

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHERYL LYN BRAXTON AND)
BRAXTON DESIGNERS,)
)
 Petitioners,)
)
vs.) Case No. 08-1827F
)
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION)
)
 Respondent.)
_____)

FINAL ORDER

A hearing was held pursuant to notice on October 24, 2008, via video teleconference with locations in Tallahassee and Jacksonville, Florida, before Barbara J. Staros, a duly-appointed Administrative Law Judge.

APPEARANCES

For Petitioner: Christopher A. White, Esquire
Reziecsek, Frazer, Hastings,
White & Shafer
4230 Pablo Professional Court
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Jacksonville, Florida 32224

For Respondent: David Minacci, Esquire
Smith, Thompson, Shaw
& Manausa, P.A.
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Tallahassee, Florida 32309-3469

STATEMENT OF THE ISSUE

Whether Petitioners are entitled to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes.

PRELIMINARY STATEMENT

On April 8, 2008, Petitioners, Sheryl Braxton and Braxton Designers (hereinafter Braxton),^{1/} filed a Supplemental Motion for Attorney's Fees and costs, an Affidavit of Petitioners' attorney regarding attorney's fees, and supporting fee statement. The Motion requests an award of fees incurred by Braxton in litigating the underlying merits case (hereinafter "merits case") styled, Department of Business and Professional Regulation v. Sheryl Lyn Braxton and Braxton Designers, DOAH Case No. 07-4001 (Order Closing File entered on October 19, 2007; agency Closing Order issued November 5, 2007).^{2/}

On April 18, 2008, Respondent (Petitioner in the merits case), Department of Business and Professional Regulation (Department), filed a Response to Respondents' Supplemental Motion for Attorney's Fees and Costs (Response). In the Response, the Department asserted that the Supplemental Motion for Attorney's Fees was untimely. The Department further asserted that its actions in finding probable cause and issuing an Administrative Complaint in the merits case were substantially justified and, therefore, an award of attorney's fees would be unjust.

On June 3, 2008, the parties filed a Stipulated Motion for Court to Rule on Issue of Timeliness of Request for Attorney Fees. A telephonic hearing was conducted on the Stipulated Motion on June 10, 2008.

On June 30, 2008, the undersigned entered an Order on Issue of Timeliness, finding that Braxton's Motion for Attorney's Fees and Costs, as supplemented, was timely filed. The case was scheduled for final hearing on August 25, 2008. The Department filed a Motion to Continue Hearing, which was granted. The hearing was rescheduled for October 24, 2008, and was heard as scheduled.

At the commencement of the hearing, the Department stipulated that Braxton is the prevailing party from the merits case and is a small business party for purposes of Section 57.111, Florida Statutes.

At hearing, Braxton presented the testimony of Sheryl Lyn Braxton and the Department presented the testimony of Dwight Chastain. Joint Exhibits numbered 1 through 24 were admitted into evidence.

A Transcript consisting of one volume was filed on November 10, 2008. Braxton filed an unopposed Motion for Extension of Time in which to file proposed final orders. The Motion was granted. The parties timely filed Proposed Final

Orders, which have been considered in preparation of this Final Order.

Unless otherwise specified, all references are to the 2007 version of the Florida Statutes.

FINDINGS OF FACT

Stipulated Facts

1. On or about May 14, 2007, the Department filed an Administrative Complaint alleging that Respondents in the merits case held themselves out as interior designers.

2. On or about August 15, 2007, Braxton filed an Election of Rights requesting a formal hearing.

3. On October 15, 2007, Braxton filed a Motion for Attorney's Fees and Costs.

4. On or about October 18, 2007, the Department filed a Motion to Dismiss Formal Hearing based on the parties' agreement that the case would be resubmitted to the Probable Cause Panel with the recommendation of dismissal.

5. On or about October 19, 2007, the Division of Administrative Hearings entered an Order Closing File.

6. On or about November 5, 2007, the case was presented to the Probable Cause Panel and a Closing Order was entered.

7. On or about December 18, 2007, a letter was sent to Braxton's attorney indicating the matter was closed and no

further action was required. However, the letter did not enclose a copy of the Probable Cause Panel Closing Order.

8. On March 3, 2008, Braxton sent a letter to the Department's counsel asking for a copy of "any final action taken by the Probable Cause Panel."

9. On or about March 7, 2008, a copy of the closing order was faxed to counsel for Braxton.

10. On or about April 7, 2008, Braxton filed a Supplemental Motion of Attorney's Fees and Costs.

Facts Based Upon the Evidence of Record

11. In the Motion and Supplemental Motion, Braxton seeks relief under the Florida Equal Access to Justice Act, Section 57.111, Florida Statutes.

12. There is no dispute that Braxton is a small business party for purposes of Subsection 57.111(4)(a), Florida Statutes.

13. There is no dispute that Braxton is the prevailing party in the underlying merits case.

14. There is no dispute that the fees and costs set forth in the April 7, 2008, affidavit filed with the Supplemental Motion for Attorney's Fees and Costs are reasonable. The undersigned has reviewed the Supplemental Affidavit as to Attorney's Fees and Costs filed on October 27, 2008, and the Second Supplemental Affidavit as to Attorney's Fees and Costs

filed on December 10, 2008, and finds the fees and costs contained therein to be reasonable.

15. Dwight Chastain is an investigator for the Department and, while employed by a private law firm, investigates complaints concerning the Board of Architecture and Interior Design. In December 2006, Mr. Chastain received a complaint letter regarding Petitioner herein, Sheryl Lyn Braxton. The complaint letter was addressed to the law firm for which Mr. Chastain is employed. The letter alleged that Ms. Braxton represented herself to the public as an interior designer, and that the complainant could find no evidence that she held a license "specifically that of an interior designer as represented in attached CBS website, is held either by her personally or her company "Braxton Designs." Attached to the complaint letter is a page purportedly from the website, CBS.com, specifically a link from the television show, "Big Brother 2."

16. Additionally, the complaint letter alleged that Ms. Braxton had verbally represented to "many individuals" that she had performed interior design work for Ivana and Donald Trump at the Plaza Hotel in Manhattan.

17. While the letter contains a signature, it is impossible to decipher the writer's last name, and Mr. Chastain considered the signature to be illegible. Further, the letter

did not contain a return address or a telephone number. Because the writer's name is illegible and there was no contact information in the letter, the complaint letter is essentially anonymous.

18. The printed page attached to the complaint letter from the CBS website identifies a participant on the show as "Sheryl," with no last name mentioned, from Ponte Vedre Beach, Florida. Under the heading "personal profile," her occupation is listed as interior designer. The copyright date at the bottom of the page is "MMIII," which is 2003, although Ms. Braxton participated in the Big Brother show in 2001.

19. The name "Braxton Interiors" does not appear on the printout from the CBS website.

20. Also attached to the complaint letter is a page purportedly from the myflorida.com website showing that Sheryl Lyn Braxton held a current real estate license and was employed by Florida Network LLC, a real estate corporation.

21. Mr. Chastain could not decipher the signature on the letter and, therefore, did not attempt to contact the complainant. He did a fictitious name search of and did not find anything under the name of Braxton Designs, Braxton Designers or Sheryl Lyn Braxton.

22. Mr. Chastain searched the Department's database and found that Sheryl Lyn Braxton was not licensed by the Board of Architecture and Interior Design.

23. Mr. Chastain also went to the CBS website and found the page referencing "Sheryl" more fully described above in paragraph 18.

24. There is nothing in the record to indicate that Mr. Chastain called CBS to seek any information which Ms. Braxton submitted to CBS about herself, i.e., whether she actually held herself out to be an interior designer to CBS.

25. Mr. Chastain acknowledged at hearing that in his computer searches of Ms. Braxton's name and "Braxton Designs," he found nothing indicating that Ms. Braxton held herself out to anyone as an interior designer. There is nothing in the record to indicate that Mr. Chastain spoke to anyone who confirmed the allegations in the complaint letter that Ms. Braxton verbally held herself out to anyone that she was an interior designer.

26. On January 5, 2007, Mr. Chastain wrote a letter to Ms. Braxton informing her that the Board of Architecture and Interior Design had initiated a complaint investigation as to allegations that she was using the title "interior designer," or words to that effect, without a valid license. The letter also informs her that "[y]ou have 20 days to respond in writing or

you may contact me at (850) 402-1570. My email address is [dwightc@stslaw.com](mailto:dwrightc@stslaw.com)."

27. Ms. Braxton called Mr. Chastain's office and left two voice mail messages for him, neither of which he received. Regardless of the circumstances of Ms. Braxton's response to the letter, Mr. Chastain proceeded with the belief that she had not responded to his letter.^{3/}

28. Mr. Chastain wrote an Investigative Report which was provided to the Probable Cause Panel. The report read in pertinent part:

Alleged Violation: FS481.223(1)(c) use of the name or title "interior designer", or words to that effect, without a valid state license.

Synopsis: This investigation was based on a consumer complaint in which it is alleged that subject appeared on the CBS television show Big Brother Show link, identifies her as an interior designer. Complainant alleges subject does business under the name Braxton Design and that she has verbally represented herself to "many individuals" that she has been involved in the interior design of many high-profile residential and commercial buildings. (Exhibit 1)

Subject is not licensed as an interior designer in Florida, but is licensed as a real estate sales associate. Braxton design is not a registered corporation or fictitious name with the Florida Secretary of State. (Exhibit 2)

Subject was notified of this investigation by letter dated January 5, 2007, but failed to respond. The letter was not returned undelivered. (Exhibit 3)

Meeting of Probable Cause Panel

29. The Probable Cause Panel met on May 14, 2007, during which the Braxton case was considered. The packet of materials which the panel members received regarding the Braxton case consists of a memorandum to the panel members from the prosecuting attorney regarding the case; another memorandum from the prosecuting attorney to someone named Emory Johnson regarding the case; a draft administrative complaint; a draft Notice and Order to Cease and Desist; the investigative report written by Mr. Chastain with three attachments: the complaint letter with the page from the CBS website and printout showing Ms. Braxton's real estate licensure status; copies of licensing and corporate registration information found by Mr. Chastain; and the letter written by Mr. Chastain to Ms. Braxton notifying her of the complaint.

30. The transcript of the Probable Cause Panel concerning the Braxton case reads as follows:

MR. MINACCI: Tab A-6, Sheryl Lyn Braxton, Case Number 2007-000968. The subject is unlicensed and held herself out as an interior designer on the CBS television show "Big Brother." The subject failed to respond to the investigation.

Recommendation, notice of order to cease and desist, one count Administrative Complaint for using the title "interior designer" without a license.

MR. WIRTZ: Motion to accept counsel's recommendation for one count.

THE CHAIR: Second. Discussion. Hearing none, all those in favor of the motion, signify by saying aye.

(so signified by aye.)

THE CHAIR: Opposed, like sign.

(No response.)

THE CHAIR: Hearing none, the motion carries unanimously.

MR. WIRTZ: She's a big star. She can afford 5,000 for the count plus costs.

THE CHAIR: Second. Recommendation has been made and seconded. Discussion? Hearing none, all those in favor of the recommendation, signify by saying aye.

(So signified by aye.)

THE CHAIR: Opposed, like sign.

(No response.)

THE CHAIR: Hearing none, the recommendation carries.

MR. HALL: Shall we send a copy of the complaint to CBS?

THE CHAIR: If you would like to.

THE [sic] HALL: We certainly can.

MR. Wirtz: I think we should.

31. An Administrative Complaint was filed against Sheryl Lyn Braxton and Braxton Designers with the Department's clerk on May 21, 2007, which began the underlying merits case.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding. §§ 57.111 and 120.57, Fla. Stat. (2008)

33. Attorney's fees have been sought by Petitioners in this matter pursuant to Section 57.111, Florida Statutes, the Equal Access to Justice Act.

34. The legislative intent for enacting the Equal Access to Justice Act is provided in Subsection 57.111(2), Florida Statutes, which provides the following:

(2) The Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state.

35. In pertinent part, Subsection 57.111(4)(a), Florida Statutes, provides the following:

(4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. (emphasis supplied)

36. Subsection 57.111(3)(c), Florida Statutes, defines a "prevailing small business party" as follows:

(c) A small business party is a "prevailing small business party" when:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;

2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding; or

3. The state agency has sought a voluntary dismissal of its complaint.

37. There is no dispute that Braxton prevailed in the underlying proceeding and that Braxton is a small business party for purposes of Subsection 57.111(3), Florida Statutes.

38. The term "substantially justified" is defined in Subsection 57.111(3)(e), Florida Statutes, as follows:

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

39. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes, the initial burden of proof is on the party requesting the award to establish by a preponderance of the evidence that it prevailed in the underlying action and that it was a small business party at the time the action was initiated. Once the party requesting the award has met this burden, the burden shifts to the agency to establish that its actions in instituting the proceeding were substantially justified or that special circumstances exist that would make an award of attorney's fees and costs to Petitioner unjust. Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998).

40. As there is no dispute that Petitioner is a prevailing small business party, the Department bears the burden of establishing that its actions in initiating this proceeding were substantially justified. "The 'substantially justified' standard falls somewhere between the no justiciable issue standard of Section 57.105 . . . and an automatic award of fees to a prevailing party." Id.

41. To be substantially justified, the government agency must have a solid though not necessarily correct basis in fact and law in its actions initiating the underlying case.

Department of Health & Rehabilitative Services v. S.G.,
613 So. 2d 1380 (Fla. 1st DCA 1993).

42. The actions in question are the finding of probable cause and the issuance of the Administrative Complaint.

43. In determining whether there was substantial justification or a reasonable basis in law and fact, the undersigned "need only examine the information before the probable cause panel at the time it found probable cause and directed the filing of an administrative complaint." Department of Health, Board of Physical Therapy Practice v. Cralle, 852 So. 2d 930, 932 (Fla. 1st DCA 2003).

44. In analyzing whether the Department had a solid basis in law, it is appropriate to examine the law granting authority to the Department to investigate complaints. Section 455.225, Florida Statutes, provides the following in pertinent part:

(1)(a) The department, for the boards under its jurisdiction, shall cause to be investigated any complaint that is filed before it if the complaint is in writing, signed by the complainant, and legally sufficient. . . . The department may investigate an anonymous complaint if the complaint is in writing and is legally sufficient, if the alleged violation of law is substantial, and if the department has reason to believe, after preliminary

inquiry, that the violations alleged in the complaint are true. (emphasis supplied)

45. While the complaint letter was in writing, the signature was illegible, and did not contain a telephone number or address of the complainant. With no way to identify or contact the complainant, the complaint was anonymous.

46. The alleged violation of law is that Ms. Braxton violated Section 481.223(1)(c), Florida Statutes, by holding herself out as an interior designer when she was not licensed. There is nothing in the record to indicate that the probable cause panel believed that the allegations amounted to a substantial violation of the law. No questions were asked of the investigator or prosecuting attorney. The only comment of substance concerned a panel member's perceived ability of Braxton to pay a \$5,000 fine and costs.

47. Moreover, there was no preliminary inquiry made as required by Section 455.225, Florida Statutes. The finding of probable cause was based on allegations with no supporting evidence to give any indication that the allegations contained in the complaint letter were true. The printout from the CBS website was not created by Ms. Braxton. It was created by a third party, CBS. There is nothing in the record submitted to the panel to indicate that CBS was contacted in at least an attempt to verify that Ms. Braxton submitted anything to CBS

indicating that she was an interior designer. The investigator's limited research revealed nothing about a company called Braxton Designs, which simply does not exist. Further, there is nothing in the record submitted to the panel regarding the "many persons" referenced in the complaint letter to indicate that the violations alleged in the complaint are true. Even if the complaint is not considered anonymous, "[t]o sustain a probable cause determination there must be some evidence considered by the panel that would reasonably indicate that the violations alleged had indeed occurred." Kibler v. Department of Professional Regulation, 418 So. 2d 1081 (Fla. 4th DCA 1982).

48. Subsection 57.111(4)(a), Florida Statutes, also affords the Agency an opportunity to avoid attorney's fees if special circumstances exist which would make such an award unjust. The Department bears the burden of showing that special circumstances exist. The Department's response to the Motion for Attorney's Fees and Costs did not specifically address the "special circumstances" prong of Subsection 57.111(4), Florida Statutes, but the Proposed Final Order did. However, the Department's argument in this regard is primarily based on Braxton's response to the Administrative Complaint and subsequent events all of which took place after the finding or probable cause.

49. The Department also argues that had Ms. Braxton responded to the letter from Mr. Chastain, the case may have been dismissed or resolved without the issuance of an administrative complaint. However, the analysis herein was based on whether the decision of the probable cause panel had a reasonable basis in law and fact. Department of Health v. Cralle, supra, 852 So. 2d 930, 932. This analysis took into consideration that the probable cause panel believed that Ms. Braxton had not responded to Mr. Chastain's letter.

50. The undersigned finds that based upon the foregoing, there was not substantial justification or a reasonable basis in law and fact and no special circumstances existed for the filing of the Administrative Complaint.

51. Accordingly, Sheryl Lyn Braxton is entitled to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes. The amount of fees and costs requested, \$13,201.56, is reasonable.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Respondents' (Petitioners herein) Supplemental Motion for Attorney's Fees and Costs, as amended by the Supplemental and Second Supplemental Affidavits, is granted.

The Department shall pay to Sheryl Lyn Braxton within 30 days of the date of this Final Order the sum of \$13,201.56 for attorney's fees and costs incurred by Petitioners herein (Respondents in the underlying merits case) in DOAH Case No. 07-4001.

DONE AND ORDERED this 26th day of January, 2009, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of January, 2009.

ENDNOTES

^{1/} While no business by the name of Braxton Designers exists, the style of the case reflected Braxton Designers as a party as it was a named party in the Administrative Complaint in the underlying merits case.

^{2/} Braxton filed a Motion for Attorney's Fees and Costs on October 19, 2007, in the merits case, Case No. 07-4001. Petitioners herein were the Respondents and Respondent herein was designated as the Petitioner in Case No. 07-4001.

^{3/} There was considerable testimony as to whether Ms. Braxton called the investigator after receiving his letter. However, only those facts necessary to reflect what the probable cause panel considered in its actions are recited here. See Department of Health v. Cralle, supra, 852 So. 2d 930, 932.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.