

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

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MAYOR CASHIN

In Case Nos. 2013-0085 and 2013-0304, Property Portfolio Group, LLC v. Town of Derry & a., the court on March 13, 2014, issued the following order:

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm in part and reverse in part.

The plaintiff, Property Portfolio Group, LLC, appeals a jury verdict in its favor on its claim of civil conspiracy against the defendants, the Town of Derry, Robert Mackey, and George Sioras. It argues that the trial court erred by: (1) precluding evidence of legal fees it allegedly incurred in ten prior cases, and the testimony of its expert as to the reasonableness of those fees, on grounds that it had violated Superior Court Rule 63B, and that collateral estoppel barred such evidence; (2) excluding testimony from its appraiser on the basis that the appraiser's opinion was unreliable; (3) limiting the testimony of its architect, accountant, and engineer to those opinions disclosed within their expert reports; and (4) denying its motion for an additur or new trial on damages. The defendants cross appeal the trial court's award of attorney's fees. They argue that the trial court erred by: (1) determining that the jury had found that they had engaged in bad faith, and awarding attorney's fees on that basis; (2) not enforcing an alleged waiver of attorney's fees; and (3) finding, without evidence, that the plaintiff incurred reasonable attorney's fees of \$50,000.

We first address the issues raised by the plaintiff's appeal. On appeal, the plaintiff has the burden to demonstrate reversible error with respect to each of the issues it is raising. See Coyle v. Battles, 147 N.H. 98, 100 (2001). We have reviewed each of the orders that the plaintiff is appealing, the plaintiff's challenges to those orders, and the record the plaintiff has provided, and we conclude that the plaintiff has not demonstrated reversible error.

We next address the town's arguments on cross-appeal. A prevailing party may be awarded the attorney's fees incurred in litigating a matter when such recovery is authorized by statute, an agreement between the parties, or an established judicial exception to the "American rule" that generally precludes the recovery of attorney's fees. Frost v. Comm'r, N.H. Banking Dep't, 163 N.H. 365, 377 (2012). Under the so-called "bad faith litigation" exception, "an award of attorney's fees is appropriate where one party has acted in bad

faith, vexatiously, wantonly, or for oppressive reasons, where the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and where it should have been unnecessary for the successful party to have brought the action." Id. at 378 (quotation omitted).

We will not overturn the trial court's decision to award attorney's fees absent an unsustainable exercise of discretion, deferring to the trial court's determination. Id. at 377. "To warrant reversal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party." Id. If there is some support in the record for the trial court's award of fees, we will uphold it. Id.

To evaluate the trial court's award of fees in this case, it is necessary to recount its procedural history. The record reflects that, in rendering its verdict, the jury answered the following question on a special verdict form:

Do you find by either of their acts or omissions, more likely than not, that George Soiras and Robert Mackey as employees of the Town of Derry were engaged in a civil conspiracy with a purpose to assist the [plaintiff's former abutting property owners] in their conversion of the firehouse property into a restaurant by relaxing certain municipal ordinances or reasonable requirements and that their conduct resulted in property damage to the plaintiff's abutting land? In order to answer "yes" to this question, you must find that the acts or omissions of both George Soiras and Robert Mackey were either wanton or reckless. A wanton or reckless act is one done in malicious or reckless disregard of the rights of others, evincing a reckless indifference to consequences to another's property rights. This conduct must be found to be more than negligence or gross negligence. It must be found to be reckless disregard of the just property rights of others equivalent to willful misconduct.

After answering this question affirmatively, the jury found that the defendants had caused the plaintiff to sustain damages of \$2,900. The plaintiff had sought more than \$600,000 in damages.

In an unrecorded chambers conference, the trial court "indicated [that] it would award reasonable attorney[']s fees for work done on this litigation exclusively given the finding of bad faith against town officials." The plaintiff's counsel responded that he would not seek attorney's fees because he had not tracked his time on the case, and had taken it on a contingency fee.

Subsequently, the plaintiff's counsel filed a motion seeking attorney's fees, submitting with it an invoice itemizing more than \$200,000 in attorney's fees and costs, and arguing that the jury's verdict confirmed the defendants' bad faith and justified an award of fees. The plaintiff's counsel asserted that "[f]or the majority of the time [recorded in the invoice], the time records were kept contemporaneously using Time Slips software. Where there were obvious missing time entries, the time was reconstructed" The defendants objected, arguing that the plaintiff had waived attorney's fees through its counsel's in-chambers statements, and that the special verdict form did not reflect a finding of bad faith. They further argued that plaintiff's counsel's in-chambers statements contradicted his claim that he kept contemporaneous time records that the invoice included time that was not recoverable, and that, were the court to determine that fees were recoverable, the defendants should have an opportunity to challenge the amount requested by the plaintiff. In denying the motion, the trial court "focus[ed] upon plaintiff's counsel's statement in chambers . . . that because he had not kept time slips for work he did in this trial, no request for attorney[']s fees would be forthcoming."

The plaintiff moved for reconsideration, conceding that its counsel had stated that he had taken the case on a contingent fee basis and had not kept time records, but claiming that he had subsequently discovered that he had kept track of some of his time, and that his contingent fee agreement "covered any court awarded fees." According to the plaintiff, it did not intend to waive its right to seek attorney's fees. Moreover, the plaintiff asserted that, regardless of whether its counsel had kept contemporaneous time records, the trial court had authority to consider the reasonableness of its fees under the factors set forth in Town of Barrington v. Townsend, 164 N.H. 241, 250 (2012). The defendants objected, reiterating that the plaintiff had waived attorney's fees, and arguing that "the statements that counsel had not kept any contemporaneous time records constitute[] an admission that [the plaintiff] would never have sufficient records to substantiate an award of fees if allowed."

In granting the motion, the trial court referenced its prior "indicat[ion that] it would award reasonable attorney[']s fees for work done on this litigation exclusively given the finding of bad faith," and stated that it "now believe[d] that those attorney[']s fees should be awarded." It observed, however, that its "real problem . . . [was] determining the amount of those fees." It explained:

The time cannot be based upon the entries of plaintiff's counsel's detailed bill as the majority of those entries were for other phases of the claims made against the Town of Derry, not this litigation in particular. While plaintiff's counsel argues that to some extent all of the billed work was necessary in order to try this case, the Court does not accept that conclusion. Thus the Court will rely upon its own expertise in terms of reasonable attorney[']s fees, recognizing that this was a six day jury trial involving a great deal of

preparation. Armed with that knowledge, and also taking into consideration the eight criteria for the determination of reasonable attorney[']s fees as set forth in McCabe v. Arcidy, 138 N.H. 20 (1993), the Court determines that reasonable attorney[']s fees for this litigation only amount to \$50,000.00.

At the outset, we reject the defendants' argument that the trial court erred by not enforcing the plaintiff's "waiver" of its claim for attorney's fees. Even if the statement of counsel that he would not seek attorney's fees constituted a "waiver," the trial court had discretion not to enforce it for good cause. See Lucas v. Cate, 99 N.H. 134, 135 (1954). In this case, absent a transcript of the chambers conference, it is impossible to ascertain whether the trial court unsustainably exercised its discretion by not enforcing the alleged waiver. Cf. Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004) (appealing party bears burden to provide record sufficient to decide issues on appeal).

We agree with the defendants, however, that there is no finding of bad faith sufficient to justify the attorney's fee award. The jury's special verdict form did not ask it to find that the defendants had engaged in bad faith, or had intended, through their actions, to harm the plaintiff. Rather, the jury found only that the defendants "engaged in a civil conspiracy with a purpose to assist the [plaintiff's former abutters] . . . by relaxing certain municipal ordinances or reasonable requirements," and that they did so "in malicious or reckless disregard of" the plaintiff's property rights. (Emphasis added.) Indeed, we note that the trial court specifically instructed the jury that it could award enhanced compensatory damages if it "determine[d] that the [defendant's] acts [were] . . . wanton, malicious or oppressive acts." The fact that the jury awarded only \$2,900 suggests that it did not find the defendant's actions to have been wanton, malicious or oppressive with respect to the plaintiff's property rights. While a finding of bad faith for purposes of an attorney's fee award does not necessarily require an intent to injure, see Indian Head National Bank v. Corey, 129 N.H. 83, 87-88 (1986), there is no indication in the special verdict that the jury necessarily found the sort of bad faith conduct that would justify an award of fees under the "bad faith litigation" exception to the American rule.

Even if the jury had found bad faith with respect to the underlying conduct that formed the basis of the lawsuit, such a finding is not in itself sufficient to compel an award of attorney's fees. Rather, it is within the discretion of the trial court to determine whether the defendants' conduct warranted an award of fees. See Maguire v. Merrimack Mut. Ins. Co., 133 N.H. 51, 56 (1990). The record in this case does not reflect that the trial court determined that the defendants "acted in bad faith, vexatiously, wantonly, or for oppressive reasons," that they acted in an "unreasonably obdurate or obstinate" manner, or that "it should have been unnecessary for the [plaintiff]

to have brought the action.” Frost, 163 N.H. at 377 (quotation omitted). Instead, it awarded fees merely “given the [jury’s] finding of bad faith against town officials.”

Moreover, even if we assume the plaintiff was entitled to an award of attorney’s fees, the evidence was insufficient to support an award of fees. The shifting of attorney’s fees for a party’s bad faith conduct assumes that the conduct in fact caused the other party to incur unnecessarily an obligation to pay attorney’s fees. See Keenan v. Fearon, 130 N.H. 494, 501-03 (1988) (explaining purpose of bad faith exception as providing compensation to party harmed by unnecessary litigation). Indeed, a self-represented party can recover no fees at all, regardless of whether that party is an attorney, because the party has incurred no obligation to pay counsel fees. See Emerson v. Town of Stratford, 139 N.H. 629, 632 (1995). It is the burden of the party seeking attorney’s fees to demonstrate that the amount sought is reasonable by introducing evidence of the services rendered, the time spent, and the fee arrangement. See Fleet Bank – NH v. Christy’s Table, 141 N.H. 285, 290 (1996); Gosselin v. Gosselin, 136 N.H. 350, 353 (1992).

In this case, the only evidence of the plaintiff’s fee arrangement was the statement by its attorney that he had taken the case on a contingency fee; there is no copy of the actual fee agreement in the record. Thus, it appears that the plaintiff’s obligation, if any, to pay its attorney was limited to a percentage of \$2,900. We note that the record reflects that the plaintiff is owned by its counsel’s spouse; thus, it is unclear that the plaintiff has any enforceable obligation to its counsel at all. See Emerson, 139 N.H. at 632.

Moreover, the trial court specifically found that it could not rely upon the invoice submitted by the plaintiff because “the majority of [the time] entries [recorded in the invoice] were for other phases of the claims made against the Town of Derry, not this litigation in particular.” Thus, the trial court found that the plaintiff had failed to introduce reliable evidence of the services its attorney had rendered, and the time he had spent on the matter. By then awarding \$50,000 in attorney’s fees anyway, the trial court effectively relieved the plaintiff of its burden to show entitlement to a fee award.

Accordingly, we reverse the trial court’s award of attorney’s fees to the plaintiff.

Affirmed in part; and
reversed in part.

Dalianis, C.J., and Hicks, Conboy, Lynn, and Bassett, JJ., concurred.

**Eileen Fox,
Clerk**

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