

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

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GEORGE DeWERD, :
Plaintiff :
vs. : CIVIL NO. 8/1980
GEORGE STARK and PATRICIA O'FRIEL, :
Defendants :

GEORGE ETHRIDGE, ESQ.
P. O. Box 9673
St. Thomas, Virgin Islands

and

DAVID S. HOFFENBERG, ESQ.
P. O. Box 9531
St. Thomas, Virgin Islands
(Attorneys for Plaintiff)

GEORGE MARSHALL MILLER, ESQ.
20 Kongens Gade
St. Thomas, Virgin Islands
(Attorney for Defendants)

MEMORANDUM OPINION AND ORDER
(June 22, 1981)

FEUERZEIG, J.

An award of attorney's fees and costs is sought by defendants George Stark and Patricia O'Friel as prevailing parties and based on a Fed.R.Civ.P. 68 offer of judgment. Stark and O'Friel obtained judgment in the sum of \$957 from plaintiff George DeWerd at trial, and formal judgment is being entered this day. ^{1/} Also pending is a motion by DeWerd's counsel to withdraw. ^{2/}

OFFER OF JUDGMENT

Offers of judgment cannot limit the trial court's power to award a reasonable attorney's fees to a prevailing party. Delta Airlines v. August, __ U.S. __, 101 S.Ct. 1146 (1981). The offer

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- ^{1/} Oral findings of fact and conclusions of law were entered following trial on April 28, 1981.
- ^{2/} Plaintiff's co-counsel by order dated May 11, 1981, were asked to review the proposed judgment and motion for attorney's fees, but instead filed the motion to withdraw.

of Stark and O'Friel to DeWerd states that: "the defendants. . . hereby offer to allow judgment to be taken against them by plaintiff for the sum of \$8,000.00, which sum shall include all costs accrued to date." This language plainly means that the \$9000 figure is the fixed sum plaintiff would have taken from this case, including compensation for his attorney's fees. In fact, this language is virtually identical to the language found to be invalid in Delta Airlines, supra. Therefore, it too is invalid and cannot be relied upon under Rule 68 to award all costs incurred by Stark and O'Friel after the offer was made. Id. 101 S.Ct. at 1155-56 (concurring opinion of Justice Powell).

COSTS AND ATTORNEY'S FEES

While counsel's billing log reflects eighty hours ^{3/} of work, scrutiny of the log requires that time spent on certain tasks be reduced. See generally Estien v. Christian, 11 V.I. 464, 507 F.2d 61 (3d Cir. 1975). The level of counsel's performance, which was nonproductive in several pertinent areas, forces a further reduction. The extent of indemnification, though, will be generous because it is apparent that this litigation was unnecessarily prolonged by the plaintiff.

The time counsel spent to prosecute and defend this case divides into several broad categories: a) client conferences, 6.75 hours; b) investigation, 11 hours; c) legal research and drafting, 26.75 hours; d) court time, 23 hours; e) preparation time, 8.5 hours, and f) conferences with other counsel, 4 hours. Reductions are made only in the areas of legal research and trial time. All other time claimed by counsel was reasonable and worthy of indemnification considering the duration and nature of this case.

A significant reduction of the legal research and drafting time is required, although the court has no doubt that counsel made the claimed expenditure of time. A prevailing party is entitled to indemnification only for the time that was reasonably spent to perform a task. Time expended because of a lawyer's

^{3/} Counsel's affidavit states he spent 89.25 hours, but the court's own addition of counsel's log time totals 80 hours.

inexperience, slow work pace, excessive zeal, or even excellent but unnecessary efforts should not be indemnified through an attorney's fees award. Why counsel devoted so much time to research and drafting is not apparent. A review of the file indicates that ten hours would have been a reasonable amount of time for counsel's written work.

Three further and specific reductions also must be made because several tasks were made necessary only because of the apparent antipathy between counsel. Counsel claimed three-quarters of an hour to oppose a motion for a continuance of a preliminary injunction hearing. The opposition was pursued even though plaintiff had agreed to extend the temporary restraining order in favor of defendants. Plaintiff will not be forced to indemnify defendants for this unnecessary action.

Counsel also claimed one-half hour to move for the entry of a default, even though the motion was filed after plaintiff had replied to the counterclaim. A simple phone call between counsel's secretaries would have prevented this useless act, assuming that counsel had not received the reply. Finally, one and one-half hours were logged to reply to plaintiff's motion to inspect defendant's property. Essentially, this opposition asked the court to settle a matter of convenience for each party. Again, mere cooperation and a simple phone call between counsel could have avoided this dispute. The parties should each bear the costs of their mutual belligerence.

This results in a total of 7.25 hours of indemnifiable legal research and drafting.

Counsel also claims twenty-three hours for court appearances, although counsel's trial time is evaluated on a daily basis and at a maximum rate of \$650 per day., Kane v. United States, Civil No. 79-3 (D.V.I. St.T. & St.J., October 22, 1980). This trial was not the most demanding type. It was tried without a jury, and involved no complex facts or legal issues. Counsel is indemnified at a rate of \$500 for each day of trial, for a total of \$1,000, plus three hours for pretrial appearances.

The basic attorney's fees to be indemnified then are 40.5 hours at an hourly rate of \$75, together with \$1,000 for two days of trial. The total is \$4,037.50 before being reduced because of counsel's performance. See generally, Lindy Brothers v. American Radiator & Standard Sanitary Corp., 540 F.2d 103 (3d Cir. 1976).

Several examples of representation by defendants' counsel, while probably not taking his overall performance below the range of average work in this community, does force a further reduction of the fee award. Notably, a basis for possibly significant damages was raised for the first time during trial and, therefore, had to be excluded. Counsel also failed to prove damages for a long list of proven contractual breaches by plaintiff and for a trespass. Consequently, time spent to pursue these claims was wasted.

Despite this, it is apparent that the high cost of this case was the fault of plaintiff DeWerd, and not the defendants who made reasonable efforts to settle this matter. This could not be made clearer than by DeWerd's refusal of the \$8,000 offer of judgment, even though his breach of contract claim was only for \$10,000.^{4/} By refusing defendant's reasonable settlement offer, the plaintiff directly forced substantial attorney's time and, of course, fees to be incurred. Defendants, therefore, are entitled to generous reimbursement of their attorney's fees, and will be awarded \$3,000.

Indemnification is proper for all costs counsel seeks except for the xeroxing charges, leaving a total of \$1,663 in costs to be awarded. The total award of costs and attorneys' fees, therefore, will be \$4,663.

MOTION TO WITHDRAW

Co-counsel for plaintiff DeWerd seek to withdraw because, they claim, DeWerd refuses to pay their bill. This is a basis for allowing withdrawal. ABA Code of Professional Responsibility, DR 2-110(C)(1)(f). Notice of counsel's motion has been given to plaintiff DeWerd as required. 5 V.I.C. App. V R. 5(b) (1966).

^{4/} DeWerd's complaint also contained a fraud count, which never was vigorously pursued and was devoid of any merit.

For these reasons, it is

ORDERED that plaintiff George DeWerd shall indemnify defendants George Stark and Patricia O'Friel for their fees and costs in bringing and defending this action in the sum of \$4,663, as stated in the judgment entered this day, and it is further

ORDERED that the judgment entered this day shall be considered final and this case will be closed, unless defendants' counsel moves for a hearing on the pending fraudulent conveyance claim no later than June 29, 1981, and it is further

ORDERED that plaintiff's counsel George Ethridge and David Hoffenberg are granted leave to withdraw.


HENRY L. FEUERZETS
Judge of the Territorial Court