SHORT FORM ORDER INDEX NO.: 41267-2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:
HON. JOHN J.J. JONES, JR.
Justice

HEARING DATE: 12-5-2012

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RIVERHEAD SANITATION & CARTING CORP.,

Plaintiff,

-against-

HAMPTON HILLS GOLF & COUNTRY CLUB,

Defendant.
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This hearing on the issue of attorneys' fees having been scheduled for December 5, 2012 and papers being submitted on that date, it is

ORDERED that this application by the attorneys for the plaintiff, Riverhead Sanitation & Carting Corp., ["Riverhead Sanitation" or "the plaintiff"] for an award of attorneys' fees pursuant to the terms of a written contract with the defendant, Hampton Hills Golf & Country Club ["Hampton Hills" or "the defendant"], is decided as follows.

Background

The parties' familiarity with the facts of the underlying action is presumed, those facts having been set forth in detail in the prior order of the court granting summary judgment in the plaintiff's favor dated October 1, 2012. The following facts are chronicled here only to inform the decision awarding attorneys' fees, costs and disbursements to plaintiff's counsel pursuant to the terms of the contract between the parties.

The action was commenced by Riverhead Sanitation to recover damages related to the alleged breach of a five year renewal of a garbage removal services contract that Riverhead Sanitation entered into with Hampton Hills on May 26, 2006, to expire on August 1, 2011. The contract contained a "Default and Remedies" provision which provided, inter alia, that the plaintiff be given thirty (30) days from receipt of notice of its default to cure any material default in its services.

On June 15, 2009, the defendant's general manager advised the plaintiff that its services were "no longer required". The basis for the plaintiff's successful summary judgment motion was that the defendant violated the default and remedies provision of the contract by not giving the plaintiff notice of and the opportunity to cure the alleged default, and that under the terms of the contract, the plaintiff was liable for one-half of the balance of the fees remaining on the contract in the total amount of $10,273.00.

The contract further provided that the defaulting party was liable for all reasonable attorneys' fees, court costs, collection fees and costs of the party incidental to any action brought to enforce the agreement. The order granting judgment in the amount of the liquidated damages of $10,273.00, also awarded costs, disbursements and reasonable attorneys' fees to be determined at a hearing.

The parties have agreed to submit this attorneys' fee application on papers. The plaintiff is seeking the amount of $42,810.00 in attorneys' fees, $1,321.00 in disbursements, and $200 in costs. For the reasons that follow, this court awards $4,275.00 as a reasonable fee award under the circumstances of this case, plus $1,321.00 in disbursements, and an additional $200 in costs.

Attorney's Fees Generally

A reasonable attorney's fee is commonly understood to be a fee which represents the reasonable value of the services rendered (***Diaz v. Audi of America, Inc.***, 57 A.D.3d 828, 830 [2d Dept. 2008] [citations omitted]).

In general, factors to be considered include (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; (2) the lawyer's experience, ability and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved (***In re Sucheron***, 95 A.D.3d 892, 894 [2d Dept. 2012], *citing* ***Matter of Freeman***, 34 N.Y.2d 1, 9 [1974]).

Although an award of an attorney's fee is within the discretion of the court, such award must be based upon a showing of "the hours reasonably expended and the prevailing hourly rate for similar legal work in the community" (***Gutierrez v. Direct Marketing Credit Services, Inc.***, 267 A.D.2d 427, 428 [2d Dept. 1999]).

A. The Reasonable Hourly Rate

As a general rule, the reasonable hourly rate is based on the customary fee charged for similar services by lawyers in the community with like experience and a comparable reputation to those by whom the prevailing party was represented (***Matter of Rahmey v. Blum***, 95 A.D.2d 294 [2d Dept. 1983]; ***Matter of Gamache v. Steinhaus***, 7 A.D.3d 525, 526-27 [2d Dept. 2004]). The burden is on the fee applicant to establish the prevailing hourly rate for the work performed (***Gutierrez v. Direct Marketing Credit Services, Inc.***, *supra)*. The invoices presented to the client over the course of the last three years were based on an hourly rate of three hundred ($300) dollars.

There is no question that counsel for the plaintiff, Richard Ready of Bee Ready Fishbein Hatter & Donovan, LLP, is an accomplished and experienced attorney. Had the entirety of the work been performed by Mr. Ready, a three hundred dollar hourly rate might be justified. However, the time records submitted by plaintiff's counsel reveal that of the one hundred twenty-five hours billed to successfully prosecute this breach of contract action, Mr. Ready's work only accounted for a small percentage of that time. The majority of the work was performed by six (6) other attorneys of varying experience and unknown reputation. No resumes were attached to the moving papers. The court knew little more about the experience and reputation of the six other attorneys who billed on this file than how long each attorney had been admitted to the practice of law and how long they had been employed at the movant's law firm. Thus, the fee applicant has failed to establish that a blended hourly rate of $300 is the prevailing hourly rate for the work performed.

Plaintiff's counsel's cases awarding an hourly rate of three hundred dollars and higher are not persuasive because those cases do not reflect what a client in Suffolk County would be willing to pay for comparable services. Specifically, the cases cited in ¶ 33 of Mr. Ready's affirmation dated December 4, 2012, were venued in New York County, Nassau and Queens Counties where the prevailing hourly rates are generally higher (*see* ***Simmons v. New York City Transit Authority***, 575 F.3d 170, 175 [2d Cir. 2009]).

The appropriate hourly rates are also influenced by the court's consideration of such factors as the time and labor required to obtain the ultimate objective, the novelty and complexity of the issues, whether the fee is fixed or contingent, and comparable awards in similar cases in the community (***Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections***, 522 F.3d 182, 187 n.3 [2d Cir.2008], *citing* ***Johnson v. Ga. Highway Express, Inc.***, 488 F.2d 714 [5th Cir. 1974]).

Notably, without in any way diminishing the reputation in the legal community of Mr. Ready's firm or its success in obtaining summary judgment on its client's behalf, the fact remains that the subject matter of this lawsuit and the complexity of the issues (or lack thereof) did not require a unique expertise in order to prevail. The May 25, 2006 two-page renewal contract contained the Default and Remedies provision.

At the end of the day, the plaintiff prevailed by demonstrating that the defendant violated the Default and Remedies provision. Indeed, the defendant's general manger admitted at his deposition that he failed to provide the plaintiff the required 30-day notice to correct its alleged default and that he declined to read the letters sent by the plaintiff requesting that it be given the opportunity to cure the default in accordance with its contract.

Rather than being novel or complex, the issues presented here involved a garden variety agreement that specified conditions precedent to the right of cancellation, conditions with which the defendant admittedly failed to comply. Thus, the rather straight forward nature of the plaintiff's claim does not justify a higher hourly rate.

Also considered in the calculus of the reasonable hourly rate is the time and labor required to achieve the desired result. The time sheets introduced through the affidavit of plaintiff's counsel's office manager break down the tasks performed to obtain the optimal result-summary judgment in favor of the

plaintiff. The tasks can roughly be broken down into several discrete tasks: the drafting of a complaint and discovery requests and responses, attendance at various conferences, the conduct of two depositions, and the preparation and submission of the summary judgment motion and fee application.

While the action took three years to complete, there were large blocks of time when there was little or no activity on the file as evidenced by many monthly invoices reflecting so. In the absence of substantial pre-trial discovery, and the conduct of only two depositions and no trial, the time and labor expended on this litigation does not warrant an upward adjustment to the reasonable hourly rate.

Finally, the court's decision is informed by other attorney fee awards in similar cases in Suffolk County *(see e.g.s.*, ***Long Island Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County, Inc.***, 865 F.Supp.2d 284 [E.D.N.Y. 2012] [collecting cases]).

Considering the above factors including the absence of novel or complex issues and awards in similar cases, this court finds that an hourly rate based upon the prevailing rate in the Suffolk County/Long Island legal community is a blended hourly rate of $250.00.

B. The Hours Reasonably Expended

After determining the reasonable hourly rate, a court must evaluate the number of hours reasonably billed to arrive at the presumptively reasonable fee. ***Arbor Hill***, 522 F.3d at 189-90.
The total fee request up to the point where the court granted summary judgment on a total claim slightly in excess of $10,000 is $37,560.00; the additional time devoted to the fee application is $5,250.00 for a total fee request of $42,810.00.

Mr. Ready's application addresses the obvious incongruity between the ultimate relief sought, slightly more than ten thousand dollars, and the legal efforts expended to attain that relief (almost thirty-eight thousand dollars), but urges that the monetary damages awarded to the prevailing party in the underlying case is not one of the factors used to calculate reasonable attorneys' fees, relying on ***Francis v. Atlantic Infiniti, Ltd.***, 2012 WL 398769 (Queens Sup.). The court does not agree with this reading of ***Francis*** or other cases involving a fee-shifting statute.

As a general rule, an attorney's fee may not be recovered by the prevailing party, unless authorized by agreement between the parties or by statute or court rule (***R.J. Hyland, Inc. v. Love Family Sports,*** 102 A.D.3d 939, 959 N.Y.S.2d 225 [2d Dept. 2013], *citing* ***Matter of A.G. Ship Maintenance Corp. v. Lezak***, 69 N.Y.2d 1, 5, 511 N.Y.S.2d 216, 503 N.E.2d 681; ***Cier Indus. Co. v. Hessen***, 136 A.D.2d 145, 148, 526 N.Y.S.2d 77). ***Francis,*** *supra,* involved a fee application by a prevailing plaintiff pursuant to General Business Law § 198-b (f)(5) under New York's Lemon Law. The fee application included legal work in connection with an appeal to the Second Department to vindicate the plaintiff's rights under the Lemon Law.

In order to vindicate certain important civil, constitutional, and economic rights and to promote public policy objectives, fee shifting statutes have been enacted as incentives for attorneys to accept cases that they might otherwise decline due to anticipated low financial returns. Examples are the New York

Lemon Law, the New York Civil Rights Law § 70-a [1], and 42 U.S.C. § 1988, vindicating constitutional rights, to name a few.

Here, unlike the ***Francis*** case relied on by plaintiff's counsel, Riverhead Sanitation's success in this lawsuit vindicates no important constitutional or civil right or public policy. This is a private matter between two commercial entities dealing at arm's length whose outcome, while important to the parties, does not promote a greater public good of a type that fee shifting statutes seek to foster. The "presumptively reasonable fee" for an attorney's work is what a reasonable client would be willing to pay for that work (***Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections***, 522 F.3d 182, 190 [2d Cir.2008]; ***Equitable Lumber Corp. v. IPA Land Development Corp.,*** 38 N.Y.2d 516, 524, 381 N.Y.S.2d 459, 465 [1976]). In the calculus of reasonableness, most clients would not be willing to pay over $37,000 to obtain a maximum recovery of $10,000.

Nevertheless, the parties agreed as between them that the prevailing party was entitled to attorneys' fees and costs. Several major aspects of the fee application collectively merit a substantial, across the board downward adjustment on the total fee request. A substantial reduction is justified for the apparent failure to use clerks, secretaries and paralegals to perform simple administrative tasks. Time spent on clerical or secretarial services are part of overhead and generally not charged to clients (***Guardado v. Precision Fin., Inc .***, No. 04–CV–3309, 2008 WL 822105, at *6 [E.D.N.Y. 2008]). Also, time spent by an attorney on administrative, secretarial or ministerial tasks is not compensable (***Hugee v. Kimso Apartments, LLC***, 852 F.Supp.2d 281, 302 [E.D.N.Y. 2012]; ***Town of Orangetown v. Magee***, 215 A.D.2d 469, 471, 626 N.Y.S.2d 511[2d Dept.1995]). As a rule of thumb, if the charge is not properly billed to the client, than it is likewise not properly billed to the adversary (***Rahmey v. Blum,*** 95 A.D.2d 294, 466 N.Y.S.2d 350[2d Dept. 1983]).

There are numerous entries by attorneys, even partners, for calling the court or speaking to a court clerk for a "status", to check if papers have been received by the court, or to adjourn a conference. There are charges for the review of Requests for Judicial Intervention, affidavits of service and the like, and even for drafting a note of issue and a litigation back. There are numerous charges for drafting and revising letters to the client advising of an examination before trial date, an adjournment of the examination, or the execution of the transcript-- tasks typically performed by support staff. Most of these clerical tasks have been billed at a minium of one-quarter hour at the $300 blended hourly rate. There is a charge of 1.20 hours to file a Reply affirmation in Supreme Court, at a cost of $360.00.

Suffice to say that efficient utilization of support staff to perform clerical and secretarial duties is not, as plaintiff's counsel suggests, the promotion of the unlawful practice of law by non-attorneys (*see* ***Rahmey v. Blum,*** 95 A.D.2d at 301).

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[1] SLAPP suits [Strategic Lawsuits Against Public Participation] are those suits designed to chill the exercise of a citizen's rights to petition the government or appropriate administrative agency for the redress of a perceived wrong. In 1992, the Legislature enacted Civil Rights Law § 70 and § 76-a to provide special protections for defendants in actions involving public petition and participation, or SLAPP suits.

Over $8,500 was billed for preparing for and attending court conferences, most of which were adjourned. The time billed for these conferences ranged from 2 hours to 5.1 hours on November 14, 2012, when the matter appeared on the court's calendar for an attorneys' fee hearing and it was determined that the fee application would be submitted on papers. Presumably, some amount of the time billed for various conferences was for travel time from counsel's Mineola office to Riverhead. However, at least three different attorneys appeared for the various conferences and the fee hearing, respectively, and none of the billing was broken down to indicate what portion of the time billed was travel time.

In the exercise of its discretion, this court would not award the same amount for time spent on travel as for fully compensable time (*see e.g.*, ***Perdue v. Kenny A. ex rel. Winn***, 559 U.S. 542, 130 S.Ct. 1662, 1670 [2010] [(approving the district court's decision to "halve [ ] the hourly rate for travel hours"); *see also* ***Barfield v. N.Y. Health & Hospitals Corp.***, 537 F.3d 132, 139, 151 [2d Cir.2008] ["travel time by counsel should be compensated at half-rate, in accordance with established court custom"]).

Another major source of billing was the preparation and filing of the summary judgment motion. The total amount of time initially spent on preparing the moving papers was approximately 28.50 hours. The Notice of Motion and the attorney's moving affirmation were both dated March 22, 2012. Yet, the billing contains entries for drafts and revisions to the motion that post date the Notice of Motion and moving affirmation. In any event, given the basis for the motion, three-and-a-half days to prepare the Notice of Motion and attorney's affirmation is excessive.

Neither the court nor the defendant challenges the proposition that the prevailing party is also entitled to a reasonable fee for the preparation of the fee application. However, as with the fee for services rendered to achieve summary judgment, a request of $5,250 for almost eighteen (18) hours expended to prepare a fee application on a $10,000 judgment is grossly excessive.

Based on the foregoing, the court applies a 88% downward adjustment to the hours spent on the legal work required on the case (*see* ***First Keystone Consultants, Inc. v. Schlesinger Elec. Contractors***, 2013 WL 950573 [E.D.N.Y.] [applying an 80% downward adjustment]. At an hourly rate of $250, the award is $3,750.00. The court also applies a 88% downward adjustment to the 17.50 hours spent on the fee application and awards an additional $525.00 award for the preparation of the fee application for a total attorneys' fee award of $4,275.00. The plaintiff is also awarded $1,321.00 in disbursements, and $200 in costs.

DATED: 21 March 2013

HON. JOHN J.J. JONES, JR.
J.S.C.