SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

THREE FORKS HERITAGE ALLIANCE, INC., FERN GARBER, WILLIAM GOWEN, and MAURICE LECROY Plaintiffs, v. DEKALB COUNTY, GEORGIA, PATRICK EJEKE, in his official capacity Director of Planning, And Development, for DeKalb County, Georgia, PATH FOUNDATION, INC., Defendants.	)	CIVIL ACTION NO.08-CV-4231-5 Related Action: No. 08-CV-3265-5

ORDER ON PLAINTIFFS' MOTION FOR FEES AND EXPENSES

The Court has before it Plaintiffs' Motion for Expenses of Litigation and Attorney Fees, filed September 19, 2008, within 45-days of this Court's entry of an August 6, 2008 Order finding in favor of Plaintiffs on their declaratory judgment and mandamus claims following the June 25, 2008 trial on this matter.[1] The motion was withdrawn as to the County Defendants following a December 17, 2008 settlement agreement and as to Defendant Lewallen at the call of the case on June 17, 2009 pursuant to a settlement agreement by and between Plaintiffs and Defendant Lewallen. Defendant PATH Foundation, Inc, appeared, by and through new counsel.[2] The Court has before it the full history of this case including hearings for injunctive relief held before this Court on March 5th, March 12th, April 2nd April 14th, the trial on June 25, 2008 and

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[1] The two actions are 08-CV-3265-5, filed March 5, 2009 and the present action, 08-CV-4231-5, filed April 1, 2008. Whether PATH "defaulted" or not, a trial on the merits of this matter was held on June 25, 2008 and liability herein is predicated upon the findings and holdings of this Court following the trial wherein PATH chose not to participate, object or otherwise defend its illegal conduct.

[2] PATH's new counsel, Jay Bennett, filed a notice of appearance on June 10, 2009, replacing Carl Crowley who filed PATH's first formal entry of appearance on October 23, 2008 in response to Plaintiffs' Motion for Fees.

the motion for a temporary restraining order on August 13th which was extended into a preliminary injunction on September 5, 2008.

The Court additionally has before it the affidavits of Plaintiffs' counsel supporting the Motion, copies of Plaintiffs' counsel's invoices for services to his clients throughout that time period, filed with the motion and filed again in open court without objection or challenge by PATH's current counsel. Finally the Court has before it the testimony of Plaintiffs' counsel, in his place, without objection or challenge from PATH's counsel, as to the reasonableness and necessity of his fees.

PATH's counsel's chief defense to Plaintiffs' Motion is that because PATH did not "appear" or "defend" the case(s), PATH has done nothing to be subject to a claim for fees incurred in the case before this Court. The Court is not persuaded by this argument.

Georgia Code Section 9-15-14 provides:

> (a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position.
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> (b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, . . . it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act."

Subsection (a) is the so-called "mandatory" award while subsection (b) *permits* the Court to award fees and expenses. Defense counsel argues that these code sections authorize fees only for *litigation activities* occurring in the court wherein fees are sought. This argument reads too

narrowly the language of this Code Section.. Subsection (a) speaks to a party asserting "a claim, defense *or other position.*" Subsection (b) similarly speaks to an award of fees if the court *"finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct. . . ."*

Courts construing statutes are charged to "give meaning to every part of a statute and not render language superfluous." See generally Costin v. State, 269 Ga. App. 632 (2004). "A statute must be construed and harmonized to give meaning to every part." Levell v. State, 247 Ga. App. 615 (2001). Indeed the canons of construction affirmatively instruct the Court to "construe [the] statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage. Currid v. DeKalb State Court Probation Dept., 285 Ga. 184 (2009).

Construing the statute as Defendant suggests renders superfluous the two italicized phrases set forth above. If "other position" or "other improper conduct" described only litigation activity *inside the courtroom* then this language is superfluous. The "plain and ordinary meaning" of these terms is *not* confined to "claims and defenses" which are "brought or defended" in the courtroom; rather the language encompasses conduct and positions taken and asserted by a party during the pendency of the suit that are without justification or which impact and unnecessarily expand the suit.

In the matter of *In re Estate of Holtzclaw*, 293 Ga. App. 577 (2008) the Court of Appeals upheld a trial court's award of fees against an executor who had unnecessarily expanded a proceeding by improper conduct in, among other things, holding an estate open for an unnecessary length of time *before litigation was filed.* Similarly, in the matter of In re Estate of Zeigler, 295 Ga. App. 156 (2008), the Court of Appeals affirmed an award of attorney fees under

O.C.G.A. § 9-15-14(b) where the Court found that the executor and her attorney "conducted themselves in a manner to prolong administration of the estate so as to give the [executor] the opportunity to sell the house."

Here a matter that could have been a straight-forward determination of a legal question by an administrative review board was, instead, greatly expanded in an effort to stop PATH's continuing improper and illegal conduct throughout the pendency of the lawsuit(s). Despite the pending administrative appeal, PATH *commenced* and continued to remove trees and disturb land without any permits or review. Indeed the Court may never have been required to get involved had PATH simply waited a few weeks for the determination reached in the first appeal to the Zoning Board of Appeals or held-off on land-disturbance activities until it lawfully secured a permit after the second appeal that held that its conduct was illegal. PATH's counsel has admitted, in open Court, that his client was served with this lawsuit. It is equally undisputed that PATH was served with the Complaint in 08-CV-3265-5 (which was *not* amended and in which PATH is unquestionably in default).

Thus, PATH was, at all times, aware of the administrative appeals, the lawsuits and the challenges raised therein. Its executive director Ed McBrayer attended many of the hearings before this Court and was subpoenaed to and actually testified at the trial on June 25th. PATH offered no defense for its conduct but did not ever pause in conducting itself so that the legal rights of the parties could be declared. Despite ample warning that its conduct appeared to be illegal, at no time did PATH *ever* voluntarily cease or hold-off on its illegal conduct to allow the ZBOA and Court to adjudicate its rights and responsibilities despite repeatedly being told by Plaintiffs, the DeKalb County Zoning Board of Appeals and, finally, this Court, that its conduct was illegal. The Court is also acutely mindful that, despite the unequivocal holding of the Court

on August 6, 2008, that the South Peachtree Creek Trail project and the underlying contract were illegal and ultra-vires, PATH *continued* its land-disturbing and construction activities until this Court was forced to return to this matter *yet again* to enter a restraining order on August 13, 2008 and to "expand" that restraining order into a preliminary injunction on September 5, 2008.

A party who is warned not to trespass but who does so anyway and who then is served with a lawsuit challenging the trespass and who then, while the suit is pending, *continues the illegal trespass* necessitating the entry of restraining orders and injunctions, is taking a "position." He is "unnecessarily expand[ing] the proceeding by other improper conduct." If he makes no defense of his action while he continues to engage in the challenged actions, he is taking a "position" for which there can be no question of the outcome; thus with respect to which "there exists such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position."

ACCORDINGLY, THIS COURT FINDS AND ADJUDGES AS FOLLOWS:

Fees and expenses in this action are mandated by the plain meaning of the language of Section 9-15-14(a) and are permissible under subsection (b). The Court incorporates its findings of fact from the August 6, 2008 Order following the trial on this matter and makes the following additional findings of fact from the Record, including the trial on June 25, 2008:

1. The first appearance of Civil Action No. 08-CV-3265-5 before this Court, on March 5, 2008, for a temporary restraining order, was necessitated by PATH's conduct in ignoring the administrative appeal to the DeKalb County Zoning Board of Appeals filed by Plaintiffs *and commencing* illegal land-disturbing activities. Plaintiffs filed the appeal and caused actual service on PATH which

made no effort to ascertain the legality of its actions but, instead, rushed to the site to commence construction and land-disturbance.

2. After April 9, 2008, PATH was aware that the DeKalb County Zoning Board of Appeals had ruled that an administrative appeal stayed all action in furtherance of the challenged decision. PATH did not challenge that decision and was aware that a *second* administrative appeal had been filed on or after March 20th, 2008 challenging the absence of a permit or stream buffer variance which should have stayed all action. PATH ignored the first holding and the second appeal and re-commenced land-disturbing activity.

3. PATH was served in both 08-CV-3265-5 and 08-CV-4231-5. PATH was aware of both of the lawsuits but answered nor appeared in either. After May 14, 2008. PATH was aware that the ZBOA had ruled that land-development activities *required* a permit and that all construction should stop.

4. Despite this awareness, PATH did not stop its construction activities. It did not appear and defend its refusal to follow the law as declared by the ZBOA. That conduct necessitated a trial to this Court on June 25, 2008 at which PATH, through its executive director, appeared at and testified (under subpoena) but offered no other defense or explanation of its conduct and position that it did not have to comply with DeKalb Code and Georgia law.

5. After this Court ruled, on August 6, 2008 that the construction and land-disturbing activities were illegal and that they required a permit and that PATH had no valid contract with DeKalb County, PATH *continued* its land-disturbance and

construction activities necessitating yet another appearance before this Court on August 13th wherein the Court granted a restraining order to Plaintiffs.

6. PATH thus has "asserted a position" (that it could ignore DeKalb Code, state-law, the holdings of the ZBOA and this Court while continuing the illegal conduct) "with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted . . . position." It could not believe that the Court would rule in its favor in the absence of any meritorious defense at trial and the unambiguous language in the statutes.

7. Similarly, PATH has by, its improper conduct (indeed, by conduct *declared illegal)*, necessitated *multiple* appearances before this Court including the August 13, 2008 hearing for a restraining order at which point there could have been no doubt that in PATH's mind that its conduct had been declared *by the Court* and the ZBOA to be illegal.

For the reasons set forth above, the Court finds that *both* sections support the award of fees to Plaintiffs in this case. Having determined that the award of fees is appropriate, the Court then reviews the evidence submitted in support of such award. The Court notes that PATH did not contest or challenge the amount or reasonableness of the fees except to point to the settlement agreements of which Plaintiffs made the Court aware. Accordingly the Court makes the following findings based on the facts set forth by affidavit in the motion and Reply and the invoices and testimony offered by Plaintiffs' counsel on June 17, 2009 without objection from

PATH's counsel:

1. Total fees and expenses in *all* of the cases (Three Forks I, II, III and IV) were over $70,000, including $58,432.77 in fees and $10,611.16 in expenses. This Motion for Fees sought recovery *only* for those fees expended in the 08-CV-3265 and 08-CV 4231 (Three Forks I & II) litigation and counsel for Plaintiffs filed copies of the invoices and a spreadsheet breaking out and excluding fees expended before the ZBOA and on the County's appeal(s) from the decisions of the ZBOA. Though these numbers were broken out and excluded for purposes of this Motion, they were presented to the County as part of the settlement demand.
2. The *total* expenditures by Plaintiffs were presented to the County defendants and Lewallen, all of whom settled, paying less than the *total* amount expended. Plaintiffs originally sought to recover $46, 188.48 plus their fees going forward on the motion (Plaintiffs' counsel testified that this number was revised downward, slightly, in the final calculation due to math errors in the amount of $1,179.92).
3. Plaintiffs' counsel testified, without objection, that $25,901.63 of the County's settlement amount was attributable to fees sought in this case and that $7,000 of Lewallen's settlement amount was attributable to fees sought in this case, leaving $17,043.93 including $4,937 invoiced for preparing a Reply Brief and for preparing for the hearing before this court on June 17, 2009.
4. Plaintiffs' counsel testified, without objection, that he is a 9th year attorney and a partner with his firm. He testified that more than 50 percent of his practice consists of land-use and permitting cases and that his current billing rate is $275

an hour. He further testified that he offered Plaintiffs' a not-for-profit rate of $200.00 an hour through trial before this Court on June 25, 2008.

5. Plaintiffs' counsel further testified that his current billing rate is between $75 and $150 below the rate of attorneys in the Atlanta metro area with comparable years of experience and involved in the same kind of practice.

6. None of Plaintiffs' testimony regarding the reasonableness or amount of fees was contested. Accordingly, the Court finds that the rate charged and work performed by Plaintiffs' counsel was reasonable and required and comparable to other attorneys performing services for the same level of complexity of cases.

7. Plaintiffs' counsel filed invoices demonstrating more than $2,300 was expended securing the *first* TRO necessitated by PATH's actions following service of the appeal; more than $6,480 preparing for the June trial, $4,042 in fees securing the final TRO and preliminary injunction *following* this Court's August 6, 2008 Order finding PATH's conduct was illegal and more than $5,802 in prosecuting the current motion, opposed only by PATH; thus, Plaintiffs have shown actual fees in excess of the $17,043.93 asked for in this motion.

THEREFORE, it is hereby found and adjudged that PATH Foundation, Inc. has asserted a position for which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted position and PATH has unnecessarily expanded the proceeding by other improper conduct, including, actions declared illegal by both the Zoning Board of Appeals and this Court. The Court therefore awards

Plaintiffs' their reasonable and necessary fees, after deduction for the settlements described above, in the amount of $17, 043.93. Such amount shall be entered as a monetary judgment against PATH and shall bear interest at the statutory rate from the entry of this judgment until same is satisfied.

So ordered this 21st day of July, 2009.

The Honorable Gregory A. Adams
Superior Court of DeKalb County

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