IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MERVIS DIAMOND COPORATION	:	
	:	
Plaintiff,	:	
	:	**Case No. 259919-V**
v.	:	
	:	
CONGRESSIONAL HOTEL CORPORATION	:	
	:	
Defendant.	:	

OPINION

Pending before the court is the plaintiff's motion for a supplemental award of $501,530.49 in attorneys' fees under a fee shifting provision in the parties' contract. (DE # 410). The defendant opposes the request. (DE # 420). The court held a hearing on September 15, 2009.

The defendant does not contend that the fees incurred by the plaintiff were not fair, reasonable, or necessary under a lodestar analysis. The defendant also does not contend that the fees are unreasonable under Rule 1.5 of the Maryland Rules of Professional Conduct. Citing to a handful of federal appellate decisions, decided largely under federal fee-shifting statutes, the defendant's sole ground for opposing the award is that the plaintiff caused certain errors in the first trial and that, but for those errors, a second trial would not have been necessary. It is for this reason alone, according to the defendant, that no further award of legal fees and costs is proper. For the reasons set forth below, the court disagrees.

I. Background

On July 6, 2004, Mervis Diamond Corporation ("Mervis") signed a ten year commercial lease (the "Lease") with Congressional Hotel Corporation ("CHC") for approximately 3,282 square feet of retail space located at 1775 Rockville Pike, the main artery in Rockville, Maryland. The Lease estimated that Mervis would take possession on February 1, 2005. The demised premises are attached to a hotel owned by CHC and are a portion of a retail space formerly occupied by Storehouse Furniture.

Before Mervis could occupy the premises, CHC was to perform certain construction work, the full scope of which is defined in Exhibit B to the Lease (the "Landlord's Work"). Thereafter, Mervis was to build out the space with certain finishes (the "Tenant's Work") in order to create a functioning retail location for its diamond sales. During Lease negotiations, CHC had estimated, internally, that it would need sixty days from the date Storehouse Furniture vacated the building to deliver the premises to Mervis.

The lease of the prior tenant expired on December 31, 2004. Mervis obtained a building permit from the City of Rockville on January 24, 2005, to perform the Tenant's Work under the Lease. However, as of February 1, 2005, the estimated delivery date of the premises, CHC had not obtained a building permit to commence its work under the Lease.

On February 12, 2005, Mervis notified CHC of its decision on the type of HVAC system to be installed under Exhibit B of the Lease. As of February 12, 2005, there were no impediments preventing CHC from commencing the Landlord's Work. CHC obtained

a building permit to perform its work under the Lease on February 15, 2005, but it did not begin the Landlord's Work.

When CHC did not respond to Mervis's inquiries about when CHC would begin its work under the Lease, Mervis filed suit in this court on March 16, 2005, for specific performance and breach of contract. (DE # 1). Along with the complaint, Mervis filed a motion for a temporary restraining order to prevent CHC from demolishing the building. (DE # 4). Mervis alleged that CHC did not intend to honor the Lease and instead, was planning to construct a condominium development at the site. In exchange for Mervis withdrawing its request for a temporary restraining order, the parties entered into a standstill agreement, which precluded CHC from demolishing or substantially altering the premises (but allowed CHC to perform the Landlord's Work under the Lease) pending a hearing on Mervis's request for a preliminary injunction. (DE # 10).

The court held a preliminary injunction hearing on May 17, 2005. As of that time, CHC still had not commenced its work under the Lease. By Order dated May 17, 2005, the court enjoined CHC from performing any work on the property other than the Landlord's Work under its Lease with Mervis. (DE # 33).

On October 11, 2005, CHC notified Mervis that it intended to cancel the Lease due allegedly to parking problems at the site. The first trial in the case began on June 12, 2006. As of that time, CHC still had not commenced the Landlord's Work under the Lease. The first trial lasted until June 16, 2006. On September 29, 2006, the circuit court issued a written order concluding that CHC had breached the Lease. (DE # 240). The court also entered a judgment ordering CHC to specifically perform its obligations under the Lease and awarding Mervis over $2 million in damages for lost profits. On

December 19, 2006, the circuit court entered a judgment in favor of Mervis for attorneys' fees, under a fee shifting provision in the Lease, as a consequence of the earlier judgment. (DE # 256). Both judgments were appealed to the Court of Special Appeals. (DE # 243, DE # 259).

In an unreported opinion issued on December 12, 2007, the Court of Special Appeals affirmed the trial court's decision to award Mervis specific performance of the Lease. However, the Court of Special Appeals reversed the judgment with respect to lost profits, concluding that the court had committed an error of law by using the date CHC was to *commence* its work as the beginning date for calculating lost profits. The opinion of the intermediate appellate court did not mention the judgment for attorneys' fees; nor did the mandate reverse or vacate the attorneys' fees award.

The Court of Special Appeals did reverse the judgment for lost profits because it concluded that the correct date to be used for calculating lost profits was the date CHC should have *completed* its work under the Lease, not the date used by the trial court—the date CHC was to *commence* the Landlord's work. The Court of Special Appeals could not affirm the judgment for lost profits because: "[W]e have not been directed to any evidence in the record indicating that CHC could have reasonably completed the Landlord's work on or before March 15, 2005." Slip Op. at 17. As a consequence, the appellate court said: "[W]e cannot determine, on review, whether the circuit court was clearly erroneous in its findings." Slip Op. at 17. The case was remanded to the circuit court for further proceedings. *Congressional Hotel Corporation v. Mervis Diamond Corporation*, No. 1848, September Term, 2006 (filed December 12, 2007).[1]

[1] The Court of Special Appeals expressly rejected, CHC's arguments that specific performance was not warranted because it had made diligent, good faith efforts to deliver possession. The

The second trial, also a bench trial, was held on March 30, March 31, and April 1, 2, 3, and 6, 2009. The court issued a Memorandum Opinion on April 22, 2009, concluding that Mervis had proven its entitlement to damages, by reason of CHC's breach of the Lease, in the amount of $2,966,597.00. This award represented an $802,097.00 increase from the damages awarded after the first trial. Before a final judgment could be entered, CHC filed for bankruptcy. With leave of the bankruptcy court, this court entered a money judgment for lost profits, the collection of which is stayed pending approval of the bankruptcy court and any appeal to the Maryland appellate courts.

II. Discussion

Section 25.01 of the Lease provides in pertinent part:

> If either party hereto finds it necessary to employ legal counsel or to bring an action at law or other proceedings against the other party to enforce any of the terms, covenants or conditions hereof, the unsuccessful party shall pay to the prevailing party a reasonable sum for attorneys' fees. Attorneys' fees shall include attorneys' fees on any appeal, and in addition, a party entitled to attorneys' fees shall be entitled to all other reasonable costs for investigating such action, taking depositions and the discovery, travel, and all other necessary costs incurred in such litigation.

The attorneys' fees requested in this case under §25.01 of the Lease are in the nature of contractual damages. Ordinarily, when considering such a request the court must employ a two-step analysis. First, the party seeking an award must prove their entitlement to attorneys' fees by a preponderance of the evidence, and under the same standards as proof of contractual damages. *Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 400 Md. 718, 761 (2007); *Bankers & Shippers Ins. Co. v. Electro*

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appellate court held that the circuit court's findings to the contrary were not clearly erroneous. Slip Op. at 26, 30. The Court of Special Appeals also affirmed the circuit court's finding that CHC was not relieved from liability under § 2.04 of the Lease. Slip. Op. at 25-26.

Enter., Inc., 287 Md. 641, 661 (1980); *Maxima Corp. v. 6933 Arlington Develop. Ltd. P'ship*, 100 Md. App. 441, 453–54 (1994). A mere compilation of hours recorded by lawyers, and multiplied by hourly rates, is insufficient. Among other things, there must be proof of the type of services rendered as well as the necessity of those services in the litigation. *See Royal Inv. Group, LLC v. Wang*, 183 Md. App. 406, 457–59 (2008); *Long v. Burson*, 182 Md. App. 1, 29 (2008); *Maxima*, 100 Md. App. at 453–54.

Second, because the award sought is for attorneys' fees, the court also must evaluate the evidence supporting or opposing the fee award under the standards of Rule 1.5 of the Maryland Rules of Professional Conduct, along with other pertinent factors. *See Diamond Point Plaza*, 400 Md. at 757–58; *Long v. Burson*, 182 Md. App. at 26–27; *B & P Enter. v. Overland Equip. Co*., 133 Md. App. 583, 625–27 (2000); *Holzman v. Fiola Blum, Inc*., 125 Md. App. 602, 639–40 (1999). "The party requesting fees has the burden of providing the court with the necessary information to determine the reasonableness of its request." *Myers v. Kayhoe*, 391 Md. 188, 207 (2006).

As noted at the beginning of this opinion, CHC is not making any of the usual objections to a claim for attorneys' fees under a contractual fee shifting provision. CHC agrees that the rates charged by Mervis' counsel are reasonable. CHC also agrees that the hours spent and the work they performed in connection with the second trial were necessary, fair, and reasonable.[2] Rather, CHC contends that because Mervis advanced, and the circuit court accepted, an incorrect damages period during the first trial, Mervis is barred from recovering *any* amount of attorneys' fees and costs associated with the

[2] These concessions, made initially in its legal memorandum, were reiterated by CHC's counsel at the hearing of September 15, 2009, and are binding on CHC. *Prince Georges Properties, Inc. v. Rogers*, 275 Md. 582, 587-88 (1975).

second trial.[3] In the words of CHC's brief: "The issue thus becomes whether Plaintiff, as the party who ultimately prevailed in litigation following the appeal and remand is entitled to *any* costs and fees incurred in obtaining the damage award in the second trial." CHC's Opposition at p. 10 (Emphasis added). The court does not agree with CHC's position.[4]

Statute-based fee shifting claims are fundamentally different from contract-based fee shifting claims. Fee shifting under a statute is not the result of an arms' length, bargained-for exchange between the parties, as it is in the case of a contract based-claim. In a statute-based case, the legislature (not the parties to a contract) has made a public policy decision that it wants to encourage the prosecution of certain types of cases concluding that lawyers would be reluctant to pursue such claims in the absence of fee shifting imposed by legislation. This point has been reiterated at least twice by the Court of Appeals. *See Friolo v. Frankel*, 373 Md. 501, 526–28 (2003), *after remand*, 403 Md. 443, 457–58 (2008). The Court of Special Appeals has expressed similar sentiments. *See Stevenson v. Branch Bank & Trust*, 159 Md. App. 620, 666 (2004); *Flaa v. Manor County Club*, 158 Md. App. 483, 501 (2004); *Blaylock v. Johns Hopkins Fed. Credit Union*, 152 Md. App. 338, 357–58 (2003).

In this case, attorneys' fees under § 25.01 of the Lease are an item of damages for which the parties specifically bargained in the event of one party's breach of the Lease. Contract-based fee shifting is a matter of agreement between the parties to a contract.

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[3] CHC also refers to certain erroneous evidentiary rulings by the circuit court during the first trial. Absent the use of the wrong damages period, it is unlikely that these errors in the admission of evidence would have constituted reversible error.

[4] CHC has taken an "all or nothing" approach in opposing the fee request. CHC has not argued that some specific smaller portion (other than zero) of the requested amount should be allowed.

Parties generally are free to negotiate contract terms, even damages provisions, as long as no fundamental policy of the State is offended. *See Barrie Sch. v. Patch*, 401 Md. 497, 506–08 (2007) (liquidated damages); *Jackson v. Pasadena Receivables, Inc*., 398 Md. 611 (2007) (choice of law); *Holloman v. Circuit City Stores, Inc*., 391 Md. 580 (2006) (waiver of right to jury trial). "A contractual obligation to pay attorneys' fees generally is valid and enforceable in Maryland." *Atlantic Contracting & Materials Co., Inc. v. Ulico Casualty Co*., 380 Md. 285, 316 (2004); *see also Brenner v. Plitt*, 182 Md. 348, 366 (1943). This rule applies to the fee shifting provisions of a commercial lease. *Maxmia Corp. v. Cystic Fibrosis Foundation*, 81 Md. App. 602, 622 (1990). Of course, the fees and costs requested under even a contractual fee-shifting agreement must be reasonable and must comport with Rule 1.5 of the Maryland Rules of Professional Conduct. The courts will not enforce arbitrary or unreasonable fee shifting provisions in a private contract. *Myers*, 391 Md. at 207.

The court has reviewed the fee and cost submissions of Mervis' counsel and finds the fees charged and the costs incurred in connection with the second trial to be fair, reasonable, and necessary.[5] CHC pursued an aggressive defense on remand, raising many issues and arguments not pursued during the first trial. Both sides approached the

[5] The court's review has included the detailed invoices attached as Exhibit 1 to Mervis' motion, along with the affidavit of Robert E. Greenberg, Esq., its lead trial counsel, attached as Exhibit 2. The court, to which this case was specially assigned for the second trial, is intimately familiar with the amount of work needed in connection with the re-trial and brings this knowledge to bear on the question of fees. This case presented many novel and difficult questions of law, procedural and substantive; the stakes for both sides were enormous. Counsel for all parties performed at the highest level of the profession. *David Sloane, Inc., v. Stanley G. House & Associates, Inc*., 311 Md. 36, 53 (1987); *Sczudlo v. Berry*, 129 Md. App. 529, 551, n. 3 (1999); *Milton Co. v. Unit Owners of Bentley Place Condo.*, 121 Md. App. 100, 121–22 (1998).

damages question in a different way than they did during the first trial.[6] The decision of the Court of Special Appeals permitted the parties to conduct a mini-trial regarding CHC's completion of the Landlord's Work under the Lease, which CHC pursued with abandon. CHC also raised new defenses which, had they been successful, would have precluded an award to Mervis for lost profits.

The court is not persuaded by CHC's argument that Mervis is barred, under the circumstances of this case, from recovering otherwise fair, reasonable, and necessary contract-based attorneys' fees simply because of the errors that occurred in the first trial. CHC's position is founded upon a handful of factually inapposite federal cases, in each of which the court denied an award of fees where a party's unreasonable trial strategy or misconduct resulted in the need for further proceedings. *See e.g., Shott v. Rush-Presbyterian-St. Luke's Medical Center,* 338 F.3d 736 (7th Cir. 2003); *Gierlinger v. Gleason*, 160 F.3d 858, 879 (2d Cir. 1998); *Meeks v. State Farm Mutual Automobile Ins. Co*., 460 F.2d 776 (5th Cir. 1972). None of the cases cited hold that attorneys' fees shall be denied *any time* there is an error in a first trial.[7] On the contrary, the Second Circuit in Gierlinger noted that "[a] fee award is not automatically precluded because the second trial was 'necessitated by' a reasonable but unsuccessful argument," 142 F.3d 409, 416 (7th Cir. 1998) and remanded the proceeding for a determination of whether "the

[6] The court granted CHC's motion to preclude Mervis from using at the second trial a key concession made by Edward Rudden, CHC's expert at the first trial. CHC did not call Mr. Rudden to expert to testify at the second trial. Instead, CHC used Wendy Moe, Ph.D., who advocated a damages theory altogether different from, and in certain respected inconsistent with, the damages theory previously espoused by Mr. Rudden.

[7] Furthermore, it would seem that such a rule would be inconsistent with the holding of *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and its line of "partial success" cases, which hold that fee awards should not be reduced simply because a plaintiff fails to prevail on every contention raised in the lawsuit. Provided that a plaintiff succeeds on any significant issue in litigation which achieves some of the benefit the it sought in bringing suit, the plaintiff may be considered a "prevailing party" entitled to a full attorney's fees award. *Id.* at 432.

expenditure of counsel's time was reasonable in relation to the success achieved." *Id.* at 416. In this case, although the Court of Special Appeals held it was error for the first trial court to use "early March 2005" as the commencement of the damages period, such an error was not the product of an unreasonable position taken by Mervis.[8]

Furthermore, the second trial did not substantially duplicate the first trial—the mini-trial on CHC's completion of the Landlord's Work was held only once, at the second the second trial. The second trial bore little resemblance to the first trial, due in large measure to the new strategies employed by CHC on remand. Had CHC prevailed on some or all of these new strategies, it likely would not be complaining about the need for a new trial. CHC should not now be heard to complain where the trial court on remand granted CHC great latitude in presenting its legal and factual defenses. Consequently, even if Maryland were to follow the reasoning of the federal cases cited by CHC, Mervis' request would not be precluded under the rationale of those cases.

Conclusion

The Clerk shall enter judgment in favor of Mervis, and against CHC in the amount of $501,530.49. Collection of this judgment, however, shall be stayed unless otherwise permitted by the United States Bankruptcy Court. It is SO ORDERED this 21st day of September, 2009.

Ronald B. Rubin, Judge

[8] At the hearing on September 15, 2009, counsel for CHC was unable to identify where or when during the first trial CHC opposed the damages period used by the trial court.