

Factual Background

The plaintiff in this case is Consortium Atlantic Realty Trust, Inc. The defendants are union pension funds. Initially, the union pension funds identified as defendants were the Plumbers & Pipefitters National Pension Fund, United Mine Workers of America 1985 Construction Workers Pension Plan, Sheet Metal Workers Local No. 100 Washington, D.C. Area Pension Fund, Communication Workers of America Plan for Employees' Pension, Communications Workers of America, Communications Workers of America, AFL-CIO, U.A. Local Union Officers and Employees Pension Fund, and National Retirement Fund. Pursuant to stipulations of dismissal,² the remaining defendants are Plumbers & Pipefitters National Pension Fund and U.A. Local Union Officers and Employees Pension Fund. Also sued as defendants are Goodloe E. Byron, Jr. ("Byron") and Potomac Asset Management Company ("PAMCO"), the Funds' investment advisors.

Before CART was formed, the Funds had invested in limited partnerships. These limited partnerships owned three office buildings in the Washington, D.C. area. In 2005 and 2006, the limited partnerships were to terminate and the Funds' investments were to be returned to them in cash. According to the defendants' counterclaim, the Funds were solicited to "roll" their limited partnership investments into a real estate investment trust ("REIT") which would be formed to hold the same three office buildings.

CART was formed on March 3, 2005. The Shareholders' Agreement is dated February 28, 2006. Each investor paid \$10.00 per share.

Under the Shareholders' Agreement, each Fund was granted the unilateral right to withdraw as a shareholder six years after the effective date of the Shareholders' Agreement,

² See docket entries # 367, 380, 381.

which was February 28, 2006. By February 28, 2012, each Fund had given notice of the exercise of its withdrawal right under Section 5 of the Shareholders' Agreement. A dispute immediately arose over the valuation of the Funds' shares under the withdrawal right, which precipitated a host of litigation, including this case.

Section 5(a) of the Shareholders' Agreement provides, in pertinent part that, upon timely notice of withdrawal by a shareholder, CART is required to redeem all of the shares held by the withdrawing shareholder "at a price equal to the Fair Market Value (as defined below) of [the withdrawing shareholder's securities.]" Section 5(d) of the Shareholders' Agreement states: "As used in this Section 5, the phrase 'Fair Market Value' shall mean the fair market value as determined by a qualified third party appraiser acceptable to the withdrawing Shareholders and the Corporation consistent with the valuation methodology previously used by the Corporation in prior appraisals."

In June of 2011, two smaller shareholders had accepted CART's offer to redeem their shares at \$7.93 per share, the price set forth in a December 2010 appraisal done solely for purposes of complying with ERISA. This price was based on an appraisal of one share of stock as of December 31, 2010. The Funds which are parties to this case, refused to accept any "discounted" value for their shares, insisting on redemption at \$10.00 per share.

On July 19, 2012, CART filed a three-count complaint against the Funds for the alleged breach of a Shareholders' Agreement. CART also sued Byron and PAMCO for the tortious interference with CART's Shareholders' Agreement with the Funds. On November 15, 2012, the Funds filed counterclaims, which were subsequently amended.

On October 1, 2013, the court entered an order granting CART's motion for partial summary judgment on count I of the complaint, and counts II, III, and IV of the amended

counterclaim.³ The court also granted the Funds' motion for summary judgment as to count II of the complaint only, and ordered CART to submit a form of the declaratory judgment and any motion for attorneys' fees under the Shareholders' Agreement.⁴

On November 15, 2013, the court signed a declaratory judgment order in favor of CART on count I of the complaint and counts II, III, and IV of the amended counterclaim.⁵ The court declared that the Funds breached the Shareholders' Agreement, and ordered the parties to select an appraiser to determine the fair market value of the common stock representing the withdrawal amount payable to the Funds. On December 9, 2013, the court signed an order appointing Houlihan Lokey as the appraiser.⁶ On January 2014, the court granted CART's first motion for attorneys' fees and costs,⁷ and the Funds' first cross-motion for attorneys' fees and costs.⁸

The Funds appealed the court's ruling on the summary judgment motions and the court's grant of attorneys' fees and costs to CART. The Court of Special Appeals, in an unreported opinion, affirmed this court's decision in its entirety. *Plumbers & Pipefitters National Pension Fund et al. v Consortium Atlantic Realty Trust, Inc. et al.*, September Term, 2013 (November 7, 2014).

On January 22, 2015, the court held a hearing on the parties' second motions for attorneys' fees and costs. At the conclusion of the hearing, the court took the second fee requests under advisement. The court's decision is set forth below.

³ See docket entry # 258.

⁴ See docket entry # 260.

⁵ See docket entry # 276.

⁶ See docket entry # 293.

⁷ See docket entry # 306.

⁸ See docket entry # 305.

II.

General Legal Principles

In *Monmouth Meadows Homeowners Ass'n, Inc. v. Hamilton*, 416 Md. 325 (2010), the Court of Appeals expressly rejected the lodestar method – common in statutory fee shifting – for reviewing attorneys' fee requests under a contractual fee shifting provision. The Court instead adopted the eight factor test set forth in Rule 1.5(a) of the Maryland Lawyers' Rules of Professional Conduct.

The factors of Rule 1.5(a) include:

- (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 that acceptance of the employment will preclude other employment of the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) time limitations imposed by the client or circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

In addition to the Rule 1.5(a) factors, trial courts also may consider the amount of the fee requested in relation to the dollar amount recovered (or the value of the opponent's claim that is defeated), the terms of any fee agreement between the paying party and its counsel, and any other factor that reasonably relates to the attorneys' fees requested in the specific case before it.

CR-RSC Tower I, LLC v. RSC Tower I, LLC, 429 Md. 387, 465 (2012); *Monmouth Meadows*, 416 Md. at 337-38; *Diamond Point Plaza Ltd P'ship v. Wells Fargo Bank, N.A.*, 400 Md. 718, 757-58 (2007).

A trial court may consider its familiarity with the case at hand and its own experience in similar types of cases litigated in the jurisdiction in which it serves. *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.*, 311 Md. 36, 53 (1987); *Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 121 Md. App. 100, 121-22 (1998); *see also Sczudlo v. Berry*, 129 Md. App. 529, 551 n. 3 (1999) (“Of course, the court, as an experienced trial judge and former lawyer of longstanding, is qualified to opine as to reasonableness of attorney's fees based on familiarity with the time and effort of counsel as evidenced by the presentations in the proceedings before the court.”); *Foster v. Foster*, 33 Md. App. 73, 77 (1976) (the trial judge “may rely upon his own knowledge and experience in appraising the value of an attorney’s services” (footnote omitted)).

The party seeking to shift fees has the burden to produce legally sufficient evidence to justify their award under the same standards for proof applicable to contract damages. *Bankers & Shippers. Ins. Co. of New York v. Electro Enters., Inc.*, 287 Md. 641, 661 (1980). The level of billing detail that must be provided by the party seeking attorneys’ fees generally is within the discretion of the trial court, but that detail must be sufficient to evaluate the work for which compensation has been requested. Although there is no specific amount of detail that is required in every case, attorneys “should make their billings as detailed as reasonably possible, so that the client, and any other person who might be called upon to pay the bill, will know with some precision what services have been performed.” *Diamond Point*, 400 Md. at 760. What is key is to ensure that there is sufficient information, given the type of case and the nature of the claims, from which the court can make an informed judgment. *See id.* at 761 (“It is not reasonable to

expect the lawyer to have in tow an industrial engineer with a stop watch to measure how much time was devoted to one claim or another.”).

Ordinarily, when considering a request in a contractual fee shifting case, 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. The burden at all times remains with the proponent of the fee claim. *Diamond Point*, 400 Md. at 761; *Maxima Corp. v. 6933 Arlington Dev. Ltd. P'ship*, 100 Md. App. 441, 453-54 (1994). The mere compilation of hours recorded by lawyers, multiplied by hourly rates, is an insufficient measure. Among other things, there must be proof of the type of services rendered, as well as the necessity of those services in the context of the specific litigation. *See Royal Inv. Grp., 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. But “[d]etermining reasonableness does not require that this Court examine individually each time entry and disbursement.” *Aveta Inc. v. Bengoa*, 2010 WL 3221823, at *6 (Del. Ch. Aug. 13, 2010) (footnote omitted).

Second, as noted above, the court must evaluate the evidence supporting or opposing the fee award under the standards of Rule 1.5(a), along with other pertinent factors. “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). But there is no fixed litany the trial court needs to recite in order to properly evaluate the request in light of the record of the proceedings. Rather, what is important is to analyze the information before the court and to relate it to the facts of the case. *See Carroll Indep. Fuel Co. v. Washington Real*

Estate Inv. Trust, 202 Md. App. 206, 237-40 (2011); *Cong. Hotel Corp. v. Mervis Diamond Corp.*, 200 Md. App. 489, 499-502 (2011).⁹

III.

Entitlement to Attorneys' Fees and Costs

Both CART and the Funds claim that they are a prevailing party and are entitled to attorneys' fees and costs under Section 18 of the Shareholders' Agreement, a contractual fee-shifting provision, which provides in pertinent part:

If the Parties hereto are forced to institute legal proceedings to enforce their rights in accordance with the provisions of this Agreement, the prevailing Party shall be entitled to recover its reasonable expenses, including attorneys' fees, in connection with any such action.

CART further claims it is entitled to attorneys' fees and costs pursuant to this court's summary judgment order and the declaratory judgment order, which make clear that CART was the "prevailing party" under Section 18 and entitled to its fees and expenses. Specifically, CART contends it incurred fees and costs from September 27, 2013 through March 31, 2014 because the Funds continued to litigate, in part, in an effort to undermine this court's substantive rulings. After the court instructed CART to submit a form of the declaratory judgment, the Funds submitted their own. CART contends that in response, the court held a hearing and considered additional submissions and correspondence regarding the form of the declaratory judgment order before adopting, with "minimal changes," the form of the order CART originally submitted.

⁹ Further discussion on the legal standard that applies can be found in *Lyon Villa Venetia LLC, et al. v. CSSE Mortgage LLC, et al.*, 2015 MDBT 1 (February 19, 2015) and *White Flint Realty Group Limited Partnership, LLLP v. Bainbridge St. Elmo Bethesda Apartments, LLC, et al.*, 2014 MDBT 1 (April 3, 2014).

The Funds respond that they prevailed on the form of the declaratory judgment because the court did not adopt CART's proposed declaratory judgment order with "minimal changes." The Funds argue that instead the court accepted its arguments and rejected CART's proposal to: (i) include CART's definition of "fair market value" with citations to a treatise CART provided; (ii) commence the interest accrual only after the appraiser determined the withdrawal amount; and (iii) permit CART an additional year after the appraiser issued its report determining the withdrawal amount in which to pay the Funds.

CART contends it prevailed on the appraiser selection process. The Funds submitted correspondence and motions regarding the selection of the appraiser. In response, the court held hearings via conference calls, ultimately appointed Houlihan Lokey as the appraiser, and according to CART, rejected the additional procedures and conditions the Funds proposed.

The Funds respond that they prevailed on the appraiser selection process because the court selected the appraiser the Funds initially proposed, and implemented procedural safeguards at the Funds' urging. The Funds argue that they initially proposed Houlihan Lokey. CART opposed this appraiser and proposed two other firms instead. Ultimately, the court chose Houlihan Lokey. The Funds claim that the court also granted the Funds' request that CART be prohibited from having *ex parte* communications with the appraiser, and granted the Funds' request to make a written submission to the appraiser.

CART further contends that it prevailed in connection with its first motion for attorneys' fees and costs. In that respect, the Funds filed an opposition and cross-motion for attorneys' fees, issued a subpoena seeking bank account information and other documents. CART argues that the court awarded CART fees and expenses and denied all of other requests the Funds made.

Subsequently, the Funds sent a letter to the court asking it to stay the entry of the judgment.¹⁰

The Funds also asked the court to stay enforcement of the judgment without requiring the Funds to post a bond.¹¹ The court denied the relief the Funds asked for in both of these filings.

The Funds respond that they prevailed on their first motion for attorneys' fees and costs because the court granted their request without adjustment,¹² and by contrast the court did not award CART all of the fees and costs it requested. The Funds argue that CART should not recover fees, as it seeks to do, for opposing the Funds' first successful motion for fees. Further, the Funds argue they are entitled to fees because they prevailed on count II of CART's complaint, and with respect to the damages claim on count I.

In opposing the Funds' second cross-motion for attorneys' fees, CART argues that the declaratory judgment and appraisal orders, and other actions requiring the court's involvement, were necessary to implement the relief CART was entitled to as the prevailing party in the summary judgment motion. CART claims that its entitlement to fees does not depend on how many edits the court made to the form of the declaratory judgment order, and that instead, what matters is that the court entered judgment in CART's favor. CART further contends that the court, in paragraph 7 of the declaratory judgment order, indicated that CART was the prevailing party. According to CART, the Funds' effort to cast themselves as "prevailing" after entry of summary judgment is contrary to the record in this case. The Funds' six notices of appeal from 15 different court orders, CART contends, prove that they were not the prevailing party.

In support of its second cross-motion for attorneys' fees, the Funds reply that unlike CART's portrayal, this is not a conventional breach of contract case. Instead, this case was

¹⁰ See docket entry # 313.

¹¹ See docket entry #324.

¹² See docket entry #305.

principally about deciding the process to value the Funds' shares, and the summary judgment decision was only one of the various steps that resulted in that valuation. Even if CART was the prevailing party on the meaning of "prior appraisals," the Funds contend, the issues of who the appraiser would be, how the appraisal would be done, and the language of the declaratory judgment were of equal interest to both sides. The Funds argue that they had a strong interest in the post-summary judgment proceedings, just like CART, because the Funds wanted to get paid. The Funds further argue that both sides brought claims to enforce their rights under the Shareholders' Agreement, and Section 18 of this agreement did not require that there be only one prevailing party. The Funds further argue that the number of appeals filed supports its position that this was not a routine breach of contract case, and that instead, the post-summary judgment phase of the litigation was complex and substantive in nature.

The court finds that both CART and the Funds, in different phases of the litigation, prevailed under Section 18 of the Shareholders' Agreement. Section 18 provides that if the parties "are forced to institute legal proceedings to enforce their rights" under the Shareholders' Agreement, the prevailing party "is entitled to recover reasonable expenses, including attorneys' fees." In this case, both sides found it necessary to institute legal proceedings to enforce their rights. Applying the objective rule of contract interpretation, the meaning of Section 18 is plain and unambiguous in that the fee-shifting provision was not drafted to exclude either party from requesting fees and costs during the course of this litigation.

CART prevailed when the court granted its motion for partial summary judgment on count I of the complaint, and counts II, III, and IV of the amended counterclaim, and denied the Funds' motion for summary judgment except as to count II of the complaint. In the declaratory

judgment order, the court acknowledged that CART was the prevailing party.¹³ Although the Funds contend that CART did not prevail on all of its requests as to the form of the declaratory judgment order, this is inconsequential. *See Ochse v. Henry*, 216 Md. App. 439, 459-469 (2014). The same conclusion applies to the Funds' argument that CART did not prevail on all of its requests regarding the appraiser. Even if CART did not prevail on every contention it raised regarding the appraiser, this is an insufficient reason to reduce its request for fees and costs.

This case was not automatically over after the court's ruling on the summary judgment motions. Specifically as to count I of the complaint, between September 27, 2013 and March 31, 2014, the court made further determinations concerning the parties' rights under the Shareholders' Agreement (*e.g.*, identity of the appraiser and the starting date for the accrual of interest on the money owed to the Funds). The fact that the Funds might have obtained, in part, requests they made (*e.g.*, earlier starting date for the accrual of interest) does not mean that they prevailed under count I. Only CART prevailed under count I when the court ruled that the Funds breached Section 5 of the Shareholders' Agreement. It is of little consequence that, after the court found that the Funds breached the Shareholders' Agreement, the court fashioned an equitable remedy that gave CART some of, but not all of the relief it requested as a direct result of the Fund's breach.

The court finds that the Funds prevailed only on their first motion for attorneys' fees. Consequently, CART's request for attorneys' fees and costs incurred in opposing the Funds' first motion for fees will be denied. However, the court cannot determine from the briefs and the evidence the Funds submitted, how much the Funds spent only on its first motion for fees. Thus, notwithstanding the determination that the Funds prevailed on their first motion for fees, the

¹³ *See* docket entry # 276, paragraph 7.

court will deny the Funds' second request for fees because the court cannot ascertain the fees and costs the Funds incurred pursuing their first motion for fees.

IV.

Amount of Attorneys' Fees and Costs

The Funds did not challenge CART's hourly rates, or the amount of time it spent on the case, or how it assigned the work. The court finds that the rates CART charged and the time it spent on the case are fair and reasonable. The court also finds that CART assigned the work appropriately and in a cost-efficient manner. Both sides employed high-skilled counsel with relevant experience, and with a solid reputation in the legal community. In its analysis of reasonableness, the court has also considered that CART's counsel achieved good results for its clients between September 27, 2013 and March 31, 2014.

V.

Adjustments and Conclusions

The Funds contend that CART's fee request should be reduced because CART was not the prevailing party in every instance from September 27, 2013 through March 31, 2014. In particular, the Funds argue that in its first request for attorneys' fees and costs, CART obtained partial success because the court did not award it its entire fee request, and CART lost entirely when it opposed the Funds' request for fees, which the court granted. Therefore, the Funds argue, if CART incurred \$148,646 in connection with its first fee request, it should be reduced by 50% or \$74,323 because CART did not completely prevail.¹⁴ In addition, the Funds argue, if CART incurred \$83,729.50 on the disputes relating to the declaratory judgment and appraisal

¹⁴ The Funds did not request fees and costs incurred when they opposed CART's first motion for fees and costs. Consequently, the court does not have to consider whether or not to award this amount.

orders, it should be reduced by 50% or \$41,864.75, because CART did not completely prevail on these issues. In total, the Funds argue CART's fee request should be reduced by \$116,187.75.

CART responds it is entitled to the full amount of fees associated with the declaratory judgment and appraiser orders because these orders were necessary to implement the contract and secure CART's full relief. CART further contends it is entitled to the full amount of fees associated with its first motion for attorneys' fees and costs because the court ruled in its favor. CART claims that if any amount is going to be reduced for opposing the Funds' first motion for fees, it should be \$8,112 instead of \$74,323 as the Funds propose.

The court denies CART's request for fees incurred when it opposed the Funds' first successful motion for fees and costs. The court has reviewed Paul J. Kiernan's affidavit, dated May 20, 2014, which affirms that CART incurred \$8,112 in fees opposing this motion. The court finds that Mr. Kiernan's affidavit is reliable and credible. It is made on personal knowledge and shows affirmatively the fees and costs CART incurred in opposing the Funds' first motion for fees and costs. CART's second request for fees and costs will be reduced by \$8,112.

For the reasons set forth above, the Clerk is directed to enter judgment in favor of CART, and against the Funds,¹⁵ in the amount of \$275,385.84. It is SO ORDERED this ____ day of March, 2015.

Ronald B. Rubin, Judge

¹⁵ Pursuant to the parties' joint stipulation filed on January 14, 2015, this judgment is not against the defendants that have been dismissed from the case. This judgment is against the remaining defendants only and jointly (Plumbers & Pipefitters National Pension Fund and U.A. Local Union Officers and Employees Pension Fund).