IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2021-016860-CA-01
SECTION: CA32
JUDGE: Ariana Fajardo Orshan

Angela Cabezas et al

Plaintiff(s)

vs.

Claudio Cini (Co Tr) et al

Defendant(s)

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FINAL JUDGMENT AND ORDER DETERMINING AMOUNT OF AND AWARDING PLAINTIFFS' ATTORNEY'S FEES AND COSTS

THIS MATTER came before the Court at an Evidentiary Hearing on March 21, 2024, that concluded on March 28, 2024, upon Plaintiffs' Motion to Determine Reasonableness of Attorney's Fees and Costs (D.E. 192) and the Court, having taken the testimony of witnesses for the Plaintiff as well as experts for both parties and hearing argument, and being otherwise fully advised in the premises, the Court finds as follows:

I. RELEVANT FACTS AND FINDINGS

This case arose from a residential real estate transaction between the plaintiffs, Angela Cabezas and Eric Mendoza, as the buyers in the transaction ("Plaintiffs" or "Buyers"), and Claudio and Andrea Cini, as the Co-Successor Trustees of the 325 Greenwood Trust, the sellers in the transaction ("Defendants" or "Sellers"). Plaintiffs placed a sizeable $427,000.00 escrow deposit to secure what would have been the purchase of the subject property. Pursuant to the subject Contract, Plaintiffs had until March 18, 2021, to obtain a financing approval to purchase the home. The Contract also stated that if they were denied, they could send a written notice of cancellation of the Contract to the sellers and they would be entitled to the return of the entire escrow deposit. The Contract as to this aspect was clear and unambiguous.

Thereafter, Plaintiffs were denied the loan to purchase the property. Plaintiffs asked Defendants for a single, brief extension of the Contract to allow them to obtain financing and resolve the lender's concerns. Defendants refused the first and only extension request and

Plaintiffs, with no other choice, sent the written notice of cancellation prior to the deadline expiration of March 18, 2021. The evidence revealed that Defendants had a backup buyer for the property that was willing to pay $700,000.00 more than the purchase price Defendants had agreed to sell the property to Plaintiffs. Thus, Plaintiffs timely, written cancellation of the Contract resulted in a windfall of $700,000.00 to Defendants.

The plaintiff then sought a return of their escrow funds. Defendants sent a letter to the escrow agent, demanding that the escrow deposit not be returned to Plaintiffs, despite the timely cancellation of the Contract. What could have been an ordinary real estate contract lawsuit became a litigious nightmare for the Plaintiffs with no factual or legal basis.

The Plaintiffs filed a lawsuit and pled breach of contract, breach of the covenant of good faith and fair dealing, and . Defendants in turn not only plead several affirmative defenses but also asserted a counterclaim, which resulted in the Plaintiffs' counsel having to expend more hours on the dual lawsuits.

After approximately 1.5 years of litigation that included Defendants' unsuccessful appeal, Defendants decided they no longer wanted to patricipate in discovery. Defendants' pleadings were ultimately stricken as a sanction. What preceded the striking of their pleadings was , baseless, and *Rocco/Palma*[1]-like litigation that should not have been defended. But for Defendants' refusal to return the escrow deposit without any supportable grounds, Plaintiffs would not have had to file this lawsuit to seek the rightful return of their deposit. But for Defendants decision to persist with unfounded theories, Plaintiffs would not have incurred their fees and costs in this litigation.

Israel Reyes, Esq. testified as Plaintiffs' expert on the reasonableness of the fees and costs sought by Plaintiffs. The Court found Mr. Reyes to be a credible and qualified expert witness. Plaintiffs' expert readily conceded billing entries he found to be improper and ultimately reduced Plaintiffs' billing entries by $146,471.60. Plaintiffs' expert found the hourly rates charged by Barakat + Bossa to be reasonable, with the exception of the hourly rate of Cristian Gallorini, an attorney barred in New York. Plaintiffs' expert made a downward adjustment to the hourly rate charged for Mr. Gallorini to that of a paralegal with a law degree. Plaintiffs' expert opined that of the $243,483.00 billed, $215,471.60 was reasonable and awardable under the Rowe factors. Plaintiffs' expert also opined that the $2,245.74 in costs is reasonable and awardable.

Attorney Gaspar Forteza testified as Defendants' expert on the reasonableness of the fees and costs sought by Plaintiffs. The Court found Defendants' expert to be qualified to opine on the issue of reasonableness. Mr. Forteza's methodology was questionable. During the hearing, Mr. Forteza admited that his review of the billing entries was not as thorough as he would have preferred. Further, Mr. Forteza's Declaration and testimony reveal that he improperly made sweeping, categorical reductions of billing entries.[2] Mr. Forteza grouped these reductions into the following six (6) categories:

1. $11,810.00 for "Pre-litigation time."
2. $51,224.00 for "post-fee entitlement sums."
3. $36,900.40 for "unnecessary work."
4. 50% reduction for any "likely ministerial/administrative work," totaling $12,185.80.
5. 50% reduction for "excessive communications," totaling $818.75.
6. 50% reduction of all "Vague/Block billed entries," totaling $43,326.25.

During his testimony, Mr. Forteza was only able to point to a few specific examples of any of one of the billing entries in the six categories of sweeping reductions. When pressed for more detail, he was unable to point out anywhere near the total $156,265.20 of billing entries that he opined were unreasonable. In fact, Mr. Forteza's testimony contradicted his Affidavit indicating that a $69,355.80 would have been a reasonable fee. Accordingly, the Court did not give significant weight to Mr. Forteza's expert opinion.

II. LEGAL ANALYSIS

A. Rowe Factors

Pursuant to *Rowe*, the Court separately considered the reasonableness of the hourly rate and the number of hours reasonably expended, and used the following criteria when determining reasonableness:

1. The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly;

The undisputed testimony in this matter was that while the Plaintiff's cause of action was perfectly straight forward, the Defense presented complex and ever changing issues. These included shifting affirmative defenses, an interlocutory appeal and the movement of assets form one trust to another. This made an otherwise simple case difficult and required a high level of skill.

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

There was no evidence offered as to this factor and as such it did not weigh in the court's ruling.

3. The fee customarily charged in the locality for similar legal services.

The Plaintiff's expert opined and the court finds the rate of fees were customary within the locality. What is more, The only rates which were challenged, was a New York lawyer, Cristian Galorini, whose rate was discounted by the Plaintiff's expert and the rates of the two partners, Brian Barakat Giacomo Bossa, whose rates raised during the course of the litigation. Both attorneys are board certified and the court finds their rates to have been reasonable.

4. The amount involved and the results obtained.

The Plaintiff obtained everything it asked for at the inception of the litigation. As such, this factor weighs in favor of the Plaintiffs fee award. What is more, at the time the hearing began it was pointed out that the Plaintiffs fees were approximately 40% of the award of $466,163.90 Plaintiffs recovered in the lawsuit. Thus, consistent with the contingency percentage deemed reasonable by the Florida bar.

5. The time limitations imposed by the client or by the circumstances.

There were no particular temporal limitations and so this factor did not weigh in the court's ruling.

6. The nature and length of the professional relationship with the client.

There was not testimony as to nature and length of the professional relationship with this client and so this factor did not weigh in the court's ruling.

7. The experience, reputation, and ability of the lawyer or lawyers performing the services.

The years of experience for each lawyer is detailed in Mr. Reyes spreadsheet, which is in evidence as Exhibit 1. Specifically, Mr. Rasco has been practicing xx years. His rate is reasonable. Mr. Barakat, Ms. Macelloni and Mr. Bossa are all board certified business litigators. In the case of Mr. Bossa, he is also board certified in real estate. Each of their rates were reasonable. The remaining associates, paralegals and law clerks each were assigned reasonable rates given their respective amounts of experience.

8. Whether the fee is fixed or contingent.

In this matter the case was billed on a hourly basis and paid as the matter progressed.

B. Disputes as to Allowable Billing

1. Pre Litigation Time

The Defense cited *US Fidelity v. Rosado,* 606 so. 2d 628 (Fla. 3d DCA 1992) for the proposition that prelitigation work was is only compensable if necessitated by the Defendant's unreasonable conduct. In this case, the pre suit work was necessitated by the the Defendant's unreasonable conduct. There was in fact no dispute for the defense to raise. The deposit should have been returned. This was ultimately born out in the litigation.

2. The Conduct of the Mediation

The contract excludes fees for the "conduct of the mediation." The Defense argues that this encompasses time spent preparing for the mediation. The Plaintiff argues that the plain language means the time spent in the mediation itself. Plain and ordinary meaning is often described as the meaning of words as found in the dictionary. *Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999). Also, plain and ordinary meaning is the natural meaning that is most commonly understood in relation to the subject matter and circumstances of the case. *Sheldon v. Tiernan*, 147 So. 2d 167, 169 (Fla. 2d DCA 1962). The above authority is cited in the Sources and Authorities section of Fla. Std. Jury Instr. (Cont. & Bus.) 416.15 Interpretation-Meaning of Ordinary Words. Thus, this Court interpreted the disputed terms using the standard dictionary plain meaning. In this case "conduct" is defined as "to direct or take part in the operation of" as in to "conduct and experiment" or to direct the performance of as in "to conduct an orchestra" it does not refer to the prep time before the experiment or the practice leading up to the performance.

Although the defense did not indicated how much would be excluded, on rebuttal, the Plaintiff's expert opined that $4,481.25 in fees were spent in preparing for the mediation. The court finds that this is compensable.

3. Fees on Fees

Plaintiff asserts that the contract clause in this case is sufficiently broad to encompass the time spent litigating the amount of fees in this matter. The parties agree that this analysis is performed under the *Waverly* line of cases, as summarized by *Nazarova v. Nayfeld*, 339 So. 3d 475, 476-477 (Fla. 3d DCA 2022), which was cited by both parties. Each case in this line holds that the question of whether the court is to award fees for the purpose of litigation fees is dependent on the breadth of the contract language providing for fees. *Waverly at Las Olas Condo. Ass'n, Inc. v. Waverly Las Olas, LLC*, 88 So. 3d 386 (Fla. 4th DCA 2012) is the first in this line of cases and held that the "language of the agreement—which authorized an award of attorney's fees for 'any litigation' between the parties—was 'broad enough to encompass fees incurred in litigating the amount of fees.'" *Nazarova*, 339 So. 3d at 446 (quoting *Waverly*, 88 So. 3d at 389). In *Nazarova* the Third District compares *Waverly's* broad language, which allows for fees litigating the amount of fees, with narrow language which does not:

Broad	Narrow
"any litigation under" the agreement between the parties	In any lawsuit brought ***to enforce the Lease*** (Emphasis in the original)

In *Nazarova*, the court found that the limiting language, "brought to enforce the Lease" was narrow language as compared to *Waverly's* broad "any litigation under" the agreement, which the court determined is broad.

In the case at bar, the language at issue is contained in paragraph 17 of the contract, which states:

> *In any litigation permitted by this Contract, the prevailing party shall be entitled to recover from the non-prevailing party costs and fees, including reasonable attorney's fees, incurred in conducting the litigation.*

Contract, at ¶ 17 (emphasis added). This sentence contains the same broad "any litigation" language used in *Waverly* and repeatedly cited by the Third District. *Obermeyer v. Bank of N.Y.*, 272 So. 3d 430, (Fla. 3d DCA 2019); *Burton Family P'ship v. Luani Plaza, Inc.*, 276 So. 3d 920, (Fla. 3d DCA 2019)*; Nazarova*, 339 So. 3d at 446; *Bland v. Dade Cnty. Fed. Credit Union*, 357 So. 3d 231 (Fla. 3d DCA 2023). Under *Waverly* and its progeny, the subject Contract in this case is broad in that encompasses *any* litigation "permitted by this Contract." It is conceded by

Defendants' expert that the process of determining the amount of fees is "litigating" fees. The award of fees is expressly permitted by the Contract in the same sentence. As such, litigating the amount of fees is necessarily included within the definition of "any litigation permitted by this Contract." Therefore, the Court finds that this contract clause is broad and allows for the award of fees litigating the amount of fees.

III. CONCLUSION

Based on the foregoing analysis, it is hereby **ORDERED AND ADJUDGED** that Plaintiffs shall recover its fees and costs from Defendants, Claudio and Andrea Cini as Successor -Co-Trustees of the 325 Greenwood Revocable Trust, the sum of $215,471.60 for attorney's fees, $2,245. 74 in costs for a total of $217,717.34, plus interest running from the date of entitlement was determined, February 21, 2023 until April 8, 2024 for a total of $29,090.42 and $54,580 in expert witness fees for a total of: $301,387.76 and which shall bear interest at the prevailing interest rate set by the Florida Chief Financial Officer at a rate of 9.34% from until said amount has been paid in full, with interest.[3] All of the above amounts shall be made payable to: Barakat + Bossa and delivered 2701 Ponce De Leon Blvd, Suite 202, Coral Gables, FL 33134, for which let execution issue immediately. The Defendant's actions in this case were wholly unreasonable and can not be rewarded. Plaintiffs should never have had to file this law suit.

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[1] *See Roco Tobacco (USA), Inc. v. Florida Div. of Alcoholic Beverages*, 934 So. 2d 479, 482 (Fla. 3d DCA 2004) ("Because Roco and its counsel took legal positions and actions to be litigious and, in effect, 'invited the State to dance,' they should now be bound by the consequences of those actions. In that light, there was no abuse of discretion in awarding attorneys fees to the State.");

[2] *See Levine v. Keaster*, 862 So. 2d 876, 882 (Fla. 4th DCA 2003) ("Although the fee applicant has the burden of establishing its entitlement to an award of attorneys' fees, the opponent of the fee has the burden of pointing out with specificity which hours should be deducted.") (quoting *Centex-Rooney Const. Co., Inc. v. Martin Cnty.*, 725 So. 2d 1255, 1259 (Fla. 4th DCA 1999)).

[3] *Fischbach & Moore, Inc. v. McBro, a Division of McCarthy Brothers Co.,* 619 So.2d 324 (Fla. 3d DCA 1993 ("post-judgment interest on an award of attorney's fees and costs starts to accrue from the date that the trial court finds that the party was entitled to such an award, even though the amount was not determined until a later date.")

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 22nd day of May, 2024.

2021-016860-CA-01 05-22-2024 3:45 PM

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Hon. Ariana Fajardo Orshan

CIRCUIT COURT JUDGE
Electronically Signed

Final Order as to All Parties SRS #: **12** (Other)

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

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