

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

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ROBERT REMOLE,	:	
Plaintiff	:	
vs.	:	CIVIL NO. 554/1980
DANIEL SULLIVAN, AIA,	:	
Defendant	:	
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PAUL HOFFMAN, ESQ.
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MEMORANDUM OPINION
(June 7, 1984)

FEUERZEIG, J.

The court is required to decide whether it has the authority to award costs and attorney's fees and prejudgment interest to a prevailing party as a result of an arbitration proceeding that was ordered by this court.

This matter was initiated by the plaintiff filing a suit for damages for architectural malpractice, but was stayed after the defendant moved to dismiss on the grounds that the contract contained a provision for arbitration. In order to avoid forum shopping between this court and the District Court of the Virgin Islands, in which a similar arbitration provision would be

enforceable under federal law, the court ordered arbitration. Remole v. Sullivan, 17 V.I. 193 (Terr. Ct. 1981). An arbitration award in favor of the plaintiff was entered and a judgment was granted to the plaintiff in accordance with the arbitrator's award in the amount of \$28,477.00. As a result, plaintiff now seeks attorney's fees and prejudgment interest. Both requests will be denied.

There is no question that this court has the power to award attorney's fees on any judgment appropriately entered by this court. 5 V.I.C. §541 (1976).^{1/} Because of the lack of express authority to award attorney's fees upon the entry of a judgment confirming an arbitration award, the defendant contends that neither this court nor the arbitrator may award attorney's fees. Moreover, even if section 541 authorizes an award, defendant contends this court lacks the necessary knowledge of the arbitration proceedings to make an award.

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- 1/ (a) Costs which may be allowed in a civil action include:
- (1) Fees of officers, witnesses, and jurors;
 - (2) Necessary expenses of taking depositions which were reasonably necessary in the action;
 - (3) Expenses of publication of the summons or notices and the postage when they are served by mail;
 - (4) Compensation of a master as provided in Rule 53 of the Federal Rules of Civil Procedure;
 - (5) Necessary expense of copying any public record, book, or document used as evidence at the trial, and
 - (6) Attorney's fees as provided in subsection (b) of this section.
- (b) The measure and mode of compensation of attorney's shall be left to the agreement, expressed or implied, of the parties; but there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defenses thereto.

THE ARBITRATION PROCEEDINGS

Initially the court must determine whether section 541 applies to an arbitration proceeding under provisions agreed to in writing by the parties. The parties concede that the only provision of their contract that is applicable to the question is Article 11 of the agreement, which, in pertinent part, states:

11.1 All claims, disputes and other matters in question arising out of, or relating to this Agreement or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law.

After the parties were ordered to submit to arbitration they further agreed by letter dated January 21, 1982 from Paul Hoffman, attorney for plaintiff, to Samuel Hall, attorney for defendant, that:

Mr. [John R.] Garfield has agreed to serve as a sole arbitrator in this matter. He is to be compensated at an hourly rate of \$65 per hour. This cost shall be divided equally by the parties unless and until the cost of arbitration is declared to be a reimbursable cost awarded to the prevailing party by the arbitrator. Article 11 of the contract between our clients states that "all claims, disputes, and other matters in question arising out of, or relating to, this Agreement or the breach thereof shall be decided by arbitration. . . ." Therefore, it is my understanding that indeed all claims, disputes and other matters shall be decided by Mr. Garfield including the amount, if any, of an ultimate award in favor of either party.

Preliminarily, it should be pointed out that the arbitrator concluded that he did not have the authority to make an award of costs and attorney's fees. Specifically, he stated, in a January 7, 1983 letter to counsel for plaintiff:

With regard to the question of award of attorney's fee in this matter, I have decided that I am not obligated to do this nor am I authorized to do so.

The agreement for arbitration services (January 21, 1982) specifically establishes for the arbitor cost but says nothing with regard to attorney costs and does not further define the "cost of arbitration." The agreement stresses equal division of the arbitor fee unless someone declares some costs to be reimbursable.

I cannot find in this language any specific instruction or authority to award fees as part of costs. I believe the implication of the language is that I may choose not to declare the cost of arbitration to be an assignable cost.

The arbitrator's decision comports with existing law with respect to the granting of attorney's fees for arbitration proceedings in the absence of an express agreement of the parties. See, e.g., Central School District v. Double M. Construction Corp., 46 A.D.2d 800, 361 N.Y.S.2d 47 (1974). In spite of that general rule, the plaintiff contends the language of the January 21, 1982 agreement by which the parties submitted the matter to arbitration broadened Article 11.1 of the contract to grant to the arbitrator and/or this court the power to award attorney's fees and prejudgment interest. Specifically, plaintiff relies upon that portion of the January 21, 1982 agreement in which it was stated "it is my understanding that indeed all claims, disputes, and other matters shall be decided by Mr. Garfield including the amount, if any, of an ultimate award in favor of either party."

Mr. Garfield, who is a member of the American Institute of Architects, was familiar with the architectural agreement, but he did not read either the basic contract between the plaintiff and the defendant or the supplemental agreement of January 21, 1982 as authorizing him to make the award. The court believes that his view is entitled to some deference. Moreover, the court believes

it must be guided by Ingvoldstad v. King Wharf Island Enterprises, Inc., Civil No. 83-36 (D.V.I., St. Croix, September 30, 1983), which holds that 5 V.I.C. section 541 does not cover the costs of arbitration, and that the prevailing party is not entitled to an award of attorney's fees and other costs for an arbitration proceeding.

In Ingvoldstad, Slip Op. at 6, the court viewed the arbitration proceeding

as a separate, quasi-judicial action, in a forum created by the parties for the resolution of their dispute. The very purpose of such an agreement is to avoid the necessity of resorting to a court for a judicial determination of the dispute with its attendant expenses. That being the case, the attorney's fees and costs of the arbitration proceeding itself, as distinct from an action in court to confirm the results of the proceedings is not part of the cost of "maintaining the action or défenses theréto" as contemplated in §541.

Case law supports the general view that attorneys' fees and other costs for an arbitration are not recoverable by either party as against the other, in the absence of the express agreement of the parties, or a statute providing therefor. We hold herein that 5 V.I.C. §541 does not cover the costs of arbitration and there is no statute which fills the void. See Hartford Accident & Indem. Co. v. Holton, 190 So.2d 801, 802 (Fla. 1966), Tassinari v. Loyer, 189 So.2d 651, 653 (Fla. 1966); Gerard v. Salter, 304 P.2d 237, 243 (Ca. 1956).

In accordance with Ingvoldstad, the plaintiff's request for attorney's fees will be denied.

PREJUDGMENT INTEREST

Plaintiff asks the court to award prejudgment interest pursuant to 11 V.I.C. §951(a)(1) (1982). Section 951(a)(1) authorizes interest at the rate of 9 percent per annum on "all monies which have become due." Assuming that prejudgment interest is allowable, defendant contends that the money did not become due

in this instance until April 5, 1983 when the arbitrator submitted his final award and conclusion. Moreover, the defendant contends that interest should not begin to run until this court confirmed the arbitrator's award, which was done on May 31, 1983.

The court agrees with the defendant that the thrust of 11 V.I.C. §951 is to authorize prejudgment interest only where the amount due is in money and therefore is easily ascertainable. In this case that could not be said to be the case until the arbitrator issued his award and it was confirmed by this court, which was on May 31, 1983. Thus, any request for interest before entry of judgment on May 31, 1983 must be denied. See Trocki v. Mendoza, 15 V.I. 256 (Terr. Ct. 1978).



HENRY L. FEUERZEIG
Judge of the Territorial Court