

STATE OF VERMONT
ORANGE COUNTY, SS.

ORANGE SUPERIOR COURT
DOCKET NO.96-5-01 OeCv

FOUR OAKS
CONSERVATION TRUST
Plaintiff

GENE BIANCO
Defendant

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FILED
JUL 01 2004
ORANGE SUPERIOR COURT

DECISION ON MOTION FOR ATTORNEYS FEES

The above matter on the hearing on Plaintiff's motion for attorneys fees on June 23, 2004. T. Laddie Lushin, Esq. trustee of the trust previously known as the Four Oaks Conservation Trust, was present and represented the trust. The Defendant was present and was represented by William Durrell, Esq..

Based upon the evidence presented, the court finds as follows:

1. This litigation arises out of a Farm Use Lease Agreement made between Four Oaks Conservation Trust and Bianco in September, 1999. The lease was intended to be in effect from July 1, 1999 until June 30, 2009. The lease pertained to a portion of property owned by Four Oaks Conservation Trust and was intended to permit Bianco, as lessee, to conduct diversified organic farming upon the leased premises.
2. A term of the lease provided that in the event that the lessor, Four Oaks Conservation Trust, prevailed in a legal action brought by either party to enforce the terms of the lease, that Four Oaks Conservation Trust "shall be entitled to all costs incurred thereby, including reasonable attorneys fees."
3. Other than the written contract, there is no agreement between the parties relative to attorneys fees.
4. Following the execution of the lease, a dispute between the parties arose early in the

lease term. This action was instituted by Four Oaks Conservation Trust in May, 2001, less than two years after the execution of the lease between the parties.

5. The procedural history of this litigation is somewhat convoluted. For example, a motion for partial summary judgment was filed within four months of the initiation of this litigation, and a motion for judgment on the pleadings was filed in February, 2003. It appears that approximately 35 motions have been filed during the pendency of this litigation. The vast majority of these motions were filed by the Plaintiff, either through one of its two prior counsel or by the trustee, who is an attorney admitted to practice law in Vermont. Many of these motions are lengthy and, perhaps, prolix.
6. The Plaintiff seeks attorneys fees in excess of over \$115,000 in connection with the prosecution of this claim. Most of these claimed fees are sought by Lushin, who as trustee was involved in assisting earlier counsel and who, as trustee, represented himself following the trust's discharge of its second retained counsel.
7. The trust claims that approximately 1700 hours of legal services were extended on its behalf between the commencement of this litigation and the date of this hearing.
8. Plaintiff's trustee has been a licensed attorney for 31 years and has been admitted to practice in Vermont since 1984.
9. Since early 2003, Plaintiff's trustee has represented himself in connection with these proceedings. At the direction of the court, attorney Lushin entered a formal notice of appearance on behalf of the trust in January 2003.
10. During the time the trust was represented by hired counsel, Plaintiff's trustee provided mostly legal support work such as affidavit preparation and legal research.
11. Plaintiff's trustee calculates the value of his legal services initially at \$100 per hour due to his inexperience as a trial attorney. He later increased the hourly rate of his billings to \$120 per hour.
12. At issue in the litigation was the trustee's efforts to quiet title to the property, to terminate the lease and evict the lessee and the recovery of money damages. Counter claims were also filed by the lessee against the trust.
13. The Plaintiff produced no expert concerning the reasonableness of the extent of the attorneys fees sought to be recovered by the Plaintiff or regarding the hourly rate sought in connection with the legal work performed.
14. The Plaintiff has offered into evidence billing summaries which purport to demonstrate the legal work performed by Attorney Lushin for the trust. These billing summaries were prepared by Attorney Lushin from other documents which were not offered into evidence. Bills from other providers were excluded from evidence due

to lack of foundation and heresay. The Court withheld ruling on the admissibility of the proffered billing summaries, proposed exhibits "C", "E", "F" and "1", from Attorney Lushin, to which objections were made by Bianco's counsel.

15. Plaintiff contends it does not need an expert to substantiate the reasonableness of the extent of attorney time expended, nor for the appropriateness of the hourly rate sought to be recovered, due to the unusual nature of this litigation. Plaintiff contends the introduction of expert testimony is not required and would not be helpful given the complexity of this case.
16. Plaintiff also claims that "questionable and improper" actions by the court, specifically the tabling of substantive motions, caused additional legal services to be necessary. Plaintiff claims the legal work required was "compounded by prejudicial and biased conduct by the court." Plaintiff has not offered any evidence of bias or prejudice to support of any claim for additional attorney's fees.
17. Plaintiff further claims the case was a difficult one from a factual, legal and strategic standpoint and that there were "strategic difficulties" at every stage of the proceedings. Plaintiff claims that additional legal work was required due to the Defendant's failure to adequately prosecute the counter claim, requiring the Plaintiff to prepare a motion for judgment on the pleadings.
18. The Plaintiff ultimately prevailed on most, but not all, of the issues raised in this litigation. The Plaintiff was successful in terminating the lease, quieting title to the premises and of regaining possession of the leased premises. The Plaintiff did not prevail on other claims, for example, the claim related to the driveway easement.

CONCLUSIONS

Absent statutory or contractual exception, parties pay their own attorneys' fees. *Concord General Mut. Ins. Co. v. Woods*, 2003 VT 33, ¶ 18. Here, the lease agreement signed by the parties specifically provides for attorneys' fees.

The first issue is whether Mr. Lushin is entitled to attorney's fees. Mr. Lushin is an attorney and has filed a notice of appearance. Mr. Lushin is also the plaintiff, as trustee for the Four Oakes Conservation Trust. If a party is not an attorney at law but appears in court pro se,

that person is not entitled to attorney's fees. 20 Am. Jur. 2d Costs § 77. Where the party appearing on his own behalf is an attorney, however, courts are split on whether such person is entitled to recover attorney's fees. *Id.*

Assuming, but without deciding, that Mr. Lushin, as attorney and as plaintiff trustee of the Four Oakes Conservation Trust, is entitled to claim attorney's fees, he has the burden of providing evidence of services upon which value can be determined. *Bruntaeger v. Zeller*, 147 Vt. 247, 254 (1986). An award for attorney's fees that is not supported by the evidence will not survive on appeal. *Hodgeman v. Jard Company*, 157 Vt. 461, 466 (1991).

At the hearing, opposing counsel objected to Plaintiff's exhibits "C," "E," "F" and "1," for lack of foundation and for offending the best evidence rule. The Vermont Supreme Court has noted that when an attorney's fees are in dispute, the record is "often best served" on the issue of reasonableness by the receipt of expert testimony from independent counsel. *Bruntaeger v. Zeller*, 147 Vt. at 255. Plaintiff testified to his own billing at the hearing, but failed to offer any expert testimony to attest to the reasonableness of the rate and time expended. Mr. Lushin asks this court to relax that Supreme Court endorsement of calling an independent expert witness. However, this court notes that Mr. Lushin already stands in the dual role of both attorney of record and plaintiff (as trustee for the trust), and to allow him to testify to the reasonableness of his own fee would compound that lack of independence. Also, Mr. Lushin has openly admitted to his lack of trial expertise, diminishing further his potential ability to testify to the fee reasonableness. These complicating factors lead the court to conclude that relaxing the expert testimony standard in this case is not warranted.

Plaintiff's exhibits are also lacking. In *Bruntaeger*, the burdened party produced an attorney's bill listing the work performed, total time, and hourly rate; failed to call the attorney to

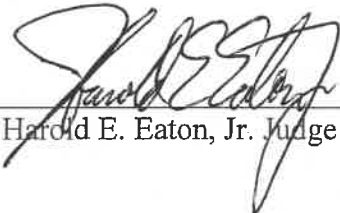
testify; and called no expert witness to establish the reasonableness of the bill. The Court held that amount of evidence insufficient to assess the reasonableness of a fee. *Id.* at 254-55.

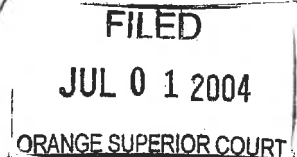
Plaintiff's exhibits consist of his own billing statements,¹ which are summaries that describe each motion or equivalent project completed and allocate an amount of hours committed to parts and subparts of each. Contrary to typical attorney billing statements, they lack specific line items and contemporaneous dates for the work performed.

The only real difference between this factual scenario and that in *Bruntaeger v. Zeller* is the fact that Mr. Lushin testified in support of his billing statements at the hearing. That, however, is not enough additional evidence to overcome the Supreme Court's rejection of the *Bruntaeger* facts. No amount of testimony from Mr. Lushin can cure these evidentiary defects; he has failed to meet his burden in producing sufficient evidence of services upon which value can be determined.

Plaintiff's claim for attorney's fees is DENIED.

Dated at Chelsea, Vermont, this 1 day of July, 2004.


Harold E. Eaton, Jr. Judge



¹Plaintiff prays for a total of \$115,980.00 in attorney's fees.