

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

EMIL P. KONDRA individually, and as)
Trustee of the Emil P. Kondra)
Revocable Trust, EMIL P. KONDRA,)
LLC, EMIL P. KONDRA FAMILY)
TRUST, EILEEN SAXTON AND)
DOUGLASS E. KONDRA, as Trustees)
of the Emil P. Kondra Family Trust,)
DOUGLASS E. KONDRA, HELEN)
PERRY, and LAWRENCE F. D')
ALESSIO,)
)
Plaintiffs,)

Civil Action Nos. 2012-CP-23-06209
2012-CP-23-06211

RECEIVED

ORDER JUL 25 2016
SC Court of Appeals

vs.)

ROBERT A. NITSCH and VERONICA)
G. NITSCH, Individually, and as)
Trustees of the Amended and Restated)
Veronica G. Nitsch Revocable Trust and)
the Amended and Restated Robert A.)
Nitsch Revocable Trust,)
)
Defendants.)

John M. Campbell, Jr., Esq.,)
)
Plaintiff,)

vs.)

ROBERT A. NITSCH and VERONICA)
G. NITSCH, Individually, and as)
Trustees of the Amended and Restated)
Veronica G. Nitsch Revocable Trust and)
the Amended and Restated Robert A.)
Nitsch Revocable Trust,)
)
Defendants.)

I. INTRODUCTION

This matter is before the Court on a Petition for Attorneys' Fees (the "Petition") filed on January 7, 2016 by Plaintiffs Emil P. Kondra individually, and as Trustee of the Emil P. Kondra

Revocable Trust; Emil P. Kondra, LLC; Emil P. Kondra Family Trust; Eileen Saxton and Douglass E. Kondra, as Trustees of the Emil P. Kondra Family Trust; Douglass E. Kondra; Helen Perry; and Lawrence D'Alessio (collectively "the Kondra Plaintiffs") and Plaintiff John M. Campbell, Jr., Esq. ("Campbell"). The Kondra Plaintiffs and Mr. Campbell petitioned this Court for an award of attorneys' fees in the amount of \$120,251.50 pursuant to the Order of this Court dated September 29, 2015 and the Report and Recommendation of Discovery Referee Mason A. Goldsmith, Esquire filed on August 21, 2015.

Also, before me are Motions to Withdraw as Counsel for the Nitsches filed by Stephanie H. Burton of Gibbes & Burton, LLC and Blair C. Fensterstock of Fensterstock & Partners, LLP on April 1, 2016.

II. PROCEDURAL HISTORY

Counsel for the Nitsches made a Motion to have a Discovery Referee appointed in this case on July 25, 2014. By Order dated February 12, 2015, the Court granted the Motion and appointed Mason A. Goldsmith, Esquire, as Discovery Referee, who was suggested by counsel for the Nitsches.

Mr. Goldsmith conducted an extensive analysis of the discovery issues assigned to him, including reviewing multiple submissions and briefs by the parties, as well as holding a hearing in his office on April 1, 2015. Mr. Goldsmith concluded that sanctions against the Nitsches were warranted because of the misconduct of Mrs. Nitsch, in receiving thousands of documents wrongfully taken from the home office of Emil Kondra, and in attempting to use them in this case, even though many of the documents were clearly protected by the attorney-client privilege (the "Disputed Documents"). (*See* Order adopting R&R, p. R&R 22–23 (Sept. 29, 2015).) Further, Mr. Goldsmith recommended that sanctions were appropriate due to counsel for the Nitsches' failure to abide by their ethical obligations in refusing to return, and then using the

Disputed Documents in this case. (*See id.*) Specifically, Mr. Goldsmith wrote, “The Nitsches and their counsel proceeded to use the Disputed Documents to prosecute their claims in this litigation without seeking guidance from this Court, despite the circumstances under which they were received, and despite the ethical obligation which counsel knew, or should have known, existed.” (*Id.*)

On August 21, 2015, Mr. Goldsmith submitted his findings in a Report and Recommendation (“R&R”) to this Court, recommending an award of attorneys’ fees to the Kondra Plaintiffs and Mr. Campbell as sanctions against Defendants, to include attorneys’ fees incurred for time spent in requesting return of the documents obtained from Mr. Kondra’s home office, motions filed regarding the documents, and proceedings before the Discovery Referee. (*See id.* at p. R&R 24.) In the Report and Recommendation, Mr. Goldsmith requested that Nelson Mullins prepare a summary of the attorneys’ fees for the work described above to be submitted separately to this Court. (*See id.*)

After reviewing the Report and Recommendation, and based upon my knowledge of the record in this case, I adopted the Report and Recommendation as the Findings of Fact and Conclusions of Law of this Court by Order filed September 29, 2015. (*See id.* at p. 2.)

On January 4, 2016, the Kondra Plaintiffs and Mr. Campbell filed the Petition for Attorneys’ Fees pursuant to the Report and Recommendation and this Court’s September 29, 2015 Order, seeking an award of \$120,251.50 in attorneys’ fees. (*See* Pls.’ Petition at 3; Order adopting R&R, p. 2 (Sept. 29, 2015); Report and Recommendation at 24.) On March 25, 2016, A. Marvin Quattlebaum, Jr. and Samuel W. Outten of Nelson Mullins Riley & Scarborough LLP submitted an Affidavit of Attorneys’ Fees to the Court and opposing counsel, in support of the Petition and providing detail in the three areas outlined in the Report and Recommendation. The Affidavit of Attorneys’ Fees was filed with this Court on March 31, 2016.

On March 31, 2016, I held a hearing on this Petition. The Kondra Plaintiffs and Mr. Campbell appeared and were represented by Samuel W. Outten. Mr. Outten outlined for the Court the work required to address the complex privilege and discovery issues raised by the Nitsches wrongfully obtaining documents from Emil Kondra's home office, and then refusing to return them. The Nitsches appeared and were represented by Stephanie Burton of Gibbes & Burton, LLC. Ms. Stephanie Burton challenged the good standing of, and rates charged by, Nelson Mullins attorneys in this case. Ms. Burton also submitted a significant number of documents containing several hundred pages to the Court in opposition to the Petition. Before the hearing ended, I directed that counsel for the Kondra Plaintiffs and Mr. Campbell provide an affidavit in support of their Petition taking into account the applicable case law in South Carolina for an award of attorneys' fees.

On April 28, 2016, counsel for the Kondra Plaintiffs and Mr. Campbell filed the Affidavit of William W. Wilkins, former Chief Judge for the U.S. Court of Appeals for the Fourth Circuit and current member of Nexsen Pruet, LLC in its Greenville, South Carolina office. Mr. Wilkins' Affidavit concludes that the attorneys from the Nelson Mullins Riley Scarborough, LLP enjoy a high level of professional standing and that the fees requested in the Petition are reasonable. Additionally, on April 28, 2016, the Kondra Plaintiffs and Mr. Campbell filed a Memorandum in Support of Petition for Attorneys' Fees and in Response to Request for the Nitsches' Counsel to Withdraw, which addressed Ms. Burton's submissions to the Court during the March 31, 2016 hearing and requested that this Court deny counsel for the Nitsches' request to withdraw as counsel until this Court had resolved all issues relating to the sanctions, the Nitsches' written consent to the dismissal of counsel had been filed, and new counsel for the Nitsches had entered an appearance.

III. ANALYSIS

A. THE KONDRA PLAINTIFFS AND MR. CAMPBELL'S PETITION FOR ATTORNEYS' FEES

After review and consideration of all submissions by the parties and oral argument, I find that the attorneys' fees requested by counsel, pursuant to the Report and Recommendation and September 29, 2015 Order of this Court, are reasonable. In reaching this conclusion, I have carefully considered the six factors identified in *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993).¹ These six factors are: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor 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 circumstances; and (6) the beneficial results obtained. *Id.* I will address each of these factors in turn.

(1) The nature, extent, and difficulty of the legal services rendered.

The litigation surrounding the Disputed Documents involved exceptional circumstances rarely addressed by any court. Thousands of documents were taken from the home office of Emil Kondra without his permission and delivered to the opposing party, the Nitsches. Counsel for the Nitsches not only refused to return the documents, but actively used them in the litigation of this case. In refusing to return and cease use of the Disputed Documents, counsel for the Nitsches raised several legal arguments in support of their position, including the following:

(1) The Kondra Plaintiffs and Mr. Campbell waived the right to assert any privilege, because the Nitsches disclosed the existence of the Disputed Documents before this litigation began.

¹ The review of the *Blumberg* factors may not be necessary in a case where, as here, fees have been awarded as sanctions and an Affidavit of Attorneys' Fees has been filed pursuant to the terms of the Report and Recommendation and September 29, 2015 Order. However, the Court has included this analysis out of an abundance of caution.

(2) The Disputed Documents were not stolen because Emil Kondra gave Helen Kondra access to his home office, where the Disputed Documents were located. Thus, Helen Kondra had the right to do what she pleased with the Disputed Documents.

(3) The Plaintiffs did not have standing to assert any privilege for the Disputed Documents or object to the Nitsches' use of the Disputed Documents, because Ellcon merged into Faiveley and any privilege was now owned by Faiveley.

(4) Because Helen Kondra had access to Emil Kondra's home office, where the Disputed Documents were stored, any privilege was waived.

(5) Because members of the Ellcon Board of Directors, including Robert Nitsch, were privy to certain privileged communications and discussed topics contained in the privileged communications, involving estate planning, corporate succession, insurance policies, and stock holdings, any privilege was waived.

(6) Because Robert Nitsch was an officer and director of Ellcon, like Emil Kondra, during the times the Disputed Documents were created, the company's privilege was also held by Mr. Nitsch, individually.

Thus, extensive research was required in order for counsel for the Kondra Plaintiffs and Mr. Campbell to respond to the Nitsches' arguments on issues relating to the attorney-client privilege, including: (1) the common interest doctrine; (2) the corporate privilege; (3) the spousal privilege; (4) the effect of a merger on a corporate privilege; (5) the privilege in relation to a corporation's former member of the board of directors; (6) the privilege in relation to estate planning and corporate succession involving family members and officers of the corporation; (7) the effect of a third party having access to the location where privileged communications are stored; (8) the effect of theft on the privilege; and (9) whether there is a temporal element to

discovering and objecting to the use of privileged documents. Additional research relating to the ethical duties of counsel in possession of stolen, privileged documents was also required.

Based upon the unique circumstances of this case and the complex legal issues raised by counsel for the Nitsches, I find that the requested attorneys' fees are reasonable in light of the nature, extent, and difficulty of the legal services rendered. The research, motions filed, and court appearances conducted by counsel for the Kondra Plaintiffs and Mr. Campbell were necessary to address the issues of privilege raised by the Nitsches. Samuel W. Outten and A. Marvin Quattlebaum, Jr. stated in their Affidavit of Attorneys' Fees that, in their combined experience of over 55 years of practicing law, they had never encountered the issue of wrongfully obtained privileged documents, and counsel's refusal to return, and continued use of, the documents in the litigation of a case. Mr. Wilkins concurred with Mr. Outten and Mr. Quattlebaum's statement and attests that during his years in private practice and 27 years on the bench, he had never seen a similar situation.

These issues were not addressed in any reported South Carolina case. Consequently, counsel for the Kondra Plaintiffs and Mr. Campbell were required to conduct extensive nationwide research and consult an expert on this matter in order to develop the legal arguments to protect their clients' attorney-client privilege. None of this work would have been necessary but for defense counsel's refusal to return the Disputed Documents and failure to seek the guidance of this Court in the use of these documents.

(2) The time and labor devoted to the case.

The time and labor of counsel for the Kondra Plaintiffs and Mr. Campbell are detailed in the Affidavit of Attorneys' Fees and other submissions to this Court. The Affidavit of Attorneys' Fees divides the time entries into the three categories identified in the Report and

Recommendation and Order of this Court: (1) requesting return of the documents obtained from Mr. Kondra's home office; (2) motions filed regarding the documents; and (3) proceedings before the Discovery Referee. During the March 31, 2016 hearing, Mr. Samuel W. Outten and Ms. Sarah Anderson described the work performed and the process used to compile the time entries included in the Affidavit of Attorneys' Fees and Petition. I find that the time and labor devoted to this case was reasonable given the urgency and complexity of the legal issues presented, including the application of the attorney-client privilege, applicable case law, and the Rules of Professional Responsibility.

The Affidavit of William W. Wilkins filed with this Court further supports the reasonableness of the time and labor devoted to this case. Mr. Wilkins has served as an expert witness in litigation in federal court regarding the reasonableness of the amount of attorneys' fees requested. Mr. Wilkins concludes in his affidavit that the time and labor was justified given the issues involved, and notes that there does not appear to be unnecessary duplication of effort by counsel for the Kondra Plaintiffs and Mr. Campbell. I agree with Mr. Wilkins' assessment and hold that the time and labor devoted in this case was consistent and reasonable given the nature, complexity, and duration of this case.

(3) The professional standing of counsel.

Mr. Wilkins states in his Affidavit that based upon his experience, knowledge, and an interview with Mr. Outten and Mr. Quattlebaum on April 13, 2016, the Nelson Mullins Riley Scarborough LLP law firm enjoys a high level of professional standing as a firm. Mr. Wilkins' Affidavit evaluates each Nelson Mullins' attorney who provided legal services for the Kondra Plaintiffs and Mr. Campbell in the Affidavit of Attorneys' Fees (collectively the "Nelson Mullins Attorneys"). Mr. Wilkins summarizes each attorney's professional history and experience and

concludes that each of the Nelson Mullins Attorneys enjoys a high level of professional standing and possesses strong legal abilities. This Court agrees.

A. Marvin Quattlebaum, Jr. is a partner at Nelson Mullins Riley Scarborough LLP, was president of the South Carolina Bar from 2011 to 2012, and was awarded the Compleat Lawyer Award from the University of South Carolina in 2010. He has received numerous awards during his practice and has been listed in *The Best Lawyers in America*, *South Carolina Super Lawyers*, and other publications. Similarly, Samuel W. Outten is a partner at Nelson Mullins Riley Scarborough LLP, is former president of the American Board of Trial Advocates, former president of the South Carolina Defense Trial Attorneys' Association, and former president of the Haynsworth-Perry Inn of Court. Mr. Outten has received numerous awards during his practice and has been listed in *The Best Lawyers in America*, *South Carolina Super Lawyers*, and other publications. Ms. Sarah R. Anderson, Mr. Lindsay L. Builder, and Mr. Kymric Y. Mahnke all possess strong legal abilities and a high level of professional standing in commercial litigation.

Therefore, this Court holds that counsel for the Kondra Plaintiffs and Mr. Campbell enjoy a high level of professional standing.

(4) The contingency of compensation.

This factor is not applicable.

(5) The fee customarily charged in the locality for similar circumstances.

Based on his experience, review of the documents, and interviews with Mr. Quattlebaum and Mr. Outten, as counsel for the Kondra Plaintiffs and Mr. Campbell, Mr. Wilkins concludes that the rates charged and fees requested in the Petition and Attorneys' Fees Affidavit are reasonable, consistent, and appropriate. Moreover, Mr. Wilkins concludes that for a case of this nature, complexity and duration, the rates charged and fees requested in the Petition and

Attorneys' Fees Affidavit are reasonable, consistent, and appropriate. Mr. Wilkins did not find any unnecessary duplication of effort on the part of any of the Nelson Mullins Attorneys.

Based on my review of the record and oral argument presented at the March 31, 2016 hearing, I agree with Mr. Wilkins' conclusion and find that the rates charged and fees requested are appropriate and reasonable. Counsel for the Kondra Plaintiffs and Mr. Campbell are experienced and enjoy high professional standing.

(6) The beneficial results obtained.

Counsel for the Kondra Plaintiffs and Mr. Campbell produced beneficial results for their clients. The result of their labor was a success in that their client's attorney-client privilege was protected, the misappropriated documents were returned, the Nitsches and their counsel were ordered to destroy any and all copies of the Disputed Documents, and were sanctioned for the conduct. Moreover, counsel for the Kondra Plaintiffs and Mr. Campbell's work resulted in this case ultimately being dismissed based on the Affidavit by Ms. Nitsch that was submitted to the Discovery Referee, which established that the Nitsches' claims were barred by the statute of limitations.

B. COUNSEL FOR THE NITSCHES' MOTIONS TO WITHDRAW AS COUNSEL

Also, pending before this Court are the Motions to Withdraw as Counsel for Defendants filed by Mr. Blair Fensterstock and Ms. Stephanie Burton on April 1, 2016. Counsel for the Nitsches claim that Defendants have failed to make payments to them in accordance with their agreement, which has rendered additional legal services unreasonably difficult.

Counsel for the Kondra Plaintiffs and Mr. Campbell object to the Motions to Withdraw on the ground that the Nitsches and their counsel have not fully complied with the sanctions ordered by this Court. Additionally, counsel requests the Nitsches' written consent to the

withdrawal of counsel to be made part of the record, and that the Nitsches identify what attorneys, if any, will be counsel of record.

The Motions to Withdraw as Counsel filed by counsel for the Nitsches are denied. This Court will not allow counsel for the Nitsches to withdraw until the Nitsches' written consent is made part of the record, and until new counsel for the Nitsches makes an appearance.

IV. CONCLUSION

Based on the foregoing, I find that the attorneys' fees requested by counsel for the Kondra Plaintiffs and Mr. Campbell pursuant to the September 29, 2015 Order and the Report and Recommendation are reasonable. Therefore, I grant the Kondra Plaintiffs and Mr. Campbell's Petition and award them attorneys' fees in the amount of \$120,251.50 as sanctions against the Nitsches. The Clerk of Court is instructed to enter judgment against the Nitsches in the amount of \$120,251.50. Additionally, I deny the Motions to Withdraw as Counsel for Defendants filed by Mr. Blair Fensterstock and Ms. Stephanie Burton until written consent of their clients is submitted to this Court.

IT IS SO ORDERED.

The Honorable Edward W. Miller

May ____, 2016

Greenville, South Carolina



Greenville Common Pleas

Case Caption: Emil P Kondra , plaintiff, et al vs. Robert A Nitsch , defendant, et al
Case Number: 2012CP2306209
Type: Order/Other

So Ordered

s/ Edward W. Miller

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