

No. 330613

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

KPS MANAGMENT,

Appellant,

v.

EDWARD ESIWILY and EUKENIO ESWINI,

Respondents.

APPELANT'S BRIEF

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I INTRODUCTION

In this Appeal KPS seeks reversal of a Superior Court Order awarding Respondent, Edward Esiwily \$12,820.00 in attorney fees for a simple unlawful detainer action. As both parties prevailed on major issues, no award of attorney fees should have been made to either party. Alternatively, the award made is excessive and should be reversed or reduced.

II ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

[1] The trial court erred in making an award of attorney fees to Respondent in its December 19, 2014 Order on Defendant Edward Esiwily's Motion for Reasonable Attorney Fees and Costs.

Where each party prevails on a major issue, should the court make an award of attorney fees to either party?

[2] The trial court abused its discretion by awarding attorney fees for unproductive time, mistakes by defense counsel, unsuccessful and improper claims.

Did the trial court abuse its discretion by awarding attorney fees for unproductive time, mistakes by defense counsel, unsuccessful and improper claims?

III STATEMENT OF THE CASE

The unlawful detainer action at issue was commenced by summons and complaint filed with the clerk of the court on July 24, 2014. CP 1.

The objects of the action were to obtain payment of past due rent and obtain a writ of restitution. CP 1.

A Show Cause Hearing was scheduled for August 6, 2014. CP 5. The Show Cause Hearing was continued to August 13, 2014. CP 6. As of August 13, 2014, the parties were engaging in settlement efforts to bring the rent current and mutually agreed to a continuance of the Show Cause Hearing to August 20, 2014. CP 8.

On August 20, 2014, Respondent, Edward Esiwily filed a pleading entitled Defendant's Answer and Affirmative Defenses. CP 11. In his Answer Respondent denied a failure to pay rent. Respondent also plead two unsuccessful affirmative defenses and one unsuccessful affirmative defense which should have been denominated as a counterclaim (i.e. allegations of violations of Fair Housing Amendments Act of 1988). CP 11, 23, 27 and 28.

The August 20, 2014 Show Cause Hearing was continued to August 25, 2014 because defense counsel did not have an interpreter present for his client. CP 14. On August 22, 2014, Respondent filed a

brief in support of Respondent's unsuccessful Personal Jurisdiction affirmative defense. CP 19.

On September 2, 2014 the trial court entered an Order directing payment of back rent to Appellant and providing that Appellant would be entitled to late fees if the rent was not paid by September 10, 2015. CP 23. This Order also directed the Parties to submit an Order representing the totality of the court's ruling at the August 25, 2014 Show Cause Hearing.

September 24, 2014 the court entered an Order continuing the contemplated presentment hearing to October 7, 2014. CP 24. The purpose of the continuance was to allow the Parties additional time to reach agreement on the terms of the Order. CP 24.

Counsel for the Parties were unable to reach agreement as to the terms of the Order so competing Orders were submitted at the presentment hearing. CP 25 and CP 28. In addition KPS filed objections to Respondent's proposed Order. CP 27.

At the October 20, 2014 presentment hearing the trial court reiterated its long standing policy against considering competing Orders. RP 126, 11:19. However, the court was forced to abandon this policy because as the court stated: "Mr. Pfundt, what you wrote as my Order and

what I remember I did are two completely different things.” RP 126,
24:25. Ultimately, the court rejected Respondent’s proposed Order and
adopted Appellant’s proposed Order. RP 127

In a reference to unsuccessful claims and defenses the court stated:

There is one other thing I would add and that is it. (sic) You have
all kinds of findings I did not make. You might have wanted me to
make them, but I did not. This is (sic) Order reflects what
happened.

RP 127, 6:9. Respondent’s rejected Order included a finding that Edward
Esiwily is handicapped/disabled which required an accommodation by
KPS. CP 25. Respondent’s proposed Order also included a conclusion of
law that: “Defendant has satisfied the prima facia elements proving the
Plaintiff’s failure to reasonably accommodate Defendant’s disability.” CP
25. Respondent’s proposed conclusion of law number 6 provided: “There
are genuine and material factual disputes as to sufficiency of Plaintiff’s
statutory notice and subject matter jurisdiction and that must be resolved
at trial.” CP 25. None of these finding of fact and conclusions of law
were adopted by the court in the Order which was actually entered. CP
28.

On October 17, 2014, Mr. Pfundt filed a 5 page Response to KPS' objections to his proposed Order and Findings. CP 29. No portion of this Response was incorporated into the court's Order. CP 28.

December 19, 2014 the trial court entered an Order awarding Respondent \$12,820 in attorney fees which was the exact amount of fees Mr. Pfundt requested. CP 45. KPS filed its Notice of Appeal on January 5, 2015.

IV ARGUMENT

[A] WHERE BOTH PARTIES PREVAIL ON MAJOR ISSUES EACH PARTY MUST BEAR THEIR OWN ATTORNEY FEES.

As a preliminary matter note that appellate courts in Washington review a determination of who is the prevailing party in an action on a de novo basis. Hawkins v. Diel, 166 Wn. App. 9-10, 269 P.3d 1049 (2011). In this section KPS demonstrates that neither party was entitled to an award of attorney fees in the trial court, because each party received some measure of relief, and there was no singularly prevailing party in the trial court.

As stated in Phillips Bldg. Co. v. An, 81 Wn.App. 696, 702, 915 P.2d 116 (1996), if both parties are awarded "some measure of relief and there is no singularly prevailing party, neither party may be entitled to

attorney fees. . .” In Hertz v. Riebe, 86 Wn. App. 102, 104-05, 936 P.2d 24 (1997), the plaintiffs succeeded on their breach of contract claim and the defendants succeeded on their collections claim. The court held that because both parties prevailed on major issues, neither party was entitled to attorney fees. *Id.* Also See, Seashore Villa Ass’n v. Hugglund Family Ltd. P’ship, 163 Wn. App. 531, 547, 260 P.3d 906 (2011) affirming the rule to be that if both parties prevail on major issues, both parties bear their own attorney fees. Finally, and significantly, Country Manor v. John Doe Occupant, 176 Wn. App. 601, 613, 308 P.3d 820 (2013) applied the foregoing rule in the context of an unlawful detainer action.

In the trial court KPS was seeking payment of rent and/or issuance of a writ of restitution. CP 1. Recall that Respondent, Edward Esiwily filed a pleading entitled Defendant’s Answer and Affirmative Defenses. CP 11. In his answer Appellant denied a failure to pay rent. Respondent also plead two unsuccessful affirmative defenses, to wit: lack of personal jurisdiction, lack of subject matter jurisdiction and one unsuccessful affirmative defense which should have been denominated as a counterclaim (i.e. allegations of violations of Fair Housing Amendments Act of 1988). CP 11, 23, 27 and 28.

The trial court refused to enter findings that it lacked either personal jurisdiction or subject matter jurisdiction (i.e. Appellant prevailed on these major issues). CP 23 and 28; RP 126-127. In addition despite the Respondent's considerable efforts the court also refused to find: a violation of the Fair Housing Amendments Act of 1988; that Respondent had a disability; or, that Respondent did not owe rent to KPS. CP 23 and 28; RP 126-127. The law is that:

[f]ailure to make a finding is construed against the person in whose favor the finding would have been made. Golberg v. Sanglier, 96 Wash.2d 874, 880, 639 P.2d 1347, 647 P.2d 489 (1982); Batten v. Abrams, 28 Wash.App. 737, 744, 626 P.2d 984 (1981).

Spokane v. L & I, 34 Wn. App. 581, 663 P.2d 843 (1983). Again, these were major issues upon which KPS prevailed.

The Respondent did succeed in preventing KPS from obtaining a writ of restitution. CP 23 and 28. In addition the court fashioned a remedy to allow Respondent to pay past due rent without penalty provided the rent was paid by September 10, 2014. After that date the court's Order allowed KPS to charge reasonable late fees. CP 23.

Because each Party prevailed upon major issues in the trial court, the trial court erred in awarding attorney fees to Respondent. Rather, neither party should have been awarded attorney fees by the trial court.

Accordingly, based upon the points and authorities cited in this section this Court should reverse the trial court's award of attorney fees to the Respondent. Only in this way can justice be served and the appropriate fee shifting standard be applied to this case.

[B] THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT \$12,820.00 CONSTITUTES RESPONDENT'S REASONABLE ATTORNEY FEES FOR PROCEEDINGS BELOW.

By discussing the amount of fees awarded to Respondent, KPS in no way abandons its position that each side prevailed on major issues and that no fees should have been awarded to either side. The first section of this brief should be dispositive of this case; however, if the court disagrees with this position the analysis in this section becomes necessary.

Washington courts have adopted the lodestar method to assess reasonable attorney fees. This methodology is a guiding light and not an anchor. It requires the Court to determine what a reasonable hourly rate is in the community for the particular areas of law at issue, taking into account the uniqueness of the question, the novelty of the issues, the experience of the attorneys, and the venue in which the parties find themselves. A lodestar award is arrived at by multiplying a reasonable hourly rate by the number of hours reasonably worked. West v. Port of Olympia, 146 Wn. App. 108, 123, 192 P.3d 926 (2008).

The lodestar methodology affords trial courts a clear and simple formula for deciding the reasonableness of attorney fees in civil cases and gives appellate courts a clear record upon which to decide if a fee decision was appropriately made. Under this methodology, the party seeking fees bears the burden of proving the reasonableness of the fees. Fetzer, 122 Wash.2d at 151, 859 P.2d 1210.

Under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. Fetzer, 122 Wash.2d at 151, 859 P.2d 1210. Counsel must provide contemporaneous records documenting the hours worked. As we said in Bowers v. Transamerica Title Ins. Co., 100 Wash.2d 581, 597, 675 P.2d 193 (1983), such documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (i.e., senior partner, associate, etc.).

Mahler v. Szucs, 135 Wn.2d 398, 433-434, 957 P.2d 632 (1998).

(Emphasis added). Mahler and its progeny also require the trial court to enter findings.

“Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits of counsel”. Mahler v. Szucs, 135 Wn.2d 398, 434-435, 957 P.2d 632 (1998). “The burden of demonstrating that a fee is reasonable is upon the fee applicant.” Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

In the case at bar the trial court erred in failing to exclude from the requested hours wasteful or duplicative hours and hours pertaining to unsuccessful theories or claims. Fetzer, 122 Wash.2d at 151, 859 P.2d 1210 (1993). This case required a hearing to determine whether or not KPS Management was entitled to a Writ of Restitution for non-payment of rent. KPS succeeded in establishing that the rent was not paid. Thus the sole issue before the Court was whether or not the Defendants had a viable defense for not paying the rent. This was not a novel or difficult issue and was based upon facts specific to this case.

In an average unlawful detainer action that is contested, the matter is heard immediately by the Judge presiding over the Unlawful Detainer Docket or another available Judge. In KPS's experience, the average cost to pursue an uncontested unlawful detainer action is \$850 to \$1,000 including costs. CP 40. The cost to engage in a contested hearing is another 2 hours of an attorney's time. CP 40. In this case, Plaintiff's attorney fees have far exceeded the normal cost of a contested hearing due to: delays caused by the Defense; wasteful hours; and, hours pertaining to unsuccessful theories and claims.

KPS Management agreed to continue the Show Cause Hearing twice based upon defense counsel's promise that the rent would be paid

current. CP 40. The first continuance was filed with the Court on August 6, 2014, the date set for the original Hearing. CP 6. Mr. Pfundt's time records show that he took no action between August 6, 2014 and August 15, 2014 with the Respondent's Payees to have the rent paid current. CP 36, Ex. E. Mr. Pfundt requested a second continuance on August 12, 2014, which was also granted. CP 8. Finally, on August 15, 2014, Mr. Pfundt's time records show he contacted Spokane Housing Authority, one of the Payee's for Respondent. Mr. Pfundt's time records never show he contacted Goodwill Industries about payment of their share of the rent prior to the Hearing. CP 36, Ex. E. Had Mr. Pfundt acted promptly on his promise to have the rent paid current by both Payees for the Respondent, no hearing would have been necessary. Thus, in all fairness none of Mr. Pfundt's fees after August 15, 2014 are justifiable because he could easily have brought the rent current by that date thereby bringing the case to an end.

Defense Counsel's empty promises and lack of effort to get the rent paid current left KPS Management no choice but to request a hearing for the Writ of Restitution on August 20, 2014. CP40. KPS Management notified Defendants that it would proceed to hearing on August 20, 2014 ahead of time. Mr. Pfundt's time records show he expended 10.2 hours on August 19, 2014 "Drafting Pleadings and Hearing Prep". CP 36, Ex. E.

The pleadings drafted consisted of a 4 page Answer and Affirmative Defenses. CP 11. This is an extraordinary amount of time which equals or exceeds the average total cost of a contested hearing. Moreover, none of the affirmative defenses plead in this document were successful. In addition, the hearing preparation was wasted time because Mr. Pfundt did not arrange to have an interpreter present at the hearing which necessitated a continuance. CP 14.

Defense counsel states in his Declaration of Barry Pfundt, page 2, lines 6-7, that the Defendant's Payees offered to pay the rent current on August 19, 2014 but his time records show no such communication to Plaintiff's counsel on that date. CP 36. If this statement was in fact true and payment was offered, KPS Management would have had no basis to proceed with the Show Cause Hearing, thus avoiding the costs involved. The time records for Mr. Pfundt show no such offer was ever made. But for defense counsel's actions no fees would have been incurred after August 19, 2014. Clearly, no attorney fees should have been awarded to Respondent after August 19, 2014 because all those fees related to unnecessary work.

"The amount of time actually spent by a prevailing attorney is relevant but not dispositive. Particularly in cases where the law is settled,

there is a great hazard that the lawyers involved will spend undue amounts of time and unnecessary effort to present the case”. Nordstrom v. Tampourlos, 107 Wn.2d 735, 744, 733 p.2d 208 (1987).

Mr. Pfundt’s Affidavit in support of the fees being requested represents but one example of substantial wasted time in this case. CP 36. Paragraph 6 of this Affidavit addresses the number of Unlawful Detainer Actions KPS has filed over the years. In addition Mr. Pfundt attached 50 plus pages of court records regarding these actions. All of this was irrelevant and a total waste of everyone’s time.

This matter could have been concluded by August 19, 2014 and would not have involved the Court if Mr. Pfundt had simply followed up on his earlier promises to get the rent paid prior to a Court Hearing. Based upon this, it is unjust to award Mr. Pfundt any additional fees after August 19, 2014 because of his lack of effort to timely resolve this matter despite Plaintiff’s willingness to twice grant him the requested time necessary to reach such an accommodation.

On August 20, 2014, the day of the first hearing before Judge Tompkins, Defense counsel spends 6 more hours in “Hearing Prep and Travel; Show Cause Hearing; Consult, Scheduling, & Affidavit of Prejudice; Consult and Case Strategy; Research; and Document review”.

CP 36, Ex. E. In truth, almost immediately after the hearing began and the Defendants disclosed their witnesses, Judge Tompkins declared a possible conflict and recused herself at Plaintiff's request.

This matter was immediately reassigned to Judge Triplett to be heard that same morning. Once the hearing began before Judge Triplett, he determined that a court approved interpreter was necessary for the Defendants and that defense counsel had not made arrangements beforehand for such a person, thus the matter could not continue at that time. CP 14.

The matter was then transferred to Judge O'Connor for hearing on August 25, 2014. Thus, but for Defense counsel's failure to make arrangements to have a court approved interpreter available for his client, this Hearing would have been resolved on August 20, 2014. Therefore, at most, Defense counsel should only be allowed a portion his fees up to and until August 20, 2014 because he should have presented his case on that date. If he had been properly prepared with an Interpreter for August 20, 2014, the Hearing would have been held and he would not have incurred any additional time.

Over the next two days, August 21-22, 2014, Mr. Pfundt logs an additional 14 hours drafting memos for the Court, researching and further

hearing prep. According to his time records, Mr. Pfundt delivered two memos to the Court and an additional pleading as well during this time. CP 36, Ex. E.

Mr. Phundt's August 22, 2014 memorandum was 2 pages long and addressed the Respondent's unsuccessful affirmative defense of lack of personal jurisdiction. CP 19. No second memorandum appears in the record. Clearly, no time should be allowed for researching and drafting two memorandums relating to unsuccessful affirmative defenses.

Despite the fact that Mr. Pfundt had already spent 10.2 hours in preparation for this Hearing prior to August 20, 2014 when the Hearing should have been heard, Mr. Pfundt claims an additional 14 hours drafting memos, researching and delivering documents to the Court on August 21 and 22, 2014 and another 20.3 hours of "Hearing Prep" between August 23, 2014 and the day of the Hearing, August 25, 2014. Clearly, most of this preparation time related to Respondent's unsuccessful affirmative defenses. In addition the time recorded is extraordinarily excessive for a 2 hour hearing.

With as much expertise in this area of the law as Mr. Pfundt claims to have, spending 44.5 hours preparing for a Show Cause Hearing on whether a Writ of Restitution should be issued is clearly excessive and

wasteful. CP 36, Ex. E. Mr. Pfundt documents a total of 88.5 hours he dedicated to this case defending against a Motion for a Writ of Restitution. (He waives his fees for 25.3 hours of his time and well he should, his work product from that time was so deficient it was unusable by the Court). Mr. Pfundt either has no billing judgment or he is attempting to punish the Appellant with an extraordinarily excessive claim for attorney fees.

RCW 59.18.250 addresses retaliatory actions by a landlord. In this statute the legislature recognized that when legal services are provided at no cost to the party, that party is not entitled to recover their reasonable attorney fees. It must be remembered that the awarding of attorney fees is meant to compensate the prevailing party in an action, not to reward the attorney involved. In this case no attorney fees were charged to the Respondent so there are really no attorney fees to shift to KPS.

“Ultimately, the fee award must be reasonable in relation to the results obtained”. Brand v. Dept. Of L & I, 91 Wn. App. 280, 292 (1998) quoting from Hensley v. Eckerhart, 461 U.S. 424, 440 (1983). The case at bar involved no exceptional issues and should have cost a client approximately \$1,500.00 in attorney fees. KPS succeeded in securing payment of back rent. Once the rent was paid there remained no basis for issuance of a writ of restitution.

Recall that the trial court refused to enter a finding that Respondent suffered from a disability. CP 25, 28 and RP 127. Inexplicably and without support in the record the trial court concluded in part that the requested fees were justified due to Respondent's disability. CP 45, 2:19. This represents an untenable ground for the fee award.

The court also based its decision in part two prior failed hearings. CP 45, 2:25-28. Recall that Mr. Pfundt's failure to arrange for an interpreter for his client was the reason one of the hearings failed. CP 14.

This was a simple case where none of Respondent's affirmative defenses succeeded yet the trial court abused its discretion by awarding all the fees requested by defense counsel including fees for the unsuccessful claims and defenses. There is simply no justification for the award of attorney fees in this case to be almost ten times the fees normally incurred in an unlawful detainer action. Accordingly, the award of attorney fees should either be reversed or substantially reduced to an amount consistent with the normal attorney fees incurred in simple unlawful detainer actions.

[C] RAP 18.1 REQUEST FOR ATTORNEY FEES.

The Parties' Lease includes an attorney fee clause which provides for an award of attorney fees to the prevailing party in litigation arising out of the Lease. CP 36, Exhibit "A", clause 15. Pursuant to RAP 18.1

KPS requests an award of reasonable attorney fees and cost if it is the prevailing party on this appeal.

V CONCLUSION

Based upon the points and authorities cited in this brief, KPS respectfully requests that this Court either reverse the award of attorney fees or substantially reduce the award of attorney fees to an amount typical for a simple unlawful detainer case.

Respectfully Submitted this 21st day of September, 2015.

Herman, Herman & Jolley, P.S.

By: _____

J. Steve Jolley, WSBA # 12982

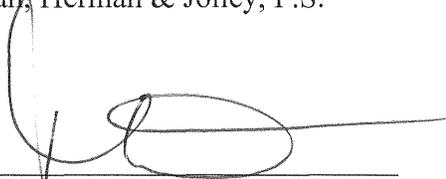
Attorney for Appellant

CERTIFICATE OF SERVICE

J. STEVE JOLLEY, attorney for KPS hereby certifies that on November 24, 2015, I placed a true and exact copy of the foregoing Brief in the U.S. Mail, postage prepaid and addressed as follows:

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Tonya Plunkett, Rule 6 Law Clerk
& Paralegal to J. Steve Jolley