

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

OPPORTUNITY, LLC, an Idaho limited liability company,)
)
)
)
Plaintiffs,)

Case No. **CV 1996 4977**

ORDER

vs.)

FRED OSSEWARDE and JOANN OSSEWARDE, husband and wife,)
)
)
Defendants.)

FRED OSSEWARDE and JOANN OSSEWARDE husband and wife)
)
)
Counter plaintiffs,)

vs.)

EDWARD STOCKLEN,)
)
)
Counter defendant.)

This matter came before the Court on Plaintiff's (Opportunity) Objection to Defendants' (Ossewarde) Memorandum of Costs and Attorney fees. Hearing was held November 27, 2001. Additional simultaneous briefing was ordered due to the Court by December 17, 2001, such briefing was submitted by both parties and reviewed by the Court.

This case was tried to the Court on December 21, 1998, the Honorable James F. Judd

presiding. Judge Judd issued a Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order on March 20, 1999. That Opinion found in favor of the Ossewardes against Opportunity in the amount of \$453,571.24, plus interest at the statutory rate. Costs and fees were awarded in favor of Ossewardes against Opportunity. The Court reserved the issue concerning counterclaim defendant Stocklen's liability as guarantor of Opportunity's obligations. A Judgment against Opportunity was entered on April 8, 1999, was certified as a final judgment under I.R.C.P. 54(b), and Opportunity filed a Notice of Appeal to the Idaho Supreme Court, which is still pending.

The Ossewardes filed a Cost Bill on April 8, 1999, which detailed the costs incurred in this case and the three attorney fees incurred by the attorneys who worked on the case for Ossewardes, Harvey Richman, Steve McCrea and Larry Davidson. Since the billings submitted by these attorneys reflected work done for Ossewardes not only in this case but other legal work as well, the pertinent billings for this case were highlighted. The highlighting apparently was not available on the copy submitted to Mr. Kok, Opportunity's counsel, but at oral argument it was made clear that the items that were pertinent to this case were also "starred" (*) in addition to being highlighted. Opportunity timely filed an objection to the Cost Bill on April 21, 1999.

While a case is on appeal, the District Court has jurisdiction to decide issues regarding the taxation of costs and the awarding of attorney fees. I.A.R. 13(b)(9).

Costs are requested in the amount of \$1,963.34. The deposition transcripts, filing fees and service of process are allowable as a matter of right (I.R.C.P. 54(d)(1)(C)) and amount to \$1,902.34. The additional \$61.00 is for a court transcript, for which there has been no showing of "necessary and exceptional" under I.R.C.P. 54(d)(1)(D), and is thus, disallowed. Costs are GRANTED in the amount of \$1,902.34. The Court finds no reason to believe that any of these costs would not have been incurred were it not for the counterclaim against Stocklen (in other words, these costs would have been incurred in the original Opportunity v. Ossewarde litigation).

Attorney fees in the amount of \$45,551.38 are sought, \$22,601.68 from Harvey Richman, \$20,149.70 from Steve McCrea, and \$2,800.00 from Larry Davidson. As to Harvey Richman's amount of \$22,601.68, there is an error on the page that begins with an entry of 8/25/97, as attorney fees total \$1,618.53, when they in fact total \$1,183.33 (it appears \$435.20 was added in as attorney fees when they were actually costs on that page). Also, there is a further addition error at some point regarding Mr. Richman, because the Court finds that when the \$435.20 is taken out, and the rest of the amounts are added up, the amount of Mr. Richman's fee request should be reduced is \$352.50 (not \$435.20), to \$22,249.18. Thus corrected, the requested fees total \$45,198.88.

Attorney fees may be awarded to a counterclaimant on a counterclaim. *Torix v. Allred*, 100 Idaho 905, 910-11, 606 P.2d 1334, 1339-40 (1980), *see also* Walters, A Primer for Awarding Attorneys Fees in Idaho, 38 Idaho L. Rev. Vol. 1, 1-88, at pp. 12, n. 56 (2001).¹

Many issues are raised in this dispute over attorney fees. Opportunity does not dispute the award of attorney fees made by Judge Judd in the April 8, 1999 Final Judgment, as Opportunity's Brief in Support of Objection to Attorney's Fees and Costs, at page 5 reads:

Opportunity does not object to any specific charge and does not object to the amount and time spent in each task. Opportunity simply makes this point: It should not have to pay for the case against Edward Stocklen.

Opportunity filed a timely Objection to the Memorandum of Costs and Attorney's Fees on April 21, 1999. Unfortunately, Opportunity's Objection is vague, and mainly addresses inappropriate attorney fee billings for work not "done which in any way related to Opportunity or Stocklen lawsuits." Objection to the Memorandum of Costs and Attorney Fees, p. 2. Those objections were put to rest once it was made clear that only the highlighted or starred (*) portions of the billings were sought in the present case by defense counsel.

¹However, fees cannot be awarded *sua sponte* if not claimed under a pertinent statute. Walters, A Primer for Attorney Fees in Idaho, 38 Idaho Law Rev. Vol. 1, 1-88, p. 4, n. 11. That is not the situation in the present case.

The first issue then, is whether Opportunity is limited to its pleading (the Objection to the Memorandum of Costs and Attorney Fees), or whether it can expand the basis of its objection in oral argument on November 27, 2001 and in its “Brief in Support of Objection to Attorney Fees and Costs.” Ossewardes claim (Defendants’ Memorandum of Law Re: Attorney Fees and Costs, p. 5) “Objections which were not raised by Opportunity in its written submission should not be allowed”, citing *Kelly v. Hodges*, 119 Idaho 872, 811 P.2d 48 (Ct.App. 1991). The Court finds *Kelly* not on point as that case concerned summary judgment, not attorney fees and costs. By letter of December 26, 2001, Mr. Richman directs the Court’s attention to *Nanney v. Linella, Inc.*, 130 Idaho 477, 943 P.2d 67 (Ct.App. 1997). However, that case is not on point as the party objecting to attorney fees said they would file a memorandum, then failed to do so. In the present case, Mr. Kok timely filed an objection on behalf of Opportunity, which articulated reasons, although not clearly stating the ultimate issue, which is that fees should not be awarded for work done on the Stocklen matter. A party’s failure to object constitutes a waiver of the right to contest the requesting party’s entitlement to attorney fees (*Fearless Ferris Wholesale Inc., v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct.App. 1986)), but it does not result in a waiver of a party’s right to object to the improper award of attorney fees. *Allison v. John M. Biggs, Inc.*, 121 Idaho 567, 826 P.2d 916 (1992). *See also*, Walters, A Primer for Awarding Attorneys Fees in Idaho, 38 Idaho L. Rev. Vol. 1, 1-88, at p. 17 (2001). Because of the Court’s discretion, even if Opportunity had filed no Objection, or filed an Objection and failed to state any reasoning (such as in *Nanney*), this Court would not be duty bound to award all costs merely because they were requested by one party and not objected to or inadequately objected to by another party. “The court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney.” *Craft Wall of Idaho, Inc. v. Stonebreaker*, 108 Idaho 704, 706, 701 P.2d 324 (Ct.App. 1985). Certainly that same logic must apply to parts (B) through (K) of

Rule 54(e)(3), in that even if Opportunity's counsel did not articulate the unfairness in awarding fees on time spent on the Stocklen matter, it is nonetheless a reality that must be addressed, and this Court has not only the discretion to so *sua sponte*, but the duty to do so.

The converse side of whether Opportunity is limited to its pleading, is how specific does the Memorandum of Costs and Attorney's Fees need to be? Ossewardes contend that the affidavit of counsel "...is a prima facie showing, and is the only factual evidence before this court to be considered in determining the amount of the award." Defendants' Memorandum of Law Re: Attorney Fees and Costs, p. 4. Ossewardes also argue "It is the defendants [plaintiffs] obligation to make proofs that my affidavit is less than correct." *Id.*, p. 5. No citation is given for this proposition. Ossewardes' arguments in this regard are not supported by *Hackett v. Streeter*, 109 Idaho 261, 706 P.2d 1372 (Ct.App. 1985). On the other hand, Opportunity claims no fees can be awarded against Opportunity because there has been no attempt to segregate out the time spent on the Stocklen matter.

Because of the discretion granted to the Court in deciding claims for attorney fees, the Court finds that Opportunity is not limited to just its pleading, and the Court also finds that Ossewardes are not precluded from an award of attorney fees because they have not separated out an exact amount between work done by their attorneys against Opportunity compared to work done by their attorneys against Stocklen.

The Court has broad discretion in determining a claim for attorney fees. *Young v. State Farm Mut. Auto. Ins. Co.*, 127 Idaho 122, 898 P.2d 53 (1993); *Bott v. Idaho State Building Authority*, 128 Idaho 580, 917 P.2d 737 (1996). As an example, the award need not be based upon the hourly time sheets, "as the amount of time spent is but one of the several factors to be considered in awarding attorney fees." *Hackett*, 109 Idaho at 263, 706 P.2d at 1374, citing *State ex rel Kidwell v. U.S. Marketing, Inc.*, 102 Idaho 451, 459, 631 P.2d 622 (1981) (quoted portion from

Kidwell). However, an award of attorney fees must be supported by findings, which must in turn, be supported by the record. *Hackett*, 109 Idaho at 263, 706 P.2d at 1374, citing *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 684 P.2d 307 (Ct.App. 1984). *Hackett* then requires the Court to look at the factors enumerated in I.R.C.P. 54(e)(3)(A)-(K), and failing to properly consider those factors is grounds for a remand. *Hackett* 109 Idaho at 263-64, 706 P.2d at 1374-75.

Those Rule 54(e)(3)(A)-(K) factors will now be discussed:

(A) The time and labor required.

The time and labor required is set forth in the billings from the three attorneys. Other than the addition errors noted above, the amounts are accurate, and as noted, “Opportunity does not object to any specific charge and does not object to the amount and time spent in each task.” Opportunity’s Brief in Support of Objection to Attorney’s Fees and Costs, p. 5. The central task is how to fairly separate out the time spent against Stocklen.

(B) The novelty and difficulty of the questions.

Ossewardes’ Cost Bill addresses this issue only as to the amount of hours spent, not really addressing the novelty and difficulty criteria. The overall time spent seems appropriate to take a matter such as this through trial. The Court has reviewed the files, and while the undersigned judge did not hear the case, based on the pleadings of the parties, the Orders and findings by Judge Judd who heard the case, there does not appear to be any exceptionally novel or difficult legal questions. This would be a neutral factor in this case, neither adjusting the fees claimed upward or downward.

(C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.

“The skill requisite to perform the legal service properly” is related to the above criteria, regarding the “novelty and difficulty of the questions”, and is accordingly a neutral factor in the

Court's analysis. The Court is aware of the experience of Mr. Richman, Mr. McCrea, but not Mr. Davidson. The experience and ability of the attorneys involved is a factor that in this Court's mind would result in a higher than average award compared to the legal community as a whole, but this fact is accounted for in their hourly rates, which are average or slightly above for Steve McCrea and Larry Davidson, and significantly above average for Harvey Richman.

(D) The prevailing charges for like work.

The hourly rate for Mr. Davidson and Mr. McCrea are average prevailing charges for the area. Given Mr. McCrea's experience, his hourly rate is lower than prevailing in the area, and would result in a slight increase upward in the attorney fee award. As stated before, the Court is not familiar with Mr. Davidson, and there is no information in the Cost Bill from which base any departure from his billing. The hourly rate of Mr. Richman is higher than the prevailing rate for the area, even given his expertise and years of experience, and would result in a slight decrease downward in the overall attorney fee award.

(E) Whether the fee is fixed or contingent.

According to the Cost Bill, the fee is on an hourly rate. Thus, this is a neutral factor as well. Had there been a contingent nature to the fee, it would be a reason to depart upward to compensate for the risk to the attorneys of not getting paid at all.

(F) The time limitations imposed by the client or the circumstances of the case.

According to the Cost Bill, there was "No substantial time limitation", so this becomes a neutral factor.

(G) The amount involved and the results of the case.

The amount involved was certainly large and results obtained (\$425,000 plus fees and costs on the sale) are certainly in line with amount of fees requested. The fees are roughly 10% of the amount of the judgment. Were this handled on a contingency basis, the fees would be significantly

higher. This factor results in a slight increase upward in the overall attorney fee award.

(H) The undesirability of the case.

According to the Cost Bill, Ossewardes claim this to be “average” as far as undesirability. While it is unknown what is meant by that, the Court finds nothing in the file to indicate this would have been an undesirable case. Accordingly, this is a neutral factor.

(I) The nature and length of the professional relationship with the client.

Ossewardes cost bill indicates “they” have been representing the Ossewardes in various matters since 1996. “They” appear to be Mr. Richman and Mr. McCrea as Mr. Davidson did not sign the cost bill. There is nothing about a prior relationship that would cause this Court to depart upward or downward on attorney’s fees.

(J) Awards in similar cases.

For this criteria, Ossewardes’ Cost Bill reads: “unknown”. This is perhaps “unknowable” as well, as this Court is not aware of any detailed data for this particular community. This is a neutral factor given the fact that the case was handled on an hourly basis, and the fees requested are about 10% of the amount recovered.

(K) The reasonable costs of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party’s case.

The amount requested was \$707.50, which this Court was unable to find as a separate cost item. If the amount requested was attorney time spent doing computer assisted legal research, it has already been accounted for in the request, and thus, in the Court’s analysis.

(L) Any other factor which the court deems appropriate in the particular case.

This is where the Court will address the distinction between Ossewardes’ defense against Opportunity and Counterclaim against Opportunity (for which attorney’s fees are to be awarded) on one hand, and Ossewardes’ attorney’s involvement in the Counterclaim against Stocklen (for which attorney’s fees are not to be awarded) on the other hand. The appropriateness of doing so is found

in Justice Walter's law review article:

The court of appeals has held that if a plaintiff sues several defendants, and prevails against only some of them, the trial court cannot assess all of the attorney fees of the plaintiff against the losing defendants, as they are not liable for work "devoted exclusively" to the claims against the other defendants. Likewise, any party can be awarded attorney fees against another party only for the work done in defending the individual claim of each other party.

Walters, A Primer for Awarding Attorneys Fees in Idaho, 38 Idaho L. Rev. Vol. 1, 1-88, at pp. 71-72 (2001). Obviously some billings are not related to Opportunity, such as the time Ossewardes' counsel spent preparing the Counterclaim against Stocklen, and reviewing Stocklen's Answer (which occurred in July, August and September 1997, but the litigation against Opportunity had been going on for over a year by that time). Equally obvious is that fees incurred prior to the Counterclaim against Stocklen, are all related to Opportunity (however, the Court is not convinced that all of the charges incurred prior to August 30, 1996 filing the original Complaint in this matter are justified as against Opportunity, although these amounts by Mr. McCrea are not great).

Although Opportunity's counsel stated at oral argument that the case against Stocklen was quite a bit more complicated than the case against Opportunity, this Court cannot find a reason why the time actually spent by Mr. Richman, Mr. McCrea and Mr. Davidson was more on Stocklen than it was on Opportunity. Clearly there was time spent in the Stocklen matter, but this Court finds that it was in all likelihood 30% or less of the total time actually spent (and requested as fees) by those three attorneys. Accordingly, on this factor alone, the corrected fee request of \$45,198.88, is reduced by 30% to \$31,639.21.

As a result of the Court's analysis of factors (A) through (K) above, a further reduction of \$3,200.00 is made, resulting in an attorney fee award in the amount of \$28,439.21. Attorney fees in the amount of \$28,439.21 are GRANTED.

IT IS ORDERED that defendants/counterclaimants Ossewardes, recover against Opportunity, attorney's fees in the amount of \$28,439.21 and costs of \$1,902.34, for a total of

\$30,341.55, as a separate Judgment, but as contemplated in the Final Judgment signed by Judge Judd.

Entered this 4th day of November, 2002.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2002, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Edward W. Kok
(208)-664-4370

250 Northwest Blvd., Ste.
102
Coeur d'Alene, ID 83814-
2971

Stephen B. McCrea
(208) 664-4370

P. O. Box 1501
Coeur d'Alene, ID 83816-
1501

Harvey Richman
(208) 664-4370

608 Northwest Blvd., Ste 101
Coeur d'Alene, ID 83814

Deputy Clerk