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AUG 12 2014

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Bank of North Carolina,)
 Successor in Interest to)
 Beach First National Bank,)
)
 Plaintiff,)
)
 vs.)
)
 Waterfall Investors 2, LLC and)
 Raymond E. Cleary III)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 CASE NO.: 2011-CP-26-1718

FILED
 HORRY COUNTY
 JUL - 8 PM 2:46
 MELANIE HUGGINS-WARD
 CLERK OF COURT

ORDER GRANTING BANK OF NORTH
 CAROLINA'S MOTION FOR
 ATTORNEY'S FEES, LITIGATION
 COSTS, AND APPRAISAL FEES

This matter concerns the case of Bank of North Carolina, Successor in Interest to Beach First National Bank (hereinafter "Plaintiff") versus Waterfall Investors 2, LLC and Raymond E. Cleary, III. A trial on the matter was held in Horry County from November 4, 2013, to November 7, 2013, where the jury returned a verdict for Plaintiff on all claims and against Defendants on all defenses and counterclaims. Plaintiff filed a Motion for Attorney's Fees, Litigation Costs and Appraisal Fees on November 20, 2013. Defendants filed an Objection to Motion for Attorney Fees and Costs and the matter was heard at a post-trial hearing on December 17, 2013, in Florence County.

At the conclusion of the hearing, the Court agreed to hold the matter in abeyance to permit the parties to enter into a Confidentiality Order for the disclosure of invoices related to legal services and costs provided by Plaintiff's attorneys: The Floyd Law Firm PC ("Floyd") and Womble Carlyle Sandridge & Rice, LLP ("Womble"). The Confidentiality Order was signed by Judge Knox McMahon on February 5, 2014, and filed thereafter on February 11, 2014.

Subsequently, Plaintiff's counsel disclosed certain legal invoices and cost statements to Defendants on March 3, 2014, and March 5, 2014. Thereafter Defendants filed their Supplemental Objection to Motion for Attorney Fees and Costs on or around May 2, 2014. On May 16, 2014, Plaintiff filed a Memorandum in Response to Defendants' Supplemental Objection to Motion for Attorney Fees and Costs.

LEGAL AUTHORITY

The general rule in South Carolina is that attorney's fees are not recoverable unless authorized by contract or statute. *First Union Nat. Bank of South Carolina v. FCVS Communications*, 469 S.E.2d 613 (S.C. Ct. App. 1996). When there is a contract that provides for the recovery of attorney's fees, that recovery is left at the discretion of the trial judge. *American Federal Bank, FSB v. Number One Main Joint Venture*, 321 S.C. 169, 175, 467 S.E.2d 439, 442 (S.C. 1996) (citing *Smith v. Smith*, 264, S.C. 624, 216 S.E.2d 541 (1975)).

In their supplemental objection, Defendants reference Rule 1.5 of the *South Carolina Rules of Professional Conduct* as a basis for a court's determination of reasonableness when awarding attorney's fees. While this rule establishes certain ethical guidelines with regard to the fee arrangement between an attorney and a client, the present dispute is over a contractual provision, within certain loan documents that were at issue in the case authorizing the recovery of costs and attorney's fees by Plaintiff's counsel.

South Carolina courts have consistently held that in awarding reasonable attorney's fees, there are six factors to be considered:

- (1) the nature, extent and difficulty of services rendered;
- (2) the time and labor necessarily devoted to the case;
- (3) the professional standing of counsel;



- (4) the contingency of compensation;
- (5) the fee customarily charged in the locality for similar legal services, and
- (6) the beneficial results obtained.

Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993).

Once the court has considered the factors in deciding the amount of an award, a challenge to an attorney's affidavit of time spent is not sufficient alone to overturn the award. *Potomac Leasing Co. v. Bone Industries, Inc.*, 294 S.C. 494, 499, 366 S.E.2d 26, 29 (S.C. Ct. App. 1988). "In any case, the measure of proper attorney fees assessed against a party is not always the time spent." *Id.* (citing *Freeman v. A. & M. Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (S.C. Ct. App. 1987)). Furthermore, a court is not required to consider a party's financial circumstances before ordering payment of attorney's fees unless a statute expressly states that the same must be considered. *Baker v. Baker*, 286 S.C. 200, 204, 332 S.E.2d 550, 552 (S.C. Ct. App. 1985).

ANALYSIS

As referenced in Plaintiff's Motion for Attorney's Fees, Litigation Costs and Appraisal Fees, the personal guaranty signed by Defendant Raymond E. Cleary, and the promissory note signed by Defendant Waterfall Investors 2, LLC, are the contractual bases for Plaintiff's requested relief.

The guaranty provides as follows—

4. The liability of the Undersigned hereunder shall be limited to a principal amount of \$3,000,000.00...plus accrued interest thereon and all other costs, fees, and expenses agreed to be paid under all agreements evidencing the Indebtedness and securing the payment of the Indebtedness, and all attorney's fees, collection costs and enforcement expenses related thereto.

Furthermore, the promissory note provides—



COLLECTION COSTS AND ATTORNEY'S FEES: I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs...

I. Nature, Extent and Difficulty of Services Rendered

Plaintiff initiated three primary claims against Defendants, rooted in collection under certain loan documents: (1) a foreclosure action against the corporate defendant mortgagor on the mortgage instrument; (2) a collection action against the corporate defendant pursuant the promissory note; and (3) a collection action against the individual defendant pursuant to the personal guaranty. The loan involved in this matter was in excess of \$2,000,000.00 and the collateral was a security interest in a large commercial tract of property in Horry County. These claims alone do not involve complex issues of fact and law in that Plaintiff argues that it was prepared to present one, possibly two witnesses regarding its claims.

Plaintiff's prosecution of its collection actions required defending against numerous affirmative defenses and counterclaims asserted by Defendants, which included fraudulent inducement, negligent misrepresentation, unconscionability, breach of contract, breach of the covenant of good faith and fair dealing, and fraud/misrepresentation. More specifically, Defendants alleged gross negligence, collusion, and fraud in the lender's valuation of the subject property as a part of the underwriting process for the subject loans. Officers and employees of the lender were accused by Defendants of misleading Defendants as to the value of the property and in failing to perform their duties in overseeing the appraisals of the same. Further, Defendants attempted to place blame on the lender for certain alleged inaccuracies and omissions in the appraisals, all performed by third parties, in the segregation of the property between wetlands and non-wetlands. Notably, Defendants sought not only to void Plaintiff's mortgage on the property, but also a seven (7) figure monetary judgment against the lender above and beyond



the value of the property. Each of these affirmative defenses and counterclaims necessitated a thorough, fact-intensive inquiry in order to properly defend at trial. Furthermore, the fact that the original lender, Beach First National Bank ("BFNB"), had been closed by the FDIC and its assets purchased by Plaintiff obligated Plaintiff to assert certain federal defenses to the affirmative defenses and counterclaims asserted by Defendants.

The South Carolina Court of Appeals case of *Charleston Lumber Company, Inc. v. Miller Housing Corporation and Robert E. Miller, Jr.*, 318 S.C. 471, 458 S.E.2d 431 (S.C. Ct. App. 1996) is instructive in the situation where a creditor made a claim for attorney's fees after a jury verdict in its favor, wherein a portion of the fees involved the defense of counterclaims, as Plaintiff is claiming in this case. In this case Charleston Lumber (creditor) brought several collections claims against Miller Housing and Miller (debtors). The debtors answered with a general denial defense along with an affirmative defense of negligence and multiple counterclaims for fraud and violation of the South Carolina Unfair Trade Practices Act. Subsequent to the hearing on the parties' summary judgment motions the debtors amended their answer to include additional affirmative defenses and counterclaims.

The Court noted there was no distinction between the prosecution of the creditor's claims and defense of the counterclaims. *Id.* at 483 and 439. The Court found no error as to the trial court's finding that the facts and issues related to the promissory note "were intertwined with those of the counterclaims which required extensive discovery and transformed a normally uncomplicated action on a note into complex litigation." *Id.* at 483-84 and 439. This is similar to what occurred in this case. Defendants' factual allegations involved a number of witnesses, estimated at 10-15, including current and former employees of Plaintiff and BFNB and business partners of Defendant Cleary, spanning a multi-year timeframe of alleged events and

occurrences. Both Plaintiff and Defendants retained expert witnesses to assist the jury in navigating the many complex issues involved in the case. Furthermore, as mentioned above, because the loan at issue was acquired from the FDIC as receiver for BFNB, certain privileges and protections passed to Plaintiff by virtue of its agreement with the FDIC and had to be raised in defense of the affirmative defenses and counterclaims asserted by Defendants, in coordination with the FDIC.

II. Time and Labor Devoted to Case

Plaintiff counsel's time and labor attributable to prosecution of Plaintiff's collection claims and defense of the affirmative defenses and counterclaims was reasonable and necessary given the extensive discovery in this matter. As noted above, as a direct result of Defendants' affirmative defenses and counterclaims, there were an estimated 10-15 witnesses with personal knowledge of information related thereto and could be called at trial. Furthermore, Plaintiff asserts the written discovery in this case produced in excess of 1,600 pages of information, and Plaintiff's employment of expert witnesses was needed to rebut the affirmative defenses and counterclaims, in addition to the testimony from experts retained by Defendants.

Plaintiff asserts that it employed certain measures to mitigate litigation costs in this matter including, but not limited to having the attorney with the lowest hourly rate, Bradley A. Floyd, Esquire, perform a majority of all discovery matters. Plaintiff contends that Mr. Floyd handled the entire written discovery and conducted all depositions with no other attorney for Plaintiff in attendance. Plaintiff also contends that Womble primarily handled all matters related to the federal law privileges and protections noted hereinabove without involvement from Floyd.

In their supplemental objection, the Defendants assert that the time spent by Plaintiff's counsel was unreasonable and inappropriate given the nature of the claims. In support,



Defendants cite a federal case involving a trade secret and intellectual property dispute *Uhlig v. Shirley, LLC*, 895 F.Supp.2d 707 (D.S.C. 2012). *Uhlig* differs from the present case, however, in that the trial judge in that case made express findings that the plaintiff "spent an inordinate amount of time on unnecessary and/or duplicative motions." *Id.* at 713. Further, it should be noted that the attorney's fees awarded in *Uhlig* were determined by applying lodestar calculations and analysis, a framework adopted by South Carolina state courts when assessing the reasonableness of attorney's fees under statute, not contract, which is the basis for Plaintiff's claim in the instant case.

The trial judge in *Uhlig* found that the parties were contentious from the outset, filed and opposed motions on matters that generally can be obtained by agreement and "refused to cooperate in discovery matters, often resorting to filing competing motions to compel and/or motions for protective orders." *Id.* Most important, the trial judge found that the plaintiff repeatedly made arguments and filed motions on matters already decided by the court. *Id.* at 714.

While the parties to the instant matter clearly disagreed as to the claims involved in the case, which resulted in a one week trial, they engaged in mutual discovery matters without resorting to motions to compel. There was only one motion for a protective order filed by Defendants relating to discovery matters, which did not result in any oral argument. Plaintiff did not engage in filing motions and arguing matters already decided. In fact, there was only one motion that involved oral arguments, Plaintiff's Motion for Summary Judgment, wherein Plaintiff raised all grounds (both substantive and those more procedural federal defenses) in the same motion.

Defendants also cite *Uhlig* for the proposition that Plaintiff's counsel engaged in certain "block" billing, which the *Uhlig* court noted as "a practice in which time records reflect many



different tasks grouped together into one time entry as a unit, rather than itemization of the time expended." *Id.* For explanation purposes the court cited an entry from one of Uhlig's counsel for 5.20 hour time entry with a narrative that included at least nine separate specific tasks. *Id.*

A simple cursory review of Floyd and Womble's invoices, however, shows that a majority of the entries (other than those for the summary judgment motion and the actual trial dates), were individual entries for specific tasks. Furthermore, the entries are detailed in nature and avoid vague references, a characteristic that the *Uhlig* court expressly referenced as troubling in its analysis of Uhlig's counsel's time entries.

Defendants next reference Virginia federal case involving the *National Voter Registration Act, Project Vote/Voting for America, Inc. v. Long*, 887 F.Supp.2d 704 (E.D.Va. 2012), in support of its contention that Plaintiff's counsel engaged in unreasonable billing. In the analysis of specific billing entries on a motion to dismiss hearing, Rule 26(f) conference and Rule 16(b) conference, the Court reduced the award on the grounds that three attorneys were not needed to participate since two of them had similar experience and because of the routine nature of the conferences. *Id.* at 714-15. However, the Court permitted an award for multiple non-participating attorney billings related to oral arguments before the 4th Circuit Court of Appeals. *Id.* at 715.

Defendants then refer to a federal appellate case, *Goodwin v. Metts*, 973 F.2d 378 (4th Cir. 1992), purportedly in support of its argument that Plaintiff's fee award should be reduced for the use of multiple attorneys and duplication of effort. *Goodwin*, however, involves a different set of facts and procedural history from the present case. In *Goodwin*, the plaintiff brought an action involving thirteen separate claims for relief against four individual defendants. Following a trial, the jury returned a verdict in favor of the plaintiff, but only as to two of the four



defendants, and only on one of the thirteen claims. *Id.* at 383. The plaintiffs attempted to recover from these two defendants all of their attorney's fees incurred in the prosecution of the action on all thirteen claims against all four defendants. Holding that a plaintiff should not be permitted to recover from one defendant costs incurred in the unsuccessful prosecution of claims against other defendants, the court affirmed the lower court's decision to award only 50% of plaintiffs' fees. *Id.* *Goodwin* is readily distinguishable from the present case, where Plaintiff prevailed on all of its claims against the Defendants at trial, in addition to prevailing on all of Defendants' affirmative defenses and counterclaims against Plaintiff.

The *Goodwin* Court also stated that plaintiff's counsel associated new lawyers well into the litigation that had to learn the facts and law. Again, such a criticism is inapplicable to the present case where, as Plaintiff contends, other than at trial and the post-trial motions hearing, Plaintiff never had more than two attorneys present at any court appearance or deposition, and the same attorneys handled the matter from the inception of the litigation. Moreover, Plaintiff asserts that when multiple attorneys were present, each handled separate and distinct matters as referenced hereinabove in order to mitigate costs.

A relevant and appropriate case on point is the South Carolina Court of Appeals case of *Taylor v. Taylor*, 333 S.C. 209, 508 S.E.2d. 50 (S.C. Ct. App. 1998). The court noted that it "will not criticize a party for hiring more than one attorney, provided their work is not duplicated and the complexity of the case demands it." *Id.* at 216 and 54. In affirming the trial court's award of attorney's fees, the *Taylor* Court noted that the prevailing party, while employing multiple attorneys, had the attorney with the least experience and lowest hourly rate perform the time-consuming matters, the same measure Plaintiff employed in this case.

III. Professional Standing of Counsel



Martindale-Hubbell, the premier organization related to peer review assessment of attorneys professional standing, denotes an AV rating for both firms that represent the Plaintiff in this matter. An AV rating indicates a preeminent status and peers have ranked such firms at the highest level of professional excellence.

Moreover, the attorneys handling this matter for Floyd have over 55 years of combined litigation experience with its founding partner, Dalton B. Floyd, Jr., amassing over 50 years of litigation experience in South Carolina courts. Furthermore, the attorneys handling this matter for Womble have over 30 years of litigation experience in South Carolina and North Carolina courts.

IV. Contingency of Compensation

Plaintiff's counsel represented Plaintiff on a fee-based billing schedule.

V. Fee Customarily Charged in Locality

The hourly rates charged by Plaintiff's counsel are consistent with the rates customarily charged in the geographic locations for each firm. Floyd primarily provides legal services in the Grand Strand and Pee Dee areas of South Carolina and the firm asserts that it engaged in a review of other firms' hourly rates when it determined hourly rates for its attorneys. Moreover, the hourly rates employed are normal for similar commercial litigation matters and attorneys with like capabilities and experience.

Womble has offices throughout the United States, but the attorneys involved in this matter are based out of the Greenville, South Carolina office. The respective rates of these attorneys are commensurate with rates customarily charged for commercial litigation matters involving complex issues of federal law akin to the issues raised in the present case. Notably, Womble's attorneys in this matter, Clayton M. Custer and Michael J. Bogle, have been involved



in 15-20 cases for Plaintiff involving the federal defenses in coordination with the FDIC referenced hereinabove.

VI. Beneficial Results Obtained

It is undisputed that Plaintiff obtained beneficial results related to all of its claims and Defendants were unsuccessful on all affirmative defenses and counterclaims. At the conclusion of the trial in this matter, the jury returned a verdict in favor of Plaintiff for the full amount requested on all its claims, and against Defendants on their defenses and counterclaims. Defendants argue that Plaintiff should not be awarded attorney's fees and costs related to the preparation, filing and arguing of Plaintiff's Motion for Summary Judgment. There is no basis in law for such a position and Plaintiff is entitled to said fees and costs by virtue of the fact that the same was directly related to the collection of the outstanding debt and was an effort to mitigate further litigation costs.

Defendants further question Plaintiff's claim for the costs associated with employment of its expert witnesses. As noted above, the expert witnesses in question were only involved in this litigation to rebut Defendants' affirmative defenses and counterclaims and Defendants' expert witnesses both in defense of Plaintiff's claims and in support of their counterclaims against Plaintiff. Whether or not a particular expert witness was permitted to testify at trial is not a basis for a determination of an award, and Defendants cite to no authority supporting such a position. The ultimate issue is whether it was reasonable for Plaintiff to undertake such costs given the issues involved in this case. As previously noted, the nature of the defenses and counterclaims transformed an otherwise simple collection matter into a complex case of comprehensive discovery and fact-intensive issues.

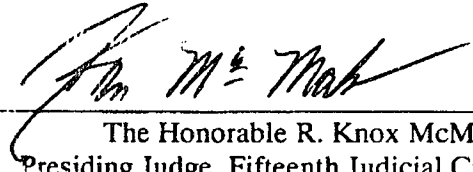


CONCLUSION

Plaintiff's Motion for Attorney's Fees, Litigation Costs and Appraisal Fees should be granted for the reasons stated hereinabove.

IT IS THEREFORE ORDERED that Defendant shall pay the following:

1. \$119,647.96 Attorney's Fees to Womble Carlyle
2. \$159,009.80 Attorney's Fees to The Floyd Law Firm
3. \$12,845.00 appraisal costs to Bank of North Carolina



The Honorable R. Knox McMahon
Presiding Judge, Fifteenth Judicial Circuit

Lexington, South Carolina
7 July, 2014