

FSM SUPREME COURT TRIAL DIVISION

CARLOS ETSCHHEIT SOAP COMPANY,) CIVIL ACTION NO. 2005-007
)
Plaintiff/Counterdefendant,)
)
vs.)
)
ERINE McVEY and DO IT BEST HARDWARE,)
a business organization,)
)
Defendants/Counterclaimants/)
Cross-Claimants,)
)
vs.)
)
BOARD OF TRUSTEES OF THE POHNPEI STATE)
PUBLIC LANDS TRUST,)
)
Defendant/Cross-Defendant.)
_____)

ORDER AWARDING ATTORNEY'S FEES AND COSTS

Ready E. Johnny
Associate Justice

Decided: June 16, 2010

APPEARANCE:

For the Plaintiff: Stephen V. Finnen, Esq.
P.O. Box 1450
Kolonia, Pohnpei FM 96941

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HEADNOTES

Civil Procedure – Motions

Although failure to oppose a motion is generally deemed a consent to the motion, even when there is no opposition, the court still needs good grounds before it can grant the motion. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 148, 149 (Pon. 2010).

Attorney's Fees – Court-Awarded – Statutory; Civil Rights

When the plaintiff prevailed on its civil rights claims against one defendant but did not prevail on its civil rights claims against the other two defendants (although it did prevail on a trespass claim against them), the one defendant that the plaintiff prevailed against on civil rights claims should not be liable for the plaintiff's attorney's fees incurred in prosecuting its claims against the other two defendants or for fees incurred in its defense of claims that other two defendants prosecuted against the plaintiff. This is because 11 F.S.M.C. 701(3) allows civil liability against any person who deprives

another of his constitutional rights, which includes an award of reasonable attorney's fees to the prevailing party, but otherwise the general rule is that the parties bear their own attorney's fees. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 148, 150 (Pon. 2010).

Attorney's Fees – Court-Awarded – Statutory; Civil Rights

Because the FSM statute is based upon the United States model, the FSM Supreme Court should consider United States court decisions under 42 U.S.C. § 1983 and § 1988 for guidance in determining the intended meaning of, and governmental liability under 11 F.S.M.C. 701(3). Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 148, 150 n.2 (Pon. 2010).

Costs

Photocopying charges are generally disallowed as costs unless those charges represent payments to others for that service and are not for the cost of copying within the law office. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 148, 151 (Pon. 2010).

Costs

Service costs are always allowable to the prevailing party. A prevailing party is entitled to costs taxable by FSM Civil Rule 54(d), such as expenses for service of process and service of subpoenas and service of process costs may be apportioned among the defendants. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 148, 151 (Pon. 2010).

Costs

Extra charges for the attorney's gross revenue taxes on costs are disallowed. Gross revenue taxes are the attorney's responsibility and not the responsibility of the attorney's client or of an adverse party to whom the fee may be shifted. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 148, 152 (Pon. 2010).

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COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On April 26, 2010, the plaintiff, Carlos Etscheit Soap Company ("Soap Company"), filed and served its Motion for Attorney's Fees and Costs. The Soap Company seeks an award of \$23,900 in attorney's fees for 239 hours of attorney work at \$100 an hour, and \$1,586.74 in expenses. No party filed an opposition. Although failure to oppose a motion is generally deemed a consent to the motion, FSM Civ. R. 6(d); Actouka v. Etpison, 1 FSM Intrm. 275, 276 (Pon. 1983), even when there is no opposition, the court still needs good grounds before it can grant the motion. Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 442 (App. 1994).

I.

The 239 hours worked and the expenses sought include all of the time the Soap Company's counsel spent on and expenses that attorney charged the Soap Company in this (consolidated¹) case. The Soap Company's right to a court award of reasonable attorney's fees in this case is statutory. Under 11 F.S.M.C. 701(3), "the court may award costs and reasonable attorney's fees to the prevailing

¹ This case was consolidated with Civil Action No. 2005-008, in which Erine McVey and Do it Best Hardware were the plaintiffs and Carlos Etscheit Soap Company was the defendant.

party" in a civil rights case. The Soap Company prevailed on its civil rights claims against the defendant Board of Trustees of the Pohnpei State Public Lands Trust ("Board"). It did not prevail on its civil rights claims against Erine McVey and Do It Best Hardware, although it did prevail on a trespass claim against them.

Since Erine McVey and Do It Best Hardware are not liable on the Soap Company's civil rights claims and since attorney's fees are to be awarded under the civil rights statute, the Board should not be liable for attorney's fees incurred in prosecuting the Soap Company's claims against Erine McVey and Do It Best Hardware or for fees incurred in the Soap Company's defense of claims that Erine McVey and Do it Best Hardware prosecuted against it. See, e.g., Houston v. Reich, 932 F.2d 883, 890 (10th Cir. 1991) (dismissed defendant cannot be made to pay part of civil rights attorney fee award); Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1125-26 (9th Cir. 1981) (when not entitled to fees against one defendant, cannot recover those fees from the other defendant); Arkansas Cmty. Orgs. for Reform Now v. Arkansas State Bd. of Optometry, 468 F. Supp. 1254, 1258 (E.D. Ark. 1979) (when plaintiffs did not prevail against one defendant, "hours spent uniquely on matters related to that defendant should not be reimbursed by an award pf fees against other defendants");⁷ cf. Herman v. Municipality of Patta, 12 FSM Intrm. 130, 137-38 (Chk. 2003) (when plaintiffs are awarded reasonable fees as damages under 11 F.S.M.C. 701(3), the liability will be assessed upon the defendants in proportion to their total liability on the rest of the judgment); Atesom v. Kukkun, 10 FSM Intrm. 19, 23 (Chk. 2001) (liability for attorney's fees will be assessed among the defendants in proportion to their responsibility for the judgment); Davis v. Kutta, 8 FSM Intrm. 218, 224 (Chk. 1997) (civil rights attorney fee awards may be entered against multiple defendants in the same proportions as those in the original judgment); Turner v. District of Columbia Bd. of Elections & Ethics, 354 F.3d 890, 898 (D.C. Cir. 2004) (fees for claims that are "truly fractionable" should be apportioned so that defendant is not liable for a fee award greater than the actual fees incurred against that defendant); Jones v. Espy, 10 F.3d 690, 692 (9th Cir. 1993) (when not entitled to fees against one defendant, cannot recover those fees from the other defendant); Council for Periodical Distribs. Ass'ns v. Evans, 827 F.2d 1483, 1487-88 (11th Cir. 1987) ("appropriate for fees to be apportioned according to the amount of time spent by the plaintiff in preparing the case against each defendant"); Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 959-60 (1st Cir. 1984) (fees apportioned between defendants); Perkins v. Cross, 728 F.2d 1099, 1100-01 (8th Cir. 1984) (no attorney's fees to be awarded for civil rights litigants whose claims were dismissed, only for litigants that prevailed; fee award should be tailored closely to the successful results obtained). This is because 11 F.S.M.C. 701(3) allows civil liability against any person who deprives another of his constitutional rights, which includes an award of reasonable attorney's fees to the prevailing party, Lolenoa v. Kosrae, 3 FSM Intrm. 167, 169-73 (App. 1987), but otherwise the general rule is that the parties bear their own attorney's fees, see generally George v. Albert, 17 FSM Intrm. 25, 34 (App. 2010).

Of the 239 attorney hours spent on this matter, a careful review of the Soap Company's submission, the attorney's billing record, and of the court file for corresponding corroboration, reveal that 48.7 hours were clearly spent on matters relating only to Erine McVey or Do It Best Hardware; 31 hours were clearly spent on matters directly related only to the Board; and the other 159.3 hours were

⁷ Because the FSM statute is based upon the United States model, the FSM Supreme Court should consider United States court decisions under 42 U.S.C. § 1983 and § 1988 for guidance in determining the intended meaning of, and governmental liability under 11 F.S.M.C. 701(3). Estate of Mori v. Chuuk, 10 FSM Intrm. 6, 13 (Chk. 2001).

for attorney time that was either clearly billed as a combination³ of matters relating to both the Board and to Erine McVey or Do It Best Hardware or it was unclear exactly what aspect of the case the time spent that day was related to. Accordingly, the court will apportion 40% of the mixed or unclear fees to the Soap Company's civil rights claim against the Board. (This is roughly the same ratio as that between the 31 "Board" hours and the 48.7 "McVey/Do It Best" hours. It also permits the court to eliminate any redundant, duplicative, and excess hours that may have resulted from the overlap of the actions.)

Forty percent of 159.3 hours is 63.7 hours, which added to the 31 "Board" hours equals 94.7 hours attributable to the Soap Company's successful civil rights action against the Board. This figure, when multiplied by \$100 an hour, a rate that the court finds to be reasonable; equals \$9,470. The Soap Company is therefore awarded \$9,470 as its reasonable attorney's fees incurred in its successful civil rights action against the Board.

II.

The Soap Company also seeks \$1,586.74 in expenses. This includes \$1,416.74 its attorney charged it for making 6,871 photocopies (at 20¢ a copy) and \$170.10 (at \$15 per service) for service of process and of subpoenas duces tecum. These charges include a surcharge to "reimburse" the attorney for the 3% gross revenue tax.

Photocopying charges are generally disallowed as costs unless those charges represent payments to others for that service and are not for the cost of copying within the law office. Bank of the FSM v. Truk Trading Co., 16 FSM Intrm. 467, 471 (Chk. 2009); Lippwe v. Weno Municipality, 14 FSM Intrm. 347, 354 (Chk. 2006); FSM Social Sec. Admin. v. Jonas, 13 FSM Intrm. 171, 173 (Kos. 2005); AHPW, Inc. v. FSM, 13 FSM Intrm. 36, 42 (Pon. 2004); Udot Municipality v. FSM, 10 FSM Intrm. 498, 501 (Chk. 2002); Damarlane v. United States, 7 FSM Intrm. 468, 470 (Pon. 1996). It is not claimed that the photocopy charges in this case represented payment to others for that service. They are thus disallowed. Furthermore, if the court were to apply a more liberal construction to costs awarded under 11 F.S.M.C. 701(3) than traditionally used for costs awarded under Civil Procedure Rule 54(d), the court is unable to apportion the copying charges between the successful civil rights against the Board and photocopies for other uses and so still would not be able to award costs for photocopies in this case.

Service costs are always allowable to the prevailing party. FSM Civ. R. 54(d); see, e.g., Udot Municipality, 10 FSM Intrm. at 501. A prevailing party is entitled to costs taxable by FSM Civil Rule 54(d), such as expenses for service of process and service of subpoenas. Uehara v. Chuuk, 14 FSM Intrm. 221, 228 (Chk. 2006). Service of process costs may be apportioned among the defendants. Cf. Estate of Mori v. Chuuk, 10 FSM Intrm. 123, 125 (Chk. 2001). The Soap Company did prevail on its trespass claim against Erine McVey and Do It Best Hardware. Those two defendants will therefore be liable for the \$30 in costs for service of process upon them. The other \$15 service of process and the eight subpoenas duces tecum all relate to the Soap Company's successful civil rights claim against the Board. The court will therefore award the Soap Company \$135 in costs recoverable from the Board.

³ The billing was done on a per day basis, listing the number of hours spent each day on the case with a description of everything done on the case that day. The billing does not apportion any one day's total among the various separate tasks performed that day. When more than one task was done on a day, it is a matter of guesswork to separate out from the combined daily total what portion was attributable for which task or to work that related to which adverse party.

The extra charges for the attorney's gross revenue taxes on costs are disallowed. Gross revenue taxes are the attorney's responsibility and not the responsibility of the attorney's client or of an adverse party to whom the fee may be shifted. Cf. Bank of the FSM v. Truk Trading Co., 16 FSM Intrm. 467, 471 (Chk. 2009). Additionally, since the copying charges were for copying done in-house, the real effect of such a surcharge would be that the copy charge is raised from 20¢ to 20.6¢ a copy for the Board, while the client presumably paid only 20¢. The law office is presumed to have taken the tax into account when it set its charge for in-house copying.

III.

The clerk shall amend the judgment to show that the Board of Trustees of the Pohnpei State Public Lands Trust is also liable to the Carlos Etscheit Soap Company for \$9,470 in reasonable attorney's fees and \$135 in costs and that Erine McVey and Do It Best Hardware are also liable to the Carlos Etscheit Soap Company for \$30 in costs.

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FSM SUPREME COURT TRIAL DIVISION

CONTINENTAL MICRONESIA, INC.,)	CIVIL ACTION NO. 2010-1021
)	
Plaintiff,)	
)	
vs.)	
)	
CHUUK STATE GOVERNMENT and JESSE MORI,)	
Director of Administrative Services of the Chuuk)	
State Government, in his official capacity,)	
)	
Defendants.)	
)	

ORDER DENYING DISMISSAL AND GRANTING INJUNCTION

Dennis K. Yamase
Associate Justice

Hearing: May 12, 2010
Decided: June 17, 2010

APPEARANCES:

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