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Docket: **1684CV01432-BLS2**
Date: **September 3, 2019**
Parties: **WILDLANDS TRUST OF SOUTHEASTERN MASSACHUSETTS, INC., and the JOHN AND CYNTHIA REED FOUNDATION V. CEDAR HILL RETREAT CENTER, INC. and BALLOU CHANNING DISTRICT of UNITARIAN UNIVERSALIST ASSOCIATION, INC.**
Judge: **/s/Kenneth W. Salinger Justice of the Superior Court**

MEMORANDUM AND ORDER DENYING CEDAR HILL'S MOTION FOR FEES AND COSTS UNDER G.L. c. 231, § 6F, and PETITION FOR STATUTORY COSTS

In March 2019 the Court heard a four-day, jury waived trial regarding a claim by Wildlands Trust of Southeastern Massachusetts, Inc., that Cedar Hill Retreat Center, Inc., had breached a conservation restriction on Cedar Hill's property. All other claims had been either dismissed or settled before trial. The Court found that Plaintiffs had not proved that Cedar Hill committed any material violation of the conservation restriction. Final judgment declaring and defining the rights of Wildlands Trust under the conservation restriction, and stating that Plaintiffs were not entitled to recover any compensatory damages or attorneys' fees or to obtain any permanent injunctive relief against Cedar Hill, was entered on April 3, 2019.

Cedar Hill has now moved for an award of attorneys' fees and costs as a sanction under G.L. c. 231, § 6F. In the alternative, it also seeks an award of taxable costs under Mass. R. Civ. P. 54(d). The Court will DENY the motion for sanctions because it is not convinced that all or even substantially all of the claims against Cedar Hill were frivolous and not advanced in good faith. And it will DENY the separate petition for taxable costs because that motion was served more than ten days after final judgment entered and therefore is time-barred.

1. Motion for Sanctions under G.L. c. 231, § 6F. Cedar Hill asks the Court to impose sanctions against the John and Cynthia Reed Foundation, Wildlands Trust, and their lawyers under G.L. c. 231, § 6F, by ordering them to pay most of the attorneys' fees and costs that Cedar Hill incurred in defending itself in this lawsuit. It seeks to recover $413,964.62 in attorneys' fees, plus $22,712.88 in costs, for a total of $436,677.30.

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1.1. Legal Background. Massachusetts generally follows the so-called "American Rule" that successful litigants must pay their own attorneys' fees and costs, and may not collect any part of their litigation expenses from an opponent unless an agreement between the parties, a statute, or a court rule gives them the right to do so. See, e.g., KG.M. Custom Homes, Inc. v. Prosky, 468 Mass. 247, 258 (2014); Preferred Mut. Ins. Co. v. Gamache, 426 Mass. 93, 95 (1997).

By statute, however, "[a] judge may award an adverse party reasonable attorney's fees and other costs upon a finding that 'all or substantially all of the claims, defenses, setoffs or counterclaims ... made by any party who was represented by counsel ... were wholly insubstantial, frivolous and not advanced in good faith." Wongv. Luu, 472 Mass. 208, 215 (2015) (quoting G.L. c. 231, § 6F). "Section 6F is the statutory codification of the bad faith exception, recognized at common law, to the 'American Rule' that counsel fees are not among the costs awarded to a successful litigant." Beacon Towers Condo. Tr. v. Alex, 473 Mass. 472, 478-79 (2016).

The Supreme Judicial Court has treated the statutory criteria of "wholly insubstantial" and "frivolous" as synonymous, but has emphasized that under § 6F sanctions may be imposed against a losing party only if substantially all of their claims or defenses were both frivolous and not advanced in good

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faith. See Hahn v. Planning Bd. of Stoughton, 403 Mass. 332, 336-337 (1988).

If a court finds that this standard has been met, and that an award of reasonable attorneys' fees and costs is appropriate, the court must articulate "the specific facts and reasons" for its finding. See G.L. c. 231, § 6F. However, the statute "does not require a judge who declines to award attorney's fees to make specific findings as [to] the reasons for refusing to do so." Datacomm Interface, Inc. v. Computerworld, Inc., 396 Mass. 760, 781 n.13 (1986).

1.2. Sanctions Against the Reed Foundation. Cedar Hill argues that the Reed Foundation should be sanctioned because all of its claims against Cedar Hill were dismissed, and the Foundation then joined in filing an amended complaint that reiterated its previously-dismissed claims. The Court is not convinced.

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Cedar Hill has not shown that all or substantially all of the Reed Foundation's claims against it were frivolous and not brought in good faith.[1] The mere fact that a party's claims are unsuccessful does not mean they were frivolous and subject to sanction under § 6F. See, e.g., Weston Forest & Trail Ass'n, Inc. v. Fishman, 66 Mass. App. Ct. 654, 662 (2006). "Sanctions for frivolousness should never be lightly imposed and should be reserved only for egregious occasions." Id.

The Reed Foundation's claim to enforce the conservation restriction against Cedar Hill was not frivolous. Judge Sanders dismissed this claim on the ground that only Wildlands Trust had standing to enforce the restriction. But the Reed Foundation had a plausible, albeit unsuccessful, claim that under the facts alleged in the complaint it was an intended third-party beneficiary with standing to enforce the restriction. See generally The James Family Charitable Foundation v. State Street Bank and Trust Co., 80 Mass. App. Ct. 720, 724-725 (2011) (intended beneficiaries may enforce a contract even if not identified by name in the contract).

The claim that Cedar Hill could be sued for breaching the so-called Gift Agreement between the Reed Foundation and Ballou Channing District Unitarian Universalist Association, Inc., was not entirely frivolous either. Judge Sanders was not persuaded by the argument that Cedar Hill could be sued because it was an intended third-party beneficiary of that contract; she held that an intended beneficiary may have standing to enforce a contract, but cannot be sued for breaching a contract to which they are not a party. Nonetheless, parties may not be sanctioned because they are unsuccessful in "present[ing] an argument that is novel, unusual or ingenious, or [urging] adoption of a new principle of law or revision of an old one." Symmons v. O'Keeffe, 419 Mass. 288, 304 (1995) (denying sanctions under Mass. R. App. P. 25), quoting Allen v. Batchelder, 17 Mass. App. Ct. 453, 458 (1984); accord G.L. c. 231, § 6F (no sanction may be imposed under § 6F "solely because a novel or unusual argument or principle of law was advanced in support thereof"); Datacomm,

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[1] The Court exercises its discretion to reach the merits of the motion for sanctions against the Reed Foundation, even though Cedar Hill waited two and a half years after the Foundation's claims were dismissed to seek such sanctions. Cf. Powell v. Stevens, 69 Mass. App. Ct. 87, 92 & n.7 (2007) (affirming judge's "discretionary conclusion" that defendants waited too long to seek sanctions under § 6F).

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396 Mass. at 781 (applying G.L. c. 231, § 6F); see also Van Christ° Advertising, Inc. v. M/A-COM/LCS, 426 Mass. 410, 418 (1998) (applying Mass.

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R. Civ. P. 11); S.J.C. Rule 3:07, Mass. R. Prof. Conduct 3.1 (lawyers may ethically make "good faith argument[s] for an extension, modification or reversal of existing law").

The Reed Foundation's failed claim against Cedar Hill under G.L. c. 93A is more troubling. It is hard to discern what good faith basis the Foundation had for alleging that Cedar Hill's challenged activities were in trade or commerce and therefore subject to c. 93A, or that those activities constitute unfair or deceptive acts or practices and would have violated c. 93A if the statute applied in the first place.

Nonetheless, even assuming that the Reed Foundation's claim against Cedar Hill under c. 93A was wholly insubstantial and not asserted in good faith, sanctions under § 6F are still not appropriate because Cedar Hill has not shown that all or substantially all of the Reed Foundation's claims against it were both frivolous and not asserted in good faith. See Datacomm, 396 Mass. at 782.

Finally, the fact that the Reed Foundation filed an amended complaint reasserting the claims against Cedar Hill that Judge Sanders had previously dismissed does not justify sanctions. Parties that file an amended complaint after certain claims have been dismissed often reassert those claims, because otherwise the amended pleading may be deemed to constitute a waiver of the dismissed claims and thus bar any right to appeal the order of dismissal. See National Constr. Co., Inc. v. National Grange Mut. Ins. Co., 10 Mass. App. Ct. 38, 40 (1980) (where amended complaint sets forth all of plaintiffs' allegations, "any matters which are not restated in the amended complaint are deemed waived or abandoned"); Connectu LLC v. Zuckerberg, 522 F.3d 82, 91 (1st Cir. 2008) ("An amended complaint, once filed, normally supersedes the antecedent complaint. Thereafter, the earlier complaint is a dead letter and no longer performs any function in the case.") (internal citations omitted). Taking pains to avoid inadvertent waiver of claims that have already been dismissed is not grounds for sanctioning a party under § 6F.

1.3. Sanctions Against Wildlands Trust. Cedar Hill also argues that Wildlands Trust should be sanctioned because it did not prevail on any of its claims at trial, other claims by Wildlands Trust were dismissed before trial, and the Court

found that Wildlands Trust could have but then refused to settle this dispute on terms that Wildlands Trust itself had proposed. Once again, the Court is not convinced.

Wildlands Trust lost on the claims it brought to trial in large part because the Court's interpretation of the conservation restriction differed materially from the interpretation favored by the Trust. For example, the Court concluded that the "conferences" and "retreats" permitted under the conservation restriction are not as narrow in scope as Wildlands Trust believed, and that the restriction allows individuals and groups participating in permitted conferences or retreats to stay overnight at the premises. The Trust's much narrower reading of the conservation restriction was not frivolous, even though the Court rejected it. If the Court had adopted the Trust's proposed interpretation of the conservation restriction, the Trust would have prevailed on material parts of its claims. Under these circumstances, Cedar Hill has not shown that substantially all of Wildlands Trust's claims at trial were frivolous and not advanced in good faith.

The fact that some of Wildlands Trust's claims against Cedar Hill were dismissed before trial does not show that sanctions are appropriate under G.L. c. 231, § 6F. Essentially for the reasons discussed above as to the Reed Foundation's claims, the Court concludes that Wildlands Trust had a good faith basis for claiming it had standing to enforce the so-called Letter Agreement and that it was entitled to enforce the so-called Gift Agreement against Cedar Hill. As discussed above, the assertion of a

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seemingly baseless claim against Cedar Hill under G.L. c. 93A does not show that substantially all of the Trust's claims were frivolous.

Finally, Wildlands Trust's refusal to settle provides no reason to impose sanctions. "[A] party may insist on [its] right to have the court resolve disputed issues and may not be penalized for doing so," whether or not the party has made good faith efforts to negotiate a settlement. Graizzaro v. Graizzaro, 36 Mass. App. Ct. 911, 912 (1992) (rescript); accord Wong v. Luu, 472 Mass. 208, 220-221 (2015).

Based on the evidence presented at trial, the Court found that Wildlands Trust declined to settle this lawsuit in early 2016 on terms that the Trust itself had proposed in 2015 because the Reeds had convinced the Trust to bring suit against Cedar Hill, that therefore the Trust had not made every reasonable effort to resolve

its claims, and thus given the dispute resolution provisions of the conservation restriction Wildlands Trust could not press any claims that use of the property before March 2016 violated the restriction.

But these were hotly contested issues. The position by Wildlands Trust, that its refusal to settle did not bar any claims, was legally viable. Its decision to take viable claims to trial rather than settle on terms it had previously offered (and Cedar Hill had initially rejected) does not make the Trust liable for sanctions under § 6F.

2. Petition for Taxable Costs. In the alternative, Cedar Hill asks the Court to award $22,712.88 in costs under Mass. R. Civ. P. 54(d).[2] This request is in substance a motion "under Mass. R. Civ. P. 59(e) [that] seeks to alter or amend the judgment so as to provide for the assessment of court costs." See Lopes v. City of Peabody, 426 Mass. 1001, 1002 (1997) (rescript).

This petition for an award of taxable costs is time-barred. A post-judgment motion or request for costs must "be served not later than 10 days after entry of judgment" (emphasis in original). Lopes, supra, quoting Rule 59(e). Final judgment entered on April 3, 2019. Cedar Hill did not serve its petition for costs until June 24, 2019, or 82 days later. Because Cedar Hill did not serve its petition for costs within ten days of the entry of judgment, this request is "untimely and may not be considered." Id. (holding that motion for taxable costs served "more than four and one-half months late" properly denied "for that reason alone"). The Court "may not extend the time for taking any action under" Rule 59(e). See Mass. R. Civ. P. 6(b).

ORDER

Hill Retreat Center's motion for an award of attorneys' fees and costs is DENIED. Cedar Hill's separate petition for statutory costs is also DENIED.

/s/Kenneth W. Salinger Justice of the Superior Court

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[2] Though Cedar Hill also seeks costs under G.L. c. 261, § 1, the Supreme Judicial Court has held that this statute does not, in and of itself, authorize any award of costs. See Waldman v. American Honda Motor Co., Inc., 413 Mass. 320, 323 (1992).

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