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When Can I Recover Attorney Fees in the Realm of Construction Law?

by Andrew L. Smith



Introduction

If you have not noticed, construction litigation is expensive! Attorney fees comprise a large portion of the overall cost. Construction cases can last years to resolve complex issues involving multiple parties, insurance issues, delay and acceleration issues, and the like. Litigation costs can easily reach into the six figures in most construction cases. The importance of being able to recover these costs if successful at trial cannot be stressed enough. From the very beginning of a project it is essential to consider these issues when drafting and negotiating the construction contract and project agreements.

Be careful not to overlook recovery of attorney fees from the inception of any project. All too often the parties are more concerned with project deadlines and costs to focus on this important detail. Many people also do not realize the American Institute of Architects form construction contracts do not provide for recovery of attorney fees under any circumstances. Indeed, if you are relying on the standard AIA A101 or A201, you have no ability to recover attorney fees in the event of litigation or arbitration under the contract.

Ohio Law and The American Rule

In general, a prevailing party in a civil action may not recover attorney fees as part of the costs of litigation in Ohio. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396. This is known as the "American rule." That is, each party must pay its own fees, regardless of who actually prevails in the case. Nearly every state in the United States follows this philosophy when it comes to awarding costs and fees.

Exceptions Permitting Fee Recovery

There are limited exceptions to the American rule in Ohio.

1. Attorney fees may be awarded when an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees. *Nottingdale Homeowners' Assn., Inc. v. Darby*, 33 Ohio St.3d 32, 34, 514 N.E.2d 702 (1987).
2. Fees may be awarded when a statute specifically provides for the losing party to pay the prevailing party's attorney fees. *Id.*
3. Fees are available when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant or evidence to justify punitive damages. *Pegan v. Cramer*, 79 Ohio St.3d 155, 156, 1997-Ohio-176, 679 N.E.2d 1129.



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Common Law Award to "Prevailing Party"

When the right to recover attorney fees arises from a stipulation in a contract, the rationale permitting recovery is the "fundamental right to contract freely with the expectation that the terms of the contract will be enforced." *Nottingdale* at 36. Courts reason the presence of equal bargaining power and the lack of indicia of compulsion or duress are characteristics of agreements that are entered into freely. *Id.* In these instances, agreements to pay another's attorney fees are generally "enforceable and not void as against public policy so long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case." *Id.* at syllabus. *See also Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St.3d 238, 513 N.E.2d 253 (1987) (an indemnity agreement requiring the payment of qualified legal expenses arising from free and understanding negotiation is enforceable and not contrary to Ohio's public policy).

On the other hand, agreements to pay attorney fees in a contract of adhesion, where the party with little or no bargaining power has no realistic choice as to terms, are unenforceable. *Nottingdale* at 37.

An additional issue concerns the definition of a "prevailing party" since fees can only be contractually awarded to the prevailing party under this exception. Black's Law Dictionary 1232 (9th Ed.2009) defines prevailing party as "a party in whose favor a judgment is rendered." Ohio courts have held a prevailing party generally is the party in whose favor the verdict or decision is rendered and judgment entered. *Hikmet v. Turkoglu*, 10th Dist. No. 08AP-1021, 2009-Ohio-6477, ¶74. According to *Hikmet*:

Prevailing party has been also defined as the party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who had made a claim against the other, has successfully maintained it.

Id. at syllabus.

The concept of prevailing party is important because a voluntary dismissal without prejudice in Ohio means that there has been no adjudication on the merits. Without an adjudication on the merits, no formal prevailing party exists. *Miami Valley Hosp. v. Payson*, 2nd Dist. No. 18736, 2001-Ohio-1926 Thus, a prevailing party does not exist when a claim is voluntarily dismissed. *Hansel v. Creative Concrete & Masonry Constr. Co.*, 148 Ohio App.3d 53, 2002-Ohio-198, 772 N.E.2d 138.

Statutory Right to Recovery of Fees

As an example of a statutory right under Ohio law to attorney fee recovery, the case of *Somerset Synfuel No. 1, L.L.C. v. Resource Recovery International Corp.*, 188 Ohio App.3d 368, 2010-Ohio-3463, 935 N.E.2d 497, is illustrative. That case involved the defendant's failure to pay attorney fees to the successful party in a promissory note. The Eleventh District Court of Appeals stated, in pertinent part:

*R.C. 1301.21(B) authorizes the award of attorney fees regarding contracts of indebtedness. It states: "[i]f a contract of indebtedness includes a commitment to pay attorneys' fees, and if the contract is enforced through judicial proceedings or otherwise after maturity of the debt, a person that has the right to recover attorneys' fees under the commitment, at the option of that person, may recover attorneys' fees in accordance with the commitment ***."*



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Id. at 374.

Ultimately, the court awarded attorney fees for enforcing the promissory note under R.C. 1301.21 based on the explicit terms of the note in dispute. Thus, R.C. 1301.21(B) authorizes the award of attorney fees regarding contracts of indebtedness if: (1) the contract includes the commitment to pay attorney fees; and (2) the contract is enforced through judicial proceedings.

Conclusion

The general rule in Ohio is that a prevailing party in a civil action may not recover attorney fees as part of the costs of litigation. However there are limited exceptions. Attorney fees may be awarded when a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees. Fees are also available when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant.

Be mindful of these issues from day one whenever drafting a construction contract or agreement to perform design work or construction services. In the absence of a contractual provision, recovery of attorney fees is likely unavailable in the event your client is forced to bring a lawsuit based on breach of contract or a project failure. A well-drafted contract clause should provide for recovery of attorney fees by the prevailing party in any arbitration or lawsuit arising out of the contract.

Andrew L. Smith is a Partner in the Cincinnati, Ohio office of Smith, Rolfe & Skavdahl Company, LPA who concentrates his practice in the areas of construction law, product liability defense, and bad faith litigation defense. Andrew has extensive experience in state and federal court handling complex civil litigation matters. He is also the co-host of BearcatsSportsRadio.com and an avid UC Bearcats follower.

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