

No. 71998-0-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

MAPLE VALLEY AT PARK PLACE, LLC.,

Respondent,

v.

MICHAEL AND TAMARA ROSS,

Appellants.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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APPELLANTS' OPENING BRIEF

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A. Introduction

The conduct below by the plaintiff and its counsel was literally “contemptuous.”¹ The plaintiff “vigorously” pursued a claim for breach of a lease against the defendants in violation of the defendants’ bankruptcy discharge, in violation of the “clean start” provided to debtors after completing bankruptcy.² The plaintiff continued to litigate the claim after being found in contempt, before finally dismissing its claim without obtaining any recovery

The lease contained a broad prevailing party attorney’s fee provision. Despite defendants’ complete victory, the trial court awarded less than half of the attorney’s fees sought by defendants as prevailing party, without making any findings that any of defendants’ work was unnecessary, inefficient, or not related to defendants’ work to prevail against plaintiff’s claim.

This is not a case in which the trial court determined that the hours worked were in general excessive or unnecessary, so a reduction was

¹ The Hon. Marc Barecca, United States Bankruptcy Court, Western District of Washington, found plaintiff and its counsel in contempt, awarding damages to defendants. *In re Ross*, No. 09-10812-MLB. CP 87.

² When defendants’ counsel provided a copy of the defendants’ bankruptcy discharge to plaintiff’s counsel at the commencement of the action, requesting that plaintiff dismiss its claim, plaintiff’s counsel responded that the plaintiff intended to pursue the claim “vigorously.” CP 136. Plaintiff and its counsel kept their word.

necessary to award only reasonable attorney's fees. Rather, the trial court excluded hours for work on certain tasks, when such tasks were necessary.

Specifically, the trial court refused to award fees for (1) 23.0 hours devoted to work successfully opposing a summary judgment motion, (2) 20.9 hours for work in a related bankruptcy matter arising out of this action which resulted in plaintiff dismissing this action, and (3) 13.7 hours spent preparing and pursuing the claim for attorney's fees.

All of these hours were directly related to successfully defending against plaintiff's claim and/or presenting defendants' claim for attorney's fees.

B. Assignments of Error

Assignments of Error

1. The trial court erred when it excluded 23.0 hours of the defendants' work on the cross-motions for summary judgment from its fee award.
2. The trial court erred when it excluded all hours of the defendants' work in the bankruptcy court from its fee award.
3. The trial court erred when it excluded hours for work by the defendants preparing and presenting their fee request from its fee award.

Issues Pertaining to Assignments of Error

1. When a party prevails in an action, should attorney's fees be discounted merely because the court did not adopt every contention asserted by that party? (Assignment of Error No. 1)

2. Are fees incurred in another court recoverable under a prevailing party attorney's fee provision, if the action in the other court was directly related to the matter covered by the fee provision? (Assignment of Error No. 2)

3. Are fees incurred preparing and presenting a request for attorney's fees recoverable under a prevailing party attorney's fee provision? (Assignment of Error No. 3)

C. Statement of the Case

In 2008, defendant Mike Ross signed a commercial lease to rent office space for a limited liability company of which he was a member. Supp. CP __ (Sub. No. 15). In ¶ 14 of the lease, it provided as follows:

14. **ATTORNEYS FEES AND COSTS:** If, by reason of any default on the part of either party herein in the performance of any provision of the lease, it becomes necessary for the other party to employ attorneys, *the prevailing party shall be reimbursed for reasonable costs, expenses, and attorneys' fees expended in, or incurred in connection therewith.*

CP 12.

In 2009, defendants Mike and Tamara Ross filed a Chapter 7 bankruptcy and obtained a discharge of all debts. Supp. CP (Sub. No. 15). In 2011, defendants abandoned the leased premises. *Id.*

Plaintiff initiated this action asserting a single claim for relief: breach of the lease. CP 1. Defendants provided a copy of their bankruptcy discharge to plaintiff's counsel to show plaintiff's claim was futile. CP 87. This prompted plaintiff's counsel to announce that defendants would not be able to file another bankruptcy to avoid liability for the plaintiff's claim, so plaintiff would pursue its claim "vigorously." CP 136. Defendants' answer asserted their bankruptcy discharge as a defense to plaintiff's claim against them. CP 9.

Plaintiff moved for summary judgment. CP 24. Defendants opposed the summary judgment, and filed a cross-motion for summary judgment based on the bankruptcy discharge.³ CP 31. The plaintiff sought to strike Mike Ross' declaration and/or a continuance of the hearing to be able to depose him. CP 39. Defendants opposed the continuance and submitted a reply in support of their summary judgment motion. CP 54. The court did not rule on the summary judgment motions.

Defendants informed plaintiff of their intent to file a contempt motion in the bankruptcy court for violation of the defendants' discharge,

³ The discharge was the basis for the bankruptcy court's later contempt finding against plaintiff and its counsel.

but offered to not file if the plaintiff would dismiss and compensate defendants for their attorney's fees to date. CP 87. Plaintiff responded by telling defendants that their contempt motion was "without merit." *Id.*

Defendants then moved to reopen their bankruptcy and have the plaintiff held in contempt for violating their bankruptcy discharge. *Id.* At a hearing on April 5, 2013, the bankruptcy court scheduled an evidentiary hearing to take evidence regarding defendants' damages arising from the violation of their discharge. *Id.*

At the evidentiary hearing, the plaintiff still disputed that its action violated the defendants' bankruptcy discharge. *Id.* The bankruptcy court held plaintiff and its counsel in contempt. *Id.* The bankruptcy court awarded the defendants \$5,000 in emotional distress damages and \$16,556.25 in attorney's fees (using \$300/hr. as the rate) as damages for violation of the discharge. *Id.*

The defendants prepared the judgment requested by the bankruptcy court. *Id.* Plaintiff opposed the entry of the judgment for the damages awarded by the bankruptcy court. *Id.* Defendants noted the judgment for entry, and then appeared at the bankruptcy court hearing on October 31, 2013. *Id.* The bankruptcy court entered the judgment as drafted by defendants. *Id.*

Plaintiff refused to dismiss the state court action after entry of the contempt judgment. *Id.* Plaintiff threatened to amend its complaint to pursue a claim not covered by the contempt motion. *Id.* Defendants then prepared to oppose the new claim plaintiff was threatening to assert, while also urging plaintiff to dismiss. *Id.*

Plaintiff then moved to dismiss. CP 73. Defendants did not oppose dismissal, so long as their right to seek reasonable attorney's fees was preserved after dismissal. CP 74. The trial court then dismissed the action. CP 117.

After prevailing in the action, defendants sought reasonable attorney's fees under the lease, submitting a motion and supporting declaration. CP 77. The request included fees for 33.0 hours of work on the summary judgment motions, 20.9 hours for work in the bankruptcy court not awarded by the bankruptcy court as damages,⁴ and 17.0 hours for work in the trial court after entry of the contempt judgment through February 4, 2014. CP 87.

The trial court ruled defendants were entitled to reasonable attorney's fees, but requested additional documentation from defendants.

⁴ The bankruptcy court awarded fees of \$16,556.25 based on counsel's hourly rate of \$300. $\$16,556.25/\$300=55.2$, so the bankruptcy court awarded fees for 55.2 hours of work. Defendants included 76.1 hours for work in the bankruptcy court, with an offset for the 55.2 hours awarded by the bankruptcy court, leaving defendants to request 20.9 hours for work in the bankruptcy court.

CP 138. The trial court specifically refused to award any fees for defendants' work in the bankruptcy court stating:

The Court will not grant fees for the cost of proceedings in the bankruptcy court, which has already assessed sanctions.

Id.

Defendants then submitted a revised attorney's fee request with additional documentation supporting the request. CP 141. Defendants sought an additional 4.5 hours for this additional work. CP 144.

The trial court awarded fees for 10.0 hours of work on the summary judgment motions, stating:

Likewise, since the dispositive issue in this case was the effect of the bankruptcy discharge, while very little of the summary judgment briefing dealt with that key issue, the 33.0 hours billed for summary judgment proceedings is excessive. It also includes time devoted to settlement discussions before taking the matter to bankruptcy court – these hours were not reasonable for the defense of the case in this court. The 33.0 hours is reduced to 10.

CP 223. The trial court awarded fees for 17.0 hours of work in the trial court after the bankruptcy court entered the contempt judgment. *Id.* It did not award any fees for additional work by defendants after February 4, 2014. *Id.*

The plaintiff moved for reconsideration of the trial court's entire award of attorney's fees. CP 227. Defendants moved for reconsideration on one issue: the trial court's refusal to award fees for 23.0 of the 33.0

hours worked by defendants on the summary judgment motions. CP 232. The trial court requested briefing from each side addressing the other side's motion for reconsideration. Defendants requested 5.7 hours for work on defendants' motion for reconsideration, and 3.5 hours for work opposing plaintiff's motion for reconsideration. CP 237.

The trial court denied both motions for reconsideration without comment. CP 239 and 242. The trial court entered judgment for 45.0 hours of work, which was \$13,500 in attorney's fees, and \$570.61 in costs. CP 247. The defendants timely filed their notice of appeal. CP 250.

D. Summary of Argument

The prevailing party attorney's fee provision in the lease was broad, applying to fees "expended in [the action to enforce the lease] or incurred in connection therewith." All of defendants' work in the trial court and bankruptcy court was "in connection with" defending against plaintiff's attempt to recover under the lease, a single claim upon which defendants prevailed completely.

The trial court was correct in using the lodestar method in calculating the reasonable fees, and used the proper hourly rate, but abused its discretion when it excluded hours for work by defendants on certain tasks. There was no basis to reduce the hours for work on the

summary judgment motions, or to not include hours worked in the bankruptcy court or in preparing the attorney's fee request.

E. Argument

1. Defendants were entitled to reasonable attorney's fees under the lodestar method.

The defendants were entitled to reasonable attorney's fees as the prevailing party, calculated under the lodestar method. A prevailing party's award of attorney's fees is calculated by using the lodestar method, which is the reasonable hourly rate multiplied by the reasonable number of hours worked. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

Here, defendants prevailed under the only claim at issue, which was plaintiff's claim for breach of the lease. Under the lease, defendants were entitled to recover all the fees for all work reasonably necessary to achieve their victory. Fees under the lodestar method should not include wasteful or duplicative hours or time spent on unsuccessful claims. *Id.*

The trial court made no finding that any of the work for which defendants seek recovery in this appeal were unnecessary, or that the hours spent were wasteful or duplicative.⁵ Defendants were entitled to all

⁵ Defendants do not here challenge the trial court's reduction of hours for work by defendants prior to the summary judgment motions.

their fees for work opposing the summary judgment, obtaining the contempt judgment, and pursuing their fee request.

2. The trial court abused its discretion in excluding certain hours worked by defendants' counsel when calculating the attorney's fee award.

The trial court abused its discretion by excluding hours for certain work when fees for all such work were recoverable. The award of fees under a prevailing party attorney's fee provision is mandatory, even while the exact amount awarded is within the trial court's discretion. *Singleton v. Frost*, 108 Wn.2d 723, 730-1, 742 P.2d 1224 (1987). A trial court abuses its discretion when it bases its decision on the wrong legal standard. *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 22, 177 P.3d 1122 (2008).

Defendants do not contest the hourly rate used by the trial court. The trial court abused its discretion when excluding hours for work on the cross-motions for summary judgment, the bankruptcy contempt motion, and the request for fees. These will be addressed separately.

a. The defendants were entitled to fees for all their work on the cross-motions for summary judgment.

As prevailing party, defendants' reasonable attorney's fees included all work to defend against the sole claim in the action, even if no court ever ruled on some of the contentions. A prevailing party should not

have its attorney's fees reduced merely because the "court did not adopt each contention raised." *Martinez v. City of Tacoma*, 81 Wn.App. 228, 243, 914 P.2d 86 (1996).

The plaintiff had only one claim, for breach of the written lease. All of defendants' summary judgment briefing was devoted to defeating that single claim. Defendants did not assert any counterclaims upon which it was unsuccessful.

In addition to asserting the bankruptcy discharge as a defense to the plaintiff's claim, the defendants also asserted that they were not individually liable under the lease. The court never had to reach that contention, as the plaintiff eventually dismissed after being found in contempt by the bankruptcy court for violating the discharge. Defendants reasonably attempted to resolve the dispute without having to go to the bankruptcy court, which plaintiff declined to do.

The fact that defendants prevailed in the bankruptcy court on their discharge violation claim does not make it unreasonable for defendants to devote part of their summary judgment briefing to the contention that defendants were not personally liable under the lease. Plaintiff vowed to "vigorously" pursue its claim, giving no merit to the defendants' bankruptcy discharge defense. Given that, defendants wisely raised all

legally meritorious contentions, rather than placing all its eggs in the “bankruptcy discharge” basket.

It would be Monday morning quarterbacking to say briefing on anything other than the bankruptcy discharge defense was unreasonable. The trial court erred when it discounted the hours worked on the summary judgment motions not directly related to asserting the defendants’ bankruptcy discharge as a defense to plaintiff’s claim.

If defendants had asserted an unsuccessful claim, the court could discount hours spent on that claim. When a party asserts unsuccessful claims, but prevails on other claims, courts do segregate, where possible, hours worked on unsuccessful claims. *Schmidt v. Cornerstone Invest. Inc.*, 115 Wn.2d 148, 170-1, 795 P.2d 1143 (1990). That is inapplicable here, as defendants prevailed on the only claim at issue.

The award of only 10.0 hours out of 33.0 hours sought (a 23.0 hour reduction) for work on the summary judgment motions was improper. A review of the briefing shows the bankruptcy discharge was the primary issue addressed by defendants. The hours worked opposing the claim upon which the defendants’ prevailed were not “unreasonable” just because some of them were devoted to contentions ultimately not necessary to obtain the successful result.

- b. The defendants were entitled to all their fees for their successful work in the bankruptcy court obtaining the contempt award against plaintiff and its counsel.

The defendants were entitled to all their fees for work seeking the bankruptcy contempt finding, as the contempt was based on plaintiff's pursuit of its claim under the lease containing the broad attorney's fee provision. Fees are recoverable for all work related to the claims covered by the attorney's fee provision. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987).

Here, the trial court had jurisdiction to rule that plaintiff's claim violated the defendants' discharge. A discharge means (1) the debtor is no longer liable for the debt, and (2) there is an injunction against any collection efforts. *In re Ransom*, 336 B.R. 790 (9th Cir. BAP 2005). State courts have subject matter jurisdiction to enforce a debtor's bankruptcy discharge. *In re Watson*, 192 B.R. 739 (9th Cir. BAP 1996).

When the trial court erred by refusing to enforce the defendants' discharge, defendants reasonably sought relief from the bankruptcy court to enforce the discharge. That court enforced the discharge, holding plaintiff and its counsel in contempt. All of defendants' actions in the bankruptcy court were related to enforcing the discharge, which was an affirmative defense to the plaintiff's claim in the state court.

The bankruptcy court never ruled on the reasonableness of defendants' fees in the bankruptcy court. The bankruptcy court awarded \$16,556.25 in attorney's fees as damages for contempt under 11 U.S.C. § 105(a), without entering any findings as to what fees were covered by the award.

The trial court's task in calculating attorney's fees was very different, involving a different legal standard than the bankruptcy court used. The trial court was determining the amount of reasonable fees were incurred "in connection with" defending against the plaintiff's "vigorous" but futile pursuit of its claim against defendants for breach of the lease, not just damages for violating the discharge injunction.

Defendants worked a total of 76.1 hours in the bankruptcy court, while the damages awarded by the bankruptcy court only covered 55.2 hours of work. That left 20.9 hours of work sought by defendants in the trial court for defendants' successful work in the bankruptcy court. The trial court abused its discretion by awarding fees for none of those 20.9 hours.

- c. The defendants were entitled to fees for their work preparing and presenting their fee request, including work on the motions for reconsideration.

Finally, the defendants were entitled to additional fees for supporting their fee request, as requested by the trial court, which included

motions for reconsideration. Fees for work preparing and presenting a fee request are recoverable. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 378, 798 P.2d 799 (1990).

Here, the defendants made their fee request prior to the trial court entering the order of dismissal. That request included a declaration from defendants' counsel explaining the fee request, and attaching a report containing daily time entries showing the hours worked each day and describing the work performed.

Rather than rule on that request, the trial court requested additional briefing and a more expansive declaration supporting the fee request. Defendants complied with that request, seeking 4.5 hours for such work. The trial court awarded none of those additional hours.

Defendants incurred 3.5 hours successfully opposing plaintiff's motion for reconsideration. In addition, defendants incurred 5.7 hours pursuing its own motion for reconsideration challenging the trial court's exclusion of 23.0 hours of work on the summary judgment motions. Those hours should also be recoverable.

In total, there were 57.6 hours excluded by the trial court that should have been included in the award of fees, broken down into three categories: (1) 23.0 hours for work on the cross-motions for summary judgment, (2) 20.9 hours work in the bankruptcy court not included in the

attorney's fees as contempt damages, and (3) 13.7 hours for work preparing and pursuing the request for fees.

3. The defendants seek attorney's fees on appeal.

Defendants seek attorney's fees on appeal under RAP 18.1. This appeal is part of the litigation commenced and vigorously pursued by the plaintiff. The work is covered by the attorney's fee provision of the lease.

F. Conclusion

The defendants prevailed completely in the action, which was based on a claim under a lease containing a broad prevailing party attorney's fee provision. Even so, the court only awarded defendants 45.0 hours in attorney's fees, excluding over 57.6 hours from its fee award, based on the erroneous exclusion of hours for certain tasks. Those hours were necessary due to the plaintiff's "vigorous" pursuit of its claim. The trial court abused its discretion in denying defendants recovery of over half of their attorney's fees.

DATED this 11th day of August, 2014.

HULTMAN LAW OFFICE

By /s/ Eric Hultman
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by email, by agreement of counsel, on the 11th day of August, 2014, to:

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