

2013 WL 8722289 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

Patricia N. GIBSON,
v.
Sharon BANKOFIER, et al.

No. 110201781.
January 4, 2013.

**Memorandum in Support of Defendant Oregon Realty
Company's Statement of Attorney Fees, Costs and Disbursements**

Hart Wagner, LLP, Cally J. Korach, OSB No. 993912, cjk@hartwagner.com, Trial Attorney:, Cally J. Korach, OSB No. 993912, cik@hartwagner.com, for defendant Oregon Realty Company.

Defendant Oregon Realty Company (ORC) hereby submits its Memorandum in Support Of Statement for Attorney Fees, Costs and Disbursements. As set out more fully below, an attorney fee award is warranted under [ORS 20.105\(1\)](#) because plaintiffs complaint had no basis in fact or law. ORC's fees are set out in detail in the separately filed fee statement and attached exhibits filed herewith.

A. Facts.

ORC incorporates the facts as set out in its motion for summary judgment.

B. As a Prevailing Party, ORC is Entitled to Recover its Reasonable Attorney Fees Pursuant to [ORS 20.105\(1\)](#).

ORC asserted a counter claim for attorney fees based on [ORS 20.105\(1\)](#). Additionally, ORC moved for attorney fees pursuant to [ORS 20.105\(1\)](#) in its motion for summary judgment.

[ORS 20.105\(1\)](#) provides as follows:

*"In any civil action, suit or other proceeding in a circuit court ***the court shall award reasonable attorney fees to a party against whom a claim***is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense or ground, upon a finding by the court ***that there was no objectively reasonable basis for asserting the claim, defense or ground for appeal."* (Emphasis added).

Summary judgment was granted in ORC's favor; therefore, ORC is a prevailing party in this action. The General Judgment provided that any fees and costs should be submitted separately pursuant to [ORCP 68](#).

A claim is not objectively reasonable if it is not supported by the law as applied to the facts. [Lenn v. Bottem, 221 Or App 241, 249 \(2008\)](#). A party has a continuing duty to evaluate its position throughout the course of litigation because a claim that was objectively reasonable when asserted may become unreasonable when viewed in light of additional evidence or changes in the law. [Dimeo v. Gesik, 197 Or App 560, 562 \(2005\)](#).

The primary inquiry in determining under [ORS 20.105\(1\)](#) whether a party had an “objectively reasonable basis” for asserting a claim is “whether there is evidence in the record to support the claim - that is, whether the party's claim is entirely devoid of legal or factual support.” *Morasch v. Hood*, 232 Or App 392 (2009) (quoting *Lenn v. Bottem*, 221 Or App 241, 248 (2008)).

Plaintiff asserted two claims against ORC in this action: negligence and **elder abuse** under [ORS 124.100, et seq.](#) Each of these claims were entirely devoid of both legal and factual support. In other words, there was no objectively reasonable basis for either claim against ORC.

An essential theme of plaintiff's claims was that Ms. Gibson was not competent at the time of the transactions that gave rise to the lawsuit, in June through October 2007. In reality, Ms. Gibson was not declared incompetent by her physicians until three years later, in July 2010.

Another theme of plaintiff's claim was that ORC should have prevented Ms Gibson from participating in the transactions which gave rise to the lawsuit. However, at the time of the transactions, in June through October 2007, plaintiff herself (Ms. Gibson's daughter) was aware of the transactions and was not in favor of the transactions. Despite her awareness and opposition, she did not exercise a valid financial power of attorney. Instead, plaintiff elected to blame ORC (and the Bankofiers) for transactions which she, herself, had the power to control.

Additionally, the applicable two year statute of limitations expired on plaintiff's negligence claim against ORC at the latest, on December 19, 2009. See Opinion and Order re: Defendants Sharon Bankofier, Duane Bankofier and Oregon Realty Company Motions for Summary Judgment Against Plaintiff Patricia Gibson. However, plaintiff filed her lawsuit, **over one year later**, in February 2011

Further, plaintiff's claim of direct liability against ORC was completely without legal or factual support since there was no evidence that ORC was even aware of the TIC transactions at issue or that ORC should have been aware of the TIC transactions at issue. Plaintiff proffered no affidavit reflecting anticipated expert testimony against ORC. Since there was no proffer of anticipated expert testimony, there was no legal basis for the assertion that ORC owed any duty during the TIC transactions at issue or that ORC breached any such duty at the time.

In fact, there was never any evidence in the record, other than bare assertions, to confirm the TIC transactions at issue were inherently wrongful or a bad investment for the Gibson Trust. Plaintiff merely pointed to less than expected returns from these investments, which were caused by a downward market, not by any act or omission by ORC. *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or 329 (2004).

Further, there was no evidence that ORC took any action as a principal to support an objectively reasonable basis for plaintiff's assertion of indirect or vicarious liability against ORC.

Lastly, a claim for financial **elder abuse** pursuant to [ORS 124.100, et seq.](#) requires some evidence of a wrongful taking of money or real property. Plaintiff's claims were completely devoid of factual support for this claim against ORC. ORC did not wrongfully take money or real property from the Gibson Trust at any time. Additionally, ORC did not permit any other individual to wrongfully take money or real property from the Gibson Trust. Plaintiff's claim of **elder abuse** was, therefore, not objectively reasonable because it was not supported by the law as applied to the facts.

In short, nothing in plaintiff's summary judgment response, oral argument or her supplemental briefing established any objective, good-faith basis for plaintiff's claims of negligence or **elder abuse** against ORC.

[ORS 20.105\(1\)](#) directs that the court “shall” award a party its attorney fees if a claim is brought against it has no objectively reasonable basis. ORC asks that this court make a finding that plaintiff's claims against it in this instant case were devoid of either legal or factual support and award ORC its reasonable attorney's fees incurred to defend this matter.

C. Consideration of ORS 20.075(1) and (2).

ORS 20.075(1) and (2) provide further factors for the court to consider in any case in which an award of attorney fees is authorized by statute. An analysis of those factors supports the award of fees to ORC pursuant to ORS 20.105(1).

ORS 20.075(1)(a) allows the court to consider 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.” In this case, ORC was not even aware of the transactions that gave rise to the instant litigation. In fact, the evidence demonstrated that after the sale of Ms. Gibson's home in June 2007, ORC was not aware of the TIC transactions or any further professional relationship between Ms. Gibson and ORC affiliated real estate broker, Ms. Bankofier, until a referral fee check arrived at the ORC offices in November 2007, after the TIC purchases had already closed.

ORS 20.075(1)(b) allows the court to consider the “objective reasonableness of the claims and defenses asserted by the parties.” As set forth above and in ORC's motion for summary judgment, plaintiffs claims of negligence and **elder abuse** against ORC were devoid of legal or factual support.

ORS 20.075(1)(d) allows the court to consider the extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.” An award of attorney fees in this case will hopefully deter plaintiff and others like her from asserting future suits which are meritless and well beyond the statute of limitations.

ORS 20.075(1)(e) allows the court to consider the “objective reasonableness of the - parties and the diligence of the parties and their attorneys during the proceedings.” During the course of discovery in this litigation, it became patently clear that ORC was not aware of the TIC transactions at the time the transactions occurred, in June through October 2007. The only link was the payment of referral fees to ORC for two of the four TIC transactions, after the TIC transactions closed. Despite this information, plaintiff maintained her claims against ORC, without an objectively reasonable basis.

ORS 20.075(1)(f) allows the court to consider the “objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.” Plaintiff did not initiate any discussions concerning settlement during the course of the litigation, until after ORC's summary judgment motion and plaintiff's response brief were filed.

Additionally, pursuant to ORS 20.075(2)(a), the time and labor required by ORC's counsel to defend plaintiffs claims was reasonable. Further, ORC's attorney fees are in the typical range for attorneys in this state representing real estate brokers and companies in professional negligence claims.

Further, pursuant to ORS 20.075(2)(g), the court may consider that the undersigned attorney is experienced in defending real estate professional liability litigation. In particular, the undersigned attorney has defended most major real estate companies in the greater Portland area in litigation since approximately 2000.

D. ORC is Entitled to Recover a Prevailing Party Fee and an Enhanced Prevailing Party Fee.

Pursuant to ORS 20.190(2)(a), ORC is entitled to recover \$275 as its prevailing party fee. Additionally, pursuant to ORS 20.190(3), ORC is entitled to recover an enhanced prevailing party fee of up to \$5,000. In particular, given the lack of any objective reasonableness for the claims asserted against ORC (ORS 20.190(3)(b)), as described herein and in ORC's motion for summary judgment, ORC is entitled to an enhanced prevailing party fee.

III. CONCLUSION

Plaintiff attempted to prosecute claims against ORC without any objectively reasonable basis to support the alleged claims. Ultimately, ORC prevailed, but only after expending unnecessary time and effort in discovery and bringing its motion for summary judgment. Because plaintiff lacked any objectively reasonable basis for bringing her claims in the first place, ORC is entitled to recover its reasonable attorney fees (\$57,525.50), anticipated fees for post-judgment work (\$1,000), a prevailing party fee (\$275), an enhanced prevailing party fee (\$5,000), plus costs and disbursements of \$637 and litigation expenses (not reflected in overhead) of \$8,346.88.

DATED this 4 day of January, 2013.

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