STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CHERRY OAK LANDSCAPING, LLC,

Plaintiff,

v

OPV PARTNERS, LLC d/b/a
AUTUMN RIDGE TOWNHOMES AND
APARTMENTS,

Defendant.
_____________________________________/

Case No. 20-000064-CB-C30

OPINION AND ORDER
RE: ATTORNEY
FEES AND INTEREST

At a session of said Court held in Lansing, Ingham County, Michigan, on October 18, 2022

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

This is what should have been a simple collection case brought by a landscaper who performed services under contract for Defendant and was never paid a penny for his work. The landscaper is Brandon Barrett, the sole owner/operator of Plaintiff. The apartment complex receiving the services is owned by Defendant and managed by non-party Real Estate Service Solutions Company (RESSCO).

The Complaint was filed January 21, 2020. The case proceeded in a normal fashion with the preliminary disclosures, scheduling order, and written discovery. On April 14, 2021, the Court heard Plaintiff's motion for summary disposition. The issue was whether the 6-page Master Contract incorporated the 8-page Attachment A. The Court found that it did. Attachment A provided a detailed description of services to be performed and a cost per service. It also provided:

> Any balance not collected within 30 days of due date is subject to a finance charge of 1.5% per month or 18% per annum. Purchaser is responsible for all collection and attorney fees as necessary.

The case again proceeded as normal until it took a turn in the summer of 2021. At that time, Defendant's counsel started claiming that the contract contained a condition precedent to payment. The condition precedent was that lien waivers and sworn statements had to be provided with each request for payment. That prompted Plaintiff to file a motion in limine to bar a lien waiver defense. Plaintiff's argument was that the affirmative defense of condition precedent had been waived. The Court disagreed that it was waived and ruled that Defendant could present a defense of failure to meet a condition precedent to payment.

Plaintiff maintained that he had submitted lien waivers with his invoices. However, all invoices had to be submitted electronically as a PDF file to Defendant's third party accounts payable processor, known as Avid. To complicate matters a little more, no sooner did Plaintiff begin working under the contract than Defendant changed its third party accounts payable processor to Yardi. Much to Plaintiff's dismay, he learned during the pendency of the case that his email server provided limited storage and his email submission of invoices was preserved but the attachments had been deleted. That development made his assertion that he had submitted lien waivers very difficult to prove.

Plaintiff's counsel then attempted to subpoena records from RESSCO, Avid, and Yardi in attempt to locate the missing lien waivers. This prompted the Defendant's motion to quash the subpoenas on grounds that discovery was closed. That motion was denied.

Ultimately, there was only one invoice submission of the 6 that had a waiver of lien attached. RESSCO had no records even when it seemed that they should have had at least *something* that Plaintiff undeniably submitted. Plaintiff's counsel believed that Defendant's counsel had in some way interfered with the RESSCO subpoena and suppressed the transmission of relevant documents. That led to Plaintiff's counsel sending a notice of deposition to RESSCO seeking information about communications with Defendant's counsel. But Defendant's counsel also represented RESSCO. Nevertheless, Plaintiff's counsel proceeded to oppose Defendant's motion to quash the RESSCO subpoena. The hearing was held and the Court granted the motion based on attorney/client privilege.

In early 2022, when all settlement attempts had failed, the parties agreed to waive jury and have a bench trial. Plaintiff issued a trial subpoena to RESSCO to get evidence of whether they refused to pay any other vendors who did not file lien waivers and sworn statements or whether RESSCO *ever* demanded those documents before paying. Plaintiff claimed this information was relevant to whether RESSCO found substantial performance of a condition precedent sufficient in those other transactions. On the morning of trial, the Court heard the motion of non-party RESSCO's objection to subpoena. The objection was sustained and the subpoena quashed because the information sought was not relevant.

The issues at trial were (1) did Mr. Barrett actually perform all of the services that he invoiced, and (2) did he fail to fulfill the condition precedent of submitting lien waivers. Plaintiff maintained that he did submit lien waivers, but Defendant had, in any event, either forfeited or waived its right to require lien waivers. Numerous emails that Mr. Barrett sent to Defendant and that Defendant sent to its management company, RESSCO, were pertinent to the waiver/forfeiture issue. Ultimately, the Court found that Defendant had waived and/or forfeited its condition precedent.

The Court also found that a small number of services were not proven to have been actually provided. However, most services were provided and Plaintiff was granted $52,321 in breach of contract damages.

The attorneys returned to Court shortly thereafter to argue about attorney fees. The Plaintiff is requesting $86,382.50. Defendant made specific objections to many of the items submitted on Plaintiff's attorney's detailed billing records. The two sides also cannot agree on the calculation of interest. The Court took the matter under advisement and now finds as follows.

The Michigan Supreme Court provided a framework for determining a reasonable attorney fee in *Smith* v *Khouri*, 481 Mich 519, 530-531, 751 NW2d 472 (2008):

> We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors.

The remaining factors were distilled into one list in *Pirgu* v *United Services Auto Ass'n,* 499 Mich 269, 281-282, 884 NW2d 257 (2016):

(1) The experience, reputation, and ability of the lawyer or lawyers performing the services,

(2) the difficulty of the case, i.e. the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
(3) the amount in question and the results obtained,
(4) the expenses incurred,
(5) the nature and length of the professional relationship with the client,
(6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
(7) the time limitations imposed by the client or by the circumstances, and
(8) whether the fee is fixed or contingent.

The *Pirgu* Court said that the above factors are not exclusive and that the trial court may consider any additional relevant factors.

Defendant does not contest that the hourly rate of $325 for Plaintiff's counsel is reasonable. Defendant does object to the hourly rate of $385 for another attorney in the same firm. Defendant says that this rate goes beyond the rates applicable in the Lansing area for this type of simple collection work. Plaintiff provided the necessary support for trial counsel's rate but provided no support for other attorneys in his firm. Since Defendant is contesting the $385 rate and Plaintiff did not support it, the Court will reduce that rate to the same $325 rate that Defendant concedes is reasonable. According to the "Fee Recap" portion of the billing, that accounts for .30 hours of time and reduces the charged amount from $115.50 to $97.50 – a savings of $18.

Next, Defendant objects to Plaintiff's counsel's block billing. This Court must perform its obligation to review the billing entries to determine whether the time spent is reasonable. The block billing entries are detailed and specific to the work that was done. Anticipating that some tasks could be deemed unnecessary, counsel gave the Court the breakdown of time in the block. Furthermore, the billing entries are sufficiently detailed to allow Defendant's attorney to identify the specific tasks performed and make his specific objections. The Court is satisfied that the block billing allows for meaningful review.

Defendant also lodges specific objections to some billing entries for being duplicative. At oral argument on this motion, Plaintiff's counsel gave detailed explanations for all the challenged entries. Based on the Court's own review of the entries claimed to be duplicative, in addition to counsel's explanations at oral argument, the Court finds no duplicative billing.

Defendant also challenges some tasks in the billing entries as excessive or unnecessary. The Court will address the entries challenged as excessive or unnecessary by category below.

Time spent on the deposition subpoena for a RESSCO representative to learn about conversations with counsel was unnecessary. This amounts to 21 hours at the $325 hourly rate. The deductions are taken from the block billing entries from 12/3/21 to 2/21/22 in an amount that is reasonably proportional to the time spent on the RESSCO subpoena issue. This 21 hour reduction at the hourly rate of $325 amounts to a reduction of $6,825.

Time spent for trial preparation was excessive. The time amounts to 73 hours. The trial was less than a full day. Plaintiff called one witness, Mr. Barrett, and cross-examined 2 witnesses called by Defendant. Granted, it was going to be a jury trial up until early 2022, but even preparation for a jury trial on a collection case such as this one should not have consumed 73 hours. The Court will reduce the trial preparation time to approximately 50% of that for a total of 37 hours. While even that seems like too much time, the Court is mindful of the fact that the trial one prepares for by necessity is not always the trial one has. This 36 hour reduction at the hourly rate of $325 amounts to a reduction of $11,700.

Time spent preparing a response to Defendant's motion for reconsideration was unnecessary. MCR 2.119(F)(2) provides that no response to a motion for reconsideration may be filed, unless the Court directs otherwise. This Court never requested a response. This amounts to 4.2 hours. The deductions are taken from the billing entries on 5/5/21, 5/11/21, 6/7/21, and 6/28/21. This 4.2 hour reduction at the hourly rate of $325 amounts to a reduction of $1,365.

Time spent preparing the trial subpoena for RESSCO and responding to Defendant's motion to quash was unnecessary. The information that Plaintiff's counsel sought from RESSCO was irrelevant to this case, as the Court ruled on the morning of trial. This amounts to a .20 reduction from 3/10/22, a 3.40 reduction from 4/26/22, and a 2.40 reduction from 4/28/22. This 6 hour reduction at the hourly rate of $325 amounts to a reduction of $1,950.

The Court also addresses the Piru factors as follows:

1. The experience, reputation, and ability of the lawyer performing the services. The Court acknowledges counsel's years of experience and skill. One might wonder why an attorney of such experience was handling a simple collection matter. However, counsel reduced his hourly rate in consideration of his client being a small business owner. There is no reason for an adjustment based on this factor.

2. The difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. There was nothing novel about this case. There was some difficulty in the case, but it was factually based and

straight forward – did Mr. Barrett actually submit the lien waivers or not. If not, the concepts of waiver and forfeiture are well defined in the law and their application here is not particularly difficult. This factor calls for no adjustment.

3. The amount in question and the results obtained. Plaintiff's case was proven and damages were awarded in an amount somewhat less than what Plaintiff requested. The Plaintiff was successful, but the success cannot be considered overwhelming or worthy of any upward adjustment for this factor.

4. Expenses incurred. Plaintiff acknowledges that the expenses were minimal. There is no basis for any adjustment.

5. The nature and length of the professional relationship with the client. Plaintiff acknowledges that this was a limited engagement. There is no basis for any adjustment for this factor.

6. The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer. Plaintiff acknowledges that this factor does not require any adjustment in either direction.

7. The time limitations imposed by the client or by the circumstances. There were no pressing time limitations in this case. This factor is neutral.

8. Whether the fee is fixed or contingent. The fee was fixed, but this does not call for any adjustment.

9. Other factors. The Court finds no other factor that is pertinent to an adjustment of fees. Both sides point fingers at the other for unnecessary complications. The Court finds it puzzling why Defendant seemed determined not to pay for the legitimately provided services of this small-business owner. This entire case should have been

unnecessary to begin with. That is not necessarily a reason for upward adjustment of attorney fees. Attorney fees are not used as a punishment. Furthermore, defense counsel did nit-pick and unnecessarily challenge everything possible. Just one example of many would be to spend any amount of time and paper to challenge $18 worth of attorney fees for the time billed at $385 per hour. However, there are some instances of Plaintiff's counsel doing the same. Just one example would be to assume that Defendant's counsel must have prevented RESSCO from turning over documents in response to the subpoena. Reductions already taken have accounted for these examples.

According to the contract, "any balance not collected within 30 days of due date is subject to a finance charge of . . . $18% per annum." Plaintiff has applied this language to calculate interest that starts on the due date of each invoice. Plaintiff compounded interest annually. Plaintiff acknowledges that the contract interest rate converts to judgment interest at the time a judgment is entered.

Defendant acknowledges that the contract interest rate applies, but contends that under MCL 600.6013, it may only be applied from the date of filing the complaint to the date of the judgment. Further, Defendant acknowledges that the statute permits compounding but the contract does not so the contract should again apply. Defendant would therefore use simple interest at 18% per annum applied from the date of filing the complaint to judgment.

The finance charge provision in the contract should be applied to calculate interest starting on the due date of each invoice, as Plaintiff has done.

> Michigan has long recognized the common-law doctrine of awarding interest as an element of damages. The doctrine recognizes that money

> has a “use value” and interest is a legitimate element of damages used to compensate the prevailing party for the lost use of its funds. *Solakis* v *Roberts*, 395 Mich 13, 19, 233 NW2d 1 (1975).

Here, the parties contracted for interest and there is no reason why that contractual provision should not be enforced. Interest is a legitimate element of damages in this case.

Although the Court agrees with Plaintiff that interest should be applied from the due date of each invoice, that interest must be simple interest, not compounded. The common law rule is that simple interest is favored over compounded interest unless compound interest is explicitly agreed to between the parties. *Nation* v *WDE Elec Co*, 454 Mich 489, 493, 563 NW2d 233 (1997). There is no explicit agreement here for compounding interest. The contract language of “18% per annum” only supports simple interest.

In summary, the Court is awarding attorney fees as follows:

Plaintiff’s original submission			$86,382.50
Reductions:			
	Hourly rate adjustment	$ 18.00	
	RESSCO subpoena/privilege	6,825.00	
	Trial preparation	11,700.00	
	Motion for reconsideration	1,365.00	
	RESSCO trial subpoena	1,950.00	
		$21,858.00	
Total award			$64,524.50

Interest is to be calculated as indicated above.

IT IS HEREBY ORDERED that Plaintiff shall submit a final judgment in this matter within 21 days of the date of this order.

/S/

Joyce Draganchuk (P39417)
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Opinion and Order Re: Attorney Fees and Interest upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on October 18, 2022.

/S/

Michael Lewycky
Law Clerk/Court Officer