Filed 5/9/12 Wilshire Ventures v. City of San Fernando Redevelop. Agency CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WILSHIRE VENTURES CORPORATION et al., Plaintiffs and Appellants, v. CITY OF SAN FERNANDO REDEVELOPMENT AGENCY, Defendant and Respondent.	B230916, B232924 (Los Angeles County Super. Ct. No. BC410145)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joanne B. O'Donnell, Judge. Judgment affirmed. Attorney fees order reversed and remanded with directions.

Goodkin & Lynch, Daniel L. Goodkin and Marshal P. Wilke for Plaintiffs and Appellants.

Aleshire & Wynder and June S. Ailin for Defendant and Respondent.

Plaintiffs Wilshire Ventures Corporation and CALMEX Development, LLC (collectively Wilshire) brought this action against the Redevelopment Agency of the City of San Fernando (Agency) alleging that Agency breached the parties' contract to negotiate a development agreement by violating the contract's explicit and implied covenants of good faith and fair dealing. After a bench trial the court granted judgment to Agency and granted its motion for attorney fees. We affirm the judgment and reverse the attorney fees award and remand with directions.

FACTS AND PROCEEDINGS BELOW

A. The Exclusive Negotiation Agreement.

In April 2007, Agency entered into an exclusive negotiation agreement with Wilshire "to establish the terms and conditions of a Disposition and Development Agreement [DDA]" for the redevelopment of two downtown parking lots. The agreement provided that during the 270-day period, from April 2007 to December 2007, Agency was prohibited from negotiating with anyone other than Wilshire for the development of the lots. In return for this right of exclusive negotiation, Wilshire agreed to pay 75 percent of the cost of preparing, reviewing and processing the necessary environmental impact report (EIR); Agency would pay the balance. The agreement required Wilshire to deposit $50,000 toward the cost of the EIR and to replenish that amount whenever the balance fell below $40,000. In addition, Wilshire was entirely responsible for the project's pre-development and development costs.[1]

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[1] Miller and Starr explain the use of exclusive negotiating agreements in their treatise on California real estate law. "Agencies often enter into exclusive negotiation agreements with a developer in order to provide structure and predictability to the negotiation process. Typically, such agreements identify the development entity and define a specific period of time during which the agency will negotiate with that developer exclusively for purposes of attempting to conclude a binding agreement for the sale and development of specified property in the redevelopment project area. This allows the developer to undertake due diligence efforts and expend resources in connection with its investigation of the project with some assurance that it will have the

Three provisions of the agreement are particularly relevant to this lawsuit.

Section 13 stated that Wilshire and Agency "understand and agree that neither Party is under any obligation whatsoever to enter into a DDA," and that if the agreement should terminate without an agreement on a DDA, Agency was free, at its option, to negotiate with other persons for the development of the lots.

The term of the agreement could be extended once by "mutual written agreement" of the parties "for an additional period not to exceed three (3) calendar months."

Agency pledged to "use good faith efforts to complete (or cause to be completed)" the preparation and processing of documents required under the California Environmental Quality Act (CEQA) "to the extent reasonably possible."

In May 2007 Agency entered into a contract with RFB Consulting to prepare the EIR for the proposed development. The RFB contract did not contain a target date for the preparation of a final EIR but stated that Agency "desires to consider certification of the environmental impact report no later than January 21, 2008."

Throughout the exclusive negotiation period Agency maintained that it could not enter into a DDA with Wilshire until the EIR was completed and approved.

B. Failure of the Parties to Reach an Agreement on a DDA

The parties failed to reach accord on a DDA by the end of the exclusive negotiation period, December 2007, and Agency refused to extend the agreement beyond an additional 60 days.

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opportunity to conclude a binding agreement to construct the project with the agency. Often an exclusive negotiation agreement includes some consideration, such as a deposit, paid by the developer to the agency. Such deposits are often refundable if no definitive agreement is concluded, so long as the developer proceeded with the negotiations in good faith. Exclusive negotiation agreements typically include a provision to the effect that the agency fully reserves its discretion to select the ultimate developer and development for the property." (11 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 30B:25, p. 71.)

Each party blamed the other for the failure to negotiate a DDA. Wilshire contended Agency failed to make a good faith effort to complete the EIR "to the extent reasonably possible" in time to permit the parties to negotiate the terms of the DDA. It also contended Agency acted in bad faith in not agreeing to extend the exclusive negotiating agreement for the additional 90 days permitted under the agreement. Agency maintained it made a good faith effort to prepare the EIR in as short a time as reasonably possible but that Wilshire's constant changes to the project and its bounced checks for the development costs caused delays beyond Agency's control.

Following a bench trial and post-trial briefing the court awarded judgment to Agency. In its statement of decision the court found that Agency prepared and processed the EIR to the extent reasonably possible under the circumstances and did not act in bad faith in the preparation of the EIR nor in its decision not to extend the exclusive negotiating agreement. The court awarded Agency approximately $290,000 in attorney fees.

Wilshire filed timely appeals from the judgment and the order awarding attorney fees. We consolidated the appeals.

DISCUSSION

I. THE TRIAL COURT'S JUDGMENT FOR AGENCY IS NOT ERRONEOUS AS A MATTER OF LAW

A. The Standard of Review

In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 684; *Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1260, 1262.) A party may breach that covenant if it subjectively lacks belief in the validity of its conduct or if its conduct is objectively unreasonable. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372 (*Carma Developers*).)

At trial, Wilshire bore the burden of proving by a preponderance of the evidence that Agency acted in bad faith in negotiating the DDA; Agency did not have to prove it acted in good faith. Consequently, on appeal from the judgment in favor of Agency, the question is whether the evidence compels a finding in favor of Wilshire as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) Such a finding is compelled only if Wilshire's evidence was "uncontradicted and unimpeached" and "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding" for Wilshire. (*Roesch v. De Mota*, *supra*, 24 Cal.2d at p. 571.)

B. The Evidence Did Not Establish as a Matter Of Law That the City Acted in Bad Faith

1. Preparation of the EIR

Wilshire claims that Agency breached its express and implied covenants to act in "good faith" to complete the EIR "to the extent reasonably possible." Wilshire concedes the exclusive negotiation agreement did not require Agency to complete the EIR by a certain date. In fact, the agreement does not couch Agency's duty in terms of "completing" the EIR. Instead, it obligates Agency to "use good faith efforts to complete (or cause to be completed)" the preparation and processing of "the CEQA Documents to the extent reasonably possible." Wilshire contends, however, that completion by the end of November 2007 must be implied from the contract because Agency maintained throughout the time the agreement was in effect that it could not enter into a DDA with Wilshire until the EIR was completed. Since the redevelopment agency believed that it would take approximately a month to negotiate the DDA after the EIR was approved, Wilshire reasons good faith required Agency to finalize the EIR a month prior to the expiration of the exclusive negotiation agreement otherwise Wilshire's exclusive negotiating rights would be meaningless.

Based on its interpretation of the exclusive negotiation contract, which we will accept for the sake of argument, Wilshire maintains that Agency breached the covenant of good faith because it failed to schedule completion of the EIR within the exclusive negotiation period. On one hand, it told Wilshire it could not negotiate a DDA until after the approval of the EIR but, on the other hand, it imposed no duty on its consultant RFB to complete the EIR by the end of November 2007 much less before the end of December 2007, when Wilshire's right of exclusive negotiation would expire. Agency merely expressed to RFB a "desire" to consider certification of the environmental impact report "no later than January 21, 2008," which was almost 30 days after Wilshire's exclusive negotiation rights expired. Under those facts, Wilshire argues, Agency could not have subjectively believed it was giving Wilshire a fair opportunity to exclusively negotiate a DDA for the project.

This argument fails for two reasons.

Nothing in Agency's contract with RFB prevented RFB from completing the EIR in November or before the end of December. Indeed, Wilshire contends that it was "reasonably possible" to have completed the EIR in time to negotiate the DDA if Agency and RFB had not unreasonably delayed the EIR's preparation and processing. Furthermore, the executive director of Agency's redevelopment agency testified that, at the time the exclusive negotiation contract was drafted, he believed the 270-day negotiation period plus the 90-day extension, if needed, would be ample time to complete the EIR and negotiate a DDA with Wilshire.

For these reasons, the evidence does not show as a matter of law that the January 21, 2008 target date for certification of the EIR injured Wilshire's right to receive the benefits of the agreement.

Wilshire also maintains that Agency breached the covenant of good faith by not acting "to the extent reasonably possible" to complete the EIR within the exclusive negotiation period. Specifically, Wilshire alleges that Agency failed to use a "generic"

project description to speed up the EIR process, failed to "fast track" the EIR process, unreasonably delayed in signing the consulting contract with RFB, failed to keep Wilshire informed about its dealings with RFB and failed to permit direct communications between Wilshire and RFB.

This argument also fails.

Wilshire produced no evidence that the EIR would have been completed before the end of the exclusive negotiation period if Agency had done the things Wilshire believes were "reasonably possible" such as using a "generic" project description and "fast tracking" the EIR preparation. Collette Morse, RFB's project manager for the preparation of this EIR, testified that she knew of EIRs that had been completed in as little as four months using a "fast track" approach. However, she did not testify that *this* EIR could have been completed in four months using the "fast track" method. Morse further testified that using a "generic" project description could have "potentially" saved "several months" in the preparation of the EIR but she also testified to a number of reasons why a "generic" project description would not have been appropriate for this project.

There was evidence that Wilshire's own acts, including issuing bad checks for the predevelopment costs and making frequent changes in the project description delayed the preparation of the EIR.

In summary, we cannot say that Wilshire established as a matter of law that Agency acted in bad faith in the preparation of the EIR.

2. Agency's Refusal to Grant a Three-Month Extension of the Exclusive Negotiation Contract

Wilshire next contends that Agency acted in bad faith in refusing to exercise its discretion to grant a three-month extension of the exclusive negotiation agreement. We find no evidence that would support a finding that Agency employees involved in the project lacked belief in the validity of their conduct or that their conduct was

unreasonable. (*Carma Developers, supra,* 2 Cal.4th at p. 372.) On the contrary, it appears Agency had valid reasons not to extend the agreement.

When the extension came before Agency for a vote, the agreement had already been extended 60 days; Wilshire was seeking a seven-month extension, not the three-month extension permitted under the agreement.[2] When the redevelopment agency met in March 2008 there was strong public opposition to giving Wilshire a seven-month extension. Finally, there was the matter of the bounced checks. Wilshire presented its first $50,000 check to Agency under the exclusive negotiation agreement on April 23, 2007. At Wilshire's request Agency held off depositing the check until May 29, 2007. The check was returned for insufficient funds. The check cleared the bank approximately two days later. In November 2007, Wilshire gave Agency a second bad check. It later made good on the check.

II. THE COURT ERRED IN AWARDING AGENCY ATTORNEY FEES INCURRED BY THE CITY IN A DIFFERENT ACTION AND IN THE HOURLY AMOUNT IT AWARDED FOR SERVICES PERFORMED BY AGENCY'S GENERAL COUNSEL

The exclusive negotiation agreement provides that "[i]f any Party should bring any legal proceeding relating to this agreement, or to enforce any provision hereof, the Party in whose favor judgment is rendered shall be entitled to recover reasonable attorneys' fees and expenses of litigation from the other." It is undisputed that Agency was "the Party in whose favor judgment [was] rendered" in this case.

Two law firms were involved on Agency's behalf in the legal proceedings relating to this agreement: Richards, Watson & Gershon (RWG), which by contract acted as general counsel to Agency and Aleshire & Wynder (A&W), a firm Agency specially hired to defend it from Wilshire's lawsuit. Agency claimed a total of $290,000 in

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[2] By the time Agency denied the seven-month extension on March 3, 2008, it had already granted Wilshire a two-month extension of the contract (January through February 2008).

attorney fees billed by these two firms and, over Wilshire's objections, the court awarded the full amount. Wilshire filed a timely appeal from the award.

Agency is entitled to compensation for all hours "reasonably spent" by its attorneys in this litigation. (*Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 273.) We review the award for abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096.)

Wilshire contends that the fees claimed are unreasonable because the two law firms involved in the case used an excessive number of attorneys, spent an excessive amount of time on document retrieval and review and a discovery motion that was never filed and used RWG to act primarily as the "go-between" for A&W and Agency. We reject these contentions because Wilshire has not shown that the hours billed for these activities were not "reasonably spent." We agree, however, with Wilshire's contentions that the court erred in awarding Agency attorney fees for work done on a previous complaint against a different defendant involving the same agreement and for "litigation" services provided by Agency's general counsel who was not an attorney of record in this case.

A. Agency Was Not Entitled to Recover the Attorney Fees Incurred by the City as the Defendant in a Separate Action Relating to the Exclusive Negotiation Agreement

Prior to representing Agency in this case, A&W represented the City of San Fernando in a previous case involving the same exclusive negotiation agreement, *Wilshire Ventures Corp., et al. v. City of San Fernando*, Los Angeles Superior Court No. BC401671 (*Wilshire I*). A&W filed a demurrer to the fraud and negligent misrepresentation causes of action on the ground that, under Government Code section 818.8, public entities are immune from liability for those torts. The demurrer was never heard because Wilshire amended its complaint to eliminate the fraud cause of action. A&W filed a demurrer to the amended complaint for failure to state a cause of action against the city on the ground that Agency was a separate entity and the city,

which was not a party to the exclusive negotiation agreement, could not be held liable for Agency's wrongful acts. The court sustained the demurrer and *Wilshire I* was dismissed in May 2009.

While the demurrer to the complaint in *Wilshire I* was pending, Wilshire filed the action that is now before us (*Wilshire II*), naming Agency as the sole defendant and alleging as the only cause of action breach of the covenant of good faith and fair dealing in the exclusive negotiation agreement. Agency contends that it is entitled to attorney fees billed by A&W and RWG for work on behalf of the city in *Wilshire I* because "[a]s a result of the demurrers in [*Wilshire I*]" Wilshire "streamlined the issues and parties it named in [*Wilshire II*]." Thus, Agency reasons, the demurrers filed by the city in *Wilshire I* were "useful" in *Wilshire II* because "they influenced [Wilshire's] decisions regarding the causes of action alleged and parties named."

Agency and the City of San Fernando are separate legal entities. (*Pacific States Enterprises v. City of Coachella* (1993) 13 Cal.App.4th 1414, 1424-1425.) Therefore, we fail to see how Agency can be entitled to recover the attorney fees incurred by the city in a separate lawsuit against the city alone. There is no merit to Agency's argument that it is entitled to the attorney fees the city incurred in educating Wilshire "regarding the causes of action alleged and parties named" in the subsequent lawsuit, *Wilshire II*. We will direct the trial court to strike the attorney fees claimed by A&W and RWG for work done on *Wilshire I*.

B. The Court Erred in Compensating Agency's General Counsel, RWG, at Its "Litigation Rate" for the Assistance It Provided in Defending This Action.

At the time *Wilshire II* was filed, RWG served as Agency's general counsel pursuant to a retainer agreement made in 1999. Under the retainer agreement RWG agreed to perform: (1) "General Services" including participating in "any legal matters for which [Agency] is responsible," (2) "Special Services" including "[r]edevelopment . . . legal services" and (3) "legal services . . . litigation[.]"

During the pendency of *Wilshire II*, RWG's compensation for "general work" was $160 an hour, its compensation for "redevelopment . . . services" was $185 an hour and its compensation for "litigation services" was $225 an hour for associates and $250 an hour for partners. The rate for litigation services specifically excluded Agency's "general legal services." RWG billed its paralegal services at $145 an hour.

According to June Ailin, A&W's lead counsel in the litigation: "Although none of the attorneys at [RWG] were identified as counsel of record in [*Wilshire I* or *Wilshire II*], they performed legal services in connection with this case. . . . RWG attorneys assisted with responding to discovery, collecting documents to be produced, and formulating case strategy[.]"

The trial court erred in compensating RWG attorneys for their work in *Wilshire II* at the rate for "litigation services." RWG attorneys were not counsel of record in *Wilshire II*—they did not perform any of the activities normally performed by litigation attorneys such as drafting pleadings, filing motions, conducting discovery, engaging in settlement discussions, examining trial witnesses, and arguing the client's case to the trier of fact. Indeed, as Ailin explained, it was RWG's potential conflict of interest with Agency in this case "that required Agency have other legal counsel as counsel of record" in *Wilshire I* and *Wilshire II*. Moreover, under the categories defined in the retainer agreement, the only activity RWG attorneys performed that could reasonably be considered "litigation services" was "formulating case strategy." That activity, however, appears to have take place only with respect to *Wilshire I*, and therefore is not compensable for the reasons explained above. (See discussion, *ante*, at p. 11.) The other services, assisting in responding to discovery, including collecting documents to be produced, to the extent they needed to be performed by an attorney, fall within the category of "General Services" which includes "participat[ing] in . . . any legal matters for which [Agency] is responsible."

DISPOSITION

The judgment is affirmed. The order awarding attorney fees is reversed and the matter is remanded to the trial court with directions to deny all fees incurred by the City of San Fernando in *Wilshire Ventures Corp., et al. v. City of San Fernando*, Los Angeles Superior Court No. BC401671 and to recalculate the fees for the services of the attorneys of Richards, Watson & Gershon consistent with the views expressed in this opinion. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.