

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

**VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE**

SUPREME COURT DOCKET NO. 2008-465

APR 14 2009

APRIL TERM, 2009

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| Estate of Laurenza Leduc DeVoyd | } | APPEALED FROM: |
| | } | |
| v. | } | Grand Isle Superior Court |
| | } | |
| Roger Lanoue d/b/a RL Marine, Carmen | } | DOCKET NO. 5-1-07 Gicv |
| Lanoue, State of Vermont and United States | } | |
| of America | } | |

Trial Judge: Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Defendants appeal the superior court's order granting plaintiff estate attorney's fees. On appeal, defendants agree that they are responsible for reasonable attorney's fees, but argue that the award is excessive because the court erred in: (1) awarding the estate \$1,000 for an expert witness; (2) awarding fees for time associated with work on a declaratory judgment action to resolve another party's right of first refusal; and (3) failing to identify the number of hours reasonably expended by the estate's attorney. We affirm in part and reverse in part.

Defendants contracted to purchase two parcels of property from the decedent in 1990 and 1997. Each contract stated: "In the event that it is necessary for the seller to retain counsel for foreclosure proceedings, the buyer shall be responsible for reasonable attorney's fees in connection therewith." On January 5, 2007, the estate of Laurenza DeVoyd filed a foreclosure action against defendants. The complaint also included a request for declaratory relief to resolve a right of first refusal given to Henry and Sally Forgues on June 1, 1977. The estate reached a stipulated agreement with the Forgues, and they were dismissed as defendants on April 5, 2007. The trial court granted the estate's request for summary judgment against defendants on April 29, 2008. The estate then filed a motion for attorney's fees, pursuant to the contract provision.

The court held a hearing on the question of attorney's fees at which both sides presented expert testimony. The estate's expert opined that the fees requested were reasonable. He testified that given the number of defendants and the nature of the case, the amount of time spent preparing the complaint and the motion for summary judgment was reasonable. Defendants' expert testified that the request was unreasonable because an inordinate amount of time had been spent preparing the complaint and motion for summary judgment.

The superior court granted the estate's request for attorney's fees in the amount of \$10,134.26. The court found that the number of hours and the billing rates submitted by the estate were fair and reasonable given "the type of case, the experience of the respective attorneys, the number of defendants in the case, the complexity of the case, and its outcome." This Court then granted defendants' motion for permission to appeal.

Parties are ordinarily responsible for their own fees, unless, as in this case, there is a statute or agreement that provides otherwise. Perez v. Travelers Ins., 2006 VT 123, ¶ 8, 181 Vt. 45. “An award of attorney’s fees must be based on the facts of each case, and therefore, the trial court is in the best position to determine a reasonable fee.” Human Rights Comm’n v. LaBrie, Inc., 164 Vt. 237, 251 (1995). “Generally, in determining what constitute reasonable attorney’s fees, courts should begin with what is referred to as the lodestar amount: the number of hours reasonably expended on the case multiplied by a reasonable hourly rate.” Perez, 2006 VT 123, ¶ 10 (quotations omitted). The court may then adjust the resulting award depending on various factors including “the novelty of the legal issue, the experience of the attorney, and the results obtained in the litigation.” Id. (quotation omitted).

Defendants first argue that there was no basis for the court to award defendants \$1,000 in expert witness costs.* Defendants contend that the expert fee is not covered by the contract, which provides: “In the event that it is necessary for the seller to retain counsel for foreclosure proceedings, the buyer shall be responsible for reasonable attorney’s fees in connection therewith.” Because the expert witness cost is not an “attorney’s fee,” defendants claim it is not reimbursable. We agree. A fee for an expert witness, even if the expert is an attorney, is not an attorney’s fee, but a cost of litigation. See Ianelli v. Standish, 156 Vt. 386, 389-90 (considering expert witness fee as a cost, not part of attorney’s fee award). The estate did not request the expert fee as a cost so we do not consider whether it would be allowable as such. See id. at 390 (holding that expert witness costs are not “generally allowable witness fees”). On remand, the court shall deduct the \$1,000 expert witness fee from the judgment.

Defendants next argue that the court erred in awarding fees associated with the resolving the right of first refusal because this effort was unrelated to the foreclosure. Some additional facts are necessary to understand this argument. The estate’s complaint sought foreclosure and a declaratory judgment to quiet title. In connection with the declaratory judgment, the estate added Henry and Sally Forgues as defendants because they had a right of first refusal recorded in the land records in June 1977. The estate contends that it was necessary to include them in the foreclosure action to resolve any interest they still had in the property. The contract allows “reasonable attorney’s fees in connection [with the foreclosure].” We agree with defendants that the action for declaratory relief was not necessary to the foreclosure and that the fees are not reimbursable under the contract. Whatever interest the Forgues held could be resolved independently of the foreclosure action, and the facts pertaining to the right of first refusal was different and separate from the facts pertaining to the foreclosure. Cf. Elec. Man, Inc. v. Charos, 2006 VT 16, ¶ 10, 179 Vt. 351 (awarding fees for several different actions because “all of the evidence is relevant to all of the claims”). On remand, the court shall recalculate the attorney’s fee award, and exclude time spent to resolve the Forgues’ right of first refusal.

* We disagree with the estate’s contention that defendants did not preserve the issues now on appeal because defendants failed to “present the issue[s] with specificity and clarity in a manner which [gave] the trial court a fair opportunity to rule on [them].” State v. Ben-Mont Corp., 163 Vt. 53, 61 (1994). The issues on appeal were either raised in argument at the hearing or in defendants’ proposed findings. At the hearing, in closing statements, defendants argued that the time spent on the Forgues’ right of first refusal was not reimbursable. Further, in their proposed findings, defendants claimed that the expert witness fee was not recoverable, and that the court must apply the lodestar method in its calculations of attorney’s fees. Thus, these arguments were sufficiently presented to the court and are properly preserved for appeal.

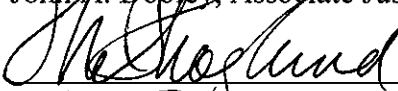
Defendants' final argument is that the court improperly calculated attorney's fees because the court did not identify the reasonable amount of time that should have been expended on the current action. As explained above, the lodestar approach requires the court to first consider the number of hours reasonably expended on the case multiplied by a reasonable hourly rate and then adjust the resulting fee according to several factors. See Perez, 2006 VT 123, ¶ 10. Defendants claim that the court failed to properly apply the lodestar approach because the court did not identify what a reasonable amount of time was for this case. We find no error. The court is not required to set out an exact number of hours to demonstrate what a reasonable amount of time is. We have emphasized that in constructing an attorney's fee award, the "touchstone is reasonableness" and that the trial court has "substantial discretion" in fashioning an award. Id. ¶¶ 8, 13. The court found the testimony of the estate's expert credible and found that the estate's request for attorney's fees was reasonable given the large number of pleadings, the number of defendants in the case, the experience of the attorneys, and the outcome of the case. Thus, the court considered the appropriate factors and did not abuse its discretion in awarding fees.

Reversed and remanded.

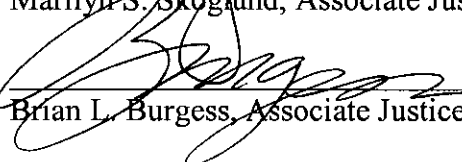
BY THE COURT:



John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice