



By the order of the court, Judge David A Wiseman

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FOR PUBLICATION

IN THE SUPERIOR COURT

OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CENTURY INSURANCE COMPANY,)
LIMITED,)
Plaintiff,)

vs.)

GUERRERO BROTHERS, INC., C.N.M.I.)
PUBLIC SCHOOL SYSTEM,)
Defendants)

Civil Action No. 01-0478

ORDER:

DENYING GUERRERO BROTHERS,)
INC. REQUEST FOR ATTORNEYS')
FEES AND COSTS)

CNMI PUBLIC SCHOOL SYSTEM,)
Counter-claimant,)

vs.)

GUERRERO BROTHERS, INC.,)
CENTURY INSURANCE, INC.,)
COMMONWEALTH DEVELOPMENT)
AUTHORITY,)
Counter-defendants.)

THIS MATTER was heard on October 30, 2008, at 1:30 p.m. in Courtroom 223. Counsel Karen Klaver appeared on behalf of CNMI Public School System (PSS). Counsel Douglas Cushnie appeared on behalf of Guerrero Brothers, Inc. (GBI).

1 **I. SYNOPSIS**

2 In the second phase of the bifurcated trial, GBI sought partial summary judgment on the issue of
3 whether PSS breached its contractual duty to interplead remaining Phase 1 Funds in the amount of
4 \$804,049.73. On August 29, 2008, this court granted GBI's motion finding that PSS did breach the
5 agreement when they failed to interplead the funds. PSS then sought judgment as a matter of law as to
6 GBI asserting GBI failed to present legally sufficient evidence showing GBI was harmed by PSS's
7 breach. This court granted PSS's motion finding that GBI failed to present legally sufficient evidence
8 showing they were harmed. The second phase of the bifurcated trial continued and the remaining
9 parties were PSS and the Commonwealth Development Agency (CDA). GBI now requests attorneys'
10 fees and costs pursuant to their settlement agreement with PSS.

11 Paragraph 10 of the PSS-GBI settlement agreement reads: "In the event that any party breaches
12 this Agreement and an action is brought to enforce said Agreement, the *prevailing party* shall be entitled
13 to an award of. . . reasonable attorney's fees and costs." (Emphasis added).

14 GBI contends that because PSS was held liable for breaching the agreement when this court
15 granted summary judgment in favor of GBI – GBI is the prevailing party as required by the language of
16 Paragraph 10. Alternatively, GBI argues that if establishing PSS's liability is not sufficient to define
17 GBI as the prevailing party, the jury award to CDA establishes GBI as the prevailing party. In support
18 of this, GBI reasons that the award to CDA was tantamount to GBI being awarded the Phase I Funds
19 and forwarding the money directly to CDA thereby reducing GBI's indebtedness to CDA – therefore,
20 GBI prevailed.

21 In light of this court's recent Order granting PSS's judgment as a matter of law and setting aside
22 the jury verdict which awarded CDA \$804,049.73, GBI revised their arguments during the hearing on
23 the motion. GBI now postulates that because CDA is no longer entitled to a monetary judgment, GBI is
24 in fact now injured and the summary judgment granted in favor of PSS which found GBI was not
25

1 harmed can no longer stand.¹ GBI's amended argument, while creative, is inconsequential to the
2 determination of whether or not GBI is the prevailing party. GBI asserts no further reasons why they
3 should be designated the prevailing party.

4 PSS argues that GBI cannot be defined as the prevailing party simply because GBI prevailed on
5 the question of liability. Nevertheless, PSS further argues the motion is untimely, was required to be
6 raised during GBI's case in chief, and the total amount requested is unreasonable.

7 GBI counters that their motion was timely, they were not required to request attorneys' fees in their case
8 in chief, and the total amount requested is reasonable.²

9 This court holds that the motion filed by GBI was timely. However, GBI cannot show that they
10 were the prevailing party in the action between themselves and PSS. Therefore, for the reasons stated
11 below, the motion to grant attorneys' fees and costs is hereby DENIED.

12 **II. DISCUSSION**

13 **1. The Motion is Timely**

14 Commonwealth Rule of Civil Procedure 54(b) requires the motion for attorneys fees and costs to
15 "be filed and served no later than 14 days after entry of judgment; must specify the
16 judgment and the statute, rule, or other grounds entitling the moving party to the award;
17

18
19 _____
20 ¹GBI's argument, while superfluous to the current motion, will be briefly addressed. This court's finding that GBI
21 suffered no harm as a result of PSS's breach was not contingent on, nor grounded in, CDA prevailing on its claim against
22 PSS. This court granted PSS's Rule 50 Motion pursuant to Commonwealth Rule of Civil Procedure because GBI could not
23 present sufficient evidence showing that they were damaged as a result of the PSS's breach of the PSS-GBI agreement. This
24 finding was irrespective and isolated from any possible future resolutions in the PSS-CDA lawsuit.

25 ² Although unnecessary to this court's determination, the court will briefly address the issues of whether GBI was
required to raise the motion during their case in chief and the reasonableness of the total amount requested by GBI.

1 and must state the amount or provide a fair estimate of the amount sought.” Com. R. Civ. Proc. 54(b).

2 PSS argues that the date of judgment, by GBI’s own statement in their motion, was August 29,
3 2008. GBI did not file the motion requesting attorneys fees until September 25, 2008, which is more
4 than 14 days as required by Rule 54.

5 GBI concedes that motions for attorney’s fees must be filed within 14 days after entry of
6 judgment. However, GBI contends the oral statement made from the bench regarding entry of judgment
7 is not sufficient and the 14 day time period does not start to run until a written judgment has been
8 entered.

9 Rule 54(a) defines "judgment" as used in these rules as “a decree and any order
10 *from which an appeal lies*. A judgment *shall not contain* a recital of pleadings, the report of a master, or
11 the record of prior proceedings.” Com. R. Civ. Proc. 54(a)(emphasis added). Regarding what an appeal
12 may be taken from, the CNMI Supreme Court has held:

13 an appeal may only be taken from a judgment which is set forth on
14 a separate document issued from the Superior Court. For judicial
15 economy and efficiency and so that parties and the courts are clear
16 as to when a case is fully adjudicated below, henceforth we will
require strict adherence to the separate document rule which
requires a formal separate entry of judgment or order prior to this
Court’s obtaining jurisdiction on appeal.

17 *Commonwealth v. Kumagai*, 2006 MP 20.

18 This court issued an Order on August 29, 2008, adjudicating the rights of the parties with respect to
19 the issue of liability. The Order granted PSS’s motion for summary judgment and made clear to interested
20 parties that the issue of liability was fully adjudicated. However, Rule 54(a) states that the judgment
21 should not contain a “recital of pleadings. . .or the record of prior proceedings.” Com. R. Civ. Proc. 54(a).
22 As is common with most written Orders of this court, the Order issued on August 29, 2008, did contain
23 such recitations. As such, that Order did not qualify as a ‘separate document’ as anticipated by the CNMI
24 Supreme Court.

25 Therefore, in accordance with Rule 54 and the CNMI Supreme Court, a separate document - in

1 addition to the order - must be issued before the 14 day time limit starts to run.³ Thus, GBI's motion is
2 timely and properly before this court.

3
4 **2. Determining the 'Prevailing Party'**

5 GBI maintains that a finding of liability is all that is necessary to establish them as the prevailing
6 party. However, GBI fails to cite any authority to support their claim. Alternatively, GBI argues that if
7 an award of damages was relevant to determining who the prevailing party is, the jury award to CDA
8 suffices. GBI reasons that the \$804,049.73 awarded to CDA was actually the damages that GBI
9 themselves were seeking with the intention of forwarding that money on to CDA. Stated simply, GBI
10 argues the verdict against PSS which awarded \$804,049.73 to CDA equates with GBI prevailing. GBI
11 concludes that GBI's "interest in the \$804,049.73 was vindicated both in the liability aspects, that PSS
12 breached its agreement, and in the recovery crediting the GBI loan account with CDA." (GBI Motion at
13 5). However, this is an erroneous assumption.

14 The award to CDA was not given in anticipation of being a "credit" to the account of GBI. The
15 ultimate destination of the awarded funds was never conclusively determined by the jury, the court, or the
16 parties. Regardless, because GBI's argument hinges on the jury award to CDA, which has since been
17 overturned, GBI's request for attorney's fees cannot be granted unless GBI can show they are the
18 prevailing party based solely on the finding of PSS's liability.⁴

19
20 ³ As the rule of "separate documents" is secondary to the primary issues of this motion, an assiduous analysis will
21 not be contemplated by this order.

22 ⁴ GBI also claims that they prevailed on their suit against Century Insurance (CIC) because CIC was seeking 2
23 million dollars and was awarded far less. This, GBI claims, is evidence that PSS is the 'ultimate loser' in the litigation. Such
24 an attenuated link establishing GBI as the prevailing party was not supported by any authority. Moreover, the claims between
25 CIC and GBI are irrelevant to GBI's current claim to attorneys' fees and in no way strengthens their claim against PSS.

1 PSS argues that GBI cannot be defined as the prevailing party unless GBI prevailed on their
2 damages claim against PSS.

3 In *Camacho v. L&T Int'l Corp.*, the CNMI Supreme Court stated that:

4 Prevaling in litigation differs from prevailing on a cause of action.
5 Thus, a 'prevailing party' may be the party prevailing in interest,
6 and not necessarily the prevailing person. To be such does not
7 depend upon the degree of success at different stages of the suit,
8 but whether, at the end of the suit, . . . the party who has made a
9 claim against the other, has successfully maintained it."

10 4 N.M.I. 323, 330 (1996).

11 Here, GBI prevailed on the issue of liability because PSS was found to have breached the contract.
12 However, succeeding on a cause of action for breach of contract requires more than a showing of liability.
13 (In the majority of jurisdictions, maintaining a cause of action for breach of contract requires a showing of
14 damages. *See e.g. Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F. 3d 1010 (9th Cir. 2000)). Nonetheless,
15 showing that GBI prevailed in *litigation*, as required by *Camacho* is even more tenuous. *Camacho*, 4
16 N.M.I. at 330. GBI's evidence was not even sufficient enough to submit the issue of damages to the jury.
17 GBI's real interest and ultimate expectation in their lawsuit against PSS was a monetary award. GBI was
18 unsuccessful in obtaining any part of this goal. Simply determining that PSS breached the contract did not
19 establish GBI's cause of action nor did it provide any practical benefit to GBI. Thus, it is unreasonable to
20 conclude that GBI successfully maintained their claim against PSS as described in *Camacho. Id.*

21 PSS quotes *Hensely v. Eckerhart* in their pleadings stating the court employed a two part test when
22 awarding attorney fees under the Civil Rights Attorney's Fees Awards Act. *Hensely v. Eckerhart*, 461
23 U.S. 424 (1983) (a portion of the holding regarding an unrelated issue has been superseded by statute); 42
24 U.S.C.A. § 1988 (West 1981) Although not in the context of a contract provision awarding attorney's
25 fees, the Court's analysis is illustrative. PSS, however, overstates the court's employment of a "two-part
test". (PSS Motion at 3:8-13). The court never defines a definitive two-part test that should be employed;
further, the quoted portion in PSS's brief does not appear in the case.

1 While the majority of the Court’s opinion focused on determining what fees are “reasonable”, the
2 Court does discuss the proper considerations in determining who the “prevailing party” is in a lawsuit. The
3 court states: “[a] typical formulation is that plaintiffs may be considered ‘prevailing parties’ for attorney’s
4 fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the
5 parties sought in bringing suit.” *Hensely* at 433 (quoting *Nadequ v. Helgemoe*, 581 F.2d 275, 278-79)
6 (1978) (internal quotations removed). *Hensely* stated "the most critical factor is the degree of success
7 obtained." *Id* at 436.

8 Similar to the CNMI Supreme Court’s holding, obtaining the benefit the party seeks is more
9 instructive of who is the true “prevailing party”. Again, the benefit GBI sought from action against PSS
10 was monetary damages. Their suit against PSS procured no such benefit. As such, it is hard to articulate a
11 way in which GBI succeeded in their claims.

12 While no explicit formula exists for determining who the prevailing party is in a breach of contract
13 action, courts agree that the flow of benefit and overall success in litigation is the crux of the
14 determination. *See e.g. Farrar v. Hobby*, 506 U.S. 103, 111-13 (1992); *Dattner v. conAgra Foods, Inc.*,
15 458 F.3d 98 (2nd Cir. 2006); *Andrettit v. Borla Performance Indus.*, 426 F.3d 824, 835 (6th Cir. 2005);
16 *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1234 (10th Cir. 2001); *Hsu v. Abbara*, 9 Cal.4th 863, 876
17 (1995); *Capital Asset Research Corp. v. Finnegan*, 216 F.3d 1268, 1272 (11th Cir. 2000). GBI’s inability
18 to procure sufficient evidence to submit the issue of damages to a jury is significant. Therefore, GBI is not
19 the prevailing party and it would be unreasonable to award them attorneys’ fees pursuant to the settlement
20 agreement.

21 **3. GBI Did Not Have to Plead Attorneys’ Fees in its Case in Chief**

22 PSS argues that attorneys’ fees should have been argued and proven at trial as an element of
23 damages because it is based on the breach of a provision of the Settlement Agreement. GBI counters that
24 the authority cited by PSS is not relevant and that GBI has claimed attorneys fees in accord with
25 Commonwealth Practice. However, GBI fails to cite authority which supports their proposition.

1 Commonwealth Rule of Civil Procedure 54, which is modeled after the Federal Rules states:
2 “[c]laims for attorneys' fees and related nontaxable expenses shall be made by motion unless the
3 substantive law governing the action provides for the recovery of such fees as an element of damages to be
4 proved at trial.” Com R. Civ. Proc. 54(d)(2)(A). We may look to federal case law for guidance in
5 interpreting our local counterpart and interpretations of the federal rules are instructive. *Ada v. K.*
6 *Sadhwani's, Inc.*, 3 N.M. I. 303, 311 n.3 (1992); *Commonwealth v. Ramangmau*, 4 N.M.I. 227 (1995).

7 Jurisdictions interpreting the federal counterpart have held that the procedure of filing a motion
8 after entry of final judgment does *not* apply to attorney’s fees recoverable as an element of damages, such
9 as under the terms of a contract. *See e.g. Carolina Power & Light Co. v. Dynegy Mktg. & Trade*, 415 F.3d
10 354 (4th Cir. 2005).

11 While many similarities exist between this case and *Caroline Power*, one important distinction
12 must be addressed which has also been recognized by other jurisdictions. The final consideration by the
13 *Caroline Power* court in determining whether the provision granting legal fees was collateral to the
14 contract or a part of damages that must be pled was addressed in the following:

15 unlike a right to nonsubstantive attorneys fees that are collateral to
16 the merits of an action, which does not accrue until the litigation is
17 actually brought, the seller's right to legal costs under the contract
between the parties in this case arises as soon as the buyer rejects a
delivery of coal.

18 *Id.* at 359.

19 Our case is clearly distinguishable. In order to bring a claim for attorney’s fees, the requesting
20 party had to first initiate litigation. By using the term “prevailing party”, the parties obviously
21 contemplated initiation of litigation. This was not the case in *Carolina* where the action arose at the
22 moment delivery was rejected. Other cases have recognized this distinction and refused to hold a claim for
23 attorney’s fees must be pled as an element of damages when the award hinges on a determination of a
24 “prevailing party”. *See e.g. Kraft Foods N. Am., Inc. v. Banner Eng'g & Sales, Inc.*, 446 F. Supp. 2d 551,
25 578 (E.D. Va. 2006) (citing *Capital Asset Research Corp. v. Finnegan*, 216 F.3d 1268, 1270) (11th Cir.

1 2000) (holding the primary exception to the general rule that such fees must be proved at trial is where the
2 contract provides for recovery of attorney's fees by the prevailing party).

3 Although recovery for attorney's fees was provided for in a provision in the PSS-GBI agreement,
4 litigation was necessary to declare one party as having prevailed; therefore, the general rule that attorney's
5 fees had to be pled as an element of damages would not apply. Therefore, in accordance with the majority
6 of federal jurisdictions, GBI was not required to plead attorney's fees as an element of damages in its case
7 in chief.

8 9 **3. GBI's Request is Unreasonable**

10 GBI's affidavit of fees includes attorney's costs of preparing for and attending both phases of the
11 jury trial; including the remaining of phase two of the trial after all of GBI's claims against PSS were
12 settled. PSS argues it is unfair and unreasonable to suggest that PSS is responsible for the costs associated
13 with a trial where GBI had no claims against PSS. PSS claims that because there was a judgment as a
14 matter of law granted against GBI, PSS should only be responsible for the preparation and hearing
15 regarding the summary judgment entered against PSS. GBI counters that the fees and costs were incurred
16 in "assuring that the damage basis of GBI's claim was successfully resolved. It was successfully resolved,
17 and that required a trial."

18 There is nothing to support GBI's claim that PSS should pay the costs they incurred in their
19 continued, voluntary involvement in the trial between PSS and CDA. GBI had no pending claims against
20 PSS and GBI was no longer a party to the suit. It is beyond reproach that PSS would be responsible for
21 those fees incurred by GBI where GBI was not a party to the suit and had *no* claims against PSS. By this
22 logic, costs of voluntary future litigation which are incidental and peripheral to any former litigation could,
23 potentially, be the responsibility of the losing party in the former litigation. Obviously, this is an untenable
24 result.

1 **III. CONCLUSION**

2 GBI cannot establish themselves as the prevailing party. Simply having established that PSS was
3 liable for breaching the agreement is not sufficient. And in light of the recent granting as judgment as a
4 matter of law, GBI's argument that CDA's monetary jury award equates with GBI being the prevailing
5 party is no longer valid. Additionally, although not consequential, GBI did not have to plead attorney's
6 fees as an element of damages and their total request for fees was unreasonable.

7 For the foregoing reasons, GBI's request for attorneys' fees and costs is DENIED.

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9 **So ORDERED** this 12th day of November, 2008.

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11 _____ /s/

12 David A. Wiseman, Associate Judge
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