STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ANDY J. EGAN CO, INC,

Plaintiff,

v

Case No. 10-114555-CK
Hon. Wendy Potts

PRO SERVICES, INC, et al,

Defendants.
_____/

OPINION AND ORDER RE: PRO SERVICES, INC'S MOTION FOR ENTRY OF JUDGMENT, INTERIM AWARD OF ATTORNEY FEES AND COSTS, AND JUDGMENT INTEREST UNDER MCL 600.6013(6)

At a session of Court
Held in Pontiac, Michigan
On
AUG 31 2015

The matter is before the Court on Defendant Pro Services, Inc's motion seeking entry of a judgment following the retrial of its consequential damages claims as well as attorney fees and costs incurred in both trials and related legal proceedings. The jury in the first trial concluded that both Pro Services and Plaintiff Andy J. Egan Co., Inc. breached their agreement and awarded Egan $1,097,730 and awarded Pro Services $1,841,468 in direct damages and $1,235,000 in consequential damages. The jury also awarded Pro Services its "reasonable attorney fees and costs incurred." Egan moved for a new trial, which the Court granted in part, concluding that Egan was entitled to a new trial limited to Pro Services's consequential damages. The jury in the new trial found in favor of Egan and awarded no consequential damages. Pro Services then brought this motion seeking more than $2.5 million in attorney fees as well as court costs and pre-judgment interest. Egan opposed the motion claiming that Pro Services was

seeking compensation for attorney fees that were unrelated to the contract between Egan and Pro Services, had already been paid by an insurer, or were incurred representing persons or entities other than Pro Services. Egan also argued that Pro Services was seeking inflated interest and costs that are not recoverable and asked the Court to hold an evidentiary hearing on the reasonableness of Pro Services's claimed attorney fees. The Court must now determine the amount of attorney fees and costs Pro Services is entitled to collect.

As an initial matter, the Court rejects Egan's attempt to revisit the jury's conclusion that Pro Services is entitled to seek attorney fees. The parties' agreement allowed Pro Services to recover "all losses, damages, penalties and fines, whether actual or liquidated, direct or consequential, and all reasonable attorneys' fees suffered or incurred by Contractor [Pro Services] by reason of or as a result of Subcontractor's [Egan's] default." Before the first trial, the parties stipulated that "[a]s for attorney's fees which are recoverable damages under any of the causes of action asserted, entitlement shall be decided by the jury on a special verdict form, and the amount shall be decided by the Court on motion following the entry of a jury verdict." Despite this stipulation, Egan now asserts that because the agreement only entitles Pro Services to attorney fees based on Egan's "default," Pro Services must demonstrate that it complied with the agreement's default notice and cure provisions before it can seek fees. Egan also asserts that Pro Services is not entitled to attorney fees because the jury determined that both parties breached the agreement. However, because Egan agreed to let the first jury decide the contractual attorney fee issue, it waived any right to now challenge Pro Services's entitlement to fees. *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 719; 179 NW2d 252 (1970). The jury found that Pro Services is entitled to reasonable attorney fees and costs incurred, and Egan's argument asks the Court to ignore the jury's finding without giving the Court a compelling

reason for doing so. This Court cannot substitute its judgment for the jury's finding. *Ellsworth v Hotel Corp of Am*, 236 Mich App 185, 194; 600 NW2d 129 (1999). Egan knowingly and voluntarily placed the issue of Pro Services's entitlement to attorney fees and costs under the contract in the hands of the jury, and it cannot now avoid the consequences of the jury's finding.

Similarly, there is no merit to Egan's claim that the no cause verdict in the second trial somehow nullified Pro Services's attorney fee and cost claim. Egan's theory is that the attorney fees and costs allowed under the parties' agreement were in the nature of consequential damages that should have been addressed and decided in the retrial of Pro Services's consequential damages claim. However, the verdict form from the first trial has separate findings for Pro Services's consequential damages and its entitlement to seek attorney fees and costs. There is no basis for Egan's argument that the first jury would have necessarily rejected Pro Services's request for attorney fees and costs if that jury had also rejected the consequential damages. Further, the Court's decision granting a partial new trial on the consequential damages award did not disturb the jury's finding that Pro Services is entitled to contractual attorney fees and costs, and the parties did not ask the jury in the second trial to determine if Pro Services is entitled to attorney fees or costs as consequential damages. In sum, there is no basis for Egan's claim that the verdict in the second trial precludes Pro Services from seeking attorney fees or costs.

Thus, the issue for this Court is not whether Pro Services is entitled to claim attorney fees and costs, but the amount of the fees and costs awarded. In reaching that decision, the Court begins by rejecting Pro Services's attempt to seek costs or fees incurred in the consequential damages retrial. That trial occurred because Pro Services engaged in misconduct during discovery in the first trial, not as a result of Egan's default under the parties' agreement. Egan cannot be held responsible for fees or costs that were incurred in a retrial that was necessitated

solely by Pro Services's conduct. The Court will not award Pro Services any attorney fees or costs incurred as a result of the second trial.

The Court further agrees with Egan that Pro Services is also not entitled to seek attorney fees or costs incurred in the New York litigation with Irving Tissue and CR Meyer. Pro Services fails to demonstrate that the costs and fees it incurred in the New York litigation were the result of Egan's default. Pro Services correctly notes that it alleged in the New York case that Egan was in default of its contract obligations, and Pro Services's claims against Irving Tissue and CR Meyer were related, at least in part, to its claims against Egan. However, Pro Services's claims against Egan in the New York case were dismissed relatively early in the litigation based on the contractual forum selection clause. Pro Services cites no findings or decisions in the New York case that Egan was in default of its contractual obligations or otherwise breached the agreement. Based on the evidence presented, the Court cannot conclude that Pro Services's attorney fees and costs in the New York litigation are the result of Egan's contractual breach or default, and the Court will not include these fees or costs in its award.

Similarly, Egan objects to Pro Services's request for attorney fees incurred by Co-Defendant Keystone Community Bank. Pro Services claims it was obligated to pay Keystone's fees under an indemnity agreement. However, Keystone's fees were not incurred as a result of Egan's breach or default of its contractual obligations. Egan sued Keystone in connection with Egan's Michigan Builders Trust Fund Act violation claim against Pro Services. Although this claim was related to the contract dispute between Egan and Pro Services, whether Egan was in default of contract obligations is not an element of the MBTFA claim. Because Pro Services fails to demonstrate that Keystone's fees were incurred because of Egan's default, the Court will not award those fees.

Egan further asserts that Pro Services is not entitled to claims attorney fees incurred in defending Michael VandeMaele and Lucas Nienhuis. Because VandeMaele and Nienhuis were not parties to the agreement with Egan, and there is no statute or court rule allowing either of them to seek attorney fees, Egan is not obligated to pay for fees incurred solely for VandeMaele or Nienhuis. *State Farm Mut Auto Ins Co v Allen*, 50 Mich App 71, 74; 212 NW2d 821 (1973). Pro Services contends that the fees incurred for the individuals' defenses are inextricably entwined with the fees incurred for Pro Services's claims and defenses. While the Court acknowledges that much of the attorney fees at issue were intertwined, some of the attorney fees claimed were incurred solely in defending VandeMaele or Nienhuis. By way of example, in September 2011, Egan moved to default VandeMaele and Nienhuis for failing to attend a settlement conference, but did not seek a default or dismissal against Pro Services. Because the Court heard this motion along with several other motions, the attorney fees incurred for appearing for this motion were intertwined with attorney fees incurred on behalf of Pro Services. However, the attorney fees incurred in reviewing the motion or drafting a response are not intertwined with Pro Services's attorney fees and are, in fact, delineated on the attorneys' invoices. Thus, it possible to separate out at least some of the fees incurred. The fact that Pro Services's attorneys may not have kept detailed records that would easily allow them to identify time spent solely on VandeMaele or Nienhuis's defense does not mean that Egan should absorb these fees. Pro Services alone is entitled to seek attorney fees incurred as a result of Egan's default, and it is incumbent on Pro Services and its counsel to separate out the fees incurred in its behalf from fees incurred solely for VandeMaele or Nienhuis. The Court will not award Pro Services attorney fees or costs incurred solely on behalf of VandeMaele or Nienhuis's defense.

Egan also argues that Pro Services is not entitled to claim attorney fees or costs that its insurer CNA paid. However, this position is directly contrary to the Court of Appeals's holding in *BJ's & Sons Constr Co v Van Sickle*, 266 Mich App 400; 700 NW2d 432 (2005). The fact that an insurer paid some or all of Pro Services's attorney fees and costs does not absolve Egan of paying the fees and costs it is contractually obligated to pay. *BJ's*, *supra* at 409-410. The Court will award Pro Services its attorney fees and costs incurred as a result of Egan's default regardless whether the fees and costs were paid by a third-party.

In its last point of opposition to Pro Services's attorney fees, Egan asserts that Pro Services fails to demonstrate that the fees are reasonable, focusing mainly on the contingency fee. There is nothing inherently unreasonable about Pro Services's blended hourly and contingency fee arrangement with the McAlpine firm. A contingent fee can be reasonable, depending the facts and circumstances of the case, and the existence of a contingent fee agreement is one of many factors the Court considers in deciding whether the claimed fees are reasonable. *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co*, 279 Mich App 691, 702; 760 NW2d 574 (2008). Thus, the Court must consider the contingent fee as a factor in deciding the reasonableness of Pro Services's claimed attorney fees.

In determining the reasonableness of Pro Services's claimed attorney fees, the Court applies the factors of *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). The first step in the *Khouri* analysis is to determine if Pro Services's attorneys' fees are comparable to the fees customarily charged in the locality for similar legal services. *Khouri*, *supra* at 530-531. This step is only partly applicable because of Pro Services's blended hourly/contingent fee arrangement with the McAlpine firm. The reasonableness of a contingent fee is determined not by comparing it to local hourly attorney fees, but by applying the factors originally set forth in

Wood v DAIIE, 413 Mich 573, 588; 321 NW2d 653 (1982) and adopted by *Khouri*. See *Univ Rehab*, *supra* at 700 n 3.

The "customary local fee" factor of *Khouri* is applicable to the hourly rates charged by Pro Services's original counsel Kotz, Sangster, Wysocki and Berg, P.C., and their substitute counsel the McAlpine firm. The McAlpine firm's $180/hour rate is well under the rates charged in Oakland County for similar legal services. The amounts charged by the Kotz firm, ranging from $125/hour to $325/hour, fall within the customary rates charged by Oakland County attorneys with similar levels of experience and skill. Thus, the Court finds that the hourly rates charged by all attorneys involved are reasonable.

As for the amount of billable hours claimed, Pro Services met its burden of providing detailed billing statements and other evidentiary support for the number of hours claimed. The Court examined Pro Services's statements and, with the exception of the fees that the Court disallowed above, the Court finds the remaining hours claimed to be reasonable under the *Khouri/Wood* factors. This case was complex, lengthy, and vigorously litigated. Pro Services's attorneys are experienced and skilled and they achieved a favorable outcome, with a net judgment in Pro Services's favor and the jury's rejection of Egan's conversion and MBTFA claims. The Court will award Pro Services all of the hourly attorney fees claimed other than those expressly rejected in this opinion.

Although the hourly rates and billable hours are generally reasonable, the Court concludes that the contingency fee as calculated by Pro Services is substantially inflated and inherently unreasonable. Pro Services's fee agreement with the McAlpine firm entitled it to 30% (in the event of an appeal, which is almost a certainty here) of "the total gross proceeds generated

through the Litigation through any settlement or judgment." In calculating the "gross proceeds," Pro Services includes not only its net jury award of $743,738, but also:

- More than $200,000 in claimed "costs," most of which are not recoverable (see the Court's ruling on costs below);
- The $1,000,000 in escrow funds that were held pending the outcome of Egan's MBTFA claim;
- Attorney fees for the New York litigation and co-Defendant Keystone (which the Court disallowed);
- Hourly fees claimed by both the Kotz and McAlpine firms.

Pro Services adds all those costs and interests to its net verdict, plus prejudgment interest, to obtain an "interim verdict" amount of more than $3.3 million. Pro Services then multiplies this interim verdict by 70% to account for its 30% contingency fee, resulting in what it calls a "gross-up" amount of over $4 million and a claimed contingency fee of more than $1.3 million. However, Pro Services provides this Court with no authority to justify this astounding calculation. The fee agreement does not define what it means by "gross proceeds," and Pro Services cites no authority holding that a contingency fee is properly calculated by adding to the verdict other hourly attorney fees, litigation expenses, or interest. Moreover, Pro Services's attempt to compound its already inflated "interim verdict" by adding an additional 30% to account for the anticipated contingency fee is simply baffling. These calculations would essentially require Egan to pay a 30% markup on all fees, costs, and interest claimed, including the contingency fees itself, which is simply unsupportable under either the facts or law. Regardless of what Pro Services now asserts about how the "gross proceeds" should be calculated, it cannot have been Pro Services's intent that it would pay its attorneys a contingency fee that is nearly twice what it actually collected in this case. Contingency fees are intended to represent a fraction of the client's proceeds, not a multiple of the proceeds.

The Court also rejects Pro Services's attempt to lump the escrowed funds onto the net verdict for purposes of calculating the "gross proceeds" generated through this litigation. The $1 million escrow was money CR Meyer owed to Pro Services that they agreed to escrow pending the outcome of Egan's MBTFA claim. Thus, the escrow was not a "proceed" of this litigation, but money Pro Services obtained as a result of its contract with CR Meyer. Pro Services asserts no factual or legal basis for including the escrowed funds in the calculation of the "gross proceeds" for calculating its contingency fee. Because the $743,738 net verdict is the only "proceed" of this litigation, Pro Services's contingency fee should be calculated solely on that amount, resulting in a contingency fee of $223,121.40.

Even if the Court were to agree with Pro Services that its contingency fee must be calculated by adding to the verdict the escrow and all other fees and costs claimed, this calculation is patently unreasonable under the *Khouri/Wood* factors. The $1,376,567.93 contingency fee is nearly twice the amount of Pro Services's net verdict, and when added to the hourly fees awarded, would result in a total attorney fee award more than three times the net verdict. Nothing about this case justifies such an excessive award. By contrast, a $223,121.40 contingency fee, added to the hourly fees charged by Pro Services's attorneys, is entirely reasonable and justified by the *Khouri/Wood* factors.

In sum, the Court concludes that the hourly attorney fees charged by the Kotz and McAlpine firms are reasonable, minus the fees that the Court excluded above. Further, a 30% contingency fee of $223,121.40 calculated solely on the $743,738 net verdict, is also reasonable.

In its final issue, Egan asserts, and the Court agrees, that Pro Services's request for costs must be limited to those costs that are normally taxable in a civil action. The term "costs" has a definite meaning in the context of civil litigation: "The power to tax costs is wholly statutory.

Therefore, costs are not recoverable where there is no statutory authority for awarding them." *Portelli v I.R. Construction Products Co*, 218 Mich App 591, 605; 554 NW2d 591 (1996). Because the parties did not define the meaning of "costs" in the verdict form, the only reasonable interpretation is that the jury was asked to decide whether Pro Services can collect taxable costs. Therefore, the Court will only award Pro Services the costs that are taxable by statute. Pro Services must submit a new bill of costs identifying the statutory authority for each cost claimed.

For all of these reasons, the Court grants Pro Services's motion for attorney fees and costs in part and will award the fees and costs outlined in this opinion. Within 21 days, Pro Services must submit a revised bill of costs eliminating the attorney fees that the Court disallowed in this opinion, specifically identifying the attorney fees that the Court approved, and giving authority for the costs claimed. The Court will review the revised bill of costs and if it complies with the rulings in this opinion, the Court will enter a judgment.

IT IS SO ORDERED.

Dated: AUG 31 2015

Hon. Wendy Potts