

IN THE DISTRICT COURT FOR CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED In The
Office of the Court Clerk

VELIE AND VELIE, P.L.L.C.



JUN 02 2010

Plaintiff,

DOCKET _____ PAGE _____ RECORDED _____

Rhonda Hall, Court Clerk

v.

Case No. CJ-07-498

DEPUTY _____

THE UNITED KEETOOWAH BAND
OF CHEROKEE INDIANS OF
OKLAHOMA,

Defendant.

DEFENDANT UKB'S REPLY BRIEF
IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES AND COSTS

Defendant, the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB"), files this reply brief in support of its motion for an Order awarding UKB its reasonable attorneys' fees and costs incurred in this action against Plaintiff, Velie and Velie, P.L.L.C. ("Plaintiff" or "Velie"). UKB seeks an award of \$30,513.25 in attorney's fees and \$885.45 in costs associated with this matter. In response to Velie's brief in opposition, UKB states and shows this Court as follows:

REPLY TO OBJECTION

UKB Is Entitled to Fees

1. In its PLAINTIFF'S OBJECTION TO DEFENDANT UKB'S APPLICATION FOR ATTORNEYS FEES AND COSTS AND PLAINTIFF'S MOTION TO STAY PENDING APPEAL ("Opposition Brief"), Plaintiff argues that the UKB is not entitled to fees because the Court determined that Plaintiff never rendered the services alleged or breached the purported contract between Plaintiff and UKB.

2. Plaintiff's argument makes no sense. Plaintiff sued to recover for labor or services it allegedly performed pursuant to the purported contract. This clearly falls within the ambit of

12 O.S.2001, § 936.

3. An award of attorney fees to a prevailing party under § 936 is mandatory. *Arkla Energy Resources v. Roye Realty and Developing Inc.*, 9 F.3d 855, 865 (10th Cir. 1993) (citing *Ellis v. Lebowitz*, 1990 OK 107, 799 P.2d 620, 621). *Ellis* held “the decision to award attorney fees in [a § 936] case is not discretionary.” *Id.* The Court of Civil Appeals has also construed the directive in § 936 that the court **shall** award attorney fees to the prevailing party to mean **must** award the prevailing party attorney fees. See *United Founders Life Ins. Co. v. Life Ins. & Pension Headquarters Agency. Inc.*, 1981 OK CIV APP 30, 633 P.2d 763, 765, n.1.

4. The prevailing party is the one that receives “the greatest affirmative judgment.” *Arkla*, 9 F.3d at 866. See also *Crown Paint Co. v. Bankston*, 1981 OK 104, 640 P.2d 948, cert. denied, 455 U.S. 946, 71 L. Ed. 2d 659, 102 S. Ct. 1444 (1982), and *Western Paper Co. v. Bilby*, 1989 OK CIV APP 62, 783 P.2d 980, 983.” When prevailing party status is the statutory prerequisite for awarding attorney’s fees we have defined the prevailing party as the party possessing an affirmative judgment at the conclusion of the entire case.” *GRP of Texas, Inc. v. Eateries, Inc.*, 2001 OK 53, P7, 27 P.3d 95, 98. “A prevailing party is one in whose favor judgment was rendered.” *Goodwin v. Durant Bank & Trust Co.*, 1998 OK 3, P10, 952 P.2d 41, 44 n.11.

5. UKB ultimately obtained an affirmative judgment that it was not liable to pay Plaintiff the amount claimed. Because UKB prevailed against Plaintiff’s claims, UKB is entitled to recover its fees and costs.

UKB’s Fees are Reasonable

6. Plaintiff next argues that UKB’s requested attorneys fees are unreasonable. On the contrary, by any measure, the fees claimed are quite reasonable.

7. Plaintiff filed suit on March 21, 2007. The final journal entry was filed March 31, 2010. Over the course of three years, there were multiple hearings and two appeals as Plaintiff vigorously defended itself against Plaintiff's claims, as it was entitled to do.

8. As noted in UKB's motion for attorneys fees, the average hourly fee for the attorneys involved in this matter is \$171.58, and the average hourly fee for non-attorneys is \$50.25. These amounts reflect, in part, the discounted rate afforded to the UKB by counsel in this case. The standard hourly rates for Kennis M. Bellmard, II, are currently \$225 to \$250 per hour; the standard hourly rates for Michael McMahan are currently \$200-\$225. It is also important to note that at their prior firm, Bellmard's standard rate was approximately \$275 per hour; McMahan's was \$250 per hour. Even at their highest, these rates are reasonable for attorneys similar longevity, experience and qualifications. The average rate reflected in this case represents a substantial discount to the UKB.

9. As to time spent on specific matters, the Court is free to make its own determination. However, as to the two issues raised by Plaintiff, UKB responds as follows:

- a. Motion to Dismiss. Although this matter was not ultimately dismissed on the basis of sovereign immunity, UKB's sovereign immunity briefing raised various determinative issues, not limited to sovereign immunity, including deference to tribal law. This deference to tribal law formed a basis for the reversal by the Court of Civil Appeals in the Second Appeal.
- b. Tribal Court Litigation. The Tribal Court Litigation was necessary to properly advise the trial court about the status of the contract under UKB law.
- c. Third Party Defendants. UKB had long maintained that any liability lay, if at all, with the individuals who signed the purported contract with Defendant.

UKB believed the inclusion of the third-party defendants was a necessary element as Plaintiff had failed to join all necessary parties in the litigation.

- d. Time Spent on Basic Tasks. Although the Court is free to make its own determinations regarding the reasonableness of certain time entries, UKB notes that, as to the changes of address about which Plaintiff complains, these filings were complicated by the fact the counsel for UKB had recently changed law firms. In all, however, Plaintiff has cited only \$527 as excessive.

RESPONSE TO MOTION FOR STAY PENDING APPEAL

10. UKB neither consents nor objects to Plaintiff's request for stay, but notes that on May 10, 2010, the Oklahoma Supreme Court directed Plaintiff to show cause why its appeal should not be dismissed. Plaintiff filed the appeal one day out of time.

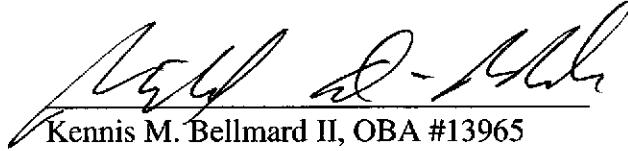
11. Plaintiff filed a response to the Show Cause order on May 25, 2010.

CONCLUSION

WHEREFORE, Defendant, UKB, respectfully seeks an Order of this Court against the Plaintiff awarding reasonable attorneys' fees in the amount of \$30,513.25, and costs in the amount of \$885.45. UKB also prays for such other relief to which it may be entitled under this Motion.

Respectfully submitted June 1 2010.

Rubenstein McCormick & Pitts, P.L.L.C.



Kennis M. Bellmard II, OBA #13965

Michael D. McMahan, OBA# 17317

1503 E. 19th Street

Edmond, OK 73013

Telephone: 405-340-1900

Facsimile: 405-340-1001

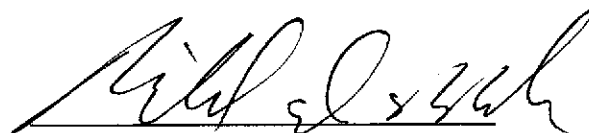
ATTORNEYS FOR DEFENDANT
THE UNITED KEETOOWAH BAND OF
CHEROKEE INDIANS IN OKLAHOMA

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed this 29 day of June 2, 2010, to the following counsel of record:

John Velie
401 West Main Street, Suite 310
Norman, OK 73069

ATTORNEY FOR PLAINTIFF
VELIE AND VELIE PLLC



Michael D. McMahan