not equate to bad faith.”

In response, Arneault argues that the attorneys’ fees fall within the category of compensation or damages as set forth in *In re Frieda Q.* Arneault argues that he has introduced competent evidence of the actual injury or harm by attaching copies of his bills for the legal work.

III. DISCUSSION

“In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.” Syl. Pt. 1, *Pritt v. Suzuki Motor Co., Ltd.*, 204 W.Va. 388, 513 S.E.2d 161 (1998) (quoting Syl. Pt. 2, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996)).

Syllabus Point 2 of *In re John T.*, 225 W.Va. 638, 695 S.E.2d 868 (2010), states that “[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney’s fees as “costs,” without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.” (quoting Syl. Pt. 3, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986)). In *In re John T.*, the Supreme Court upheld a circuit court’s decision awarding attorney’s fees to a father after the mother made several false allegations that the father had sexually abused one of his children. *Id.* at 643, 873. The Supreme Court, however, did find that the circuit court erred by not allowing the mother to challenge the reasonableness of the fees awarded to the father. *Id.* at 644, 874.

In *Pritt*, 204 W.Va. at 395, 513 S.E.2d at 168 (1998), the Supreme Court upheld the circuit court’s decision in awarding Suzuki Motor Co.’s attorney’s fees due to Mr. Pritt bringing a fraudulent claim. Mr. Pritt misrepresented his physical and mental condition and actively concealed the truth regarding his condition. The Supreme Court stated “[t]his case illustrates the

significance of sanctions, including awards of attorneys' fees, when valuable court resources have clearly been wasted and litigants with valid claims have experienced delayed access to the judicial system based on a claim that is both fraudulently asserted and pursued." *Id.* at 170, 397.

In Syl. Pt. 6 of *Yost v. Fuscaldo*, 185 W.Va. 493, 406 S.E.2d 72 (1991), the Court held that "[b]ringing or defending an action to promote or protect one's economic interests does not *per se* constitute bad faith, vexatious, wanton or oppressive conduct within the meaning of the exceptional rule in equity authorizing an award to the prevailing litigant of his or her reasonable attorney's fees as "costs" of the action.'" (quoting Syl. Pt. 4, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986)).

In this case, this Court finds that MTR has acted in bad faith, vexatiously, wantonly or for oppressive reasons in filing its complaint in the District Court, in refusing to dismiss its claims in the District Court, and in filing the writ of prohibition in the Supreme Court. The Court bases this finding on the several facts including the fact that MTR has never fully explained the reasons for filing its complaint in the District Court. It is unclear to this Court what interest was served in MTR in filing the complaint in the District Court. The Court can reach only one conclusion: that MTR did so for the sole reason that Arneault filed his civil rights claim in the District Court, thus waiving the forum selection clause. MTR's actions violated the clear forum clause in the Settlement Agreement stating that all claims arising out of the Agreement were to be filed in the Circuit Court of Hancock County. MTR has failed to establish in any way how the District Court was the more lawful, appropriate or convenient forum in which to file its complaint.

Further, MTR chose to disregard the lawful Order of this Court to simply dismiss the case in the District Court and proceed in the Circuit Court of Hancock County. MTR could have easily complied with this Court's Order without prejudice to any of its' legal claims. Instead, MTR

chose to continue with the District Claim and filed the writ of prohibition without adequately justifying the District Court as the appropriate forum. MTR proceeded at its own risk.

This Court finds that there is competent evidence of Arneault's actual injury and harm resulting from MTR's actions and conduct. Arneault was compelled to litigate claims in an improper, protect and defend his clear legal rights, incur attorney fees and deal with the resulting added stress and inconvenience.

Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Syl. Pt. 3, *In re. John T.*, 225 W.Va. at 638, 695 S.E.2d at 868 (quoting Syl. Pt. 4, *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986)).

Additionally, Syl. Pt. 6 of *In re Frieda Q.*, 230 W.Va. 652, 742 S.E.2d 68 (2013) states that "[a] monetary civil contempt sanction for compensation or damages must be based upon competent evidence of actual injury or harm to the aggrieved party resulting from the contemnor's refusal to follow an order of the circuit court. The sanction must be remedial, not punitive."

As evidence of the actual injury or harm that he has incurred, Arneault has attached a copy of his bill for the legal work that was performed by the Mizner Firm. In addition, Arneault has a

contingency fee agreement with Daniel J. Guida, Esq., and Robert P. Fitzsimmons, Esq., which is a common and customary practice for plaintiff's attorneys in West Virginia. Arneault is requesting that he be awarded the attorneys' fees incurred from Mizner as well as Mr. Guida and Mr. Fitzsimmons. In the bill submitted by the Mizner Firm, the Mizner Firm worked on the contempt matter, billing approximately \$4,687.50. The remainder of the bill submitted by Mizner appears to be related to the complaint filed in the District Court. Mr. Guida and Mr. Fitzsimmons handled the bulk of the work in the contempt matter, as well as the writ of prohibition, as is evidenced by the fact that they are counsel of record in the Hancock County matter and signed all relevant documents.

This Court finds that the attorneys' fees requested by Arneault for the legal services performed by Mr. Guida and Mr. Fitzsimmons under the contingency fee agreement in the amount of 40% of the amount recovered after an appeal is fair and reasonable, and that said percentage is a common, ordinary and customary contingent fee in West Virginia. It is not necessary for Mr. Guida or Mr. Fitzsimmons to provide a detailed hourly billing for legal services provided in this matter given that it is not the practice of most attorneys with contingent fee agreements to keep a detailed accounting of their time expended.

In re Frieda Q., the West Virginia Supreme Court, quoting *Hicks v. Feiock*, 485 U.S. 624, 632, 108 S.Ct. 1423, described the difference between sanctions that are remedial and sanctions that are punitive. “[S]anctions are ‘remedial’ when [they are] paid to the complainant, and punitive when [they are] paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court’s order.” *Id.* at 664, 80 (quoting *Hicks*). Therefore, an award of attorneys’ fees in this matter was not “punitive” as the fees were awarded to Plaintiff rather than to the Court.

This Court recognizes that the award of attorney fees is discretionary. This Court has reviewed the claim for attorney fees within the context of the factors set forth in *Aetna Casualty and Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986).

In determining attorney fees in this matter, the overarching concern for this Court is that the fees awarded must be reasonable. This Court concludes that after applying the *Pitrolo* factors, the attorney fees which are outlined above are reasonable under the circumstances. It is accordingly

ORDERED that Plaintiff is awarded attorney fees in the sum of \$4,687.50 for legal services performed by the Mizner Firm on the contempt matter. It is further

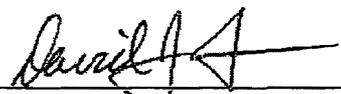
ORDERED that Plaintiff is awarded attorney fees in the sum of \$49,400.00 for legal services performed by Daniel J. Guida, Esq. and Robert P. Fitzsimmons, Esq., being 40% of the total monetary sanction of \$123,500 paid in the contempt matter. It is further

ORDERED that this matter shall be, and is hereby, stricken from the Court's active docket. It is further

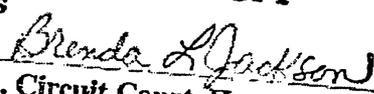
ORDERED that the Clerk shall provide an attested copy of this Order to Counsel for the Plaintiff and to the Defendants.

To which ruling the respective objections of the parties are hereby noted and preserved.

Enter this 3rd day of June, 2014.



Judge David J. Sims

A TRUE COPY
Attests


Clerk, Circuit Court, Hancock County

Deputy