

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

LEE CONTRACTING, INC., a Michigan
corporation,

Plaintiff/Counter-Defendant,

vs.

ADVANCED TOOLING SYSTEMS, INC.,
a Michigan corporation,

Defendant/Counter-Plaintiff.

Case No. 13-04195-CZB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER DENYING, WITHOUT PREJUDICE, ADVANCED
TOOLING SYSTEMS'S MOTION FOR ATTORNEY FEES AND COSTS

In this hotly-contested case about a contract to relocate a huge clearing press, Defendant and Counter-Plaintiff Advanced Tooling Systems, Inc. (“ATS”) won a resounding victory when the jury rendered a verdict against Plaintiff Lee Contracting, Inc. (“Lee Contracting”) on its claim for breach of contract and awarded ATS \$297,777 in damages on a counterclaim for breach of contract. Before trial, ATS made a \$200,000 offer of judgment to Lee Contracting, so the verdict *in favor of* ATS and against Lee Contracting plainly constitutes an “adjusted verdict [that] is more favorable to the offeror than the average offer[.]” See MCR 2.405(D)(1). And, as a result, Lee Contracting “must pay to the offeror the offeror’s actual costs incurred in the prosecution or defense of the action[.]” id., which includes attorney fees. Moreover, the parties’ contract dictates an award of reasonable attorney fees to the “prevailing party” in litigation arising under the contract. Nevertheless, the Court cannot yet provide ATS with an award of “reasonable” attorney fees because the Court does not yet know the actual hourly rates at which the law firm representing ATS billed its client in this case.

I. Factual Background

On August 25, 2015, the Court issued an opinion and order on cross-motions for summary disposition that reduced the case to a claim by Plaintiff Lee Contracting for breach of contract and a counterclaim by Defendant ATS for breach of contract. On December 11, 2015, ATS presented an offer of judgment to Lee Contracting that would have resolved the case with a \$200,000 payment from ATS to Lee Contracting. See Brief in Support of Defendant/Counter-Plaintiff's Motion for Attorneys' Fees, Exhibit 13. Lee Contracting chose not to accept that offer of judgment, and the case resulted in a verdict against Lee Contracting on its breach-of-contract claim and in favor of ATS on the counterclaim for breach of contract to the tune of \$297,777. That verdict elevated ATS to the status of a "prevailing party" by any definition of that term, so ATS filed a post-trial motion for its attorney fees and costs on two bases: (1) the language of the parties' contract that provides for such an award to the "prevailing party" in litigation arising from the parties' contract; and (2) offer-of-judgment sanctions under MCR 2.405(D)(1). The Court received extensive briefing from both sides and heard oral arguments on ATS's motion. Now, the Court must consider an award of "reasonable" attorney fees and costs in favor of ATS.

II. Legal Analysis

Under Michigan law, "attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." See Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 297 (2009). Here, Defendant ATS has properly identified two separate theories that justify attorney fees. First, the parties' contract contains the following broad authorization for an award of attorney fees to the

“prevailing party” in litigation over the parties’ agreement:

Attorney fees. If any action at law or in equity is brought to enforce or interpret the provisions of this Agreement, the prevailing party in such action shall be entitled to reasonable attorneys’ fees.

See Brief in Support of Defendant/Counter-Plaintiff’s Motion for Attorneys’ Fees, Exhibit 1 (parties’ contract, § 7). Because ATS manifestly was the “prevailing party” at trial, the contract itself grants ATS the right to recover its attorney fees from Plaintiff Lee Contracting. Second, MCR 2.405(D)(1) dictates that “the offeree must pay to the offeror the offeror’s actual costs incurred in the prosecution or defense of the action” when “the adjusted verdict is more favorable to the offeror than the average offer[.]” Although MCR 2.405(D)(3) provides that the Court “may, in the interest of justice, refuse to award an attorney fee under this rule[.]” the Court finds no basis to invoke that interest-of-justice exception in this case. Consequently, Lee Contracting’s rejection of the \$200,000 offer of judgment from ATS serves as an independent basis for an award of attorney fees to ATS.

Regardless of the justification for an award of attorney fees to Defendant ATS, the Court has an obligation to determine that ATS simply receives “reasonable” attorney fees. See Pirgu v United Services Automobile Ass’n, 499 Mich 269, 279 (2016). And, as our Supreme Court has cautioned, “reasonable fees are different from the fees paid to the top lawyers by the most well-to-do clients.” Smith v Khouri, 481 Mich 519, 533 (2008). The calculation of a reasonable attorney fee requires a three-step analysis. See id. at 522. The Court must “begin the process of calculating a reasonable attorney fee by determining” the “reasonable hourly or daily rate customarily charged in the locality for similar legal services[.]” Id. That hourly rate “should be multiplied by the reasonable number of hours expended.” Id. Finally, “the court may consider making adjustments up or down in light of the other factors listed in Wood [v DAIIE], 413 Mich 573 (1982)] and MRPC 1.5(a).” Id. As our

Supreme Court recently observed, those factors can be distilled into a non-exhaustive list of eight considerations. See Pirgu, 499 Mich at 281-282. Accordingly, the Court must employ the three-step process prescribed by our Supreme Court in order to determine a “reasonable” attorney fee to which ATS is entitled.

Defendant ATS received legal representation throughout this case from Rhoades McKee PC, which assigned several attorneys to work on the matter. To be sure, the attorneys assigned to this case all justifiably command relatively high hourly rates because, to a person, they are highly skilled members of the bar. But the hourly rates they have claimed do not reflect the rates that they charged to their client because “Rhoades McKee agreed to a discounted rate for its services on behalf of ATS and other companies in the Tooling Systems Group.” See Brief in Support of Defendant/Counter-Plaintiff’s Motion for Attorneys’ Fees at 3. Nevertheless, ATS wishes to impose upon Plaintiff Lee Contracting higher hourly billing rates than those actually paid by ATS, albeit with the assurance that “ATS will not retain any amount awarded by the Court that exceeds the discounted fees charged by Rhoades McKee; rather, ATS wants (and the fee agreement requires that) Rhoades McKee will be paid any additional amount by the Court as attorneys’ fees in this matter.” Id. With all due respect to the excellent attorneys at Rhoades McKee, this approach to “reasonable” attorney fees cannot be squared with Michigan law.

Defendant ATS accurately points out that “[r]easonable fees are not equivalent to the actual fees charged.” Smith, 481 Mich at 528 n12. But our Supreme Court offered that observation in the course of explaining that a “reasonable” attorney fee does not necessarily mean “the highest rate the attorney might otherwise command.” Id. at 528. Significantly, our Supreme Court further noted in that very same passage that fee-shifting provisions that allow for “reasonable” attorney fees are “not

designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls.” Id. Here, the approach proposed by ATS would not only provide the company with all of the money it expended for attorney fees in this case, but also furnish its law firm with a windfall of revenue beyond what the law firm chose to bill ATS for legal representation in this case.

Fundamentally, however, the Court’s greatest concern is that Defendant ATS has chosen not to provide any information about what it actually paid on an hourly basis for its legal representation. As ATS explains its approach: “Because ‘reasonable fees are not equivalent to actual fees charged,’ ATS is not submitting, as it would be inappropriate, information regarding the rates at which it was actually billed for services rendered in the successful defense of Lee Contracting’s case.”¹ See Brief in Support of Defendant/Counter-Plaintiff’s Motion for Attorneys’ Fees at 2 n1. The Court simply cannot conduct the analysis prescribed by our Supreme Court without knowing the hourly rates that ATS paid for its legal representation. If those rates were well below the level of reasonableness, the Court can account for that fact either by approving hourly rates in excess of what ATS was charged (despite the concerns identified in Smith, 481 Mich at 528), e.g., Cleary v The Turning Point, 203 Mich App 208, 212 (1994),² or by making an upward adjustment at the third stage of the analysis. See Pirgu, 499 Mich at 282 (identifying factors that the Court can take into consideration in making

¹ Defendant ATS has cited only one unpublished decision in support of its refusal to provide the actual hourly rates it paid. See Furness Golf Construction, Inc v RVP Development Corp, No 279398, slip op at 7 (Mich App June 11, 2009). The paucity of authority supporting ATS’s position raises red flags, but the Court places even greater significance upon the fact that the trial court and the appellate court in that matter knew the hourly rates charged. See id. at 3 (noting that defendant “argued that CNA actually paid Plunkett & Cooney an attorney fee of \$115 per hour”). Therefore, not one decision, published or unpublished, has permitted a party to refuse to divulge the hourly rates that it actually paid.

² The Court has serious reservations about following the reasoning in the Cleary case, which was decided more than a decade before the Supreme Court issued its decision in Smith.

adjustments at the third step of the analysis). In any event, however, the Court must see the actual hourly rates paid by ATS before rendering a decision about an award of “reasonable” attorney fees in this case.

III. Conclusion

For all of the reasons set forth in this opinion, the Court finds that Defendant ATS is entitled to an award of a “reasonable” attorney fee from Plaintiff Lee Contracting as a matter of contract and as an offer-of-judgment sanction, but the Court cannot perform the three-step analysis necessary to determine a “reasonable” attorney fee without knowing the hourly rates at which ATS compensated its attorneys. Accordingly, the Court shall deny, without prejudice, ATS’s motion for an award of “reasonable” attorney fees. If ATS wishes to obtain an attorney-fee award, ATS simply must file an affidavit setting forth the hourly rates it actually paid for the attorneys who worked on this case. Once ATS submits that affidavit, the Court shall promptly issue an award of “reasonable” attorney fees and costs in its favor.

IT IS SO ORDERED.

Dated: October 25, 2016



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge