Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
06/09/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-021234 06/08/2017

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
B. Randhawa
Deputy

PHILIP HALL, et al.

RON KILGARD

v.

ELECTED OFFICIALS RETIREMENT PLAN, THE, et al.

BENNETT EVAN COOPER

CHARLES A GRUBE

UNDER ADVISEMENT RULING

On June 6, 2017, the Court heard oral argument on Plaintiffs' April 4, 2017 Motion for Entry of Judgment on Remand, Plaintiffs' April 4, 2017 Motion for Award of Prejudgment Interest, and Plaintiffs' April 4, 2017 Motion for Award of Attorney's Fees. The Court has now considered same.

PREJUDGMENT INTEREST

On appeal, the Arizona Supreme Court held that plaintiffs are entitled to an award of prejudgment interest, finding that the amounts due to plaintiffs were liquidated. The Supreme Court directed that the rate of interest be set pursuant to A.R.S. § 44-1201 (F). That subsection says that "[i]f awarded, prejudgment interest shall be at the rate described in subsection A or B of this section." A.R.S. § 44-1201 (F). Subsection A applies to "[i]nterest on any loan, indebtedness or other obligation" and provides for interest at ten percent per annum unless the contract in question provides otherwise. A.R.S. § 44-1201 (A). Subsection B provides that interest on any judgment is at the "lesser of ten percent per annum or at a rate per annum that is equal to one percent plus the prime rate as published by the board of governors of the federal reserve system…." unless the contract provides otherwise. A.R.S. § 44-1201 (B).

Plaintiffs advocate for application of a ten percent rate of interest, arguing that the sums owed to the plaintiffs constituted an "other obligation." The defendants contend that the obligation owed here is dependent on the judgment and, therefore, argue that the lower rate in subsection B applies.

Although not directly on point, some of the discussion in *Metzler v. Coca-Cola Bottling Co. of Los Angeles, Inc.* 235 Ariz. 141, 329 P.3d 1043 (2014) is instructive. *Metzler* pointed out that in 2011, the legislature amended A.R.S. § 44-1201 and uncoupled judgments from "loans, indebtedness or other obligations" so as to limit the interest applicable to judgments. *Id*. at 145, 329 P.3d at 1047. In ascertaining whether sanctions under Civil Rule 68 constituted an "obligation" under A.R.S. § 44-1201, the Arizona Supreme Court noted that "other obligation" in subsection A "is most appropriately interpreted to apply only to things of the same nature or class as 'loan' and 'indebtedness'." *Id.* at 145-146, 329 P.3d at 1047-1048. As such, the sanction under Rule 68 was found to not constitute an "obligation" and was held to be dependent on the judgment. *Id.* at 145, 329 P.3d at 1047. The Court reasoned that interest accrues at the lower, judgment rate of interest when the amount owed "depends on a judgment for its existence." *Id*. at 146, 329 P.3d at 1048.

The Arizona Court of Appeals decision *in Arizona State Univ. Bd. of Regents v. Arizona State Ret. Sys.*, No. 1 CA-CV 16-0239, 2017 WL 1954807 (Ariz. Ct. App. May 11, 2017) is also instructive. There, the Court noted that subsection B cannot simply apply to all liabilities reduced to judgments. *Id*. at *2. If that were the case, subsection F would have no meaning. *Id*. The Court of Appeals also rejected the notion that subsection A applies to all liquidated claims once reduced to judgment. *Id*. at *3. In *ASU*, the Court held that the indebtedness arising out of a sum wrongly collected by ASRS was a "debt" under section A. *Id*. at *1. The Court explained that there was no cogent reason why the claim for a refund should be treated differently that the claim that gave rise to the overpayment. *Id*. at *3.

Here, the amounts owed to the plaintiffs arose from the contractual obligations owed to the plaintiffs by the State. As the Supreme Court held, the State could not unilaterally change the terms of the contract. An "obligation" was owed to the plaintiffs, which is not different than the compensation that any employer owes to its employees. This obligation is very much akin to a loan or debt. At oral argument, the Court expressed concerns about the ability of the State to negate its obligations by passing an unconstitutional statute and later arguing that it had no legal "obligation" to pay until the statute was declared unconstitutional. The salient question, however, boils down to whether the "obligation" to pay is dependent on the judgment.

The State contends that *Shreve v. Western Coach Corp.*, 112 Ariz. 215, 540 P.2d 687 (1975) is controlling. In *Shreve*, the Arizona Supreme Court held that a person cannot be found

liable for acting under a statute that was later declared to be unconstitutional. *Id*. at 218, 540 P.2d at 690. In so holding, the Court found that persons are entitled to rely on statutes until declared unconstitutional. *Id*.

Shreve is instructive, but not directly on point. Certainly, citizens and entities were entitled to rely on SB 1609 until it was declared unconstitutional. No one is trying to hold anyone "liable" for acting in accordance with that law.

The situation presented here is different. *Shreve* does, however, negate the "Blackstonian" view that unconstitutional statutes confer absolutely no rights and are of no force and effect whatsoever. *Id*. at 217, 540 P.2d at 689. While the Court is troubled by the notion that the State could pass a statute that unconstitutionally "eliminated" an obligation owed to an employee, the Court does believe that the obligation here is in fact dependent on entry of the judgment. If the statute had not been held unconstitutional and no judgment was ever entered so finding, then the benefits sought here would not in fact be due and owing. In essence, the State and EORP would have had no obligation to pay those sums until a Court said they had to. As such, the "obligation" to pay here is in fact dependent on the judgment. Therefore subsection B applies.

The question presented here is a very difficult and close question. It is not made any easier by the poor wording in the statute. It really cannot be denied that the statute should be amended and clarified. This Court's function, however, is to interpret the law and apply the precedents of the Arizona Supreme Court and Court of Appeals. Of course, the plaintiffs are entitled and will receive interest; just not as much as they had hoped.

ATTORNEYS' FEES

The Arizona Supreme Court has ruled that plaintiffs are eligible for an award of attorneys' fees. The issue presented now is whether fees should be awarded under ARS § 12-341.01(A). An award of fees is discretionary. The Court has considered the relevant factors from *Associated Indem. V. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).

First, plaintiffs obtained all of the relief requested.

Second, the litigation could not have been avoided or settled.

Third, there is no evidence that an award of fees in the amount requested would pose a hardship on the Plan and the State.

Fourth, the issues here were novel and complex. Addressing these issues required counsel with a high degree of skill.

Fifth, an award of fees here will not deter Arizona public pension plans from litigating in other cases.

Based on these factors, the Court, it its discretion, determines that the plaintiffs are entitled to an award of attorneys' fees from both defendants.

The Court will address the specific arguments raised by the defendants against an award of fees. First, the defendants champion the fact that the Arizona Supreme Court did not award fees on appeal. This Court finds this unpersuasive.

The Court does not believe that the failure of the Supreme Court to grant fees on appeal is "law of the case" with applicability to the question of whether fees should be awarded by the trial court. The determination as to whether a litigant is entitled to fees on appeal is a different question than whether that litigant is entitled to fees at the trial court level. Here, the relevant factors all weigh in favor of an award of fees.

The Arizona Supreme Court certainly gave no indication that fees should not be awarded on remand. Indeed, the Supreme Court's decision reversed the trial court's ruling that no fees could be awarded here. In so doing, it gave no indication that fees should not in fact be awarded by the trial court.

The Court has, however, considered the fact that the Supreme Court did not award fees on appeal, and gives that some weight. The decision whether to award fees, however, is a discretionary one. The Court believes that fees should be awarded.

EORP argues that fees should not be awarded against it because it is an "innocent" party and because it did not contest the relief request by plaintiffs. These arguments are rejected.

The determination of whether fees should be awarded does not depend on whether a party is "innocent" or not. Indeed, many parties who breach contracts are "innocent" and may not even know that they breached a contract. Nonetheless, fees are regularly awarded against parties who have breached contracts, despite the fact that they may be "innocent."

The decision in *Valley Bank of Nevada v. JER Mgmt. Corp.*, 149 Ariz. 415, 719 P.2d 301 (1986) does not mandate a different result. In that case, the Court of Appeals simply affirmed the trial court's use of its discretion in refusing to award fees against two "innocent" parties. *Id.*

at 416, 719 P.2d at 302. The Court noted that trial courts have wide discretion under ARS 12-341.01 and found that the trial court did not abuse its discretion. *Id*. at 422, 719 P.2d at 308.

While it might be true that EORP had no choice but to abide by the unconstitutional statute until it was declared unconstitutional by a court, that factor, in and of itself, does not necessarily mean that fees should not be awarded. The alleged "innocence" of EORP is one factor considered by the Court in assessing whether fees should be awarded. In the context of all of the other relevant considerations, however, the Court finds that fees should be awarded against EORP.

The plaintiffs here had to file suit to restore the contractual rights that were taken away by an unconstitutional statute. EORP had to be named. There is no justifiable reason why these plaintiffs should be forced to litigate to receive the contractual benefits they were entitled to and not receive a fee award.

While the Court agrees with plaintiffs that the question of whether the matter was "contested" is generally an issue that goes toward plaintiffs are eligible for fees at all, it is an issue that can be considered by the Court in exercising its discretion as to whether to award fees. EORP was more than a passive participant in this litigation. While it may not have taken a position defending the legislation in question as stridently as the State did, it did actively participate in this litigation and did not exactly endorse plaintiffs' positions. EORP could have avoided an award of fees, of course, by simply agreeing that the statute was unconstitutional.

The amount requested by the plaintiffs here is very reasonable. In a contingency fee case such as this, the most useful starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.

The number of hours spent on the representation, 1350.6, is very reasonable. As noted above, the issues here were complicated. The claims required a high amount of investigation. The summary judgment proceedings involved carefully prepared briefs. In sum, a lot of time and effort had to go into this case. The amount of hours spent was reasonable. No contention was made by the defendants to the contrary.

The rates being requested are reasonable. When the total amount requested is allocated to the two attorneys and the paralegal, the effective rate for Mr. Kilgard is $356, for Ms. Chase is $178 and for Ms. Trumpower, the paralegal, is $89. These rates are eminently reasonable.

The State has objected to certain time entries. The time entries from May 2, 2011, May 10, 2011 and May 11, 2011 are disallowed. State's Resp. at 3. The Court also disallows the

September 17, 2011, February 12, 2012 and April 17, 2013 time entries referred to at page five of the State's Response.

The Court allows recovery of the time entries that refer to Mr. Campbell and the *Fields v. Elected Officials' Ret. Plan*, 234 Ariz. 214, 320 P.3d 1160 (2014) case. This case and the *Fields* case have much in common and the Court concludes that the time entries in question were reasonably necessary to the representation of the plaintiffs.

The Court declines to award Westlaw charges.

The plaintiffs have agreed to reduce the amount of fees sought against the State to those that were incurred after the State was added to the case. As such, the fee award against the State will include only the awarded fees incurred after the State was added to the case.

JUDGMENT

The Court also rules that paragraph six of the lodged Judgment should be rewritten to apply only to EORP. Paragraph 5 of the Judgment can stay as is. That paragraph is consistent with the earlier Judgment. While the earlier judgment did not run against the State, the State did cross appeal and did not contend that the judgment language was improper. In addition, the Judgment only requires that the defendants in this case calculate benefits for class members as described in the Judgment on Remand and pay them. This is not controversial.