

**IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA**

**Circuit Clerk  
Business Court Division  
NICHOLAS COUNTY, WV**

**MICHAEL D. HARLOW** 2019 JUN 19 A 9:35  
**Plaintiff,**

**Civil Action No.: 17-C-149**

v.

**Presiding Judge: James H. Young, Jr.**

**Resolution Judge: Paul T. Farrell.**

**EASTERN ELECTRIC, LLC,  
Defendant.**

**ORDER**

This matter came before the Court on May 7, 2019 for a bench trial before the Honorable James H. Young, Jr. The Plaintiff, Michael Harlow, appeared in person and represented by counsel, Robert P. Dunlap, II, Esq. and Leah-Ann Clay, Esq. The Defendant, Eastern Electric, LLC, appeared by representatives, Kristin Moores, Chris Skaggs, and Charlie Pritt, and represented by counsel, John D. Hoblitzell, III, Esq., John R. Hoblitzell, Esq., and Lindsay M. Gainer, Esq.

At the Pretrial hearing conducted on April 26, 2019, the parties stipulated that the value of Plaintiff's one-third (1/3) distributional interest in Eastern Electric, LLC was \$100,000 plus 1/3 of the net proceeds of any potential recovery arising out of the *Grim* matter pending before the West Virginia Court of Claims. The sole issue remaining for the Court to resolve at the May 7, 2019 bench trial was whether either party acted arbitrarily, vexatiously, or not in good faith so that the Court would award attorney fees and expenses as authorized under W.Va. Code § 31B-7-702.

Thereupon, the Court proceeded to hear the evidence and arguments of the parties; wherefore, the Court upon considering all the evidence and arguments makes the following Findings of Fact and Conclusions of Law:

**Findings of Fact**

In consideration of all the evidence presented in the record, the Court hereby makes the following findings of fact:

1. Prior to Plaintiff, Michael Harlow's, dissociation, Defendant Eastern Electric, LLC, (Eastern or Defendant) was made up of three members: Michael Harlow, Chris Skaggs, and Charlie Pritt.
2. On April 14, 2017, Plaintiff, Michael Harlow, voluntarily dissociated from Eastern. *See* Transcript (hereafter "Tr.") of May 7, 2019, Evidentiary Hearing at Defendant's Ex. 1 (Formal Notice of Dissociations).
3. Prior to Plaintiff's dissociation, Eastern received an adverse jury verdict against it in the Circuit Court of Kanawha County in the amount of approximately \$360,000 in a civil action styled *Grim, et al. v. Eastern Electric, LLC*, Civil Action No. 13-C-111. Grim was a prevailing wage case in which Eastern alleged that they relied on representations from the West Virginia Department of Administration that Eastern did not have to pay the prevailing wage. The jury ultimately found that Eastern should have paid the prevailing wage and that there was no honest mistake or error that alleviated Eastern's liability. *See* April 26, 2019 *Order on Defendant's Motion to Disqualify Martha Harlow* at ¶¶ 3-4.
4. The *Grim* verdict was recorded in Eastern's financial books for \$389,474 after the addition of interest and after including items such as payroll taxes on the wages to be paid and attorney fees. *See* Tr. At p. 253:12-21; *see also* Pltf's Ex. 3, Eastern May 12, 2017

Initial Offer at Ex. B to Offer; Def's Ex. 19, Apr. 24, 2019 Report of Eastern's valuation expert, Roger Griffith at p. 20.

5. Eastern is currently pursuing a recovery from the West Virginia Legislative Claims Commission for losses incurred in the *Grim* matter; however, any potential recovery from the Claim Commission is completely speculative and uncertain.
6. The *Grim* verdict created substantial and reasonable uncertainty as to whether Eastern would be able to continue business operations.
7. On May 12, 2017, within thirty days of Plaintiff's dissociation date and pursuant to W.Va. Code § 31B-7-701 (b) Defendant delivered a purchase offer to Plaintiff. The purchase offer was accompanied by a statement of Eastern's assets and liabilities as of Plaintiff's dissociation date, the most recent balance sheet and income statement, and an explanation of the estimated amount of the offer, which is the information required to be provided under W.Va. Code 31B-7-701 (b) (1-3). *See* Tr. at Plt's Ex. 3. Defendant's initial offer to purchase Plaintiff's distributional interest was \$45,000 or 1/3 of the gross proceeds of the potential *Grim* recovery from the Claims Commission. *See* Tr. at Plt's Ex. 3.
8. On May 19, 2017, Plaintiff rejected Eastern's initial purchase offer, which was presented to the Plaintiff on May, 12, 2017. *See* Tr. at p. 23:1-24:7; and at Plt's Ex. 4.
9. Per Eastern's routine accounting practices, accounts receivable for work-in-progress that had not yet been billed was not included in Eastern's balance sheet at the time of the initial offer. Kristin Moores, business manager for Eastern, testified that Eastern had always used this method of accounting and no evidence was presented to contradict Mrs. Moores' testimony. *See* Tr. at 257:10-22; 260: 8-10.

10. Plaintiff proposed three counteroffers. The first was for \$120,000 plus one-third of any recovery from the Claim Commission; the second was a lump sum total of \$225,000, and release any right Plaintiff would have to recovery from the Claim Commission; and the third was for the parties to hire a mutual certified valuation analyst to try to arrive at a fair value, provided that neither side would be obligated to accept the valuation. *See* Tr. at p. 23:1-24:7; and at Plt's Ex. 4.
11. Defendant rejected Plaintiff's counteroffers by letter dated May 22, 2017. *See* Tr. at Plt's Ex. 5.
12. On October 25, 2017, Plaintiff advised that he had retained his own expert to perform a preliminary evaluation of his interest and requested that Defendant voluntarily provide information to Plaintiff that his expert requested. *See* Tr. at Defendant's Ex. 3.
13. Eastern provided to Plaintiff information responsive to the preliminary requests for information, on December 7, 2017, and supplemental requests for information on February 20, 2018. *See* Tr. at p. 101:21-102:6.
14. During this time period, Eastern had retained new counsel due to its prior counsel being appointed and confirmed as the United States Attorney for the Southern District of West Virginia. During this transition, Eastern's response to Plaintiff's supplemental requests for information had been provided to its counsel, but this information was not forwarded to Plaintiff's counsel. *See* Tr. at p. 269:15-270:16.
15. Eastern's responses to the supplemental information requests were eventually provided on February 20, 2018, after counsel for Eastern became aware that the responses were never forwarded to Plaintiff's counsel. *See* Tr. at p. 101:21-102:6.
16. On December 8, 2017, Plaintiff filed this lawsuit.

17. On May 22, 2018, the Court entered a Scheduling Order which set forth the following deadlines: Plaintiff was to provide Defendant all discovery concerning the fair value of his distributional interest including all expert opinions by August 27, 2018; after which Defendant could accept, reject, or compromise the fair value of Plaintiff's interest by September 28, 2018. If Defendant rejected Plaintiff's proposal, Defendant was to provide Plaintiff all discovery concerning Defendant's valuation of Plaintiff's interest including all expert opinions by November 30, 2018. Trial was set for February 19, 2019. *See* Order entered on May 22, 2018.
18. In May of 2018, Defendant made a settlement offer to Plaintiff in the amount of \$75,000. *See* Tr. p. 107:13-109:15.
19. Plaintiff rejected this offer in June 2018 and provided two counteroffers. The first demanded \$130,000 and 1/3 of the any potential recovery in the Court of Claims and the second demanded \$200,000 and Plaintiff would release his right to any recovery in the Court of Claims. *See* Tr. at p. 109:16-110:16; p. 113:18-20; p. 152:2-6; and at Def's Ex. 7. Both counteroffers provided for lump sum payments. *See* Tr. at p. 114:14-21.
20. Plaintiff received a report from Plaintiff's expert dated August 27, 2018, which concluded that the values of Plaintiff's distributional share was \$120,000 as of the date of dissociation. *See* Tr. at Pltf's Ex. 22. ACT Aug. 27, 2018 report. *See* Tr. at Pltf's Ex. 22.
21. On November 30, 2018, Eastern's expert issued his report valuing Plaintiff's interest at \$69,814. *See* Tr. at Def's Ex. 18.
22. On January 8, 2019, Eastern increased its offer to \$95,000 plus 1/3 of the net recovery of the *Grim* Claims Action. Plaintiff responded on January 24, 2019, with a demand of

\$122,000, plus interest, 1/3 recovery in the *Grim* Claims Action, and attorney fees. See Defendant's Motion for Reasonable Expenses at p.13.

23. On April 22, 2019, Plaintiff received a revised valuation that valued Plaintiff's interest at \$100,000. See Tr. Pltf's Ex's 22 & 23.
24. On April 23, 2019, Eastern's expert issued a revised report which valued Plaintiff's interest at \$79,209. See Tr. Def's Ex. 19.
25. During the pretrial hearing conducted on April 26, 2019, the parties announced to the Court that the parties had agreed to stipulate to the value of Mr. Harlow's distributional interest of Eastern at \$100,000 plus 1/3 of the net proceeds of any potential *Grim* recovery. Tr. Apr. 26, 2019, hearing at p. 13:2 – 15:8.
26. Concerning the numerous discovery issues raised by both parties, without delving into the specifics of each and every complaint, the Court finds that Eastern complied with W.Va. Code § 31B-7-701 (b) by delivering a purchase offer and the mandated accompanying information to the dissociated member within thirty (30) days.
27. The Court further finds that Plaintiff did not make a formal request pursuant to W.Va. Code § 31B-4-408(a) to review the records of Eastern during discovery. Once this issue was raised in January 2019, the Court resolved the issue by ordering that Eastern was to make certain documents available for inspection during normal business hours and on ten (10) days written notice. See March 20, 2019 Order of Discovery Motions. The Court further finds that this this inspection was conducted on April 10, 2019, in accordance with this Court's Order and in accordance with W.Va. Code § 31B-4-408(a).
28. The Court also finds that the parties began undertaking informal discovery post dissociation but prior to the filing of this lawsuit. Once the lawsuit was filed, both parties

substantially complied with the West Virginia Rules of Civil Procedure in regards to discovery.

29. While discovery issues arose that could not be resolved between the parties, the Court finds that these issues were brought before the Court and the Court made rulings that were thereafter complied with by the parties.
30. Regarding Martha Harlow, the Court finds that Defendant brought forth a motion to disqualify Mrs. Harlow due to an apparent conflict of interest in which Mrs. Harlow was seeking payment from Eastern for legal services previously rendered. The Court agreed with Defendant that this created a conflict of interest and ruled to disqualify Mrs. Harlow. After this ruling, it was presented to the Court that Mrs. Harlow undertook remedial efforts to absolve this conflict at which time the Court considered its previous ruling moot and advised Mrs. Harlow that while the previous ruling was moot, as an attorney she was still governed by the West Virginia Rules of Professional Conduct.
31. The Court further finds that Eastern wanted Plaintiff to enter into a non-compete agreement as part of his dissociation from Eastern. The terms of the non-compete agreement were for Plaintiff to not compete within 150 mile radius for three years. The Plaintiff rejected any term requiring a non-compete clause.

### Conclusion Law

1. It is a general rule that each litigant bears his or her own attorney fees. *See* Syl. Pt. 2, *Sally-Mike Properties v. Yoakum*, 179 W.Va. 45, 365 S.E. 2d 246 (1986).
2. West Virginia Code § 31B-7-702 (d) states:

If the court finds that a party to the proceeding acted arbitrarily, vexatiously or not in good faith, it may award one or more other parties their reasonable expenses, including attorney's fees and the expenses of appraisers or other experts, incurred in the proceeding. The finding may be based on the company's failure to make an offer to pay or to comply with section 7-701(b).
3. "There 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." Syl. Pt. 3, *Sally-Mike Properties v. Yoakum*, 179 W.Va. 45, 365 S.E.2d 246 (1986).
4. The West Virginia Supreme Court of Appeals has explained that "bad faith" requires "the assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law." Syl., *Daily Gazette v. Canady*, 175 W.Va. 249, 332 S.E.2d 262 (1985), *Newcome v. Turner*, 179 W.Va. 309, 313, 367 S.E.2d 778, 782 (1988).
5. The Court additionally clarified that "vexatious" is defined as "causing vexation; troublesome, annoying, "(of legal action) instituted without sufficient grounds and serving to cause annoyance to the defendant." *Random House Dictionary of the English Language*, 2117 (2d ed. 1987)." *Id.* 179 W.Va. at 312 n. 5, 367 S.E.2d at 781 n.5 (1988).
6. Bad faith must be proven by clear and convincing evidence in order for a Court to assess costs. *See Miller v. Lambert*, 196 W.Va. 24, 33, 467 S.E.2d 165, 174 (1995).



7. Plaintiff alleges that Defendant acted in bad faith by (1) not negotiating in good faith, (2) concealing accounts receivable, (3) withholding records Plaintiff was entitled to under W.Va. Code § 31B-4-408, (4) delaying the production of documents, (5) trying to get Martha Harlow removed from the case, and (6) other vexatious conduct including the covenant not to compete and by violating the tolling agreement.
8. Defendant alleges that Plaintiff acted in bad faith by not negotiating in good faith, undertaking excessive motion practice, and not complying with discovery in good faith.
9. Here, the Court finds that neither party has proven by clear and convincing evidence that either party acted in bad faith, vexatiously, wantonly, or for oppressive reasons.
10. First, Plaintiff alleges that Defendant Eastern did not negotiate in good faith. The Court disagrees with this assertion. The Court concludes that at the time of Plaintiff's disassociation and subsequent negotiations Eastern was uncertain as to whether it could even continue business operations as a result of the nearly \$400,000 liability resulting from the *Grim* verdict. Defendant continued to negotiate with Plaintiff by making reasonable offers in light of the financial standing of Eastern. Therefore, the Court does not find that Eastern negotiated in bad faith.
11. Next, Plaintiff alleges that Defendant concealed accounts receivable. While Plaintiff is correct that the initial financial statements did not correctly reflect accounts receivable, the Court finds that this was largely due to Eastern's standard accounting practices that omitted work-in-progress that was not yet billed. The record indicates that this was Eastern's standard practice prior to Plaintiff's dissociation from Eastern. While this is perhaps not the best accounting practice, the Court does not find that it rises to the level

of vexatious conduct as no evidence was presented that the books were “cooked” in order to present a lower figure to Plaintiff.

12. Plaintiff further alleges that he was denied access to records he was entitled to under W.Va. Code § 31B-4-408. As discussed above, Plaintiff made no formal request to access this information until January 2019. In fact, there is no clear evidence in the record that any time prior to January 2019 Plaintiff attempted to look at Eastern’s records and was denied access. Once this issue was raised and before the Court in January of 2019, the Court resolved the issue by ordering that Eastern was to make certain documents available for inspection during normal business hours and on ten (10) days written notice. This inspection was conducted on April 10, 2019, in accordance with this Court’s Order and in accordance with W.Va. Code § 31B-4-408(a). As such, the Court does not find Defendant denied access to records that the Plaintiff was entitled to under W.Va. Code § 31B-4-408.

13. Plaintiff also alleges that Defendant delayed in producing documents. As discussed above, the Court finds that both parties substantially complied with statutory requirements and the West Virginia Rules of Civil Procedure regarding discovery. The Court also notes that Eastern’s counsel was appointed and confirmed as United States Attorney for the Southern District of West Virginia during this litigation which inevitably led to delays as new counsel had to be brought up to speed. In the midst of this transition, Eastern’s response to Plaintiff’s supplemental requests for information had been provided to former counsel, but this information was not forwarded to Plaintiff’s counsel. Once this issue was brought to Eastern’s attention the problem was resolved. While this is just one instance of delay of which Plaintiff complains, after reviewing the record and

Plaintiff's proposed findings of fact and conclusions of law the Court finds that no complained of delay in the production of documents rises to the level of bad faith.

14. Plaintiff further alleges that Defendant acted in bad faith by its "late stage attacks on Martha Harlow." As fully discussed above, Eastern put forth a motion to disqualify Mrs. Harlow due to what Eastern perceived to be a conflict of interest. The Court agreed with Eastern and entered an Order stating as such. After entry of the Order, Mrs. Harlow undertook actions which she deemed sufficient to eliminate the conflict. As the Court granted Defendant's motion to disqualify Mrs. Harlow, the Court does not find this "late stage attack" to be in bad faith.
15. Plaintiff alleges "Other Vexatious Conduct" that includes the covenant not to compete and violation of the tolling agreement. Plaintiff appears to concede that the noncompetition clause does not merit the finding of bad faith on its own, but Plaintiff argues that it should be viewed in addition to Defendant's other bad faith behavior. As shown above, the Court does not find that Plaintiff acted in bad faith. Therefore, the covenant not to compete, which Plaintiff never entered into, does not rise to the level of bad faith.
16. Finally, Plaintiff alleges that Defendant acted in bad faith by violating the tolling agreement, which required Defendant to respond to ACT's November 20, 2017 supplemental information request within five business days. As explained above, Defendant provided this information to its attorney who was at the time in the process of being confirmed as the United States Attorney for the Southern District of West Virginia. During the confirmation process, Defendant provided its response to its attorney who then failed to forward this information to Plaintiff's counsel. Once this lapse was brought

to the attention of Defendant's new counsel the information was provided to Plaintiff counsel on February 20, 2018. Therefore, the Court finds that while this was a technical violation of the tolling agreement, given the totality of circumstances such a lapse falls well short of the high bar the Court has set for bad faith.

17. Now turning to Defendant's allegations of bad faith against the Plaintiff, the Court characterizes Defendant's allegations into three categories: Plaintiff acted in bad faith by (1) failing to negotiate in good faith, (2) undertaking excessive motion practice, and (3) failing to comply with discovery timely.

18. First, Defendant alleges that Plaintiff failed to negotiate in good faith. Plaintiff's initial offer consisted of three options, the first called for \$120,000; plus one-third of any recovery from the Claim Commission; the second was a lump sum total of \$225,000, and release any right Plaintiff would have to recovery from the Claim Commission; and the third was for the parties to hire a mutual certified valuation analyst to try to arrive at a fair value, provided that neither side would be locked into that valuation. Defendants rejected this offer. Without again delving into the history of the negotiation process, the Court notes that the final agreement as to Plaintiff's distributional interest of Eastern was \$100,000 and 1/3 of the net recovery of the *Grim* matter. The Court notes that this figure represents a difference of \$20,000 from Plaintiff's initial offer whereas Defendant's initial offer was less than half (\$45,000) of where the parties eventually agreed. On this fact alone the Court would be extremely reluctant to find that the Plaintiff negotiated in bad faith. Furthermore, the record shows that Plaintiff reduced his demand once he received his expert's valuation. Therefore, when reviewing the record as whole, the Court finds that Plaintiff's conduct during the negotiating process falls well short of bad faith.

19. Next, Defendant alleges that Plaintiff acted in bad faith by undertaking excessive motion practice in disregard of the Court's Time Frame Orders and prior rulings in this matter. After reviewing the record the Court does not find that Plaintiff's motion practices were excessive or in bad faith. Although Plaintiff's motions were, as the Defendant characterizes, largely unsuccessful, these motions cannot be said to have been brought in bad faith. The filing of these motions did not substantially delay the proceedings, nor does the Court find them to be meritless. As such, the Court concludes that Plaintiff's motions were not brought in bad faith.

20. Finally, Defendant alleges that Plaintiff acted in bad faith by failing to comply with timelines in conducting discovery, failing to comply with his meet and confer obligations, serving additional subpoenas out of time and without leave, failing to abide by the Rules of Civil Procedure and the Court's Orders, and failing to provide documents, which caused delay. As discussed above, the Court finds that both parties substantially complied with the West Virginia Rules of Civil Procedure and Orders from this Court regarding discovery. While in a perfect world parties would get through litigation without squabbling over discovery, the Court understands that such expectations are largely unrealistic. Here, both parties have complaints about the other's action or inaction regarding discovery. However, none of the complaints raised regarding discovery surpasses the high bar the Court would need to find in order to find bad faith and impose costs. As such, the Court finds that Defendant has failed to prove by clear and convincing evidence that Plaintiff acted in bad faith.

Accordingly, based upon the foregoing findings of fact and conclusions of law, the Court does hereby ORDER:

1. That both Plaintiff and Defendant's Motions for Reasonable Expenses and Attorney Fees are hereby **DENIED**;
2. That neither party is entitled to and shall not recover reasonable costs in this matter pursuant to W.Va. Code § 31B-7-701(d); and
3. Is if further **ORDERED** that the Clerk of the Court shall prepare and forward certified copies of this order to counsel of record.
4. The objections and exceptions of parties aggrieved by this Order are noted and preserved.

All accordingly which is **ORDERED** and **DECREED**.

Enter this 18<sup>th</sup> day of June, 2019.

ORDER  
ENTER:

  
HONORABLE JAMES W. YOUNG, JR.

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