VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 39-3-18 Oscv

Barrup vs. Barrup Farms Inc. et al

ENTRY REGARDING MOTION

Title: Motion for Attorney's Fees (Motion: 39)
Filer: Susan J. Flynn
Filed Date: March 28, 2024

The motion is GRANTED.

Defendant Rodney Barrup seeks attorney's fees and costs for the expenses incurred in this breach of settlement agreement action. This matter went before a jury in March of 2024, which resulted in a verdict in favor of Defendant.

This matter has a long and extensive history that has been detailed in prior rulings from this Court, but it may be summarized as follows. Plaintiff Kevin Barrup, son of Rodney Barrup, was originally a minority shareholder and officer in the family's mulching business run through the corporation, Barrup Farms, Inc. In 2018, Rodney fired Kevin from the company and sought to sell the business. Kevin, believing that he had been wrongfully discharged and unwilling to agree to the sale filed the present lawsuit and refused to turn over his shares to the corporation.

In December 2018, the parties executed a settlement agreement aimed at resolving their disputes. Under the terms of the Agreement, Kevin agreed to sign his shares in Barrup Farms, Inc. to Rodney. Pltf. Ex. 1, Settlement Agreement, at ¶ 4. In exchange, Rodney agreed to pay Kevin $190,000 on or before July 1, 2019, unless Rodney was unable to sell the company, in which case, Rodney could either make the lump sum payment or begin paying Kevin monthly installments of $3,000 at a 6% annual rate of interest on the same date. Id. at ¶¶ 3, 8.

As part of the Agreement, Kevin agreed not to take any further action in either the litigation or

> [P]ublication or dissemination of disparagement or negative information about the Company, including dissemination Company employees or customers, . . . or takes any other action that causes the sale of Barrup Farms, Inc. or substantially all of the assets of Barrup Farms, Inc. not to occur or substantially reduces the value of such sale then Plaintiff shall relinquish all rights to the payment provided in Paragraph 3 hereof, shall release all security . . . .

Id. at ¶ 6. This second provided the only condition, apart from signing over his shares, on Kevin's right receive the $190,000 promised in the Agreement.

At the beginning, the Agreement states that "Failure by any party to perform pursuant to this Agreement shall constitute a breach and failure of consideration, and shall be actionable as a breach of contract." Id. at ¶ 1.

In the same section, the parties agreed that "A party found by a Court of competent jurisdiction to have breached this Agreement shall be obligated to the other Party for reasonable attorney's fees and costs incurred as a direct and proximate result of the breach." Id.

On July 1, 2019, Rodney Barrup did not make the promised $190,000 payment, and by August 1, 2019, he had not made any installment payments. On August 9, 2019, Kevin Barrup sought to lift the stay on the litigation and moved to enforce his right to payment under the Settlement Agreement. The stay, while not immediately lifted, appears from the court docket to have been lifted on or about September 20, 2019 when the Court conducted a status conference, and the parties resumed discovery and motion practice.

The parties continued to litigate this matter until March of 2024 when it was set for a jury trial. At trial, Rodney Barrup conceded that he had made no monetary payments to Kevin Barrup, but he presented evidence showing that the sale of Barrup Farms, Inc. had been substantially disrupted, and the final sale price reduced due, in part, to an anonymous complaint filed in the spring of 2019 with the Agency of Natural Resources that caused delays in a planned closing, added to the carrying cost of the business and lowered both the price and the money realized from the sale. Rodney also presented circumstantial evidence that tended to show that Kevin Barrup was behind the anonymous complaint due to particular information in the 2019 complaint that would have been known primarily to him.

At the end of the trial, the Jury returned a Defendant's verdict and found that Rodney did not owe any payment to Kevin. This motion for attorney's fees and costs followed.

Application of the Settlement Agreement's Attorney's Fees Provision

Plaintiff Kevin Barrup's primary argument against the motion for attorney's fees concerns the lack of a specific finding from the jury that he had breached the Settlement Agreement. This argument might have more weight except for two considerations.

First, the only way the jury could come to a defendant's verdict is to conclude that Kevin Barrup had breached Section 6 of the Settlement Agreement. The undisputed facts showed that Kevin had turned over his shares, which was the only other obligation that he had under the Settlement Agreement. Indeed, Plaintiff's primary case was limited to show that he complied with the turning over of the company shares and to assert his denial that he had interfered with the sale. The remainder of the case then focused on Defendant's affirmative defense that Kevin had interfered with the sale in violation of Section 6 and to show how Kevin was connected to the ANR complaint and how the complaint led to a delay, modification, and ultimately reduction in the price of the sale. At no time during the trial, did Defendant dispute whether or not Kevin had violated any other provision of the Agreement or cite any other basis for withholding the agreed upon payment.[1]

Second, Section 1 of the Settlement Agreement states that the failure "by any party to perform pursuant to this Agreement shall constitute a breach . . . and shall be actionable as a breach of contract." Pltf. Ex. 1, Settlement Agreement, at ¶ 1. Therefore, to the extent that the jury returned a defendant's verdict, it found that Plaintiff had violated Section 6. But even to the extent that it could be argued whether or not the jury went as far as to make a finding that this non-compliance constituted a breach, the argument is moot. By the terms of Section 1, the parties had elected to define such non-compliance as a breach of contract and elected to treat it as a breach of contract for purposes of the Settlement Agreement and its attorney's fees provisions.

While the American Rule normally requires parties to be responsible for their own attorney's fees, these fees can be shifted from one party to another by statute or by the parties' agreement. *Ring v. Carriage House Condominium Owners' Ass'n*, 2014 VT 127, ¶ 19. In this case, the parties included

[1] Part of Plaintiff's response to this evidence was to claim that this narrow focus did not emerge at the time of the breach and that Defendant had offered multiple excuses for failing to perform. Notwithstanding these earlier responses, Defendant did not offer any other explanation for non-payment at trial apart from the Section 6 breach, and any other bases for non-payment were not brought to the jury except for this purpose of impeachment.

a provision in the Settlement Agreement that states a party found to be in breach "shall be obligated to the other Party for reasonable attorney's fees and costs incurred as a direct and proximate result of the breach." Pltf. Ex. 1, Settlement Agreement, at ¶ 1. When fees are shifted by the terms of an agreement, the Court is obligated to apply the provisions in a manner consistent with the parties' language. *Kneebinding, Inc. v. Howell*, 2018 VT 101, ¶¶ 100, 110 (interpreting a contractual fee switching provision in a narrow manner). In this case, the parties framed the provision in terms of breach and limited the award of attorney's fees to those that were the direct and proximate cause of the breach.

Based on the plain language of Section 1 along with the jury verdict, which necessarily involves a finding that Plaintiff violated Section 6 of the Settlement Agreement, the Court concludes that Kevin Barrup's actions, on which the jury based its defendant's verdict constitute a breach of the Settlement Agreement, and by its plain language, Rodney Barrup is entitled to reasonable attorney's fees and costs that directly and proximately resulted from Kavin Barrup's breach. *Ring*, 2014 VT 127, at ¶ 19. Following from this conclusion, the Court is obligated to examine the reasonableness of the proposed attorney's fees under the so-called lodestar analysis.

Standard of Review

In determining the reasonableness of a fee award, the Court begins with the so-called "lodestar figure," which is the number of hours reasonably expended on the case multiplied by a reasonable hourly rate. *L'Esperance v. Benware*, 2003 VT 43, ¶ 22; see also *Ring*, 2014 VT 127, at ¶¶ 20–21. This concept arises from United States Supreme Court case law that dictates that a Court reviewing a request for attorney's fees should begin this analysis by first looking at the number of hours expended by the prevailing party and established through documentation. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The Court should then exclude from this initial calculation any hours that were "not reasonably expended" on the case. Id. The Supreme Court explains that this can include situations where the case is overstaffed, where the hours are redundant, where the excess billing may be the result of differing attorney skill, and other elements that go into what is often called "billing judgment" in the private sector. Id.

In making this analysis, the Court is guided by the demands of the case and not necessarily the amount of the damages. The Vermont Supreme Court has expressly rejected this approach to attorney's fees, and it has affirmed attorney's fee awards that have exceeded the underlying damages

by as much as 86%. *Vastano v. Killington Valley Real Estate*, 2010 VT 12, ¶ 9 (awarding $55,012 in attorney's fees after a $7,875 award of damages); see also *Kwon v. Eaton*, 2010 VT 73, ¶ 20 (re-affirming the holding of *Vastano* and its successor cases). This is particularly relevant in the present case where the demands of the case outstripped the value of the damages award.

After making this initial calculation, the Court may then adjust the amount upwards or downwards based on the circumstances of the case and factors including: 1) the novelty of the legal issue; 2) the experience of the attorney; and 3) the results obtained by the litigation. *L'Esperance*, 2003 VT 43, at ¶ 22. Of these factors, *Hensley* holds that the most important is the third. *Hensley*, 461 U.S. at 434. This may be broken down into an analysis of whether the plaintiff failed to prevail on part of its claims and did the plaintiff achieve the "level of success that makes the hours reasonably expended in a satisfactory basis for making a fee award?" Id. This does not mean that an attorney's fee is reduced simply because the plaintiff did not prevail on every contention raised in the lawsuit—particularly if those contentions were made in the alternative or go beyond what the court had to decide. Id at 435. "There is no precise rule or formula for making these determinations." Id. at 436. The trial court is given wide discretion in making these determinations. *L'Esperance*, 2003 VT 43, at ¶ 21.

Step One: Initial Calculation of the Lodestar

Defendant Rodney Barrup has submitted affidavit and invoices for the two attorneys that he retained in this matter. From the outset of litigation in 2018 until July of 2023, Rodney Barrup retained Attorney Steven Adler as his counselor. After July 2023 through trial, Rodney retained Susan Flynn and her firm to represent him. Both attorneys are experienced in commercial litigation. Steven Adler billed Rodney at a rate of $300 per hour and accumulated **$41,827.50** in legal fees, which translates to roughly 139.4 hours. Adler also submitted cost totaling to **$1,432.10**. Adler's bills, as submitted, begin in July 2019 when Kevin Barrup's attorney filed a motion to enforce the settlement agreement and lift the stay that had been in place since the execution of the Settlement Agreement. They end in July 2023 when Attorney Adler stepped down from the case as part of his planned retirement from the practice of law. While Attorney Adler has no charged portions of his time related to the transitions, there are some charged included in his billing that reflect work performed for the transition.

In July of 2023, Attorney Susan Flynn was retained to replace Attorney Adler, and she became the lead attorney for Rodney Barrup, and eventually represented him at trial. Attorney Flynn billed at a $250 per hour rate and employed a paralegal who billed at $75 per hour. Attorney Flynn, her paralegal, and her partner billed 154.9 hours for a total of **$35,722.50**. Flynn also submitted for **$34.40** in costs.

The first question is whether Attorney Adler and Attorney Flynn's billings were redundant or not reasonable expended for the purpose of the litigation. After examining the billing records from both attorneys, the Court finds that the billing practices were separate and represented two distinct phases of the case. Attorney Adler oversaw the development and discovery of the litigation, while Attorney Flynn completed the discovery and prepared the matter for trial. There ae two areas within Attorney Adler's billing where the Court finds some of the charges do not fit within the narrow scope of attorney's fees or overlap with the transition to Attorney Flynn.

The first comes at the beginning of the litigation when the matter was subject to a Court stay. While Attorney Adler appears to have been engaged in responsive fact-finding, the Court does not find the work done before September 20, 2019, when the stay was lifted and litigation resumed in earnest to be strictly part of the work required by the breach. The billing events during this time were primarily gathering information and communicating to opposing counsel. It is only after the life the stay when the Attorney Adler begins interviewing other professionals on September 27, 2019 that the Court will consider the legal fees incurred to be part of the resulting legal work arising from Kevin Barrup's breach. In this respect, the Court will reduce Attorney Adler's bill by **$3,150** by removing the bills from July 10, 2019 to September 12, 2019.[2] The Court will also deduct **$2,280** from Attorney Adler's final billing, which represent charges related to his transition out of the case and handing it off to Attorney Flynn. While Attorney Adler discounted some of these charges, these amounts reflect a reduction based on the total amounts billed, which the Court finds to be outside the narrow standards of the Settlement Agreement.

When deducted, Attorney Adler's lodestar is reduced to **$36,397.50**. The Court finds Attorney Adler's costs to be reasonable and will allow them in whole, which would bring Attorney Adler's portion of the lodestar to **$37,829.60**.

[2] This amount does not include the billing for July 24th, August 28th, and September 3d that Attorney Adler struck in his July 15th revised filing.

Turning to Attorney Flynn's billing, the Court finds that her billing is largely reasonable and devoid of any redundancies, with one exception. From October 4th to October 17th, Attorney Flynn had an associate working on a motion to amend. The Associate was billed at $150 per hour, which a reasonable billing rate for an associate. During this time, the Associate billed 16.3 hours. Much of this time was spent reviewing the case file and becoming familiar with the case. Nevertheless, of the purposes of the lodestar analysis, this work of bringing an associate up to speed is not a reasonable expense, particularly because the associate's work appears to have been limited to one month and not more consistent work with the case. Further, the motion to amend came at a time where the case was moving to trial and appears to be less about moving the case forward, than exploring a potential strategic avenue. As such, the Court does not find this billing to be consistent with the allowable amounts under either Settlement Agreement or a lodestar analysis, and the Court will remove **$2,445** from Attorney Flynn's billing amounts. This reduces Attorney Flynn's lodestar amounts to **$33,277.50**. The Court will allow Attorney Flynn's costs of **$34.40** in full, which brings Attorney Flynn's total portion of the lodestar to **$33,311.90**.

Step Two: Adjustments to the Lodestar

In reviewing the docket sheets, and history of this case, the second step lodestar factors do not weigh toward any increase or reduction of the fees as calculated in the first step with one exception.

The first factor that the Court must consider is the novelty of the legal issue. While contract law is not a particularly novel area of the law, this case presented several challenging factors to its prosecution and defense. First, the relationship between the parties spans decades, and it carries with it the complexity and difficulty of sorting through family relationships. To further complicate the case, the sale of Barrup Farms, Inc.'s went through several iterations, and understanding the components and terms for each posed a challenge to the attorney's preparing the case. Finally, a lot of this case involving witness credibility, which required extensive preparation for cross-examination and impeachment material. Together these issues added up to a case with novel legal issues and challenges that warranted the additional time spent by Attorney Flynn preparing the matter for trial.

The second factor looks to the experience of the attorneys. In this case, the Court finds that both Attorney Adler and Flynn are experienced litigators, and the work that they put into the case reflected the necessary time to develop and prepare a case. In particular, the Court finds that

Attorney Flynn's billing practices reflect her extensive trial experience for insurance companies in that the bulk of her billing occurred within 30 days of trial as she prepared the case for trial. This kept her billing expenses relatively low and only increased when the parties could not reach settlement and the matter was set for trial. As such, the Defendants' billing practice are not only consistent with experienced practitioners in the amount and type of work done, but also in the timing and manner. For these reasons, the Court does not apply any reduction.

The Third and most important factors is the result of the litigation. *L'Esperance*, 2003 VT 43, at ¶ 22. In this case, Defendant's attorneys were able to establish their case through circumstantial evidence and persuade a jury to connect those circumstantial pieces into a finding that Plaintiff Kevin Barrup had violated the Settlement Agreement. The Defendant's verdict speaks to the level of success in what was a difficult and not entirely straightforward defense and counterclaim. The Court finds no grounds under this prong to reduce the fees from either Attorney Adler or Attorney Flynn.

There is one exception to these findings. Within Attorney Flynn's billing there were five entries from Attorney Flynn's partner, who billed at the same rate of $250 per hour, that concerned meetings with Patrick Malone, who was originally slated to purchase Barrup Farms, Inc. in 2018. This sale had been cancelled long before the litigation, and the Court finds that the work was of questionable import to the remainder of the case. Therefore, the Court finds that the Attorney Flynn's lodestar amounts should be reduced by **$1,225.** This would bring Attorney Flynn's billing to **$32,052.50.**

Totaled together, Attorney Adler and Attorney Flynn's fees and costs, once reduced under the two steps lodestar analysis total to **$69,916.50**. The Court finds this amount to be reasonable and consistent with the experience of the attorney's and the needs of the case demonstrated through both the results obtained as well as the billing practice shown. The Court will award this amount to Defendant.

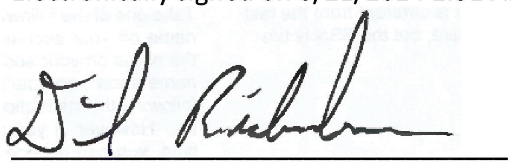
In his last argument, Plaintiff Kevin Barrup urges the Court to compare the attorney's fees that he incurred with Attorney Simon, which were approximately $28,000 less than what the Court finds to be reasonable for Defendants in this case. Plaintiff's argument effectively urges the Court to apply a comparative proportionality analysis. The Vermont Supreme Court has rejected such arguments when couched in terms of comparison between a attorney's fees and amounts recovered.

Walsh v. Cluba, 2015 VT 2, ¶¶15–21. This was a long and difficult case, and it ultimately required a jury trial, which required extensive preparation. In this respect, the Court will observe that parties can vary widely in how they litigate and what resources the must put into a case. The Court's sole job is to remove any redundant or overstaffing billing amounts that violate the Court's sense of a "billing judgment" and further reduce or increase those amounts to reflect the specific nature of the case. In this respect, the Court would be abusing its discretion if it tied its award to a comparison of the other side's billing because this comparison does not inform the analysis but simply records the difference between the two parties' litigation needs and strategy. For these reasons, the Court denies Plaintiff's arguments to further reduce the award of attorney's fees to reflect this comparison.

ORDER

Based on the lodestar analysis conducted by the Court, Plaintiff's request for attorney's fees is **Granted but Reduced to $69,916.50**, inclusive of attorney's fees and costs. The Court shall enter final judgment consistent with this award and its previous findings and judgment.

Electronically signed on 8/21/2024 2:31 AM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge