

cc: KKS, KRB, client

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| District Court, Park County Combined Court 300 4 th Street, P.O. Box 190 Fairplay, CO 80440 719-836-2940 | EFILED Document CO Park County District Court 11th JD Filing Date: Dec 10 2007 12:50PM MST Filing ID: 17595783 Review Clerk: Theresa L. VanDerhoof Case No. 06CV320 |
| WILL O WISP METROPOLITAN DISTRICT Plaintiff v. MAGNESS LAND HOLDING LLC et al. Defendant | Division: B |
| ORDER RE: ATTORNEY FEES AND COSTS | |

This case is before the court for determination of attorney fees and costs related to the initial petition in condemnation. The court decided in its Findings and Order on Petitioner's Motion to File Amended Petition in Condemnation of October 11, 2007 that §38-1-122(1), C.R.S., required the court to award attorney fees and costs to Magness Land Holdings LLC ("MLH") when it found petitioner was not authorized by law to acquire the interest it originally sought in MLH's property because the point of diversion on which petitioner relied was incorrect. The court ordered counsel for MLH to submit an affidavit of attorney fees and costs. The affidavit has been filed. Petitioner has filed a response. MLH has filed a reply. The court finds:

MLH seeks \$52,065.26. The court concludes that the amount sought is not reasonable and therefore not assessable in that amount under §38-1-122(1), C.R.S. It ordered MLH to "provide to the court and petitioner an affidavit of attorney's fees and costs incurred in defending its interest in lot 134." The court should have been more specific and indicated that the attorney fees and costs are confined to those regarding the issue of the erroneous designation of point of diversion. It appears that MLH has included billing for work on the case generally related to the immediate possession hearing and the motion to amend, and not confined to work necessitated by the erroneous point of diversion.

The court conducted a hearing on the request for immediate possession on May 8, 2007. The focus of the hearing, i.e., the primary point of contention of MLH (as well as co-respondents') at the hearing, was that petitioner was not entitled to immediate possession as alleged because it was premised on an erroneous determination of the point of diversion from Elk Creek. The court found that it was unable to determine that the point of diversion from Elk Creek which petitioner alleged was on lot 134 coincided with the point of diversion on the water decree on which petitioner relied for the water right. The court continued the hearing to June 25, 2007 at petitioner's request to take further evidence on the determination of the point of diversion. The June 25, 2007 hearing was

vacated at the request of petitioner to allow petitioner to consider its position following the issuance of letters subsequent to May 8, 2007 by the Water Division of the State of Colorado regarding the point of diversion. The court granted petitioner leave to file an amended petition and it has done so. It seeks to condemn different interests and different areas of MLH's property, albeit on the same lot, 134. The original petition sought a fee interest only along the western boundary of lot 134. The amended petition seeks a fee interest in the southern portion of lot 134 and a permanent easement diagonally across approximately the center of the lot. It apparently is based on a different point of diversion than originally alleged.

As MLH contended, it should have been obvious to anyone who examined the records on the point of diversion that there was a problem with its location. While it may have presented a complex problem for the surveyor, the legal defense of MLH to the original petition did not involve similar complexity. As the court noted in its order of October 11, 2007, a metropolitan district cannot condemn property except as authorized by law. No statute allows the condemnation of property which is unnecessary to the purpose for which it is condemned. These are pretty straightforward legal principles. MLH was required to expend legal resources to prevent the immediate possession because petitioner persisted in seeking immediate possession even after it was apparent that the point of diversion on which it was premised was not certain.

A review of the notes accompanying the list of billing for MLH's law firm indicates that issues beyond the point of diversion problem were included in Todd Miller's affidavit. For instance, included are references to discussion of water rights, Woodside's (co-respondent) positions, availability of hearing date, review of water court decrees, status of 1041 application, motion in limine, contact with parties not included in the original petition (e.g., Mr. Windemuller), pipeline condemnation requirements, etc.

The affidavit indicates that over 140 hours of attorney time, billed at \$49,556, was devoted to the case between May 1, 2007 and September 27, 2007 plus costs of \$2509.26 for a total of \$52,065.26. It appears to the court that only a portion of attorney time and costs were necessary to resist immediate possession because of a mistaken point of diversion.

The court concludes that it is reasonable to estimate that approximately one-quarter of the attorney fees and costs are attributable to the problems occasioned by petitioner's reliance on the incorrect point of diversion. That is \$13,016.31. Because this is an estimate by the court, based on paper review of the documents submitted, the parties (Will-O-Wisp and MLH) may request a hearing and the court will take evidence at the hearing on the amount properly attributable to the point of diversion issue. It will not entertain any further argument on whether an amount is assessable at all.

Therefore, it is ordered:

MLH is awarded \$13,016.31 from petitioner for attorney fees and costs.

In the event that either MLH or Will-O-Wisp request a hearing on this issue, the award is set aside and the amount will be determined at a hearing.

BY THE COURT:

C. J. Burd

District Court Judge

Anne Van Teyens

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