FOR PUBLICATION

E-FILED
CNMI SUPERIOR COURT
E-filed: Apr 09 2015 11:06AM
Clerk Review: N/A
Filing ID: 57050157
Case Number: 09-0331-CV
N/A

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN THE MATTER OF: **SU, YUE MIN et al., DEPARTMENT OF LABOR, by and through its Secretary GIL M. SAN NICOLAS, officially, and CINTA KAIPAT, Deputy Secretary, and or Acting Secretary, officially and individually,** **Complainants-Appellees,** **v.** **FENG HUA ENTER., INC., et al.,** **Respondents-Appellants.**	**CIVIL CASE NO. 09-0331** **ORDER GRANTING MOTION FOR TAXATION OF COSTS AND ATTORNEY FEES IN PART AND DENYING IN PART**

I. INTRODUCTION

THIS MATTER came before the Court on September 25, 2014, at 1:30 p.m. in Courtroom 223A. Appellees, Yue Min Su, et al., were represented by Attorney Joe Hill. Appellants, Feng Hua Enterprises, Inc., et al., were represented by Attorney Robert Myers.[1]

Based on review of the filings, oral arguments, and applicable law, the Court hereby **GRANTS** costs and attorney's fees. The Court further **DENIES** awarding post-judgment interest in this matter.

II. BACKGROUND

This matter arises from Appellants' action for judicial review on appeal from the July 31, 2009 decision of then then-Acting Secretary of Labor, affirming the decision and order of the administrative hearing officer's "award[] [of] $63,661 in damages with respect to unpaid wages and overtime and an equal

[1] The Court notes that a Notice of Appeal was filed in the instant matter by Appellants on September 7, 2014.

amount in liquidated damages, plus $1,200 in reimbursement for illegal deductions, $5,573.50 in attorneys fees and costs, and $12,000 in fines." Pet. for Judicial Review at ¶ 1.

On August 8, 2014, the Court dismissed the instant action for Appellants' failure to prosecute their claims to finality for over three years. Now, Appellees now bring a motion for taxation of costs and attorney's fees.

III. DISCUSSION

Appellees request that the Court grant them costs, attorney's fees, and post-judgment interest on attorney's fees. The Court grants costs and attorney's fees, but not post-judgment interest.

A. Appellees are awarded costs in the amount of $541.00.

Appellees argue that they are the prevailing party in the suit, and that Rule 54(d)(1) of the Commonwealth Rules of Civil Procedure ("Rule 54") grants them costs as a matter of course. Appellants challenge the notion that Appellants, being merely a prevailing party of a summary dismissal, is a prevailing party under the meaning of Rule 54. The Court is unpersuaded by Appellants' argument.

Appellants argue that because Appellees did not initiate the instant litigation, Appellees cannot be the "prevailing party" under Rule 54. Appellants' argument relies on the Commonwealth Supreme Court case of *Camacho v. L&T International Corporation* where the Supreme Court held that a prevailing party is one who successfully maintains his or her suit at the end of the litigation. 4 NMI 323, 330 (1996). But the Court finds that Appellant's reliance on *Camacho* to be misplaced. There, the Supreme Court determined whether or not a party was required – as a condition precedent to performance of a contract provision – to "institute litigation . . . and prevail[]." *Id.* The Supreme Court held, as a matter of contract interpretation, that a party did not need to prevail on a cause of action. Rather, a party merely needed to ultimately prevail in the course of litigation.

Here, Court records show that Appellees prevailed on their motion to dismiss for failure to prosecute, resulting in a summary dismissal of the case. They are the ultimate prevailing parties to the instant litigation. The Court also notes that Appellees' claim is for an award of costs under Rule 54 – not under an agreed-

upon contract provision that requires a party to institute litigation and prevail in said litigation. Rule 54 provides that costs "shall" be allowed "as of course." Accordingly, there is a strong presumption in favor of awarding costs to the prevailing party. *Assoc. of Mexican-American Educators v. California*, 231 F.3d 572, 591 (9th Cir. 2000)(en banc). Appellees have not met their burden to overcome this strong presumption, and the Court awards costs of suit under Rule 54. Accordingly, upon reviewing Appellees' submitted declaration, the Court finds good cause to award Appellees in the amount of $641.00 for costs.

B. Appellants' "intentionally dilatory litigation tactics" warrant a reasonable attorney's fees award.

Appellees also request an award of attorney's fees under the equitable power of the courts as held in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 258-59 (1975) ("*Alyeska Pipeline*"). Cf. *Guerrero v. Dep't of Public Safety*, Civ. No. 09-0186 (NMI Super. Ct. Mar. 19, 2012) (Findings of Fact and Conclusion of Law at 18) (explaining that the American Rule, providing for the principle that the prevailing litigant is ordinarily not entitled to collect attorney's fees from the loser, has a bad faith exception). In *Alyeska Pipeline*, the Supreme Court of the United States held that a court may award attorney's fees "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ." *Id.* Appellees argue that Appellants engaged in "frivolous dilatory tactics" and that the Court should grant attorney's fees as a form of a sanction against Appellants – to deter delay and to compensate Appellees for their efforts.[2] E.g., *Reyes v. Reyes*, 2004 MP 1 ¶¶ 83 ("A court may award attorney's fees when a party's bad faith actions compel it to make an equitable exception to the American Rule.").

Contrary to Appellants' assertion that this Court made no finding of bad faith action by Appellants, this Court previously found that Appellants engaged in "intentionally dilatory litigation tactics to avoid paying a lawfully obtained judgment on behalf of Appellees to recover unpaid wages." *Yue Min Su v. Feng*

[2] The Court notes that Appellees' citation to *Huecker v. Milburn*, 538 F.2d 1241, 1245 n.9 (6th Cir. 1976) is misplaced. *Huecker* was overruled by *Shimman v. Int'l Union of Operating Eng'rs, Local 18*, which held that *Hucker*'s discussion on bad faith exceptions to the American Rule were dicta. 744 F.2d 1226, 1233 ("Under the facts in *Huecker*, the reference to bad faith 'in the processing of applications and the award of benefits' could only refer to bad faith in the conduct giving rise to the underlying claim. These statements in *Huecker* are dicta, since the district court had not awarded fees under a bad faith theory, and these dicta are disapproved to the extent inconsistent with our holding today.").

Hua Enter., Inc., Civ. No. 09-0331 (NMI Super. Ct. Aug. 8, 2014) (Order Granting Defendant's Motion to Dismiss For Failure to Prosecute at 9). Therefore, this Court finds that an award of reasonable attorney's fees is appropriate and warranted in this matter.

C. $10,860.00 is a reasonable fee under Rule 1.5 of the ABA Model Rules of Professional Conduct.

Appellees request a total attorney's fee award of $10,860.00. Appellants do not dispute Appellees' proposed figures. An award of attorney's fees requires a court to engage in a two-step analysis. The Court first determines whether the requested fees are reasonable by considering all the relevant attorney fee factors as outlined in Rule 1.5 of the ABA Model Rules of Professional Conduct ("Rule 1.5(a)"). *In re Estate of Malite*, 2010 MP 20 ¶ 45. The Court next determines the appropriate fee award. *Id.*

Rule 1.5(a) provides:

> [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 of 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, reputations, and ability of the lawyer or lawyers performing the services;
> (8) whether the fee is fixed or contingent.

Model Rules of Prof'l Conduct r. 1.5(a).

The following paragraphs show the Court's consideration of the Rule 1.5 factors. Upon consideration of the factors, the Court finds that Appellees' attorney's fees in the amount of $10,860.00 is reasonable.

(1) The Time and Labor Required, the Novelty and Difficulty of the Questions Involved, and the Skill Requisite to Perform the Legal Service Properly.

Rule 1.5(a)(1) assesses "the time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal service properly." Model Rules of Prof'l Conduct r. 1.5(a)(1). The Court finds that Appellee's attorney spent 54.3 hours in this matter, billed at a rate of $200.00.

The Court finds that Appellees' attorney spent time on tasks typical to similar cases, among other things, drafting an answer, preparing motions, attending oral arguments, and reviewing facts and pleadings. But Appellees' attorney did not provide the Court with information on the novelty or difficulty of the questions involved. Upon review of the file record, the Court finds that the questions were neither novel nor difficult.

(2) The Likelihood, if Apparent to the Client, that the Acceptance of the Particular Employment will Preclude other Employment of the Lawyer.

Rule 1.5(a)(2) assesses "the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer." Model Rules of Prof'l Conduct r. 1.5(a)(2). Appellees did not provide information that would allow the Court to assess this factor. Therefore, this factor does not favor Appellees' attorney's fees claim.

(3) The Fee Customarily Charged in the Locality for Similar Legal Services.

Rule 1.5(a)(3) assesses "the fee customarily charged in the locality for similar legal services." Model Rules of Prof'l Conduct r. 1.5(a)(3). Appellees' attorney submitted a declaration attesting to the notion that his hourly fee of $200.00 approximates the average local prevailing rate for attorneys with similar qualifications, "but is believed to be lower than attorneys with [his] experience." Hill Decl. ¶ 6. Appellees also submitted a declaration by Attorney Joseph Horey who claimed that his services on similar cases entail a fee of $245.00 per hour – $45.00 less than Appellees' attorney. Therefore, this factor favors a finding that Appellees' attorney's fees were reasonable.

(4) The Amount Involved and the Results Obtained.

Rule 1.5(a)(4) assesses "the amount involved and the results obtained." Model Rules of Prof'l Conduct r. 1.5(a)(4). The Court finds that because of Appellees' attorney's skills and efforts, Appellees prevailed on a motion for dismissal for failure to prosecute, resulting in a summary dismissal of the case. Therefore, this factor favors a finding that Appellees' attorney's fees were reasonable.

(5) The Time Limitations Imposed by the Client or by the Circumstances.

Rule 1.5(a)(5) assesses "the time limitations imposed by the client or by the circumstances." Model

Rules of Prof'l Conduct r. 1.5(a)(5). Appellees did not provide information that would allow the Court to assess this factor.. Therefore, the Court finds that this factor does not favor Appellees' attorney's fees claim.

(6) The Nature and Length of the Professional Relationship with the Client.

Rule 1.5(a)(6) assesses "the nature and length of the professional relationship with the client . . . ." Model Rules of Prof'l Conduct r. 1.5(a)(6)." Appellees did not provide information that would allow the Court to assess this factor. Therefore, this factor does not favor Appellees' attorney's fees claim.

(7) The Experience, Reputations, and Ability of the Lawyer or Lawyers Performing the Services.

Rule 1.5(a)(7) assesses "the experience, reputations, and ability of the lawyer or lawyers performing the services." Model Rules of Prof'l Conduct r. 1.5(a)(7). In his declaration, Appellees' attorney provides a sufficient showing of his vast and long-standing experience and competency as a practicing Commonwealth attorney in the areas of wage and hour, employment law, workers' right and civil rights litigation. Therefore, this factor favors a finding that Appellees' attorney's fees were reasonable.

(8) Whether the Fee is Fixed or Contingent.

Rule 1.5(a)(8) assesses "whether the fee is fixed or contingent." Here, Appellees' attorney's fee is subject to a contingent fee agreement. Thus, the Court finds that Appellees' attorney is entitled to an award that is reasonable in light of the inherent risk to an attorney when he or she enters into a contingent fee agreement. Therefore, in evaluating the factors, the Court finds that Appellees' requested attorney's fees are reasonable, and that he should be entitled to an award of $10,860.00.

D. Post-Judgment Interest does not accrue from the date of an administrative agency decision.

Appellees request that the Court award post-judgment interest on Appellees' attorney's fees at a rate of nine percent dated from the Secretary of Labor's Order of Appeal dated/entered on July 31, 2009 under 7 CMC § 4101 ("Every judgment for the payment of money shall bear interest at the rate of nine percent a year from the date it is entered."). The Court denies Appellees' request because an agency decision is not a "judgment" in the meaning of 7 CMC § 4101, and only judgments are eligible for an award of post-

judgment interest. *Mallick v. Saipan HWA Ran Corp.*, Civ. No. 09-0523 (NMI Super. Ct. Mar. 12, 2013) (Order Granting Attorney's Fees and Costs and Denying Prejudgment Interest at 3).

Appellees cite to the Commonwealth Trial Court decision of *Office of the Attorney General v. Labitag*, arguing that a judgment "is a final decision of the agency where the action is commenced with the administrative agency." Civ. No. 86-399 (NMI Trial Ct. Feb. 3, 1987)(Opinion at 997).[3] But *Labitag* stands at odds with current administrative law jurisprudence. For example, in *Pacific Security Alarms, Inc. v. Commonwealth Ports Authority*, the Commonwealth Supreme Court distinguished court judgments from agency decisions in holding that agency actions are entitled to *de novo* review. 2006 MP 17 ¶¶ 12-15. In other jurisdictions, post-judgment interest starts accruing only after a court issues a judgment. For example, in the Illinois appellate court decision of *Board of Education v. McCoy*, the appellate court reversed the trial court's award of post-judgment interest from the date of an administrative finding. 123 Ill. App. 3d 1065, 1073 (1984). In its decision, the appellate court wrote:

> Finally, we turn to the second element in the Board's cross-appeal, the matter of interest. It will be recalled that the trial court allowed interest from the date of the hearing officer's report. This was erroneous. Interest is allowed only on a judgment. The report was not a judgment. The judgment arose upon the order of the circuit court made and entered on June 23, 1983. Interest, if any, accrued from that date.

Id. (citations omitted); see also *Am. Fed'n of Labor and Cong. of Indus. Org. v. Unemployment Ins. Appeal Bd.*, 13 Cal. 4th 1017, 1037 (1996) ("The California Unemployment Insurance Code does not give the Unemployment Insurance Appeals Board or its administrative law judges the statutory authority to award interest on an administrative award of benefits, and courts cannot, by judicial fiat, create such authority. That determination is a matter for the legislature."). Therefore, the Court finds Appellees' citation to *Labitag*

---

[3] The Court notes that the trial court in *Labitag*, in holding that a judgment is a "final decision of the agency where the action is commenced with the administrative agency," cited to a number of authorities. Those authorities included the Fifth Edition of Black's Law Dictionary, the Second Edition of the American Jurisprudence Judgments, and 1 CMC § 9112(d) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). The Court reviewed said authorities, but could not find a reference to the legal principle that an administrative agency has the power to issue a judgment – defined as a judicial action of a court.

misplaced. Accordingly, the Court does not grant post-judgment interest on Appellee's attorney's fees.

CONCLUSION

Based on the foregoing, the Court **GRANTS** Appellees' motion in part and **DENIES** Appellees' motion in part. The Court **GRANTS** Appellees costs in the amount of $541.00. The Court further **GRANTS** Appellees' attorney's fees in the amount of $10,860.00. The Court **DENIES** Appellees' requested relief of post-judgment interest on Appellees' attorney's fees as accrued from the July 31, 2009 Secretary of Labor's Order on Appeal.

SO ORDERED this 9th day of April, 2015.

/ s /
David A. Wiseman, Associate Judge

FOR PUBLICATION

E-FILED
CNMI SUPERIOR COURT
E-filed: Apr 09 2015 04:00PM
Clerk Review: N/A
Filing ID: 57050273
Case Number: 09-0331-CV
N/A

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN THE MATTER OF:	**CIVIL CASE NO. 09-0331**
SU, YUE MIN et al., DEPARTMENT OF LABOR, by and through its Secretary GIL M. SAN NICOLAS, officially, and CINTA KAIPAT, Deputy Secretary, and or Acting Secretary, officially and individually,	**ERRATA ORDER**
Complainants-Appellees,	
v.	
FENG HUA ENTER., INC., et al.,	
Respondents-Appellants.	

The Court is hereby correcting the Order Granting Motion for Taxation of Costs and Attorney Fees in Part and Denying in Part filed on April 9, 2015.

IT IS HEREBY ORDERED that the Order Granting Motion for Taxation of Costs and Attorney Fees in Part and Denying in Part dated April 9, 2015 is amended to read *$541.00* on page 3 line 6 in lieu of $641.00. The published opinion shall reflect this change.

SO ORDERED this 9th day of April, 2015.

/ s /
David A. Wiseman, Associate Judge