MINNESOTA STATE LAW LIBRARY

NO. A10-875

State of Minnesota

In Court of Appeals

St. Michael Mall, Inc.,

Appellant,

v.

Michael Elsenpeter d/b/a A & M Liquor Store,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION TO APPEAL

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

I. Did the District Court abuse its discretion in determining that the Respondent was the prevailing party in the District Court action to compel arbitration under the Lease between Appellant and Respondent?

The Trial Court ordered arbitration under the Lease and ruled that Respondent was the prevailing party in the District Court action.

II. Did the District Court abuse its discretion in determining that the Respondent was entitled to attorney's fees under the Lease Agreement as the prevailing party in the District Court action?

The Trial Court ruled that as the prevailing party in the District Court action, Respondent was entitled to his attorney's fees and costs under the terms of the Lease.

III. Was the District Court clearly erroneous in granting the Respondent's request for attorney's fees?

The Trial Court ruled that Respondent's request for attorney's fees and costs in the amount of $27,167.30 was reasonable and appropriate.

STATEMENT OF THE FACTS

This matter arises out of a demand for arbitration made by Respondent Michael Elsenpeter under his Lease with Appellant St. Michael Mall, Inc. (Appellant's App. p.1) Appellant corporation was formed in 1998 and its sole purpose is to own and operate a strip mall (hereinafter the "Property") in St. Michael, Minnesota. (See, District Court Record, Elsenpeter Memorandum in Support of Motion for Attorney's Fees, Aff. of Michael Elsenpeter). Respondent and his wife are both tenants of the Property and shareholders in Appellant corporation. (Id.) There are twelve (12) shareholders in Appellant including the Elsenpeters and all of the shareholders are also tenants of the Property. (Id.) Pursuant to the Lease, Respondent Elsenpeter is paying $7.50 per square foot for 3,620 square feet of the property. (Appellant's App. p. 1) The Lease provides for arbitration of disputes arising under the Lease in Section 3.05. In addition, the XXX Lease Addendum in Section 9 provides:

> 9. ATTORNEYS FEES. In the event either party hereto institutes legal action or proceedings arising out of or in any way connected with this Lease, the non-prevailing party shall reimburse the prevailing party for all reasonable attorney fees and costs incurred in connection therewith.

(Appellant's App. p. 22)

In 2007, Elsenpeter caused an audit of the property to be taken to determine whether he was in possession of the space called for under the Lease. (Elsenpeter Aff.) Pursuant to the audit, Elsenpeter discovered that he was only in possession of 3,221 square

feet, 399 less than called for under the Lease. (Id.) Respondent made several efforts to have the issue of space allocation addressed by the corporation and/or the shareholders but received no response. (Id.) Pursuant to the Lease, Respondent then made repeated requests to Appellant to arbitrate the issue of his space allocation. The requests to arbitrate the issue were ignored by Appellant. (Id.) On August 2, 2007, this suit was served to compel arbitration of the dispute under the Lease and appointment of an arbitrator by the Court. (Respondent's App. p. 1) After several months' delay, a response to the Complaint was served by Appellant on November 30, 2007. (Respondent's App. p. 8) In its response, Appellant denied that it was obligated to submit the dispute to arbitration and further asserted a Counterclaim claiming waste of corporate assets and seeking to compel a forced buy-out of Respondent's shares in the corporation pursuant to Minn. Stat. §302A.751 subd. 4 (2009). (Id.)

In May 2008, the parties brought cross-motions for summary judgment. On August 6, 2008, Judge Halsey granted Respondent's motion compelling Appellant to submit the Lease dispute to binding arbitration reserving the issue of attorney's fees for trial. (Appellant's Add., p. 25) In December 2009, Appellant voluntarily dismissed its Counterclaim, leaving open only the issue of attorney's fees. (Respondent's App. p. 16, T. 2-9) The parties agreed to submit to the issue of fees to the Court on briefs in lieu of a hearing. (T. 12-14) On March 19, 2010, Judge Mossey of the District Court held that Respondent was the prevailing party and awarded Respondent $27,167.30 in fees and

costs. (Appellant's Add. p. 31)

The District Court, pursuant to the terms of the Lease, awarded Respondent his attorney's fees and costs as the prevailing party in the district court action. Appellant has appealed claiming it is the prevailing party and that it should have been awarded its fees and costs. Respondent maintains that the District Court did not abuse its discretion in determining that Respondent was the prevailing party and that the Lease called for Respondent to receive his attorney's fees and costs, and that the record supports the Court's conclusion that the fees and costs requested were reasonable and appropriate.

ARGUMENT

I. THE RESPONDENT WAS THE PREVAILING PARTY IN THE UNDERLYING LITIGATION.

The first issue for this Court to determine is whether the District Court abused its discretion in determining that Respondent was the prevailing party in the underlying litigation. "[T]he prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered." Borchert v. Maloney, 581 N.W.2d 838, 840 (Minn. 1998). When determining which party, if any, is prevailing, courts should consider "the general result" and make an "inquiry as to who has, in the view of the law, succeeded in the action." Id. The District Court's determination of which party is the prevailing party will only be reversed if the trial court has abused its discretion. Benigni v. County of St. Louis, 585 N.W.2d 51, 54 (Minn. 1998). An abuse of discretion occurs

when the trial court has acted willfully, arbitrarily, capriciously, or contrary to well-established legal usage. Bryant v. Bryant, 264 Minn. 509, 119 N.W.2d 714, 716 (1963). The Appellate Court will not interfere with the District Court's exercise of discretion unless the discretion is clearly abused or exercised in an arbitrary and capricious manner. In re R L K's Welfare, 269 N.W.2d 367 (Minn. 1978).

Respondent Elsenpeter brought this action as a tenant of Appellant St. Michael Mall seeking arbitration on an issue of the amount of space that was allocated under the Lease. Appellant's response to Respondent's effort to compel arbitration was to deny its obligation to arbitrate and to dramatically expand the litigation by counterclaiming and asserting shareholder claims under Minn. Stat. §302A.751 (2009) despite the fact no shareholders were a party to the action. The District Court decision that granted Respondent's motion to compel arbitration and Appellant's decision to voluntarily dismiss all of its claims clearly supports the District Court's determination that Respondent was the prevailing party.

A. The District Court awarded the relief requested by Respondent in its Complaint.

A simple review of the Complaint in this matter makes it evident that the District Court decision provides exactly the relief requested in Respondent's Complaint. The Complaint in this case was limited to the issue of whether arbitration of the space allocation issue was required under the Lease. The primary relief requested was "An

Order to select an arbitrator for Defendant [St. Michael Mall] and compelling Defendant to arbitrate the above dispute in a timely and expedition manner." Appellant, in its Answer and Counterclaim, denied that it had a duty to arbitrate and sought dismissal of the Complaint. (Respondent's App. p. 8) In response to Respondent's motion for summary judgment, the Honorable Judge Stephen Halsey of the District Court granted Respondent's motion as it related to the issue of arbitration stating:

> That Plaintiff's motion to compel arbitration is GRANTED and each party shall comply with paragraph 3.05 of the Lease, incorporated herein by reference . . . If either party fails to designate an arbitrator within ten (10) days following their designation, said selection shall be made by the undersigned judge.

(Appellant's Add. p. 30) There is simply no legitimate basis for Appellant to dispute that Elsenpeter was the prevailing party on the issue of whether arbitration should be compelled.

B. The Appellant dismissed all of its claims when faced with trial and received none of the relief it requested in its Counterclaim.

In addition, Appellant has no basis for claiming that it is the prevailing party on any issue in the lawsuit since it voluntarily dismissed all of its claims when faced with a pending trial in this matter. In its Counterclaim, Appellant brought claims for Count I - Waste and Misapplication of Corporate Assets, Count II - Buy-out of Plaintiff's Shares on Motion and Count III - Award of Attorney's Fees and Disbursements. In its Counterclaim, Appellant requested relief including the following:

3. Finding that equitable relief is just and necessary under the circumstances.

4. Finding that it would be fair and equitable to all parties under the circumstances of the case for all of Plaintiff's shares in SMM be sold to the corporation.
5. Directing that Plaintiff's shares in SSM to be sold to the Corporation.

(Respondent's App. p. 10-11) Appellant brought a motion for summary judgment on its requested relief which was denied in its entirety by Judge Halsey. Subsequently, at the final pretrial conference, Appellant dismissed all of its claims with no relief provided by the Court and no consideration provided by Respondent. Given that Appellant received none of the relief requested in the underlying lawsuit, it cannot credibly contend it was the prevailing party in the action.

C. Appellant did not timely or properly appeal the decision of the District Court requiring arbitration of the dispute and cannot now challenge that decision.

Appellant commits a substantial part of its brief attacking the decision of the District Court in ordering arbitration. This issue is not, however, properly before this Court. Appellant did not identify the order compelling arbitration as an issue in its Notice of Appeal. In addition, the issue is now moot since the arbitration has been completed. The proper procedure for Appellant to have followed to challenge that decision would have been to file an appeal pursuant to Minn. R. App. P. 103.03(e) or (i) (2010). By failing to appeal the requirement that it arbitrate and by submitting the dispute to arbitration, Appellant effectively waived any challenge to the relief that Respondent sought and was granted by the District Court.

Moreover, as the District Court correctly noted, if there was an issue of arbitrability, it should have been properly placed before the arbitrator as part of the arbitration proceedings. Judge Halsey noted:

> The second argument that the Lease does not specify the issues that can be arbitrated and, therefore, the Plaintiff cannot enforce the arbitration clause is also without merit. As drafter of the Lease, any ambiguity is construed against Plaintiff. Further, under *Zelle*, the arbitration provision may be in general terms and under *Heyer*, if it is debatable whether the issue is subject to arbitration, the court should still order arbitration.

Appellant's Add. pp. 27-28. Appellant, however, did not raise the issue of arbitrability before the arbitrator and the arbitrator made no ruling on that issue. As a result, it cannot now be raised again upon appeal. Appellant consented to and proceeded with the arbitration without either seeking appeal pursuant to Rule 103.03 or review of the issue before the arbitrator. It, therefore, waived that issue and cannot now properly raise it upon appeal.

D. The District Court correctly concluded the dispute should be submitted to arbitration.

Even assuming that Appellant could have properly raised the issue of the merits of the Court's decision to require arbitration, the decision of the District Court to do so was correct. It is the public policy of Minnesota, as embodied in the adoption of the Uniform Arbitration Act, Minn. Stat. §572.08 et seq. (2009), to encourage the use of arbitration in commercial disputes. AFSCME Dist. Council 96 v. Ind. Sch. Dist. 381, Two Harbors, 351 N.W.2d (Minn. App. 1984). The mandate of Minn. Stat. §572.09(a) (2009) is clear that

if an agreement contains an arbitration provision the district court is required to order arbitration. It states:

> (a) On application of a party showing an agreement described in section 572.08, and the opposing party's refusal to arbitrate, the court **shall** order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied. (Emphasis added)

The only prerequisite for a court to order arbitration is existence of an agreement containing an arbitration provision. Appellant has made no argument that the Lease Agreement was not a valid and enforceable agreement.

Moreover, Minn. Stat. §572.09 (e) (2009) provides "[a]n order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown." Appellant spends considerable time in its brief arguing the merits of Respondent's claim and/or the proper construction of the Lease and arbitration provision. None of those arguments are relevant considerations in a Court's determination to order arbitration. Id. The record is clear that the District Court properly followed the mandate of §572.09(a) (2009) and ordered arbitration of this matter.

E. The results of the arbitration have no bearing on who was the prevailing party in the underlying litigation.

Finally, Appellant is attempting to confuse the issue of who prevailed in the litigation from which this matter has been appealed by attempting to have the Court

focus on the result of the arbitration rather than the results of the litigation. The arbitration, however, is not the matter that is on appeal. The underlying litigation in this matter was about the issue of whether arbitration was necessary, not on the merits of the dispute to be arbitrated. Moreover, the issues actually raised by Appellant in the underlying action were all shareholder issues which Appellant voluntarily dismissed. There is nothing in the underlying litigation which dealt with the merits of dispute. Significantly, had Appellant simply agreed to arbitration as it was ultimately required to do by the District Court, this entire litigation would have been avoided. The fees awarded by the District Court relate entirely to the question of whether arbitration should be compelled, and the Respondent was the prevailing party on the issue decided by the Court.

There is no jurisdictional basis for the Court of Appeals to consider the results of the arbitration. See, e.g., Minn. Stat. §572.19 et seq. (2009). Appellant's arguments that it should have been entitled to additional fees as a result of prevailing in the arbitration could only be raised in the arbitration itself. In fact, the arbitrator ruled on that issue and Appellant cannot now raise for review the amount of the arbitrator's attorney's fee award.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING RESPONDENT ATTORNEY'S FEES.

The standard for review of an award of attorney's fees is reasonable is also based

upon whether the District Court abused its discretion. An appellate court will not reverse a district court's award of attorney's fees absent an abuse of discretion. Becker v. Alloy Hardfacing & Eng'g Co., 401 N.W.2d 655, 661 (Minn. 1987) In order to show an abuse of discretion, the record must be reviewed in the light most favorable to the Respondent and the Trial Court's decision will only be reversed on a showing that the District Court acted arbitrarily, capriciously or contrary to well-established legal usage. Bryant v. Bryant, 264 Minn. 509, 119 N.W.2d 714, 716 (1963).

A. The District Court properly concluded that Respondent was entitled to attorney's fees under the Lease.

The claim for attorney's fees in this matter arises pursuant to a contract between the parties. The prevailing party in litigation is entitled to recover attorney's fees and costs if there is a contract between the parties authorizing such an award. Barr/Nelson, Inc. v. Tonto's, Inc., 336 N.W.2d 46, 53 (Minn. 1983). The governing real estate lease has a provision that makes an award of attorney's fees mandatory to the prevailing party. The Lease provides in its Addendum:

> In the event either party hereto institutes legal action or proceedings arising out of or in any way connected with this Lease, the non-prevailing party **shall** reimburse the prevailing party for all reasonable attorney fees and costs incurred in connection therewith. (emphasis added)

Appellant's App. p. 22. In its Complaint, Respondent properly pled a claim for attorney's fees by requesting its fees and costs both in paragraph 8 of the Complaint and in its Prayer for Relief. Respondent's App. p.2-3. Contrary to Appellant's assertions,

Respondent did not limit his claim to any specific section of the Lease stating only that he "seeks its [sic] court costs and attorney's fees as provided in the Lease Agreement." (Id.) Given the mandatory requirement of the Lease that the prevailing party be reimbursed for its fees and costs, the District Court properly awarded Respondent his attorney's fees.

B. The District Court properly concluded that Respondent's attorney's fees were reasonable and appropriate.

The reasonable value of an attorney's services has generally been characterized as a question of fact, and a [district] court's findings on that issue should therefore be upheld unless clearly erroneous. See, Ryan v. Bigos Properties, 351 N.W.2d 680, 681 (Minn. App. 1984) A reviewing court will not disturb the trial court's findings of fact, even though it might not agree with them, unless the findings are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not soundly supported by the evidence as a whole. Northern States Power Co. v. Lyon Food Products, Inc., 304 Minn. 196, 229 N.W.2d 521 (1975). A finding of the trial court is not to be disturbed unless clearly erroneous, either on a clear demonstration that it is without substantial evidentiary support or that it was induced by an erroneous view of the law. Reserve Mining Co. v. State of Minnesota, 310 N.W.2d 487 (Minn. S.Ct. 1981). The record in this case was more than adequate to support the District Court's determination of reasonableness.

The parties stipulated that the issue of attorney's fees would be submitted to the District Court via brief and affidavits. In support of his request for attorney's fees, Respondent provided all of his attorney's billing records showing each entry of time, a description of the work performed, the amount of time spent and the fees charged. Respondent waived any privilege regarding the time entries to provide a thorough record of the fees and costs for the District Court's review. In addition, Respondent provided the Affidavit of Paul J. Zech, who supported the hourly rate charged by Respondent's counsel as actually being below current market rates.

Significantly, Appellant does not challenge any time entry made by Respondent's counsel as unnecessary, does not claim that the actual amount of time involved was excessive or that the hourly rate charged was excessive. No argument was raised on any of these points. The fact that Appellant claims to have incurred over $50,000 in fees in this matter, supports the Court's conclusion that Respondent's fees for this matter are "reasonable" especially in comparison to what Appellant was charged.

Appellant does point to Respondent's attorney's deferred billing arrangement to argue that by deferring the billing of a portion of the fees until the end of the litigation, that portion of the fees is somehow unreasonable. Respondent's counsel agreed to defer billing of a portion of the hourly rate in this matter until the end of the case to assist with Respondent's ability to finance the cost of the proceedings. Respondent was, in fact, billed in full for all fees at the conclusion of the litigation. At all times Respondent

remained responsible for the full amount of fees and costs incurred. Appellant provides no authority for its position that this deferral somehow makes the deferred amount "unreasonable" and again makes no argument that an hourly rate of $275 is unreasonable or excessive.

C. Appellant's post-judgment motions were defective and should not be considered by the Court.

In the pretrial before Judge Mossey on November 23, 2009, a hearing date of March 4, 2010 was set on the issue of fees and costs. Between the date of the pretrial and the hearing, Appellant conducted no discovery and requested no information relative to Respondent's fees. The parties appeared in court prepared to proceed to hearing in this matter before Judge Mossey on March 4, 2010. Id. Respondent retained different legal counsel to represent him at the hearing and Robert Halagan, on behalf of Halagan Law Firm, Ltd., was in Court to appear as a witness on the issue of Respondent's fees. Id. All of the invoices and billing documents were available for Mr. Halagan to be cross-examined on at that time. Rather than proceed with the hearing, however, Appellant stipulated to the process utilized by the Court which was to submit the issue of fees to briefs and memorandum. Id. Appellant should not now be allowed to claim that it was somehow prejudiced by the process utilized by the Court.

Subsequent to the Court's decision awarding Respondent his fees and costs, Appellant failed to make any appropriate motion under Minn. R. Civ. P. 52 for the Court

to amend it findings or any other timely motion with the Rules of Civil Procedure. Appellant stylized a motion under the General Rules of Practice for the District Courts 119.03 in which it improperly attempted to ask the Court to supplement the record after judgment had been entered with material it presumably felt would help its arguments on appeal. The failure of Appellant to properly follow the Minnesota Rules of Civil Procedure at the District Court level precludes its ability to now raise those issues on appeal.

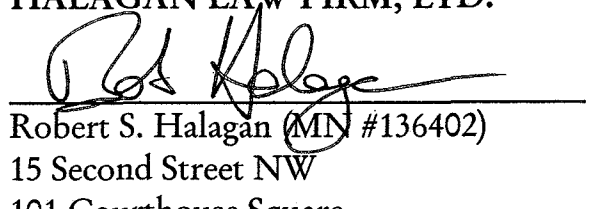
CONCLUSION

Respondent respectfully requests the Court of Appeals affirm the District Court in all respects.

Dated: Sept. 13, 2010

Respectfully submitted,

HALAGAN LAW FIRM, LTD.



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