SHORT FORM ORDER INDEX NO.: 0032983/2011

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:
HON. JOHN J.J. JONES, JR.
Justice

HEARING DATE: 10/24/2012

SOUTHAMPTON DAY CAMP REALTY, LLC and JAY JACOBS, in his capacity as manager of Southampton Day Camp Realty, LLC, and individually,	HARRIS BEACH, PLLC By: Robert J. Chanis, Esq. Attys. for Plaintiffs The OMNI 333 Earle Ovington Boulevard, Suite 901 Uniondale, NY 11553
Plaintiffs,	
-against-	PHILLIPS NIZER LLP By: Stuart A. Summit, Esq. Attys. for Defendants 666 Fifth Avenue New York, NY 10103-0084
JOHN GORMON and JOHN BARONA,	
Defendants.	

This hearing on the issue of attorneys' fees having been scheduled for October 24, 2012 and papers being submitted on that date, it is

ORDERED that this application by the attorneys for the defendants, John Gormon and John Bivona, for an award of attorneys' fees pursuant to Civil Rights Law § 70-a is decided as follows.

Background

The parties' familiarity with the facts of the underlying action is presumed, those facts having been set forth in detail in the prior order of the court granting summary judgment in favor of the defendants dated July 3, 2012. The following facts are chronicled here only to inform the decision awarding attorneys fees, costs and disbursements to defense counsel pursuant to Civil Rights Law § 70-a.

The action was commenced by plaintiffs, Southampton Day Camp Realty, LLC, and Jay

Jacobs, in his capacity as manager of Southampton Day Camp Realty, LLC, and individually, [collectively "the plaintiff"], for injuries as a result of allegedly defamatory statements made by the defendants, John Gormon ["Gormon"] and John Barona ["Barona"] about the plaintiff. The alleged defamatory statements were contained in a flier that was circulated by unidentified persons to challenge the plaintiff's proposal for the renovation and expansion of an existing tennis camp on certain real property owned by the plaintiff in the Town of Southampton.

Several local groups opposed the plaintiff's proposal for the property and appealed the decision of the local Building Inspector to the local zoning authority. The opponents of plaintiff's land use application challenged the Building Inspector's position that the plaintiff's proposal for an expanded day camp would not constitute a change in the pre-existing non-conforming use of the property.

The defendants, Gormon and Barona, were officers of one of the local groups opposing the plaintiff's proposal. Their names appeared at the bottom of the allegedly defamatory flier. The flier indicated that the defendants could be called for more information. On summary judgment the defendants established, without serious evidentiary challenge, that their names and contact information were included on the subject flier without their knowledge or *imprimatur*.

The defendants joined issue asserting various affirmative defenses and a counterclaim alleging that the defamation action constituted an unlawful SLAPP suit. [1] As such, the defendants claimed, *inter alia*, that they were entitled to attorneys fees pursuant to Civil Rights Law § 70-a. After joinder of issue but before discovery the defendants successfully moved for summary judgment pursuant to CPLR 3212 (h). In the Decision and Order of the Court dated July 3, 2012, the court granted the defendants' motion for summary judgment and also granted the defendants' counterclaim for attorneys' fees and costs. The court has considered the extensive submissions by parties on this application for an award of attorneys' fees and costs. The parties have agreed to submit the application on papers.

Attorneys Fees

A reasonable attorney's fee is commonly understood to be a fee which represents the reasonable value of the services rendered. ***Diaz v. Audi of America, Inc.***, 57 A.D.3d 828, 830 (2d Dept. 2008) (citations omitted).

---

[1] SLAPP suits [Strategic Lawsuits Against Public Participation] are those suits designed to chill the exercise of a citizen's rights to petition the government or appropriate administrative agency for the redress of a perceived wrong. In 1992, the Legislature enacted Civil Rights Law § 70 and § 76-a to provide special protections for defendants in actions involving public petition and participation, or SLAPP suits.

In general, factors to be considered include (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; (2) the lawyer's experience, ability and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved. ***In re Sucheron***, 95 A.D.3d 892, 894 (2d Dept. 2012), *citing* ***Matter of Freeman***, 34 N.Y.2d 1, 9 (1974).

Although an award of an attorney's fee is within the discretion of the court, such award must be based upon a showing of "the hours reasonably expended and the prevailing hourly rate for similar legal work in the community." ***Gutierrez v. Direct Marketing Credit Services, Inc.***, 267 A.D.2d 427, 428 (2d Dept. 1999).

A. The Reasonable Hourly Rate

As a general rule, the reasonable hourly rate is based on the customary fee charged for similar services by lawyers in the community with like experience and a comparable reputation to those by whom the prevailing party was represented. ***Matter of Rahmey v. Blum***, 95 A.D.2d 294 (2d Dept. 1983). The burden is on the fee applicant to establish the prevailing hourly rate for the work performed. ***Gutierrez v. Direct Marketing Credit Services, Inc.***, *supra*.

There is no question that both counsel for the defendants, Stuart A. Summit and Jeffrey Shore of Phillips Nizer LLP, are both accomplished and experienced attorneys. Defense counsel concedes that "[a]s a general rule, the 'reasonable hourly rate [for an attorney] should be based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented." ***Matter of Gamache v. Steinhaus***, 7 A.D.3d 525, 526-27 (2d Dept. 2004).

Nevertheless, defense counsel posits that the court should base its fee award on the prevailing hourly rate for New York City firms, rather than Long Island firms, because defense counsel made several unsuccessful attempts to obtain *pro bono* or low cost representation from Suffolk County practitioners on the defendants' behalf before agreeing to represent the defendants themselves. These efforts by Mr. Summit, who states he has known both defendants for many years and owns a home in the same community, consisted of speaking with "several lawyers in Suffolk County" including the attorney who represented one of the local groups opposing the plaintiff's proposal before the local zoning board, to no avail. Defense counsel also asked a local retired attorney who initially expressed some interest in representing the defendants but ultimately declined.

These limited efforts failed to rebut the presumption that the reasonable hourly rate for an attorney should be based on the customary fee charged for similar services by lawyers in the community. *See* ***Simmons v. New York City Transit Authority***, 575 F.3d 170, 175 (2d

Cir. 2009).

Defense counsel argues in the alternative that a reasonable hourly rate on Long Island for attorneys with similar credentials to Mr. Summit, including more than thirty years of litigation experience, is $450 per hour. Defense counsel further posits that an hourly rate in a range of $300-$425 for an attorney with ten plus years of experience is appropriate for someone with Mr. Shore's level of experience.

The appropriate hourly rates are also influenced by the court's consideration of such factors as the time and labor required to obtain the ultimate objective, the novelty and complexity of the issues, whether the fee is fixed or contingent, and comparable awards in similar cases in the community. ***Arbor Hill***, 522 F.3d at 187 n. 3, *citing* ***Johnson v. Ga. Highway Express, Inc.***, 488 F.2d 714 (5th Cir. 1974).

Notably, while defense counsel have in excess of fifty years of litigation experience between them, and without in any way diminishing their reputation in the legal community or their success in obtaining summary judgment on their clients' behalf, the fact remains that the subject matter of this lawsuit and the complexity of the issues (or lack thereof) did not require a unique expertise in order to prevail. At the end of the day, in order to defeat the plaintiff's defamation claim the defendants could have elected to demonstrate the truth of the challenged statements or, even simpler, that the defendants did not make the challenged statements at all, much less with constitutional malice, that is, knowledge of their falsity or reckless disregard of whether they were false. ***Singh v. Sukhram***, 56 A.D.3d 187, 194-95 (2d Dept. 2008), *citing* ***T.S. Haulers v. Kaplan***, 295 A.D.2d 595, 598 (2d Dept. 2002).

The defendants did just that by annexing the uncontradicted affidavits of both defendants attesting that they did not draft the challenged flier containing their names but that in any event, they believed the few allegedly defamatory statements in the flier were true. Barona and Gormon both maintained that the plaintiffs falsely represented the prior use of the property as a children's day camp and further, that the small cottages on the property had previously been used as dormitories. They also believed that the plaintiffs used misleading sanitary flow figures in their land use application to the Town.

Rather than being novel or complex, the issues presented here involved garden variety defamation claims made by an applicant for a governmental benefit, (the pre-existing non-conforming use of the subject property), that required the plaintiff to prove as part of its affirmative case by clear and convincing evidence that 1) the challenged statements were false, 2) the challenged statements were defamatory, 3) the defendants made the challenged statements, and 4) the defendants knew the defamatory and false statements to be false when made or made them with reckless disregard of their falsity. ***Id***. Thus, the rather straight forward nature of the plaintiff's claim does not justify a higher hourly rate.

Also considered in the calculus of the reasonable hourly rate is the time and labor

required to achieve the desired result. The moving affirmation breaks down the tasks performed to obtain the optimal result-the dismissal of the complaint. The tasks can roughly be broken down into two discrete tasks: the drafting of an answer, counterclaim and discovery requests and the preparation and submission of the summary judgment motion.

The action was commenced on October 21, 2011. The Answer with counterclaim and discovery demands was served on November 29, 2011. The summary judgment motion was noticed on January 26, 2012 for February 21, 2012. The motion papers were fully submitted by April 25, 2012. The court rendered its decision on July 3, 2012. The defendants correctly assessed that the matter lent itself to early summary disposition. However, from start to finish the action took nine months. In light of the relatively short duration of the litigation, the absence of any pre-trial discovery or depositions and/or a trial, the time and labor expended on this litigation does not warrant an upward adjustment to the reasonable hourly rate.

Defense counsel agreed to represent the defendants *pro bono* without any guarantee of compensation other than a potential statutory fee award and vigorously defended the action until its conclusion. While their willingness to take on the defense of the action should be commended, under the circumstances this fact alone does not warrant an upward adjustment to the reasonable hourly rate.

Finally, the court's decision is informed by other awards in similar cases in Suffolk County. *See e.g.s.*, ***Long Island Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County, Inc.***, 865 F.Supp.2d 284 (E.D.N.Y. 2012). (collecting cases).

Considering the above factors including the experience, reputation and ability of Messrs. Summit and Shore, the absence of novel or complex issues, the alacrity with which the case was disposed, and awards in similar cases, this court finds that an hourly rate based upon the prevailing rate in the Suffolk County/Long Island legal community for someone with Mr. Summit's level of experience is $350.00. The hourly rate for someone with Mr. Shore's level of experience is $200.00. Both parties concede that the appropriate hourly rate for the paralegal who also worked on the case is $80 and the court will accept that figure.

B. The Hours Reasonably Expended

After determining the reasonable hourly rate, a court must evaluate the number of hours reasonably billed to arrive at the presumptively reasonable fee. ***Arbor Hill***, 522 F.3d at 189-90. The court is not indifferent to the fact that in applying for its fee defense counsel has voluntarily applied a 45% discount in its hours. Even with the substantial discount, the total fee request up to the point where the court granted summary judgment is $83,570.00.

Based on contemporaneous time records submitted on the fee application commencing on October 30, 2011 and ending on July 6, 2012, and based on Long Island hourly rates, the

defense makes the following fee request:

	Hours Spent	Discounted Hours	Fee Request
Stuart Summit	104.1 hours	57.00 @ $450/hr.	$25,650
Jeffrey Shore	258.6 hours	142.00 @ $400/hr.	$56,800
Kristine Grisset	27.0 hours	14.00 @ $80/hr.	$ 1,120
Total			**$83,570**

Notwithstanding defense counsel's offer to discount its fee by 45%, the court is not relieved from fulfilling its obligation to exercise its discretion in reviewing the hours expended to justify a fee award and making deductions, even substantial deductions, where appropriate.

The court is not insensitive to the conundrum of the practitioner who, in zealously representing the attorney's client must weigh how much effort is enough and how much is overkill. Obviously, by volunteering to discount the hours spent by 45% defense counsel recognizes that the fee award authorized by the statute is not meant to compensate a prevailing party's attorney for shooting the proverbial mosquito with an elephant gun.

A substantial amount of Mr. Summit's time as documented on his time records was devoted to discussing, reviewing, revising and rewriting work performed by Mr. Shore, himself an experienced and seasoned litigator with over twenty years of experience. The court finds that an unreasonable amount of time was spent by Mr. Summit reviewing and revising Mr. Shore's work which primarily entailed preparing the answer and discovery demands and the summary judgment motion.

The second basis for a substantial reduction in the reasonable number of hours allowed is the amount of time devoted on the summary judgment motion to "review and comprehend" all the documents that plaintiff had submitted to the Town Board of Zoning Appeals and the Suffolk County Department of Health Services relating to the land use proposal. The plethora of documents included the Environmental Assessment Form, the Suffolk County Department of Health Services submissions, the proposed sanitary design plans, and the plaintiff's submission to the Southampton Zoning Board of Appeals, to name a few.

Although the defendants' summary judgment submission was a comprehensive and persuasive blueprint for opposing the plaintiff's land use application to the local zoning authority, it went well beyond what was required to establish the defendants' entitlement to judgment as a matter of law in this defamation action. This is particularly so where, as here, the burden of proof rested with the opponent of the motion (as emphasized by defense counsel) and the plaintiff could not raise a material issue of fact by proof in admissible form

that either defendant had played a part in the creation of the challenged flier. *CPLR* § 3212 (h).

The final area that this court believes justifies a substantial reduction in the number of hours billed are the many entries containing mixed entries or block billing. Many of the larger entries in connection with the preparation of the summary judgment motion fail to differentiate the time spent on legal research, writing the memo of law in support of the motion, and revising, rewriting, and editing same. There is no doubt that the memoranda in support of the motion were all-encompassing and well written. However, the decision on the ultimately successful motion turned on the simple and uncontradicted fact that neither defendant authorized the use of his name on the challenged flier. A treatise on the history of SLAPP suits was not required to achieve the desired result. *See* ***Simmons v. New York City Transit Authority***, 575 F.3d 170, 177 (2d Cir. 2009) (loser "should not have to pay for a limousine when a sedan could have done the job").

Under all the circumstances the court awards a fee for work performed from October 30, 2011, until July 6, 2012, by Messrs. Summit and Shore and Ms. Grisset as follows:

	Hours Spent	Hours Allowed	Fee Award	Discount
Stuart Summit	104.1 hours	34.7 @ $350/hr.	$12,145	66.67%
Jeffrey Shore	258.6 hours	129.30 @ $200/hr.	$25,860	50.00%
Kristine Grisset	27.0 hours	14.00 @ $80/hr.	$ 1,120	45.00%
Award 10/30/11-7/6/2012			**$ 39,125.00**	

Fee Award on Fee Application

Finally, the same rationale applies with respect to the "fee on the fee application". It is not necessary, nor is it reasonable, in this court's view, to spend 66.80 hours on a fee application in a case with a shelf life of nine months. The historical and sweeping discussion in the motion papers about the prevailing party's entitlement to a fee award based on the time devoted to preparing the fee application is complete, accurate, and informative; however, a tutorial on a topic that is neither complicated nor esoteric is unnecessary.

The defendants' request that the court award an amount that equals 10% of the award for the time spent on the case itself is reasonable. Of course, the request assumed that the fee award would be significantly greater than the roughly $39,000 awarded. Nevertheless, the court grants a further award in the amount of $3,912.50, or 10% of the fee for services prior to the decision granting summary judgment as more than reasonable for the preparation of

the fee application in the instant matter. *See e.g.*, ***Pall Corporation v. 3M Purification Inc.***, 2012 WL 1979297 (E.D.N.Y.).

In summary, the total fees awarded are $39,125.00 for work performed between October 30, 2011 and July 6, 2012, the additional amount of $3, 912.50 for the fee on the fee application, and an award of disbursements and costs in the full amount requested of $800. The total is $43,837.50.

Defendants shall settle judgment.

DATED: 15 Nov. 2012

HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION