Filed:07/22/2021 12:54:00
Fourth Judicial District, Boise County
Mary Prisco, Clerk of the Court
By: Deputy Clerk -Baumhoff, Staci

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR BOISE COUNTY

DENNIS LARGENT, MARY CORDOVA, CHUCK STEELE, ACTING AS MEMBERS OF THE BOARD OF DIRECTORS OF THE TERRACE LAKES WATER COMPANY, Plaintiffs, vs. ILENE JOHNSON, LONNIE BRAMON, DARLENE BLAKESLEE AND TERRACE LAKES WATER COMPANY, Defendants.	Case No. CV08-20-247 ORDER RE: ATTORNEY FEES AND COSTS

THIS MATTER comes before the Court on Plaintiffs' request for attorney fees and costs, filed through counsel on May 19 and 26, 2021. The Court issued a briefing schedule, and the matter was taken under advisement without oral argument. For the reasons set forth herein, Plaintiffs' Motion is GRANTED. Plaintiffs are awarded $831.40 in costs and $18,041.20 in attorney fees against Defendant Ilene Johnson.

BACKGROUND

This was a dispute concerning who made up the legitimate Board of Directors of the Terrace Lakes Water Company ("the Company"). The Plaintiffs in this case were legitimately elected to the Company's Board of Directors in October 2020. After they were elected, the Company's former president and board member, Ilene Johnson ("Johnson"), without authority and in violation of the then prohibition against private gatherings of more than 10 people, held another

election to overthrow the newly elected Board. Plaintiffs filed this action against Johnson, among others, seeing various forms of injunctive relief, writs of mandate, and requested a temporary restraining order. The Defendants moved to dismiss the action.

Following a hearing on the matter, on March 2, 2021, the Court entered an *Order Granting Motion for Preliminary Injunction and Denying Motion to Dismiss* (hereafter, "Order"). The Order granted almost all the relief Plaintiffs requested (aside from the TRO as the motion came up for hearing after Johnson had held the invalid election in December 2020, thus any TRO was moot).

Thereafter, the parties entered a stipulation resolving any remaining matters. The stipulation recognized that the individually named Plaintiffs make up the legitimate Board of Directors and imposed various obligations on the Defendants to transfer Company books and records to the Plaintiffs. An order granting the stipulation was filed on May 13, 2021.

On May 19, 2021, Plaintiffs filed a Memorandum of Costs claiming $831.40 in costs as a matter of right. On May 26, 2021, Plaintiffs filed a Motion, Memorandum, and Affidavit for Attorney Fees seeking $18,501.20 in attorney fees under Idaho Code § 12-121. Plaintiffs request the award of fees be imposed against Johnson only.

The same day, Defendants filed an objection to the request for fees and costs claiming that there were no prevailing parties. On May 28, 2021, Plaintiffs filed a reply brief arguing they were the prevailing parties. On June 4, 2021, the Court issued a briefing schedule. On June 8, 2021,

Defendants filed a response and affidavit from counsel. On June 14, 2021, Plaintiffs filed a reply. The parties did not request oral argument, and the matter was taken under advisement.

ANALYSIS

1. Prevailing Party

Costs and attorney fees are only awardable to the prevailing party or parties in an action. Idaho Rule of Civil Procedure 54(d)(1)(A) provides that "costs are allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court." "In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract." I.R.C.P. 54(e)(1).

> In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

I.R.C.P. 54(d)(1)(B). It is within the trial court's discretion to determine which party to the action is the prevailing party. *See id*.; *Jorgensen v. Coppedge*, 148 Idaho 536, 538, 224 P.3d 1125, 1127 (2010). In making the determination, the Court considers, "(a) the final judgment or result obtained in the action in relation to the relief sought by the respective parties; (b) whether there were multiple claims or issues between the parties; and (c) the extent to which each of the parties prevailed on each of the issues or claims." *Chadderdon v. King*, 104 Idaho 406, 411, 659 P.2d 160, 165 (Ct. App. 1983).

"[T]he prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." *Credit Suisse AG v. Teufel Nursery, Inc.*, 156 Idaho 189, 203, 321 P.3d 739, 753 (2014) (citation omitted). The party moving for attorney fees bears the burden of showing that the standards for such an award have been met. *Cunningham v. Waford*, 131 Idaho 841, 844, 965 P.2d 201, 204 (Ct. App. 1998).

Defendants argue Plaintiffs are not the prevailing parties, because the parties entered into a stipulation resolving all matters.[1] Defendants rely on *Cunningham v. Waford*, which found there was insufficient information regarding the terms of the parties' settlement from which the Court could determine a prevailing party. *Cunningham*, 131 Idaho at 844–45, 965 P.2d at 204–05. The Court of Appeals noted that the parties' settlement stipulation included no acknowledgment of liability, and the record was devoid of information from which a court could judge the extent to which the settlement accomplished any change. This case is distinguishable.

Here, there is ample information in the record from which the Court can easily find Plaintiffs are the prevailing parties. The Plaintiffs successfully moved for and were granted a preliminary injunction and peremptory writ. Defendants did not prevail on their motion to dismiss. The parties' stipulation and the order entered granting the stipulation also shows Plaintiffs are the prevailing parties and coincides with the relief sought in their Complaint. It establishes the individually-named Plaintiffs as the current Board of Directors of the Company and makes this Court's findings in the Order "permanent," including "the temporary injunction and peremptory

[1] Defendants also claimed that "looking at the success as a whole there were still many issues that were undetermined because of the early stipulation to dismiss." *See* Defs.' Objection p. 4 (filed May 26, 2021). However, Defendants failed to point out any unresolved issues. In fact, the Court noted "[r]emaining issues (if any) shall be reserved for trial." As far as this Court could tell, the Order addressed all the issues raised by the parties and the merits of the case.

writ and all other findings of the court." *See Order for Resolution of all Matters and Dismissal* ¶ 1 (filed May 13, 2021). The stipulation goes on to impose various obligations on the Defendants to transfer the Company's business affairs to the Plaintiffs and provides that any violation of the stipulation may be brought before the Court. The stipulation provides all the relief that Plaintiffs sought in bringing this action. Plaintiffs certainly benefitted because of this litigation. Conversely, there is no evidence Defendants benefitted.[2] Therefore, the Court concludes Plaintiffs are the prevailing parties and are entitled to seek costs and attorney fees.

2. Costs

As the prevailing parties, Plaintiffs are entitled to costs as a matter of right under Idaho Rule of Civil Procedure 54(d)(1)(C). Plaintiffs seek $221 in filing fees and $610.40 in service of process fees. Plaintiffs are entitled to these costs under Rule 54(d)(1)(C)(i) and (ii), and Defendants did not object to these claimed costs. Therefore, Plaintiffs are awarded $831.40 in costs as a matter of right.

3. Attorney Fees

a. Basis for Fees

"In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract." I.R.C.P. 54(e)(1). Plaintiffs seek fees against Johnson only under Idaho Code § 12-121.

[2] Johnson clearly sought to be re-elected to the Company's Board. She was unsuccessful in that attempt during the course of the litigation in this case.

Attorney fees may only be awarded under Idaho Code § 12-121 when the Court "finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." *See also* I.R.C.P. 54(e)(2).

In *Clark v. Jones Gledhill Fuhrman Gourley, P.A.*, 163 Idaho 215, 409 P.3d 795 (2017), an attorney, who had represented plaintiffs in a prior unrelated action, filed suit against the law firm that had represented the defendants in the prior action. The attorney alleged that the law firm had breached its duty to protect an attorney's lien. This Court granted the law firm's motion to dismiss and awarded attorney fees to the defendants under Idaho Code § 12-121, because (1) the attorney disregarded established case law finding that the failure to take affirmative adjudicative steps to perfect an attorney's lien rendered the claimed lien unenforceable, (2) the attorney did not argue a new or novel interpretation of Idaho Code § 3-205, (3) the attorney was advised prior to filing suit that his claim would fail based on Idaho case law, and (4) the attorney unnecessarily increased the cost of litigation by filing documents under seal, which were not filed under seal in the underlying case.

On appeal, the Supreme Court upheld this Court's award of attorney fees under Idaho Code § 12-121:

> We conclude the district court's award of attorney fees under section 12-121 to Jones Gledhill signifies a proper exercise of discretion. The district court recognized that it had discretion to award fees. Further, the district court acted within the boundaries of its discretion and consistently with relevant legal standards. In that regard, the district court accurately recited the governing law and recognized that it was tasked to find whether Clark pursued the case frivolously, unreasonably, or without foundation. Finally, the district court reached its decision by an exercise of reason. The district court explained that Clark "did not argue a new or novel interpretation of Idaho Code § 3-205, nor argue that the law should be extended or modified. [Clark's] 'novel legal

> question' merely argued that the Court should ignore established precedent, which it has declined to do." Additionally, the district court noted that Clark "took action that increased the cost of litigation by filing documents that were under seal in another case...." Although Clark contends the district court's "myopic focus on the holding in *Frazee*" was erroneous, we disagree. As reasoned above, Clark's attempt to distinguish *Skelton* from *Frazee* is not grounded in a reasonable interpretation of either opinion. Clark simply ignored a key aspect of both *Skelton* and *Frazee* by arguing he was not required to foreclose his lien. *Frazee*, 104 Idaho at 466, 660 P.2d at 931; *Skelton*, 102 Idaho at 73, 76, 625 P.2d at 1076, 1079.

Id. at 229–30, 409 P.3d at 809–10.

Here, the Court likewise concludes Johnson defended the case frivolously, unreasonably, and without foundation. Johnson's conduct in challenging the October 2020 election was without a legitimate basis in fact or law. As set forth in this Court's Order by calling for a new election (without any legitimate basis), she plainly violated a November 14, 2020 Executive Order prohibiting gatherings of more than 10 people due to the COVID-19 pandemic.[3] This Court also held that Johnson was equitably estopped from claiming she (and the other individually-named Defendants) made up the legitimate Board based on Johnson's own representation there was no Board of Directors and her failure to raise any objection to the creation of an Interim Board or to the procedures agreed to by a majority of Subscribers. In discussing the first element of equitable estoppel, the Court noted how Johnson herself created much of the chaos and confusion surrounding the election of a Board of Directors:

> Here, Johnson represented to the Subscribers that there was no Board of Directors. Although she might have believed at the time that there was no Board, she is charged with constructive knowledge as the self-claimed President of the Company and member of the Board since the Company's inception. She was in the best position to know of the status of the Board of Directors. Her name is on almost every spotty record kept since the Company's inception. It is clear she mismanaged the Company by failing to keep and maintain proper records and hold meetings as called for in the Bylaws. She also sent a written notice advising

[3] Defendants do not address the Court's ruling on this issue in its opposition brief.

> the Subscribers they all able to vote for the Board: "[p]roperty owners have five votes one for each director. . . . Every lot owner with water service can vote. . . ." There is no evidence that any objection was made to the creation of the Interim Board or to the October election. Only when the results were not in the Defendants favor, did the Defendants protest.

Order p. 16. Even more damaging to Defendants' position is that all three individual Defendants participated by voting in the October 2020 election, which they then claimed was invalid.

Defendants argue they had a valid defense to the estoppel claim in that the Plaintiffs could have discovered the truth. Defs.' Opposition p. 11 (filed June 8, 2021). However, this argument is contrary to the facts. Johnson maintained the Company records, including meeting minutes. The evidence showed her record keeping, and maintenance of the Company books was sloppy (at best). Also, once litigation commenced, she did not readily hand over Company records, which cuts against her argument that Plaintiffs could have "easily" discovered the truth by obtaining those records.[4] Therefore, the Court finds that this defense was frivolous and without foundation.

Most importantly, Johnson did not have a reasonable defense that the October 2020 election was invalid. She consistently maintained that Subscribers did not have a right to vote, even though such claim was clearly contradicted by the facts and Johnson's own actions recognizing the Subscribers the right to vote. Defendants argue their defense had merit because the Articles were never amended to allow Subscribers the right to vote. The Court addressed this issue and noted that it was plainly contradicted by the facts. Meeting minutes showed that the amendment to the Articles was adopted. Plaintiffs provided at least three affidavits from individuals who were at

[4] As Plaintiffs noted "As is now known, Johnson did not supply the amended articles of incorporation that were adopted in 2010 (as well she could not since she and her fellow board members failed to reduce them to writing). Nor did she inform the court of their existence. Instead, she withheld the records demonstrating the adoption of the amendment and the reasons therefore: to give the subscribers the right to vote." Pls.' Mem. in Supp. p. 3 (filed May 26, 2021).

the 2010 meeting who testified that the Articles were amended to allow Subscribers voting rights. While the Bylaws were properly amended, Johnson thereafter failed, refused or neglected to actually draft the written amended Articles (or to retain them, if any, in the official company records). However, since 2010, in each and every of Johnson's notices calling for a meeting to elect a Board member, the notices inform all Subscribers that the Board is to be elected by the Subscribers. The Defendants' argument that there was no authority for Subscribers to elect the Board was plainly frivolous based on the facts in this case.

In sum, the Court concludes Johnson's defense of this case clearly lacked merit. The Court also finds she unreasonably drove up the cost of litigation by misrepresenting facts and not being forthright in producing Company records. Thus, the Court concludes the case was defended unreasonably, frivolously, and without foundation. Plaintiffs are entitled to attorney fees under Section 12-121.

b. Reasonableness

The calculation of reasonable attorney fees is within the discretion of the trial court." *Bott v. Idaho State Bldg. Authority*, 128 Idaho 580, 592, 917 P.2d 737, 749 (1996). "When awarding attorney's fees, a district court must consider the applicable factors set forth in I.R.C.P. 54(e)(3) and may consider any other factor that the court deems appropriate." *Lettunich v. Lettunich*, 145 Idaho 746, 749–50, 185 P.3d 258, 261–62 (2008) (citation omitted). "Rule 54(e)(3) does not require the district court to make specific findings in the record, only to consider the stated factors in determining the amount of the fees. When considering the factors, courts need not demonstrate how they employed any of those factors in reaching an award amount." *Smith v.*

Mitton, 140 Idaho 893, 902, 104 P.3d 367, 376 (2004). While the Court has considered all of the factors under Rule 54(e)(3), it will address some of the most important factors herein.

a. Time and labor required

Plaintiffs' attorney and paralegal expended 92.4 hours of work on this case. Plaintiffs' attorney, Michael Kane ("Kane") charged $200 an hour, and his paralegal charged $100 and hour.

"A court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney. . . . An attorney cannot 'spend' his time extravagantly and expect to be compensated by the party who loses at trial." *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct. App. 1985). Thus, "a court may disallow fees that were unnecessarily and unreasonably incurred or that were the product of attorney 'churning.'" *Daisy Mfg. Co. v. Paintball Sports, Inc*., 134 Idaho 259, 263, 999 P.2d 914, 918 (Ct. App. 2000).

At its heart, this case presented the issue of whether the October 2020 election was valid, and if so, whether Johnson's actions in holding a December 2020 election were invalid. The facts were somewhat complex and difficult to flesh out given Johnson's incomplete record-keeping and misstatements of fact.

Johnson drove up the cost of the litigation by holding an illegitimate election in December 2020 and asserting defenses that were plainly without merit and contrary to fact. The case was filed December 16, 2020. Plaintiffs filed numerous affidavits and motions in efforts to stop the

December 2020 election that Johnson insisted on holding. While the Court did not have the opportunity to rule on the TRO prior to the December 2020 election, Plaintiffs' conduct in attempting to stop the election was warranted. Johnson went ahead and held the election despite being on notice that the Plaintiffs were challenging her conduct. She went ahead with the election despite an Executive Order prohibiting such gatherings due to the COVID-19 pandemic and without a legitimate legal or factual basis.

Defendants defended the case by filing a motion to dismiss along with an affidavit from Johnson. Johnson misrepresented facts in this case, which necessitated Plaintiffs filing more affidavits to counter her misstatements. Prior to the hearing, Defendants filed a motion to strike some of the affidavits Plaintiffs filed and asserted they were untimely. However, they did not request additional time to file any additional affidavits or assert any prejudice by the late filings, thus, that motion was also denied.

The parties presented oral argument on the various motions on January 22, 2021, and the Court issued a decision on March 1, 2021. About two months later, the parties entered a stipulation that was in line with this Court's ruling.

Defendants argue Kane's time spent on this matter was out of proportion to the short duration of this case and is unreasonable. Plaintiffs argue Kane's time was reasonably spent given the nature of the relief requested and they had the burden to establish they were entitled to the relief requested. The Court agrees. Although the duration of the case was short, Kane expended a substantial and reasonable amount of time to establish that his clients were entitled to the relief

requested. Johnson's misrepresentations necessitated obtaining declarations and affidavits to counter her assertions. Thus, the Court finds the time and labor required overall was commensurate to the hours worked by Kane. Nevertheless, the Court will address Defendants' specific objections to Kane's time entries.

Defendants argue that spending 6.1 hours to research, draft, revise, and send an initial letter to defense counsel was unreasonable and excessive. In reviewing Kane's time entries, the Court finds the time spent was reasonable. It appears the time was spent on getting up to speed with the case as well as conducting research and contacting opposing counsel. This was reasonable and not excessive.

Defendants argue that approximately 31.6 hours to draft initial filing materials was unreasonable. The initial filing materials are substantial and include applications for various writs, a petition for a declaratory judgment, motions for a TRO and preliminary injunction and are supported by 10 affidavits. As argued by Plaintiffs, it was their burden to establish entitlement to the relief sought. This entailed substantial time and preparation of these materials. The Court finds the time spent to prepare these filings was reasonable. Likewise, approximately eight hours spent in preparation for and attending the January 2021 hearing was reasonable given that this was the most important and potentially dispositive hearing of the case.

Defendants argue the time spent to prepare affidavits was unnecessary and unreasonable; however, based on Johnson's misrepresentations, the Court finds the evidence was helpful and necessary. Kane's time spent was reasonable. Defendants also object to 9.1 hours of phone calls

with clients; however, again, that time was reasonable in order to prepare the amount of affidavits submitted in this case and to counter Johnson's factual rendition.

Defendants object to a few entries that appear unrelated to the case including reviewing "golf contract provisions;" however, the remainder of that entry relates to reviewing the stipulation and emailing clients. It is unclear whether "golf" was a typo. There were also two entries for reviewing an engineering contract. Plaintiffs did not address these objections in their reply brief. Thus, the Court will deduct the time claimed for these three entries that appear on their face to be unrelated to this case (a total of $460).

The Court has reviewed the entirety of Kane's time entries and finds the remaining entries show reasonable time spent working on this case.

b. The novelty and difficulty of the questions

The issues raised in this case while not legally difficult were factually complex given the Defendants' defense of the case, Johnson's shoddy record keeping of Company books, and the various events that occurred in the fall and winter of 2020 relating to the disputed elections.

c. The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law

Plaintiffs' counsel is an experienced attorney. His experience made his work that much more efficient.

d. The prevailing charges for like work

In *Bates v. Seldin*, a garden variety breach of contract and fraud case from 2009, the Idaho Supreme Court determined the district court did not abuse its discretion by finding "the prevailing charges for like work without trial in the Boise area is about $175 per hour and that $250 to $400 per hour is charged for trial." *Bates v. Seldidn*, 146 Idaho 772, 777, 203 P.3d 702, 707 (2009). By 2021, those prevailing charges have most certainly increased. Thus, counsel's fee of $200 an hour does not exceed the prevailing charge in the Boise area and is reasonable. Given his level of skill and experience, he could reasonably charge $300 to $400 per hour, or more.

e. The time limitations imposed by the client or the circumstances of the case

This case was brought on an expedited basis, sought an early determination on the merits, and certainly imposed time constraints on counsel.

f. The amount involved and the results obtained

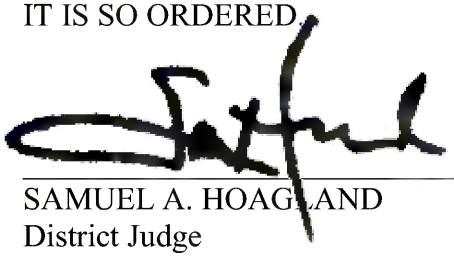
Plaintiffs sought to establish their legitimacy as the proper Board of Directors and obtain Company records so that they can do their job. They obtained all the relief sought.

In considering all the factors outlined in Idaho Rule of Civil Procedure 54(e)(3), the Court finds $18,041.20 ($460 deducted from $18,501.20) is reasonable for the litigation.

CONCLUSION

For the reasons set forth herein, Plaintiffs' Motion for Attorney Fees and Costs is GRANTED as follows. Plaintiffs are awarded $831.40 in costs and $18,041.20 in attorney fees, for a total of $18,872.60, against Johnson. A judgment will be issued concurrent with this decision.

IT IS SO ORDERED.



7/21/2021 11:49:40 AM

SAMUEL A. HOAGLAND
District Judge

Date

CERTIFICATE OF MAILING

I hereby certify that on 7/22/2021 12:54 PM, I served a true and correct copy of the within instrument to:

Michael Kane
mkane@ktlaw.net

Terri Pickens Manweiler
terri@pickenslawboise.com

MARY T. PRISCO,
Clerk of the District Court

By 
Deputy Court Clerk