

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

SUPREME COURT CASE NUMBER 2018 ~~0071~~ ⁰¹¹¹

Irene Avila,)
)
Plaintiff and Appellee,)
)
v.)
)
Maria G. Weaver, a.k.a. Maria G. Berlin)
)
and)
)
William G. Berlin,)
)
Defendants and Appellants.)

APPELLEE’S BRIEF

**APPEAL FROM AMENDED JUDGMENT AND DECREE
ENTERED JANUARY 30, 2018**

**Made by the Honorable Bradley A. Cruff,
Judge of the District Court, Richland County,
Southeast Judicial District, North Dakota
District Court Case File Number: 39-2016-CV-00156**

Jonathan L. Green
(N.D. Bar I.D. #06853)
Attorney for Plaintiff/Appellee

GREEN LAW FIRM, P.C.
522 Dakota Avenue, Suite 1
Wahpeton, ND 58075
(701)672-1218

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STATEMENT OF JURISDICTION

[¶1] Weaver and Berlin are appealing from Amended Judgment and Decree of the District Court, Richland County, North Dakota, awarding attorney's fees in the amount of \$12,450.00. See Register of Actions, Appellee's App. p. 1 - 6; see also Amended Judgment, Appellee's App. p. 7 – 8. The North Dakota Supreme Court has jurisdiction to review the decision of a lower court pursuant to N.D. Const. Art. VI §§ 2 and 6, and N.D.C.C. § 25-03.3-19.

STATEMENT OF THE ISSUES

- [¶2] I. Whether the Weaver and Berlin timely filed their appeal from the Order Granting and Denying Plaintiff's Motion for Attorney Fees and to Amend Judgment; and Denying Defendant's Motion for Sanctions entered November 30, 2017.
- II. Whether District Court erred in granting Avila's Motion for Attorney's Fees.
- III. Whether the issue of the reasonableness of attorney's fees is properly before the Court.
- IV. Whether the Amount of Attorney's Fees Awarded by the District Court to Plaintiff was reasonable?

STATEMENT OF THE CASE

[¶3] This case comes before the North Dakota Supreme Court from the Southeast Judicial District, Richland County, through an order by the Honorable Bradley A. Cruff on November 30, 2017, which was subsequently incorporated into an Amended Judgment and Decree dated January 30, 2018. See Order Granting and Denying Plaintiff's Motion for Attorney Fees and to Amend Judgment; and Denying Defendant's Motion for Sanctions, Appellee's App. p. 9 – 14; see also Amended Judgment and Decree, Appellee's App. p. 7 – 8. A trial was held on June 27, 2017, in a quiet title

action commenced by Plaintiff on August 17, 2016. See Register of Actions Appellee's App. p. 1 – 6; see also Complaint, Appellee's App. p. 15 – 17. Plaintiff was determined to be the prevailing party and awarded \$6,650.00 in the form of a money judgment, but the Court did not award attorney's fees at that time. See Findings of Fact, Conclusions of Law, and Order for Judgment, Appellee's App. p. 18 – 22. On October 16, 2017, Plaintiff filed a Motion for Attorney's Fees and Amended Judgment. See Notice of Motion and Motion for Attorney's Fees and for Amended Judgment, Appellee's App. p. 23 – 25. On November 30, 2017, the district court granted Plaintiff's Motion for Amended Judgment and Attorney's Fees and awarded Plaintiff a substantial portion her attorney's fees in the amount of \$12,450.00. See Order Granting and Denying Plaintiff's Motion for Attorney Fees and to Amend Judgment; and Denying Defendant's Motion for Sanctions, Appellee's App. p. 9 – 14. The district court entered Amended Judgment and Decree on January 30, 2018. Amended Judgment and Decree, Appellee's App. p. 7 – 8. Weaver and Berlin filed a Notice of Appeal on March 15, 2018 and an Amended Notice of Appeal on March 19, 2018, but did not pay the required filing fee of \$125 until March 27, 2018. See Notice of Filing Amended Notice of Appeal, Appellee's App. p. 26 – 27.

STATEMENT OF THE FACTS

[¶4] Avila and Weaver entered into a Contract for Deed on May 1, 2015, wherein Avila was selling a single family home located in Fairmount, North Dakota, to Weaver, legally described as Lot Three (3) in Block Thirty-Nine (39) of the re-surveyed portion of the original townsite. See Contract for Deed, Appellee's App. p. 28 – 31; see also Memorandum Opinion, Appellee's App. p. 32 – 37. The physical address of the property is 107 2nd Street South, Fairmount, North Dakota. Id.

[¶5] The Contract for Deed was drafted by Weaver who had worked for forty (40) or fifty (50) years as a paralegal. Memorandum Decision, Appellee’s App. p. 32 – 37. The purchase price was Eight Thousand Dollars (\$8,000.00) plus One Hundred Nine-nine Dollars (\$199.00) in non-identified transfer fees. *Id.* Among other things, the Contract for Deed provided for attorney’s fees to the prevailing party should the matter be litigated. *Id.*

[¶6] Avila had purchased the home from Savanna Perales (“Perales”) on a Contract for Deed. *Id.* Avila had paid Perales in full for the property, but no deed was recorded with the Richland County Recorder’s Office. *Id.* Weaver became aware that Avila was not the record title owner when she attempted to record the Contract for Deed between Avila and her. *Id.* Weaver, wrongfully believing that Avila was not the rightful owner of the property, then quit making payments to Avila on the Contract for Deed. *Id.*

[¶7] In the Complaint, Avila requested a determination of attorney’s fees. See Complaint, Appellee’s App. p. 15 – 17. Avila testified that in lieu of cancelling the Contract for Deed and quieting title, she would be satisfied with receiving the balance on the Contract and her costs, including attorney’s fees. Memorandum Decision, Appellee’s App. p. 32 – 37. The Contract for Deed provided for attorney’s fees be awarded to the prevailing party but does not state a specific amount or formula for determining the amount of attorney’s fees to and there was no evidence presented during trial regarding Avila’s attorney’s fees. *Id.*; see also Contract for Deed, Appellee’s App. p. 28 – 31. The Findings of Fact, Conclusions of Law, and Order for Judgment provided that “A money judgment in the amount of \$6,650 shall be entered in favor of Irene and against Maria only” and further provided that “No attorney fees shall be awarded to either party.”

Appellee's App. p. 18 – 22. Judgment was entered on September 29, 2017 (see Judgment (Appellee's App. p. 38) and Notice of Entry of Judgment was served on Weaver, through her attorney, on October 16, 2017. Appellee's App. p. 38

[¶8] Plaintiff filed a motion requesting her attorney's fees on October 16, 2017, pursuant to N.D.R.Civ.P. Rule 54(a)(3)(A). See Motion for Attorney's Fees and for Amended Judgment, Appellee's App. p. 23 - 25. On October 30, 2017, Weaver filed her response to the Motion for Attorney's Fees objecting solely and exclusively on the following grounds:

The Court made a specific finding as to an award of attorney's fees to Irene in its Findings which was incorporated by reference into the Court's Judgment dated September 29, 2017. The Court again addresses the issue of attorney's fees to the prevailing party, Irene, in its Judgment which states "No attorney fees shall be awarded to either party."

See Brief in Support of Motion for Imposition of Rule 11 Sanctions and in Response to Plaintiff's Motion to Amend Judgment, Appellee's App. p. 40 – 42.

On November 30, 2017, the District Court granted Avila's Motion for Attorney's Fees and for Amended Judgment and awarded Avila attorney's fees in the amount of \$12,450.00. See Order Granting and Denying Plaintiff's Motion for Attorney Fees and to Amend Judgment; and Denying Defendant's Motion for Sanctions, Appellee's App. p. 9 – 14. Notice of Entry of said order was served upon Weaver and Berlin that same day, by and through their attorney. See Notice of Entry of Order, Appellee's App. p. 43. In its Order Granting and Denying Plaintiff's Motion for Attorney Fees and to Amend Judgment; and Denying Defendant's Motion for Sanctions the District Court held in relevant part:

7. Evidence of attorney fees was not submitted at the trial on the merits of the case and as such the court did not grant attorney fees at that time.

8. After entry of judgment, Avila timely filed a Rule 11 [sic] motion for her attorney fees.

9. The matter of attorney's fees is properly before the Court.

See Order Granting and Denying Plaintiff's Motion for Attorney Fees and to Amend Judgment; and Denying Defendant's Motion for Sanctions, Appellee's App. p. 9 – 14.

Even though neither Weaver nor Berlin ever raised the issue of reasonableness of attorney's fees in its Brief in Support of Motion for Imposition of Rule 11 Sanctions and in Response to Plaintiff's Motion to Amend Judgment (See Appellee's App. p. 40 – 42), the district court, nevertheless, addressed the eight (8) factors set forth in N.D.R.Prof. Conduct 1.5(a), as well as North Dakota case law, to determine the reasonableness of Avila's attorney's fees. See Order Granting and Denying Plaintiff's Motion for Attorney Fees and to Amend Judgment; and Denying Defendant's Motion for Sanctions, Appellee's App. p. 9 – 14. Upon completing its thorough analysis the district court reduced Avila's attorney's fees by \$1,000 from \$13,450 to \$12,450 finding that \$12,450 was reasonable. Id.

STANDARD OF REVIEW

[¶9] This Court reviews a district court's decision regarding attorney's fees under the abuse of discretion standard. See *Gratech Co., Ltd. v. Wold Engineering, P.C.*, 2007 ND 46, 729 N.W.2d 326, (2007) (citing *City of Medora v. Golberg*, 1997 ND 190, ¶ 18, 569 N.W.2d 257). A district court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, or if it misinterprets or misapplies the law. Id.

LAW AND ARGUMENT

[¶10] I. Whether the Weaver and Berlin timely filed their appeal from the Order Granting and Denying Plaintiff's Motion for Attorney Fees and to Amend

Judgment; and Denying Defendant's Motion for Sanctions entered November 30, 2017.

[¶11] Rule 4(a) of the North Dakota Rules of Appellate Procedure sets forth when an appeal may be taken in civil matters and provides as follows:

RULE 4. APPEAL—WHEN TAKEN

(a) Appeal in Civil Case.

(1) Time For Filing Notice of Appeal. In a civil case, except as provided in paragraph (a)(4), the notice of appeal required by Rule 3 must be filed with the clerk of the supreme court within 60 days from service of notice of entry of the judgment or order being appealed.

(2) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this subdivision, whichever period ends later.

(3) Effect of Motion on Notice of Appeal.

(A) If a party files with the clerk of district court any of the following motions under the North Dakota Rules of Civil Procedure, however titled, and does so within the time allowed by those rules, the full time to file an appeal runs for all parties from service of notice of the entry of the order disposing of the last such remaining motion:

- (i) for judgment under Rule 50(b) ;
- (ii) to amend or make additional factual findings under Rule 52(b) , whether or not granting the motion would alter the judgment;
- (iii) for attorney's fees under Rule 54;
- (iv) to alter or amend the judgment under Rule 59;
- (v) for a new trial under Rule 59; or
- (vi) for relief under Rule 60 if the motion is served and filed no later than 28 days after notice of entry of judgment;

(B)

- (i) If a party files with the clerk of district court any motion listed in subparagraph (a)(3)(A) after a notice of appeal is filed, the party filing the motion must notify the clerk of the supreme court in writing, and the court may remand the

case to the district court to decide the motion. The supreme court retains jurisdiction on remand unless it expressly dismisses the appeal. If the supreme court remands and retains jurisdiction, the parties must promptly notify the supreme court clerk when the district court has decided the motion on remand.

- (ii) A party intending to challenge an order disposing of any motion listed in subparagraph (a)(3)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal, in compliance with [Rule 3\(c\)](#), within the time prescribed by this rule measured from the service of notice of the entry of the order disposing of the last such remaining motion.
- (iii) No additional fee is required to file an amended notice.

(4) Motion for Extension of Time.

(A) The supreme court may extend the time to file a notice of appeal if:

- (i) a party so moves no later than 30 days after the time prescribed by subdivision (a) expires; and
- (ii) that party shows excusable neglect or good cause.

(B) If a motion for extension of time is filed, notice must be given to the other parties.

(C) No extension under paragraph (a)(4) may exceed 30 days after the prescribed time.

Rule 54(e)(3) provides:

RULE 54. JUDGMENT; COSTS

.....

(e) Costs; Objections; Attorneys' Fees.

.....

(3) Attorneys' Fees. A claim for attorneys' fees and related nontaxable expenses not determined by the judgment must be made by motion. The motion must be served and filed within 21 days after notice of

entry of judgment. The trial court may decide the motion even after an appeal is filed.

[¶12] Here, Weaver’s and Berlin’s appeal to Avila’s Rule 54 motion is untimely given that the plain language of N.D.R.App.P. 4(2)(a)(iii) sets forth that “the full time to file an appeal runs for all parties from service of notice of the entry of the order disposing of the last such remaining motion.” Notice of Entry of Order was served upon Berlin and Weaver, through their attorney, on November 30, 2017 (Appellee’s App. p. 43), but their Notice of Appeal was not filed until March 15, 2018. See Notice of Filing Amended Notice of Appeal, Appellee’s App. p. 26 – 27. The time for timely filing an appeal on Avila’s Rule 54 motion would have extended sixty (60) day from November 30, 2017, or through January 29, 2018.

[¶13] Reading N.D.R.App.P. 4 in conjunction with N.D.R.Civ.P. 54(e)(3) further supports that Weaver and Berlin failed to timely file their appeal. N.D.R.Civ.P. 54(e)(3) contemplates a judgment having been entered prior to the filing of a motion for attorney’s fees, not the other way around. Indeed, the only reason for issuing the Amended Judgment in the instant case was for the inclusion of the legal description of the property. This appeal was not filed within the time allowed under N.D.R.App.P. 4(2)(a)(iii), accordingly, it should be dismissed.

[¶14] II. Whether the District Court erred in granting Avila’s Motion for Attorney’s Fees.

[¶15] Rule 54(e)(3) provides:

RULE 54. JUDGMENT; COSTS

....

(e) Costs; Objections; Attorneys' Fees.

....

(3) Attorneys' Fees. A claim for attorneys' fees and related nontaxable expenses not determined by the judgment must be made by motion. The motion must be served and filed within 21 days after notice of entry of judgment. The trial court may decide the motion even after an appeal is filed.

North Dakota Century Code § 28-26-01(1) provides:

§ 28-26-01. Attorney's fees by agreement - Exceptions - Awarding of costs and attorney's fees to prevailing party

1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.

Under N.D.C.C. § 28-26-01(1), the amount of attorney's fees in civil actions must be left to the agreement, express or implied, of the parties.

[¶16] In the instant case, the contract for deed between the parties provide for attorney's fees but did not state a specific amount of attorney's fees or formula for determining an amount in the event of litigation. Findings of Fact, Conclusions of Law and Order for Judgment, Appellee's App. p. 18 – 22. On August 17, 2016, Avila initiated a quiet title action against Weaver and Berlin. Affidavit of Service, Appellee's App. p. 44. The matter went to trial on June 17, 2017. See Order Setting Time for Continued Bench Trial, Appellee's App. p. 45. See also Register of Action, Appellee's App. p. 1 – 6. At trial, both parties introduced evidence, but neither party introduced evidence of attorney's fees incurred as a result of the quiet title action commenced by Avila. Memorandum Opinion, Appellee's App. p. 32 -37. In a Memorandum Opinion issued by the district court on August 17, 2017, the district court found the contract for deed between the Plaintiff and the Defendant to be valid and enforceable and went on to state "While the Court finds Irene to be the prevailing party, the court cannot speculate as to the amount of attorney fees she incurred in bringing this suit and as such is precluded from awarder her attorney fees." Id.

However, in its Order Granting and Denying Plaintiff’s Motion for attorney fees and to Amend Judgment; and Denying Defendant’s Motion for Sanctions dated November 30, 2017, the district court clarified its Memorandum Decision when it held “7. Evidence of attorney fees was not submitted at the trial on the merits of the cases and as such the court did not grant attorney fees at that time.” Appellee’s App. p. 32 – 37. The plain reading of Rule 54(e)(3) provides for the filing a motion for attorney’s fees post judgment. N.D.R.Civ. P. 54. In their Brief, Weaver and Berlin have cited to no law supporting their assertion that the district court’s discussion the issue its Memorandum Decision somehow forecloses the opportunity to file a Rule 53(e)(3) motion.

[¶17] III. Whether the issue of the reasonableness of attorney’s fees is properly before the Supreme Court.

[¶18] The North Dakota Supreme Court held that it “does not consider questions that were not presented to the district court and are raised for the first time on appeal.” Hoff v. Gututala-Hoff, 2018 ND 115, ¶ 7, 910 N.W.2d 896 (citing to Bickler v. Happy House Movers, L.L.P., 2018 ND 177, ¶ 11. An issued raised for the first time on appeal is waived. Bickler ¶ 11.

[¶19] In the instant case, neither Weaver nor Berlin objected to the reasonableness of attorney’s fees and raise this issue for the first time on appeal. Accordingly, the Supreme Court should not consider this issue on appeal.

[¶20] IV. Whether the Amount of Attorney’s Fees Awarded by the District Court to Plaintiff was reasonable?

[¶21] In determining the reasonableness the district court is guided by the factors set forth in N.D.R.Prof. Conduct 1.5(a):

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

T.F. James Co. v. Vakoch, 2001 ND 112, ¶ 23, 628 N.W.2d 298, (2001). The North Dakota Supreme Court has uniformly held that when determining the reasonableness of attorney's fees, all factors must be considered and no single factor controls. *Id.*

[¶22] In the instant case the district court completed a thorough analysis, as follows:

1. "Avila's attorney's rate appears to be in line with the prevailing rate and Berlin's did not object to the amount of Avila's attorney's fees."
2. It necessary to reduce Avila's attorney's fees by \$1,000 given that "Some of the work performed and billed is suited to that of an administrative assistance or paralegal which does not appear to have been billed separately. Specifically, Notices of Subpoena; Certificate of Service; Affidavits of Service; Scheduling depositions; and E-filing."
3. While the amount in controversy was relatively modest, the case involved a quiet title action and specific performance was requested requiring the matter to be heard in district court.
4. That basing attorney fees on the proportionality of the damages awarded by a jury or the court, except as tempered by the results obtained, appears to be frowned upon by our Supreme Court. City of Medora, at ¶22. This is designed not to discourage counsel from accepting meritorious cases of nominal value, such as this case.
5. Several continuances were granted at the request of the Plaintiff given Weaver and Berlin's failure to comply with Avila's discovery demands. Weaver and Berlin's failure to comply with discovery and subsequent continuances naturally increase Avila's attorney fees.
6. Even after Weaver and Berlin hired counsel, they persisted under mistake of law that Avila did not have an equitable interest in the property to sell.

The district court's analysis was thorough, complete and complied with North Dakota law regarding reasonableness of attorney's fees.

[¶23] Weaver and Berlin have asserted 1) the award of attorney's fees is unreasonable given the purchase price on the contract for deed was \$8,000, 2) that any delay was caused by Avila, and 3) the attorney's fees exceed the bounds of reasonable attorney's fees for a cause of action of this nature in the respective community of the parties. Their assertions are disingenuous given that the reasons Avila was not prepared and request continuances were due to Weaver's and Berlin's failure to comply with Avila's discovery demands. Weaver and Berlin have cited to nothing in the record in support of their assertion that the delays were caused by Avila.

CONCLUSION

[¶24] Due to Weaver and Berlin's untimely appeal, the North Dakota Supreme Court lacks subject matter jurisdiction to hear this appeal and it should be dismissed. In the event that the Supreme Court finds that the matter is properly before the Court, it should affirm the decision of the district court in all respects.

CERTIFICATE OF COMPLIANCE

[¶25] The undersigned, as attorney for the Plaintiff/Appellee, Irene Avila, hereby certifies that Plaintiff/Appellee's Brief was prepared with proportional typeface and that the Plaintiff/Appellee's Brief does not exceed 8,000 words.

CERTIFICATE OF SERVICE

[¶26] The undersigned attorney represents the Plaintiff/Appellee, Irene Avila, in the above-entitled matter and hereby certifies that on September 12, 2018, he served

Appellee's Brief and Appendix electronically upon Erica Chisholm, attorney for Appellants/Defendants, Maria G. Weaver and William G. Berlin, at the following email address:

elchisho@hotmail.com

Dated this 12th day of September, 20118.

GREEN LAW FIRM, P.C.
522 Dakota Avenue, Suite 1
Wahpeton, ND 58075
(701) 672-1218 (Office)
(701) 672-1219 (Fax)

By: /s/ Jonathan L. Green
Jonathan L. Green (ND Bar ID #06853)
Attorney for Appellee/Plaintiff
jon.green@jongreenlawfirm.com