TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT   STATE OF MINNESOTA

Shakopee Mdewakanton Sioux (Dakota)
Gaming Enterprise

Plaintiff,

vs.

Leonard Prescott, individually, and as
current and former officer and/or director
of Little Six, Inc.

Defendant.

Court File No. 436-00

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY
FILED OCT 2 6 2005
LYNNEA A. FERCELLO
CLERK OF COURT

MEMORANDUM OPINION AND ORDER

In this protracted litigation[1], the Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise ("the Enterprise") sought reimbursement for monies paid by its predecessor in interest, Little Six, Inc. ("LSI"), to the Kelley Law Office, who served as attorneys for LSI's former Chairman, Mr. Leonard Prescott in 1993 and 1994. LSI and the Enterprise also sought reasonable attorneys fees and costs incurred by them in maintaining this litigation[2], based upon the provisions of Section 67 of the Community's Business Corporation Ordinance ("the Corporation Ordinance").

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[1] A summary of the history of these proceedings, together with citations to the five reported decisions from this Court and the Court of Appeals that the case has produced, appears in this Court's May 11, 2005 decision.

[2] The Gaming Enterprise sought reimbursement for the fees that it actually paid in pursuing this litigation.

On May 11, 2005, following proceedings that included a two-day trail in 2004 and extensive post-trial briefing thereafter, the Court ruled substantially in favor of the Enterprise on its claims for reimbursement of the moneys paid to the Kelley Law Office. The Court also held that under the plain language of Section 67 of the Corporation Ordinance, the Enterprise was entitled to recoup the reasonable attorneys fees and costs it and LSI incurred in this matter. In so holding, the Court noted that Mr. Prescott had not responded to, or in any way resisted, the Enterprise's claims under Section 67. The Court therefore ordered the parties to submit briefing on the only remaining issue, which was the amount of those reasonable fees and costs.

The Gaming Enterprise then submitted evidence regarding the amount of the Plaintiff's fees and costs incurred in these proceedings, and contemporaneously moved for a protective order that would permit Mr. Prescott and his counsel to review the records but that would otherwise prohibit their disclosure to the public. Mr. Prescott objected to the protective order; but pending my decision on the Enterprise's motion, I ordered that the documents summarizing the fees and costs not be disseminated or disclosed.

Mr. Prescott responded to the Plaintiff's statement of attorneys fees and costs by making two general arguments: (1) that attorneys fees and costs in fact should not be awarded in this matter, and (2) that the fees and costs actually sought by the Enterprise are excessive.

In my view, Mr. Prescott's first argument simply is untimely. The question as to whether Section 67 of the Corporation Ordinance entitles the Enterprise to its attorneys fees and costs was squarely presented in the Complaint in this matter, and the

Enterprise's claim to the award was the explicit subject of post-trial briefing by the Enterprise – briefing that drew no response, on the subject of the entitlement to attorneys' fees and costs, from Mr. Prescott. I determined that an award of reasonable fees and costs was justified, on May 11, 2005, and it would be inappropriate for me to revisit that determination here. But I do note that even if Mr. Prescott's argument on this point had been timely made, he has failed to explain why the relevant language of Section 67 of the Corporation Ordinance should not be applied to this case.

Consequently, the question presented to me now by Mr. Prescott's objections relates solely to the amount of the Plaintiff's attorney's fees and costs that is "reasonable", under Section 67. In my view, the burden here is on the Plaintiff to demonstrate the reasonableness of its attorneys' fees and costs. See, e.g., Johnson v. University College, 706 F.2d 1205, 1207 (11 Cir. 1983). To carry this burden, the Enterprise has submitted contemporaneous records setting forth the hours spent on this case and the subject matter of the work completed by the attorneys. Mr. Prescott's objections to those records, and to the work and expenses that they memorialize, are:

1. That certain billed amounts are excessive in light of the work that was performed. He specifically objects to the fact that 82.2 hours of attorney time was spent on the research and drafting of an appellate response brief in connection with Mr. Prescott's interlocutory appeal from my denial of his motion to dismiss; that attorney and paralegal fees for 23.9 hours of work to draft the Complaint in this matter were unreasonable; and that the Enterprise's law firm devoted 70.6 hours of

attorney time and 17.8 hours of paralegal time to researching and drafting a response to Mr. Prescott's motion to dismiss;

2. That many attorney and paralegal hours were billed by the Enterprise's law firm without, in Mr. Prescott's view, sufficiently specific description of the work being done. In particular, Mr. Prescott cites seven entries, totalling 30.2 hours, which describe work performed in June, 2001 simply as "Research re: Appellate brief, Prescott Indemnification"; 4.2 hours under the heading "Prepare exhibit list; confer with Atty. Olson and trial prep."; and 3.9 hours billed to prepare subpoenas and cover letters and "review files".

3. That costs relating to computerized legal research, telefax charges, postage costs, delivery service costs, and photocopying not related to trial exhibits are not properly recoverable in this context.

With respect to each of these arguments, I have reviewed the billings in question, and the resulting work product. I have concluded that in each of the instances of attorney and paralegal work objected to by Mr. Prescott, the time expended by the Plaintiff's law firm was commensurate with the quantity and quality of the work produced, and the billing therefore was "reasonable" under Section 67 of the Corporation Ordinance.

Specifically, with respect to Mr. Prescott's assertions that it was excessive for the law firm to devote 82.2 hours of attorney time to the drafting and research of a reply brief in Mr. Prescott's interlocutory appeal from my denial of his motion to dismiss, I find that the brief which was produced by those hours of work was nearly thirty pages long, containing extensive citation of carefully researched and analyzed case law, and that the

underlying positions it took it apparently were ultimately persuasive to the Appellate Court. I allow as how the costs – in excess of $19,000.00, as I calculate it from the law firm's billings – was high; but the matters at stake and the quality of the product were high, as well.

Likewise, I do not agree with Mr. Prescott's arguments that 23.9 hours to time was excessive for the drafting of the Complaint in this matter. The factual allegations in the Complaint covered more than six years of history, and the prayer sought more than half a million dollars in damages. The Plaintiff never was obliged to amend the Complaint, and the litigation that the Complaint initiated resulted in an award of nearly all sums sought. Under these circumstances, a drafting effort of slightly less than three days seems to me to be entirely reasonable.

Nor do I agree that it was excessive to spend 88.4 hours of combined attorney and paralegal time to the response to Mr. Prescott's motion to dismiss. Mr. Prescott asserts that devoting that amount of time "solely to a motion response", at attorney billing rates of between $230.00 and $250.00 per hour, was inappropriate. But the motion to which the response was being generated was a dispositive one: if the motion had been granted, the Plaintiff's claim for more than half a million dollars would have been dismissed. The memorandum that was produced was, again, substantial (some thirty pages in length, containing detailed factual and legal discussion); and, once again, the memorandum ultimately was persuasive. Under these circumstances, the investment of two-plus weeks of attorney and paralegal time to the product seems to me to be reasonable; and nothing in the record suggests that the hourly billing rates associated with the work were

inconsistent with either the quality of the work or the rates generally prevailing for such work at that time.

I differ, too, with Mr. Prescott's assertion that greater specificity is required to award fees for such matters as "Research re: Appellate brief, Prescott Indemnification", or "Prepare exhibit list; confer with Atty. Olson and trial prep.". The product of that work – the appellate brief, the massive exhibit list, and the evidence and testimony adduced at trial – is before the Court. I do not consider it necessary, given the product that is in the record of this case, and considering the time expenditures billed, to require that the billing records identify exactly what issue was being researched for the appellate brief, or precisely what exhibits and materials were being reviewed in preparation for trial.

As to the billing of costs, I agree with Mr. Prescott that the cost of computerized legal research should not be imposed as an item of taxable costs. Although the federal courts are split on this question, see, e.g., In re Media Vision Technology Securities Litigation, 913 F.Supp. 1362, 1370-71 (N.D.Cal.1996), I find the Eighth Circuit's approach on this matter to be persuasive. See Stadley v. Chilhower R-IV School Dist., 5 F.3d 319, 325 (8th Cir. 1993). It seems to me that the cost of computer-aided research is akin to the cost of maintaining law books on a shelf, and should be regarded simply as a cost of an attorney's doing business[3]. The remaining items of costs, however, including

[3] The record does not contain, and the parties have not provided, a separate itemization of the computerized legal research costs included in the law firm's billings. The Court has examined the record and identified nineteen billing entries, from April 30, 2000 through September 30, 2004, that appear to be billings for computerized research. The total of those entries $1,478.31, and it is that amount that the Court will deduct from the billing award.

copying, paralegal time, postage, delivery services, and fax fees, are in my view acceptable and are properly taxed here.

That leaves, then, only the question of the protective order that the Enterprise has sought to protect the confidentiality of these billing and cost records. The Enterprise suggests that the billing and cost information is "sensitive" and could be damaging if it is "misused". Mr. Prescott responds that no law has been cited that supports the restriction of "sensitive" information – that by seeking reimbursement of its fees and costs the Enterprise has waived its attorney-client privilege, and that no confidential trade secrets or proprietary commercial information is revealed in the billing and cost records.

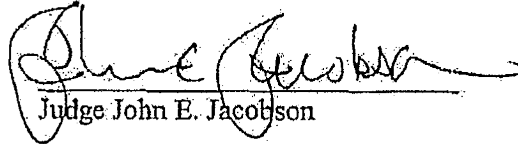
I agree with Mr. Prescott. In my view, when the Enterprise elected to seek reimbursement of its attorneys' fees and costs and thereby placed the reasonableness of those fees and costs at issue, it waived the privilege and the confidentiality that otherwise would have attached to the records of those fees and costs. Cf. In the Matter of the Children's Trust Fund, 4 Shak. T.C. 41 (Feb. 7, 2000).

For the foregoing reasons, and based upon all the files and pleading herein, it is herewith ORDERED:

1. The Defendant shall pay to the Plaintiff the sum of $185,810.08 in legal fees and costs (that is, $187,393.39 minus a Federal Court filing fee of $105.00 that the Plaintiff conceded, in its Reply Brief filed July 25 herein, was erroneously billed to this file, and also minus $1,478.31 in computerized legal research costs); and

2. The Plaintiff's motion for a protective order with respect to the billing records filed in this matter is DENIED.

October 26, 2005



Judge John E. Jacobson