Schoolcraft v. The City Of New York et al Doc. 665

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---x

ADRIAN SCHOOLCRAFT, 10-cv-6005 (RWS)

Plaintiff,

REPLY DECLARATION OF NATHANIEL B. SMITH

-v-

CITY OF NEW YORK, et al.,

Defendants.
---X

Nathaniel B. Smith, being an attorney admitted to practice law in this State and before this Court, hereby states and declares under the penalties of perjury that the foregoing is true and correct.

1. I am submitting this reply declaration in response to the papers submitted by the City Defendants in opposition to the Smith Team's motion for reconsideration. While most of the arguments and points made by the City are addressed in the accompanying memorandum of law, I am submitting this declaration to address certain factual matters in response to the opposition to the reconsideration motion.

2. The City states falsely that the Smith Team lacked "ethically required billing judgment" in our fee application, suggesting that we did not reduce our fee application appropriately. In fact, the Smith Team reduced its fee application in its initial and in our reply papers as follows: (a) reduced all hours by the "third" chair at depositions; (b) reduced by $100 per hour the hourly rate for the "second" chair at depositions; (c) eliminated billing time by attorneys for non-compensable time such as clerical, administrative or secretarial tasks; (d) reduced the time

Dockets.Justia.com

spend pursuing law enforcement options for the plaintiff; and (e) reduced time spent upon commencement of our work, which the City identified as the "cost of substitution."

3. The City also falsely states that I had a "back-seat role" in trial preparation, including a "limited" role in the Joint Pre-Trial Order and witness preparation, even going so far as to suggest that I had an "of counsel" role in the case. In fact, when the Smith Team and the Norinsberg Team started getting ready for trial, first set for April 2015 and then adjourned to October 2015, we all agreed that with at least 25 to 35 likely witnesses to be called on the plaintiff's case and cross-examined on the defendants' case, division of labor between the groups was precisely what the case required because of the number of potential witnesses and the estimated length of the trial (four to eight weeks). Accordingly, the four attorneys with speaking roles in the case (Jon Norinsberg, Gerald Cohen, John Lenoir and me) divided up the witness list so that each one of us would focus our own attention to our assigned witnesses. I also personally prepared 15 summaries and 8 different outlines for direct and cross-examination of various potential witnesses. I also took on the lead role for the extensive preparation of the joint pre-trial order.

4. The City submits as Scheiner Exhibits B and C Bronsther's schedules of deposition hours that have been altered from our original time records filed with the Court. As set forth in more detail in footnote one of the accompanying memorandum of law, I have identified 43 examples where the hours listed in Bronsther's schedules have altered the number of hours listed in the actual billing records to make erroneous, subjective and undisclosed allocations of billed hours.

5. There is no basis whatsoever for the suggestion that the Smith Team engaged in media-based and web site-based conduct. In fact, the Smith Team engaged in none of that conduct. When the plaintiff retained me, he had already discharged the Norinsberg Team and was looking for lead counsel to take over the case. I agreed to take on that role based on the express

understanding with the plaintiff that I would at a minimum be entitled to recovery my reasonable attorney's fees from the defendants in the event that the plaintiff prevailed in this action. The plaintiff agreed with me that I would be entitled at a minimum to seek my fees directly from the defendants if he achieved "prevailing plaintiff" status and the fee-shifting provision of 42 U. S. C. § 1988 applied. I did not then, nor do I believe it appropriate now, to reduce my requested hours or my hourly rate because of some other alleged conduct by some other attorney over whom I had no connection or relationship. Nor do I believe it is proper to reduce my hourly rate based on the speculative possibility that the plaintiff could have negotiated a lower hourly rate. There was no discussion about the plaintiff paying on the hour, other than the default rate set in the retainer in the event of a need to value my work in *pro rata* relation to the work of other attorneys. Indeed, since the plaintiff could not pay any hourly-rate fee, there was simply no negotiation over the plaintiff paying fees on an hourly rate as the work was performed. The purpose of Section 1988 is to encourage attorneys to take on meritorious civil rights cases by providing that the attorney is entitled to recovery reasonable fees in the event the plaintiff prevails. In undertaking this representation, I relied on the fact that I would be paid for my time based on the prevailing hourly rates for this type of work in this District at the time the fee application was presented.

6. One of the first matters I addressed in this case as lead counsel involved the cessation of any attempts to solicit media attention for the action. Indeed, the media attention that the case had already attracted was a growing problem for the plaintiff's case, as the litigation over the disclosure of the QAD report by the Village Voice made clear. Once I took on the role of lead counsel for the plaintiff, I specifically directed all persons working with me on the case to have *no* contact with the media about the case. On no occasion did I or anyone working with me use or solicit the media or the Internet to gain attention for the case, the plaintiff or our role in the case.

On those occasions when the media contacted me directly, I told them that I would not provide any kind of information for attribution and that I would only provide them with publically available background information. I repeatedly denied media requests for interviews of the plaintiff or myself.

7. Under these circumstances I believe that the Court should evaluate the role and value that the Smith Team provided to the case based on prevailing hourly rates and the hours that the Smith Team expended on the plaintiff's behalf without regard to the conduct of other counsel.

Dated: October 28, 2016
New York, New York

s/NBS

____

NATHANIEL B. SMITH
Attorney for Plaintiff
100 Wall Street – 23rd Floor
New York, New York 10006
(212) 227-7062