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Circuit Court for Lane County, Oregon

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

BARBARA PARMENTER LIVING TRUST,

Plaintiff,

v.

STEVE LEMON and KYMBERLY LEMON,

Defendants.

Case No. 12-02-23704

OPINION & ORDER

This matter is before the Court on remand from the Oregon Supreme Court, 345 Or 334 (2008). After remand, Plaintiff Barbara Parmenter Living Trust filed for bankruptcy protection on March 5, 2009. This filing automatically stayed this proceeding. Nobody alerted the Court to any change in that stay status. Finally, the Court, on its own motion, ascertained the stay was no longer in effect, and that no further filings have been made by the parties since that bankruptcy matter concluded nearly one year ago. Therefore, the Court enters this Opinion and Order.

### SUMMARY

This matter arises out of a landlord-tenant dispute between the plaintiff landlord, Barbara Parmenter Living Trust, and the defendant tenants, Steve and Kymberly Lemon. The Lemons are seeking attorney fees in the amount of \$40,424.42. On remand from the Supreme Court, this Court must decide whether to award the Lemons attorney fees under ORS 90.255. In making this decision, the Court must analyze the mandatory factors of ORS 20.075. Based on its analysis of the factors in ORS 20.075, the Court declines to award attorney fees to the Lemons.

### DISCUSSION

#### I. Facts and Procedural Background

From April to October of 2002, Barbara Parmenter Living Trust (hereafter Parmenter) rented a duplex to Steve and Kymberly Lemon (hereafter the Lemons). After the Lemons vacated the duplex, Parmenter filed a lawsuit for breach of contract, negligence, and willful misconduct, seeking \$2,308.20 in damages. The Lemons filed six counterclaims, including unlawful entry, unlawful ouster, and unlawful disposition of property, seeking \$10,308.50 in damages. After a bench trial, the Court found for Parmenter on her breach of contract claim in the amount of \$345 and found for the Lemons on their unlawful entry and unlawful ouster counterclaims in the

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amount of \$1,396.<sup>1</sup> The Court designated both the plaintiff and the defendants as prevailing parties.<sup>2</sup>

In an order dated September 24, 2004, neither the Lemons nor Parmenter were awarded attorney fees by the Court.<sup>3</sup> In reaching this decision, this court made eight findings: (1) Both parties “caused and complicated” the litigation; (2) Both parties presented minor meritorious and non-meritorious claims; (3) Granting attorney fees would encourage non-meritorious claims in the future; (4) Granting attorney fees would not deter others from bringing meritless claims in the future; (5) “Inadequate settlement offers” were made by both parties; (6) An enhanced prevailing party fee does not apply to this case; (7) Attorney fees would be “highly disproportional” to the outcomes sought and obtained in this case; and (8) This case presents circumstances which weigh against an award of attorney fees.<sup>4</sup>

The Lemons appealed, arguing, among other things, that this court abused its discretion in not awarding them attorney fees.<sup>5</sup> The Court of Appeals affirmed the ruling based on the “doctrine of unusual circumstances.”<sup>6</sup> The Court of Appeals interpreted that doctrine to permit a court to overcome a presumption towards awarding attorney fees in cases where unusual circumstances arise.<sup>7</sup> The Supreme Court reversed the Court of Appeals. In doing so, the Supreme Court found that the doctrine of unusual circumstances did not apply here. The Supreme Court ruled that a court has discretion to award attorney fees under ORS 90.255.<sup>8</sup> Pointing to the language of ORS 20.075, the Supreme Court held that a trial court must consider the terms found in ORS 20.075(1) before exercising its discretion to decline to award attorney fees. The Supreme Court found that four of the factors this court used in ruling on the attorney fee award were not legally permissible under ORS 20.075.<sup>9</sup> The Supreme Court remanded to this court with instructions to consider all the required factors in ORS 20.075 in making a decision to exercise its discretion to either permit or deny an award of attorney fees.<sup>10</sup> This court now does its best to comply.

## II. Analysis of ORS 20.075 Factors

The Court must evaluate the Lemons’ claim for attorney fees using the factors of ORS 20.075. ORS 20.075 lists eight factors. That statute provides:

- (1) A court shall consider the following factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees:

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<sup>1</sup> General Judgment, at 1 and 2 (OJIN 417 and 418).

<sup>2</sup> Court’s Order Re: Petitions for Attorney Fees (OJIN 776 – 778).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Barbara Parmenter Living Trust v. Steve Lemon and Kymberly Lemon*, 212 Or App 669, 673 (2007).

<sup>6</sup> *Id.* at 674 – 675.

<sup>7</sup> *Id.*

<sup>8</sup> *Barbara Parmenter Living Trust v. Steve Lemon and Kymberly Lemon*, 345 Or 334, 340 (2008).

<sup>9</sup> *Id.* at 349.

<sup>10</sup> *Id.* at 348.

- (a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.
- (b) The objective reasonableness of the claims and defenses asserted by the parties.
- (c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.
- (d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.
- (e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.
- (f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.
- (g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.
- (h) Such other factors as the court may consider appropriate under the circumstances of the case.<sup>11</sup>

The legislature's purpose in allowing attorney fees in landlord-tenant disputes is to encourage parties to "vindicate their statutory rights."<sup>12</sup> The factors above must be considered in light of that purpose. Below, the Court discusses each factor in the context of this case, and then reaches a conclusion based on those findings.

***A. The Conduct of the Parties in the Transactions or Occurrences that Gave Rise to the Litigation Including any Conduct of a party that was Reckless, Willful, Malicious, in Bad Faith or illegal***

ORS 20.075(1)(a) requires the Court to "consider the conduct of the parties in the transactions or occurrences that gave rise to the litigation." Having considered these factors, the Court concludes that the Lemons' engaged in unlawful conduct. The Lemons (1) willfully breached their rental agreement with Parmenter, (2) committed waste to the rental premises, and (3) knowingly filed a false counterclaim with the Court.

First, on April 23, 2002, the Lemons entered into a month-to-month rental agreement with Parmenter.<sup>13</sup> The terms of the agreement required the Lemons to pay rent before the beginning of each month.<sup>14</sup> The Lemons willfully breached that agreement by failing to pay rent for the

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<sup>11</sup> ORS 20.075(1) (2006).

<sup>12</sup> *Lemon*, 345 Or at 343-344.

<sup>13</sup> Plaintiff's Complaint, "Exhibit 1" (OJIN 4 – 5).

<sup>14</sup> *Id.*

month of October.<sup>15</sup> On October 23<sup>rd</sup>, the Lemons moved out of the duplex and continued to withhold rent.<sup>16</sup> The Lemons' decision to breach their rental agreement directly led to Parmenter filing this lawsuit.

The Lemons also committed waste to the rental premises. The duplex's floors and walls were unclean and in disrepair; the garage windows had been painted black; and the Lemons had neglected to clean up after their dog.<sup>17</sup> The Lemons' waste to the premises resulted in \$400 in damages and cleaning costs.<sup>18</sup>

Finally, on February 28<sup>th</sup>, 2003, the Lemons filed their third counterclaim, which they knew to be false. The Lemons alleged in that counterclaim that Parmenter had unlawfully disposed of \$544.50 worth of their personal property.<sup>19</sup> At trial, the Lemons provided this court a list of the allegedly missing property that Mr. Lemon had compiled. Mr. Lemon later testified, however, that he, and not Parmenter, had actually disposed of the missing property.<sup>20</sup> This was further confirmed by Mrs. Lemon, who testified that she had only become aware of the missing property after her husband had taken it to the dump.<sup>21</sup> This testimony by the Lemons directly contradicted their original allegations that Parmenter had unlawfully disposed of their personal property.<sup>22</sup>

The Lemons' chose to breach their rental agreement, commit waste to the rental premises, and lie to this court. These factors weigh heavily in this court's decision to deny the Lemons attorney fees.

#### ***B. Reasonableness of the Claims and Defenses Asserted by the Parties***

Under ORS 20.075(1)(b), this court must consider "the objective reasonableness of the claims and defenses asserted by the parties." None of the defendant's claims or defenses asserted appeared, on their face, objectively unreasonable. As such, the consideration of this factor has no significant bearing on this court's opinion.

#### ***C. The Extent to Which an Award of Attorney Fees Would Deter Others from Asserting Good Faith Claims or Defenses***

A party who asserts a claim or defense in good faith accepts the risk that they may be liable for reasonable attorney fees. ORS 20.075(1)(c), however, allows a court to factor in the possibility that in some cases, an award of attorney fees may deter parties from asserting good faith claims or defenses.<sup>23</sup> Landlords or tenants, for instance, may hesitate to assert good faith claims or defenses in cases where they could become liable for unreasonably high attorney fees. This, in

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<sup>15</sup> Affidavit of Barbara Parmenter, "Exhibit B" (OJIN 177).

<sup>16</sup> *Id.*

<sup>17</sup> Audio Transcript of Trial Proceedings, 2:27:00 – 2:30:00.

<sup>18</sup> Audio Transcript of Trial Proceedings, 4:58:00 – 5:00:00.

<sup>19</sup> Amended Answer, Counterclaims, and Affirmative Defenses, at 11, Paragraph 46 (OJIN 49).

<sup>20</sup> Audio Transcript of Trial Proceedings, 4:52:00 – 4:54:00.

<sup>21</sup> Audio Transcript of Trial Proceedings, 3:37:00 – 3:37:26.

<sup>22</sup> Audio Transcript of Trial Proceedings, 2:57:00 – 2:58:00.

<sup>23</sup> ORS § 20.075(1)(c) requires this court to consider "the extent to which an award of attorney fees would deter others from asserting good faith claims or defenses."

effect, contravenes the purpose of ORS 90.255, which is to encourage parties to vindicate their statutory rights.

Parmenter contends that an award of attorney fees should not greatly exceed what a party might reasonably expect to pay for legal services on a good faith claim or defense.<sup>24</sup> This court agrees. Parmenter could not have reasonably expected to pay \$40,424.42 in attorney fees in this case given the minor nature of the claims and the Lemons' culpability in accruing those fees.

This case began as a small claims matter. Parmenter's claims and the Lemons' counterclaims were of the kind commonly found in landlord-tenant disputes. The parties moved this case from small claims court after Parmenter filed an abuse of process claim for \$50,000; that claim was dismissed by the court.<sup>25</sup> Thereafter, both the parties and their original attorneys – Justus “Buck” Humphreys and Brian D. Cox – allowed this case to drag on for more than five years. This court awarded \$345 to Parmenter and \$1,396 to the Lemons. From this, the Lemons received a net award of \$1,051. The Lemons are now seeking \$40,424.42 in attorney fees for that award.

It is unlikely that Parmenter would have ever filed her original claims had she expected to pay tens of thousands of dollars in attorney fees. While Parmenter is far from blameless in this matter, she does not bear sole responsibility for the length and complexity of this case. Both parties engaged in conduct which prolonged and complicated the litigation. Both the parties and their respective attorneys failed to act diligently by filing frivolous motions and stalling the litigation. Unlike the Lemons, however, Parmenter chose not to request tens of thousands of dollars in attorney fees on appeal.

Holding Parmenter liable for Lemons' attorney fees would set a chilling precedent in future cases. Parties should be able to assert good faith claims or defenses without fear of being liable for unreasonable or excessive attorney fees. Landlords or tenants who fear this kind of attorney fee exposure will hesitate before asserting good faith claims or defenses in similar cases; in some instances, parties may even forego the judicial process altogether. If parties cannot assert good faith claims or defenses in these kinds of cases, then the legislature's purpose in allowing attorney fees is undermined.

***D. The Extent to Which an Award of Attorney Fees Would Deter Others from Asserting Meritless Claims or Defenses***

ORS 20.075(1)(d) requires this court to consider “the extent to which an award of attorney fees would deter others from asserting meritless claims or defenses.” An award of attorney fees by this court would not likely deter or encourage others to assert meritless claims or defenses. As such, this factor is neutral to this court's analysis.

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<sup>24</sup> Plaintiff's Memorandum Re: Remand to Reconsider Defendant's Claim for Attorney Fees, at 5.

<sup>25</sup> First Amended complaint (Breach of Contract & Abuse of Process), at 4, Paragraph 19 (OJIN 66).

**E. *The Objective Reasonableness of the Parties and the Diligence of the Parties and their Attorneys During the Proceedings***

Under ORS 20.075(1)(e), this court must also consider the “objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.” Both the parties and their original attorneys failed to act reasonably or diligently during the proceedings.

Parmenter’s original attorney, Mr. Humphreys, acted unprofessionally during the proceedings and filed frivolous claims.<sup>26</sup> Mr. Humphreys wasted significant time in pursuing Parmenter’s claims and eventually withdrew from the case.<sup>27</sup> Similarly, the Lemons’ attorney, Mr. Cox, often filed unnecessary motions and stalled the depositions of his clients by calling out unreasonable objections.<sup>28</sup> Mr. Cox’s insistence on fighting small battles at the expense of reaching either a compromise or a timely dispatch of this case contributed significantly to prolonging this matter.

The Lemons’ unlawful and malicious conduct during these proceedings factors heavily into this court’s ORS 20.075(1)(e) analysis. In addition to filing a false counterclaim, the Lemons were often evasive during cross-examination and Mr. Lemon lied to the court. There were many times when this court had to direct Mr. Lemon to cooperate with the questioning lawyer or to answer a question directly.<sup>29</sup> While Parmenter did not make a good faith effort to resolve this case, the Lemons have made every effort to keep this court battle alive. Mr. Lemon even threatened Parmenter’s husband prior to trial, stating that he would make him “pay for what he was doing” and that he would run up attorney costs.<sup>30</sup> The Lemons have acted on these threats. The Lemons have ignored every opportunity to resolve this case equitably. The Lemons have dragged this case through the judicial system for almost five years. Now they have the audacity to request \$40,424.42 in attorney fees.

The Lemons’ conduct during these proceedings has fallen well below what could be considered objectively reasonable or diligent under ORS 20.075(1)(e). The Lemons have acted unlawfully and maliciously; they have willfully attempted to prevent a fair and equitable resolution of this matter. The Lemons’ unlawful and malicious conduct helps persuade this court to decline awarding them attorney fees.

**F. *The Objective Reasonableness of the Parties and the Diligence of the Parties in Pursuing Settlement of the Dispute***

ORS 20.075(1)(f) requires this court to consider “the objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.” Neither party was objectively reasonable or diligent in pursuing a settlement of this case. The Lemons’ attorney represents that at least six settlement offers were made throughout the course of these proceedings.<sup>31</sup> The first

<sup>26</sup> *Id.*; Plaintiff’s Motion for Sanctions, at 1 (OJIN 212).

<sup>27</sup> *Id.*, at Exhibit B, page 2, “Dog Deposition” (OJIN 203).

<sup>28</sup> Additional Exhibit to Plaintiff’s Motion to Compel Discovery, *see* attached deposition transcripts from page 1 (OJIN 129-154).

<sup>29</sup> Audio Transcript of Trial Proceedings, 2:35:00 – 2:36:00.

<sup>30</sup> Plaintiff’s Resistance to Motion for Partial Summary Judgment, at Exhibit B, page 2 (OJIN 186).

<sup>31</sup> Defendants’ Petition for Attorney Fees, Cost Bill, & Supporting Affidavit, at 9 (OJIN 638).

settlement offer was made by Parmenter, who requested a sum of \$1,500 in exchange for a settlement of all claims.<sup>32</sup> This offer could have saved both the parties and the court significant time and money. On February 17, 2003, the Lemons made a counter-offer, requesting a sum of \$5,000, inclusive of costs and attorney fees.<sup>33</sup> This offer represented an overinflated assessment of the worth of the Lemons' counterclaims.

More than a year later, on February 17, 2004, the Lemons made their fifth and final settlement offer, requesting \$3,500 plus costs and reasonable attorney fees in exchange for the settlement of all claims.<sup>34</sup> As with their previous offers, the Lemons were adamant about collecting attorney fees, noting that "all future settlement offers will take the Lemons' accruing fees and costs into consideration . . ."<sup>35</sup> Parmenter rejected this offer, and represented by a new attorney, made the following settlement offer two weeks before trial: For a settlement of all claims, the Lemons would receive a net recovery of \$200 with the issue of attorney fees to be left to the court. This offer by Parmenter was the most reasonable settlement offer made. Notably, Parmenter's final offer would have put the Lemons in an arguably better position that they are in today.<sup>36</sup> The Lemons rejected that offer.

Additionally, Mr. Lemon's actions prior to trial indicated his unwillingness to settle this case. During his deposition, Mr. Lemon acknowledged saying, more than once, that he told Parmenter's husband that if he and Parmenter were to forcibly lock him out of his dwelling, he would "make him pay for what he was doing."<sup>37</sup> Mrs. Lemon confirmed during her deposition that Mr. Lemon told Parmenter that "he wanted to run up bills and cost Parmenter... as much money as he could."<sup>38</sup> The court concludes that from these statements that Mr. Lemon intended to prevent a fair or equitable resolution of this matter.

Before reaching its decision, this court must consider the final statutory factor of ORS 20.075.

***G. The Amount that the Court Has Awarded as a Prevailing Party Fee Under ORS 20.190***

ORS 20.075(1)(g) requires this court to consider "the amount that the court has awarded as a prevailing party fee under ORS 20.190." Since no enhanced prevailing party fee has been awarded in this case, that factor has no bearing on this court's decision to deny attorney fees to the Lemons.

Finally, ORS 20.075(1)(h) permits this court to consider "such other factors as the court may consider appropriate under the circumstances of the case." In reaching its decision, this court declines to formally examine other factors not discussed in this opinion.

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at Exhibit 9, pages 1 (OJIN 557).

<sup>34</sup> Defendants' Petition for Attorney Fees, Cost Bill, & Supporting Affidavit, Exhibit 12, page 2 (OJIN 552).

<sup>35</sup> *Id.*

<sup>36</sup> Plaintiff's ORCP 68 C Objections, at 4 (OJIN 764).

<sup>37</sup> Plaintiff's Resistance to Motion for Partial Summary Judgment, at Exhibit B, page 2 (OJIN 186).

<sup>38</sup> *Id.* at Exhibit B, pages 8 and 9 (OJIN 179 – 180).

**CONCLUSION**

The award of attorney fees under ORS 90.255 is permissive, subject to the mandatory analysis of the ORS 20.075 factors. This court has examined the mandatory factors contained in ORS 20.075(a)-(g) and now declines to award attorney fees to the Lemons.

Therefore, IT IS HEREBY ORDERED that plaintiff's request for attorney fees is DENIED.

Dated this 14 day of November, 2012.



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Karsten H. Rasmussen, Presiding Judge