

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge, Second Judicial Circuit

Case No. 2018-CP-02-00675

Ex parte: Daniel Geitner, Appellant,

In re: Kelly Sims, Respondent,

v.

Sharon Enteen-Prusso a/k/a Sharon Enteen
and Falcon Ridge, Inc., Defendants.

RESPONDENT'S BRIEF

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AUG 22 2019

SC Court of Appeals

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STATEMENT OF THE CASE¹

On March 22, 2018, the trial court in Aiken, S.C. issued a subpoena for Appellant Geitner's deposition (the "Subpoena") pursuant to the South Carolina Interstate Depositions and Discovery Act, S.C. Code Ann. § 15-47-100 et seq., in connection with *Sims v. Enteen*, Superior Court of Cherokee County, Georgia, Civil Action No. 18cve0059. On May 22, 2018, counsel for Respondent Sims deposed Appellant Geitner. As the trial court found, during his deposition, Appellant Geitner "initially lied under oath" and, then, when confronted with evidence of his mendacity, "refused to answer any further questions." (12/5/18 Order at 3, R. p. 7.)

On June 28, 2018, Respondent Sims filed a motion to compel Appellant Geitner's continued deposition and to award Respondent Sims her reasonable attorneys' fees in connection with the motion (the "Motion to Compel"). The motion was fully briefed at the time of filing.

Upon motion, on August 22, 2018, Respondent Sims's lead counsel was admitted to the bar pro hac vice to participate in the motion proceedings in Aiken. Appellant Geitner moved on September 21, 2018, with Respondent Sims's consent, for continuance of the scheduled hearing of the motion.

Oral argument on the motion was held November 5, 2018, and post-hearing submissions were made by the parties. On December 5, 2018, the trial court entered an Order granting the Motion to Compel. (12/5/18 Order, R. pp. 5-15.) In that Order, the trial court detailed the material allegations in the underlying action (the gravamen of which is breach of fiduciary duty and fraud) and explained why Appellant Geitner has personal knowledge that is material to Respondent Sims's claims. (12/5/18 Order, R. pp. 5-15.) In that Order, the trial court also

¹ Respondent Sims provides her own statement of the case pursuant to Rule 208(b)(2), SCACR, because Appellant Geitner's statement of the case contains contested matters in noncompliance with Rule 208(b)(1)(C), SCACR.

directed Respondent Sims's counsel to submit an affidavit to the court regarding Respondent Sims's cost of the motion.

Respondent Sims's counsel submitted affidavits from lead counsel and local counsel, each containing discussion of factors for reasonableness of attorney's fees, biographical data, and detailed time records. Appellant Geitner's counsel submitted a memorandum opposing the award of fees and a counter-affidavit from Appellant Geitner's Georgia counsel. Respondent Sims replied. Appellant Geitner did not request further hearing.

On January 16, 2019, the trial court then entered a separate Order awarding Respondent Sims's costs and attorneys' fees of \$14,486.69 incurred in connection with her Motion to Compel. (1/16/19 Order, R. pp. 1-4.)

In its January 16, 2019 Order, the trial court made specific factual findings regarding the reasonableness of Respondent Sims's attorneys' fees; to wit:

6. The expenses of \$14,486.69 submitted by the moving party are reasonable, taking into account numerous factors, the chief one of which is that the expenses were actually agreed and incurred.

7. Additionally, the legal services were complicated by pendency of the litigation in another state, making the services more extensive and difficult and requiring that local counsel be engaged. The time devoted was considerable and was all accounted for unless some has not actually been charged. Counsel have professional standing justifying the fees charged. The fees are those customarily charged by them in the locality for similar services, and the fees charged by others in the locality vary according to the nature of the matter and lawyers hired, and the fees in the instant case are within that range. The motion was granted in its entirety, and pertained to a matter which was necessary.

(1/6/19 Order at 2-3, R. pp. 2-3.)

Appellant Geitner did not request reconsideration. This appeal followed when Appellant Geitner served notice of appeal February 21, 2019, of only the order awarding fees, and not the order compelling the discovery and directing the submission of a fee application.

STANDARD OF REVIEW

Respondent Sims agrees the standard of review is abuse of discretion. Notably, however, in this context, “[a]n abuse of discretion [only] occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” *Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439 (2009) (citation and punctuation omitted). “Where an attorney’s services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by *any* competent evidence.” *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (emphasis added in *Blumberg*, quoting *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296 (1989)) (upholding award against adverse party in suit under lease with contractual provision for attorney’s fees); *Baron*, 297 S.C. 382, 384, 377 S.E.2d 296, ___ (no emphasis in original) (upholding award against adverse party in suit under equipment leases with contractual provision for attorney’s fees); *Seabrook Island Prop. Owners Ass’n v. Berger*, 365 S.C. 234, ___, 616 S.E.2d 431, 434 (Ct. App. 2005) (without emphasis, quoting *Baron*) (upholding award against adverse party in suit by property owner’s association under restrictive covenants with contractual provision for attorney’s fees). The trial court will be affirmed “if any competent evidence exists to support the award.” *Williamson v. Middleton*, 374 S.C. 419, ___, 649 S.E.2d 57, 61-62 (Ct. App. 2007) (awarding fees against adverse party in Wage Payment Act claim), *rev’d on other grounds*, 383 S.C. 490, 681 S.E.2d 867 (2009).

ARGUMENT

I. The trial court made specific factual findings in support of the fee award.

In his Appellant's Brief, Appellant Geitner contests only the amount of attorney's fees, and not the decision to award them. The law is clear: when determining the amount of attorney's fees to award, the trial court should make "specific findings of fact" on the record for the following factors: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659 (1993). Here, the trial court did exactly that in Paragraphs 6 and 7 of its January 16, 2019 Order. (1/16/19 Order, R. pp. 2-3.)² Thus, the whole premise of Appellant Geitner's argument – that the trial court did not do so -- is incorrect.

Additionally, "no one of the above factors in itself [is] controlling." *Darden v. Witham*, 263 S.C. 183, 194, 209 S.E.2d 42, 46 (1974). The trial court was simply required to take each of them into consideration. *Darden*, 263 S.C. at 194, 209 S.E.2d at 46; *see also Baron* (agreeing with the trial court's determination that factor #4 (contingency of the compensation) was "not applicable," approving the assignment of varying weight to factor #6 (the amount recovered) and sustaining the trial court's award). The trial court did as it was required to do and should be affirmed.

² The trial court did not hold an additional hearing but where the parties are afforded the opportunity to submit evidence or the record otherwise supports the award, a hearing is not required. *Seabrook Island Prop. Owners Ass'n v. Berger*, 365 S.C. 234, 244, 616 S.E.2d 431 (Ct. App. 2005). Evidence on motions may be received by affidavit, unless the court directs otherwise. Rule 43(e), SCRCP.

Appellant Geitner argues the Order only “summarily referenced the factors”; this argument, however, is hyperbolic characterization. In its Order, the trial court considers each factor and finds that the circumstances pertaining to each factor (including the non-applicability of factor #4) favored the award made to Respondent Sims. Neither South Carolina law, judicial efficiency, nor common sense require trial courts to engage in encyclopedic exposition when making “specific” factual findings. *See Horton v. Jasper Cnty. Sch. Dist.*, 423 S.C. 325, 330-31, 815 S.E.2d 442 (2018) (finding “general statements” about various factors were “adequately ... specific”). Appellant Geitner’s caselaw—all of which involves appeals from trial court orders completely devoid of any factual findings—is not to the contrary.

II. The trial court’s factual findings are supported by sufficient evidence.

Appellant Geitner argues that there is insufficient evidence to support the trial court’s finding with respect to factors #1, 2, and 3. The question, however, is whether there is “any” evidence. *Blumberg; Baron; Seabrook; Williamson*. Here, the evidence is not just sufficient, but plentiful. All of Appellant Geitner’s present arguments were briefed and submitted to the trial court prior to its entry of the Order. (Response Brief, R. pp. 210-214.) The trial court disagreed with those arguments, as evidenced by its entry of contrary findings of fact, and there is evidence in the record that supports those findings. (See, e.g., Reply Brief, R. pp. 303-309.)

Appellant Geitner seeks to have this Court substitute its judgment for that of the trial court—despite the applicable standard of review forbidding such an outcome. The standard of review recognizes that the trial court is vested with discretion to reach a conclusion that another might disagree with. *Darden*, 263 S.C. at 194, 209 S.E.2d at 46 (stating the question is not whether the reviewing court agrees with the court below, and clarifying that the reviewing court is “never justified” in substituting its discretion for that of the trial court); *and see Rice v.*

Multimedia, Inc., 318 S.C. 95, 101-102, 456 S.E.2d 381 (1995) (finding no abuse of discretion where trial court awarded fees in excess of the verdict and in excess of the agreed contingent fee, where the trial court weighed all six factors in determining the appropriate fee).

There is ample evidence in the record to support the trial court's factual findings. With respect to factor #1, the legal services rendered to Respondent Sims were, to the degree observed by the trial court, novel, extensive, and difficult. (Ichter Affidavit, ¶ 6, R. p. 167; Stanton Affidavit, ¶ 6, R. p. 150 and ¶ 8, R. p. 151.) While motions to compel may be routine as a general proposition, the Motion to Compel here involved application of the Interstate Depositions and Discovery Act, a pro hac vice application, extensive research on the specific issue of whether confidentiality agreements can trump compulsory discovery, and out-of-state travel. (See, e.g., Ichter Affidavit, Exhibit B, R. pp. 177-199; Stanton Affidavit, ¶ 8, R. p. 151, and attached time records, R. pp. 153-165.)

Appellant Geitner contends "it cannot be argued that the filing and arguing of the Motion [to Compel] was unique or difficult in nature." But, before the trial court, when opposing the Motion to Compel, Appellant Geitner essentially argued the opposite, noting "no binding legal authority in South Carolina exists on the subject matter." (Response Brief, R. p. 211.) Furthermore, as noted, the Motion to Compel was complicated by the out-of-state nature of the underlying litigation, which required obtaining local counsel, a pro hac vice application, and an analysis of the interplay between the Interstate Depositions and Discovery Act and the South Carolina Rules of Civil Procedure. (See, e.g., Ichter Affidavit, Exhibit B, R. pp. 177-199; Stanton Affidavit, ¶ 8, R. p. 151, and attached time records, R. pp. 153-165.) Finally, due to Appellant Geitner's conduct, Respondent Sims was forced to pay counsel to brief the Motion to Compel, attend and argue a hearing on same, and then conduct a second deposition. (See, e.g.,

Ichter Affidavit, Exhibit B, R. pp. 177-199; Stanton Affidavit, ¶ 8, R. p. 151, and attached time records, R. pp. 153-165.) This work was neither exoteric nor easy.

With respect to factor #2, as evidenced by the detailed billing records,³ Respondent Sims's requested fees are premised on time necessarily incurred to protect her interests despite Appellant Geitner's conduct. (See, e.g., Ichter Affidavit, Exhibit B, R. pp. 177-199; Stanton Affidavit, ¶ 8, R. p. 151, and attached time records, R. pp. 153-165.)

Appellant Geitner argues "the requested fees for work performed by both Mr. Ichter's firm and Mr. Stanton are for unrelated work, unnecessary work, or work not properly to be included in the request." Appellant made this same argument to the trial court. Again, the trial court found otherwise, and additionally noted in paragraph 7 of its Order that possibly not all the time expended had been claimed or submitted.

There is sufficient evidence in the record to support that finding, such as the Affidavits of Messrs. Ichter and Stanton averring that the requested fees were for necessary work. (Ichter Affidavit, ¶¶ 9, 10, and 11, R. p. 168; Stanton Affidavit, ¶¶ 7, 8 and 9, R. pp. 150-152.) In the lengthy time records, there were a limited number of time entries identified by Appellant Geitner as being for work unrelated to the Motion to Compel. In a Reply Brief in the trial court, Respondent Sims withdrew the time related to those items which were indeed unrelated or not worth arguing over.⁴ Yet, the complete record also evidences that Respondent Sims incurred

³ The supporting materials are detailed and extensive. Even where affidavits and records are "somewhat deficient," the trial court's determinations of the time spent and the other factors in the case, when based on the trial court's familiarity with the case and observation of the proceedings and the attorneys, may serve as support for the trial court's proper consideration of the required factors. *See Taylor v. Medenica*, 331 S.C. 575, 503 S.E.2d 458 (1998) (affirming fee award in excess of principal judgment where some attorneys kept no contemporaneous time records, some made estimates, and some submitted no estimates).

⁴ As the party bearing the burden of presenting this Court with an adequate Record for review, Appellant Geitner did not include in his Designation of Matter in this Court, the Reply Brief of

significant time and fees replying to Appellant Geitner's briefing before the trial court---time and fees that Appellant Geitner simply ignores in his initial brief to this Court. (Reply Brief, R. pp. 306-308.) Time responding to Appellant Geitner's objection to the award, was, just like responding to the instant appeal, time necessarily spent.

The trial court, just as this Court, also encourages care and sufficient thoroughness in checking work, complying with the court's rules, making corrections, and making cogent presentations. Despite efforts in these regards, work is not always 100% efficient or error free. Care and thoroughness, which often save time for the court, and often safeguard a better result, are encouraged, but they also take attorney time, which should not be discouraged *per se* or penalized.

With respect to factor #3, Respondent Sims's attorneys are well-recognized and in good standing in the legal community. (Ichter Affidavit, ¶ 2, R. p. 166, and Exhibit A, R. pp. 169-176; Stanton Affidavit, ¶¶ 3 and 4, R. pp. 147-149.) Rather than concede counsel's professional standing, Appellant argues a decade-old, subsequently vacated sanctions award entered against Mr. Ichter in a case in which Appellant's counsel had no involvement. Appellant's Georgia counsel's argument is hardly dispositive of Mr. Ichter's professional reputation, which is based on thirty-five (35) years of continuous practice in the State of Georgia. (Ichter Affidavit, ¶ 2, R. p. 166, and Exhibit A, R. pp. 169-176; Stanton Affidavit, ¶ 4, R. p. 149.)

Again, the trial court weighed the evidence on this factor, and made its factual finding, and there is sufficient evidence to support that finding.

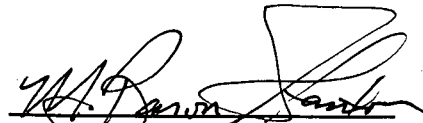
Respondent Sims. The Reply Brief responds to detailed objections to the requested award and details the additional attorney's fees incurred by Respondent Sims in responding to additional briefing by Appellant Geitner in the trial court proceedings. (Reply Brief, R. pp. 305-309.)

No one factor is controlling, *Darden*, and Appellant does not present argument on factors #4, 5, and 6. Nevertheless, the trial court specifically found with respect to factor #4 that, as opposed to a contingent fee arrangement, the fees incurred by Respondent Sims were not contingent, were definite and actually incurred, and would have to be borne by her if not shifted to Appellant Geitner. The evidence of this is undisputed. With respect to factor #5, the trial court also found without dispute that the fees were those customarily charged by counsel in the locality for similar services, and that the fees charged by others in the locality varied according to the nature of the matter and lawyers hired, and the fees in the instant case were within that range. With respect to factor #6, the trial court also found without dispute that the motion was granted in its entirety, and pertained to a matter which was necessary. The result was thus beneficial.


CONCLUSION

Where there is no evidence that the trial court considered the required *Blumberg* factors, ordinarily, the only appellate remedy is a remand for the trial court to consider the factors. *Blumberg*. As demonstrated above, a remand in the instant case will accomplish nothing, because, contrary to Appellant's whole premise, the trial court did consider all the factors. A remand would delay the matter even further than the instant appeal. A remand would likely also add to Respondent Sims's total fee-recovery for the additional time spent in the proceedings on remand, to Appellant's detriment. As further demonstrated above, there is ample evidence in the Record to support the findings of the trial court, regardless of whether Appellant Geitner agrees with them. The Court should therefore affirm, with costs.

Dated: August 22, 2019.


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