

Albunio v City of New York

2012 NY Slip Op 31522(U)

June 6, 2012

Supreme Court, New York County

Docket Number: 113037/03

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**
J.S.C.
Justice

PART 1

Index Number : 113037/2003
ALBUNIO, CAPTAIN LORI
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 007
COUNSEL FEES, EXPENSES

INDEX NO. 113037/03
MOTION DATE _____
MOTION SEQ. NO. 007

The following papers, numbered 1 to _____, were read on this motion for attorney's fees
Notice of Motion/Order to Show Cause — Affidavits — Exhibits A-C [No(s)] 1
Answering Affidavits — ~~Exhibits~~ _____ [No(s)] 2
Replying Affidavits _____ [No(s)] 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUN 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 6, 2012

MARTIN SHULMAN, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
CAPTAIN LORI ALBUNIO AND LIEUTENANT
THOMAS CONNORS,

Plaintiff,

Index No. 113037/03

THE CITY OF NEW YORK, THE NEW YORK CITY
POLICE DEPARTMENT, INSPECTOR JAMES HALL,
INDIVIDUALLY AND AS AN EMPLOYEE,
FREDERICK PATRICK, INDIVIDUALLY AND AS AN
EMPLOYEE,

Decision and Order

Defendants.

FILED

-----X
Hon. Martin Shulman, J.:

JUN 08 2012

In a post-verdict motion, Mary D. Dorman, Esq. ("Dorman"), former counsel for
NEW YORK
COUNTY CLERK'S OFFICE
plaintiffs, former NYPD Captain Lori Albunio ("Albunio"), and former NYPD Lieutenant
Thomas Connors ("Connors")(collectively "plaintiffs"), seeks attorney's fees pursuant to
N.Y.C. Adm. Code § 8-502(f)¹ for representing plaintiffs in appeals before the Appellate
Division, First Department and the New York State Court of Appeals, as well as for
preparing the within motion. Dorman also seeks an award of costs and disbursements
pursuant to CPLR §§ 8101, 8102 and 8301.

This motion was submitted without opposition on February 9, 2012. On or about
February 29, 2012 (approximately three weeks later), defendants' counsel served and

¹ This statutory attorney's fees provision is contained in New York City's Human
Rights Law ("HRL"). N.Y.C. Adm. Code § 8-502(f) states:

In any civil action commenced pursuant to this section, the court, in its discretion,
may award the prevailing party costs and reasonable attorney's fees. For the
purposes of this subdivision, the term "prevailing" includes a plaintiff whose
commencement of litigation has acted as a catalyst to effect policy change on
the part of the defendant, regardless of whether that change has been
implemented voluntarily, as a result of a settlement or as a result of a judgment
in such plaintiff's favor.

filed an untimely opposing affirmation, offering no explanation for the delay or the failure to properly request an adjournment. In reply, Dorman urges this court to reject defendants' late opposition. This court agrees that defendants' failure to proffer an excuse for their late filing warrants rejection. See *Bush v Hayward*, 156 AD2d 899, 900 (3d Dept 1989)("[w]ithout a valid excuse, plaintiff's late papers could not properly be considered [citations omitted]"), *app den* 75 NY2d 709 (1990); *Risucci v Zeal Mgt. Corp.*, 258 AD2d 512 (2d Dept 1999).

In *Jordan v. Bates Advertising Holdings, Inc.*, 11 Misc3d 764, 816 NYS2d 310 (Sup Ct, NY 2006), the court relies on *McGrath v. Toys "R" Us, Inc.*, 3 NY3d 421 (2004) for the following factors gleaned from *Hensley v. Eckerhart*, 461 US 424, 430, n.3 (1983), to guide a court in making an attorney's fees award:

- 1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

The *Hensley* court further enunciated the principle that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' . . .

This is a generous formulation that brings the plaintiff[s] only across the statutory threshold. It remains for the . . . court to determine what is 'reasonable'. 461 U.S. at 433.

Even if defendants' opposition were being considered, their arguments can be quickly addressed and disposed of. First, defendants summarily assert that nothing in N.Y.C. Adm. Code §8-502(f) mandates the payment of fees for appellate work. However, this court finds nothing in the statute precluding an award of fees on appeal. Permitting plaintiffs to recover as the prevailing parties on multiple appeals defending the jury verdicts in their favor is consistent with the HRL's purpose of making prevailing parties as whole as possible and deterring others from engaging in reprehensible discriminatory conduct. *McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 176 Misc2d 325, 327, 672 NYS2d 230, 231 (Sup Ct, NY 1997). Notably, in the companion action *Sorrenti v City of New York, et al.*, NY County Index No. 126981/02 ("Sorrenti"), defendants did not oppose that plaintiff's application for fees related to the appeal to the Appellate Division, First Department and court records reflect that judgment was entered accordingly in the amount of \$81,165.00.²

Moreover, "the attorney's fee provision in the New York City Human Rights Law is similar to the fee provisions in the federal civil rights statutes" and as such, federal case law is often cited in interpreting the HRL's provisions. *McGrath v. Toys "R" Us, Inc.*, 3 NY3d 421, 426 (2004). Federal case law has construed the attorney's fees provisions of comparable federal civil rights laws as including appellate work and provides persuasive authority for an award of fees in connection with the appeals in this

² The Sorrenti case was not implicated in the subsequent appeal to the Court of Appeals.

action. See, e.g., *Vasquez v Fleming*, 617 F2d 334, 336 (3d Cir. 1980); *Davis v New York City Hous. Auth.*, 2002 WL 31748586 (SDNY).

Second, this court rejects defendants' self-serving conclusion that the approximately \$300,000 in attorney's fees that Dorman has already recovered from defendant City of New York for representing plaintiffs in this action's pre-trial and trial phases is "beyond reasonable". An award of fees pursuant to N.Y.C. Adm. Code §8-502(f) is within this court's discretion where, as here, plaintiffs unquestionably prevailed on appeal and their counsel, a solo practitioner, put in hundreds of hours of work and incurred significant out of pocket expenses in connection with defendants' pursuit of their appellate remedies.

This court similarly rejects defendants' argument that Dorman's hourly rates of \$450 per hour for the Appellate Division appeal and \$475 per hour for the appeal to the Court of Appeals are unreasonable. Defendants argue that Dorman, a solo practitioner, has not established entitlement to an hourly rate greater than what she was previously awarded.³ However, this court finds no authority for capping Dorman's hourly rate for appellate work at the level found to be reasonable in 2007 for pre-trial and trial work, particularly given Dorman's level of experience, the difficulty of the appeals in question and the fact that Dorman was unable to perform other work and earn income while expending significant amounts of time on these appeals.

³ Although defendants contend that Dorman was previously granted fees at an hourly rate of \$425 per hour, this court's decision and order dated August 24, 2007 and the amended order and judgment signed on October 26, 2007 indicate that the hourly rate Dorman sought and that was ultimately awarded was at the rate of \$400 per hour.

Finally, this court rejects defendants' general claim that legal services performed by Dorman's co-counsel, Paul O'Dwyer, Esq. ("O'Dwyer"), who assisted her at the Court of Appeals level, were redundant, unnecessary and excessive. The need for assistance at the highest appellate level cannot seriously be disputed. Much was at stake at the Court of Appeals level - both plaintiffs faced the possibility of having their significant judgments reversed and Dorman faced the possibility of being paid nothing for years of work on this case. Victory for these plaintiffs was far from a "slam dunk", as evidenced by Justice Catterson's partial dissent at the Appellate Division level recommending reversal of the jury verdict awarded to plaintiff Alunio. Under these circumstances, any attorney would be ill-advised to undertake such a monumental task on his or her own.

Notwithstanding that this motion is being deemed unopposed, this court must nonetheless determine whether the fees sought are reasonable. "The fixation of legal fees is very troubling to a court for in analyzing the fees sought, it appears to demean a colleague and denigrate his/her services, competence and/or integrity." *McIntyre v Manhattan Ford, Lincoln-Mercury, Inc., supra.*

In determining a reasonable award, the court utilizes the "lodestar" method, calculating the amount to be awarded by multiplying the number of hours reasonably expended by a reasonable hourly rate. *McGrath v. Toys "R" Us, Inc.*, 3 NY3d at 430. As set forth above, this court has found Dorman's hourly rates for appellate work to be reasonable. With respect to determining the hours reasonably expended, this court must consider the following:

(1) hours which reflect inefficiency or duplication of services should be discounted; (2) hours that are excessive, unnecessary or which reflect "padding" should be disallowed; (3) legal work should be differentiated from nonlegal work such as investigation, clerical work, the compilation of facts and other types of work which can be accomplished by nonlawyers who command lesser rates; (4) time spent in court should be differentiated from time expended for out-of-court services; and (5) the hours claimed should be weighed against the court's own knowledge, experience and expertise as to the time required to complete similar activities.

McIntyre v Manhattan Ford, Lincoln-Mercury, Inc., 176 Misc2d at 328, 672 NYS2d at 232, citing *Matter of Rahmey v Blum*, 95 AD2d 294 (2d Dept 1983).

As documented in computerized billing records, receipts and invoices annexed to counsel's supporting affirmation, Dorman seeks a total of \$261,777.25 in fees for herself, \$36,820.00 in fees for O'Dwyer and \$3,105.85 in disbursements, as follows:

1) \$104,512.50 (232.25 hours multiplied by a billable rate of \$450.00/hr.) for legal services rendered on behalf of Albinio and Connors for the Appellate Division appeal and disbursements of \$1,034.79 (photocopying, postage, overnight delivery service and appellate printing costs);

2) \$9,540.00 (21.2 hours multiplied by a billable rate of \$450/hr.) and disbursements of \$59.94 (overnight delivery service and binding) for opposing defendants' motion for leave to appeal to the Court of Appeals;

3) \$138,913.75 (292.45 hours multiplied by a billable rate of \$475.00/hr.) for legal services rendered on behalf of Albinio and Connors for the appeal to the Court of Appeals and disbursements of \$1,913.70 (appellate printing costs, travel and hotel);

4) \$36,820.00 (92.05 hours multiplied by a billable rate of \$400/hr.) for O'Dwyer's services on behalf of Albunio and Connors for the appeal to the Court of Appeals; and

5) \$8,811.00 (19.58 hours multiplied by a billable rate of \$450.00/hr.) and disbursements of \$97.42 (motion filing fee and overnight delivery service) for preparation of this fee application.

This court must "look at the big picture to see if the total time expended for each portion of the case was reasonable (citation omitted)." *McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 176 Misc2d at 329, 672 NYS2d at 232. After reviewing Dorman's billing records and corroborating documentation for plaintiffs' costs on appeal, this court finds that fees should be awarded as follows:

Appellate Division Appeal

Dorman's supporting invoice for work pertaining to the Appellate Division appeal indicates that the bulk of work performed included opposing defendants' motion to enlarge their time to appeal and to consolidate, drafting a cross-motion to dismiss the appeal, preparing and/or reviewing the joint record on appeal, reviewing trial transcripts, conducting legal research, drafting the opposing brief, preparing for and attending oral argument. For the reasons set forth above, the hourly rate of \$450 is reasonable for services rendered in connection with the appeal to the Appellate Division. Further, of the 232.25 hours claimed, this court concludes that 216.05 hours at the hourly rate of

\$450 and 9.2 hours at the hourly rate of \$100 are reasonable, for a total fee award of \$98,142.50.⁴ Finally, the claimed disbursements of \$1,034.79 are also reasonable.

This award is particularly reasonable when compared to the \$81,165.00 in attorney's fees recovered in the related Sorrenti case for this same appeal. Dorman's slightly larger award reflects the fact that she represented two (2) plaintiffs whose cases had different factual nuances and involved more complicated legal issues.

Motion for Leave to Appeal to the Court of Appeals

Dorman's request for fees and disbursements totaling \$9,599.94 in connection with opposing defendants' motion for leave to appeal to the Court of Appeals is granted as requested. For the reasons stated above, Dorman's billable rate of \$450 per hour is reasonable and this court finds that 21.20 hours is a reasonable amount of time to expend on this endeavor. Finally, the disbursements of \$59.94 incurred (for binding and service of plaintiffs' opposition) are also reasonable.

Appeal to Court of Appeals (Dorman and O'Dwyer)

Having previously found that Dorman's increased hourly rate of \$475 for Court of Appeals work is reasonable, this court similarly finds given O'Dwyer's background and experience that \$400 per hour is a reasonable rate for his services. The only question remaining is whether the hours expended were reasonable. This court does not doubt

⁴ The first seven (7) hours in the supporting invoice detail non-appellate work (viz., drafting and docketing each plaintiff's judgment) which are not properly included in this application for appellate fees. Additionally, 9.2 hours were expended in locating, retrieving and copying trial exhibits for the record on appeal. Such services are more properly performed by support staff and do not warrant counsel's hourly billable rate of \$450. Instead, this court allows fees for these services at the rate of \$100 per hour.

that all of the itemized services were performed and that counsel actually worked the claimed number of hours. It is also evident from Dorman's invoices that she and O'Dwyer made every attempt to "work[] in tandem but not in duplication." *McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 176 Misc2d at 332-333, 672 NYS2d at 234. Nonetheless, some duplication of efforts was inevitable. This court finds that O'Dwyer's 92.05 hours at the hourly rate of \$400 were reasonable but finds that Dorman's hours should be reduced from 292.45 hours to 250 hours at the hourly rate of \$475.

Accordingly, this court awards Dorman fees for services rendered in connection with the appeal to the Court of Appeals in the total amount of \$155,570 (\$118,750 [250 hours x \$475] plus \$36,820 [92.05 hours x \$400]). Finally, the disbursements of \$1,913.70 incurred in connection with the appeal to the Court of Appeals for appellate printing, travel and hotel accommodations in Albany are granted as reasonably incurred.

Fee Application

At the outset, this court finds that Dorman is not entitled to fees at the hourly rate charged for appellate work in connection with this fee application. The legal services delineated in the supporting invoice include not only time records for the preparation of this application but also for recalculating interest on each plaintiff's judgment and entry thereof post-appeal. This court previously set fees for pre-trial and trial related services in this action at \$400 per hour and finds that the same rate should apply to this non-appellate work is nowhere near as difficult as the appellate work. Additionally, the number of hours for preparing this fee application are not reasonable taking into

consideration that this is Dorman's second fee application in this action. This court finds that a reasonable award for post-appeal fees is \$4,480.00 (11.2 hours [7 hours for the fee application plus 4.2 hours for judgment entry and recalculation] multiplied by a billable rate of \$400.00/hr.) plus \$45 for disbursements (motion filing fee). This court disallows the claimed disbursements for sending each plaintiff's proceeds check by overnight delivery, as this is essentially an overhead cost.

Conclusion

For all of the foregoing reasons, Dorman is entitled to recover a total of \$270,785.93, representing fees of \$267,732.50 and \$3,053.43 in disbursements, as follows:

1) \$98,142.50 (216.05 hours multiplied by a billable rate of \$450.00/hr. plus 9.2 hours multiplied by a billable rate of \$100.00/hr.) for legal services Dorman rendered on behalf of Albunio and Connors for the Appellate Division appeal and disbursements of \$1,034.79, for a total of \$99,177.29;

2) \$9,540.00 (21.2 hours multiplied by a billable rate of \$450.00/hr.) and disbursements of \$59.94 for opposing defendants' motion for leave to appeal to the Court of Appeals, for a total of \$9,599.94;

3) \$118,750.00 (250 hours multiplied by a billable rate of \$475.00/hr.) for legal services Dorman rendered on behalf of Albunio and Connors for the appeal to the Court of Appeals and disbursements of \$1,913.70, for a total of \$120,663.70;

4) \$36,820.00 (92.05 hours multiplied by a billable rate of \$400/hr.) for Paul O'Dwyer, Esq.'s services on behalf of Alburnio and Connors for the appeal to the Court of Appeals; and

5) \$4,480.00 (11.2 hours multiplied by a billable rate of \$400.00/hr.) and disbursements of \$45.00 for preparation of this fee application, for a total of \$4,525.00; and it is hereby

ORDERED that Dorman shall prepare and submit a judgment directly to the Judgment Clerk in accordance with this decision and order; and it is further

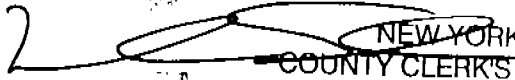
ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes this court's decision and order. Courtesy copies of same have been provided to counsel for Dorman and defendants.

Dated: New York, New York
June 6, 2012

FILED

JUN 08 2012


NEW YORK
COUNTY CLERK'S OFFICE
HON. MARTIN SHULMAN, J.S.C.