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E-FILED - 8/25/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHAEL A. ZAMANI, an individual and
NANCY MILLER-WALLACE (Formerly
NANCY ZAMANI), an individual,

Plaintiffs,

v.

H. GENE CARNES, an individual,
PHILLIP CARNES, an individual,
JENNIFER CARNES, an individual,
KATHRYN SCHALLER, an individual, and
KEVIN SCHALLER, an individual,

Defendants.

Case No.: C-03-00852-RMW

ORDER AWARDING ATTORNEY'S FEES
AND COSTS

Defendants seek their attorney's fees in the amount of \$205,974.88 and costs not taxed by the Clerk from plaintiffs Michael Zamani and Nancy Miller-Wallace (formerly Nancy Zamani) for their defense of this action in which judgment was entered in defendants' favor on August 20, 2008. On September 3, 2008 defendants filed a Bill of Costs and a Motion for Attorney's Fees and Costs. The Clerk of the Court taxed costs in the amount of \$5,693.33 on November 11, 2008. Plaintiff Michael Zamani, it appears, had previously filed a Chapter 11 bankruptcy case on December 5, 2006 which stayed the immediate pursuit of attorney's fees and costs against him. On February 13, 2009 defendants obtained an Order from the bankruptcy court lifting the stay and expressly allowing defendants to "proceed to a final determination of their post-judgment Motion for Attorneys Fees and Costs." Order Granting Motion for Relief from Stay, Case No. 06-52509 MM in the United States Bankruptcy for the Northern District of California. On September 16, 2008 Michael Zamani

1 filed a notice of appeal from the August 20 judgment. That appeal was subsequently dismissed on
2 March 9, 2009 for failure to file and serve a Transcript Designation Order Form. This court
3 submitted the defendants' Motion for Attorney's Fees and Costs on the papers filed and issued a
4 tentative ruling on July 16, 2009 on that motion. The parties were given the opportunity to object to
5 the tentative order and respond to any objection filed by the other side. A timely objection was
6 received from defendants to a portion of the court's tentative ruling. No objection or response to
7 defendants' objection was filed by either plaintiff.

8 The court now rules that defendants are entitled to attorney's fees in the amount of
9 \$156,274.34 and costs including those taxed by the clerk for a total amount of \$18,528.46.

10 **I. Bases of Motion**

11 Defendants move for attorney's fees and costs on two bases: (1) they are the prevailing
12 parties in an action brought by plaintiffs pursuant to California Civil Code of Procedure section 724
13 and that section provides for attorney's to the prevailing party; and (2) they are entitled to attorney's
14 fees and costs incurred after April 11, 2005 since plaintiffs rejected the offer of settlement made by
15 defendants pursuant to California Civil Code of Procedure section 998 and failed to obtain a better
16 judgment. Neither plaintiff has filed any opposition to defendants' motion for fees and costs.

17 **II. Entitlement to Fees and Costs Under Cal. C.C.P. § 724**

18 On February 26, 2203 plaintiffs Michael Zamani and Nancy Miller-Wallace, formerly Nancy
19 Zamani (collectively "Zamani"), filed a complaint against H. Gene Carnes, Phillip Carnes, Jennifer
20 Carnes, Kathryn Schaller and Kevin Schaller (collectively "Carnes") entitled "Complaint for
21 Damages – Violation of CCP § 724.050 and 724.070 – Conditioning Acknowledgment of
22 Satisfaction on Performance of Act or Payment of Amount and Refusal to Provide Acknowledgment
23 of Satisfaction as Demanded. The essence of the complaint was that Carnes had violated the
24 provisions of California Code of Civil Procedure sections 724.050, 724.060 and 724.070 in their
25 refusal to acknowledge satisfaction of judgment upon proper tender of what was owed.

26 Code of Civil Procedure section 724.080 requires that "[i]n an action or proceeding
27 maintained pursuant to this chapter, the court shall award reasonable attorney's fees to the prevailing
28

1 party." Since Carnes were the prevailing parties, they are entitled to reasonable attorney's fees
2 pursuant to section 724.080.

3 **III. Entitlement to Attorney's Fees, Costs and Expert Witness Costs After Rejection of Offer**
4 **Made Pursuant to Cal. C.C.P. § 998**

5 The plaintiffs rejected the defendants' \$30,000 Offer of Settlement that was prepared and
6 presented in accordance with California Code of Civil Procedure section 998 on April 11, 2005. As
7 plaintiffs' case was eventually dismissed for failure to diligently prosecute, plaintiffs failed to obtain
8 a more favorable judgment. As a result, the defendants are entitled to their costs including, in the
9 court's discretion, expert witness fees incurred after April 11, 2005.

10 CCP § 998(c)(1) states:

11 If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more
12 favorable judgment or award, the plaintiff shall not recover his or her post offer costs
13 and shall pay the defendant's costs from the time of the offer. . . the court . . . , in its
14 discretion, may require the plaintiff to pay a reasonable sum to cover costs of the
15 services of expert witnesses, who are not regular employees of any party, actually
16 incurred and reasonably necessary in either, or both, preparation for trial . . . of the
17 case by the defendant.

18 Whether a cost item was reasonable necessary as contemplated by section 998 is a question
19 of fact to be decided by the trial judge. *See Jones v. Dumrichob*, 63 Cal. App.4 th 1258, 1266
20 (1998). Expert witness fees can be awarded. C.C.P. § 998. "Recoverable litigation costs. . . include
21 attorney fees, but only when the party entitled to costs has a legal basis, independent of the cost
22 statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of
23 attorney fees." *Ford Motor Credit Co. v. Hunsberger*, 163 Cal. App. 4th 1526, 1530 (2008). Here,
24 as discussed above, attorney's fees are recoverable under Code of Civil Procedure section 724.080.

25 Although California Code of Civil Procedure section 998 is a state rule, offer of judgment
26 rules appear to be "substantive" for *Erie* purposes. *See Jones v. United Space Appliance, LLC*, 494
27 F.3d 1306, 1309 (11th Cir. 2007); *see also MRO Communications, Inc. v. AT&T Co.*, 197 F.3d 1276,
28 1281 (9th Cir. 1999). Therefore, section 998 is applicable in this case.

29 **IV. Determination of Reasonable Fees and Costs**

30 California state law regarding attorney's fees applies because this court is exercising its
31 diversity jurisdiction. *Farmers Ins. Exch. v. Law Offices of Joe Sayas, Jr., Esq.*, 250 F.3d 1234,
32 1236 (9th Cir. 2001).

1 Federal district courts must calculate awards for attorneys' fees using the "lodestar"
2 method. The "lodestar" is calculated by multiplying the number of hours the
3 prevailing party reasonably expended on the litigation by a reasonable hourly rate.
4 Although in most cases, the lodestar figure is presumptively a reasonable fee award,
5 the district court may, if circumstances warrant, adjust the lodestar to account for
6 other factors which are not subsumed within it.

7 *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 (9th Cir. 2001) (citations omitted).¹ California
8 follows the same lodestar methodology. *See generally PLCM Group v. Drexler*, 22 Cal. 4th 1084
9 (2000).

10 The court has reviewed the declarations and detailed billing and cost records submitted
11 including defendants' objection to the tentative ruling. The hourly rates for counsel are reasonable
12 and within a reasonable range for those providing the type of litigation services involved here. The
13 hours billed for services rendered also are reasonable. Two other factors need to be considered in
14 this case. First, the hours incurred by defense counsel given the nature of the case appear to be on
15 the high side. Unfortunately, the case involved more work for defendants than should have been
16 necessary. Mr. Zamani represented himself during a significant portion of the litigation. His
17 aggressive attitude, distrust of defendants and lack of knowledge of legal procedures and
18 requirements resulted in unnecessary work for defendants. Although the defendants' counsel may
19 have over-reacted at times in trying to work with Mr. Zamani, there is no question but they had to
20 spend extra time with respect to discovery and other pretrial proceedings. Second, defendants have
21 included in their hours the time spent pursuing an unsuccessful interlocutory appeal of the court's
22 denial of their motion to strike the Zamanis' first two causes of action pursuant to California's
23 anti-SLAPP ("Strategic Lawsuit Against Public Participation") statute, Cal.Civ.Proc.Code § 425.16.
24 Although the interlocutory appeal concerned the facts at issue in the case, the work pursuing the
25 appeal of the denial of the SLAPP motion had limited relationship to the work defendants would
26 later have to undertake to get the case ready for trial, *i.e.* the work done in the appeal did not reduce

26 ¹Other potential factors in determining the reasonableness of the fees include: (1) the time and
27 labor required; (2) the novelty and difficulty of the issues involved; (3) the skill required to perform the
28 legal services properly; (4) the preclusion of other employment by an attorney due to acceptance of the
case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by
a client or the circumstances; (8) the amount in question and 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.
Gates v. Deukmejian, 987 F.2d 1392, 1402 (9th Cir. 1992) (citations omitted).

1 the workload for preparation and trial. The subject matter of the appeal also was unrelated to the
2 basis on which the case was dismissed. Therefore, the court does not find that the time related to
3 defendants' unsuccessful interlocutory appeal of the denial of the SLAPP motion should be included
4 in the time used in the lodestar calculation. *See Webb v. Sloan*, 330 F.3d 1158, 1169 (9th Cir. 2003)
5 (court *did* include time related to unsuccessful claim because it could not isolate the time spent on
6 the unsuccessful claim from the successful one). The defendants' fees related to the interlocutory
7 appeal can be effectively isolated because the appeal was filed December 27, 2004 and the judgment
8 affirming the denial was entered July 16, 2007. Progress on the underlying case itself was slowed
9 during the pendency of the appeal.

10 The defendants did not originally itemize their fees in a format that permitted a precise
11 estimate of what fees should be attributed to the appeal. In their objection to the tentative ruling
12 defendants' counsel has provided more information which enables the court to make a more accurate
13 estimate. The court now estimates, still giving plaintiffs the benefit of doubt as to whether time is
14 properly allocated to the appeal, that approximately \$14,500 of the fees charged by Rowe & Hales
15 and \$35,500 by the Sullivan Law Offices are attributable to the appeal. Therefore, the court awards
16 fees in the amount of \$156,274.34 as reasonable attorney's fees.

17 Costs including those taxed by the court are awarded in the amount of \$18,528.46. This
18 includes the fees of expert Morger since he apparently rendered his services after the section 998
19 offer was rejected but does not include Waagstaffe's fees since his services were rendered prior to
20 the offer of compromise. The court also has not included LexisNexis fees as those should be
21 included as overhead built into the fees for services.

22 **V. Order**

23 Defendants are awarded fees in the amount of \$156,274.34 and costs of \$18,528.46.

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25 DATED: August 21, 2009

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RONALD M. WHYTE
United States District Judge

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Copy of Order E-Filed to Counsel of Record:

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