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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA

8 UNITED STATES OF AMERICA,

1:95-CV-05346 OWW SMS

9 Plaintiff,

ORDER GRANTING IN PART
DUMAS' MOTION FOR ATTORNEY'S
FEES AND COSTS (DOC. 269.)

10 v.

11 GLEN D. BELL, JEANETTE BELL, et
12 al.,

13 Defendants.

14 I. Introduction.

15 Before the court for decision is Dumas International LLC's
16 ("Dumas") motion for attorneys fees and costs. Doc. 269, filed
17 Nov. 21, 2008. The motion was required by the district court's
18 September 30, 2008 Order of Distribution. Doc. 267. The United
19 States opposes the fee request in its entirety. Doc. 274, filed
20 Dec. 23, 2008.

21 The underlying dispute on the merits, which was the subject
22 of a one-day bench trial on April 25, 2008, related to the amount
23 due under a 1984 Deed of Trust recorded against residential
24 property previously owned by defendant taxpayers Glenn and
25 Jeanette Bell, and the priority of that deed relative to a 1987
26 federal tax lien. Findings of Fact and Conclusions of Law were
27 issued September 17, 2008, Doc. 261, as amended to correct
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1 clerical and typographical errors, see Doc. 266, along with a
2 Judgement of Extent and Priority of Liens, Doc. 268, filed,
3 October 6, 2008.

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5 II. FACTUAL BACKGROUND.

6 The Bells purchased the subject property in Modesto
7 California in 1984. Finding of Fact ("FOF"), Doc. 261, #9. They
8 subsequently obtained a construction loan in the amount of
9 \$251,000.00 from Stockton Savings, evidenced by an Adjustable
10 Rate Note dating to 1984. FOF #13. In conjunction with the
11 construction loan and Adjustable Rate Note, a First Deed of Trust
12 was executed by the Bells and recorded in Stanislaus County,
13 encumbering the property as security for a \$310,000.00
14 construction note. FOF #23. To the extent that this First Deed
15 of Trust secures the repayment of the construction loan, it was
16 deemed to have priority over, as it antedated, any federal tax
17 liens against the property, the earliest of which was recorded in
18 1987. *United States v. Bell*, 27 F. Supp. 2d 1191, 1200 (E.D.
19 Cal. 1998); FOF #30. The exact amount due under the First Deed
20 of Trust was not finally determined by *Bell*, 27 F. Supp. 2d 1191.

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22 It is undisputed that Dumas, which is in the business of
23 purchasing "troubled" properties and clearing up defective title
24 problems, is the successor in interest to the original lender.
25 FOF #4.

26 Various estimates of the claim secured by the First Deed of
27 Trust were elicited at trial, ranging from \$251,113.00 to just
28 over \$1,034,011.00. FOF #37, #109, Conclusions of Law ("COL")

1 #12. The \$1,034,011.00 figure reflected Dumas' position at trial
2 that, in addition to the original principal balance of the
3 construction loan, the Bells had been advanced an additional sum.
4 FOF #45-61. The priority of the First Deed of Trust was
5 established in a published decision before Dumas became a party
6 to the case. *Bell*, 27 F. Supp. 2d at 1200. Review of all the
7 evidence established that Dumas' assertion that the First Deed of
8 Trust secured unpaid principal and accrued interest of
9 \$1,034,011.00 was "not supported by the underlying evidence."

10 COL #12. Specifically, there was a "lack of objective evidence
11 establishing an advance was made or when it was made." COL #11.

12 Dumas also sought to estop the United States from asserting
13 that the note balance due was less than \$857,946.54, based on
14 statements made by the United States in correspondence. COL #16-
15 17. This argument was rejected on the finding that "Dumas,
16 despite a lack of credible evidence, seeks to obtain a windfall
17 under an estoppel theory, to recover \$857,946.74 on a loan for
18 which it paid \$260,000." COL #30.

19 The district court found the United States' calculation of
20 the amount due Dumas, \$449,999.46, to be consistent with the
21 available evidence, COL #13, #44, and ruled that "Dumas shall
22 recover \$449,999.46, plus, additional interest to the date of
23 entry of these Findings of Fact and Conclusions of Law, and
24 attorney's fees and costs." Doc. 261 at 44.

25 The United States did not object to the inclusion of an
26 attorney's fees and costs recovery provision in the decision, as
27 attorney's fees are authorized by the Note.

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1 III. DISCUSSION.

2 Dumas now moves for attorney's fees in the amount of
3 \$62,727.50 and costs in the amount of \$14,549.00, for a total of
4 \$77,276.50.

5 Local Rule 54-293 governs the award of attorney fees in this
6 District, pursuant to which a party requesting fees must show the
7 following:

- 8 (1) The moving party was the prevailing party;
9 (2) The moving party is eligible for fees, and the
10 basis of that eligibility;
11 (3) The amount of the fees sought;
12 (4) Information pertaining to the criteria considered
13 in fixing the award; and
14 (5) Other matters required by statute.

15
16 A. Legal Bases for Fee Petition.

17 In support of its fee petition, Dumas cites 26 U.S.C. §
18 6323(e) (3),¹ which provides: "If [a] lien imposed by [the
19 government for taxes] is not valid as against a lien or security
20 interest, the priority of such lien or security interest shall
21 extend to... (3) the reasonable expenses, including reasonable
22 compensation for attorneys, actually incurred in collecting or
23 enforcing the obligation secured...."

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25 ¹ In headings in its motion for attorney's fees, Dumas
26 refers to 42 U.S.C. § 1988, which permits awards of attorney's
27 fees to prevailing civil rights plaintiffs. Section 1988 is
28 inapplicable to this case concerning the priority of a lien
relative to a government tax lien. Dumas also invokes the
appropriate statute: 26 U.S.C. § 6323(e) (3).

1 The Adjustable Rate Note contained an attorney's fee
2 provision, whereby the lender shall be reimbursed for all its
3 "costs and expenses" incurred in obtaining repayment of the loan:
4 "If the Note Holder has required me to pay immediately in full as
5 described above [for being in default], the Note Holder will have
6 the right to be paid back by me for all its costs and expenses
7 not prohibited by applicable law. Those expenses include, for
8 example, reasonable attorney's fees." Ex. 3 at ¶7(e).

9 The Deed of Trust also contained an "attorneys fees"
10 provision that entitles the lender to make disbursements for
11 "reasonable attorneys fees" in the event the borrower fails to
12 make required payments under the Adjustable Rate Note. Ex. 4 at
13 ¶7. Such fees "become additional indebtedness" of the borrower,
14 and bear interest at the rate set in the overlying promissory
15 note. *Id.*

16 Under California law, when a trust deed provides for
17 attorney's fees, a beneficiary is entitled to recover such fees
18 that are incurred to protect and enforce his or her secured
19 obligation, and such award has equal priority status with
20 principal amount of the deed of trust. *Wutze v. Bill Reid*
21 *Painting Serv., Inc.*, 151 Cal. App. 3d 36, 46 (1984).

22
23 B. Prevailing Party Requirement

24 Dumas argues that by virtue of its status as successor-in-
25 interest to Guarantee Bank (and its predecessor Stockton
26 Savings), it is entitled to collect attorney's fees and costs
27 incurred in this litigation.

28 The United States does not dispute that a prevailing party

1 in a dispute over the amount and priority of a lien is entitled
2 to collect fees and costs. The United States maintains, however,
3 that Dumas incurred its fees pursuing the theory upon which it
4 did not prevail, namely that a large sum should be added to the
5 principal balance to reflect an advance given to the Bells by
6 their lender. Only fees "actually incurred in collecting or
7 enforcing the obligation secured" are permitted a priority under
8 26 U.S.C. § 6323(e)(3). The United States points out that, apart
9 from the "loan advance" theory, the respective experts very
10 nearly agreed on the balance due on the loan.

11 Dumas sought at trial an award of \$1,034,011.00 but
12 eventually obtained a judgment for \$455,936.52, less than half of
13 the award sought. Critically, the United States asserts that the
14 "priority of the judgment actually obtained was stipulated by the
15 parties before Dumas entered the case." Doc. 274 at 4. Although
16 it is undisputed that the priority of the existing lien was
17 established well before Dumas became a party, *Bell*, 27 F. Supp.
18 2d at 1200, the United States has not pointed to any evidence of
19 a stipulation as to the amount due under the First Deed of
20 Trust.²

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22 ² Dumas points out that under Rule 68 of the Federal
23 Rules of Civil Procedure, the United States could have offered a
24 settlement just prior to trial, which would have shifted the
25 burden to pay for costs to Dumas. Fed. R. Civ. P. 68 ("If the
26 judgment that the offeree finally obtains is not more favorable
27 than the unaccepted offer, the offeree must pay the costs
28 incurred after the offer was made."). Dumas incorrectly suggests
that Rule 68 would also have shifted the burden of paying for
attorney's fees to Plaintiff. In *Marek v. Chesney*, 473 U.S. 1, 9
(1985), the Supreme Court held that the term "costs" under Rule
68 includes attorney's fees whenever the underlying statute that

1 Dumas maintains that the amount due under the First Deed of
2 Trust was disputed by the United States. In large part, this
3 dispute arose from the existence of two separately dated
4 residential mortgage loan statements from December 2003. The
5 first mortgage statement, referencing Loan. No. 72888-00527-001,
6 dated December 9, 2003, reflects a principal balance due of
7 \$251,112.49 and a past due balance of \$60,692.00, while the
8 second statement, referencing Loan. No. 72888-00527-001 ADV,
9 dated December 15, 2003, reflects a principal balance due of
10 \$328,726.76 and a past-due balance of \$462,826.85. The original
11 statements were introduced into evidence, together with the
12 mailing envelopes and testimony suggesting that the two separate
13 loan transactions were both secured under the First Deed of
14 Trust. However, the evidence did not support including the
15 advance sum in the award to Dumas. Dumas did not prevail on its
16 theory that the advance should be added to the amounts secured by
17 First Deed of Trust.

18 Absent evidence of a Rule 68 offer prior to trial or a
19 stipulation that the amount actually recovered was never in
20 dispute, Dumas did obtain a substantial judgment in its favor.
21 Dumas had the burden of proof to show the amount due under the
22 lien and, at least in part, satisfied that burden. "[P]laintiffs

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24 provides for attorney's fees expressly includes such fees as
25 "costs." Here, the applicable statute, 26 U.S.C. 6323(e) does
26 not do so, instead providing that the priority of an antecedent
27 lien shall extend to "the reasonable expenses, including
28 reasonable compensation for attorneys, actually incurred in
collecting or enforcing the obligation secured...." §
6323(e) (3).

1 may be considered 'prevailing parties' for attorneys fees
2 purposes if they succeed on any significant issue in litigation
3 which achieves some of the benefit the parties sought in bringing
4 suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Dumas is
5 a prevailing party.

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7 C. Adjustment of Fee Award to Reflect Partial Success.

8 The district court has discretion to reduce the amount of a
9 fee award to reflect the partial success of the party requesting
10 fees. See *LeMaire v. Maass*, 12 F.3d 1444, 1461 (9th Cir. 1993)
11 (in a section 1988 action, district court may determine extent to
12 which a plaintiff prevailed and adjust fee accordingly without
13 regard to any precise formula). *Nat'l Equip. Rental Ltd. v.*
14 *United States*, 1978 WL 4590, *4 (C.D. Cal., Sept. 13 1978) is the
15 only case, an unpublished decision, that discusses adjustment of
16 fee awards to reflect partial success in the context of 26 U.S.C.
17 § 6323. In that case, a creditor prevailed as to approximately
18 two-thirds of its lien, and the district court awarded the
19 creditor only two-thirds of its requested fees. *Id.*

20 Here, the United States argues it would not be reasonable to
21 award Dumas even one-half of its fees and costs request because,
22 "[a]lthough it prevailed on approximately half of its lien claim,
23 the documented portion of the lien was never opposed by the
24 United States and it was fully litigated before Dumas ever
25 obtained an interest or became a party." Doc. 274 at 6. As
26 discussed above, this is not an entirely accurate description of
27 Dumas' burden at trial. Absent evidence of a stipulation as to
28 the amount actually awarded, Dumas bore the burden of proving the

1 amount due under the lien.

2 A large portion of the evidence, roughly sixty (60) percent,
3 presented by Dumas during the bench trial concerned theories upon
4 which it did not prevail. This is evidenced by, among other
5 things, the exhibits admitted into evidence, most of which
6 concerned Dumas' attempt to prove up its loan advance theory.
7 See Doc. 261 at 2-3. A review of counsel's billing records also
8 reveals an emphasis during trial preparation on discussions with
9 the expert witness, who testified almost exclusively as to
10 theories upon which Dumas was unsuccessful. See Doc. 270.
11 Accordingly, it is appropriate to award Dumas 40% of its
12 attorney's fees request based on limited success. The final
13 Lodestar calculation will be adjusted accordingly.

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15 D. Lodestar Calculation.

16 The basic fee, or "lodestar," is calculated by multiplying
17 the number of hours reasonably expended by a reasonable hourly
18 rate. *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 982
19 (9th Cir. 2008). The prevailing party has the burden of
20 documenting the hours expended and submitting evidence in support
21 of the hours worked. *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98
22 (9th Cir. 1992). "It is an abuse of discretion for the court to
23 award fees for hours that are not properly documented." *Stewart*
24 *v. Gates*, 987 F.2d 1450, 1453 (9th Cir. 1993). Hours that are
25 "excessive, redundant, or otherwise unnecessary" are to be
26 excluded from the fee request. *Id.* at 1452. The reasonable
27 hourly rate typically is based on "prevailing market rate[s] in
28 the community" for similar work. *Jordan v. Multnomah County*, 815

1 F.2d 1258, 1262 (9th Cir. 1987).

2 The Declaration of Frank T. Zumwalt, of The Zumwalt Law
3 Firm, APC, of Modesto California, explains that he spent a total
4 of 228 hours on this litigation, for which he charged Dumas
5 \$300.00 per hour. Doc. 270. He was assisted by Mr. John J.
6 Hollenback, who spent 18.7 hours on the case, for which he
7 charged his normal hourly rate of \$325.00. In addition,
8 paralegals at the Zumwalt Firm spent 50 hours on this case, for
9 which Dumas was charged \$65.00 per hour. The total fee request,
10 based on the time spent and hourly rates, is \$62,727.50.

11 The hourly rates charged by Dumas' attorneys are reasonable
12 and well within prevailing hourly rates for attorneys before the
13 court in the field of debt collection and real estate security
14 transactions. See Doc. 371, Decl. of M. Jensen.

15 The time expended in representing Dumas' interest in this
16 case, approximately 250 hours over 2 years of litigation,
17 including a one-day bench trial, after adjustment for Dumas'
18 partial success, were reasonably expended to protect its lien.
19 "A strong presumption exists that the lodestar figure represents
20 a reasonable fee." *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119
21 n.4 (9th Cir. 2000).

22

23 E. Costs Bill.

24 The district court has also reviewed the Costs Bill, which
25 requests a total of \$14,549.00, \$13,851.00 of which is expert
26 witness fees due Richard Goldstein, who testified at length at
27 trial about the Advance Loan. Doc. 272. His opinions were not
28 adopted by the district court. Defendant did not prevail on the

1 theory advanced by Mr. Goldstein, whose testimony the court found
2 not to be helpful. The principles underlying Defendants'
3 calculation of interest and unpaid balance under the promissory
4 note were neither hard nor complex. Mr. Goldstein introduced
5 theories about fixing the unpaid balance that were legal
6 conclusions and not helpful to the court as the trier of fact.
7 Moreover, "[a]bsent express statutory authority for shifting
8 expert witness fees, reimbursement for such fees is limited by
9 [Title 28, United States Code] §§ 1821(b) and 1920(3)." Here,
10 the applicable fee statute, 26 U.S.C. § 6323, makes no specific
11 mention of expert witness fees. Expert witness fees are not
12 recoverable. Accordingly, the only costs taxable for Mr.
13 Goldstein's services is a \$40.00 per day fee, afforded witnesses
14 under 28 U.S.C. § 1821(b), for each day's attendance in court or
15 at a deposition. He attended one day of trial, entitling
16 Defendant to \$40.00 in witness fees.

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