

IN THE DISTRICT COURT FOR CLEVELAND COUNTY MAY 14 2010
STATE OF OKLAHOMA

VELIE AND VELIE, PLLC



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Rhonda Hall, Court Clerk
DEPUTY

Plaintiff,

v.

Case No. CJ-07-498

THE UNITED KEETOOWAH BAND
OF CHEROKEE INDIANS OF
OKLAHOMA,

Defendant.

**PLAINTIFF'S OBJECTION TO DEFENDANT UKB'S APPLICATION
FOR ATTORNEY FEES AND COSTS AND PLAINTIFF'S MOTION TO
STAY PENDING APPEAL**

Plaintiff, Velie and Velie, PLLC, objects to the Application for Attorneys' Fees and Costs submitted by Defendant, the United Keetowah Band of Cherokee Indians of Oklahoma ("UKB"). Further, the amount of attorney fees sought is not reasonable. Plaintiff also moves this Court for an Order staying Defendant's Application for Attorneys' Fees pending appeal to the Supreme Court of the State of Oklahoma and the rendering of a decision by the appellate court. In support of this Objection and Motion, Plaintiff state as follows:

I. Defendant, UKB, is not entitled to an award of attorney fees.

Defendant, UKB, seeks attorney fees under 12 Okla. Stat. § 936 which provides a reasonable attorney fee to the prevailing party in "any civil action to recover for labor or services rendered, or on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods." UKB then claims it was successful in its *contract* claim against Plaintiff and is thus entitled to an award of attorneys' fees.

However, Plaintiff prevailed on partial summary judgment determining that UKB had ratified the contract dated April 17, 2004 between Plaintiff and UKB. Thus, the contract controls in this situation. Further, this Court determined that the contract was for the purpose of providing legal services collectively to the 9 District Council Members. See Findings of Fact and Conclusions of Law of the Judge of the District Court, pg 3, ¶ 7 (attached as Exhibit A). Thus, and as determined at the Trial Court, UKB is not bound by any contractual obligations for lack “of proper Council action under tribal law.” *Id.* at pg 7, ¶5.

“In Oklahoma, the right of a litigant to recover an attorney’s fee is governed by the American Rule.” *Barnes v. Oklahoma Farm Bureau Mu. Ins. Co.*, 11 P.3d 162, 179-80 (Okla. 2000). “This Rule is firmly established in Oklahoma and provides that courts are without authority to award an attorney’s fee in the absence of a specific statute or a contractual provision allowing the recovery of such fees, with certain exceptions.” *Id.* at 180. The Oklahoma Supreme Court has ruled the exceptions to the American Rule are narrowly defined because of the chilling effect on open access to the courts. See *Pioneer Equipment Rental, LLC v. W.S. Bowlware Const., Inc.*, 180 P.3d 694, 696 (Okla. Civ. App. 2007)(citing *Kay v. Venezuelan Sun Oil Co.*, 806 P.2d 648 (Okla. 1991)); *Whitehorse v. Johnson*, 156 P.3d 41, 46 (Okla. 2007).

This suit has always been about the validity of a contract and services rendered under that contract. 12 Okla. Stat. § 936 is inapplicable in such context. “Before counsel fees may be awarded the case must be one that falls clearly within the express language of the authorizing statute.” *Cook v. Oklahoma Bd. Of Public Affairs*, 736 P.2d 140, 154 (Okla. 1987). Although Plaintiff seeks amounts owed for ‘labor or services rendered,’

this is not an unjust enrichment claim. This claim is necessarily based on contract because without such Defendant is immune from suit based on principles of sovereign immunity. Further the contract is not for the "purchase or sale of goods" but is a contract for legal services which is beyond the scope of the statute. That the suit is based on the validity of a contract is apparent to Defendant as most of the initial proceedings in this suit involved UKB's claim of sovereign immunity which is insurmountable without a contractual waiver of sovereign immunity provision.

Because the Court determined the contract was valid but the purported services rendered were not authorized, no damages were awarded. The question of a potential contractual breach by Plaintiff was never at issue and Plaintiff, therefore, is not liable for any reason under the contract.

There is no statutory or contractual basis for which the Court is authorized to award attorneys' fees. UKB is therefore not entitled to an award of attorneys' fees and their application must be denied.

II. UKB's requested amount of attorneys' fees is not reasonable.

The proper determination of reasonable attorney fees requires a balancing and thorough consideration of the *Burk* and *Oliver's* factors which are applicable to each case. *Robert L. Wheeler, Inc. v. Scott*, 777 P.2d 394, 398 (Okla. 1989). Such factors include the time and labor required; the amount involved and results obtained; and preclusion of other employment. *Id.* at 395. The reasonableness of a fee award must also be equitable because post judgment proceedings to award attorney fees are "in the nature of an equity suit." *Volvo Commercial Finance, LLC The Americas v. Houdek Enterprises*,

inc., 130 p.3d 756, 760 (Okla. Civ. App. 2005); *quoting Tisdale v. Wheeler Bros. Grain Co., Inc.*, 599 P.2d 1104, 1105 (Okla. 1979).

In *Atwood v. Atwood*, the Oklahoma Civil Court of Appeals also found other general criteria in determining the “justice and equity” in an attorneys’ fees award, including: reasonableness of the parties’ claims, contentions, or defenses; unnecessarily prolonging litigation; relative ability to bear the financial burden; result obtained by the litigation and prevailing party concepts; and whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation. *Atwood v. Atwood*, 25 P.3d 936, 947 (Okla. Civ. App. 2001). Plaintiff argues this would include factors such as (a) unduly protracted amount of time spent on a non-prevailing issue; (b) unreasonableness of including time spent in tribal court when requesting attorney fees for state court claim; (c) unreasonableness in including time spent on third party defendant claims; and (d) inordinate amount of time spent on relatively minor tasks.

A. Prolonged time billed on Motion to Dismiss based on sovereign immunity

UKB filed an initial Motion to Dismiss in the State Court case based on its claim of sovereign immunity. That Motion was denied and summary judgment was even granted to Plaintiff back in April and August of 2007. UKB filed a Petition in Error with the Oklahoma Supreme Court on the same issue which appeal was dismissed in November 2007. The Supreme Court also remanded the suit for lack of a final appealable order. A final order was issued on Plaintiff’s motion to settle the journal entry in April of 2008. UKB also appealed that order which was eventually remanded again until it was

finally determined that Plaintiff's contract with UKB was valid and precluded the sovereign immunity claim of Defendant.

Where a plaintiff achieved only limited success, "the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Atwood*, 25 P.3d at 952; citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Roughly half of the billing submitted by UKB's counsel relates to the claims and appeals for which UKB ultimately did not prevail on the sovereign immunity issue. The sovereign immunity claim was a tactic and strategy used by UKB's counsel to avoid the ultimate issues and prolong the litigation. Should an attorneys fees be awarded, Plaintiff contends that principles of equity preclude liability of fees for over two years of litigation and appeals which were utilized as a legal strategy that ultimately failed.

B. State Court cannot award fees for time spent on a Tribal Court matter.

Several entries on UKB counsel's billing are for time spent on the Tribal Court matter initiated by Defendant. Such entries are apparent on 7/14/07, 7/23/07, 10/3/07, 11/13/07, 11/26/07. It is assumed that other entries are also related to the Tribal Court proceedings, but the above mentioned dates specifically cite time spent on the Tribal Court matters. Because the Tribal Court matter is beyond the jurisdiction of the State District Court, it is improper to award attorneys' fees for such time.

C. Time spent on claims against Third Party Defendants is improperly allocated as an attorneys' fees award against Plaintiff.

Beginning on October 23, 2009, many of the entries on UKB counsel's billing are for time spent on its third party claims against various third party defendants. These claims were for indemnification purposes should Defendant be found liable on Plaintiff's

claims. The decision to bring in these parties was to potentially re-allocate the burden of an adverse judgment. However, this decision and its inherent risk was not necessitated by Plaintiff neither should Plaintiff now be responsible for time and fees incurred in involving these parties. Each of these claims was ultimately dismissed by the Court and/or UKB. Again a legal strategy was employed by UKB's counsel that ultimately failed. It is by either mistake or simply bad faith that UKB's counsel attempts to assign their time and fees on this futile tactic with Third Party Defendants against Plaintiff. Equity again precludes Plaintiff from being responsible or liable for this alleged time.

D. Unreasonable time spent on basic tasks.

Many of the entries on UKB counsel's billing seem to be either exaggerated or the time spent on the task is unreasonable for an attorney or legal assistant with any amount of experience. The most glaring examples include the amount of time it apparently took to draft Change of Addresses for counsel on 6/4/2009:

- 1.3 hours for a Notice of Change of Address
- 1.2 on the same day for another Notice of Change of Address
- 0.7 again on the same day for another.

Although it appears a legal assistant probably prepared these Notices, a total of 3.2 hours in one day to prepare such a simple document seems unreasonable, especially when name replacements were all that was required on the later two Notices.

The same assistant took an hour to draft two certificates of service by mail on 12/15/2009 which certificates probably required a cut and paste job. It also took half an hour to distribute, not draft, the summons and petition to each third party defendant totaling three (3) hours to give the summons and petitions to the process server.

The amount of time alleged on the above instances calls into question the total amounts alleged.

Plaintiff argues that Defendant is not entitled to any amount of an attorneys' fees award. However, assuming *arguendo*, an attorney's fees award is granted, Plaintiff asserts that amount alleged by Defendant's counsel is grossly unreasonable in light of the above arguments by Plaintiff. Therefore an attorneys' fees award, if any, should be substantially reduced to represent the equitable amount of time spent on the relevant issues.

There is no question that the current tribal administration ratified the contract; that services were performed as directed by council members; and that the vast majority of this litigation was based on Defendant's failing arguments and delay tactics which unduly prolonged this case. In excess of \$25,000.00 of fees were spent on third party claims, a failed sovereign immunity argument, or tribal court litigation which is outside this Court's jurisdiction. Other fees charges were excessive and repetitive in nature.

MOTION FOR STAY PENDING APPEAL

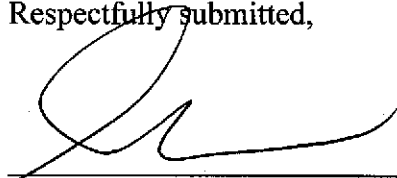
Plaintiff hereby moves this Court for an Order staying the Court's judgment from the hearing of March 11 and 12, 2010 pending appeal to the Supreme Court of the State of Oklahoma and the rendering of a decision by the appellate court and states as follows:

1. This Motion is made on the grounds that on March 11 and 12, 2010, the Court held hearings and entered a judgment granting partial judgment in favor of Defendant. A copy of the Journal entry and Final Judgment and the related Finding of Fact and Conclusions of Law are attached as Exhibit A.

2. Plaintiff has filed an appeal on the Judgment.
3. Plaintiff requests a stay of proceedings because the pending review of the Judgment may have a material affect on the Judgment and/or any subsequent proceedings including Defendant's Application for Attorneys' Fees.
4. Defendant will suffer no harm if a stay of proceedings is ordered by the Court.

WHEREFORE, Plaintiff hereby requests this Court to deny Plaintiff's Application for Attorneys' Fees and Costs; alternatively, Plaintiff hereby requests this Court to substantially reduce Defendant's counsel attorneys' fees award amount; and, Plaintiff hereby requests this Court stay any further proceeding pending the resolution of Plaintiff's appeal.

Respectfully submitted,

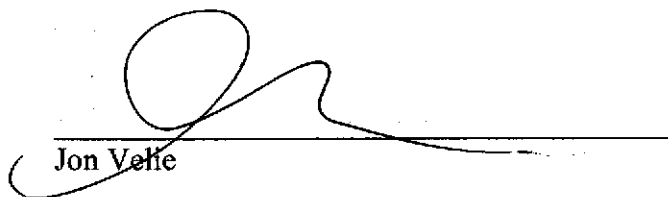


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ATTORNEY FOR PLAINTIFF

CERTIFICATE OF DELIVERY

The undersigned certifies that on the 13 day of May, 2010, a true and correct copy of the foregoing document was mailed via first-class United States Mail, adequate postage pre-paid, and via facsimile, to the following:

Kennis M Bellmanrd II
Michael McMahan
Rubenstein McCormick & Pitts, PLLC
1503 E 19th Street
Edmond, OK 73013
Facsimile: (405)340-1001



Jon Velle

NOTICE OF HEARING

This matter is set for the 9th day of June, 2010 at 2:00 PM before the judge sitting for the Honorable Judge Hetherington.