

Accordingly, the State of Pohnpei shall, no later than July 21, 2015, file with the court its proposal on how it intends to proceed against the defendant M/V *Ping Da 7*. Failure to proceed can lead to a dismissal for want of prosecution. FSM Civ. R. 41(b).

V. CONCLUSION

There being no just cause for delay, the clerk IS HEREBY EXPRESSLY DIRECTED to enter an amended default judgment, FSM Civ. R. 54(b), for the plaintiff against the defaulting defendants, jointly and severally, for the sum of \$13,422,880.72, with 9% interest per annum thereon, starting December 11, 2013, for the \$13,419,000, and starting on the date of the amended judgment for the \$3,880.72 in costs. Pohnpei shall inform the court, no later than July 21, 2015, how it intends to proceed against the remaining defendant, the M/V *Ping Da 7*.

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FSM SUPREME COURT TRIAL DIVISION

CARLOS ETSCHUIT SOAP COMPANY,

Plaintiff,

vs.

ERINE McVEY and DO IT BEST HARDWARE,
a business organization, and BOARD OF TRUSTEES
OF THE POHNPEI STATE PUBLIC LANDS TRUST,

Defendants.

CIVIL ACTION NO. 2005-007

ORDER AWARDING FEES AND COSTS

Ready E. Johnny
Acting Chief Justice

Decided: June 25, 2015

APPEARANCES:

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

For the Defendant: Monaliza Abello-Pangelinan, Esq.
(Board of Trustees) Assistant Attorney General
Pohnpei Department of Justice
P.O. Box 1555
Kolonias, Pohnpei FM 96941

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HEADNOTES

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

Under 11 F.S.M.C. 701(3), the court may award costs and reasonable attorney's fees to the prevailing party in a civil rights case. Carlos Etscheit Soap Co. v. McVey, 20 FSM R. 81, 82 (Pon. 2015).

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

Since the FSM civil rights statute is not as expansive as 42 U.S.C. § 1988 because it allows an attorney's fee award only in an "action" brought under 11 F.S.M.C. 701(3) and since an "action" is a court case while a "proceeding" includes both administrative and judicial proceedings, 11 F.S.M.C. 701(3) does not authorize the award of attorney's fees incurred for administrative proceedings, even for administrative proceedings that are a prerequisite to a later court action (the exhaustion of administrative remedies requirement). Carlos Etscheit Soap Co. v. McVey, 20 FSM R. 81, 83 (Pon. 2015).

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

Since the statute authorizes an attorney's fee award only for actions (court cases) brought under 11 F.S.M.C. 701(3), fees for attorney time spent preparing for, participating in, and reviewing administrative proceedings before an agency and before the Governor will be disallowed. Carlos Etscheit Soap Co. v. McVey, 20 FSM R. 81, 83-84 (Pon. 2015).

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

When the defendant is not liable for the attorney's fees incurred in the plaintiff's litigation against other parties against whom the plaintiff did not have a viable civil rights claim, the court will disallow an attorney fee request for work solely in response to motions filed by those other defendant parties. Carlos Etscheit Soap Co. v. McVey, 20 FSM R. 81, 84 (Pon. 2015).

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

The court will allow fees for attorney time spent reviewing the appellate court's mandate as that was part of the process leading to trial on civil rights damages. Carlos Etscheit Soap Co. v. McVey, 20 FSM R. 81, 84 (Pon. 2015).

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COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

This comes before the court on the Carlos Etscheit Soap Company's Motion for Attorney's Fees and Costs, filed December 3, 2014; the Board of Trustees of the Pohnpei State Public Lands Trust's Response to Plaintiff's Motion for Attorney's Fees and Costs, filed February 24, 2015; and the Soap Company's Reply Supporting Motion for Attorney's Fees and Costs; Motion to Strike, filed March 9, 2015. The Soap Company's motion to strike the Board's response is denied. The court fails to see how the one-day late filing prejudices the Soap Company. The court will therefore turn to the Soap Company's motion for fees and costs.

I.

Under 11 F.S.M.C. 701(3), "the court may award costs and reasonable attorney's fees to the prevailing party" in a civil rights case. The Soap Company prevailed on its civil rights claims against

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the defendant Board of Trustees of the Pohnpei State Public Lands Trust ("Board"). Carlos Etscheit Soap Co. v. McVey, 17 FSM R. 102, 111 (Pon. 2010). The court ruled that

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.

Carlos Etscheit Soap Co. v. McVey, 17 FSM R. 148, 150 (Pon. 2010). Since the court determined that only 40% of the attorney's fees sought were incurred on the Soap Company's civil rights claim against the Board, it would be "awarded \$9,470 as its reasonable attorney's fees incurred in its successful civil rights action against the Board." *Id.* at 151. The Soap Company appealed both the judgment and the fee allocation. The appellate division affirmed the allocation of attorney fee liability. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 440-41 (App. 2011).

The appellate division also affirmed the trial court decision on its merits but remanded the case because it held that the trial court "cannot have foreclosed the Soap Company's right to a hearing on the actual damages flowing from the civil rights violation," and so instructed the trial court to hold an evidentiary hearing and determine actual damages. *Id.* at 438 (App. 2011). The appellate court also ruled that while the issue of whether the Soap Company should be awarded the right to use Lot No. 014-A-08 for a time period equal to the time period from February 3, 2005 to July 1, 2005 was not properly before it, it did seem that this was an issue of damages to be resolved on remand. *Id.*

After trial on August 20-21, 2014 on those issues, the court ruled that it would not grant the Soap Company the five months lease tenure unless, at the end of this case, the Soap Company is granted a renewal lease of Lot No. 014-A-08, in which case the court would order five months added onto the term of Lot No. 014-A-08's lease. The court gave the Soap Company judgment for \$212.70 in damages (unrefunded rental payment), as suggested by the appellate division as due. See Carlos Etscheit Soap Co. v. McVey, 17 FSM R. 427, 438 & n.7 (App. 2011) (suggestion on 2005 rental payment). No other relief was granted.

II.

Since this was a civil rights case, in which the Soap Company has generally been the prevailing party, the Soap Company is entitled to an award of reasonable attorney's fees and costs. 11 F.S.M.C. 701(3). It has submitted its fee and costs request. It asks that it be awarded \$14,870 in attorney's fees for 148.7 hours of attorney work since the 2011 remand at \$100 an hour and \$120 in costs for 6 trial subpoenas. The Board contends that the Soap Company's request is unreasonable and unjust and that at this stage of the case the parties should follow the usual rule and each bear their own fees and costs or, in the alternative, the Soap Company's attorney's fees should be reduced to exclude all matters unrelated to the civil rights damages trial.

The Board's alternative contention has some merit. The court has previously held that since the FSM civil rights statute is not as expansive as 42 U.S.C. § 1988 because it allows an attorney's fee award only in an "action" brought under 11 F.S.M.C. 701(3) and since an "action" is a court case while a "proceeding" includes both administrative and judicial proceedings, 11 F.S.M.C. 701(3) does not authorize the award of attorney's fees incurred for administrative proceedings, even for administrative proceedings that are a prerequisite to a later court action (the exhaustion of administrative remedies requirement). Poll v. Victor, 18 FSM R. 402, 405 (Pon. 2012). The statute authorizes an attorney's

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fee award only for actions (court cases) brought under 11 F.S.M.C. 701(3). Poll, 18 FSM R. at 405. Accordingly, fees for attorney time spent preparing for, participating in, and reviewing administrative proceedings before the Board and before the Governor will be disallowed.

The court will also disallow the attorney fee request for work solely in response to motions filed by Erine McVey and Do It Best Hardware since the Board, as previously affirmed by the appellate division, is not liable for the attorney's fees incurred in the Soap Company's litigation against a party that the Soap Company did not have a viable civil rights claim. Carlos Etscheit Soap Co. v. McVey, 17 FSM R. 148, 150 (Pon. 2010), *aff'd*, 17 FSM R. 427, 438 & n.7 (App. 2011). These include the Soap Company's attorney's work in regard to McVey's motions to lift the stay and the work involved in moving to disqualify McVey's counsel.

The court will allow attorney's fees for all work involving pretrial preparation, pretrial statements, and pretrial motions such as the motion in limine. The court will also allow attorney time spent reviewing the appellate court's mandate as that is part of the process leading to trial on civil rights damages.

A careful review of plaintiff's counsel's billing sheet for this case reveals that the Soap Company was billed for 55.1 hours that meet these requirements for an attorney fee award against the Board for this action. The court determines that \$100 an hour is a reasonable fee and that 55.1 hours represents a reasonable amount of time spent. Therefore, the court will allow \$5,510 in attorney's fees and \$120 in service costs for trial subpoenas.

III.

Accordingly, the Carlos Etscheit Soap Company is awarded \$5,510 in attorney's fees and \$120 in service costs.

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