Attorney's fees 9/24 (1984)

memo re: awarding of attorney fees in Mt. Lawel litigation

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TO: Barbara Williams
FROM: Joan Icklan
RE: Awarding of Attorney Fees in Mt. Laurel litigation
DATE: September 24, 1984

The awarding of counsel fees in the state of New Jersey is governed by Court Rule 4:42-9. In reelvant part, this statute reads:

> 4:42-9 Counsel Fees
>
> (a) Actions in which fee is allowable. No fee for legal services shall be allowed in the taxed costs or otherwise, except
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> (1) In a family action ...
> (2) Out of a fund in court ...
> (3) In a probate action ...
> (4) In an action for the foreclosure of a mortgage ...
> (5) In an action to foreclose a tax certificate or certificates ...
> (6) In an action upon a liability or indemnity policy of insured ...
> (7) As expressly provided by these rules with respect to any action, whether or not there is a fund in court.
> (8) In all cases where counsel fees are permitted by statute.
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> Pressler, Current N.J. Court Rules, Comment R. 4:42-9 (Gann, 1984).

The purpose of this rule limiting the kinds of cases to which counsel fees might be allowed was to eliminate abuses of the power to grant counsel fees that prevailed under former practice. See Red Devil Tools v. Tip Top Brush Co., Inc., et al., 236 A.2d 861 (N.J. 1967); Sunset Beach Amusement Corp. v. Bell, 162 A.2d 834 (N.J. 1960). See also Pressler, Current N.J. Court Rules, Comment R. 4:42-9 (Gann, 1984), at 781.

That the rule mandatorily states that "no fee for legal services shall be allowed in the taxed costs or otherwise," except as provided therein has been accepted by the N.J. Supreme Court as the prevailing standard. U.S. Pipe & Foundry Co. v. United Steelworkers of America, CIO-AFL, Local #2026, 181 A.2d 353, 359; Sunset Beach Amusement, supra, at 836. See also Zyck v. Hartford Insurance Group, 375 A.2d 1232, 1234 (N.J. App. Div. 1977).

The general rule then is that except in the situations within its terms each litigant shall bear the expenses of prosecuting and defending his individual interests. Sunset Beach Amusement, supra, at 837. See also State v. Otis Elevator, 95 A.2d 715 (N.J. 1953), 719, 728 (dissenting opinion).

The general rule as written and as interpreted by the courts negates the awarding of attorney fees in the Mt. Laurel litigations with which this memo concerns itself. It is clear, too, from the Comment to R. 4:42-9 that the court believes that "sound judicial administration" will best be advanced by having each litigant bear his own counsel fee except in those few situations specially designated ...

in the rule. Gerhardt v. Continental Insurance Co., 48 N.J. 291 (1966). The fact that the Supreme Court has rejected any essential change in this rule and in the 1971 and 1975 amendments thereto may be construed as a further expression of the court's concern that expansion of the power to allow counsel fees might well result in impositions on both judicial administration and the litigants themselves which would outweigh any anticipated advantages. See Pressler, supra, at 782.

A telephone conversation with Mr. Kenneth Meiser, Office of the Public Advocate, is also discouraging. In that communication, the question of the awarding of attorney fees in Mt. Laurel litigation was discussed. Mr. Meiser indicated that as recently as July, 1984, inquiries addressed to the court regarding the awarding of attorney fees had been rejected. Mr. Meiser indicated that costs for transcripts and briefs were routinely awarded, but that the court showed "no willingness" to consider the awarding of attorney fees.

Against this admittedly bleak and negative background, one must juxtapose the few positive factors to be gleaned from the Rule itself and in the case law. R. 4:42-9(a) mentions fees allowable "out of a fund in court." The meaning of this phrase was clarified in Sunset Beach Amusement, supra, as "a shorthand expression intended to embrace certain situations in which equitably [sic] allowances should be made and can be made consistently with the policy of the rule that each litigant shall bear his own costs." Id. at 837. The problem of applying this concept to the instant litigation is that no such fund currently exists. An additional problem is that the concept of a fund in court generally deals with estate funds, corporate stock funds, or escheat actions. Id. at 837, 838. If a fund could be created or could be shown to exist in some other context, one could argue that allowances from the funds should be made since the litigants are doing more than advancing their own interests. Id. at 837. Then, too, the principle that "In order for an attorney to be entitled to compensation ... from a "fund in court," he must have aided directly in creating ... the fund, would be satisfied. See Shilowitz v. Shilowitz, 115 N.J. Super. 165, 188 (Ch. Div. 1971), modified on other grounds, 119 N.J. Super. 311 (App. Div. 1972), certif. denied, 62 N.J. 72 (1972). Quoted in Pressler, supra, at 784. The awarding of fees to plaintiff attorneys in Sunset Beach was rejected on the basis of the fact that the plaintiffs in that case sought to advance their own interests. Sunset Beach, supra, at 839. The Urban League position in the Mt. Laurel litigation is clearly that of public advocacy. The Urban League can analogize its position and its right to attorney fees to the awarding of the builder's remedies in Southern Burlington County NAACP v. Mt. Laurel Twp., 456 A.2d 390, 452 (Mt. Laurel II), (N.J. 1983). This analogy would also be beneficial in distinguishing the Urban League attorneys from the developers' attorneys in the Mount Laurel suits; this distinction seems essential to an awarding of attorneys' fees to the Urban League, since the Mt. Laurel court seems satisfied that the builder's remedy is sufficient compensation for the developers who have initiated the litigation. Id. at 452.

The one case found by this researcher which appears helpful in arguing for the awarding of attorney fees is Bergen County Sewer Authority v. Borough of Bergenfield, et al., 361 A.2d 621 (N.J. Sup. Ct. 1976). In that case, applications were brought for allowance of counsel fees for individual attorneys in behalf of various municipalities. The court found that equity required award of counsel fees to the spokesmen attorneys on the theory of quasi-contract with the fees to be collected from the municipalities and to be equally apportioned within each class. Id. at 621. The court, while cognizant of the strict limitations of R. 4:42-9, believed that the rule "should be administered with a proper measure of equitable flexibility and with full recognition that the ends of justice must be scrupulously observed." Id. at 627. The court here rejected the principle of a fund in court on the basis of the fact that the attorneys here had not initiated the litigation or commenced the suit. The court found further that the Authority was seeking primarily to protect its own interests. Both of these characterizations of counsel distinguish this case from the Urban League's role in pursuing the Mount Laurel litigation. The Urban League has been one of the organizations initiating Mount Laurel litigation on behalf of the public and has sought to advance the interests of the public at large.

The Court in Bergen County Sewer Authority, supra, also rejected the concept of the public litigator/private attorney-general for the awarding of fees. Here, too, the Urban League should be distinguished from counsel in Bergen County Sewer Authority, supra. The Urban League did help initiate litigation and did seek to advance the arguments on behalf of a larger class. Id. at 629. One might argue further that without the awarding of counsel fees, unlike the court's conclusion in Bergen County Sewer Authority, supra, at 629, public bodies will lack the funding to continue to litigate issues which affect the public interest and that competent attorneys will be dissuaded from participating in public litigation. See memo on feasibility of including expert fees as reimbursible cost item dated September 7, 1984, p. 4, for related arguments.

N.B. Because the Bergen County case is a Superior Court decision, this researcher has Shepardized the cites in an attempt to discover subsequent history on the case. No subsequent history has been found. This researcher has also contacted the office of Mr. Stephen J. Moses, 1 Essex St., Hackensack (201) 343-6612, in an effort to learn more about any additional history or relevant information. These contacts have not yet borne fruit.