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Order on Motion for Attorneys' Fees and Other Expenses of Litigation (EUROPEAN AMERICAN REALTY, LTD.)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
FEB 06 2008
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

EUROPEAN AMERICAN REALTY, LTD. and SCOTT K. TOBERMAN,

Plaintiffs,

v.

DAVID LANG,

Defendant.

Civil Action File No. 2005-CV-103849

ORDER ON MOTION FOR ATTORNEYS' FEES AND OTHER EXPENSES OF LITIGATION

Counsel appeared before the Court on January 31, 2008, to present oral argument and evidence on Defendants' Motion for Attorneys' Fees and Other Expenses of Litigation. After reviewing the record of the case, the briefs submitted by the parties, the testimony of the witnesses, and the arguments of counsel, the Court finds as follows:

Scott Toberman approached McGuire Woods, LLP ("McGuire Woods") in August, 2005, with complaints against a soon-to-be former employee, David Lang, of European American Realty Ltd. ("EAR"). Timothy Kratz, Esq., at McGuire Woods, was the lead counsel in the matter who, with the assistance of a partner and an associate with the firm, investigated the allegations and prepared the Complaint. The McGuire Woods attorneys investigated Mr. Toberman's allegations for approximately three weeks, interviewing Mr. Toberman and several EAR employees and reviewing certain documents, including a time line of events prepared by an EAR consultant. On September 6, 2005, McGuire Woods filed the Complaint for Mr. Toberman and his business, EAR, against Mr. Lang.

In the Complaint, EAR and Mr. Toberman alleged that Mr. Lang started a competitive company, approached EAR employees, solicited EAR business, communicated with EAR contacts, retained EAR electronic records and removed EAR physical files after his termination. The Complaint contained seven counts: (1) Uniform Deceptive Trade Secrets Act, (2) Misappropriation

of Trade Secrets, (3) Breach of Duty of Good Faith, (4) Tortious Interference, (5) Computer Theft and Trespass, (6) Trespass to Chattels, and (7) Conversion.

Underlying this Complaint against Mr. Lang is a dispute between Mr. Toberman/EAR and Toberman's former partner Harold Gootrad and his "GEF" companies (the "Toberman/GEF Dispute"). At the time that the Complaint was filed, the Toberman/GEF Dispute involved allegations of embezzlement against Mr. Toberman and a document referred to as the Binding Term Sheet ("BTS") whereby Mr. Toberman promised to pay GEF $7,500,000, and agreed to restructure several real estate development projects. The allegations levied against Mr. Lang in this case were related to his alleged efforts with Mr. Gootrad/GEF to restructure an existing condo conversion project and retain certain EAR employees (Tom Spiro) in that restructuring, in addition to Mr. Lang's disclosure of the BTS to a crucial EAR funding source. Shortly after the Complaint was filed, the parties in the Toberman/GEF Dispute filed several lawsuits against each other. Eventually, this Court granted summary judgment to Mr. Lang in this case.

Mr. Lang's arguments in support of this Motion are that Mr. Toberman was aware of and approved the proposed restructuring with GEF, that Mr. Lang approached Mr. Spiro with Mr. Toberman's knowledge and consent, and that up until his termination with EAR, Mr. Lang was acting at the direction and with the consent of Mr. Toberman.

Mr. Lang brings this motion for attorneys' fees against McGuire Woods pursuant to O.C.G.A. § 9-15-14 alleging that the Complaint asserted claims with a "complete absence of any justicable issue of law or fact" or that they "lacked substantial justification". O.C.G.A. § 9-15-14 (a), (b). Essentially, Mr. Lang argues that McGuire Woods failed to perform the due diligence necessary to establish Mr. Toberman's claims against him and/or that McGuire Woods had evidence

or reason to doubt Mr. Toberman's allegations that Mr. Lang acted without his knowledge and consent.

The standard set forth in O.C.G.A. 9-15-14 is an extremely difficult burden to meet, and one that falls upon the moving party. See Northen v. Mary Anne Froflick & Assoc., 236 Ga. App. 7 (1999). In Northen, the Court of Appeals reversed a trial court's award of fees under O.C.G.A. § 9-15-14 against an attorney who had misrepresented in court and in an affidavit that he filled on behalf of his client that his client was indigent and that he was not a shareholder in B&N, a company at the center of the parties' dispute. In preparing the affidavit and in his in court appearance, the attorney relied upon his client and his client's accountant, to ascertain his financial condition. Additionally, at the time that the attorney was providing false testimony that Northen was not a shareholder in B&N, the attorney responded to interrogatories in a different case that Northen was a shareholder in the company. Nonetheless, the Court of Appeals analyzed the attorney's duty of inquiry and concluded that the evidence was insufficient to determine that his investigation was "inadequate". Id. at 12. The Court wrote, "[h]ere, the record indicates that Tobin did not solely rely upon Northen's claims of insolvency but required Northen to verify his financial situation with his accountant. In light of Tobin's legal duty to his client, who asserted that ReMax was subjecting him and his business to harassment....we cannot say that Tobin's investigation...before filing...was inadequate." Id.

In this action, three McGuire Woods' attorneys conducted several interviews of Mr. Toberman and various EAR employees, including Mr. Spiro. In addition, McGuire Woods was aware of the ongoing Toberman/GEF Dispute and viewed the allegations against Mr. Lang as another example of the Gootrad/GEF "assault" on Toberman and EAR.

A central piece of Mr. Lang's argument for an award of fees under O.C.G.A. § 9-15-14 relates

to McGuire Woods's interview of Tom Spiro, in which Mr. Spiro divulged information warranting a McGuire Woods attorney to write "Scott wants Tom to take job with David?" Mr. Barnum, the McGuire Woods partner who wrote the note, however, provided an affidavit and testified at the hearing that customary to his note taking style, the question mark at the end of the sentence was not in quotation marks and therefore indicated a question that Mr. Spiro had about Mr. Toberman's intentions, and not the interviewer's question or a red-flag in the file. In sum, McGuire Woods submitted three affidavits and provided the testimony of two of the three investigating attorneys each asserting that they performed reasonable due diligence and had reasonable justification to file a complaint based upon Mr. Toberman's allegations. While Mr. Lang raises several challenges to McGuire Woods' investigation, which might be compelling with the benefit of hindsight, they do not meet the high burden under O.C.G.A. § 9-15-14 nor overcome the evidence presented by McGuire Woods. Without more, there is insufficient evidence to establish that McGuire Woods' investigation in this matter was "inadequate" and would warrant the imposition of attorneys' fees under O.C.G.A. § 9-5-14.

McGuire Woods had a duty of inquiry, which it satisfied, however minimally, to excuse it from attorneys' fees under O.C.G.A. § 9-15-14.

SO ORDERED this 6th day of February, 2008.

Elizabeth E. Long, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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