UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DOUGLAS NORWOOD, III; LEEANN NORWOOD; and D.N., Minor Son of Plaintiffs NORWOOD,

Plaintiffs,

vs. **3:12-cv-1025 (MAD/DEP)**

MICHAEL SALVATORE, in his capacity as TOWN OF HANCOCK CODE ENFORCEMENT OFFICER; and TOWN OF HANCOCK,

Defendants.

APPEARANCES: **OF COUNSEL:**

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Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On June 22, 2012, Plaintiffs commenced this action pursuant to 42 U.S.C. § 1983. Plaintiffs allege that Defendant Town of Hancock, New York, and its code enforcement officer, Defendant Michael Salvatore, violated Plaintiffs' rights under the Due Process and Equal Protection Clauses in relation to Plaintiffs' efforts to secure a building permit for their property. After the completion of a trial, the jury found in Plaintiffs' favor and awarded compensatory damages in the amount of $107,000.00. *See* Dkt. No. 81. Currently pending before the Court are

Plaintiffs' motion for attorney's fees and Defendants' post-trial motion for judgment as a matter of law. *See* Dkt. Nos. 89, 92.

II. BACKGROUND

A. Procedural History

On June 22, 2012, Plaintiffs Douglas, LeeAnn, and Devon Norwood (the "Norwoods" or "Plaintiffs") and Paul and Lena Orlowski (the "Orlowski Plaintiffs") filed their initial complaint, which alleged violations of each Plaintiffs' substantive due process and equal protection rights, requested declaratory relief as to the Norwood Plaintiffs, and asserted a malicious prosecution claim as to the Orlowski Plaintiffs. *See* Dkt. No. 1. On April 10, 2013, this Court granted Defendants' Rule 12(b)(5) motion to dismiss for insufficient service as to Defendant Salvatore in his personal capacity and denied the motion as to Defendant Town of Hancock and Defendant Salvatore in his official capacity. Dkt. No. 15 at 5-9. This Court also dismissed the Norwood Plaintiffs' equal protection claim and request for declaratory relief and the Orlowski Plaintiffs' substantive due process, equal protection, and malicious prosecution claims pursuant to Rule 12(b)(6). *Id.* at 9-27. The April 10 order further granted Plaintiffs leave to amend their complaint as to their equal protection claims, denied Defendants' motion to dismiss on qualified immunity grounds, and did not dismiss the Norwood Plaintiffs' substantive due process claim. *Id.* at 22-23, 27-29.

On May 6, 2013, Plaintiffs filed an amended complaint expanding the allegations regarding their equal protection claims. *See* Dkt. Nos. 19, 19-1. On January 17, 2014, the Court dismissed the Norwood Plaintiffs' equal protection claims and the Orlowski Plaintiffs' selective enforcement equal protection claim. *See* Dkt. No. 29. The Court denied Defendants' motion to dismiss as to the Orlowski Plaintiffs' "class of one" equal protection claim. *Id.* at 21-22. After

the Court's January 17, 2014 Order, the only causes of action remaining were the Norwood Plaintiffs' substantive due process claim and the Orlowski Plaintiffs' "class of one" equal protection claim. *See id.* at 22.

On January 31, 2014, Defendants filed their answer to Plaintiffs' amended complaint. Dkt. No. 30. After discovery, Defendants moved for summary judgment on June 30, 2014. Dkt. No. 42. On February 13, 2015, the Court granted Defendants' motion for summary judgment as to the Orlowski Plaintiffs' equal protection claim. Dkt. No. 52. Following this order, the Orlowski Plaintiffs were terminated from the action and the Norwood Plainitffs' substantive due process claim was the only claim that remained for trial. *Id.* at 23 n.12.

This matter proceeded to trial on June 1, 2015. At the close of Plaintiffs' case, Defendants moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. *See* Dkt. Nos. 94-96, Trial Transcripts ("T."), at 192. The motion asserted that Plaintiffs failed to show both that Defendants acted in a manner that was outrageous and shocking to the conscience and also that Defendant Salvatore acted pursuant to a town policy or custom. T. at 192. Finding that Plaintiffs had presented certain evidence to establish these elements, the Court reserved its decision on Defendants' motion. T. at 220. The jury returned a verdict in Plaintiffs' favor, awarding $107,000.00 in compensatory damages. *See* Dkt. No. 79.

B. Trial Testimony[1]

1. Douglas Norwood

Mr. Norwood testified that he generally enjoyed living in East Branch and the community

[1] The record below frames the trial testimony in the light most favorable to Plaintiffs and disregards "'all evidence favorable to [defendants] that the jury was not required to believe.'" *Toporoff Eng'rs, P.C. v. Fireman's Fund Ins. Co.*, 371 F.3d 105, 108 (2d Cir. 2004) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 113, 151 (2000)).

around him. T. at 60-62. He lived in a home with his wife and four children, which burned down in May of 2008. T. at 62. The house was covered for approximately $90,000 in insurance, which the Norwoods received from the insurance company six to eight months after the fire. T. at 63, 64. Mr. Norwood first spoke to Mr. Salvatore at his office several months after cleaning up the debris from their burned house. T. at 67. At this meeting, Mr. Norwood presented Mr. Salvatore with a building permit application with plans to build a modular home on a concrete slab. T. at 69. Mr. Salvatore said that Plaintiffs could not build the modular house on the ground, but would have to build it elevated to the Federal Emergency Management Agency ("FEMA") elevation specs since the building site was located in a designated floodplain. T. at 69. Mr. Salvatore indicated that the Norwoods would need professional plans from an engineer to meet the FEMA requirements and did not accept the building permit application for the modular home. T. at 70.

At a town meeting discussing rebuilding the Norwoods' home, Mr. Salvatore indicated that "he didn't know if he would issue a permit at all" even if the Norwoods could build to floodplain specs. T. at 73-74. However, Mr. Norwood submitted a new application with the required engineer certification and Mr. Salvatore accepted the application, saying that "everything was in order and looked fine." T. at 78. The application states that the amount enclosed is $261.00, which was not written in Mr. Norwood's handwriting. T. at 78-79; Dkt. No. 89-2. Mr. Norwood testified that he paid this amount in cash to Mr. Salvatore. T. at 78. Mr. Salvatore accepted this application and gave a second copy of the construction plans back to Mr. Norwood, which he understood to mean that he would be issued a building permit. T. at 79. After accepting the application, Mr. Salvatore told Mr. Norwood that he "could go ahead and start the footings." T. at 79-80. The Norwoods began construction on their new home in mid-spring of 2009. T. at 81.

The first work that Mr. Norwood did on the house was to put the footings in. T. at 81. After this, Mr. Salvatore came to the building site to conduct a first inspection. T. at 81. After ten days, Mr. Salvatore came back for a second inspection to make sure the cement was poured correctly and that the rebar was set in the correct place. T. at 82-83. Mr. Salvatore "said everything looked fine" and did not tell Mr. Norwood to stop construction on his home. T. at 83. After approximately another week, Mr. Salvatore conducted a third inspection of the concrete Sonotubes and, once again, told Mr. Norwood that "everything was up to code and looked good." T. at 84-85. Up to this point, Mr. Norwood had spent approximately $22,000 to $23,000 on rebuilding the house. T. at 84.

After the third inspection, Mr. Norwood put in girders and floor joists, which cost approximately $3,000 to $5,000. T. at 86. After this, Mr. Salvatore came back to the house and told Mr. Norwood to stop working because he did not have his building permit attached to the side of the house, and that he should come to Mr. Salvatore's office on Monday to resolve the issue. T. at 87. Mr. Norwood classified this as a "verbal stop work order." T. at 87. Mr. Norwood spent approximately $30,000 on the process of rebuilding his house before he was told to stop the construction. T. at 93.

The following Monday at the meeting, Mr. Salvatore told Mr. Norwood that "he didn't think that . . . the town was going to issue [Plaintiffs] a permit at that time." T. at 89. Mr. Salvatore did not mention anything about the payment of the application fee at this meeting. T. at 90. Rather, Mr. Salvatore said "I don't think I'd like you to build there anyway because if anything happened to you or your family and your home, I would feel responsible." T. at 89. Mr. Norwood was upset after hearing this and left without any further conversation with Mr. Salvatore. T. at 89. Mr. Norwood never received a written stop work order and never followed

up with the town to see if he could get his permit after this meeting. T. at 97, 98. Eventually, Plaintiffs sold their property for $1,000. T. at 93. Mr. Norwood did not know what his property would have been worth if he had completed the construction on his home. T. at 106.

Immediately after the fire destroyed their house, Mr. and Mrs. Norwood moved with their two youngest children to Mrs. Norwood's mother's home, while the other two children moved in with their uncle across the street. T. at 63. After realizing that they would not be able to complete their home, the whole family moved in with Mrs. Norwood's father. T. at 91. The family proceeded to move six times in the next seven years. T. at 91.

Mr. Norwood testified that, while the denial of the building permit did not immediately affect his relationship with his wife, they are currently separated, with Mrs. Norwood and the two youngest children living approximately 45 minutes away. T. at 92, 94. Mr. Norwood testified that felt mad and upset when Mr. Salvatore first told him that he would not be able to continue constructing his home, saying that "it sucks" to have spent so much time and money to no avail. T. at 89, 93, 95. Mr. Norwood testified that he was depressed after his house burned down and their family was separated. T. at 92. However, on cross examination he stated the following:

> Q You personally are not claiming medical damages as part of this case; is that right?
> A Yes.
> Q And you personally are not claiming emotional distress damages as part of this case; is that right? . . .
> A Yes, that's right.

T. at 102.

2. Mrs. LeeAnn Norwood

Mrs. Norwood testified that, after her husband had the last meeting with Mr. Salvatore, he came home and told her that "Mr. Salvatore said we could not continue to build." T. at 131. Mrs.

Norwood considered this to be a final decision denying their building permit. T. at 133. She testified that she and her husband were both "devastated" when Mr. Salvatore told him to stop building. T. at 132.

Mrs. Norwood testified that her performance at work suffered after they were denied the building permit, stating that she "became distant, withdrawn, [and] couldn't concentrate." T. at 136. She told the jury that "it was hard for [her] to get through the day without crying." T. at 136. She was prescribed Effexor by her primary care physician to treat her depression, and had to be hospitalized overnight on one occasion because she overdosed on this medication. T. at 136-37. Mrs. Norwood stated that her depression affected her marriage because she was distant, causing Mr. Norwood to become distant. T. at 137. She stated that the burning of their home and Mr. Norwood's disability contributed to her depression and recognized that not all of their problems were caused by Mr. Salvatore's actions. T. at 142. However, the denial of the building permit was "one of the main stressors" in her life. T. at 144.

3. Devon Norwood

Devon Norwood testified that his parents were "both very depressed" when their building permit was denied. T. at 152. Specifically, his mother "would lay in bed and cry and sleep a lot more." T. at 152. Devon "didn't like" moving after they could not build their home and felt sad that he could not see his siblings as much. T. at 153, 154.

4. Michael Salvatore

Mr. Salvatore testified that his job as code enforcement officer is to enforce the Town of Hancock local building codes, local floodplain laws, and the State of New York building codes. T. at 222-23. He recognized that the town law states that he is authorized to collect permit fees.

T. at 157. Despite this, he testified that the "town's procedure has never been to have the code enforcement officer collect the fees." T. at 157.

Mr. Salvatore rejected Mr. Norwood's first building permit application for a modular home and gave the application back to Mr. Norwood. T. at 167. The second building permit application contained updated plans and also a floodplain development permit application, which contained a notation indicating a permit fee of $35. T. at 170. Mr. Salvatore accepted and filed the building permit and floodplain development permit applications when Mr. Norwood submitted them. T. at 172. All of the applications were properly filed. T. at 173. However, Mr. Salvatore testified that he did not issue the Norwoods' building permit because they failed to pay the required application fee. T. 235-36. Nonetheless, Mr. Salvatore permitted the Norwoods to do substantial work on their house prior to receiving a building permit because he "assumed with discussions with them that they were going to pay [him] for the permit once they received their insurance money." T. at 237. Mr. Salvatore testified in a conflicting manner concerning how he would handle permit applications that did not contain the required fee. First, he stated that he would "hand back the applications and refuse to accept them" if they did not contain the fees. T. at 238. Then, he stated that applications would often come in without fees and the Town would only receive the fees after the permit had been approved. T. at 239.

After receiving the applications, Mr. Salvatore specifically allowed the Norwoods to begin construction on their home. T. at 173. Mr. Salvatore inspected the building on three or more occasions and never objected to the way the work was being done, noting that there was never any work that the Norwoods did that failed to comply with the town law. T. at 173, 182. Mr. Salvatore knew that the ongoing construction was costing the Norwoods thousands of dollars. T. at 174. It was a common occurrence for Mr. Salvatore to allow applicants to begin construction

prior to being granted a building permit. T. at 237-38. When asked on cross examination about this practice, the following exchange occurred:

> Q It's fair to say that because you stated it was a common practice to allow people to perform work before the building permit was issued . . . if it was common, it was part of the town's policy. Correct?
> A Certain circumstances, correct.
> Q Right. That there was leeway?
> A Yeah.
> Q Even though the town law says you can't do it, right?
> A Yeah.
> Q And even though the town law doesn't say that and doesn't allow it, that leeway or discretion lies with you. Correct?
> A Correct.
>
> * * *
>
> Q In fact, you report to the town board every month. You just said it yourself. Right?
> A Yes, I do.
> Q You go to those town meetings. Correct?
> A Correct.
> Q And so the town board is aware of this policy. Correct?
> A Correct.

T. at 259-60.

Mr. Salvatore acknowledged that at a September 9, 2008 Town Board meeting, he said that he would likely still have to deny Plaintiffs' permit even if it met the floodplain regulations. T. at 243-44. However, this was because of more stringent New York building laws, and did not suggest that "they would not be able to get a building permit if they complied with all the applicable floodplain requirements." T. at 244. Mr. Salvatore later clarified that there was no reason that he would deny a permit application if the applicant complied will all applicable laws and paid the appropriate fees. T. at 246.

5. Relevant Town Law Provisions

The evidence submitted at trial included the Town of Hancock "Local Law Providing for

the Administration and Enforcement of the New York State Uniform Fire Prevention and Building Code, Local Law #1 of 2007" (the "Town Law"). *See* Dkt. No. 89-3. Section 3 of that law establishes the powers and responsibilities of the code enforcement officer. *Id.* at 3. Specifically, section 3(a) states that "[t]he Code Enforcement Officer shall administer and enforce all the provisions of the Uniform Code, the Energy Code and this local law." *Id.* The relevant duties of the code enforcement officer are as follows:

> The Code Enforcement Officer shall have the following powers and duties:
>
> > (1) to receive, review, and approve or disapprove applications for Building Permits, . . . ;
> >
> > (2) upon approval of such applications, to issue Building Permits, . . . and to include in Building Permits . . . such terms and conditions as the Code Enforcement Officer may determine to be appropriate;
> >
> > * * *
> >
> > (8) to collect fees as set by the Town Board of this Town.

Id. at 3-4.

Section 4 pertaining to Building Permits provides as follows:

> (a) Building Permits Required. . . . a Building Permit shall be required for any work which must conform to the Uniform Code and/or the Energy Code . . . . No Person shall commence any work for which a Building Permit is required without first having obtained a Building Permit from the Code Enforcement Officer.
>
> * * *
>
> (e) Construction documents. . . . the return of a set of accepted construction documents to the applicant shall not be construed as authorization to commence work, nor as an indication that a Building Permit will be issued. Work shall not be commenced until and unless a Building Permit is issued.
>
> (f) Issuance of Building Permits. . . . The Code Enforcement Officer shall issue a Building Permit if the proposed work is in compliance with the applicable requirements of the Uniform Code and Energy Code.
>
> * * *
>
> (k) Fee. The fee specified in or determined in accordance with the

> provisions set forth in . . . this local law must be paid at the time of submission of an application for a Building Permit . . . .

Id. at 5-8.

Section 6 pertaining to stop work orders provides as follows:

> (a) Authority to issue. . . . The Code Enforcement Officer shall issue a Stop Work Order to halt:
>
> * * *
>
> (3) any work for which a Building Permit is required which is being performed without the required Building Permit . . .
>
> (b) Content of Stop Work Orders. Stop Work Orders shall (1) be in writing, (2) be dated and signed by the Code Enforcement Officer, (3) state the reason or reasons for issuance, and (4) if applicable, state the conditions which must be satisfied before work will be permitted to resume.

Id. at 9.

III. DISCUSSION

A. Attorney's Fees

Pursuant to § 1988, "[i]n any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). "Determining whether an award of attorney's fees is appropriate requires a two-step inquiry. First, the party must be a 'prevailing party' in order to recover. If [it] is, then the requested fee must also be reasonable." *Pino v. Locascio*, 101 F.3d 235, 237 (2d Cir. 1996) (internal citations omitted).

To award fees pursuant to § 1988, a party is considered a prevailing party if they "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar v. Hobby*, 506 U.S. 103, 109 (1992) (internal quotation marks omitted) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). "To qualify for attorney's

fees, there must be a 'judicially sanctioned change in the legal relationship of the parties.'" *Kirk v. N.Y. State Dep't of Educ.*, 644 F.3d 134, 137 (2d Cir. 2011) (quoting *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001)). "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111-12. Section 1988 "has been interpreted to create a strong preference in favor of the prevailing party's right to fee shifting," and therefore, a prevailing party "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Wilder v. Bernstein*, 965 F.2d 1196, 1201-02 (2d Cir. 1992) (quoting S. Rep. No. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912).

A party may recover fees under § 1988 even if it does not prevail on every claim pleaded in the complaint. *See Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 2214, 180 L. Ed. 2d 45 (2011). Generally, these types of cases fall in one of two categories; where the parties presented wholly unrelated claims, some prevailing and others not, and where the parties presented several interrelated claims, only some of which prevailed. *See Hensley*, 461 U.S. at 436. The court should not award compensation for time that can be clearly delineated as spent on unsuccessful claims. *See Fox*, 131 S. Ct. at 2214. If, however, a party prevails on only one of several interrelated claims, or an attorney represents several related parties and only a portion are successful, then the court may reduce the award to reflect a reasonable amount of time spent on the prevailing portions of the case. *See Hensley*, 461 U.S. at 436-37. When an attorney represents multiple parties and not all prevail, the court need not categorically reduce the award by the proportion of unsuccessful parties, but should exercise discretion to reduce the fee to reflect a reasonable amount of time spent on the prevailing party's case. *See Adorno v. Port Auth.*

of N.Y. & N.J., 685 F. Supp. 2d 507, 518 (S.D.N.Y. 2010) (reducing an award by 60% when only two of seven plaintiffs prevailed).

"[I]n awarding attorneys' fees, 'the most critical factor is the degree of success obtained.'" *Patterson v. Balsamico*, 440 F.3d 104, 123 (2d Cir. 2006) (quoting *Hensley*, 461 U.S. at 436) (other citation omitted). "If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley*, 461 U.S. at 436. In reducing the amount of attorney's fee awards, "[t]here is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.* at 436-37.

In this case, Defendants assert three main arguments for why Plaintiffs' fees should be reduced to "less than fifty percent of the amount requested"; any time spent on the Orlowski Plaintiffs' claims should not be compensated, the time spent on the Norwood Plaintiffs' claims that were dismissed prior to trial should be substantially reduced, and the trial preparation time should be reduced to reflect Plaintffs' unsuccessful arguments in response to Defendants' motions *in limine*. *See* Dkt. No. 102-1 at ¶¶ 16-19.

This case was commenced by two sets of plaintiffs, the Norwoods and the Orlowskis, asserting eight causes of action. *See* Dkt. Nos. 1, 19. As the Orlowski Plaintiffs did not prevail on any of their claims, let alone get to trial, Defendants argue that Plaintiffs' counsel should not be awarded any fees in connection to the work done for the unsuccessful Plaintiffs. *See* Dkt. No. 102-1 at ¶ 16. While the claims of each set of Plaintiffs were asserted against the same Defendants, Plaintiffs' counsel admits that Defendant Salvatore "engaged in separate and distinct courses of wrongful conduct" against each of the Plaintiffs. Dkt. No. 92-1 at ¶ 9. Thus, even

though the cases were brought together and the "allegations were all somewhat similar," the work performed on the Orlowski Plaintiffs' case was not inextricably linked to the Norwood Plaintiffs' case as to justify compensation for the full amount of time spent on their case. *Id.* at ¶ 6; *see also Adorno*, 685 F. Supp. 2d at 517 (noting that in a multi-plaintiff case, despite "some minor overlap," counsel should not be "compensated for the time spent prosecuting the unsuccessful plaintiffs' claims"). However, the work done on the Orlowski Plaintiffs' claims was not entirely irrelevant to the prevailing claims, as both sets of Plaintiffs disclosed the same non-party witnesses who were required to be deposed in this case. *See* Dkt. No. 104-1 at 2 n.1. Accordingly, a reduction, but not a complete elimination, from Plaintiffs' attorney's time is necessary to account for the non-prevailing parties.

Defendants assert that any fee award "should be substantially reduced to reflect the extent to which Plaintiffs' counsel's time in drafting complaints, conducting discovery, and opposing dispositive motions" was spent on the dismissed claims asserted by the Norwood Plaintiffs. Dkt. No. 102-1 at ¶ 17. The Norwood Plaintiffs' equal protection claims and request for declaratory relief were dismissed by this Court's granting of Defendants' motions to dismiss. *See* Dkt. Nos. 15, 29. As some of the Norwood Plaintiffs' claims presented wholly different arguments from those that succeeded at trial, such as attempting to prove the existence of a race-based zoning scheme, the Court finds that a reduction in the time spent responding to Defendants' dispositive motions is warranted. *See Hensley*, 461 U.S. at 440.

From January 1, 2011 through March 20, 2015, Plaintiffs' counsel spent a total of 79.4 hours on this case in the dispositive motion stage and prior to the Orlowski Plaintiffs' dismissal. *See* Dkt. No. 92-2 at 1-7. While certain time entries during this period clearly state that work was being performed for the Orlowski Plaintiffs or on one of the Norwood Plaintiffs' unsuccessful

claims, the mixed descriptions of the majority of the time entries does not allow for the Court to categorically exclude all the hours spent on unsuccessful claims. *See Patterson v. Balsamico*, 440 F.3d 104, 123-24 (2d Cir. 2006) (noting that a court must provide an explanation for any specific hours that it deems unreasonable). Thus, the Court finds that a 50% reduction to the time spent on the preliminary portion of this case is reasonable in light of the unfavorable outcome for the Orlowski Plaintiffs and the numerous other claims dismissed by Defendants' dispositive motions.

Plaintiffs' counsel spent approximately 4.4 hours drafting the opposition to Defendants' motions *in limine* and approximately 20 minutes addressing the same issues with the Court in a pretrial meeting. *See* Dkt. No. 92-2 at 8-9; Dkt. No. 72. Plaintiffs did not oppose every element of Defendants' motion *in limine*, *see* Dkt. No. 70 at 3, and only presented arguments on issues that counsel believed would support their remaining substantive due process claim, *see id.* at 4 (noting that "Defendant Salvatore's reason for denying Plaintiffs' permit application is crucial to Plaintiffs' claim"). During trial, Plaintiffs' counsel approached the Court seeking to have the Orlowski Plaintiffs testify as to their interactions with Defendant Salvatore. T. at 145-49. While ultimately unsuccessful in this request, counsel had a legitimate purpose behind his request, to show a repeated course of Defendant Salvatore allowing work to be done on a property without first granting a building permit, and the exchange lasted only eight minutes. *See id.*; Dkt. No. 72. The Court concludes that Plaintiffs' arguments on these evidentiary issues were not so unfounded as to constitute an unreasonable trial strategy and, thus, do not mandate a reduction to time spent at trial and on trial preparation. *See Crawford v. City of New London*, 3:11-CV-1371, 2015 WL 1125491, *7-8 (D. Conn. Mar. 12, 2015) (noting that time spent on unsuccessful evidentiary motions is compensable so long as it was part of "a reasonable litigation strategy" (citing *Gierlinger v. Gleason*, 160 F.3d 858, 880 (2d Cir. 1998)).

The Court finds that the 115.4 hours spent from April 1, 2015 through July 7, 2015 in trial and on trial preparation is reasonable in light of the issues raised in this case and the complexity of § 1983 litigation. However, the Court notes that, despite receiving a total judgment of $107,000.00, the Norwood Plaintiffs received only a fraction of the $750,000.00 sought by both sets of Plaintiffs in their complaint. *See* Dkt. No. 19. Further, neither set of Plaintiffs were awarded their building permits or certificates of occupancy as sought in their requests for declaratory relief. *See id.* Accordingly, the Court reduces the award for the amount of time spent during trial and in trial preparation by 10%. *See Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 152 (2d Cir. 2008) ("Both 'the quantity and quality of relief obtained,' as compared to what the plaintiff sought to achieve as evidenced in her complaint, are key factors in determining the degree of success achieved" (quoting *Carrol v. Blinken*, 105 F.3d 79, 81 (2d Cir. 1997)).

The rate of $250 per hour is reasonable for an attorney in the Northern District of New York. *See Scott v. Hand*, No. 07-CV-0221, 2010 WL 1507016, *2 (N.D.N.Y. Apr. 15, 2010). Further, travel time is compensated at half of the attorney's prevailing rate. *See id.* Accordingly, the Court awards Plaintiffs the following attorney's fees, adjusted as discussed above. *See* Dkt. No. 92-2.

Date Range	**Time (hours)**	**Hourly Rate**	**Percent Reduction**	**Amount Awarded**
1/1/2011 - 12/31/2011	18.6	$250	50%	$2,325.00
1/1/2012 - 12/31/2012	13.2	$250	50%	$1,650.00
1/1/2013 - 12/31/2013	10.9	$250	50%	$1,362.50
1/1/2014 - 6/30/2014	16.4	$250	50%	$2,050.00

7/1/2014 - 12/31/2014	15.3	$250	50%	$1,912.50
1/1/2015 - 3/31/2015	5	$250	50%	$625.00
4/1/2015 - 5/31/2015	72.1	$250	10%	$16,222.50
6/1/2015 - 7/7/2015	43.3	$250	10%	$9,742.50
Travel Time	9.1	$250	50%	$1,137.50
Total				**$37,027.50**

Plaintiffs' request for reimbursement of costs in the amount of $350 for filing fees, $80 for process server fees, and $431.85 for lodging during trial are all compensable under § 1988. *See O'Grady v. Mohawk Finishing Prods., Inc.*, No. 96-CV-1945, 1999 WL 30988, *8 (N.D.N.Y. Jan. 15, 1999) (lodging); *Spence v. Ellis*, No. CV 07-5249, 2012 WL 7660124, *8 (E.D.N.Y. Dec. 19, 2012), *adopted by* 2013 WL 867533 (Mar. 7, 2013) (process server and filing fees). Accordingly, the Court awards costs to Plaintiffs in the amount of **$861.85**.

B. Judgment as a Matter of Law

1. Standard of Review

A Rule 50 motion for judgment as a matter of law may only be granted where the evidence, viewed in the light most favorable to the nonmoving party, "'is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.'" *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038-39 (2d Cir. 1992) (quoting *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970)) (other citation omitted). A judgment will only be set aside if there was "such a complete absence of evidence supporting the verdict that the jury's

findings could only have been the result of sheer surmise and conjecture." *Dailey v. Societe Generale*, 108 F.3d 451, 455 (2d Cir. 1997) (quotation omitted). A district court may only consider issues in a renewed Rule 50 motion that were raised in a motion for directed verdict prior to judgment being decided in the case. *Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1155 (2d Cir. 1994).

During trial, Defendants moved for judgment as a matter of law at the close of Plaintiffs' case on two separate grounds: "(1) Plaintiffs failed to prove an outrageously arbitrary or 'conscience-shocking' deprivation of a property right; and (2) Plaintiffs failed to prove that Mr. Salvatore's actions were performed pursuant to a municipal policy or custom." Dkt. No. 89-1 at ¶ 5; T. at 192. Defendants' instant motion renews the same arguments that were raised at trial. *See* Dkt. No. 89-1 at ¶ 6.

a. Conscience-Shocking Deprivation of Property Right

In order to recover on a substantive due process claim, a plaintiff must demonstrate that (1) he was deprived of "a valid 'property interest' in a benefit that was entitled to constitutional protection at the time [he] was deprived of that benefit," and (2) that the defendants' actions in depriving him of that interest were "'so outrageously arbitrary as to be a gross abuse of governmental authority.'" *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 17 (2d Cir. 1999) (quoting *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999)) (other citation omitted); *see also Ferran v. Town of Nassau*, 471 F.3d 363, 369-70 (2d Cir. 2006) (holding that the plaintiff must establish that the government misconduct was "'arbitrary,' 'conscience-shocking,' or 'oppressive in the constitutional sense,' not merely 'incorrect or ill-advised'" (internal quotation marks and citation omitted)).

In the land use and zoning context, "federal courts should not become zoning boards of

appeal to review nonconstitutional land use determinations." *Brady v. Town of Colchester*, 863 F.2d 205, 215 (2d Cir. 1988) (quoting *Sullivan v. Town of Salem*, 805 F.2d 81, 81 (2d Cir. 1986)). Rather, a substantive due process claim only arises when the government acts "arbitrar[ily] or irrational[ly] . . . with no legitimate reason for its decision." *Ahmed v. Town of Oyster Bay*, 7 F. Supp. 3d 245, 259 (E.D.N.Y. 2014) (quoting *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 102 (2d Cir. 1992)) (other citations omitted); *see also Sullivan*, 805 F.2d at 81. There is no rigid standard for what constitutes a violation of an individual's substantive due process rights, and each case must be analyzed in its specific context to determine whether a government's action was "conscience shocking." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) ("[O]ur concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking").

In this case, there are two potential explanations that the jury could have considered for why Plaintiffs were not issued a building permit. First, Mr. Salvatore testified that the only reason Plaintiffs did not receive their building permit was because they did not pay the application fees. T. at 235-36. Second, Mr. Norwood testified that, when he was informed that the Town was not going to issue the building permit, Mr. Salvatore told him "I don't think I'd like you to build there anyway because if anything happened to you or your family and your home, I would feel responsible." T. at 89. Regardless of which reason the jury credited for the failure to issue Plaintiffs' building permit, neither provided a legitimate legal basis for Mr. Salvatore's actions.

Town Law § 4(f) states that "[t]he Code Enforcement Officer shall issue a Building Permit if the proposed work is in compliance with the applicable requirements" of the building codes, floodplain regulations, and permit application procedures. Dkt. No. 89-3 at 7. Defendant

Salvatore testified that Plaintiffs' application satisfied all building code and floodplain regulation requirements. T. at 172-73, 184. Giving credit to Mr. Norwood's testimony that he paid the application fee, as the Court must do on this motion, the Town Law did not grant Mr. Salvatore with any reason not to issue the building permit. While the lack of a legitimate legal basis for the failure to issue the permit is itself sufficient to constitute a "conscience shocking" governmental action, the specific circumstances of this case make it all the more shocking. Specifically, Defendant Salvatore personally inspected Plaintiffs' property and knew that they had invested substantial amounts of money into the reconstruction of their home. T. at 173-74. Despite knowledge of this substantial investment and receipt of Plaintiffs' completed permit application, Defendant Salvatore failed to issue a building permit notwithstanding the Town Law's clear mandate that he do so.

Defendants contend that Mr. Salvatore's actions could not have been a conscience shocking abuse of governmental authority since he never issued a written stop order or a written denial of Plaintiffs' building permit application. Dkt. No. 89-5 at 5-6. However, it is the failure to issue the building permit after Plaintiffs submitted a properly documented and paid for application, in spite of the Town Law's clear mandate requiring the issuance of such permit, that is the conscience shocking action. That Defendant Salvatore never actually issued a written denial of the building permit does not negate the fact that he consciously flouted the requirements of the Town Law while allowing Plaintiffs to expend thousands of dollars in construction costs in expectation of the Town Laws being enforced.

Accordingly, the Court finds that sufficient credible evidence supported the jury's finding that Defendant Salvatore's actions amounted to an "outrageously arbitrary or 'conscience-shocking' deprivation of [Plaintiffs'] property right." Dkt. No. 89-1 at ¶ 5.

b. Municipal Policy or Custom

When a governmental official is sued in his official capacity, "a governmental entity is liable under § 1983 only when the entity itself is a moving force behind the deprivation; thus, in an official-capacity suit the entity's policy or custom must have played a part in the violation of federal law." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (internal citations and quotation marks omitted). A municipal policy may be established by the single act giving rise to a plaintiff's claims if it was "committed by a city official 'responsible for establishing final policy with respect to the subject matter in question,' and . . . represent[ed] a deliberate and considered choice among competing alternatives." *Hall v. Town of Brighton*, No. 13-CV-6155, 2014 WL 340106, *5 (W.D.N.Y. Jan. 30, 2014) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986) (plurality opinion)). When a plaintiff attempts to prove municipal liability "by a city employee's single tortious decision or course of action, the inquiry focuses on whether the actions of the employee in question may be said to represent the conscious choices of the municipality itself." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 126 (2d Cir. 2004) (citing *Pembaur*, 475 U.S. at 481-82). Thus, the single unconstitutional act of an official with "final policymaking authority" can subject a municipality to liability under § 1983. *Pembaur*, 475 U.S. at 483.

Whether a municipal employee has "'final policymaking authority' is a question of state law" to be decided by the court.[2] *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (quoting *St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1998)). Such a

[2] While neither party raised the issue during trial or in their post trial motions, the Court notes that it should have made a finding as a matter of law as to whether Defendant Salvatore was a policymaker for the Town before the case was submitted to the jury. The Court finds that this error was harmless in light of the jury's findings and the Court's conclusion on this issue upon this post-trial review.

determination is made by "[r]eviewing the relevant legal materials, including state and local positive law, as well as "'custom or usage" having the force of law.'" *Id.* (quoting *Praprotnik*, 485 U.S. at 124 n.1). Importantly, "the official in question need not be a municipal policymaker for all purposes. Rather, with respect to the conduct challenged, he must be 'responsible under state law for making policy *in that area* of the [municipality's] business.'" *Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000) (quoting *Praprotnik*, 485 U.S. at 123) (other citations omitted). Further, the "official policy" standard "refers to formal rules or understandings – often but not always committed to writing – that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembauer*, 475 U.S. at 480-81. Thus, the actions of an officer who does not have explicit policymaking authority may, nonetheless, constitute "official policy" if his decisions are accepted as the binding and ordinary course of conduct by the authorized policymakers. *See Praprotnik*, 485 U.S. at 127 ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final").

New York Town Law § 261 grants town boards with the authority to create local laws that establish the mechanisms to enforce local and state building codes and to create and enforce zoning regulations. N.Y. TOWN LAW § 261. The Town of Hancock has established a Town Law that defines the requirements and procedures to regulate New York's uniform fire prevention and building codes. *See* Dkt. No. 89-3. This Town Law created Defendant Salvatore's position of the code enforcement officer. *See id.* at 3. Specifically, "[t]he Code Enforcement Officer shall administer and enforce all the provisions of the Uniform Code, the Energy Code and this local law." *Id.* Defendant Salvatore also testified that his responsibilities consisted solely of enforcing the local laws and New York state building laws. T. at 222-23. Thus, neither the State nor the

Town laws explicitly grant Defendant Salvatore the discretion or authority to design, implement, or alter any of the provisions or policies contained in either the local or state building laws. However, in this case, the inquiry into Defendant Salvatore's policymaking authority cannot end with the strict reading of these laws.

While the code enforcement officer has not been explicitly granted the authority to establish town policy, the evidence presented at trial evinces that the town board allowed Defendant Salvatore to deliberately disregard the written Town Law and effectively ratified his actions at town board meetings and by allowing his "unwritten rules" to be the standard of conduct in issuing building permits in Hancock. First, Town Law § 3(a)(8) states that the code enforcement officer shall "collect fees as set by the Town Board." Dkt. No. 89-3 at 4. However, Defendant Salvatore repeatedly testified that he did not collect fees for building permit applications and that the "Town's procedure has never been to have the code enforcement officer collect the fees." T. at 155, 157, 233, 264.

Second, § 4(k) of the Town Law states that the fee for building permit applications "must be paid at the time of submission of an application for a Building Permit." Dkt. No. 89-3 at 8. Despite this, Defendant Salvatore testified that he would regularly receive and accept permit applications that did not contain the required fees. T. at 239. In these instances, the applicants would only pay the fees once the permit had been approved. *Id.*

Third, Town Law § 6(a)(3) states that a written stop work order shall be issued to halt "any work for which a Building Permit is required which is being performed without the required Building Permit." Dkt. No. 89-3. After allowing Plaintiffs to commence their construction despite not having a building permit, and after inspecting their work on three separate occasions, Defendant Salvatore decided that it was time to stop the construction due to the lack of a permit.

Even with this decision, Defendant Salvatore did not follow the Town Law requiring the issuance of a written stop work order. Rather, he verbally told Mr. Norwood to stop doing the work, which Mr. Norwood classified as a "verbal stop work order." T. at 87. Defendant Salvatore never issued a written stop work order for the Norwoods' house. T. at 97, 239. Moreover, notwithstanding the verbal nature of Defendant Salvatore's stop work order, he likewise violated the Town Law requirement that such stop work orders shall "state the conditions which must be satisfied before work will be permitted to resume." Dkt. No. 89-3. According to Defendant Salvatore, the Norwoods were not issued a building permit because they had not paid the application fees. T. at 235-36. Yet, during the meeting at the Norwoods' house and the subsequent meeting in Mr. Salvatore's office, he never mentioned that Plaintiffs' failure to receive a building permit was because they had not paid their application fees. T. at 90.

Lastly, and most importantly in this case, Town Law § 4(a) provides that "[n]o Person shall commence any work for which a Building Permit is required without first having obtained a Building Permit from the Code Enforcement Officer." Dkt. No. 89-3 at 5. Further, § 4(e) states that "[w]ork shall not be commenced until and unless a Building Permit is issued." *Id.* at 7. Despite this clear mandate, Defendant Salvatore testified that it was a common practice for him to allow applicants to begin construction prior to being granted a building permit. T. at 237-38. Further, the Town Board, which is empowered with statutory authority to create official town policy, was aware of and complied with Defendant Salvatore's creation of his own means of handling building permit applications. When questioned about his role in creating these policies, Defendant Salvatore responded as follows:

> Q It's fair to say that because you stated it was a common practice to allow people to perform work before the building permit was issued . . . if it was common, it was part of the town's policy. Correct?

A Certain circumstances, correct.
Q Right. That there was leeway?
A Yeah.
Q Even though the town law says you can't do it, right?
A Yeah.
Q And even though the town law doesn't say that and doesn't allow it, that leeway or discretion lies with you. Correct?
A Correct.

* * *

Q In fact, you report to the town board every month. You just said it yourself. Right?
A Yes, I do.
Q You go to those town meetings. Correct?
A Correct.
Q And so the town board is aware of this policy. Correct?
A Correct.

T. at 259-60. In light of the numerous examples of Defendant Salvatore's actions that run contrary to the explicit requirements of the Town Law, coupled with the Town Board's awareness and acceptance of these actions, the Court finds that Defendant Salvatore is an official policymaker for the purpose of interpreting and enforcing the local building code procedures. *See Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000) (noting that an official can be a policymaker in one specific area). Upon the Court's determination that Defendant Salvatore is, as a matter of law, a policymaker for the Town of Hancock in regards to building code procedures, the next inquiry is whether his actions were the cause of Plaintiffs' constitutional depravation. *See id.* It was clearly established at trial that Defendant Salvatore was the individual who failed to issue Plaintiffs' building permit despite the Town Law's requirement that such permits shall be issued by the code enforcement officer for all properly submitted and paid for applications. T. at 78, 89-90, 172-73, 180, 184-85; Dkt. No. 89-3 at 7. Accordingly, sufficient evidence was produced at trial to support the jury's conclusion that Defendants' deprivation of Plaintiffs' constitutional rights was pursuant to a town policy or custom. Thus, Defendants' Rule 50 renewed motion for judgment as a matter of law is denied.

C. Rule 59 Motion for New Trial

"The standard for granting a new trial under Rule 59 is less strict than that for judgment as a matter of law under Rule 50(b), for 'a new trial motion may be granted even if there is substantial evidence to support the verdict.'" *Datskow v. Teledyne Cont'l Motors Aircraft Prods.*, 826 F. Supp. 677, 689 (W.D.N.Y. 1993) (quoting *Bevevino v. Saydjari*, 574 F.2d 676, 683 (2d Cir. 1978)). However, the district court must "abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result." *Bevenino*, 574 F.2d at 684. If a district court finds that damages are excessive or unsubstantiated, it may offer the plaintiff a choice of accepting a remittitur of the award or ordering a new trial solely on the issue of damages. *See Lore v. City of Syracuse*, 670 F.3d 127, 176-77 (2d Cir. 2012) ("[T]he trial judge enjoys 'discretion to grant a new trial . . . without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)'") (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 (1996)).

1. Emotional Distress

Defendants' assert two arguments for why Plaintiffs' emotional distress damages should be vacated: (1) Plaintiffs' failed to present sufficient corroborating evidence to substantiate emotional distress damages for each Plaintiff, and (2) that the emotional distress awards were "conscience shocking" in light of the lack of proof adduced at trial as to each Plaintiff's damages, specifically focusing on Mr. Norwood's statement that he was not seeking damages for emotional distress. *See* Dkt. No. 89-5 at 13-14.

a. Corroborating Testimony

Courts may award emotional distress damages for section 1983 violations. *See*

Patrolmen's Benevolent Ass'n of N.Y. v. City of New York, 310 F.3d 43, 55 (2d Cir. 2002) (citing *Miner v. City of Glenns Falls*, 999 F.2d 655, 662 (2d Cir. 1993)). "However, the mere fact that a constitutional deprivation has occurred does not justify the award of such damages; the plaintiff must establish that she suffered an actual injury caused by the deprivation." *Id.* (citing *Carey v. Piphus*, 435 U.S. 247, 263-64, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)). To carry this burden, the plaintiff must submit "competent evidence concerning the injury," *Carey*, 435 U.S. at 264 n.20, which must consist of more than the plaintiff's own subjective testimony, *see Annis v. Cty. of Westchester*, 136 F.3d 239, 249 (2d Cir. 1988). The additional evidence required to substantiate emotional distress may include the testimony of other witnesses, *see Miner*, 999 F.2d at 663, the objective circumstances of the violation itself, *see Waltz v. Town of Smithtown*, 46 F.3d 162, 170 (2d Cir. 1995), or the plaintiff's receipt of medical treatment for the emotional injury, *see Carreo v. N.Y.C. Hous. Auth.*, 890 F.2d 569, 581 (2d Cir. 1989).

Defendants rely on two Second Circuit cases for their assertion that Plaintiffs failed to substantiate their claims of emotional distress. *See* Dkt. No. 89-5 at 13; *see also Patrolmen's Benevelont Ass'n*, 310 F.3d at 55; *Annis*, 136 F.3d at 249. Each of these cases held that a plaintiff's own subjective testimony, standing alone, was "insufficient to sustain an award of emotional distress damages." *Patrolmen's Benevolent Ass'n*, 310 F.3d at 55. While Defendants acknowledge that each Plaintiff corroborated the others' testimony of emotional distress, they assert that the required corroborating testimony "should be from disinterested third parties, not from one plaintiff testifying about another plaintiff's emotional distress." Dkt. No. 113 at 8. The Court is not persuaded that either *Patrolmen's Benevolent Ass'n* or *Annis* stand for this proposition. Rather, as the Southern District explained,

> [d]istrict courts in this Circuit interpreting *Annis* have generally understood the Second Circuit's holding as not requiring a specific

> kind of support to justify emotional distress damages; but rather, have read it narrowly in the context of the Second Circuit's other precedents to hold that the holding in *Annis* is based on the particularly minimal evidence provided by the plaintiff in that case.

Dejesus v. Vill. of Pelham Manor, 282 F. Supp. 2d 162, 177-78 (S.D.N.Y. 2003) (collecting cases) (citations omitted).

The additional evidence required to substantiate a plaintiff's subjective assertion of their own emotional distress may include "(1) 'other evidence that such an injury occurred, such as testimony of witnesses to the plaintiff's distress,' and (2) 'objective circumstances of the violation itself.'" *Id.* at 177 (citing *Miner*, 999 F.2d at 663) (internal citations and quotations omitted). Further, the corroborating witness' testimony need not be from a disinterested witness. *See, e.g.*, *Fink v. City of New York*, 129 F. Supp. 2d 511, 531-32 (E.D.N.Y. 2001). In *Fink*, the Eastern District considered a similar question in a post trial motion seeking to vacate the jury's award of emotional distress damages. There, the plaintiff testified that the defendants' unconstitutional actions were the cause of his emotional distress. *Id.* Specifically, the plaintiff stated that the defendants' actions "upset" him and caused marital problems with his wife; that he became "bitter" with his employment; and that he "would be upset, have headaches, [and] get up in the middle of the night." *Id.* The plaintiff's assertions were corroborated by his wife's testimony that "[t]hese episodes of anger and sleeplessness would happen three to four times a week," and that he "started to experience problems at work [and] became short-tempered." *Id.* at 532. The court concluded that the plaintiff's claims of emotional distress were sufficiently corroborated by his wife's testimony to warrant recovery, but ultimately reduced the award from $300,000 to $175,000 after concluding that the relatively benign nature of the plaintiff's emotional distress did not warrant such an excessive award. *Id.* at 537-38. Thus, emotional distress damages can be corroborated by any witness, not solely in the form of medical evidence or from disinterested

third-parties. *See, e.g., Petramale v. Local No. 17 of Laborers' Int'l Union*, 847 F.2d 1009, 1011-12 (2d Cir. 1998) (corroborating testimony from the plaintiff's children); *Tanzini v. Marine Midland Bank*, 978 F. Supp 70, 78 (N.D.N.Y. 1997) (corroborating testimony from the plaintiff's wife); *Broome v. Biondi*, 17 F. Supp. 2d 211, 223 (S.D.N.Y. 1997) (corroborating testimony from co-plaintiff spouse). Accordingly, the Court finds that the testimony of Douglas, LeeAnn, and Devon Norwood, coupled with the objective circumstances surrounding Defendants' failure to issue Plaintiffs' building permit, sufficiently corroborated each witness' testimony of their own emotional distress such that Plaintiffs' awards for emotional distress do not fail as a matter of law.

b. Conscience Shocking Damages

Having concluded that emotional damages were properly awarded by the jury, the Court "may only reduce the award if the amount 'shocks the conscience.'" *Patrolmen's Benevelont Ass'n*, 310 F.3d at 56 (citations omitted). Emotional distress damages are "inherently speculative," with "no objective way to assign any particular dollar value" to such distress. *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 162 (2d Cir. 2014). The district court's duty is to ensure that awards for such damages "be fair, reasonable, predictable, and proportionate." *Id.* (quoting *Payne v. Jones*, 711 F.3d 85, 93 (2d Cir. 2013)). For claims of emotional distress, "'awards within the Second Circuit can generally be grouped into three categories of claims: "garden-variety," "significant" and "egregious."'" *Stevens v. Rite Aid Corp.*, No. 6:13-CV-783, 2015 WL 5602949, *21 (N.D.N.Y. Sept. 23, 2015) (quotation omitted). "Garden-variety" claims for emotional distress "arise where the evidence of harm was presented primarily through the testimony of the plaintiff, who describes his or her distress in vague or conclusory terms and fails to describe the severity or consequences of the injury." *Id.* District courts in the Second Circuit generally approve "garden-variety" damages ranging from $30,000 to $125,000. *Id.* at *22

(collecting cases).

Here, the jury awarded $15,000 in emotional distress damages to each Douglas and LeeAnn Norwood, and $7,000 to Devon Norwood. *See* Dkt. No. 79. at 3-4. The Court concludes that each of these awards is not so excessive as to shock the conscience and, thus, approves the jury verdict for emotional damages. As an initial matter, the Court notes that Mr. Norwood is not categorically excluded from receiving emotional distress damages simply because of his answer to two questions posed on cross examination. Mr. Norwood was first asked if he was "claiming medical damages" as part of the case, to which he responded that he was not. T. at 102. The next question was worded very similarly, asking if he was "claiming emotional distress damages" as part of the case. T. at 102. Mr. Norwood hesitantly responded that he was not. T. at 102. It is reasonable that both the jury and Mr. Norwood – being lay people who are not well-versed in the descriptive language used by attorneys to define different types of compensable damages – interpreted this line of questioning as asking Mr. Norwood if he was seeking specific reimbursement for any medical procedures, psychological therapy, or counseling treatment that he underwent as a result of his emotional distress. Since Mr. Norwood testified that he had not sought any medical treatment for his injuries, this interpretation of his answer is consistent with the totality of the other testimony in this case. In contrast to Mr. Norwood's hesitant response that he was not personally seeking emotional distress damages, his own testimony and the testimony of the other witnesses presented sufficient evidence for the jury to find that he did, in fact, suffer such emotional injury. *See* T. at 102. He testified that felt mad and upset when he was first told by Mr. Salvatore that he would not be able to continue constructing his home. T. at 89. He was upset about being denied the permit testified that "it sucks" to not be able to complete their home after spending so much time and money on it. T. at 93, 95. While Mr. Norwood testified that the

denial of the building permit did not immediately affect his relationship with his wife, he and Mrs. Norwood subsequently separated, with Mrs. Norwood and the two youngest children currently living forty-five minutes away from him. T. at 92, 94.

Mrs. Norwood's testimony, in words and demeanor, set the basis for the emotional toll that Defendant Salvatore's actions took upon this family. *See Fink*, 129 F. Supp. 2d at 532 (noting that a witness' demeanor at trial is a relevant factor in determining emotional distress damages). She testified that, while there were several stressors in the Norwoods' lives during the relevant time period of this case, the denial of their building permit after spending essentially all of their expendable resources on the construction of their new home was the main factor contributing to their emotional problems. *See Petramale v. Local No. 17 of Laborers' Int'l Union*, 847 F.2d 1009, 1011-12 (2d Cir. 1998) (noting that a factor in reducing jury award from $200,000 to $100,000 was the uncertainty to which the emotional distress was caused by the unconstitutional deprivation as opposed to other stressors in the plaintiff's life). Mrs. Norwood testified that the marital problems with her husband began at about the time their permit was denied, and that he became distant from her as a result of her own depression. *See* T. at 137. Thus, Mrs. Norwood's testimony about the disintegration of their family unit, coupled with Mr. Norwood's testimony that he was angered and upset by Defendant Salvatore's actions and their son, Devon's testimony that his father was depressed, sufficiently supported the jury's award of emotional distress damages for Mr. Norwood.

Mrs. Norwood clearly suffered emotional distress after Defendant Salvatore denied Plaintiffs' building permit. She became depressed, was prescribed medication for this depression, which she ultimately overdosed on, and experienced negative repercussions with her quality of work. T. at 134-37. Her depression was triggered by Mr. Salvatore's actions and the realization

that the family would not be able to rebuild their home in the neighborhood where they lived and raised their children, and that they would have no resources left to buy or build a new home in the surrounding area. While the family's initial relocation to live with relatives was a result of losing their home in a fire and not Defendant Salvatore's actions, the subsequent five moves would undoubtedly not have occurred had the Norwoods been able to complete construction on their own home. *See* T. at 63, 91. These emotional injuries were corroborated by Devon's testimony that his mother became withdrawn, cried, and slept for extended periods of time, multiple times per week after the building permit was denied. T. at 152. Mrs. Norwood's injuries were further corroborated by Mr. Norwood, who testified that his wife became upset and started crying when he told her that they could not complete their home. T. at 90. After this, he stated that Mrs. Norwood "ended up depressed" and "was hospitalized for taking too many pills at one time." T. at 91. Mr. Norwood observed that "she didn't want to get up and go to work" and "she would law in bed [and] cry a lot," which happened three or four times per week. T. at 92.

Devon Norwood's award for emotional distress was established largely by his own testimony and the objective circumstances of the situation. He was required to observe the disintigration of his parent's marriage and live separated from his siblings. Further, he testified that the separation from his siblings has taken a negative emotional toll on him. T. at 152, 154. The Court recognizes that his distress was not as severe as his parents, with their economic and marital hardships, and, thus, approves of the proportionately lower award on Devon's behalf.

Accordingly, the Court finds that each Plaintiffs' emotional distress damages were properly supported by the testimony of numerous witnesses, the demeanor of the witnesses at trial, and the objective circumstances of Plaintiffs' case. Further, the awards, being at the very low end of acceptable "garden-variety" emotional distress damages, are not so excessive as to

shock the conscience, such that no reduction is necessary.

B. Property Value

A plaintiff seeking to recover economic damages "must present evidence that provides the finder of fact with a reasonable basis upon which to calculate the amount of damages . . . [and] the jury is not allowed to base its award on speculation or guesswork." *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038 (2d Cir. 1992). However, a party need not submit expert testimony to prove damages and a jury is entitled to rely on the parties' own statements about the value of the work that they conduct. *See Toporoff Eng'rs, P.C. v. Fireman's Fund Ins. Co.*, 371 F.3d 105, 109 (2d Cir. 2004) (citations omitted). Remittitur of damages is warranted where "the jury awarded specific amounts of damages that were not supported by the record." *Tse v. UBS Fin. Servs., Inc.*, 568 F. Supp. 2d 274, 287 (S.D.N.Y. 2008) (citing *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 337 (2d Cir. 1993)).

In this case, the jury awarded $70,000 in compensatory damages for Plaintiffs' loss of their home and property values. *See* Dkt. No. 81. To reach this award, the jury was asked in a special verdict form to identify three independent values: (1) "the fair market value of Plaintiffs' property, if Plaintiffs had received a building permit from the Town and had constructed their intended home on the Property"; (2) "the fair market value of the property as vacant land, without a house on it"; and (3) "the actual amount of construction costs that Plaintiffs would have needed to spend in order to construct their intended home." Dkt. No. 79 at 2-3. After determining these amounts, the final award was calculated by subtracting the fair market value of vacant land and the amount of construction costs from the fair market value of the property after completion of Plaintiffs' intended home. *See* Dkt. No. 81.

First, the jury found that the fair market value of Plaintiffs' property had they been able to

complete their intended home was $175,000. *See* Dkt. No. 79 at 2-3. There was no evidence presented at trial to support the finding of this amount. The only testimony regarding the value of Plaintiffs' completed home was Mr. Norwood's statement that his previous home was covered for approximately $90,000 in insurance. T. at 63. Mr. Norwood was unable to provide an estimate of what the value of the property would have been had he completed the construction on the home. T. at 106. Thus, the Court finds that the jury's valuation of the property with the completed home is completely unsubstantiated. The only reasonable value of the completed home presented at trial was the $90,000 insurance value on Plaintiffs' previous home.

Second, the jury found that the fair market value of Plaintiffs' property as vacant land was $35,000. Dkt. No. 79 at 3. This amount is also entirely unsubstantiated. The only evidence as to the value of the vacant land was Mr. Norwood's testimony that the property sold for $1,000 after he abandoned construction on the house. T. at 93. Thus, the only reasonably supported conclusion that the jury could have reached as to the value of the vacant land was $1,000.

Third, the jury found that Plaintiffs would have needed to expend $70,000 to complete the intended construction on their house. Dkt. No. 79 at 3. Once again, this amount is unsubstantiated by the evidence adduced at trial. The only documentation of the estimated cost of construction of Plaintiffs' home was on their building permit application, which states the cost of construction at $53,000. Dkt. No. 89-2. Defendant Salvatore testified that he could not estimate how much money it would have cost Plaintiffs to complete the construction on their home. T. at 241-42. Accordingly, the Court concludes that the only amount supported by the evidence that the jury could have calculated for the cost of construction is $53,000.

Based upon the evidence discussed above, the Court finds that the jury's award of $70,000 for Plaintiffs' compensatory damages as to their home and property value was entirely

unsupported. The only reasonable calculation of Plaintiffs' compensatory damages as to their home and property value should have been $36,000, which is determined by subtracting the fair market value of the vacant land, $1,000, and the amount of construction costs to complete Plaintiffs' intended home, $53,000, from the fair market value of the completed home, $90,000. *See Trademark Research Corp.*, 995 F.2d at 337-38 (noting that specific damage amounts listed on a special verdict form must be based on evidence presented at trial). Therefore, Defendants' motion for a new trial on the issue of Plaintiffs' compensatory damages is granted unless Plaintiffs' file and serve, **within ten days from the filing of this Memorandum-Decision and Order**, a written acceptance of remittitur of the award of compensatory damages to $73,000, which represents the full award for emotional distress damages and the reduced award for Plaintiffs' home and property values.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Plaintiffs' motion for attorney's fees (Dkt. No. 92) is **GRANTED in part**; and the Court further

ORDERS that Plaintiffs are awarded attorney's fees in the amount of **$37,027.50**, and the Court further

ORDERS that Plaintiffs are awarded costs in the amount of **$861.85**, and the Court further

ORDERS that Defendants' motion for judgment as a matter of law or, in the alternative, for a new trial (Dkt. No. 89) is **GRANTED in part** and **DENIED in part**; and the Court further

ORDERS that Defendants' motion for judgment as a matter of law pursuant to Federal

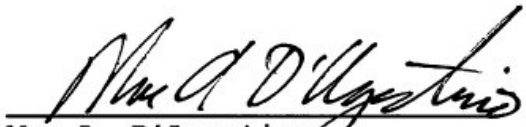
Rule of Civil Procedure 50(b) is **DENIED**; and the Court further

ORDERS that Defendants' motion for a new trial pursuant to Federal Rule of Civil Procedure 59 is **GRANTED** on the issue of Plaintiffs' compensatory damages unless Plaintiffs file and serve, **within 10 days** from the filing of this Order, a written acceptance of remittitur of the award of compensatory damages to **$73,000.00**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: March 15, 2016
Albany, New York



Mae A. D'Agostino
U.S. District Judge