

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

LEGACY MORTGAGE, INC., a)	CIV. NO. 11-00767 JMS-KSC
Hawaii corporation,)	
)	ORDER ADOPTING IN PART AND
Plaintiff,)	MODIFYING IN PART FINDINGS
)	AND RECOMMENDATION
vs.)	REGARDING AWARD OF
)	ATTORNEYS' FEES
TITLE GUARANTY ESCROW)	
SERVICES, INC., a Hawaii)	
corporation,)	
)	
Defendant.)	
_____)	

**ORDER ADOPTING IN PART AND MODIFYING IN PART
FINDINGS AND RECOMMENDATION REGARDING
AWARD OF ATTORNEYS' FEES**

I. INTRODUCTION

On April 18, 2013, Plaintiff Legacy Mortgage, Inc. ("Plaintiff") filed its Objection, Doc. No. 46, to the Magistrate Judge's Findings and Recommendation Regarding Award of Attorneys' Fees ("F&R"), recommending that Defendant Title Guaranty Escrow Services, Inc. ("Defendant") be awarded attorneys' fees of \$6,525.00. Doc. No. 45, at 4. After careful consideration of the F&R, Objection, court record, and relevant legal authority, the F&R is ADOPTED in part and MODIFIED in part.

II. PROCEDURAL BACKGROUND

On January 4, 2013, Plaintiff filed a Motion to Stay this case pending the disposition of separate, but related, actions against Defendant and others in state court. Doc. No. 19. On February 4, 2013, Plaintiff filed a Motion for Voluntary Dismissal Without Prejudice, Doc. No. 24, a Motion for Extension of Time and/or Continuation of Trial Date, Doc. No. 22, and a Motion to Advance Hearings on Motions. Doc. No. 26. The Magistrate Judge granted the Motion to Advance and set all three pending Motions for a February 20, 2013 hearing. Doc. No. 30. On February 15, 2013, Plaintiff filed a Motion for Protective Order. Doc. No. 34.

On March 12, 2013, the Magistrate Judge issued a Findings and Recommendation to Dismiss Action (“F&R to Dismiss”), denying the Motion for Protective Order and imposing the following conditions: (1) that Defendant be awarded reasonable attorneys’ fees; and (2) that Plaintiff serve a written response to Defendant’s request for production of documents. Doc. No. 38, F&R to Dismiss at 2. On April 2, 2013, this court adopted the F&R to Dismiss. Doc. No. 43.

Meanwhile, on March 14, 2013, Defendant filed a Declaration of Leta H. Price Regarding Attorneys’ Fees, in which it sought \$6,625.00 in attorneys’ fees. Doc. No. 40. On March 18, 2013, Plaintiff filed its Declaration of James J.

Stone Re Request for Attorneys' Fees, Doc. No. 41, and on March 26, 2013, Defendant filed a Reply. Doc. No. 42. On April 4, 2013, the Magistrate Judge issued his F&R awarding attorneys' fees of \$6,525.00, Doc. No. 45, to which Plaintiff filed its Objection on April 18, 2013, Doc. No. 46. Pursuant to Local Rules 7.2(d) and 74.2, the court finds this matter suitable for disposition without a hearing.

III. STANDARD OF REVIEW

When a party objects to a magistrate judge's findings or recommendations, the district court must review de novo those portions to which the objections are made and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also United States v. Raddatz*, 447 U.S. 667, 673 (1980); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) ("[T]he district judge must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise.").

Under a de novo standard, this court reviews "the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered." *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006); *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988). The district court need not

hold a de novo hearing; however, it is the court's obligation to arrive at its own independent conclusion about those portions of the magistrate judge's findings or recommendation to which a party objects. *United States v. Remsing*, 874 F.2d 614, 616 (9th Cir. 1989).

IV. ANALYSIS

Plaintiff asserts the following objections: (1) Defendant is not entitled to an award of attorneys' fees because it is not a prevailing party; (2) the Magistrate Judge erred by recommending fees for work performed after Plaintiff filed its Motion to Dismiss; (3) the Magistrate Judge erred by recommending fees for work that can be used in the state court actions; and (4) fees were recommended for 1.2 hours that should be deemed clerical. The court will address these objections in turn.

A. Defendant Is Not a Prevailing Party

District courts have broad discretion to impose an award of attorneys' fees as a condition for dismissing an action without prejudice. *See* Fed. R. Civ. P. 41(a)(2) (providing that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper"); *see also Smith v. Lenches*, 263 F.3d 972, 978 (9th Cir. 2001) (reviewing district court's decision regarding an award of attorneys' fees and costs relating to federal law suit

voluntarily dismissed for abuse of discretion); *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996) (remanding for determination whether fees and costs should be imposed as a condition of dismissal without prejudice, and noting that pursuant to Rule 41(a)(2) the court may impose “any terms and conditions [it] deems proper” when granting voluntary dismissal). Because the award of attorneys’ fees in an order dismissing without prejudice is discretionary and not based upon legal authority reserving such awards for prevailing parties, Plaintiff’s objection is without merit.

B. Fees for Work Done after Motion to Dismiss Was Filed

Plaintiff contends that Ninth Circuit precedent precludes an award of attorneys’ fees for work done after a Motion to Dismiss is filed and therefore, Defendant should not have received attorneys’ fees for work done after February 4, 2013. Plaintiff is mistaken¹ and his reliance on *Westlands* is not persuasive. Rather than support his contention, *Westlands* encourages the use of discretion in determining whether an award of fees should include work that may not have been necessary prior to dismissal. *Westlands*, 100 F.3d at 98 (suggesting on remand to the district court that it determine whether a denial of fees would be appropriate for

¹ Plaintiff primarily relies on a 2004 unpublished decision from the Ninth Circuit Court of Appeals, which is neither precedential nor citable, *see* 9th Cir. R. 36-3.

work on defendants' summary judgment motion, filed several weeks after plaintiff's motion for voluntary dismissal).

Ninth Circuit precedent does not preclude, but rather, encourages the court to use discretion based on facts specific to each case when determining both whether and to what extent to award attorneys' fees. Here, upon de novo review, the court concludes that an award is appropriate where Defendant incurred fees responding to Plaintiff's motions and not in connection with any later-filed dispositive motion of its own.

C. Fees for Work That Cannot Be Used in Future Litigation

The F&R to Dismiss specified that attorneys' fees would only be awarded "for the work undertaken in this case that cannot be used in future litigation[.]" Doc. No. 38, F&R to Dismiss ¶ 2. Plaintiff contends that because the claims in this action and the state court action are the same, all work performed in connection with this case can be used in future litigation. The court disagrees.

Defendant's counsel represented that "[a]ll services [for which fees are requested] cannot be used in the state litigation. For example, legal research on Lanham Act, state trademark infringement, and [Plaintiff's] other claims as well as services relating to the production of documents have been excluded." Doc. No. 40, Decl. of Leta H. Price ¶ 5. After careful review of counsel's declaration, the

descriptions of services rendered, and the court docket, this court agrees with the

Magistrate Judge that:

the hours expended were on tasks that cannot be used in the state court litigation or future litigation. No litigation on the merits occurred in this case that would overlap with the state court action. Rather, the time expended by Ms. Price in this case related to the non-substantive motions filed by Plaintiff.

Doc. No. 45, F&R at 3.

D. Clerical Work

Finally, Plaintiff contends that an additional 1.2 hours should be deducted as clerical. Generally, “clerical or ministerial costs are part of an attorneys’ overhead and are reflected in the charged hourly rate.” *Jeremiah B. v. Dep’t of Educ.*, 2010 WL 346454, at *5 (D. Haw. Jan. 29, 2010) (citing *Sheffer v. Experian Info. Solutions, Inc.*, 290 F. Supp. 2d 538, 549 (E.D. Pa. 2003)). Tasks deemed clerical and not compensable in this district have included:

reviewing Court-generated notices; scheduling dates and deadlines; calendaring dates and deadlines; notifying a client of dates and deadlines; preparing documents for filing with the Court; filing documents with the Court; informing a client that a document has been filed; personally delivering documents; bates stamping and other labeling of documents; maintaining and pulling files; copying, printing, and scanning documents; receiving, downloading, and emailing documents; and communicating with Court staff.

Haw. Motorsports Inv., Inc. v. Clayton Grp. Servs., 2010 WL 4974867, at *5 (D. Haw. Dec. 1, 2010), *adopted by Haw. Motorsports Inv., Inc. v. Clayton Grp. Servs.*, 2010 WL 5395669 (D. Haw. Dec. 22, 2010); *see also, e.g., Yamada v. Weaver*, 2012 WL 6019363, at *10 (D. Haw. Aug. 30, 2012), *adopted in pertinent part by Yamada v. Weaver*, 2012 WL 6019121 (D. Haw. Nov 30, 2012) (deeming clerical work completed on table of authorities).

Plaintiff contends that the following entries, not already deducted by the Magistrate Judge, are clerical:

1.	3/12/2013	Review of USDC Memo	0.1 hrs
2.	7/2/2012	Review USDC email	0.1 hrs
3.	8/23/2012	Review USDC letter and Notice of Election form	0.1 hrs
4.	10/19/2012	Review Notice of Case Reassignment	0.1 hrs
5.	3/8/2013	Review USDC email notification	0.1 hrs
6.	3/19/2012	Review Rule 16 Scheduling Conference Minutes	0.2 hrs
7.	3/19/2012	Calendar discovery and trial dates	0.2 hrs
8.	3/19/2012	Attend Rule 16 Scheduling Conf.	0.3 hrs

This court concurs that entries numbered 1, 2, 4, 5, and 7 are clerical; but entries numbered 3, 6, and 8 are not clerical. Thus, a total of 0.6 additional

hours, or \$150.00, will be deducted as clerical.

V. CONCLUSION

As set forth above, the Court ADOPTS in part and MODIFIES in part the F&R for a total award of attorneys' fees of \$6,375.00.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 10, 2013.



/s/ J. Michael Seabright

J. Michael Seabright
United States District Judge

Legacy Mortg., Inc. v. Title Guar. Escrow Servs., Inc., Civ. No. 11-00767 JMS-KSC, Order Adopting in Part and Modifying in Part Findings and Recommendation Regarding Award of Attorneys' Fees