UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PROSPECT CAPITAL CORPORATION, PROSPECT CAPITAL MANAGEMENT LLC, JOHN F. BARRY, M. GRIER ELIASEK, WALTER PARKER and BART DE BIE,

Petitioners,

v.

MICHAEL ENMON,

Respondent.

MEMORANDUM & ORDER

08 Civ. 3721 (LBS)

SAND, J.

Petitioners Prospect Capital Corporation, Prospect Capital Management LLC, John F. Barry, M. Grier Eliasek, Walter Parker and Bart de Bie (collectively known as "Prospect") brought an action for monetary sanctions against counsel for Respondent Michael Enmon, Arnold & Itkin, pursuant to 28 U.S.C. § 1927 and this Court's inherent power. Prospect's motion was granted and it was ordered to submit a proposed judgment to the Court. *Prospect Capital Corp. v. Enmon*, No. 08 Civ. 3721 (LBS), 2010 WL 907956, at *8 (S.D.N.Y. Mar. 9, 2010). Prospect timely filed its proposed judgment. Arnold & Itkin objects to Prospect's proposed judgment and, in addition, moves to file two exhibits under seal.

For the purposes of these motions, familiarity with the history of this litigation is assumed. In our March 2010 decision, we found "the imposition of sanctions appropriate based on (1) the persistent, frivolous litigation filed for the purpose of frustrating

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arbitration; (2) the misrepresentations made by omission in order to obtain the Texas TRO; and (3) the misrepresentations made to this Court, particularly with regard to the 60(b) application." *Id.* Sanctions were imposed "with relation to the Texas TRO and for the period beginning with the filing of the 60(b) motion through the confirmation of the arbitration award." *Id.* Sanctions were also imposed for "[c]osts related to Arnold & Itkin's appeal of the confirmation of the arbitration award." *Id.* at 16 n.10.

I. Discussion

Prospect submits a proposed judgment of $354,559. (Grinalds Dec. ¶ 12.) This award includes fees incurred (1) in connection with the Texas TRO; (2) in opposing the Rule 60(b) motion and subsequent appeal; (3) in responding to Arnold & Itkin's opposition to the confirmation of the arbitration award; and (4) in bringing the sanctions motion. (Grinalds Dec. ¶¶ 16(a)-(d).) Prospect's estimate does not include claims for meals, travel, legal assistant time, or summer associate time. (Grinalds Dec. ¶ 16.) Arnold & Itkin contends that the proposed judgment must be reduced by at least $300,526 for three reasons: (1) Prospect should not be able to recover fees related to the sanctions motion itself; (2) the Court incorrectly accepted certain arguments advanced by Prospect in its prior decision; and (3) Prospect has failed to provide adequate factual support for its fee requests. (Resp't Opp. Judg. 5-6.)

a. Fees Related to the Sanctions Motion

Where a sanctions motion is granted, courts may award costs relating to the sanctions motion itself. *See, e.g. Dux S.A. v. Megasol Cosmetic GmbH*, No. 03 Civ. 8820 (RO), 2006 WL 44007, at *1, 5 (S.D.N.Y. Jan. 9, 2006) (granting motion, including fees incurred in preparing the sanctions motion itself); *Nadler v. Princess Hotels Int'l*, No. 94

Civ. 6986 (PKL), 1996 WL 219639, at *4 (S.D.N.Y. Apr. 30, 2006) ("[T]he Court finds that the costs of making this motion are caused by defendant's and defendant's counsel's sanctionable conduct, and accordingly awards the reasonable costs, including attorneys' fees, of making this motion."). Furthermore, "[a] court has discretion to award a party full attorneys' fees incurred in a proceeding, even if the party did not obtain all the relief that it sought." *Telenor Mobile Commc'ns AS v. Storm LLC*, No. 07 Civ. 6929 (GEL), 2009 WL 585968, at *3 (S.D.N.Y. Mar. 9, 2009).

Throughout the course of this litigation, Arnold & Itkin has pursued frivolous claims and made numerous misrepresentations to the Court. Although we found a colorable basis for Enmon's original opposition to the motion to compel, we noted that in briefing the issue Arnold & Itkin had "continued its pattern of misrepresentations to the Court." *Prospect Capital*, 2010 WL 907956, at *4. Nor was this the only instance where Arnold & Itkin made misrepresentations to the Court in the course of the sanctions motion. *See e.g., id.* at *6 ("Arnold & Itkin's argument that it had previously 'believed' but now 'knew' about the signed documents is contradicted by the numerous representations previously made by counsel to the courts. . . . Arnold & Itkin further misrepresented that before discovery it did not know that the documents had been delivered to Vinson & Elkins. However, as Fiser's testimony and corresponding e-mails demonstrate, Enmon knew since May of 2006 that the documents were transferred to Vinson & Elkins.").

Based on Prospect's success on the merits of the sanctions motion,[1] which only occurred as a result of Arnold & Itkin's sanctionable conduct, and Arnold & Itkin's

[1] Arnold & Itkin is incorrect in stating that Prospect was largely unsuccessful on its motion.

continued misrepresentations throughout the course of the sanctions motion itself, costs incurred on the sanctions motion are included in the award.[2]

b. Alleged Errors in the Sanctions Decision

Arnold & Itkin contends that the Court made two incorrect findings in the sanctions order. First, with regard to the Rule 60(b) motion, Arnold & Itkin claims that it was prevented from disclosing the contents of the e-mail, which was the subject of its motion, due to the parties' confidentiality agreement. Second, the Court incorrectly found that Arnold & Itkin made misrepresentations by omission to the Texas state court in order to obtain the Texas TRO.

Arnold & Itkin's failure to disclose the contents of the e-mail was not the basis of this Court's finding that Arnold & Itkin's conduct regarding the 60(b) motion warranted sanctions. Arnold & Itkin was sanctioned for representing to the Court that the evidence was "new," even though Arnold & Itkin had known about the evidence for over a year. Arnold & Itkin's failure to disclose the contents of the e-mail at issue was merely additional evidence of its lack of candor. Furthermore, the Confidentiality Stipulation at issue permits the parties to disclose "Discovery Material" to "any court of competent jurisdiction to which any appeals [from the arbitration] may be made." (Pet'r Reply Obj. Judg. 9, Ex. A ¶ 4(a).) The clear language of the stipulation permits the parties to disclose discovery material to this Court.[3]

[2] As discussed in detail below, Arnold & Itkin has made additional misrepresentations to this Court in the instant briefing. These misrepresentations are further evidence that Arnold & Itkin should pay fees for the sanctions motion.

[3] Arnold & Itkin's motion to file exhibits under seal is also denied. As Arnold & Itkin concedes, the documents it attempts to seal have already been filed with the Court as exhibits to its Supplemental Memorandum of Law. The motion appears to have been brought to give legitimacy to the argument that it was prohibited from providing certain documents to the Court in connection to the Rule 60(b) motion.

Second, Arnold & Itkin attacks the Court's finding that it made a misrepresentation by omission to the Texas state court, when it failed to disclose the action already pending in federal court. Arnold & Itkin contends that Prospect raised this argument "for the first time in its final submission to the Court," and, therefore, Arnold & Itkin did not have a meaningful opportunity to respond.[4] (Resp't Opp. Judg. 2.) This statement is not true. Prospect raised the issue of Arnold & Itkin's failure to disclose the pending federal proceeding, and the unconstitutional nature of the Texas TRO, at every opportunity—its initial memorandum, reply memorandum, oral argument, and supplemental briefing.

Prospect's initial memorandum, dated May 29, 2009, stated:

> In violation of the Supremacy Clause of the United States Constitution and long-settled Supreme Court jurisprudence, [Arnold & Itkin] procured an *ex parte* TRO from a state court judge in Beaumont, Texas enjoining Prospect and its agents from proceeding in federal court (apparently without disclosing to the state court judge that such an order was facially unconstitutional).

(Pet'r Sanctions Mem. 2.) Fourteen pages later Prospect raises the argument again: "It appears that Mr. Itkin failed to inform the Texas state judge that the Petition to Compel Arbitration was already pending in federal court—since otherwise the state court judge would have known that the injunction Mr. Itkin requested *directly violated the Supremacy Clause*, U.S. Const., art. VI, cl. 2, and should never have been issued." (Pet'r Sanctions Mem. 16) (emphasis in original). This argument was also raised in Prospect's reply brief, oral argument and supplemental brief. (Pet'r Reply Prop. Judg. 6.)

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[4] Later in its brief, Arnold & Itkin acknowledges that Prospect had "fleetingly referenced" the issue in earlier papers. (Resp't Opp. Judg. 16.)

At oral argument Prospect's counsel argued that "it has never been demonstrated in the record that [Mr. Itkin] ever advised Judge Sanderson that we had actually already gone to federal court, or, more importantly, that Judge Sanderson was going to be entering a facially unconstitutional order enjoining a litigant from proceeding in federal court. That has never been shown." (T. at 42:14-20.) Counsel for Prospect ended her remarks two sentences later. Counsel for Arnold & Itkin then began his remarks. Even though Prospect's counsel had raised the argument of misrepresentations by omission just minutes before, Arnold & Itkin did not address the argument. Arnold & Itkin has had ample opportunity to address this argument and supplement the record; it is not entitled to now re-litigate previously decided issues.[5]

c. Reasonableness of Attorney's Fees

In *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 184 (2d Cir. 2008), the Court of Appeals for the Second Circuit discussed the present state of "confusion" in the Second Circuit with regard to the proper methodology in determining the reasonableness of the attorney's fees. *Arbor Hill*, 522 F.3d at 189. *Arbor Hill* abandoned the use of the "lodestar" calculation,[6] finding that over time the

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[5] Even if the Court were to entertain the substance of Arnold & Itkin's motion, the proffered evidence does not support a finding that Arnold & Itkin fully disclosed the nature of the federal proceedings to Judge Sanderson. The body of the TRO request and Itkin's attached affidavit specifically reference the TRO being sought in federal court, but are noticeably silent as to the action already pending in federal court. Similarly, the Texas court TRO specifically mentions the federal TRO Prospect is seeking but makes no mention of the action already pending. Additionally, Arnold & Itkin now informs the Court for the first time that it was not present at the state court proceeding. Itkin instructed Enmon's local counsel, Perry Neichoy, to attend the hearing. (Itkin Dec. ¶ 7.) Despite the fact that Arnold & Itkin previously represented to the Court that it fully informed Judge Sanderson of the New York proceedings, (Resp't Supp. Mem. 5), it now claims that it was not present at the hearing and only has an "understanding" as to what happened. (Itkin Dec. ¶ 8.) No transcript of the proceedings exists and no affidavit from Neichoy was supplied to the Court. (Itkin Dec. ¶ 11.)

[6] The lodestar was the product of the attorney's usual hourly rate and the number of hours worked. *Arbor Hill*, 522 F.3d at 186.

meaning of the term had deteriorated to the point that it was no longer useful.[7] *Id.* at 190. The court held that the "the better course—and the one most consistent with attorney's fees jurisprudence—is for the district court, in exercising its considerable discretion, to bear in mind all of the case-specific variables that we and other courts have identified as relevant to the reasonableness of attorney's fees in setting a reasonable hourly rate." *Id.* Specifically, the court found that the reasonable hourly rate is "the rate a client is willing to pay." *Id.* In its analysis, the district court should consider the *Johnson* factors[8] and that "a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively." *Id.*

Both under the lodestar method and the *Johnson* factors, we find that the hourly rates used by Prospect's counsel is reasonable. Numerous courts have recognized that "negotiation and payment of fees by sophisticated clients are solid evidence of their reasonableness in the market." *Bleecker Charles Co. v. 350 Bleecker St. Apt. Corp.*, 212 F. Supp 2d 226, 230 (S.D.N.Y. 2002) (collecting cases). Prospect is a sophisticated client, who regularly pays its bills in full. Prospect "specially negotiated case-by-case discounts ranging from 12% to 20%." (Grinalds Dec. ¶ 16.) The fees submitted to the Court are not "hypothetical amounts prepared only for purposes of a fee application," but rather actual invoices that Prospect would have, if it has not already, paid its counsel.

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[7] The court added, "While we do not purport to require future panels of this court to abandon the term—it is too well entrenched—this panel believes that it is a term whose time has come." *Arbor Hill*, 522 F.3d at 190 n.4.

[8] In *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the Court of Appeals for the Fifth Circuit articulated twelve factors for district courts to consider in establishing a reasonable fee: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the 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." *Arbor Hill*, 522 F.3d at 187 n.3 (*citing Johnson*, 488 F.2d at 717-19).

Bleecker Charles Co., 212 F. Supp. 2d at 230. Given the evidence that Prospect, a sophisticated client, negotiated its rates and regularly paid the bills, we find that the hourly rates are reasonable.

Next, we must determine whether the number of hours billed is reasonable. The court looks at the amount of time spent on each category of tasks, as documented in the timekeeping records, and whether these hours were "reasonably expended." *Malletier v. Dooney & Bourke, Inc.*, No. 04 Civ. 5316 (RMB) (MHD), 2007 WL 1284013, at *1 (S.D.N.Y. Apr. 24, 2007). In calculating the number of reasonable hours, the court relies on its own experience with the case, as well as its general experiences with similar submissions and arguments. *Clarke v. Frank*, 960 F.2d 1146, 1153 (2d Cir. 1992). "If the court finds that some of the time was not reasonably necessary to the outcome, it should reduce the time for which compensation is awarded." *Tucker v. City of New York,* No. 08 Civ. 4753 (VM), 2010 WL 1191636, at *6 (S.D.N.Y. Mar. 25, 2010); *see also McGhee v. Apple-Metro, Inc.*, No. 03 Civ. 1870 (WHP) (MHD), 2005 WL 1355105, at *1 (S.D.N.Y. Jun. 7, 2005).

A reduction of the fee is appropriate where the time entries are vague. *See Ragin v. Harry Macklowe Real Estate Co.*, 870 F. Supp. 510, 520 (S.D.N.Y. 1994) (finding that the time records contain "many vague phrases" and that "ambiguity defeats the capacity to determine proper fee allocation"). However, counsel is "not required to record in great detail how each minute of his [or her] time was expended[,]" the court need only be able to determine from those entries whether the hours allocated are reasonable. *Id.* (*quoting Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). A district court may use a percentage reduction of the fee "as a practical means of trimming fat from a fee application."

McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund, 450 F.3d 91, 96 (2d Cir. 2006) (*quoting Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998)).

In Prospect's fee application, it submits timekeeping records for each of the four issues for which it is entitled to recover fees: the Texas TRO (18.13 hours); Rule 60(b) motion (42.1 hours); Enmon's opposition to the confirmation of the arbitration award (99.75 hours); and the sanctions motion itself (454.4 hours). (Grinalds Dec. ¶¶ 29, 33, 38, 44.) The fee application identifies the tasks completed with regard to each of the above legal issues, and the timekeeping records specify the time spent on each aspect of that project. Prospect's counsel took a conservative approach to the fee application and excluded certain fees, such as for legal assistant and summer associate work. (Grinalds Dec. ¶ 16.) In addition, recognizing the degree of uncertainty inherent in its block-billing approach,[9] Prospect "endeavored to identify the specific time entries referable to the sanctioned conduct and to estimate the amount of excess time allocable to that specific legal work. . . . Where the records were deemed insufficient to estimate a reasonable allocation, no claim was made." (Grinalds Dec. ¶ 17.)

Arnold & Itkin argues that the hours must be reduced because the timekeeping records are vague and use standardized entries that suggest that they were not kept contemporaneously.[10] Specifically, Arnold & Itkin criticizes the billing records of Daniel Sussner, who billed over 280 hours working on the sanctions motion. Sussner sometimes used the same entry for multiple days in a row, such as "Research re: sanctions reply brief. Drafting brief." (Grinalds Dec. Ex. 15.) The sanctions motion required time

[9] Block-billing is where a single time entry includes a number of various case-related tasks without specifying the exact amount of time allocated to each task.
[10] Arnold & Itkin brings various other challenges to the timekeeping records, which the Court finds to be without merit.

intensive briefing and involved a detailed review of the lengthy history of this case. Each of Sussner's entries specifies the type of work—research, drafting, outlining, or editing—and the specific project—sanctions memorandum, reply memorandum, oral argument, or supplemental briefing. We have no doubt that Prospect's counsel spent significant time on this motion, and the entries are sufficiently specific to establish that the hours expended were reasonable.[11] *Ragin*, 870 F. Supp. at 520.

II. Conclusion

Arnold & Itkin is sanctioned in the amount of $354,559. Prospect is awarded post-judgment interest from the date of entry of this judgment at a rate calculated pursuant to 28 U.S.C. § 1961. *See Moran v. Sasso*, No. 05 Civ. 4716 (DRH) (ETB), 2009 WL 1940785, at *7 (E.D.N.Y. Jul. 2, 2009). Additionally, Arnold & Itkin must submit this Court's Sanctions Order with any future applications for admission *pro hac vice* in the Southern District of New York. Arnold & Itkin's motion to file exhibits under seal is denied.

SO ORDERED.

Dated: June 23, 2010
New York, NY

U.S.D.J.

[11] Even if a modest reduction were appropriate, it would be offset by the additional fees incurred by Prospect in briefing the instant motions. In objecting to the proposed judgment, Arnold & Itkin has attempted to re-litigate the sanctions order, made additional misrepresentations to the Court, and filed a frivolous motion to file exhibits under seal. Prospect has no doubt incurred additional and substantial expenses in opposing these arguments.