

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

MASH ENTERPRISES, INC., et al. : CIVIL ACTION
: :
: :
vs. : :
: :
PROLEASE ATLANTIC CORPORATION, et al. : NO. 01-2437

MEMORANDUM

ROBERT F. KELLY, Sr. J.

AUGUST 7, 2006

In this Court's Findings of Fact and Conclusions of Law issued on March 4, 2004, at page 33, we made the following award to ProLease Atlantic:

DAMAGES

Original Principal Balance of the Promissory Note:	\$2,066,875
Set-Off Under The Recalculation Formula:	\$1,692,500
ProLease Atlantic's Payment of ECW Taxes:	\$6,132.92
ProLease Atlantic's Payment of Health Insurance for PLC's Employees:	\$106,807
ProLease Atlantic's Payment of Health Insurance for Relatives and Acquaintances:	\$39,846
ProLease Atlantic's Payment of Worker's Compensation Insurance for PLC Employees:	\$45,935.62
Counter Defendants; Failure to Reimburse ProLease Atlantic for Administering PLC's Payroll and Benefits:	\$33,212
ProLease Atlantic's Promissory Note Payment:	\$151,558.69

We also awarded counsel fees to ProLease Atlantic as the prevailing party in the sum of \$306,330.50.

On appeal the Third Circuit reduced the set-off figure under the recalculation formula by the “maximum of \$335,000”¹ and reversed this Court’s finding of fraud on the part of Plaintiffs. The Third Circuit then remanded the case to this Court to (1) decide whether Ventresca employees were part of the sale and (2) to re-evaluate the attorneys’ fee award in light of the changes made by the Third Circuit to this Court’s findings.

VENTRESCA EMPLOYEES

In its Opinion the Third Circuit directed this Court on Remand to determine whether the “Eligible Employees” of Ventresca were part of the assets purchased by ProLease Atlantic. If we find that they were part of the purchase then ProLease Atlantic must pay for them and according to the Third Circuit Opinion this Court must award MASH \$325,884 plus interest. If we find that they were not part of the sale we are to subtract the amount attributed to Ventresca employees (about \$15,000) from the \$325,884 before calculating interest on the remainder.

In their Memorandum of May 15, 2006, Plaintiffs point out that Mark Freed testified at trial, that at the time the parties signed the Purchase Agreement, PLC’s assets, including Ventresca were for sale. (Ex. 1, testimony of Mark Freed at 169-70.) It was not until later that ProLease Atlantic decided that it did not want to buy clients located in Florida. (Id.) At closing, the parties went through a list of clients located in Florida and “lined them out” with a black marker to indicate that those clients were not being sold to ProLease Atlantic. (Id. at 170;

¹The Third Circuit was not certain as to the exact amount because a question remained as to whether Ventresca employees were part of the sale, if they were the amount was \$335,000, if not there would have to be a reduction from that figure.

see also Ex. 2.) Plaintiffs point out that Ventresca was not one of the clients lined out because Ventresca is not located in Florida. As a letter sent to ProLease Atlantic indicates, it is a Pennsylvania Corporation. (Ex. 3.) Accordingly, Plaintiffs argue, that Ventresca's leased employees were assets purchased by ProLease Atlantic and therefore properly counted as "Eligible Employees" in the calculation of the amount owed by ProLease Atlantic on the Promissory Note.

This argument is persuasive, and when we consider that Defendants make no attempt to refute Plaintiff's position, we conclude that the Ventresca employees were purchased by ProLease Atlantic and therefore \$15,000 should be awarded to Mash for these employees.

Under the Purchase Agreement the Promissory Note is to bear interest at 8% per annum. Based on an amount due on the Note of \$325,884 at 8% interest for a period of six years, ProLease Atlantic would owe approximately \$156,424 in interest resulting in a total amount due on the Promissory Note of \$482,308.

ATTORNEYS' FEES AND COSTS

The parties agree that the right to attorneys' fees to the prevailing party is contained in the contract the parties entered into and that the contract is to be governed by Maryland law.

According to Maryland case law, the quality and amount of information that a claimant is required to provide is as follows:

(a) the party seeking the fees, whether for him/herself or on behalf of a client, always bears the burden of presenting evidence sufficient for a trial court to render a judgment as to their reasonableness; (b) an appropriate fee is always reasonable charges for the services rendered; (c) a fee is not justified by a mere compilation of hours multiplied by fixed hourly rates or bills issued to the client; (d) a request for fees must specify the services performed, by whom they were performed, the time expended thereon, and the hourly rates charged; (e) it is incumbent upon the party

seeking recovery to present detailed records that contain the relevant facts and computations undergirding the computation of charges; (f) without such records, the reasonableness, vel non, of the fees can be determined only by conjecture or opinion of the attorney seeking the fees and would therefore not be supported by competent evidence.

B&P Enters. v. Overland Equip. Co., 133 Md. App. 583, 625, 758 A.2d 1026, 1048

(2000)(quoting Maxima, 100 Md. App. at 453-54, 641 A.2d at 977). After the claimant has presented the necessary evidence in support of an award of attorneys' fees, the trial court is required to evaluate the reasonableness of the fees. Id. (citing Holzman v. Fiola Blum, Inc., 125 Md. App. 602, 726 A.2d 818 (1999)). In order to evaluate the reasonableness of the fees, the factors to be considered are as follows:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

Id. (citations omitted). "The claimant bears the burden 'to provide the evidence necessary for the fact finder to evaluate the reasonableness of the fees.'" Id. (quoting Maxima, 100 Md. App. at 454, 641 A.2d at 977).

In our Memorandum of July 19, 2004 (Doc. No. 202), we awarded ProLease Atlantic a total of \$306,330.50 as reasonable attorneys' fees and costs. We still view that amount as reasonable for the results that ProLease Atlantic attained at that point. The Third Circuit reduced the "set off under the recalculation formula" by \$335,000, thereby reducing the original

set off figure of \$1,692,500 to \$1,357,500 and they reversed our finding of fraud contained in Count II of the Counterclaim.

The question for us at this point is, what effect did those reductions have on the \$306,330.50 figure which we originally found to be reasonable and which we now view as a proper base to start from?

ProLease Atlantic in its Memorandum on this issue argues:

1. ProLease Atlantic claims that because of their overall success they are still entitled to all of the original fee of \$306,330.50; or
2. ProLease Atlantic would have us add together certain discreet fees and costs that they can isolate, deduct those from the original fee, then take 77% of the balance and add that figure to the discreet fees that they isolated. That would work out something like this:

Fees and costs re: expert witness -	\$15,123.01
Fees and costs re: MASH's fraud claim -	\$ 6,250.
Fees and costs re: MASH's constructive trust -	<u>\$21,570.</u>
	\$42,943.01

ProLease would then deduct \$42,943.01 from \$306,330.50 and arrive at a figure of \$263,387.49. They would then take 77% of \$263,387.49 and add it to the \$42,943.01 for a total of \$245,751.38 as their final fee and cost figure. (See Defendant's Memorandum of June 15, 2006.)

I believe Plaintiff's position basically is that Defendant has the burden of proving the hours spent on the portion of the set off that was reversed (\$335,000) and the time spent on the unsuccessful attempt to prove fraud in Count II of the Counterclaim in order to deduct that time

from the total fee of \$306,330.50. It is also Plaintiff's position that Defendant has failed to prove this.

In my view it is an almost impossible task to require Defendant to identify the time spent on that particular issue. In our Findings of Fact and Conclusions of Law we found that the number of "Eligible Employees" under the Contract was 1,853 and reduced the amount owed by ProLease Atlantic accordingly. MASH on appeal argued successfully that an additional 268 employees should have been added to the number of "Eligible Employees" and the Third Circuit agreed.

I believe it is unrealistic to require ProLease Atlantic to identify the time spent trying to exclude the 268 additional employees from the 1,853 employees. I believe the best solution is to reduce the fee in proportion to the reduction in the set off under the recalculation formula. When the Third Circuit added the 286 workers to the list of "Eligible Employees" thereby reducing the set off due to ProLease Atlantic from \$1,692,500 by \$335,000, this amounted to approximately a 20% reduction in ProLease Atlantic's favorable result. The original fee award of \$306,330.50 should be reduced accordingly. Therefore the original fee should be reduced by \$61,266.10.

FRAUD CLAIM

The Third Circuit Court of Appeals also reversed this Court's finding of fraud set forth in Count II of the Defendants' Counterclaim. One of the issues that this Court must decide is what effect did this reversal of the fraud claim have on the attorneys' fee awarded by this Court. In order to determine this let us compare the allegations set forth in Count II, the Fraud Count of the Counterclaim which was reversed with Count III, the Negligent Misrepresentation Count of

the Counterclaim which was not reversed.²

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Count II

(Fraud - Counter-Defendants HRO/MASH, Fried and Vogel)

106. ProLease Atlantic realleges Paragraphs 1 through 105 as if fully set forth herein.
107. At the time HRO/MASH Fried and Vogel entered into the Asset Purchase Agreement and the Letter Agreement with ProLease Atlantic, HRO/MASH Fried and Vogel, jointly and severally, made numerous false representations and misleading material omissions of fact to ProLease Atlantic. These false representations and material omissions included, but are not limited to:
- I. false representations and material omissions relating to the accuracy of the Client List attached as Exhibit C to the Asset Purchase Agreement;
 - ii. false representations and material omissions relating to the number of HRO's Eligible Employees;
 - iii. false representations and material omissions relating to clients identified on Exhibit C who were intending to cease doing business with HRO;
 - iv. false representations and material omissions relating to the asserted payment by HRO of all federal, state and local taxes due and owing by HRO and its "Affiliates" (including ECW) to governmental bodies at the time of Closing;
 - v. false representations and material omissions relating to PLC's

Count III

(Negligent Misrepresentation - Counter-Defendants HRO/MASH, Fried and Vogel)

113. ProLease Atlantic realleges Paragraphs 1 through 112 as if fully set forth herein.
114. HRO/MASH Fried and Vogel owed ProLease Atlantic a duty of care not to make misrepresentations which were untrue.
115. At the time HRO/MASH Fried and Vogel entered into the Asset Purchase Agreement and the Letter Agreement with ProLease Atlantic, HRO/MASH Fried and Vogel, jointly and severally, made numerous negligent misrepresentations to ProLease Atlantic including but not limited to:
- I. negligent misrepresentations relating to the accuracy of the Client List attached as Exhibit C to the Asset Purchase Agreement;
 - ii. negligent misrepresentations relating to the number of HRO's Eligible Employees;
 - iii. negligent misrepresentations relating to clients identified on Exhibit C who were intending to cease doing business with HRO;
 - iv. negligent misrepresentations relating to the asserted payment by HRO/MASH of all federal, state and local taxes due and owing by HRO and its "Affiliates" (including ECW) to governmental bodies at the time of Closing;
 - v. negligent misrepresentations relating to PLC's compliance with the terms

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| | compliance with the terms of its group health insurance policy with Capitol BlueCross. | | of its group health insurance policy with Capitol BlueCross; |
| vi. | false representations and material omissions relating to HRO's compliance with the terms of its group health insurance policies with Amerihealth; | vi. | negligent misrepresentations relating to HRO's compliance with the terms of its group health insurance policies with Amerihealth; |
| vii. | false representations and material omissions relating to HRO's asserted disclosure to ProLease Atlantic of all facts material to HRO's operations; | vii. | negligent misrepresentations relating to HRO's asserted disclosure to ProLease Atlantic of all facts material to HRO's operations; |
| viii. | false representations and material omissions relating to the truth of each of the warranties and representations made in the Asset Purchase Agreement; | viii. | negligent misrepresentations relating to the truth of each of the warranties and representations made in the Asset Purchase Agreement; |
| 108. | Subsequent to the Closing, Fried, on behalf of MASH/HRO and Vogel, fraudulently induced ProLease Atlantic into advancing payroll payments to TASC based upon Fried's false representation that HRO and/or its affiliates had tendered "a deposit" to ProLease Atlantic for the purpose of permitting ProLease Atlantic to advance payroll to TASC. | 116. | At the time these misrepresentations were made prior to Closing, MASH/HRO, Fried and Vogel knew or should have known that these misrepresentations were false and misleading, and that ProLease Atlantic was likely to suffer harm as a result of these misrepresentations. |
| 109. | These representations and material omissions were made by HRO, MASH, Fried and Vogel prior to Closing with the knowledge of their falsity and/or with reckless disregard of their truth, with the intention that ProLease Atlantic would rely upon these statements, and with the knowledge that ProLease Atlantic would likely suffer harm as a result of these misrepresentations. | 117. | These misrepresentations were materially relied upon by ProLease Atlantic when it decided to enter into the Asset Purchase Agreement, to pay the Purchase Price for the Purchased Assets and to execute the Promissory Note, and materially induced ProLease Atlantic to purchase HRO's assets. |
| 110. | These misrepresentations and material omissions were reasonably relied upon by ProLease Atlantic when it decided to enter into the | 118. | As a result of ProLease Atlantic's reliance upon these negligent misrepresentations, ProLease Atlantic has been damaged in the amount of Five Million Dollars (\$5,000,000.00). |

As can be seen both Counts would require almost identical proof, the main difference being the requirement of “intentional” as opposed to “negligent misstatements”. Because the work to prove the successful Count was basically the same as that to prove the unsuccessful Count, I believe no reduction should be made for the dismissal of the Fraud Count.

CONCLUSION

Incomplete success is a frequent basis for a downward adjustment in a fee award. However, the usual precision that the State of Maryland would require cannot reasonably be applied to reduce a fee where the successful and unsuccessful claims are factually intertwined or where counsel devoted most of his time to the litigation as a whole. It is for these reasons that we arrived at our conclusions.

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- Asset Purchase Agreement, to pay the Purchase Price for the Purchased Assets and execute the Promissory Note, and materially induced ProLease Atlantic to purchase HRO’s assets, to pay the Purchase Price and execute the Promissory Note.
111. As a result of ProLease Atlantic’s reasonable reliance upon these fraudulent representations and material omissions, ProLease Atlantic has been damaged in the amount of Five Million Dollars (\$5,000,000.00).
 112. The foregoing actions were undertaken by HRO, MASH, Fried and Vogel with actual malice and with ill will, such that an award of punitive damages is appropriate.

We therefore enter the following Order.

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ORDER

AND NOW, this 7th day of August, 2006, having considered Plaintiffs' Memorandum Addressing The Remaining Issues Before This Court Following The Decision Of The United States Court of Appeals for the Third Circuit As Amended on February 9, 2006, and Defendants' response thereto, it is **ORDERED** that:

Defendants, ProLease Atlantic Corp., et al., shall pay to Plaintiff, MASH Enterprises, Inc. \$325,884 in principal owed on the Promissory Note plus 8% interest per annum calculated from June 30, 2000 to the date of this Order, which is \$159,140.02 for a total of \$485,024.02; and

MASH Enterprises, Inc. shall pay the sum of \$245,064.40 to ProLease Atlantic Corp. in attorneys' fees and costs.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY
SENIOR JUDGE