IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GARY STAFFIERI and ADRIA CHARLES STAFFIERI, husband and wife,	)	
Plaintiffs,	)	
v.	)	C.A. No. 7439-VCL
HENRY BLACK and MARYLOU BLACK, husband and wife, RAYMOND BUCHTA, W. SCOTT BLACK, and BLACKBALL PROPERTIES, LLC,	)	
Defendants.	)	

FINAL ORDER AND JUDGMENT

WHEREAS on October 24, 2012, the Court issued a Post-Trial Order which, among other things, awarded attorneys' fees and costs to plaintiffs and contemplated entry of a final order and judgment establishing the amount of the award;

WHEREAS on December 5, 2012, defendants noticed an appeal;

WHEREAS on December 21 and 26, 2012, and January 25, 2013, plaintiffs filed affidavits in support of their fee application;

WHEREAS on January 31, 2013, this Court issued a Final Order and Judgment (the "January 31 Order") which determined that the amount sought by plaintiffs was reasonable and ruled that defendants had waived any objections by failing to respond, but noted that defendants' seemingly improper interlocutory appeal raised a jurisdictional issue as to the Court's ability to enter the January 31 Order;

WHEREAS on February 18, 2013, after defendants moved for reargument, the Court vacated the January 31 Order to allow the parties to present the jurisdictional issue to the Delaware Supreme Court;

WHEREAS on March 13, 2013, the Delaware Supreme Court dismissed defendants' appeal as improperly seeking interlocutory review without complying with the requirements of Rule 42;

WHEREAS on April 1, 2013, plaintiffs renewed their fee award application and filed supplemental affidavits in support of an award;

NOW THEREFORE, this 8th day of August, 2013, the Court finds and orders as follows:

1. The Post-Trial Order awarded attorneys' fees and costs to plaintiffs under the bad faith exception to the American Rule. *See* Post-Trial Order ¶ 16; *H&H Brand Farms, Inc. v. Simpler*, C.A. No. 1658 (Del. Ch. June 10, 1994); *see also Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997) (noting fee shifting may be appropriate where pre-litigation conduct "justif[ies] an award . . . as an element of damages.").

2. In making this ruling, the Court specifically cited and relied on defendants' resort to self-help at a time when they knew that the rights they claimed were contested. The Court also took into account defendants' conduct as a whole, which can best be summarized as a campaign to use their superior financial and technological resources to bully, intimidate, and wear down plaintiffs without regard to plaintiffs' legal rights.

3. The evidence at trial established that defendants began monitoring and photographing their neighbors from the vantage of their property at 1709 Concord Pike at least as early as 2001. *See* JX 55; Tr. 197-98 (picture taken in 2000 or 2001).

4. In May 2011, plaintiffs began renovating the structure at 1707 Concord Pike to accommodate their planned auto detailing business. This required replacing the building's front wall with a garage door. As soon as construction began, defendants began making frequent complaints to the New Castle County Department of Land Use (the "Department of Land Use") both by letter and in-person. *See* JX 21E ("We have made no less than 15 trips [to the Department of Land Use] to keep them updated."); JX 21 A-C (letters to the Department of Land Use complaining about change of use standards and the parking situation); JX 21E ("We have hundreds of photos, documentation and emails to the county . . . ."). Defendants regularly referred to what they believed to be the limited availability of parking at 1707 Concord Pike. *See* JX 21A ("Realistically there are only 2 parking places at this location . . . ."). The Department of Land Use did not grant defendants the relief they sought or give defendants any indication that it supported their legal conclusions regarding the parking situation.

5. Displeased with their perceived lack of influence, defendants purchased the property at 1703 Concord Pike for the purpose of exerting additional pressure on plaintiffs. *See* JX 21D ("[D]ue to the continuing degradation of our property brought on by the four businesses situated next to us, we . . . purchased the real estate located at 1703 Concord Pike"). With a new platform from which to assert legal positions, defendants informed Jim Smith, an Assistant General Manager in the Department of Land Use, that

they believed that the "drive and rear parking area was reserved exclusively for use by the properties at 1701 to 1705 Concord Pike." *Id.* To make their position clear, defendants painted the areas with yellow lines. They also installed a fence between the rear of 1707 and the rear parking area to curb what they claimed were "illegal activities" targeting 1709. *Id.* The fence, located along the common driveway between 1705 and 1707, blocked the rear of the building at 1707.

6. On October 4, 2011, Smith responded by letter and informed defendants that his office had determined that "automotive detailing [was] a permissible commercial reuse of 1707 Concord Pike." JX 22A at 3. Smith described a plan to install inline parking spots in front of 1707 "and potentially an additional employee parking space behind the building." *Id.* at 2. The parking spot that Smith identified behind 1707 required use of the common driveway to reach the area behind 1707. Access to the space also required removal of the fence that defendants had installed. Smith's plan was directly contrary to defendants' positions regarding their claimed legal rights.

7. Smith's response did not sit well with defendants. As part of their efforts to influence the County, defendants had started broadcasting email updates to a wide range of individuals and public officials whom defendants apparently believed might support them. Two days later, Henry Black described the situation with the County in an email update and noted that the relationship between defendants and New Castle County employees had become strained. He recounted that after their last in-person visit, defendants "were told to leave the premises and never come back." JX 21E. This should

have been an additional indication to defendants that the County did not agree with or support their positions.

8. Rather than seeking relief from a court empowered to resolve the dispute, defendants resorted to self-help. They unilaterally installed cement wheel stops that blocked the 1707 property from the common driveway between 1705 and 1707. Defendants owned lots 1703 and 1709, yet they placed the wheel stops on the property at 1705 and along the 1705-1707 border. *Defendants did not own 1705, the property on which they placed the wheel stops.* Paul and Candy Miller, the owners of 1705, "did not place [the wheel stops] there" and "had no part in or awareness of their placement." Dkt. 96.

9. Concurrently, defendants continued to circulate emails with updates about the parking situation at 1707. Henry Black noted in an October 21, 2011 email to Smith and others that his complaints had been to no avail because the Department of Land Use had granted a change of use permit for the 1707 property that would be effective through April 2012. *See* JX 22B at 3. The granting of the change of use permit confirmed the obvious: the Department of Land Use did not support the defendants' positions. JX 22A. Smith responded to Black's email and provided further confirmation, stating: "you created a very dangerous situation by erecting a wheel stop border at the edge of the common driveway (which, by the way, you can expect to receive a violation notice to remove immediately)." JX 22B.

10. During this litigation, defendants continued to keep the 1707 property under video surveillance 24 hours a day, 7 days a week. They also would rush out to

photograph visitors to the property, including plaintiffs' counsel during a site visit. Tr. 466-68. Defendants launched a website, "wherewilltheypark.com," devoted to detailing defendants' perspective on the parking problems at the Triplex and 1707. Defendants posted to their website pictures and videos of plaintiffs obtained through defendants' surveillance of plaintiffs' property.

11. Defendants have the right to exercise their First Amendment freedom of speech and express their views of the parking situation, the County, and this Court, and the Court does not view the website or the communications as evidence of bad faith. The website and the 24/7 surveillance does, however, show the greater technological resources that the defendants possess.

12. On the facts of this case, defendants' actions as a whole have been intimidating and aggressive and evidence an intent to bully and wear down plaintiffs without regard to plaintiffs' legal rights. The centerpiece of defendants' bad faith was their decision to install a fence and wheel stops on property that they did not own, at a time when it was clear from their extensive interactions with the County that the Department of Land Use did not endorse their legal position. The wheel stops remained in place through trial, in spite of Smith's admonition that they created a dangerous situation, demonstrating defendants' disregard for the safety and rights of others.

13. Under these circumstances, as this Court previously held, defendants' installation of the fence and wheel stops without regard for plaintiffs' rights, other property owners' rights, or the safety of visitors to 1707 warranted the shifting of fees as

an element of damages. *See Arbitrium*, 705 A.2d at 231; *H&H Brand Farms, Inc. v. Simpler*, C.A. No. 1658 (Del. Ch. June 10, 1994).

14. Once a court determines that fee shifting is appropriate, it must determine "whether the fees requested are reasonable." *Mahani v. Edix Media Gp., Inc.*, 935 A.2d 242, 245 (Del. 2007). The Court has broad discretion in determining the amount of fees and expenses to award. *See Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005).

15. The Delaware Supreme Court has instructed trial courts to look to the eight-factor test set forth in the Delaware Lawyers' Rules of Professional Conduct Rule 1.5(a) when assessing reasonableness. *See* Del. Lawyers' Rules of Prof'l Conduct R. 1.5(a); *see also Mahani*, 935 A.2d at 245-46. Depending on the type of fee application at issue, the factors are given different weight. When a party "confer[s] a corporate benefit or creat[es] a common fund, our law emphasizes the results obtained." *Aveta Inc. v. Bengoa*, 2010 WL 3221823, at *6 (Del. Ch. Aug. 13, 2010) (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 140, 149 (Del. 1980)). "[W]hen a party seeks to recover under a contractual fee-shifting provision, the results are secondary." *Id.* "Absent any qualifying language that fees are to be awarded claim-by-claim or on some other partial basis, a contractual provision entitling the prevailing party to fees will usually be applied in an all-or-nothing manner." *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *8 (Del. Ch. Feb. 23, 2009). Courts focus principally on enforcing the parties' agreement with the aim of making the prevailing party whole. *Id.* When fees are shifted as the result of a bad faith finding, the analysis more closely resembles contractual fee-shifting in that the Court "takes into account the remedial nature of the

award." *Aveta*, 2010 WL 3221823, at *6. Such an award is designed to make whole the party who was injured by the other side's bad faith acts. "The remedial nature [of] the award commends putting primary emphasis on reimbursing the injured party. The results achieved are of secondary importance." *Aveta*, 2010 WL 3221823, at *6; *accord In re SS & C Techs., Inc. S'holders Litig.*, 2008 WL 3271242, at *3 n.14 (Del. Ch. Aug. 8, 2008) (noting that because fees were awarded as a sanction, the Court did not focus narrowly on the Rule 1.5(a) factors); *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 1998 WL 155550, at *3 (Del. Ch. Mar. 30, 1998) (taking into account that fees were shifted because of bad faith litigation tactics when evaluating award).

16. Plaintiffs seek fees and expenses of $184,320.47. The proposed figure is supported by affidavits filed on December 21 and 26, 2012 and supplemental affidavits filed on January 25, 2013 and April 1. *See* Dkt. 115, 117, 118, 131.

17. In the circumstances of this case, a fee request of approximately $185,000 is facially reasonable. This Court previously held that the fee request was "reasonable under the factors set forth by the Delaware Supreme Court in [*Mahani*]." Dkt. 120. This Court vacated that ruling on reconsideration because of the procedural confusion created by defendants' premature appeal. It remains true, as the Court previously held, that the requested award is reasonable.

18. This matter was litigated for over a year and culminated in a two-day trial. Plaintiffs' principal lawyer charged $300 per hour, and their Delaware lawyer charged a reduced $250 per hour rate. If plaintiffs had the financial resources (which they did not), they reasonably could have hired counsel from a large firm or litigation boutique who

would have charged far higher but still reasonable hourly rates. Plaintiffs' counsel also approached the litigation in a targeted manner. They did not seek expansive, overly burdensome discovery. They did not take a single deposition. They did not belabor issues unnecessarily at trial. If plaintiffs had the financial resources, other lawyers might have litigated the case more intensively (but still reasonably). Viewed *in toto*, the request is moderate.

19. A further validation for the amount of the request is the fact that at the time the fees and expenses were incurred, plaintiffs had no guarantee of obtaining a fee-shifting award. A party that must assume it will pay its own fees and expenses has every incentive to monitor counsel's work to ensure that it is reasonable. *See Aveta*, 2010 WL 3221823, at *6 ("A further indication of reasonableness is the reality that when Aveta filed its motion to enforce and paid the expenses it now seeks to recover, Aveta did not know that it would be able to shift those expenses to Bengoa."); *Arbitrium*, 1998 WL 155550, at *2 (considering that client had retained counsel on non-contingent basis and faced prospect of bearing full cost of litigation effort); *see also First Fed. Sav. & Loan Ass'n v. U.S.*, 88 Fed. Cl. 572, 585 (2009) (holding that plaintiff "had every incentive to exercise control over the work of its counsel and to monitor closely the cost of the litigation" given the "lack of any assurance" that it would prevail); *Fla. Rock Indus., Inc. v. U.S.*, 9 Cl. Ct. 285, 289 (1985) ("the risk of abuse is minimal because plaintiff has no assurance of recovering and must assume it will bear the full cost of the litigation").

20. Defendants proffer a number of specific objections to the fee request. First, they argue that the Complaint "did not plead a Count claiming attorneys['] fees under the

Bad Faith Exception . . . ." Dkt. 139 (emphasis omitted). To the contrary, both the original and amended complaints sought "an order [for defendants] to pay [p]laintiffs' costs (including attorneys' fees)." Dkt. 1 at 11-16; Dkt. 47 at 13-18. In the Amended Joint Pre-Trial Stipulation, *defendants themselves* identified the issue of an attorneys' fees award as one remaining to be litigated. *See* Dkt. 95 ("18. Whether Plaintiffs are entitled to attorneys[']fees under one species of the Bad Faith Exception to the American Rule?"). Defendants had ample notice of plaintiffs' fee request. *See Cent. Mortg. Co. v. Morgan Stanley Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011) (finding pleading sufficient if allegations put opposing party on notice of the claim).

21. Second, defendants identify a number of plaintiffs' filings that they claim were unsuccessful and argue that the fee award should be reduced proportionately. The filings include (i) an initial request for expedited proceedings and injunctive relief, (ii) an amended complaint, and (iii) a partial summary judgment brief. As discussed above, when shifting fees under the bad faith exception to the American Rule, the primary goal is to compensate the party receiving the award; less emphasis is placed on the results obtained. Equally important, when awarding fees, this Court does not pour over counsel's individual litigation decisions with the benefit of hindsight. *See Arbitrium,* 1998 WL 155550, at *4. Doing so would permit the "hazardous" exercise of "second-guess[ing], on a hindsight basis, an attorney's judgment." *Id.* The party seeking fees must only show that the "services . . . rendered [were] thought prudent and appropriate in the good faith professional judgment of competent counsel." *Danenberg v. Fitracks, Inc.*, 58 A.3d 991, 997 (Del. Ch. 2012) (quoting *Delphi Easter P'rs Ltd. P'ship v.*

Spectacular P'rs, Inc., 1993 WL 328079, at *9 (Del. Ch. Aug. 6, 1993)) (internal quotation marks omitted).

22. None of these contested decisions are so clearly outside the bounds of the reasoned judgment of counsel to disallow recovery. The Court largely granted plaintiffs' request for expedited proceedings by scheduling a prompt trial. The Court denied injunctive relief because defendants had already installed the concrete wheel stops and affirmative relief would be required to remove them. Although that type of relief can be obtained on a preliminary basis, it generally is ordered only after a trial—hence the scheduling of an expedited trial. Far from being unjustified, the initial motions and scheduling conference advanced the case. The amended complaint properly framed the issues that plaintiffs sought to litigate. Plaintiffs' filing of a summary judgment motion comported with their desire to litigate the case in an efficient and targeted manner. Indeed, the Court informed counsel that it "would be willing to entertain a summary judgment motion." Pls.' Reply Br. Ex. F. at 12.

23. Third, defendants cite two issues relating to plaintiffs' choice of counsel. They contend that having Sharon Cherry, a Pennsylvania attorney, "bear the laboring oar" in the litigation was inappropriate and wasteful. Dkt. 139. This argument is wholly unconvincing. Out-of-state lawyers frequently appear in this Court via the *pro hac vice* process. Cherry adhered to this Court's Rules and abided by the professional and ethical standards expected of Delaware counsel. A litigation combination comprising forwarding counsel and Delaware counsel is both customary and generally reasonable. Although it could result in some duplication of effort, there is no evidence in this case of

excessive, inappropriate, or wasteful time or expenses. *See Weichert Co. of Pa. v. Young*, 2008 WL 1914309, at *3 (May 1, 2008) (rejecting objection to use of forwarding counsel and Delaware counsel).

24. Defendants also contend that by replacing their Delaware counsel shortly after the initial scheduling conference, plaintiffs necessarily incurred duplicative fees. In the abstract, that is a fair objection, and the Court has reviewed the application carefully for evidence of duplication. The submissions do reflect that Wolcott billed 2.9 hours of the 8.4 hours he devoted to "get up to speed" (to use a colloquialism) and file the motion for substitution of counsel. *See* Dkt. 117. These hours will not be shifted to defendants. *See Aveta*, 2010 WL 3221823, at *7. Otherwise, there is no reason to disallow the time and expenses incurred by predecessor counsel. Prior counsel's work formed part of plaintiffs' litigation strategy. Had Wolcott been in the case from the outset, he would have prepared similar papers and participated in the scheduling conference. For similar reasons, the Court will not force defendants to pay for the fees related to the February 28, 2013 motion to withdraw. *See* Dkt. 127. Arguably the Court could award fees for the motion: defendants' bad faith necessitated litigation that eventually exhausted plaintiffs' resources, plaintiffs could no longer pay their attorneys, and Wolcott and Cherry were forced to seek to withdraw as a result. But because the motion related to substitution of counsel and was later withdrawn, the award will not include fees for this issue.

25. Fourth, defendants question three other categories of fees: the fees Cherry incurred before filing the complaint, her fees relating to the aborted appeal, and Wolcott's fees for attending trial. The initial "non-litigation" fees involved negotiating with

defendants' counsel and communicating with New Castle County about the issues that defendants created at the property. For the most part, they resulted directly from defendants' tactics, including the resort to self-help. Both the dispute and defendants' bad faith conduct pre-dated the actual filing of the litigation. By seeking to resolve the matter before filing suit, plaintiffs acted responsibly. After defendants refused to compromise, plaintiffs were forced to sue. With one exception, Cherry's pre-litigation fees are reasonable and properly awarded "as an element of [the] damages" that the equitable determination to shift fees seeks to remedy. *Arbitrium*, 705 A.2d at 230. The exception relates to the fees Cherry incurred seeking a change of use permit for the 1707 property, which would have been required regardless of the litigation. Here too, the Court could conceivably award fees because it was the defendants' actions and positions that made Cherry's involvement necessary. Nevertheless, the Court will not award plaintiffs this aspect of Cherry's fees.

26. Defendants also question the propriety of Cherry billing hours associated with the Delaware Supreme Court appeal, claiming that she acted unethically. Cherry was not admitted *pro hac vice* before the Delaware Supreme Court, but she billed $6,690 associated with the appeal. Cherry has represented to this Court that she "anticipated that she would be admitted pro hac vice." Dkt. 144 at 14. Pursuant to Delaware Lawyers' Rules of Professional Conduct Rule 5.5(c), she could assist with the appeal under those circumstances. Excluding a fifteen minute bill from March 7, 2013 for two telephone calls with Wolcott, Cherry did not incur any fees associated with the appeal after February 18, 2013, approximately three weeks before plaintiffs filed their answering

appellate brief *pro se*. This is consistent with Cherry ceasing to render legal advice as soon as it became apparent that plaintiffs no longer could afford counsel, that Cherry would not be seeking admission *pro hac vice*, and that plaintiffs would be forced to proceed *pro se*. The Court has no reason to believe that Cherry acted unethically, and she incurred fees only because defendants improperly noticed an interlocutory appeal. Those fees are awarded as part of the bad faith sanction.

27. Defendants' most extreme argument is that "fees charged by Wolcott to attend the trial should be denied . . . . [Cherry] . . . was admitted *pro hac vice*, thereby rendering [Wolcott]'s presence . . . surplusage." Dkt. 144 at 15. Under Court of Chancery Rule 170(d), "Delaware counsel . . . *shall* attend all proceedings before the Court . . . unless excused by the Court." Ct. Ch. R. 170(d) (emphasis added). Unless excused, a Delaware lawyer who moves the admission of an out-of-state lawyer is required by rule to attend all court proceedings. The Court did not excuse Wolcott and would not have done so. The Court vastly prefers to have Delaware counsel attend trial. This is particularly true for an attorney like Wolcott who is known to the Court and familiar with Chancery procedures, because the presence of such an attorney frequently streamlines the trial process. Wolcott's fees for attending trial are properly part of the award.

28. With respect to expenses, defendants analogize plaintiffs' application to an award of costs to a prevailing party under Rule 54 and 10 *Del. C.* § 8906, then and claim that only those costs "directly related to interaction with the Court" are awardable. Dkt. 139 at 10. But this is an award of fees and expenses pursuant to the bad faith exception

to the American Rule. When such an award is granted, it typically includes reasonable litigation expenses. *See Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 507 (Del. 2005) (affirming award of fees and expenses under bad faith exception); *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546-47 (Del. 1998) (same); *Soterion Corp. v. Soteria Mezzanine Corp.*, 2013 WL 869353, at *1 (Del. Ch. Mar. 7, 2013) ("The Court, relying upon the bad faith exception to the American Rule, ordered the Plaintiffs to pay the Defendants their attorneys' fees and expenses . . . ."); *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *4 (Del. Ch. May 11, 2001) ("I find that these faithless defendants have acted in 'bad faith' and that an award of attorneys' fees and expenses would be appropriate under the bad faith exception to the American Rule."). The more limited interpretation of "costs" under Rule 54 and the cost statute does not apply to the equitable shifting of fees and expenses. *See Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, — A.3d —, —, 2013 WL 1914714, at *12 (Del. May 9, 2013) (overruling decisions that "improperly conflate the Court of Chancery's inherent equitable power to award fees in a proper case with the statutory authority to award costs where the equities dictate under 10 *Del. C.* § 5106"). Plaintiffs' affidavits identify reasonable expenses, including standard items like photocopying, legal research, expert fees, and court costs. None of these figures appear unreasonably high in the context of this litigation. They are shifted to defendants.

29. Plaintiffs' total request of $184,320.47 is reduced by $1,175 to exclude Wolcott's fees for time spent becoming familiar with the litigation and on the motion to

withdraw and by $6,475 to exclude Cherry's fees relating to the change of use permit. Plaintiffs are awarded fees and expenses of $176,670.47.

30. This Final Order and Judgment incorporates the rulings made and the relief granted in the Post-Trial Order. In addition, for the reasons set forth herein, judgment is entered in favor of plaintiffs and against defendants Henry Black, Marylou Black, Raymond Buchta, W. Scott Black, and Blackball Properties, LLC, jointly and severally, in the amount of $176,670.47.

31. This Final Order and Judgment may be entered by the Office of the Prothonotary of New Castle County in the same manner and form and in the same books and indexes as judgments are entered in the Superior Court, as provided in 10 *Del. C.* § 4734.

Vice Chancellor J. Travis Laster