COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. 87

SUPERIOR COURT
CIVIL ACTION
NO. 2012-04034

GRAND MANOR CONDOMINIUM ASSOCIATION & others[1]

vs.

CITY OF LOWELL

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO AMEND JUDGMENT

Plaintiff Grand Manor Condominium Association ("GMCA") moves for post-trial relief, pursuant to Mass. R. Civ. P. 59(e). GMCA requests that this court amend the judgment entered on June 28, 2016, to reflect an award of prejudgment interest in the amount of $24,065.02, and second, that pursuant to G. L. c. 21E, § 4A and § 15, this court enter a finding entitling GMCA to attorneys' fees, litigation costs and expenses, in the amount of $226,252.25. Defendant City of Lowell ("the City") opposes all of GMCA's requests. For the reasons set forth below, GMCA's Motion to Amend Judgment is **ALLOWED** in part and **DENIED** in part.

Background

On October 10, 2012, GMCA filed a three-count Complaint against the City pursuant to G. L. c. 21E, the Massachusetts Oil and Hazardous Material Release Prevention Act (the "Act"), and G. L. c. 93A, § 9, in relation to the discovery and remediation of environmental contamination at Grand Manor Condominium in Lowell, Massachusetts. The Amended

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[1] Keith Parker, Paul Donoghue, Anthony Delgreco, William Gallo Solorzano, Susanna Ritson, Carol Sagro, Judith Copithorne, Frances Inglis, Susan Elimhingbe, Kathleen Harris, Derek Soderquist, Eiddie Katende, Walter Patterson, Jr., Michael R. Sherman, Michael Gibbs, Ellsworth J. Evans, Jr., Paul Weissbach, Amir Tabrizi, Keith L. Bennett, Jr., Prabhaker Jani, Jyoti Jani, William R. Zink, Linda A. Zink, Daniel R. Smith, Sr., Ashwin Thakkar, Giselia Resendes, Michelle Maher, Maureen Guerin-Porter, Theodore Leoutsakos, Susan Leoutsakos, Lawrence Kelleher, Deborah Carkin, George Barry, Nancy Barry, Brian Andriolo, Helen Bullock, Edward Bullock, Julia Paquin, and Tracy Paquette

Complaint, filed on November 8, 2012, asserted three claims: for GMCA's response costs incurred to mitigate the release of environmental contamination under G. L. c. 21E, § 4 (Count I); for the individual unit owners' property damage under G. L. c. 21E, § 5(a)(iii) (Count II); and for violations of G. L. c. 93A, § 9 based on the City's failure to record a notice in the chain of title that the property had previously been used as a landfill (Count III). On February 25, 2016, another justice of this court (Haggerty, J.) allowed summary judgment in favor of the City on the plaintiffs' 93A claim (Count III), and allowed partial summary judgment in favor of the plaintiffs on the issue of the City's liability as a "responsible person" under the Act (Paper No. 34).

The case was tried before the undersigned and a jury from June 13 through June 23, 2016. The jury returned a verdict in favor of GMCA on its claim for response costs under § 4 in the amount of $113,673.19, representing reasonable, necessary and appropriate attorneys' fees and costs.[2,3] On the individual unit owners' claims for property damage under § 5(a)(iii), the jury found in favor of the City, concluding that the claims were not timely brought within the applicable statute of limitations. Judgment entered on June 28, 2016. The judgment did not include any prejudgment interest on the award of response costs.

Discussion

I. Prejudgment Interest on § 4 Response Cost Award

Relying on Bank v. Thermo Elemental Inc., 451 Mass. 638 (2008), GMCA requests amendment of the judgment to reflect an award of prejudgment interest in the amount of $24,065.02 on its § 4 response cost award. In opposing GMCA's motion, the City argues that

[2] The only response costs sought by GMCA at trial were the attorneys' fees and costs billed to GMCA by the law firm of Rackemann Sawyer & Brewster, P.C. in connection with the response action.

[3] The jury were instructed that, to be recoverable as response costs, attorneys' fees must be for services that are closely tied to the response action and must be reasonable, necessary, and appropriate; and that attorneys' fees incurred for litigation-related activity are not recoverable as response costs.

GMCA has not provided proof that it has paid all of its legal fees, and therefore, it is not entitled to recover prejudgment interest because it has not been deprived of the use of any money. For the reasons discussed below, I conclude that GMCA is entitled to recover prejudgment interest, but only on the attorneys' fees it has actually paid to date.

The Act does not include language specifically addressing the award of prejudgment interest. However, in Bank, 451 Mass. at 662-663, the Supreme Judicial Court ("SJC") determined that the plaintiffs were entitled to recover prejudgment interest on § 4 response costs in the form of attorneys' fees, accruing on the last day of each year in which the plaintiffs paid their legal bills. In analyzing the award of prejudgment interest under the framework of G. L. c. 231, §§ 6B and 6C, the SJC explained that while prejudgment interest is usually added from the time of commencement of suit, in some circumstances, where no loss is incurred until after that time, prejudgment interest is appropriately calculated from the date the loss was actually incurred as a matter of fairness. Id. This conclusion was based, in part, on the fact that "[a]n award of prejudgment interest is made 'so that a person wrongfully deprived of the use of money' is 'made whole for his loss.'" Id. at 662, quoting Sterilite Corp. v. Continental Cas. Co., 397 Mass. 837, 841(1986), and Perkins Sch. for the Blind v. Rate Setting Comm'n, 383 Mass. 825, 835 (1981).

GMCA has not suffered a loss on the entirety of its attorneys' fee award. See Sterilite Corp., 397 Mass. at 841-842 (where damages were awarded for breach of insurer's duty to pay insured's bills and not for preceding breach of duty to defend, interest should be computed just from dates when insured had paid bills itself); St. Paul Surplus Lines Ins. Co. v. Feingold & Feingold Ins. Agency, Inc., 427 Mass. 372, 377 (1998) (prejudgment interest awarded from time insurer actually made payments as result of insurance agency's negligent and intentional

misconduct); Thomas & Betts Corp. v. New Albertson's, Inc., 2016 U.S. Dist. LEXIS 58082, *31-32 (D. Mass. 2016) (prejudgment interest ran from date action was commenced, rather than date trial was commenced, in contribution action brought under the Act by property owner to apportion costs associated with remediation of contaminated banks and streambed, where owner paid clean-up costs in full prior to commencing action).

The jury awarded $113,673.19 as necessary and reasonable attorneys' fees and costs for GMCA's response action. To date, GMCA has paid a total of $30,730.34 in attorneys' fees and costs. See Affidavit of Michael W. Parker (Paper No. 80.1).[4] As such, GMCA is entitled to recover prejudgment interest on that amount only. Applying the formula utilized in Bank (a monthly interest rate of one percent for forty-six months from the commencement of the action on October 10, 2012 to the date of judgment), GMCA is entitled to $14,135.96 in prejudgment interest. The judgment shall be amended accordingly.

II. Attorneys' Fees and Costs Under G. L. c. 21E, § 4A and § 15

GMCA also requests an award of its reasonable attorneys' fees and litigation costs incurred in prosecuting its § 4 claim under G. L. c. 21E, § 4A(d)(1) and § 15.

a. Entitlement to Fees and Costs

General Laws c. 21E, § 4A sets forth comprehensive procedures to facilitate cost-sharing arrangements among potentially responsible parties and, in the absence of agreement among all relevant parties, authorizes the award of litigation costs and reasonable attorneys' fees in specified circumstances. See G. L. c. 21E, § 4A(d) and § 15. Pursuant to § 4A(a), a person seeking contribution for response costs must send a pre-suit demand letter that sets forth the nature, scope, and cost of the remediation, the legal and factual basis for the demand, and the contribution being sought. G. L. c. 21E, § 4A(a). The recipient of such a demand must reply in

[4] These amounts were paid between April, 2011 and September, 2012, prior to the filing of this lawsuit.

writing "sent by certified mail, return receipt requested, within forty-five days" of having received the notification. Id. Absent a "reasonable basis" excusing a recipient's failure to respond within forty-five days, a successful § 4 litigant is entitled to recover "its litigation costs and reasonable attorneys' fees." G. L. c. 21E, § 4A(d)(1).[5]

In this case, on October 13, 2009, GMCA served a § 4A demand letter upon the City. The City did not respond within forty-five days. As such, GMCA contends that it is entitled to recover its litigation costs, which it identifies as $226,252.25. The City does not challenge the requirements set forth in § 4A(a). Nor does it dispute that it failed to make a timely, written response. Instead, the City argues that equity demands that GMCA's request for attorneys' fees and costs under § 4A(d)(1) be denied, because at all relevant times the City participated in response actions. This argument fails for two reasons.

First, aside from "compel[ling] prompt and efficient cleanup of hazardous material," Sheehy v. Lipton, 24 Mass. App. Ct. 188, 197 (1987), § 4A's procedural requirements are "designed to encourage parties to settle environmental liability suits without formal litigation proceedings." Zecco, Inc. v. The Travelers, Inc., 938 F. Supp. 65, 66 (D. Mass. 1996). See Buddy's Inc., 62 Mass. App. Ct. at 262 (explaining that recovery process is intended to motivate parties to resolve matters outside judicial system). While it is true that the City participated in response actions, it did so while actively denying its status as a "responsible person" under the Act. GMCA was therefore required to pursue extensive discovery and to litigate a motion for partial summary judgment in order to establish the City's liability. Second, an award under §

[5] Under § 4A(d) "[a] successful 'plaintiff' may recover fees and costs in any of three situations: (1) if the defendant failed without reasonable basis to make a timely response to the plaintiff's notification; (2) if the defendant did not participate in negotiations or dispute resolution in good faith; or (3) if the defendant failed without reasonable basis to offer to enter into or carry out an agreement to perform or participate in the performance of a response action on an equitable basis or pay its equitable share of the costs of such response action." Buddy's Inc. v. Saugus, 62 Mass. App. Ct. 256, 261 (2004).

4A(d)(1) is mandatory, and therefore, this Court is without discretion to deny GMCA's request. See G. L. c. 21E, § 4A(d)(1) (stating that court "shall" award attorneys' fees and costs if statutory prerequisites are satisfied).

Even in the absence of a mandatory award under § 4A(d)(1), GMCA may also recover its reasonable litigation costs under G. L. c. 21E, § 15, which provides, "the court may award costs, including reasonable attorney and expert witness fees, to any party other than the Commonwealth *who advance the purposes of this chapter*." (emphasis supplied). The SJC has discussed the situations in which an individual advances the purpose of the Act in Sanitoy, Inc. v. Ilco Unican Corp., 413 Mass. 627 (1992), and Martignetti v. Haigh-Farr, Inc., 425 Mass. 294 (1997). In Sanitoy, Inc., the SJC explained "that any person who undertakes assessment, containment, or removal activities as defined in the Act, and subsequently seeks reimbursement pursuant to G. L. c. 21E, § 4, enforces and advances the purposes of the Act." 413 Mass. at 632. In Martignetti, the SJC expanded its discussion to situations in which the party seeking to recover its litigation costs under § 15 is liable solely by reason of its ownership status, but is not itself a contaminator of the land. 425 Mass. at 320-321. There, the SJC explained that such a party "'advance[s] the purposes' of G. L. c. 21E by undertaking a cleanup and thereafter seeking, by means of a § 4 claim, to place the cost on the parties actually responsible for the problem." Id. at 320, citing Sanitoy, Inc., 413 Mass. at 632-633, and Sheehy, 24 Mass. App. Ct. at 197-198. Here, there was no evidence presented at trial showing that any party other than the City was liable for the contamination. As such, GMCA advanced the purposes of the Act in undertaking remediation and initiating a § 4 response action against the City.

In sum, because GMCA served the requisite § 4A demand letter upon the City, and the City failed to respond within forty-five days, GMCA is entitled to recover its reasonable

attorneys' fees and costs incurred in prosecuting its claim for § 4 response costs under G. L. c. 21E, § 4A(d)(1). GMCA is also entitled to an award of its reasonable attorneys' fees and costs under G. L. c. 21E, § 15, because it advanced the purposes of the Act.

b. Reasonable Attorneys' Fees and Costs

Determining what constitutes a reasonable fee award under the Act is committed to "the sound discretion of the trial judge." Sanitoy, Inc., 413 Mass at 633. The basic measure of reasonable attorneys' fees is the "fair market rate for time reasonably spent preparing for litigating a case." Fontaine v. Ebtec Corp., 415 Mass. 309, 326 (1993). This determination turns on neither the amount billed nor the amount in controversy. Berman v. Linnane, 434 Mass. 301, 303 (2001). Rather, the reasonableness of the fee award is determined using the "Lodestar" approach, which involves "consider[ing] the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." Linthicum v. Archambault, 379 Mass. 381, 388-389 (1979). "No one factor is determinative, and a factor-by-factor analysis, although helpful, is not required." Berman, 434 Mass. at 303.

GMCA's application for attorneys' fees and costs is supported by the affidavit of Attorney Alan B. Rubenstein ("Rubenstein Aff."), appended to which is a detailed chart setting forth the tasks performed and hours billed by five attorneys involved in the litigation ("Exhibit A"). Attorney Rubenstein states that GMCA seeks attorneys' fees incurred in prosecuting its successful G. L. c. 21E, § 4 claim, which he identifies as $226,252.25. Rubenstein Aff., ¶ 13. GMCA does not seek fees relating to the prosecution of its unsuccessful § 5 and 93A claims. Id. Attorney Rubenstein initially billed at $450 per hour, and thereafter, at rates of $465 and $480

per hour.[6] Id. at ¶ 5. I credit Attorney Rubenstein's averment that his hourly rates are lower than those charged by his peers. Id. Throughout the course of litigation, Attorney Rubenstein was assisted by four attorneys: Jesse W. Abair, whose hourly rate was $310; Michele E. Connolly, whose hourly rate was $350; Cara J. Daniels, whose hourly rate was $300; and Stacie Ann Kosinski, whose hourly rate was $300 until July 2015, after which her rate increased to $350 per hour. Id. at ¶ 6-7. I also credit Attorney Rubenstein's assertion that these rates are "less than, or comparable to, the rates charged by their peers in Boston with comparable experience." Id. at ¶ 7.

The record before the court establishes that these five attorneys, including Attorney Rubenstein, conducted work for GMCA in connection with the litigation.[7] The record also establishes that Attorneys Rubenstein and Connolly reviewed each legal bill pertaining to this matter and requested only fees attributable to GMCA's successful prosecution of its § 4 claim. Id. at ¶ 13. Additionally, Attorneys Rubenstein and Connolly assigned a percentage for each attorney's time spent on GMCA's § 4 claim when that time was split between tasks relating to the § 4 claim and other matters. Id. at ¶ 16 and Exhibit A. Finally, I conclude that each attorney's rates are commensurate with his or her experience and appropriate for the work he or she performed.

The amount requested represents just over twenty-five percent of the total litigation fees incurred in this case, $860,892.50, Id. at ¶ 13, and is consistent with the scope and complexity of the litigation and the volume of activity it has encompassed over more than four years, as reflected in the court docket. In addition, the parties conducted extensive discovery, deposed

[6] From September 2012 through June 30, 2014, he billed $450 per hour. Rubenstein Aff., ¶ 5. Between July 2014 and July 2015, he billed $465, and from June 2016 forward, he billed at a rate of $480 per hour. Id.
[7] Attorneys Connolly, Daniels, and Kosinski entered appearances. Attorney Abair did not enter an appearance; however, he did assist Attorney Rubenstein throughout the course of litigation as outlined. See Rubenstein Aff., ¶ 6.

neighborhood witnesses, city employees and environmental consultants, and expended significant time and effort reviewing documents in relation to the City's status as a person liable for response costs. Rubenstein Aff. at 17. Although the plaintiffs were unsuccessful in prosecuting their § 5 and c. 93A claims, they were successful in establishing the City's liability as a "responsible person" and in recovering § 4 response costs. Further, the record supports Attorney Rubenstein's assertion that the proof necessary for the § 4 and § 5 claims overlapped considerably. Id. at ¶ 15. GMCA is entitled to recover its fees incurred in successfully prosecuting its § 4 claim, even though some of that work also assisted the plaintiffs with their unsuccessful § 5 and c. 93A claims. See Giuffrida v. High Country Investor, Inc., 73 Mass. App. Ct. 225, 244 (2008). While a trial judge "may make an appropriate adjustment to account for the prevailing party's limited success[,]" id., such an adjustment is unnecessary here, as GMCA has requested only an appropriate percentage of the total fees it incurred.

The City's primary objection to the amount GMCA seeks is its contention that GMCA unreasonably inflated its legal costs by frivolously pursuing discovery in relation to proving the City's status as a "responsible person" under both the § 4 claim for response costs and the unsuccessful § 5 claim. That contention mischaracterizes not only the dispute, but the record, which make clear that both the City's past and present conduct necessitated extensive discovery in relation to that issue.

As a preliminary matter, if not for the City's failure to record notice in the chain of title that the property had previously been used as a landfill when it conveyed the property to Antonis Katsikas in 1983, its status as a "responsible person" would not have been disputable. Of greater significance is the fact that the City has consistently denied the factual basis for its status as a party responsible for the contamination since the litigation commenced. Its arguments in

opposition to GMCA's motion for partial summary judgment are illustrative. There, the City claimed that material issues of fact remained as to whether it was "the sole party liable for the contamination" and whether there had been a "release of hazardous materials" within the meaning of the Act. As a result, GMCA was required to respond to the City's denial of its status as a responsible party, incurring significant discovery costs along the way. If not for the City's unwillingness to concede that fact, the costs incurred would have been significantly less.[8] See e.g., Foote-Smith v. Goodwin, 66 Mass. App. Ct. 1114, at *2 (2006) (Rule 1:28 Unpublished Decision) (attorneys' fees accumulated largely as a product of defendant's "intransigence").

To the extent that the fee award sought is larger than the amount of the verdict for GMCA's § 4 response costs, this disparity does not automatically require a reduction. See Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 429-431 (2005) (upholding award of $1 million in attorneys' fees and costs even though company was awarded only $118,950 in G. L. c. 93A damages, despite defendant's objection regarding proportionality of verdict and attorney fees); Stratos v. Department of Pub. Welfare, 387 Mass. 312, 323 (1982); City Rentals, LLC v. BBC Co., 79 Mass. App. Ct. 559, 568 (2011) (Affirming – with minor reductions – a fee award of $78,136.75 in a case where total damages amounted to only $35,910, noting that "[w]hile at first glance, the fees tail may appear to be wagging the damages dog, both the complexity of a case—factual or legal—and the intensity of the defense may drive the claimant's legal fees well beyond the level of its damages figure."); J.P. Constr. Co. v. Stateside Bldrs., Inc., 45 Mass. App. Ct. 920, 921 (1998) (affirming that fee award of $39,583 was reasonable notwithstanding that judgment was only $29,095).

[8] The City's contentions, set forth in its Opposition to Plaintiff's Motion to Amend Judgment, at pp. 9-10, that it only denied liability for § 4 response costs because of its potential exposure on the § 5 claim, and that GMCA was in possession of documentary records sufficient to establish the City's liability under the Act such that "litigation of this question was essentially nugatory," are inconsistent with the history of this litigation and are unpersuasive.

In conclusion, GMCA has demonstrated that it is entitled to its attorneys' fees and that, based on a "Lodestar" analysis, the fees sought are reasonable. Although the court is not obligated "to review and allow or disallow each individual item in the bill," Berman, 434 Mass. at 303, I have nevertheless reviewed each of the very detailed entries in Exhibit A, and conclude that GMCA's request for $226,252.25 in attorneys' fees pursuant to G. L. c. 21E, § 4A(d)(1) and § 15 is amply supported by the record evidence.

Order

For the foregoing reasons, it is hereby **ORDERED** that GMCA's Motion to Amend Judgment is **ALLOWED** in part and **DENIED** in part as follows: the judgment shall be amended to add prejudgment interest in the amount of $14,135.96 on the jury's award of attorneys' fees to GMCA pursuant to G.L. c. 21E, § 4. Additionally, GMCA shall recover its litigation fees and costs in the amount of $226,252.25 pursuant to G. L. c. 21E, § 4A(d)(1) and § 15.

Dated: November 17, 2016

Kathe M. Tuttman
Justice of the Superior Court