

STATE OF MICHIGAN
COURT OF APPEALS

IN RE: HAHN DRAINAGE DISTRICT.

DRAVES BRANCH OF THE HAHN DRAIN,

Plaintiff-Appellee,

v

JOE C. BOGEL,

Defendant-Appellant.

UNPUBLISHED

December 20, 1996

No. 173316

LC No. 92-1110-CC

Before: White, P.J., and Markey and R.M. Pajtas,* JJ.

PER CURIAM.

Defendant appeals the circuit court's order awarding him \$1,870 in attorney fees and \$20.40 in costs in this action brought under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.*; MSA 8.265(1) *et seq.* We affirm.

I

Plaintiff filed its complaint on May 20, 1992, alleging that it was necessary to secure defendant's property for public drainage purposes in order to improve and maintain the Draves Branch of the Hahn Drain. The complaint named only defendant and alleged that plaintiff had made a good-faith written offer to purchase the property, that plaintiff "has been unable to agree with all of the persons interested in said parcels of property for the purchase of said interest," and that plaintiff had deposited an amount estimated to be just compensation with the Midland County Treasurer. A Statement of Necessity and a Declaration of Taking were attached to plaintiff's complaint, the latter stating that the estimated just compensation for a permanent easement on defendant's property is \$666, and for a second, temporary easement, \$100.

Defendant filed an answer to plaintiff's complaint and a motion to review necessity on June 24, 1992. Defendant's answer denied that plaintiff's offer was a good-faith offer, denied that plaintiff had extended an offer to all parties holding an ownership interest in the subject property, and denied that the

* Circuit judge, sitting on the Court of Appeals by assignment.

proposed drain extension was necessary. Defendant's motion to review necessity argued in pertinent part that plaintiff had failed to join all the owners of the subject property and that plaintiff's offer to defendant was insufficient to constitute a good-faith written offer, and requested that the court determine there was no necessity for the acquisition and award defendant costs and actual attorney fees.

Six days later, defendant filed a motion for summary disposition, arguing that the circuit court lacked jurisdiction over the necessary persons and property because plaintiff did not name both defendant and his wife, Barbara Bogel, who owned the property as tenants by the entireties. Defendant's motion further argued that the circuit court lacked subject matter jurisdiction because a good-faith written offer was not made to the owner prior to the filing of plaintiff's complaint as required by the UCPA, i.e., the only offer presented was solely to defendant and was grossly inadequate, and no offer at all had been made to the tenants by the entireties. Finally, defendant argued that plaintiff's complaint failed to state a claim on which relief could be granted because the complaint failed to include and name the owners of the property, which were known to plaintiff. Defendant sought actual attorney fees and "other expenses" under the UCPA.

Plaintiff's answer to defendant's motion for summary disposition admitted that Barbara Bogel was "inadvertently omitted" from the pleadings. Plaintiff then moved to amend its complaint to add Barbara Bogel as a party.

Defendant's answer to plaintiff's motion to amend its complaint argued that plaintiff's complaint should be dismissed without prejudice and its motion to amend denied. Defendant again argued that the circuit court lacked subject matter jurisdiction to consider plaintiff's motion and that plaintiff's motion failed to state a claim on which relief can be granted. Defendant further argued that on December 12, 1990, the date the hearing had been held to determine the necessity of the proposed drain, the township tax assessment roll showed "Bogel, Joe C. et ux" as owners of the land at issue; that Barbara Bogel was entitled to notice and had the right to be heard at such hearing, and that plaintiff's failure to provide her with notice of the hearing denied her and defendant due process and equal protection. Defendant's answer also argued that plaintiff's complaint and attempt to amend its complaint were void for plaintiff's failure to provide Barbara Bogel the required notice of the prior hearing. Defendant sought expenses and "actual reasonable attorney fees" under the UCPA.

At a hearing on October 2, 1992, the circuit court ruled that it would dismiss the action without prejudice, stating the following:

THE COURT: All right.

It's my opinion based upon conference that we had in chambers, which was very procedurally academic, um, the parties agree and the Court agrees that this matter should be re-filed in Circuit Court, and that's with the understanding that there is an additional defendant that should be added.

I'm uncertain—I don't have the name, but in any event, it's the wife of Joe C. Bogel. And the present matter will need to be dismissed.

And then there are various things that, once again, will have to be raised by the Defendant.

We're not deciding at this time whether the determination as to necessity was procedurally proper. None of those are being decided at this point in time, because I don't have jurisdiction to decide it.

But undoubtedly, those issues will come up.

Now, does that fairly state it?

MR. SCHNEIDER [*counsel for defendant*]: Only thing I would add is it is dismissed without prejudice so that he may re-file, your Honor.

THE COURT: Definitely without prejudice. Thanks.

* * *

MR. SCHNEIDER: As you have stated the reason on the record. I'm going to try to write it in an order, your Honor.

THE COURT: It's not necessary.

MR. SCHNEIDER: And I want to inform the Court I will file an additional petition concerning costs and attorney fees where I can give him the itemization of that and then you can decide it at another hearing.

THE COURT: Yeah, we can visit that at a later time if it's necessary.

MR. BROWN: Thank you, your Honor.

THE COURT: Thank you. You're welcome.

The circuit court's October 14, 1992 order dismissing plaintiff's complaint recited its determination that it lacked subject matter jurisdiction:

. . . after hearing arguments of counsel in chambers, the Court determining it lacked subject matter jurisdiction, and the parties agreeing that the above-entitled matter may be dismissed without prejudice,

IT IS ORDERED AND ADJUDGED that the above entitled matter is dismissed without prejudice,

IT IS FURTHER ORDERED that Defendant's request for expenses and actual reasonable attorney fees pursuant to [UCPA] MSA 8.265(16)(2) shall be considered

by the Court at a further hearing upon Defendant filing his petition itemizing such request.

Defendant filed a motion for attorney fees and expenses, with interest, under the UCPA. Defendant's motion argued that plaintiff commenced the instant action without including defendant's wife, that defendant had successfully challenged the legal sufficiency of the proceedings and plaintiff's right to acquire the property, and that the court had dismissed said action. Defendant argued he had incurred attorney fees and the expense of an expert witness, for which the UCPA mandates that the court order plaintiff to reimburse defendant.

Defendant's brief in support of his motion argued that plaintiff did not acknowledge to the court until the time of the summary disposition hearing that due to its admitted error in not naming Barbara Bogel, the circuit court may not have subject matter jurisdiction, and that this "forced Defendant to be prepared to prove each of his grounds for Summary Disposition" and to subpoena and require that his expert witness be prepared up to the time of the scheduled hearing. Defendant argued that the UCPA makes mandatory that the court order plaintiff to pay defendant actual attorney fees and expenses for his expert witness which the court finds reasonable. Defendant attached to his motion an itemized statement, which set forth the dates, times, and subject matter of defense counsel's preparation through October 2, 1992, totaling 30.3 hours at \$110 an hour, or \$3,333.00. The statement also set forth expenses of \$38.80. On the following day, October 23, 1992, defendant filed an amended itemized statement reflecting time expended through October 19, 1992, and estimating time for attendance at the subsequent hearing.¹ The amended itemized statement set forth hourly charges of \$4,103.00 for 37.3 hours at \$100 an hour, and expenses of \$38.80.

At a hearing on November 25, 1992, the circuit court responded to argument from defendant's counsel:

THE COURT: You're going to have to defend Joe [sic] Joe Bogel in any event. The work that you have done, with the exception of having to do certain things because the wife wasn't joined, you were going to have to do any way [sic]. He was served properly. I mean, he was given—what is that preliminary thing they have to give them, a good faith offer?

MR. BROWN: Good faith offer.

THE COURT: And, um, the, so those are things that if you had, if—if they don't prevail ultimately then you can have those expenses, those attorney fees. But that's something that you have just done preliminary, if you will, I mean whether you do it in the lawsuit or whether you do it in the next one, you know, if you didn't start another lawsuit you cover everything. But I don't think it's really fair when you've done all the research for the second lawsuit to just compensate you for it because you got it dismissed. That—I have trouble with that.

MR. SCHNEIDER: Well—

THE COURT: I have no difficulty with giving you the money for coming here for that summary disposition and for the research you had to do on that issue because they made a mistake. They'll say maybe differently. I don't know what they'll say. But as far as I'm concerned, they had made a mistake in not joining Mrs. Bogel.

So for that, you should receive compensation. But not for the whole thing. I'm just not going to let that fly.

* * *

. . . I'm holding it in abeyance. I am just not going to award it at this time.

* * *

. . . And I'm not going to get into all of it, because if they do it properly the next time, then you've already paid for it. And if they lose, meaning the Plaintiffs, then you can be compensated. But not at this point in time.

* * *

If they said, well, we're not evening [sic] be going to be starting it again, then you would have a right for everything at this point in time. But that would be like saying, okay, now I'm going go to pay him his attorney fees and all of his expenses and they go ahead and win in this second suit. That is not the intent here of this law.

MR. SCHNEIDER: But the way it was handled, we were sandbagged in because they never acknowledged until in your chambers the day at trial that we didn't have to do that—all that other work, your Honor.

THE COURT: That's why I'm going to give you the money that you wasted because they sandbagged you. And that's just going to the issue of the wife. You wouldn't have had to be here that today [sic]

The circuit court entered an order for adjournment sine die on November 25, 1992, which stated in pertinent part:

IT IS ORDERED that Defendant's attorney fees and expenses **are allowed subject to further review by the Court as to their reasonableness**. Defendant's attorney shall file an affidavit itemizing such fees and expenses that were in regard to said issues.

IT IS FURTHER ORDERED that this shall not be the final order of the Court on Defendant's Motion, and that a further hearing thereon is adjourned sine die, to be rescheduled by either party after Plaintiff files a similar action versus Defendant and his wife as represented by Plaintiff. [Emphasis added.]

Plaintiff filed a second suit in December 1992, naming both defendant and Barbara Bogel.² The circuit court denied defendant's motions to review necessity and dismiss the complaint on grounds of inadequacy of plaintiff's offer to purchase and lack of notice to Barbara Bogel of the hearing held to determine necessity. Following denial of defendant's motions, defendant requested that the circuit court decide his motion for entry of order for payment of attorney fees. On May 13, 1993, the circuit court entered an order temporarily denying defendant's motion "consistent with the continuing previous ruling of the Court that Defendant may hereafter, by Motion accompanied with Affidavit, seek an Order for payment of certain attorney fees in this cause after the final resolution of Plaintiff's Complaint in the matter of said Plaintiff v Joe C. Bogel and Barbara M. Bogel, Defendants, File No. 92-001709-CC-B, for the acquisition of property or property rights."

The second action settled on the day trial was to commence, and was dismissed with prejudice. The transcripts before us state that the settlement figure in the second action included attorney fees pertinent to that action.

Defendant filed a third motion for determination and order for payment of attorney fees, requesting \$3,892.40. Defendant also requested interest. The motion attached two affidavits, one setting forth total attorney fees and costs in the first action of \$5,262.00, and the second itemizing attorney fees and costs requested pursuant to the court's ruling permitting attorney fees and costs only related to the non-joinder of Barbara Bogel and the lack of subject matter jurisdiction. The second affidavit included fees and costs totaling \$3,892.40, 35.2 hours at \$110 an hour, (\$3,872.00) plus \$20.40 for costs.

The following colloquy transpired at the October 15, 1993 hearing:

[Defense counsel]: . . . But just to kind of refresh your memory. And what you had said before when we appeared you were going to limit the attorney fees, although the statute made it mandatory, you were going to limit those to the work that I did on those issues which involved the dismissal of the first suit.

And I'm saying that involved two things. No subject matter jurisdiction, because they didn't make any offer to Mrs. Bogel; and two, they didn't include her as a party even in the lawsuit.

And what you asked me to do before, which I've done, is to break those out in the form of affidavit. So what I've done, to refresh your memory, I've got two affidavits. One is to the entire work that I've done on this case, and the other one is to limit it to what, at least in my opinion, I necessarily had to do to bring those issues before the Court which you did decide the dismissal on.

And if you're consistent, of course, with your prior opinion, what I would be asking you to do is to grant those on that one affidavit, that's the smaller amount. Of course, Mr. Bogel here would prefer the whole amount. That is evident. But I am being candid with you. That is what at least your prior decision was.

And so that's why we're back and we're asking that we get an order for payment of those fees.

THE COURT: Well, Mr. Schneider, before we have Mr. Brown talk, are you saying that I made a determination that there was not subject matter jurisdiction and to [sic] they had to start it over because of that?

MR. SCHNEIDER: Yes, your Honor.

THE COURT: Because of the failure to make an offer? Wasn't it just an offer on the wife though because the wife hadn't been included?

MR. SCHNEIDER: Yeah, that's what that—

THE COURT: So that is all included in it.

MR. SCHNEIDER: See that's what the Escanaba case, [sic] said.

THE COURT: Okay.

MR. SCHNEIDER: That the condemnation statute requires the good faith offer to be made before you even start your suit. Well, there were [sic] no offer at all to Mrs. Bogel. That was the basic defect.

THE COURT: I'm sorry we have to go through this route, Mr. Schneider, but I find your fee to be exceptionally high for what I think should have been done, and that's why I'm going to have to ask you these questions.

MR. SCHNEIDER: Okay.

THE COURT: What was your total attorney fee in this case?

MR. SCHNEIDER: That's on the other affidavit. \$5,262. Well, that's with some witness fees and costs and things. The fees itself, \$5,203 with cost expended \$5,262.

And I have it all itemized for you on that affidavit.

THE COURT: Okay. And I saw that affidavit.

MR. SCHNEIDER: Now the second affidavit—

* * *

THE COURT: How much is that?

MR. SCHNEIDER: \$3,892.40 including, there's about \$20.40 costs on that one.

THE COURT: So—

MR. SCHNEIDER: Filing fees and copy.

THE COURT: Just to correct a procedural problem and to bring that to the Court's attention, you want almost two thirds of your total attorney fees paid for by the Defendant?

MR. SCHNEIDER: Yes.

THE COURT: Excuse me, the Plaintiff. It sounds a little bit out of proportion.

MR. SCHNEIDER: Well, what I really wanted was the whole thing. But what you decided was I should limit it to the work that was necessary to do those two things, yeah . . .

Plaintiff's counsel argued that defendant's requested fees were excessive and asked the court to allow only 9.1 hours, for a total of \$1,001.

The court questioned counsel about the settlement in the second action. Counsel responded that plaintiff had offered defendant and his wife \$600 and the matter settled for \$2,750.

THE COURT: \$2,750?

MR. SCHNEIDER: Uh-huh.

For the easement and—

THE COURT: These are always interesting to me.

\$10,000 worth of attorney fees over a \$2,700 deal. That's how we get our bad name, gentlemen.

The court took the matter under advisement, and on November 16, 1993, issued a written opinion awarding defendant \$1,870 (seventeen hours at \$110 an hour) plus costs of \$20.40, and interest. The court relied on *Escanaba & LSR Co v Keweenaw*, 156 Mich App 804; 402 NW2d 505 (1986), and its opinion states in pertinent part:

Mr. Schneider undertook extensive preparation in defense. The original action was summarily dismissed by this Court because Draves had failed to join Mrs. Barbara M. Bogel as a party and the Court found it to be procedurally deficient. Subsequently, Draves refiled and eventually settled.

* * *

. . . this Court determined that Mr. Bogel was entitled to attorney fees and expenses pursuant to MCL 213.66 . . .

* * *

In the Escanaba case, the trial court found that the Plaintiff had failed to make a good faith offer. The appellate court held that “a finding that the condemnation proceedings are procedurally defective is per se a finding that the proposed acquisition is improper, and that the trial court does not have to separately state on the record that it finds the acquisition improper. To hold otherwise, under the instant circumstances, places form over substance.” This Court determined that the original condemnation proceedings were defective due to Draves’ failure to join Mrs. Bogel. The court is bound to follow the direction of the appellate court in Escanaba [sic] supra, and hold that the procedural defect creates a per se determination that the acquisition was improper.

. . . Mr. Bogel received compensation under subsection (3) in the second suit in this action as part of his settlement. It is the Court’s opinion that the Defendant, Mr. Bogel is entitled to actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition in the first suit pursuant to subsection (2). Relying on subsection (2) of the Act, **the Court determined that Mr. Bogel was only entitled to those attorney fees and expenses incurred that were directly related to the issue of non-joinder of Mrs. Bogel.** The Court reasoned that any preparation undertaken in the first action for the other issues were applied to the second action, were compensated for under subsection (3) in the settlement, and were not actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition. Granting Mr. Bogel relief under subsection (2) of the act for those efforts related directly to the non-joinder issue in the first suit, combined with the relief granted under subsection (3) in the second suit, would meet the objective of the Act and make Mr. Bogel whole.

Mr. Schneider submitted two affidavits in the second motion for attorney fees and expenses. The first affidavit itemized all of the preparation and the total bill for Mr. Schneider’s efforts in the first suit. The second affidavit itemized those preparations undertaken by Mr. Schneider for two issues: first the non-joinder issue; and second, the inadequate offer issue. Mr. Schneider’s second affidavit equaled approximately 60% of the total bill. Apposing [sic] counsel offered to pay for 9.2 hours.

Since this Court has determined that Mr. Bogel is only entitled to attorney fees and expenses related to the issue of non-joinder, it is this Court’s opinion that Mr. Bogel should be reimbursed by the Plaintiff for attorney fees in the amount of \$1,870 (17 hours at \$110/hr) plus costs of \$20.40.

Interest is allowed pursuant to MCL 213.65 . . .

* * *

. . .The interest rate shall be applied to the settlement amount including the award of reasonable attorney fees and expenses . . . The parties will be required to determine the period of interest, if any, plus the interest amount as the Court does not have the facts to make these determinations.

On December 21, 1993, the circuit court entered a Judgment for Attorney Fees and Expenses, awarding defendant "\$1,870 of his attorney fees and \$20.40 of his costs, which relate to the issue of non-joinder, and reimbursement for the remainder of the fees reported in the first and second affidavits of Mr. Schneider for other issues is denied." The court further ordered that interest on the award "is determined pursuant to the [UCPA] MCL 213.65, which provides that interest is waived until Plaintiff takes possession of the premises awarded to Plaintiff."

Defendant filed a motion to amend findings and order for attorney fees, arguing that under the court's previous order he was entitled to fees and costs on both the issues of non-joinder and subject matter jurisdiction, and that the applicable judgment interest statute was MCL 600.6013; MSA 27A.6013. The circuit court denied defendant's motion and assessed sanctions against defendant of \$700 based on its determination that the motion constituted a frivolous action under MCR 2.625 and MCL 600.2591; MSA 27A.2591. The court ordered that defendant reimburse plaintiff \$700, allowing plaintiff to deduct that amount from the \$1870 award. This appeal ensued.

II

On appeal, defendant argues that the policy of the UPCA is to place the property owner in as good a position as before the taking, and that the property owner shall not be made to suffer for a proceeding he did not initiate for the taking of his private property. Defendant argues that the court was disinclined to grant fees, and that it erred in limiting the fees to those related to non-joinder of defendant's wife, where other work was reasonably and legitimately done in preparation for the hearing and in obtaining the order for attorney fees. Defendant also asserts that the court employed improper criteria in determining the reasonableness of the fee.

We review the circuit court's award of attorney fees under the UCPA for abuse of discretion. *Dep't of Transportation v Robinson*, 193 Mich App 638, 643, 646-647; 484 NW2d 777 (1992). Section 16 of the UCPA provides in pertinent part:

(2) If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition.

(3) If the amount finally determined to be just compensation for the property acquired exceeds the amount of the written offer as defined in section 5, the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer as defined by section 5. The reasonableness of the owner's attorney's fees shall be determined by the court. [MCL § 213.66; MSA 8.265(16).]

We conclude that the court arrived at a reasonable formula when it limited the attorney fee award in the first action to the issues of non-joinder and subject matter of jurisdiction. The court's bifurcated approach to the two actions was reasonable, as was the court's determination that because the substantive matters were settled in the second suit, in which defendant received a separate attorney fee under the statute, limiting defendant's compensation in the first action to fees relating to the technical issues rendering plaintiff's first suit deficient would adequately make defendant whole.

We recognize the circuit court's discretion in determining both a "reasonable" attorney fee and sanction award and find no abuse of discretion here. MCL 213.66(2); MSA 8.265(16); *Escanaba*, 156 Mich App at 813-815.

III

Lastly, we reject defendant's argument, based on *Escanaba*, that the circuit court erred in not awarding interest under MCL 600.2913; MSA 27A.2913. *Flint v Patel*, 198 Mich App 153, 161; 497 NW2d 542 (1993).

Affirmed. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Richard M. Pajtas

¹ The itemized statement mistakenly states the date of the subsequent hearing as October 22, 1992. The hearing was held on November 25, 1992.

² The record of this second action is not before us. The parties refer to it in their briefs, and it is from the briefs and transcripts in the first action that we glean this information.