

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

BAMAR, LLC,

Plaintiff,

vs.

Xiaolan Michelle Wang,

Defendant and Counterclaimant,

vs.

BAMAR, LLC, and Gloria B. Martin and William Bates, Individually and as Members or former members of BAMAR, LLC, a dissolved Limited Liability Company,

Counterclaim Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT  
CIVIL ACTION NO.: 2014-CP-40-1815

**ORDER GRANTING  
JUDGMENT AGAINST BAMAR, LLC,  
GLORIA B. MARTIN AND  
WILLIAM THURMAN BATES, Jr.**

**RECEIVED**  
JUL 30 2018  
SC Court of Appeals

This case is before the court on motion of Xiaolan Michelle Wang (“Wang”) on two issues. First, she seeks an award of attorney’s fees against BAMAR, LLC (“BAMAR”) asserting she is the prevailing party in a dispute arising under a lease containing a provision allowing the prevailing party to recover attorney’s fees and costs from the other party in the event of a dispute. Second, she seeks judgment against Gloria B. Martin (“Martin”) and William Bates (“Bates”) who are the only members of BAMAR based upon Ms. Martin and Mr. Bates having received distribution of all BAMAR’s assets, where the amount of assets distributed to each person exceeds the amount in controversy. The second issue was addressed by stipulation during the hearing. Argument, testimony and exhibits were presented on the attorney’s fee issue.

#### FACTS

Ms. Wang operates restaurants in the Columbia, South Carolina area. In 2013 and earlier BAMAR owned a building on Main Street which it leased to Ms. Wang. On November 29,

2013, without notice to Ms. Wang, BAMAR violated the lease by evicting Ms. Wang from the leased premises during the paid up lease term by changing the locks on the leased premises and locking Ms. Wang out of the leased premises. No notice was given to Ms. Wang prior to eviction, and Ms. Wang was not notified of any alleged breach of the lease. During the lockout, BAMAR detained equipment owned by Ms. Wang in the leased premises. BAMAR sued Ms. Wang on March 18, 2014 seeking allegedly unpaid rent. Ms. Wang answered and counterclaimed.<sup>1</sup>

The case was extensively developed through discovery. BAMAR and Ms. Wang traded interrogatories, requests to produce, requests to admit, and took depositions. Written discovery was propounded, answered or supplemented 37 times.

The parties tried to resolve the case through mediation on March 24, 2015. The effort was unsuccessful. Further time was expended on settlement negotiations which also proved unsuccessful.

The case was also developed through motion practice. Ms. Wang found it necessary to file a motion to compel on September 10, 2014, and moved to amend her answer. BAMAR was compelled to respond to certain items of discovery and Ms. Wang was allowed to amend and did so. Numerous other motions were filed, opposed and resolved. All told, there have been 40 pleadings filed in the case.

On January 6, 2015, Ms. Wang moved for summary judgment. She amended the motion July 22, 2015. Gloria Martin, on behalf of BAMAR LLC, filed an affidavit in opposition to the summary judgment motion which Ms. Wang moved to strike. On July 28, 2015, BAMAR filed its own summary judgment motion.

---

<sup>1</sup> The facts in this paragraph are as stated in Judge Manning's October 2, 2015 order granting summary judgment in favor of Ms. Wang.

On October 2, 2015, Judge Manning granted Ms. Wang's motion for summary judgment. The court addressed numerous issues that had been pursued in discovery by BAMAR including BAMAR's claim Ms. Wang breached the lease by failing to pay taxes and insurance. The court held:

“[b]y locking [Ms. Wang] out of the leased premises during the tenancy, when rents are fully current, and when no notice of any kind whatsoever had been given by [BAMAR] to [Ms. Wang] as required by the lease, [BAMAR] breached the most fundamental rights of [Ms. Wang] under the lease-possession and the covenant of quiet enjoyment...” “[a]s a result, there is no genuine issue of material fact that all of [BAMAR's] claims for breach of the lease fail, and summary judgment in favor of [Ms. Wang] as to such claims is hereby entered.”

Order granting Summary Judgment pp. 3-4.

As to BAMAR'S claims it was entitled to rents, the court held “[a]s a matter of law, [BAMAR] is entitled to no rent whatsoever after its wrongful eviction of [Ms. Wang.]” *Id.* at 4. The court found BAMAR's claim for “taxes and the payment of insurance incurred after the lockout and wrongful eviction of [Ms. Wang] must fail, for the same reason.” *Id.*

BAMAR's claims for insurance premiums over the life of the lease were denied. The court held “[BAMAR's] claims related to a dispute over the payment of insurance premiums also fail as a matter of law, because such claims are barred by the statute of limitations.” *Id.* The statute of limitations for breach of contract, § 15-5-530, is three years. The court found the undisputed facts show Ms. Wang clearly indicated five years prior to the suit that she would not pay the insurance premium. As such, the court found that the statute of limitations started to run on BAMAR's claim on September 24, 2009. Since the action was not brought within three years, the court granted summary judgment to Ms. Wang.

Finally, the court ruled in favor of Ms. Wang on her claim that BAMAR breached the

lease agreement. The court held that [Ms. Wang] is entitled to judgment as a matter of law as to her claims for breach of the lease by [BAMAR], who admittedly dispossessed Ms. Wang during the paid up leasehold terms.” *Id.* at 6-7.

BAMAR moved to reconsider the court’s October 2, 2015 order. The motion was denied October 23, 2015. BAMAR appealed the two orders. The appeal was dismissed without prejudice on April 11, 2016, after the Court of Appeals denied BAMAR’s motion to stay the appeal pending the circuit court’s hearing and ruling on damages.

Following the failed motion to reconsider and attempted appeal, BAMAR LLC was dissolved on March 17, 2016. Its assets had been distributed May 19, 2015, and the distribution left BAMAR LLC with no assets. In response, Ms. Wang moved to join Ms. Martin and Mr. Bates, the individual members of the LLC, as parties to the lawsuit on June 17, 2016.

During the June 13, 2018 hearing on attorney’s fees the parties stipulated that BAMAR distributed all its assets to Martin and Bates equally and that the assets each distribute received exceeded the \$63,345 amount claimed by Ms. Wang.

In addition to amending to add Ms. Martin and Mr. Bates, Ms. Wang also amended her counterclaims to assert additional counterclaims sounding in trespass and conversion (“the tort claims”). Ms. Wang filed a motion for partial summary judgement on her trespass and conversion counterclaims on April 24, 2017 on collateral estoppel grounds.

On August 25, 2017, Ms. Wang filed a consent order substituting counsel Rogers Townsend & Thomas, PC in place of Schmidt & Copeland LLC. With her new counsel, Ms. Wang moved to drop the tort claims. The motion was granted.

On November 28, 2017, Ms. Wang filed her Third Amended Answer and Counterclaim wherein she clarified the basis for the previous complaints having sought attorney’s fees and

costs by citing the prevailing party provision in the lease. Article VIII Section 5 of the lease states:

“If any action at law or in equity shall be brought on account of any breach or to enforce or interpret any of the covenants, terms or conditions of the Lease, the prevailing party shall be entitled to recover all of the prevailing party’s costs, reasonable attorney’s fees, the amount of which shall be fixed by the court and shall be made a part of any judgment rendered.”

### ANALYSIS

The facts of this case give rise to several issues in need of resolution i.e., whether Ms. Wang is a prevailing party; whether BAMAR deserves an offset or recovery for the fees it spent defending against the tort counterclaims which Ms. Wang voluntarily dismissed; and the reasonableness of the attorney’s fees and costs claimed by Ms. Wang

#### I. Whether Ms. Wang is the Prevailing Party.

Ms. Wang asserts she is the prevailing party because Judge Manning granted summary judgment on BAMAR’s claims against her under the lease regardless of any other claims which might have been in the case. The court agrees.

In *Heath v. County of Aiken*, the South Carolina Supreme Court considered whether to uphold an award of attorney’s fees and costs to a sheriff who had won a suit against the local county council. *Heath* was brought under S.C. Code Ann. § 15-77-300 which, similar to the lease at issue, requires a party to be the prevailing party to attain an award of attorney’s fees and costs. The Court held that “a party need not be successful as to all issues in order to be found to be a prevailing party.” *Heath v. Cty. of Aiken*, 302 S.C. 178, 182 (1990). The court adopted the holding of *Buza v. Columbia Lumber Co.* defining the prevailing party as “[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the

decision or verdict is rendered and judgment entered.” *Id.* at 182-83. In addition, “[a] court determines the prevailing party by evaluating the degree of success obtained.” *Id.* Clearly Ms. Wang prevailed on the main issue i.e., whether BAMAR breached the lease.

**II. Whether BAMAR is a Prevailing Party Where Ms. Wang’s Tort Counterclaims Were Dismissed**

BAMAR claims to be the prevailing party in relation to the counterclaims that Ms. Wang voluntarily dismissed. BAMAR is incorrect for two reasons. First, in making this claim, BAMAR incorrectly asserts, without authority, that there may be two prevailing parties to an action. The law is that there may only be one prevailing party to an action. The United States District Court for the District Court of South Carolina has held, in the context of patent litigation, that “[f]or the purposes of costs and fees, there can be only one winner. A court must choose one, and only one, 'prevailing party' to receive any costs award.” *Pure Fishing, Inc. v. Normark Corp.*, No. 10-cv-2140-CMC, 2014 U.S. Dist. LEXIS 7068, at \*4 (D.S.C. Jan. 21, 2014). See also *Heath v. Cty. of Aiken*, 302 S.C. 178, 182 (1990) (“a party need not be successful as to all issues in order to be found to be a prevailing party.”).

Second, BAMAR ignores the fact that Ms. Wang voluntarily dismissed her counterclaims. The Fourth Circuit Court of Appeals dealt with this issue in *Best Indus. v. CIS BIO Int’l* where the court adopted the view of the Seventh Circuit and held, “that a voluntary dismissal without prejudice does not render a defendant a prevailing party.” *Best Indus. v. CIS BIO Int’l*, No. 97-1217, No. 97-1412, 1998 U.S. App. LEXIS 1409, at \*13 (4th Cir. Feb. 2, 1998). The court reasoned that because work completed in defense of the dismissed claim can be reused in a later suit, an action dismissed without prejudice is not complete and cannot have a prevailing party until a decision or verdict is rendered. *Id.* BAMAR was not in any way a

prevailing party. BAMAR is not entitled to any attorney's fees or costs whether by way of affirmative recovery or by way of offset against Ms. Wang's recovery.

As the prevailing party on the main issue, Ms. Wang is entitled to attorney's fees and costs in this action excluding those expended in litigating her counterclaims. Exhibit 4 detailed the fees that pertained to the tort claims. Those fees were not part of the claim Ms. Wang made during the hearing.

### III. Whether Ms. Wang's Petition for Attorney's Fees and Costs is Reasonable

Ms. Wang presented John Schmidt of Schmidt & Copeland and Robert Bryan Barnes of Rogers Townsend & Thomas to testify about the fees and costs expended and paid to their firms on this case. The testimony was accompanied by the actual time and expense records. None of the detail in the records was challenged by BAMAR, Ms. Martin or Mr. Bates.

When determining the reasonableness of a request for attorney's fees, South Carolina courts consider the following six factors:

- (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services.

*Jackson v. Speed*, 326 S.C. 289, 308(1997); see also *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 377 (1989).

The court considered the attorney's fees from two firms employed by Ms. Wang: Schmidt & Copeland, LLC which served as her counsel from June 9, 2014 – August, 2017 and Rogers Townsend & Thomas, PC which has served since August, 2017 and continues to serve.

#### (a) Reasonableness of Schmidt & Copeland's fees and costs

- i. The nature, extent, and difficulty of the case

This case arose from BAMAR's self-help eviction or lock-out of Ms. Wang from a building where she had fully paid the lease amount. The lock-out created a significant issue for Ms. Wang's business reputation given her other restaurants. The case involved a number of factual and legal issues that created a level of complexity in the case that required extensive legal work. These disputes included contentions over which party locked the other out of the leased premises, the nature of the leak in the building, and issues connected with the dissolution of BAMAR LLC. Additionally, the litigation involved BAMAR's claims for unpaid rent, insurance premiums, property taxes and attorney's fees; none of which were recovered. Although the issue was contested, Ms. Wang asserted that in addition to having been forced to defend herself, she was confronted with a claim for rent, insurance, taxes and BAMAR's attorney's fees and costs over a five year lease which totaled at least \$63,000. She did not have the option of artificially limiting what her lawyers spent defending her. Similarly, once she had prevailed BAMAR did not pay Ms. Wang's attorney's fees which left her no alternative but to engage an attorney to pursue them.

ii. The time necessarily devoted to the case

Schmidt & Copeland spent 126 attorney hours and 78 paralegal hours representing Ms. Wang in this case from 2014-2017. Each tenth of an hour claimed was itemized and presented to the court. The case had a significant number of claims against Ms. Wang (rent, taxes, insurance, attorney's fees) and required thorough investigation. Pleadings, written discovery, motions, mediation and normal correspondence used up a substantial amount of time. All this was required by the suit BAMAR initiated.

Late in the case, trespass and conversion claims were added and later dropped. The time entries related to those claims were identified and quantified. The evidence showed a total of 6.8

attorney hours and 7.35 paralegal hours spent on the tort claims. Ms. Wang did not seek recovery for these hours. Removal of the time spent on the trespass and conversion claims left 119.2 hours of attorney time and 70.65 hours of paralegal time devoted to litigating the rest of Ms. Wang's case.

iii. Professional standing of counsel

Mr. Schmidt is a South Carolina licensed attorney in good standing with the court and bar. He has also been admitted to the bar of the District of Columbia and Virginia. Since graduating from the University of Pennsylvania School of Law, Mr. Schmidt has practiced law in Washington, DC, North Carolina, and South Carolina for over 30 years including having been a partner at Nelson Mullin, Riley and Scarborough before forming his own firm.

Mr. Schmidt's primary practice involves contracts and disputes that arise in the course of contracts. He has been published many times for his academic research into this and other areas of the law.

Mr. Schmidt also acts as a South Carolina Certified Mediator and Arbitrator, a Pro Bono Prosecutor for the Attorney General's office, and has received many awards for his outstanding legal services including the South Carolina Attorney General's Award of Appreciation.

Mr. Schmidt handled this litigation with skill and professionalism. His reputation and success in his portion of the litigation demonstrate his outstanding professional standing.

iv. Contingency of compensation

Schmidt & Copeland undertook the case on an hourly basis, but stopped receiving payment October 15, 2015. Nevertheless they continued to work on the case. When they were relieved, they were owed \$20,598.29 out of a total of \$58,624.11 which meant they were not

paid 35% of the amount they charged. Although the fee agreement had not been contingent, it turned out that 35% was contingent. The unpaid 35% was forgiven and never paid.

v. Beneficial results obtained

Mr. Schmidt clearly gained a beneficial result for Ms. Wang in that he obtained summary judgment on BAMAR's claim against Ms. Wang for breach of the lease. This completely changed the nature of the case from one where Ms. Wang was being sued to one where Ms. Wang was pursuing a claim.

vi. Customary legal fees for similar services

The hourly rate Ms. Wang agreed to pay Schmidt & Copeland through the course of litigation was \$380.00. However, given the amount of time spent and the amount that went unpaid, his hourly rate was actually \$250/hour as is explained in more detail below.

The true hourly rate Mr. Schmidt was paid may be seen by removing the paralegal time and dividing the amount actually paid by Ms. Wang into the number of hours worked by Mr. Schmidt. Mr. Schmidt's firm bills the paralegal at \$115.00 per hour. She worked 70.65 hours leading to a total bill for her services of \$8,124.75. Mr. Schmidt's firm was paid \$38,025.82 for its work on this case. Removing the payment for paralegal time allows the court to see what was paid for lawyer time.  $\$38,025.82 - \$8,124.75$  leaves \$29,900.25 that was paid for attorney time. Dividing this payment over the course of Mr. Schmidt's 119.2 hours of work on this case leads to an hourly rate of \$250.84. This rate of pay is comparable to, if not on the low end of, what is customarily charged by Columbia attorneys in their representation of clients in business disputes. The court notes that BAMAR's attorney's fee affidavit sought payment at \$300/hour.

As the above factors indicate, Mr. Schmidt's fees billed over the course of nearly three years of litigation are more than reasonable in the context of his defense of complex breach of

contract claims. Mr. Schmidt succeeded in defending Ms. Wang against BAMAR's claims for rent, insurance, property taxes and attorney's fees, and his effective billable rate is more than reasonable in the context of similarly situated law firms in South Carolina. As such, the court finds the fees and costs that were paid Mr. Schmidt's firm by Ms. Wang to be reasonable and should be awarded to Ms. Wang as prescribed the attorney's fees provision of the lease.

Ms. Wang did not claim the attorney's fees and costs that were incurred that relate solely to Schmidt & Copeland's litigation of her tort counterclaims that were dismissed. These charges amounted to a value \$3,429.25 and were all incurred **after** Ms. Wang stopped paying Schmidt & Copeland. The last bill Ms. Wang paid to Schmidt & Copeland was paid October 29, 2015 (see Exhibit 5). The earliest work on the tort claims was May 4, 2016. See Exhibit 4. Therefore, none of the tort claim time needs to be deducted from the actual amount claimed.

(b) Reasonableness of Rogers Townsend & Thomas' fees and costs

i. The nature, extent, and difficulty of the case

When Rogers Townsend became counsel of record, the case involved pursuit of a recovery for purloined equipment, lost profits and attorney's fees.

The extent of the case included numerous issues of damages related to the tort counts and some complication on the attorney's fees claim. The case appeared to be on the eve of a hearing. Immediate preparation was required. Later, it was envisioned that eliminating some of the claims might lead to settlement. The tort claims were eliminated but settlement did not occur. Thus, preparing the case for a hearing became the primary issue. BAMAR raised several issues concerning the attorney's fee aspect of the case which were unusual and highly fact driven, e.g. who was the prevailing party where claims had been dismissed and to what extent should there be offsets. Those issues were analyzed and discussed with witnesses in preparation for the

hearing. It was also necessary to prepare to cross examine Mr. Martin, Mr. Bates and their counsel, who was petitioning for fees and costs. The affidavit of Robert Bryan Barnes was submitted and detailed precisely the work that was done by the lawyer, paralegal and law clerk.

ii. The time necessarily devoted to the case

The initial efforts were to settle the case, but that proved to be impossible. Therefore, it became necessary to amend the pleadings, attend roster meetings and prepare for a hearing. Every witness need to be contacted and prepared, exhibits prepared, a prehearing brief prepared and normal communications with opposing counsel undertaken.

iii. Professional standing of counsel

Mr. Barnes graduated from Furman University and then USC School of Law. After clerking for a state trial court judge (James E. Moore) and a federal judge (Joseph F. Anderson, Jr.), Mr. Barnes has practiced 30 years. All 30 years have been in a litigation practice. Twenty-two of those years have been handling insurance defense in the construction and contracts area. Mr. Barnes' CV shows he is rated AV by Martindale, has been listed for years by Best Lawyers in America, and is a member of numerous bar organizations (DRI, ABA, Council on Litigation Management-former) as well as having been admitted Pro Hac Vice in 26 states where he has defended construction and products liability cases during the last 20 of his 30 years at the bar. Mr. Barnes has handled cases in trial and appellate courts (state and federal) and before administrative bodies as demonstrated by the list of published decisions on his CV.

iv. Contingency of compensation

Although Rogers Townsend accepted the case on an hourly basis, after paying one bill, Ms. Wang asked that the firm handle the case on a contingency fee basis. Rogers Townsend agreed. Thus, the compensation is completely contingent upon winning and collecting.

v. Beneficial results obtained

Rogers Townsend streamlined the case by dismissing the tort claims in a way which caused no prejudice to Ms. Wang. It also articulated a rationale for collecting all the fees that were paid to Schmidt & Copeland which fees had an ostensible rate of \$380/hour. It further moved the case through a hearing on attorney's fees providing the court with an ample basis for ruling for Ms. Wang on all the time and expense that had been incurred.

vi. Customary legal fees for similar services

The portion of time Rogers Townsend was handling case on an hourly basis used an attorney rate of \$250/hour and a paralegal rate of \$125/hour. Both rates are common in the Columbia, South Carolina area as well as for the level of experience of the attorney (30 years of practice) and paralegal (20 years).

Defendant is therefore entitled to all of its attorney's fees and costs incurred by Rogers Townsend which total \$25,320 as demonstrated in Exhibit 10, the Affidavit of Robert Bryan Barnes.

In summary, the court finds that the fees and costs paid to Schmidt & Copeland (\$38,025) and the work performed by Rogers Townsend (\$25,320) are reasonable under the circumstances and in light of the six factors requires to be considered by the South Carolina Supreme Court as detailed above.<sup>2</sup> Therefore, the court awards Ms. Wang \$63,345 in attorney's fees and costs.

IV. Judgment against Ms. Martin and Mr. Bates

S.C. Code Ann. § 33-44-808 (d) provides:

A claim not barred under this section may be enforced: ...(2) if the assets have been distributed in liquidation, against a member of the dissolved company to the extent of the member's proportionate share of the claim or the company's assets distributed to the member in liquidation, whichever is

<sup>2</sup> See *Jackson v. Speed*, 326 S.C. 289, 308 (1997)

less, but a member's total liability for all claims under this section may not exceed the total amount of assets distributed to the member.

Ms. Wang's counsel called Ms. Martin in Ms. Wang's case in chief and began to examine her concerning the distribution by BAMAR of all its assets to Ms. Martin and Mr. Bates when Counsel for Ms. Martin and Mr. Bates agreed to stipulate: (1) Ms. Martin and Mr. Bates are liable for any judgment against BAMAR in an amount up to the amount distributed from BAMAR to Ms. Martin and Mr. Bates; and (2) the amount distributed to each of Ms. Martin and Mr. Bates exceeds the \$63,345 which was claimed at the hearing. Ms. Wang's counsel agreed to the stipulation and such was put on the record. The order of this court confirms the stipulation. The facts concerning the distribution from the LLC and its receipt by Ms. Martin and Mr. Bates are also confirmed by their pleadings. See Ms. Wang's counterclaim alleging the aforementioned facts and the Second Amended Answer and Counterclaim by Ms. Martin and Mr. Bates.

### CONCLUSION

Based on the foregoing, the Clerk of Court is directed to enter judgment in the amount of sixty-three thousand three hundred forty-five (\$63,345) dollars against BAMAR, LLC, Gloria Martin Bates and William Thurman Bates, Jr., jointly and severally.

IT IS SO ORDERED.

\_\_\_\_\_, 2018  
Columbia, South Carolina

\_\_\_\_\_  
Robert E. Hood  
Circuit Judge



Richland Common Pleas

**Case Caption:** BAMAR LLC vs Xiaolan Michelle Wang  
**Case Number:** 2014CP4001815  
**Type:** Order/Other

So Ordered

s/ R.E. Hood #2164

Electronically signed on 2018-06-27 13:44:26 page 15 of 15