

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1593

BARBER BROTHERS CONTRACTING COMPANY, L.L.C.

VERSUS

LOUISIANA DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT AND CITY OF BATON ROUGE/PARISH OF
EAST BATON ROUGE

Judgment Rendered: May 4, 2007

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 535,893
The Honorable Timothy E. Kelley, Judge

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

welch, J. dissents and assigns reasons.

GAIDRY, J.

This appeal challenges an award of attorney's fees where a low bidder on a public works project obtained a preliminary injunction that was later reversed by this court. We affirm.

BACKGROUND

The Louisiana Department of Transportation and Development (DOTD) accepted bids on the proposed construction of a state project in East Baton Rouge Parish from six contractors, including Barber Brothers Contracting Company, L.L.C. (Barber Brothers) and B&K Construction Company, Inc. (B&K). DOTD determined that Barber Brothers' bid was irregular and rejected the bid. By letter dated August 4, 2005, DOTD notified B&K that it had submitted the apparent low bid.

On August 25, 2005, Barber Brothers filed this petition against DOTD and the City of Baton Rouge/Parish of East Baton Rouge challenging DOTD's rejection of its bid. Barber Brothers alleged that it was the lowest responsible bidder on the project, and that awarding the project to any other bidder violated Louisiana's Public Bid Law. Barber Brothers sought a preliminary injunction restraining DOTD and the City/Parish from awarding or entering into a contract with any bidder other than Barber Brothers, permanent injunctive relief, and a mandamus ordering DOTD and the City/Parish to award it the contract.

DOTD filed an answer in which it asserted that B&K was the lowest responsible bidder on the project. DOTD also filed a reconventional demand against Barber Brothers seeking damages pursuant to Louisiana Code of Civil Procedure article 3608 in the event a preliminary injunction was issued by the trial court and subsequently dismissed. Article 3608 permits a court to allow damages for the wrongful issuance of a preliminary

injunction, and specifically authorizes an award of attorney's fees for services rendered in connection with the dissolution of a preliminary injunction as an element of recoverable damages.

On September 19, 2005, the trial court granted Barber Brothers' application for a preliminary injunction. The judgment stated¹:

It is ORDERED, ADJUDGED AND DECREED that plaintiff's application for preliminary injunction is GRANTED and accordingly, upon plaintiff's furnishing security in accordance with law in the amount of \$450,000, the defendants Louisiana DOTD and City of Baton Rouge/Parish of East Baton Rouge will be enjoined from awarding or entering into a contract for State Project...entitled *Groom Road Improvements* (LA 964 - LA 19) with anyone *other than* Barber Brothers Contracting Co., L.L.C., or otherwise proceeding with construction of said Project(s).

That same day, the trial court granted DOTD's application for supervisory writs to this court, ordering DOTD to file the application on or before September 23, 2005.

On September 21 and 27, DOTD's attorney requested verification from Barber Brothers that it had posted the bond for the injunction. When it was not provided with such information, on September 27, 2004, DOTD awarded the contract to B&K.

The following day, on September 28, 2004, this court granted DOTD's writ application and reversed the trial court's granting of the preliminary injunction. This court ruled that Barber Brothers failed to meet DOTD's specifications, rendering its bid irregular or non-responsive.

Thereafter, on February 9, 2006, DOTD filed a motion for an award of attorney's fees pursuant to Article 3608 for services rendered by its attorney in connection with the dissolution of the preliminary injunction. In support of its motion, DOTD submitted an affidavit of its attorney, Cheryl L. Duvieilh, who attested that she had been an attorney for over seventeen

¹ According to correspondence appearing in the record, counsel for Barber Brothers prepared the judgment.

years, working for DOTD as a lead construction attorney since 1997. Attached to her affidavit was an exhibit setting forth 31.0 hours of work performed in connection with the “B&K” file. Lastly, DOTD submitted a letter from Charles Foti, Louisiana’s Attorney General, setting forth the maximum hourly fee schedule for professional legal services. The schedule sets the fee for attorneys with five to ten years experience in the practice of law at \$150.00 per hour, and \$170.00 per hour for attorneys with ten or more years.

In opposition to the motion for an award of attorney’s fees, Barber Brothers urged that because it did not post security as required by the court in granting the preliminary injunction, no preliminary injunction was ever “issued” enjoining DOTD from acting. Since no preliminary injunction was “issued” by the trial court, Barber Brothers posited, it could not be held responsible for attorney’s fees based on the wrongful issuance of a preliminary injunction under Article 3608.

Following a hearing, the trial court held that DOTD was entitled to an award of attorney’s fees under Article 3608, concluding that an injunction order had in fact been issued. The court stressed that Barber Brothers had to be given a reasonable amount of time in which to post the bond, and that DOTD’s attorney had attempted to discern whether Barber Brothers posted the bond before moving to award the contract to B&K. Given the lead attorney’s seventeen years of experience, the court awarded attorney’s fees at the rate of \$170.00 per hour for 31 hours, for a total award of \$5,270.00. Barber Brothers’ motion for a new trial was denied, and this appeal followed.

DISCUSSION

Louisiana Code of Civil Procedure article 3610 states that a preliminary injunction “shall not issue unless the applicant furnishes security in the amount fixed by the court....” The purpose of the security requirement is to “indemnify the person wrongfully restrained or enjoined for the payment of costs incurred and damages sustained.” As noted earlier, Article 3608 of the Louisiana Code of Civil Procedure authorizes an award of damages, including attorney’s fees for services rendered in connection with the dissolution of a preliminary injunction. Article 3608 recognizes that preliminary injunction is a harsh remedy subject to the danger of misuse, and it imposes on the party who improperly uses the remedy the responsibility to redress all damages. **Scheyd, Inc. v. Jefferson Parish School Board**, 412 So.2d 567, 569 (La. 1982). A trial court has discretion in determining whether to award damages under Article 3608, and a trial court’s ruling on the issue of damages under this provision will not be disturbed on appeal absent a clear abuse of discretion. **Caldwell v. Griggs**, 40,838, pp. 6-7 (La. App. 2 Cir. 3/8/06), 924 So.2d 464, 468-69.

Barber Brothers insists that the trial court did not have authority to award attorney’s fees pursuant to Article 3608 for the wrongful issuance of a preliminary injunction. In support of its argument, Barber Brothers relies on Article 3610 of the Code of Civil Procedure which states that a preliminary injunction “shall not issue unless the applicant furnishes security in the amount fixed by the court.” Barber Brothers posits that because it did not furnish the security set forth in the judgment, no injunction ever “issued,” and DOTD was never restrained from acting. Thus, Barber Brothers reasons, as no injunction was issued by the trial court, it was unnecessary for DOTD to take any steps to dissolve the preliminary injunction, and the trial

court could not have found that legal services were rendered on behalf of DOTD in connection with the dissolution of a wrongfully issued injunction.

We disagree. The judgment granted Barber Brothers the injunctive relief it sought. The mere fact that Barber Brothers did not furnish the required security after obtaining the preliminary injunction does not prevent a court from awarding attorney's fees under Article 3608. Even where a plaintiff voluntarily dismisses an injunction, attorney's fees may still be awarded if the injunction was wrongfully obtained. **Scheyd, Inc.**, 412 So.2d at 569. Thus, the crucial question in determining whether Barber Brothers is liable for attorney's fees under Article 3608 is whether the injunction was wrongfully obtained.

In order to comply with Article 3612 of the Code of Civil Procedure, DOTD was required to challenge the order granting the preliminary injunction within fifteen days from the date it was rendered. Acting in accordance with Article 3612, DOTD's attorney began the process of dissolving the injunction by applying for supervisory writs to this court within this fifteen-day time period. This court determined that Barber Brothers' bid was not responsive and that Barber Brothers was not entitled to the injunctive relief it sought.

Accordingly, as the injunction was wrongfully obtained by Barber Brothers, the trial court had discretion in determining whether to award DOTD attorney's fees for services rendered in connection with its efforts to vacate the preliminary injunction. Under the circumstances of this case, we cannot say that the trial court abused that discretion in determining that DOTD was entitled to recover attorney's fees for the work performed in obtaining a reversal of the preliminary injunction by this court. Moreover,

we find no abuse of discretion in the trial court's setting of the attorney's fee award at \$5,270.00.

CONCLUSION

For the foregoing reasons, the judgment appealed from is affirmed. All costs of this appeal are assessed to Barber Brothers Contracting Company, L.L.C.

AFFIRMED.

**BARBER BROTHERS
CONTRACTING COMPANY, L.L.C.**

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JW

WELCH, J., DISSENTING.

On September 19, 2005, the trial court signed a judgment granting Barber Brothers' application for a preliminary injunction, which provided, in pertinent part:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's application for preliminary injunction is **GRANTED** and accordingly, upon plaintiff's furnishing security in accordance with law in the amount of \$450,000, the defendants Louisiana DOTD and City of Baton Rouge/Parish of East Baton Rouge will be enjoined from awarding or entering into a contract for State Project Nos. 250-01-0037 and 742-07-0112, FAP Nos. 5101(105) and 8049(005) entitled *Groom Road Improvements (LA 964 – LA 19)*, with anyone *other than* Barber Brothers Contracting Co., L.L.C., or otherwise proceeding with construction of said Project(s).

In addition to the express language of the judgment, La. C.C.P. art. 3610 provides, in pertinent part:

A temporary restraining order or preliminary injunction shall not issue unless the applicant furnishes security in the amount fixed by the court, except where security is dispensed with by law.

It is undisputed that Barber Brothers never posted the required security, and the trial court judgment was ultimately reversed by another panel of this court. However, the day before this court reversed the trial court judgment, DOTD awarded the contract for the relevant projects to another bidder upon discovering that Barber Brothers had not posted security.

The majority concludes that the trial court properly awarded attorney's fees to DOTD in accordance with La. C.C.P. art. 3608, which authorizes a trial court to award damages, including attorney's fees, for the wrongful issuance of a

preliminary injunction. I respectfully disagree. In my view, no preliminary injunction was ever “issued” in this matter, because Barber Brothers never posted security as required by law and the express terms of the judgment. Because no preliminary injunction was ever “issued,” La. C.C.P. art. 3608 is simply inapplicable. Furthermore, as DOTD’s actions in awarding the contract to another bidder demonstrate, DOTD clearly did not consider itself enjoined by the trial court’s judgment once it determined that Barber Brothers had not posted security. Accordingly, I respectfully dissent.