

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MONUMENT BUILDERS : CIVIL ACTION
OF PENNSYLVANIA, INC. :
 :
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 v. :
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 :
 AMERICAN CEMETERY :
 ASSOCIATION, et al. : NO. 84-3014

MEMORANDUM

Dalzell, J.

July 9, 2002

Monument Builders of Pennsylvania, Inc., the trade association that is the plaintiff class representative in this matter, has filed a motion to compel compliance with the Consent Decree that Judge Troutman approved on January 31, 1989.

Monument Builders has filed this motion on behalf of plaintiff class member Gallagher Memorials, Inc. which claims that West Laurel Hill Cemetery Company, a member of the defendant class in this litigation, has failed to comply with the Consent Decree.

West Laurel Hill's initial defense was that it was not a member of the defendant class, and therefore not subject to the Consent Decree. In view of this defense, by an Order of May 31, 2002 we required the parties to brief this issue, bearing in mind this Court's decision in Monument Builders of Pennsylvania, Inc. v. American Cemetery Ass'n, et al., 206 F.R.D. 113 (E.D. Pa. 2002). In response, counsel for West Laurel Hill, in a letter to the Court of June 11, 2002, conceded that the Cemetery "did receive correspondence from Robert Heim, Esq., lead counsel for the defendant class . . . advising the cemetery of the proposed

settlement and the actions available to it as defendant class member."¹

Because, as will be seen, the monument involved in the current motion is an unusually large one, West Laurel Hill also defended on the basis that the Consent Decree did not cover a memorial of such an immense scale. See Def't's Ans. at second and third unnumbered pages (doc. num. 374). When at the hearing on July 8, 2002 we brought to counsel's attention the inclusive coverage of the Consent Decree, she withdrew this untenable defense on West Laurel Hill's behalf.

What follows constitutes our findings of fact and conclusions of law under Fed. R. Civ. P. 52(a). Our task, of course, is to examine the language of the Consent Decree "within its four corners" to determine whether it has been violated, Harris v. City of Philadelphia, 137 F.3d 209, 212 (3d Cir. 1998). We are mindful of Harris's admonition that in this enterprise, "we must not strain the decree's precise terms or impose other terms in an attempt to reconcile the decree with our own conception of its purpose," id.

Factual Setting

Both Gallagher Memorials, Inc. and West Laurel Hill Cemetery are venerable institutions. Both date their origins to

¹ Ltr. of Patricia M. David, Esq. to Hon. Steward [sic] Dalzell dtd. Jun. 11, 2002.

the nineteenth century. They are thus both familiar with the details of the funeral-related industry.

After Dr. Yen Wang's wife died in 2000, he met in November of that year with Todd Woodside, West Laurel Hill's Vice-President of Marketing, and purchased twenty cemetery plots for his family for \$42,500.00. Several months later, Dr. Wang began discussions about the design of a multi-ton family monument for the site which would bear the surname "Wang" and an associated Chinese ideogram. All parties to the hearing agreed that this monument's granite structure was one of the largest memorials to be installed at West Laurel Hill in recent memory. Although Dr. Wang had twenty plots available for his family, at least at the time of meeting with Mr. Woodside, Dr. Wang contemplated the site for the burial of his wife, himself, and his son, Peter.

Beginning in March of 2001, Dr. Wang began discussions with Lawrence Conroy, Gallagher's Vice-President for Sales, about the design of the family monument. We credit Mr. Conroy's testimony that although in September of 2001 Dr. Wang was prepared to accept Gallagher's \$54,000.00 bid for the project, Dr. Wang felt unable to conclude a contract with Gallagher because he could not get a "complete price" from West Laurel Hill as to what the total cash outlay would be for the installation.

It is quite clear from the testimony that West Laurel Hill and Gallagher were competing with each other for this very substantial item of business. It also seems rather clear that

West Laurel Hill used its position as a cemetery to create enough doubt in Dr. Wang's mind as to his total cash outlay that he was fatigued into finally accepting an October 20, 2001 contract with West Laurel Hill for a package price of \$53,898.00.

Although the testimony is in conflict, we find that West Laurel Hill introduced a substantial doubt in Dr. Wang's mind by the reference to a "care fee" that would be imposed for the monument.² We also find that the idea of this "fee" ultimately proved to be fictional but it served the desired purpose of keeping the Wang monument in play long enough for Dr. Wang to suffer buyer's fatigue and take the line of (apparent) least resistance, which was to conclude a contract with the cemetery that had perpetual control of the monument that was of such obvious importance to his family.

In view of these factual findings, the question becomes whether West Laurel Hill's behavior ran afoul of the Consent Decree.

Conclusions of Law

² Although, to be sure, Dr. Wang's recollection was dubious on this subject, the documented scenario here in September and October of 2001 makes no sense at all unless some element of doubt appeared that thwarted the conclusion of the offer Gallagher faxed Dr. Wang on September 10, 2001. See Pl'ff's Ex. 7. For this reason, together with his forthrightness and demeanor, we entirely credit Mr. Conroy's testimony on what happened during this critical period.

Although the Consent Decree has over the years been the subject of much construction,³ it is well to rehearse what are the crucial provisions at issue here. In particular, the Consent Decree provides in ¶ 7 that:

7. In consideration of the dismissal with prejudice of all claims against them, defendant cemeteries (including members of the defendant class who do not file a timely election to opt out) agree that they will not:

(a) Prohibit dealers from selling memorials to their customers, subject to the other rules and regulations of the cemetery.

(b) Prevent Dealers with written authorization from their customers from performing work necessary for the installation of the memorial subject to the other rules and regulations of the cemetery. In the event that a dealer and cemetery agree to have a memorial or a foundation installed by a cemetery, defendant cemeteries agree that the price charged to Dealers will be no greater than that charged to Cemetery's Customers.

(c) Establish unreasonable specifications for Dealers for the foundation of each type of memorial which it permits in the cemetery, which specifications are different from those the cemetery utilizes in preparing foundations for each type of memorial.

³ See, e.g., Monument Builders of Pennsylvania, Inc. v. American Cemetery Ass'n, 206 F.R.D. 113 (E.D. Pa. 2002); Monument Builders of Pennsylvania, Inc. v. Catholic Cemeteries Ass'n, Inc., 190 F.R.D. 164 (E.D. Pa. 1999); Monument Builders of Pennsylvania, Inc. v. American Cemetery Ass'n, Inc., 1996 WL 478636 (E.D. Pa. 1996); Monument Builders of Pennsylvania, Inc. v. American Cemetery Ass'n, Inc., 1989 WL 43622 (E.D. Pa. 1989), aff'd 915 F.2d 1559 (table) (3d Cir. 1990).

* * *

(f) Promptly provide to Dealers, on written request, copies of written cemetery rules and regulations governing specifications affecting the foundations, memorials or installation thereof, and or to provide information concerning the location of graves.

(g) Charge a fee, except a fee based on its actual costs and overhead in accordance with general accounting principles, including a reasonable profit, to lay-out where layouts are performed, and to inspect the work product of Dealers of memorial foundation and installation services. Actual cost, in accordance with general accounting principles, is defined as the hourly compensation, including fringe benefits, of those employees whose normal duties include lay-out and inspection of memorials installed by Dealers.

* * *

(i) Charge the Dealer for fees of any nature in connection with the foundation and/or memorial except as specifically provided in this agreement where installation thereof is performed by a Dealer.

(j) Offer all pre-need sales only upon the condition that the memorial or foundation be purchased from the cemetery, make such memorial or foundation pre-need sales without each item or service being priced separately nor impose a condition that any one item or service may be purchased only if another item or service is purchased. Nothing contained herein shall prevent a cemetery from developing a section where the foundations for memorials are preinstalled.

It is readily apparent from ¶ 7 that the Consent Decree contemplates a transparency for Pennsylvania cemeteries' business practices to the consuming public with whom the plaintiff class is in competition. This transparency of "rules and regulations governing specifications affecting the foundations, memorials or installation thereof" is to level the competitive playing field between Pennsylvania monument builders and cemeteries. Thus, ¶ 7 requires that cemeteries offer bids and fees in such a way that consumers may readily compare them to what outside monument builders offer, thus enhancing the competition that the antitrust laws exist to promote.

This case illustrates what happens when a cemetery fails to comply with these transparency provisions. By West Laurel Hill's introducing the possibility that "care fees" of some kind might be imposed on Dr. Wang, Gallagher was put in a position where it simply could not respond to give Dr. Wang the security of a final, all-inclusive price that the Wang family would incur. West Laurel Hill's temporizing with the fictive "care fee" thus ran afoul of ¶¶ 7(a) and (f).

Although the matter was not particularly material given the magnitude of the Wang project, it is also clear that the layout fee that Mr. Mann claimed that he calculated -- \$150.00 -- was not figured in accordance with ¶ 7(g). This subsection only permits "[a]ctual costs, in accordance with general accounting principles," i.e., "the hourly compensation, including fringe benefits, of those employees whose normal duties include lay-out

and inspection of memorials installed by dealers." Even on Mr. Mann's purported calculus, the lay-out fee should have been \$141.75, and ¶ 7(g) does not permit the upward rounding that Mr. Mann unilaterally claimed he was entitled to do. Indeed, we find as a fact that the worksheet for the calculation -- which West Laurel Hill failed to produce to Gallagher notwithstanding its request for it -- was in fact not contemporaneously created, but rather constitutes a post hoc attempt to back into the Consent Decree that for months West Laurel Hill claimed it was not subject to.⁴

West Laurel Hill's more serious breach of the Consent Decree is found in its admitted bundling of all fees into the single, inclusive price provided in the October 20, 2001 contract. See Pl'ff's Ex. 21. It will be recalled that ¶ 7(j) prohibits such bundling of services. West Laurel Hill's defense, however, was predicated on the transaction at issue not being a "pre-need sale" because Mrs. Wang had already died. Given the reality that Dr. Wang bought twenty cemetery plots and that, at a minimum, the monument was intended to cover at least three members of the Wang family, 95% of the monument's use ($19 \div 20$) or 66.66% of it (two out of three identified family members) was

⁴ We are also disturbed that West Laurel Hill failed to provide Gallagher with an extant chronology that Mr. Woodside created and brought with him to the hearing, but never produced before that hearing. This kind of hide-the-ball approach to the defense of the motion fortifies our view that West Laurel Hill never had any intent of either honoring the Consent Decree or the lawful processes of this Court and the Federal Rules of Civil Procedure.

manifestly on a pre-need basis. To either extent, therefore, even a cemetery-lenient reading of ¶ 7(j) would lead to the conclusion that the predominate purpose of the monument was indeed pre-need.

We shall, however, reflect the fact of Mrs. Wang's post-need use of part of the plot by reducing the damage pro tanto in the most liberal reading of what in fact occurred here. As both firms agreed that the gross benefit on this transaction was \$20,000.00, we will award to Gallagher two-thirds of that sum, or \$13,340.00, to cover its loss here occasioned by West Laurel Hill's failure to comply with the Consent Decree.⁵

Other Relief

Besides awarding Gallagher \$13,340.00 for West Laurel Hill's failure to comply with the Consent Decree, we will also award Gallagher its reasonable counsel fees in connection with the prosecution of its motion, including counsel's time in responding to this Court's Order of May 31, 2002 which, in turn, was incurred because of West Laurel Hill's unwarranted defense that it was not subject to the Consent Decree. See Halderman v.

⁵ It is worth noting that the record seems quite clear that Gallagher would have won the Wang family's business but for West Laurel Hill's improper conduct here. Besides crediting Mr. Conroy's testimony on this point, it has not escaped our attention that the October 20, 2001 contract price was only \$102.00 less than what Gallagher had quoted on September 10. It is undisputed that Mr. Conroy in September went to Dr. Wang's home to conclude a contract, and it was only because of the uncertainty West Laurel Hill created that Dr. Wang did not sign his contract with Gallagher as planned.

Pennhurst State School & Hosp., 49 F.2d 939, 941 (3d Cir. 1995);
Robin Woods, Inc. v. Woods, 28 F.3d 396, 400-01 (3d Cir. 1994).

If the parties cannot agree on the appropriate fees in this respect, Gallagher's counsel shall submit an affidavit as to his claimed fees and expenses by July 25, 2002.

Although there is certainly a predicate for Gallagher's request for the imposition of punitive damages in view of West Laurel Hill's palpable contempt, in our discretion we conclude that the imposition of the \$13,340.00 and counsel fees will suffice to convey to West Laurel Hill that it must in the future comply with the letter of the Consent Decree.⁶ Such relief also makes Gallagher whole for this episode. We therefore decline to award punitive damages.

An Order embodying this relief follows.

⁶ More than this would also in our view constitute inequitable piling on.

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ORDER

AND NOW, this 9th day of July, 2002, upon consideration of plaintiff's motion to compel compliance with court-approved consent decree and to find respondent in contempt of court (docket no. 371), and West Laurel Hill Cemetery Company's opposition thereto, and after a hearing on the motion, and upon the findings of fact and conclusions of law contained in the accompanying Memorandum, it is hereby ORDERED that:

1. Plaintiff's motion is GRANTED;
2. For West Laurel Hill Cemetery's failure to comply with the Consent Decree, it shall REMIT \$13,340.00 to Gallagher Memorials, Inc. by August 8, 2002; and
3. If the parties are unable to agree on a reasonable counsel fee, plaintiff's counsel shall by July 25, 2002 submit a petition for an allowance of counsel fees and reimbursement of out-of-pocket costs, and West Laurel Hill shall file any

opposition to that petition by August 2, 2002 and state whether it demands a hearing on the petition.

BY THE COURT:

Stewart Dalzell, J.