SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

Justice

X

In the Matter of the Application of

SUZANNE CAPORICCI,

Petitioner,

For an Order and Judgment pursuant to § 3001 and Articles 78 and 86 of the C.P.L.R. and 42 U.S.C. §1983

- against-

ELIZABETH R. BERLIN, AS EXECUTIVE DEPUTY COMMISSIONER OF THE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE OF THE NEW YORK STATE DEPARTMENT OF FAMILY ASSISTANCE, AND RICHARD F. DAINES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH,

Respondents.

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IAS PART 14

Index No.: 002507/11
Motion Sequence...02, 03
Motion Date...11/30/11

Papers Submitted:
Notice of Motion (Mot. Seq. 02).....x
Memorandum of Law.....x
Notice of Motion (Mot. Seq. 03).....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

The Petitioner, Suzanne Caporicci, by way of two separately interposed applications, moves for an award of counsel fees and expenses pursuant to either 42 USC §1988 or Article 86 of the CPLR (Mot. Seq. 02 and Mot. Seq. 03). The motions are determined as hereinafter provided.

By way of background, on February 26, 2007, the Petitioner, who was then 34 years of age, suffered a ruptured brain aneurysm and massive stroke, which required that she receive Personal Care Services twenty-four hours per day, seven days per week. On February 17, 2011, the Petitioner commenced the underlying Article 78 proceeding, which sought the following relief: a judgment reversing that portion of a Decision After Fair Hearing, which failed to award Medical Assistance reimbursement, for the period between March 6, 2008 and October 28, 2008; an order remanding the within matter to the Respondents, for further proceedings to determine the Petitioner's eligibility for such reimbursement, and: for an award of counsel fees incurred in connection to the commencement of the previously commenced Article 78 proceeding.

On July 1, 2011, this Court granted the Petition to the limited extent that the matters raised in the Petition were to be remanded to the Respondents to determine the Petitioner's eligibility for reasonable out-of-pocket Medical Assistance reimbursement, for the period in issue. With respect to the Petitioner's request for an award of counsel fees, this Court denied same in accordance with CPLR § 8601 (b). Thereafter, on September 19, 2011, the Fair Hearing was reopened in accordance with this Court's directive (*see* Vollmer

Affirmation in Support at Exh. 3).[1]

Counsel for the Petitioner has now submitted two applications, the first of which seeks $31,010.40 in legal fees and $971.86 in expenses, incurred in connection to the underlying Article 78 proceeding, as well as the interposition of the fee application (Mot. Seq. 02). The second application submitted herein seeks $4,739.58 in legal fees and $153.75 in expenses, incurred in representing Ms. Caporicci at the Reopened Fair Hearing, as well as the interposition of the supplemental fee application (Mot. Seq. 03).[2]

With particular respect to the initial fee application, counsel for the Petitioner contends that in unilaterally electing to narrow the time period for which the Petitioner sought reimbursement, the Respondents violated the Petitioner's federal due process rights, a cognizable violation under 42 USC §1983, thereby entitling her to an award of counsel fees under 42 USC §1988 (*see* Petitioner's Memorandum of Law in Support dated September 8, 2011, at pp. 3-8).

In the alternative, counsel posits that the Petitioner is entitled to an award of

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[1] On October 13, 2011, a "Decision After Reopened Fair Hearing" was issued in which it was held the "[t]he Agency is directed to evaluate the [Petitioner's] eligibility for reimbursement under Medical Assistance for any reasonable out of pocket bills for personal care services for the period between March 6, 2008 to October 28, 2008 (*see* Vollmer Affirmation in Support dated, October 27, 2011, at Exh. 2). The decision went on to state that "[t]he Agency is directed to advise the Appellant and her representative in writing of her eligibility for reimbursement * * *" (*id.*). To date, this Court has not been informed as to what determination, if any, was made within respect to the issue of Petitioner's reimbursement request.

[2] The Court notes that in the "Reply Affirmation in Further Support of Initial and Supplemental Motion for Attorney's Fees, Costs and Expenses", counsel for the Petitioner has upwardly revised his request to reflect an "an additional 16 hours 20 minutes of attorney time to address the Respondents' arguments to the Petitioner's initial and supplemental fee motions" (*see* Vollmer Reply Affirmation at ¶¶ 69, 71, 72). The total amount sought by Petitioner's counsel now amounts to $40,137.50 in legal fees and $1,125.61 in expenses.

counsel fees in accordance with the provisions of the New York State Equal Access to Justice Act, as codified in Article 86 of the CPLR (*id.* at pp. 8-14). To this point, counsel asserts that Ms. Caporicci is an individual lacking financial resources, who was a prevailing party and who timely interposed a fee application, and accordingly is entitled to relief as afforded by the statute (*id.* at pp. 9-12). Counsel further asserts that as an agency of the State, THE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE was a named Respondent and the position adopted thereby was unjustified, the relief herein requested is both warranted and authorized by the statute (*id.*).

In addition to the foregoing, counsel contends that given the complexity of the underlying "public entitlement" litigation, as well as his years of experience in this area of law, the fees requested are reasonable and aligned with prevailing market rates (*id.* at pp.23,24,26-28). Finally, counsel asserts that the requested fees are fully substantiated and detailed by the annexed billing records and avers that he has exercised the necessary "billing judgment" and properly reduced his "raw" time by 20% when arriving at the total amount due (*id.* at 21 - 26).

With respect to the Petitioner's supplemental fee application, counsel specifically posits that "[a]s a result of the Decision After Reopened Fair Hearing, NCDSS must * * * reimburse Ms. Caporicci for the time period from March 8, 2008 and October 28, 2008", and accordingly the Petitioner has fully prevailed warranting the relief herein requested (*see* Petitioner's Memorandum of Law dated, October 27, 2011 at p.7).

In opposing the Petitioner's initial application[3], counsel for the Respondents initially argues that inasmuch as this Court previously denied the Petitioner's fee application made in accordance with Article 86 of the CPLR, the within application made thereunder should be similarly denied (*see* Respondents' Affirmation in Opposition at p.2). Counsel additionally argues that because this Court has yet to find a violation of the Federal law, any fee request made pursuant to 42 USC §1988 is premature (*id.* at pp. 3,4). Counsel stresses that the remand previously ordered by this Court on July 1, 2011, in the absence of any concomitant finding of a Federal law violation, is an insufficient basis upon which to request legal fees under 42 USC §1988 (*id.* at pp. 4,5). In addition to the foregoing, counsel posits that while the substantive matters raised in the Petition were indeed remanded for further administrative proceedings, until such proceedings have been fully concluded, the Petitioner can not be characterized as a prevailing party as contemplated by 42 USC §1988 (*id.* at p.5, 6).

The Court initially addresses the viability of the Petitioner's fees requests, which are predicated upon 42 USC §1988. "In any action or proceeding to enforce a provision of [section] * * * 1983 * * * of this title, the court, in its discretion may allow the prevailing party, * * *, reasonable attorney's fees as part of the costs * * *" (42 USC §1988 [b]). The New York State Court of Appeals has held that "[a] wide variety of Federal rights

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[3] The Court notes that while counsel states that the "[r]espondent's will respond to such supplemental application at the appropriate time", no opposition has been received with respect thereto (*see* Respondents' Affirmation in Opposition at p.8).

are encompassed by section 1983 and can, therefore qualify for a discretionary fee award under section 1988" including those "rights secured by the Due Process Clause of the Fifth and Fourteenth Amendments" (*Thomasel v. Perales*, 78 N.Y.2d 561 [1991] at 567). However, while recognizing the availability of fees under 42 USC 1988, the Court of Appeals has held that where a court renders a decision and does not predicate same upon a "clear Federal basis", an award of counsel fees thereunder is not appropriate (*Giaquinto v. Commissioner of New York State Department of Health,* 11 N.Y.3d 179 [2008]).

In rendering its prior decision and ordering a remand of the matters raised in the Petition, this Court neither addressed any potential violation of Ms. Caporicci's rights or employed any Federal statute as a legal basis for its decision and rather confined its analysis as to whether a remand to the Respondents was warranted by the record (*id.*). Thus, the Petitioner herein is not entitled to an award of counsel fees based upon 42 USC §1988 (*id.*).

The Court now turns to the Petitioner's requests for fees, which are premised upon the New York State Equal Access to Justice Act [hereinafter EAJA]. The EAJA provides that "a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust" (*New York State Clinical Laboratory Association, Inc. v. Kalakjian,* 85 N.Y.2d 346 [1995] quoting CPLR § 8601 [a]). "An award of attorney's fees under the [EAJA] * * * is generally left to the sound discretion of the trial court" (*Graves v. Doar*, 87

A.D.3d 744 [2d Dept. 2011] at 746 [internal citations omitted]).

Within the purview of the EAJA, CPLR § 8602 (f) defines a "prevailing party" as "a plaintiff or petitioner in the civil action against the state who prevails in whole or in substantial part where such party and the state prevail upon separate issues." In interpreting the statute, the Court of Appeals has held that "a party has 'prevailed' within the meaning of the State EAJA if it has succeeded in acquiring a substantial part of the relief sought in the lawsuit" (*New York State Clinical Laboratory Association, Inc. v. Kalakjian,* 85 N.Y.2d 346 [1995] , *supra* at 355). The Court stressed that a party who has prevailed is "a plaintiff who can show that it succeeded in large or substantial part by identifying the original goals of the litigation and by demonstrating the comparative substantiality of the relief actually obtained" (*id.*).

In defining the term "substantially justified", the Court of Appeals squarely relied upon the definition espoused by the United States Supreme Court in *Pierce v. Underwood* (*id.* at 356). In *Pierce*, the high court interpreted "substantially justified" to mean "justified to a degree that could satisfy a reasonable person" (*Pierce v. Underwood*, 487 US 552 [1988] at 565). The ultimate determination as to whether or not the position articulated by the State "was substantially justified is committed to the sound discretion of the court of first instance" (*Graves v. Doar*, 87 A.D.3d 744 [2d Dept. 2011], *supra* at 747 quoting *Simpkins v. Riley*, 193 A.D.2d 1009 [3d Dept. 1993] at 1010-1011). Further, [t]he burden of establishing substantial justification rests with the State, which must make a strong

showing to support its position" (*id.*).

Applying to foregoing principles of law to the two fee applications *sub judice*, the Court finds that the Petitioner is entitled to the relief herein requested. With particular respect to the initial fee application, this Court finds that the Petitioner is a "prevailing party" as contemplated by the EAJA (*New York State Clinical Laboratory Association, Inc. v. Kalakjian,* 85 N.Y.2d 346 [1995] , *supra*). Here, as noted above, the Article 78 proceeding previously interposed by the Petitioner clearly and unequivocally sought a remand to the Respondents for further proceedings to determine her eligibility for reimbursement for out of pocket medical costs, incurred between March 6, 2008 and October 28, 2008. This was precisely the relief awarded to the Petitioner by Order of this Court dated July 1, 2011 (*id.*). Moreover, it its previous decision, this Court expressly held that the determination of the Commissioner's Designee was "arbitrary and capricious" and therefore by implication not substantially justified (*id.; Graves v. Doar*, 87 A.D.3d 744 [2d Dept. 2011], *supra*).

As to the Petitioner's supplemental request for those fees and expenses incurred in connection to the remanded proceeding, the Court of Appeals has held that "section 8602(b), allows for an award of fees for administrative proceedings on remand from judicial action" (*Greer v. Wing,* 95 N.Y.2d 676 [2001] at 681). Thus, inasmuch as the totality of the relief herein requested is both appropriate and legally authorized, the Court must determine if the amount requested is reasonable as contemplated by the statute (CPLR § 8602 [b]).

The EAJA provides for an award of "reasonable attorney fees", the measure of which "shall be determined pursuant to prevailing market rates" (CPLR § 8602 [b]; CPLR § 8601 [a]).

With respect to those fees which are "reasonable", the United States Supreme Court has held that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" (*Hensley v. Eckerhart*, 461 US 424 [1983] at 433). In so holding, the *Hensely* Court cautioned that "[c]ounsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary * * * " (*id.* at 434).

As to that which constitutes the prevailing market rate, a Court should look to those fees charged in the relevant legal community, which is the "the judicial district in which the trial court sits" (*Davis v. City of New Rochelle, NY*, 156 FRD 549 [SDNY 1994]; *Miele v. New York State Teamsters Conference Pension & Retirement Fund,* 831 F2d 407 [2d Cir 1987]).

In the instant matter, counsel for the Petitioner has requested fees in the aggregate of $40,137.50. In so computing, counsel employed an hourly rate of $325, which in this Court's view, is indeed reflective of the prevailing market rates in Nassau County *(see generally Luca v. County of Nassau*, 698 FSupp2d 296 [EDNY 2010]; *Cruz v. Henry Modell & Co., Inc.*, 2008 WL 905351 [EDNY 2008]). Moreover, having carefully reviewed the

submissions herein, Petitioner's counsel is clearly possessed of considerable knowledge and experience with respect to the legal matters involved in the underlying litigation. Finally, while the Court is cognizant that several of the Petitioner's submissions are duplicative with respect to the information provided, counsel has already voluntarily reduced his billed hours by 20% (*Hensley v. Eckerhart*, 461 US 424 [1983], *surpra* at 434).

Therefore, based upon the foregoing, the applications interposed by the Petitioner, for an award of counsel fees in the amount of $40,137.50 and expenses in the sum of $1,125.61, is hereby **GRANTED**.

Submit a Judgment on Notice.

This constitutes the Decision and Order of the Court.

All application not specifically addressed are **DENIED**.

DATED: Mineola, New York
February 1, 2012

Hon. Randy Sue Marber, J.S.C.