

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY,

CRYOSURGERY, INC.,)
)
 Plaintiff,)
)
 vs.) No. 15-871-BC
)
 ASHLEY RAINS AND COOL)
 RENEWAL, LLC,)
)
 Defendants.)

MEMORANDUM AND ORDER: (1) AWARDING \$75,470
IN ATTORNEYS FEES TO DEFENDANT ASHLEY RAINS AND
(2) ENTERING FINAL ORDER

Decided herein is the amount of attorneys fees Defendant Rains is entitled to recover in defending against this case.

After reviewing the briefs, affidavits and applicable law, it is ORDERED that Defendant Ashley Rains is awarded \$75,470 in attorneys fees pursuant to the attorneys fee provision in the parties' contract and in accordance with Tenn. Sup. Ct. R. 8, RPC 1.5. Court costs are taxed to the Plaintiff.

The facts, authorities and analysis on which this award is based are as follows.

The context for the above ruling is that this lawsuit was filed by an industry leader in manufacturing, selling and distributing cryogenic surgical products and appliances used by doctors and veterinarians to treat certain types of skin lesions. The lawsuit was filed against Defendant Rains as a former employee and her newly founded business operating in the same industry as the Plaintiff. Claiming violation of restrictive covenants and

misappropriation of trade secrets, the Plaintiff's causes of action asserted in the Complaint were (1) breach of contract for an alleged noncompete and nonsolicitation agreement with Defendant Rains, (2) breach of contract under a confidentiality agreement signed by Defendant Rains, and (3) misappropriation of trade secrets pursuant to the Tennessee Uniform Trade Secrets Act against both Defendants. Recovery of compensatory damages, attorneys fees and permanent injunctive relief was claimed.

Over the course of the lawsuit, all of the Plaintiff's causes of action were dismissed on dispositive motions. Defendant Rains then asserted a claim to recover her attorneys fees incurred in defending the case. An August 18, 2017 Memorandum and Order concluded that the attorneys fees provision of agreements the Plaintiff and Defendant Rains entered into entitled her to recover attorneys fees.

Parties' Positions

As per Davidson County Local Rule § 5.05, on August 28, 2017, Defendant Rains' Attorney, Robert H. Horton, filed an affidavit and itemized statement requesting reimbursement of \$150,940 in attorneys fees.

On September 5, 2017, the Plaintiff filed a *Response and Objection*. It consisted of two essential objections: (1) the \$150,940 does not separate out the representation of the Defendant LLC and covers representation of both Defendant Rains and the LLC Defendant even though the contract with the attorneys fee provision is only with Defendant Rains and (2) the rate charged by Defendant Rains' Counsel is excessive.

1. The itemized statement filed in support of an award of attorneys' fees for Defendant Ashley Rains show that the fees were incurred on behalf of Cool Renewal, LLC who was not a party to the contract containing the "prevailing party" attorneys' fee provision. Therefore, the fees associated with representation of Defendant Cool Renewal, LLC are not evidence of attorneys' fees incurred by Defendant Ashley Rains.
2. Pursuant to *Crescent Sock Co. v. Yoe*, No. E201500948COAR3CV, 2016 WL 3619358 (Tenn. Ct. App. May 25, 2016), Defendant Ashley Rains attorneys' fees must be separated from Defendant Cool Renewal, LLC because Defendant Ashley Rains is the only Defendant contractually entitled to seek fees.
3. The Defendant failed to provide actual invoices to show the amounts billed to Defendant Ashley Rains.
4. The fees requested in Attorney Horton's affidavit are excessive under Tennessee law.

Plaintiff's Response and Objection to the Affidavit of Robert W. Horton Regarding Attorneys' Fees, September 5, 2017.

On September 7, 2017, Defendant Rains filed a *Reply* in further support of the award of attorneys fees. Attached to the *Reply* was (1) an affidavit of Ashely Rains stating that the fees described by Attorney Horton in his affidavit were all of the fees incurred by both Defendants and that the limited payments made thus far by Defendant Cool Renewal have come from Defendant Rains and her husband's personal assets because Defendant Cool Renewal, LLC has not yet yielded a profit; (2) copies of the actual invoices issued by Bass Berry & Sims in the lawsuit; and (3) an affidavit of Attorney Bob Boston from the law firm Waller, Lansden, Dortch & Davis, LLP stating that "the hourly rates charged by Bass, Berry & Sims for this case are within the range of fees customarily charged by similarly situated and experienced attorneys within the Nashville area for similar cases."

Analysis

Under Tennessee law, the only parties entitled to an award of attorneys fees under a contractual fee provision are the contracting parties.

Tennessee has long followed the “American Rule” with regard to attorney’s fees. State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 194 (Tenn. 2000). This Rule provides that “a party in a civil action may recover attorney's fees only if: (1) a contractual or statutory provision creates a right to recover attorney’s fees; or (2) some other recognized exception to the American Rule applies, allowing for recovery of such fees in a particular case.” Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303, 308 (Tenn. 2009) (citing Fezell, 158 S.W.3d at 359; John Kohl & Co. P.C. v. Dearborn & Ewing, 977 S.W.2d 528, 534 (Tenn. 1998)). Otherwise, litigants are responsible for their own attorney’s fees. Cracker Barrel Old Country Store, Inc., 284 S.W.3d at 309 (citing House v. Estate of Edmondson, 245 S.W.3d 372, 377 (Tenn. 2008)).

One of the most common exceptions to the American Rule involves contracts that contain provisions expressly permitting or requiring the prevailing party to recover its reasonable attorney's fees incurred to enforce the contract. Cracker Barrel Old Country Store, Inc., 284 S.W.3d at 309. ***Accordingly, parties who have prevailed in litigation to enforce their contractual rights are entitled to recover their reasonable attorney’s fees once they demonstrate that the contract upon which their claims are based contains a provision entitling the prevailing party to its attorney’s fees. Id.***

Eberbach v. Eberbach, No. M201401811SCR11CV, 2017 WL 2255582, at *3 (Tenn. May 23, 2017) (emphasis added).

In this case it is undisputed that Defendant Cool Renewal, LLC was not a party to any contract containing an attorneys fee-shifting provision with the Plaintiff. Thus, under Tennessee law, any award of attorneys fees in this case can not be attributable to work performed by Counsel on behalf of Defendant Cool Renewal, LLC.

The issue, then, is how to proceed to separate the fees. Citing to *Crescent Sock Co. v. Yoe*, No. E201500948 COAR3CV 2016 WL 3619358 (Tenn. Ct. App. May 25, 2016), the Plaintiff asserts that the Court should “refrain from granting any amount of attorneys fees to Rains until sufficient evidence is brought forth as to the amount of fees billed and paid by Rains, individually, separate from Cool Renewal” *Plaintiff’s Response*, September 5, 2017 at 5.

The record establishes, however, that conducting such an evidentiary hearing is futile. In *Crescent Sock* the claims against the individual defendant and corporate defendant were different, and, therefore, the Court in that case held that differentiation of fees attributable to each client, while difficult, would not be impossible.

In this case, however, the claims against Defendant Rains and Defendant Cool Renewal required the same defense because the factual allegations for the claims are identical. It is physically impossible, Defendants’ Counsel asserts, to separate the time.

Plaintiff argues that Rains must segregate the fees incurred by her during the defense of this lawsuit from the fees incurred by Cool Renewal, per the Appellate Court’s ruling in *Crescent Sock Co.* However, the fees were segregated as appropriate and this case can be distinguished from the circumstances faced by the Appellate Court in *Crescent Sock Co.*

As a preliminary matter, Rains segregated certain fees from her request for fees, as set forth in Paragraphs 5-15 of the Horton Affidavit. Specifically, Rains and Cool Renewal incurred fees in the defense against Plaintiff’s common law claims and breach of contract claims arising out of the non-compete and non-solicitation agreement with Rains, which did not include a fee provision. This work resulted in approximately \$18,000 of fees that Rains excluded from her fee request.

The present case is clearly distinguishable from *Crescent Sock Co.* because the only claim asserted against Cool Renewal, a claim under TUTSA, was also asserted against Defendant Rains. There were no claims brought in this case that applied only to Cool Renewal. In *Crescent Sock Co.*, there was a dispute only between Yoe Enterprises and Crescent regarding the intellectual property agreement and Yoe Enterprises had its own counterclaims against Crescent. *Id.* at 7. Therefore, there was work done in the lawsuit on these claims and counterclaims related only to Yoe Enterprises that was distinguishable from the work done on the other claims that included Yoe. *Id.* at *9.

Because the only claim in this case against Cool Renewal is a misappropriation of trade secrets claim, and that mirrors the breach of confidentiality agreements claim against Rains, there is no distinguishable work performed only on behalf of Cool Renewal that was not performed for Rains with respect to the breach of confidentiality agreements claim for which Rains is entitled to her attorney's fees. As already addressed in the Horton Affidavit, the defense of the TUTSA claim did not result in fees in addition to those accumulated by Rains in the defense of the breach of contract claim because the factual allegations under both claims were identical. The First Amended Complaint states: "Count 1: Breach of Contract – Confidentiality Provisions (against Rains)" that Rains breached the confidentiality provisions "by, among other things, misappropriating CryoSurgery's Confidential Information." Because Plaintiff's claims of breach of contract and misappropriation under TUTSA are essentially the same, and the TUTSA claim brought against Cool Renewal and Rains are essentially the same, there simply is no work to be separated out from the total fees attributable to Rains for the breach of contract claim, other than those that have already been separated as discussed supra.

Defendants' Reply To Response To Affidavit For Fees, pp. 2, 4 (Sept. 7, 2017).

12. Plaintiff originally brought the following claims against Rains and Cool Renewal: Breach of Fiduciary Duty (against Rains), Breach of Non-Compete (against Rains), Conversion (Rains and Cool Renewal), Misappropriation of Trade Secrets (Rains and Cool Renewal), Tortious Interference with Business Relations and Prospective Business Relations (Rains and Cool Renewal), and Unfair Competition by Misappropriation (Rains and Cool Renewal). Defendants filed a Motion to Dismiss based on the argument that Plaintiff's common law claims were preempted by the Tennessee Uniform Trade Secrets Act ("TUTSA") and that Plaintiff failed to plead the existence

of an enforceable contract in support of its breach of contract claim against Rains. Plaintiff filed a First Amended Complaint in which Plaintiff dropped its claims for Breach of Fiduciary Duty, Conversion, Misappropriation of Trade Secrets, Tortious Interference with Business Relations and Prospective Business Relations, and Unfair Competition and added a claim under the TUTSA. Plaintiff also amended its breach of contract claim against Rains by separating its claims into two Counts: Count 1: Breach of Contract – Confidentiality Provisions (alleging breaches of Rains’ Consulting Agreement and Rains’ Confidentiality Agreement); and, Count 2: Breach of Contract – Non-Compete and Non-Solicit (alleging breach of Rains Employee Non-Compete Agreement). The Court conducted oral argument on Defendants’ Motion to Dismiss Count 2 and made a bench ruling denying Defendants’ motion. Shortly thereafter, the Court entered an Order altering its ruling from the bench denying Defendants’ Motion to Dismiss and requested the parties provide additional briefing on the motion. After this briefing, the Court then granted Defendants’ Partial Motion to Dismiss Plaintiff’s Count 2 against Rains for breach of the Employee Non-Compete Agreement.

13. Following the Court’s granting of the Defendants’ Partial Motion to Dismiss, the two remaining claims were breach of contract-confidentiality provisions against Rains (alleging breaches of Rains’ Consulting Agreement and Rains’ Confidentiality Agreement) and misappropriation of trade secrets under the TUTSA against both Defendants. As set forth in Defendants’ motion for summary judgment, the defense against both these claims was identical – that Plaintiff had no evidence of misappropriation by Rains of confidential information belonging to Plaintiff (whether individually or in her role as the owner of Cool Renewal) regardless of whether such information qualified as a trade secret. Rains (as owner of Cool Renewal) did not incur any attorney’s fees with respect to the defense against the TUTSA claim (whether on her behalf or that of Cool Renewal) that she would not have incurred with respect to her defense against the claims of breach of contract-confidentiality provisions under the Consulting Agreement, Confidentiality Agreement, or Independent Contractor Agreement. The legal work and expense accumulated with respect to the defense of the breach of contract claims against Rains was not separate from the legal work and expense accumulated with respect to the defense of the claims under the TUTSA against Rains and Cool Renewal.

Affidavit of Robert W. Horton, pp. 4-6, ¶¶ 12-13 (Aug. 28, 2017) (footnote omitted).

Under the circumstances described by Defendants' Counsel of the impossibility of separating time defending Defendant Rains from time defending the Defendant LLC, the distinction between this case and *Crescent Sock* is even more evident considering that the procedure provided by the Court of Appeals in *Crescent Sock* was to remand the case for the trial court "to take evidence and determine the proper amount of attorney's fees and costs to be allocated" to the corporate defendant. A hearing in this case would be fruitless because the evidence in the record from Attorney Horton and apparent from the pleadings, motions and rulings is that the defense was "identical" and "[t]he legal work and expense accumulated with respect to the defense of the breach of contract claims against Rains was not separate from the legal work and expense accumulated with respect to the defense of the claims under the TUTSA against Rains and Cool Renewal." There is no indication that this type of evidence existed in the record before the Court of Appeals in *Crescent Sock*.

For these reasons, the Court concludes that the procedure ordered on remand in *Crescent Sock* does not apply, and the Court shall not apply the procedure of requiring an evidentiary hearing for Counsel to perform a differentiation and allocation of fees for which he has testified is not possible.

Not applying the procedure of *Crescent Sock*, however, does not lead to the result that Defendant Rains is awarded the entire \$150,940 fees requested. *Crescent Sock Co.* and the recent case of *Goree v. United Parcel Serv. Inc.*, No. W201601197COAR3CV, 2017 WL 2398707 (Tenn. Ct. App. June 2, 2017) which discusses *Crescent Sock Co.*, stand for the legal principle that, under either a contract or statute, an award of attorneys fees must be just under the totality of the circumstances, and attorneys fees may not be awarded

“gratis.” Under the authority of these cases, the Court concludes that some reduction of the fee is required in this case.

Because, however, separating and differentiating time spent is not possible, the Court shall apply the reduction mechanism approved in *Goree* of reduction of the attorneys fees by a percentage amount. In *Goree*, the Court of Appeals affirmed a trial court’s reduction of an attorneys fee award by 50% because it was impossible to separate the fees and costs attributable to two plaintiffs, where only one of the plaintiffs prevailed in the litigation. No. W201601197COAR3CV, 2017 WL 2398707, *1 (Tenn. Ct. App. June 2, 2017). The Court of Appeals in *Goree* used the United States Supreme Court’s method for reducing hours related to pursuing unsuccessful claims. The United States Supreme Court in *Hensley v. Eckerhart* held that a court “may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.” *Hensley*, 461 U.S. 424, 436–37 (1983) (emphasis added).

Finding separation impossible, the Court of Appeals in *Goree* used the Supreme Court’s percentage reduction method and affirmed the trial court’s 50% reduction of fees.

We have reviewed some of the billing entries for attorney’s fees, and we cannot conclude that the trial court’s determination that it is not possible to segregate the fees and costs attributable to Mr. Goree from those attributable to Mr. Wherry constitutes an abuse of discretion. Under the holding in *Hensley*, having made this determination, the trial court could ‘simply reduce the award to account for the limited success....’ Given the fact that only one of the two plaintiffs was successful, the trial court’s decision to reduce Mr. Goree’s attorney’s fees and costs by 50% was a logical and reasonable reduction.

In view of the foregoing authority and considering the totality of the circumstances presented in this case, we cannot conclude that the amount of attorney's fees and costs awarded to Mr. Goree was an abuse of the trial court's discretion.

Goree v. United Parcel Serv. Inc., No. W201601197COAR3CV, 2017 WL 2398707, at *4–5 (Tenn. Ct. App. June 2, 2017).

This Court acknowledges that the award of attorneys fees in *Goree* was statutory and not based on a contract provision. This distinction, however, the Court concludes, is immaterial given the facts and circumstances of this case and the evidence provided by Defendant Rains' Counsel in support of the award of attorneys fees. The distinguishing factor in applying *Goree* over *Crescent Sock* is that itemization to differentiate or separate the time attributable for work done on behalf of Defendant Cool Renewal, LLC as opposed to Defendant Rains is physically impossible. It therefore would be futile to hold a hearing and take additional evidence.

Lastly, while the result in reducing the award of attorneys fees by a percentage will necessarily result in an imprecise number, such imprecision is permissible to assure that attorneys fees are not awarded in an unjust and illogical manner. *Crescent Sock Co. v. Yoe*, No. E201500948COAR3CV, 2016 WL 3619358, at *9 (Tenn. Ct. App. May 25, 2016) (“We recognize that this will not be an easy task and may result in a number that is imprecise, but, as discussed in this opinion, it is our view that justice requires such an effort under these unusual circumstances.”).

Accordingly, applying the foregoing case law to the record in this case, the Court concludes that a 50% reduction is appropriate because Defendant Rains was the only one

of two Defendants entitled to attorneys fees under the “prevailing party” provision in the contract. In reaching this determination, the Court is aware from the Rains affidavit of the hardship to Defendant Rains from awarding her recovery of only 50% of fees incurred. Defendant Rains’ affidavit establishes that she and her husband are the sole owners of Defendant Cool Renewal, LLC, and the payment of all the attorneys fees in this case, for both Defendant Rains and the Defendant LLC, will likely be paid by Defendant Rains. The Court is further aware that the 50% reduction in *Goree* was because only one of the two plaintiffs were successful. Here, both Defendants have prevailed in obtaining dismissal of the claims against them. Nevertheless, the law is clear that the Defendant LLC is considered its own separate entity from the individual Defendant, and it is undisputed the LLC was not a party to the contractual attorney fee-shifting provision. With these facts, the Court concludes that reducing the award of attorneys fees by half is consistent with the principles of *Crescent Sock* and *Goree*. The Court therefore reduces the award of attorneys fees from the \$150,940 requested to 50% of that, for a recovery to Defendant Rains of \$75,470.

Supreme Court Reasonableness Factors

In reaching the determination that \$75,470 should be awarded in attorneys fees to Defendant Rains, the Court has also considered the relevant factors from Tenn. Sup. Ct. R. 8, RPC 1.5 and accredits the Affidavit of Robert W. Horton addressing the Rule 1.5 reasonableness factors.

For ease of reference, Tenn. Sup. Ct. R. 8, RPC 1.5 is quoted as follows.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(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 time limitations imposed by the client or by 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;

(8) whether the fee is fixed or contingent;

(9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and

(10) whether the fee agreement is in writing.

TN R S CT Rule 8, RPC 1.5 (West 2017).

With regard to the specific factors, the Court concludes that factors (1), (2), (3), (4), (5) and (7) are applicable and relevant to the determination that \$75,470 is a reasonable award of attorneys fees in this case.

As to factors (1), (2) (4) and (5), the Court concludes that these factors are established because, as evidenced by Attorney Horton's affidavit, the defense of this case was extensive.

As stated by Attorney Horton, the defense required the work of three attorneys – a partner and two senior associates at the law firm. Originally, the lawsuit involved claims of (1) Breach of Fiduciary Duty (against Defendant Rains); (2) Breach of Non-Compete (against Defendant Rains); (3) Conversion (against both Defendants); Misappropriation of Trade Secrets (against both Defendants); (4) Tortious Interference with Business Relations and Prospective Business Relations (against both Defendants); and (5) Unfair Competition by Misappropriation (against both Defendants). After a motion to dismiss filed by the Defendants, the Plaintiff amended its Complaint to allege the following causes of action: (1) Breach of Contract – Confidentiality Provisions (against Defendant Rains); (2) Breach of Contract – Non-Compete and Non-Solicit (against Defendant Rains); (3) Misappropriation of Trade Secrets under TUTSA (against both Defendants); and (4) Attorneys Fees (against all Defendants). The *First Amended Complaint* also sought an application for a temporary and permanent injunction. The legal issues involved with this lawsuit involved extensive and difficult legal briefing and argument. As to the novelty of issues involved, a specific example of this is a complex discovery dispute in the case where ultimately a Delaware procedure was used as a mechanism to require the Plaintiff to provide preliminary identification of trade secrets to the Defendants during the discovery process. The use of out-of-state law for this discovery dispute was necessary because there was no Tennessee authority addressing the issue.

As to the time involved in defending these claims, the lawsuit was originally filed on July 21, 2015 and the Court granted summary judgment in the Defendants favor on May 17, 2017. During the almost two years of litigation, Defendant Rains was required to engage in extensive pre-trial litigation which included preparing, briefing and arguing a motion to dismiss; responding to a Rule 59.04 motion to alter or amend a Court Order; filing multiple motions to compel discovery and obtaining an order from the Court using a Delaware procedure to require the Plaintiff to provide preliminary identification of trade secrets in issue; filing a motion for sanctions against the Plaintiff; and preparing, briefing and arguing a motion for summary judgment. According to the Affidavit of Attorney Horton, the defense of this litigation took a combined 510.70 hours. From the above litigation work and hours involved, it is evident that the acceptance of Defendant Rains as a client precluded other employment by the attorneys involved. Regarding the success, at almost every level of litigation – motion to dismiss, discovery motions and ultimately summary judgment – Counsel achieved successful results for Defendant Rains.

As to factors (3) and (7), the Court finds that these factors are established. The Court accredits the affidavit testimony of Robert E. Boston that “the hourly rates charged by Bass, Berry & Sims for this case are within the range of fees customarily charged by similarly situated and experienced attorneys within the Nashville area for similar cases.” As further

support for factors (3) and (7), the Court accredits paragraphs 3-8 and paragraph 16 of the *Affidavit of Robert W. Horton* filed in support of the award of attorneys fees.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efile as applicable to:

Adam Dread
Joshua Hedrick
Jacob B. Kring
Britton D. McClung
Michael C. Wurtz
Robert W. Horton
Mary Leigh Pirtle
L. Lymari Cromwell

Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/ Justin F. Seamon
Deputy Clerk
Chancery Court

October 3, 2017