POST TRIAL DECISION

INDEX No. 6197-12

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

TRIAL DATE 7/11/13
Submission Date Regarding Damages 8/19/13
CDISP Y xx N ___

RMP CAPITAL, CORP	:	REISMAN, PEIREZ, et al
	:	Attys. For Plaintiff
Plaintiff,	:	1305 Franklin Ave.
	:	Garden City, NY 11530
-against-	:	
	:	KEITH D. BLACK, P.C.
VICTORY JET, LLC, JEFF ERICKSON, CHRISTOPHER BARNES and ROGER MALDONADO,	:	Atty. for Def. Barnes
	:	626 RexCorp Plaza
	:	Uniondale, NY 11566
	:	
Defendants.	:	BERKMAN, SCHWARTZ,
	:	Attys. for Def. Erickson
	:	1050 Franklin Ave
	:	Garden City, NY 11530
	:	
Defendants.	:	MACCO & STERN, LLP
	:	Attys for Def. Maldonado
	:	132 Pinelawn Rd. So.
	:	Melville, NY 11747

POST-TRIAL DECISION

The plaintiff is engaged in the business of providing various types of financing to businesses and other entities in need thereof. In September of 2010, defendant Victory Jet, LLC was an air charter broker engaged in the business of providing charter air transport to corporate and private clients.

This action arises out of the corporate defendant's breach of a September 25, 2010 Factoring and Security Agreement as amended by an April 27, 2011 written amendment and the individual defendants' breaches of the terms of their written guaranties of the corporate defendant's performance under such agreement. The agreement called for the plaintiff's discount purchase of future accounts receivable generated by Victory Jet, ownership of which, could vest in the plaintiff, at its sole discretion. As security, Victory Jet granted the plaintiff a security interest in all of its assets, including its accounts. Further security for Victory's performance was the subject of three separate written guaranties executed by the individual defendants on October 13, 2010.

The claims advanced against the corporate defendant were nullified by an automatic stay that arose upon such defendant's filing of a Chapter 7 petition in bankruptcy on October 24, 2011, prior to the commencement of this action. All of the claims interposed against the corporate defendant, Victory Jet, LLC, were withdrawn by the plaintiff due to a bankruptcy filing and all such claims were dismissed, without prejudice, in this Court's Order of April 12, 2013.

The plaintiff chose to proceed on its claims against the individual guarantor defendants. By notice of motion dated January 3, 2013, the plaintiff moved for summary judgment on its THIRD cause of action wherein it charged the individual guarantor defendants with breaching their written guarantees of the obligations of Victory Jet under the terms of the Factoring and Security Agreement. After due consideration of the papers advanced in support of and in opposition to the motion, the court, by order dated April 12, 2013, granted the plaintiff's motion to the extent of awarding partial summary judgment against the individual defendants on the issue of their liability to the plaintiff under the THIRD and SIXTH causes of action. Pursuant to that Order, the plaintiff's entitlement to an immediate trial on the issue of its damages pursuant to CPLR 3212(c) was fixed and determined. The plaintiff's submissions to the April 12, 2013 Order were, however, insufficient to establish the amount of the damages to which the plaintiff is entitled to recover under the terms of the contract and guaranties, including the reasonable value of legal fees incurred. The defendant guarantors were afforded the opportunity to engage in discovery with respect to the issue of damages, as set forth in the Order of this Court dated May 23, 2013.

Here, each of the individual defendants executed written guaranties in which they unconditionally guaranteed the payment and performance of Victory's obligations under the Factoring and Security Agreement. The Court held, in the Order of April 12, 2013, that the unlimited and continuing nature of the guaranties and the express waiver of all legal defenses set forth therein were conclusively binding upon the individual defendants. Such defenses, including the defenses of usury, material breach on the part of the plaintiff purportedly discharging one or more of the defendants from their guaranty obligations, the purported invalidity of the Factoring and Security Agreement under state and federal statutes and the other asserted defenses were not available to the defendants due to their waiver under the terms of their written guaranties.

In the papers seeking summary judgment, plaintiff stated that Victory made the required monthly payments of Factoring Fees (aside from payment of invoices from the account debtors) from October 2010 to May 2011, but ceased to make payments thereafter and accordingly, defaulted in its payment obligations under the Factoring Agreement. Plaintiff advanced the position that pursuant to paragraph 8 of the Factoring Agreement, plaintiff demanded that Victory repurchase from plaintiff the unpaid face amount of all invoices and all unpaid fees associated therewith (*see* Aff. of Matthew Davis, January 3, 2013, par.19), but Victory failed to repurchase any invoices. Plaintiff sent a Notice of Default on October 11, 2011 and accelerated all amounts due under the Factoring Agreement, which was claimed to total $873,741.74, as of that date. The Court notes that while the Notice of Default states that "RMP has accelerated all amounts due under the Factoring Agreement," no such language is set forth in Paragraph 8 of said Agreement (*but see* par. 20.3.1; upon Event of Default, "Purchaser may immediately terminate this Agreement, at which time all Obligations shall immediately become due and payable without notice"). Pursuant to Paragraph 23.2, upon termination, "the unpaid balance of the Obligations shall be due and payable without demand or notice, and Purchaser shall not purchase any further Accounts from Seller."

Additionally, it was alleged that plaintiff purchased invoices totaling $1,830,888.19 and that between October 27, 2010 and May 13, 2011, made advances to Victory in the sum of $1,272,009.61, a sum that represents 69 percent of the face amount of the invoices ("Although the Factoring Agreement provides that RMP would advance 45 percent of the amount of the invoices, RMP in actuality advanced 69 percent of the amount of such invoices" [Aff. of Matthew Davis, January 3, 2013, par. 21]). Plaintiff further alleged that it received payments totaling $478,623.28 on account of payment of the monthly fees and the payment of invoices purchased, leaving a claimed balance due of $793,386.33, prior to any fees and expenses due under the Agreements.

Paragraph 8 of the Agreement states as follows:

> 8. **Repurchase Of Accounts**. Purchaser may require that Seller repurchase, by payment of the then unpaid Face Amount thereof, together with any unpaid fees relating to the Purchased Account (each, an "Account Subject to Repurchase"), on demand, or, at Purchaser's option, by Purchaser's charge to the Reserve Account:
>
> 8.1 any Purchased Account, the payment of which has been disputed by the Payor, Purchaser being under no obligation to determine the bona fides of such dispute;
>
> 8.2 any Purchased Account regarding which Seller has breached any representation or warranty set forth in Section 17 hereunder; and

> 8.3 all Purchased Accounts upon the occurrence of an Event of Default, or upon the termination date of this Agreement.

For purposes of paragraph 8.3, the relevant Event of Default is set forth under 20.1.1:

> Seller defaults in the payment of any Obligations or in the performance of any provision hereof or of any of the other Transaction Documents now or hereafter entered into with Purchaser, or any warranty or representation contained herein proves to be false in any way, howsoever minor.

Additionally, the filing of a petition in Bankruptcy is an Event of Default under 20.1.3.

At trial, the testimony mirrored that allegations set forth above from plaintiff's moving papers. The plaintiff's president, Donald Barrick, testified that plaintiff advanced disbursements to Victory Jet in the sum of $1,272,009.61, based upon wire transfers set forth in Pl. Ex. 1, which is a compilation of bank statements from JPMorgan Chase Bank, NA. Mr. Barrick discussed each advance in detail. After the October 27, 2010 advance of $494,970.00, Mr. Barrick declared the November 19 and November 24 advances resulted from payments from Swift Aviation Group (Swift), to which Victory was an agent thereof pursuant to an Aircraft Management Agreement, and constituted monies due Victory. No explanation was offered as to why Victory was entitled to this rebate.

Mr. Barrick then explained that the December 9, 2010 and January 18, 2011 advances were based upon the buying of invoices from Victory. These payments do not reflect a 45/55 percent split in advances as set forth in the Factoring Agreement. Thereafter, Mr. Barrick explained that each of the subsequent advances of March 11, March 14, March 15, March 17, March 18, March 22, March 23, March 29, March 31, April 5, April 14, April 22, April 28, April 29, and May 13, 2011, were owed to Victory as its share of accounts receivables or collected receivables and monies owed to Victory from the Reserve. No explanation was offered as to whether these payments were capital advances or why these sums were owed from the Reserve, but it was clear from the testimony that these sums belonged to and were owing to Victory. On its face, the Court believes that the April 29, 2011 advance of $100,000.00 must relate to the purchase of the fourth invoice, but again, there is no correlation to the 45/55 percent split in advances as set forth in the Factoring Agreement. In any event, Mr. Barrick testified that it was monies due Victory as a release from the Reserve.

In the Agreement, the Reserve Account is defined at 1.53 as follows:

> a bookkeeping account on the books of the Purchaser representing that portion of the Purchase Price which has not been paid by

> Purchaser to Seller, maintained by Purchaser to ensure Seller's performance of the provisions of this Agreement.

The reserve percentage is noted to be 55% at 1.54 of the Agreement.

Plaintiff's Exhibit 4 is a compilation of essentially four invoices, the first being a group of eleven old invoices, totaling $1,115,840.00 and three additional single invoices, for the purchase of all invoices totaling $1,830,888.19. The invoices are directed to Swift, with whom Victory had a separate management agreement, as above noted.

Mr. Barrick stated that plaintiff received payments of $478,623.28 during the life of the Agreement. He explained that with regard to a purchase invoice, the customer pays, while Victory would pay the factoring fee separately. Plaintiff testified that the measure of damages should be what it paid out and disbursed to Victory less the payments it received, that is, $1,272,009.61 minus $478,623.28 for a balance due of $793,836.33.

Mr. Barrick offered testimony that $7,500.00 was also owed as commitment fees, as shown on Pl. Ex. 2 as reserve charges on October 27, 2010 and January 31, 2011. Additionally, Mr. Barrick claims $330.00 in unpaid wire charges as related in Pl. Ex. 2 on October 27, 2010, January 18, 2011, March 11, 15, 17, 18, 22, 29, 31, April 5, and 14, as reserve charges.

As for the Factoring Fee, plaintiff acknowledges monthly payments from October 2011 to May 2011 in the total sum of $96,118.45. These factoring payments are reflected in Pl. Ex. 2, with the May payment of $16,668.60 shown on June 8, 2011. Plaintiff has continued to compute factoring fees, each month, even after termination of the Agreement, until June 30, 2013, for a total of $626,849.21, with an additional sum of $7,345.58 until July 8, 2013, and continuing at $918.20 per diem. Plaintiff claims it is owed a factoring fee as of July 8, 2013 in the sum of $530,730,26, after deduction for the factoring fees paid.

The Court must first decide the date when the Factoring Agreement was terminated. Victory Jet paid the plaintiff the monthly factoring installments due under the terms of the Factoring Agreement from October of 2010 through May of 2011. Such payments totaled $96,118.45, with the last payment made on June 8, 2011. Payments on the accounts receivables totaled $478,623.28, with the last payment made on May 13, 2011. While plaintiff claims that Victory defaulted in its payment obligations in May of 2011, the notice of default and acceleration of monies claimed to be due in the amount of $873,741.74 was issued on October 11, 2011. Pursuant to Paragraph 1.57(iii) of the Agreement, the termination date is the date the purchaser elects to terminate the agreement pursuant to the terms thereof. Therefore, the Court will utilize the date of October 11, 2011 as the date of the breach and termination of the Agreement.

Next, the Court must question the assumptions made by plaintiff in arriving at the claimed sums due. Mr. Barrick repeatedly testified that the first measure of damages should be what plaintiff paid out and disbursed to Victory less the payments it received, that is, $1,272,009.61 minus $478,623.28 for a balance due of $793,836.33. However, the provisions of the Factoring Agreement do not support that analysis. Plaintiff relied upon Paragraph 8 of the Agreement to support its claim for damages. However, that provision does not authorize a damage computation based upon what was paid out to Victory and then deducting what was received in payments. Here, plaintiff conceded in its moving papers that it did not abide by the Agreement in its distribution of sums to Victory. As admitted, plaintiff made advances to Victory for a sum that represents 69 percent of the face amount of the invoices, instead of the 45 percent as provided for in the Factoring Agreement. Plaintiff overpaid by advancing 69 percent of the amount of purchased invoices.

But more importantly, plaintiff, in the moving papers, set forth the appropriate measure of damages. Therein, pursuant to Paragraph 8 of the Factoring Agreement, plaintiff demanded that Victory repurchase from plaintiff the unpaid face amount of all invoices and all unpaid fees associated therewith. There is no doubt that plaintiff invoked the provisions of Paragraph 8, in particular, "Purchaser may require that Seller repurchase, by payment of the then unpaid Face Amount thereof, together with any unpaid fees relating to the Purchased Account..." Yet, no testimony was offered as to the unpaid face amount relating to any of the purchased accounts. Instead, plaintiff seeks to recoup the sums it paid and overpaid to Victory, after deducting the total sum of what is claimed to have been paid on those accounts. Such is not the measure of damages as set forth in Paragraph 8 of the Agreement.

One can find on Pl. Ex 2 the purchase of four invoices (*see* 10/26,12/10, 1/17, and 1/21), but no testimony was offered as to "the then unpaid Face Amount thereof," as of the Event of Default. The Court did not find the testimony of Gail Winther, plaintiff's Director of Operations, to be helpful on this issue and the explanation surrounding the invoice requested in Def. Ex D displayed a continued lack of adherence to the provisions of the Factoring Agreement. The Court must agree with defendants' contention that there was a failure of proof as to the actual amount of money damages claimed to be owed on this item of damages. No proof was offered as to what portion of the face amount of the invoices remains unpaid. Therefore, on this issue the Court will only award the sums requested for the commitment fee ($7,500.00) and the wire fees ($300.00), as requested.

As to the Factoring Fee, the Court cannot agree with plaintiff's contention that it is entitled to such a fee after the termination of the Agreement by the service of the Notice of Default on October 11, 2011. The definition of "Factoring Fee" is set forth in Paragraph 1.24. Pursuant to Paragraph 20.3.1 of the Agreement, upon termination of the Agreement, "all Obligations shall immediately become due and payable without notice." Additionally,, under Paragraph 23.2, upon termination, "the unpaid balance of the Obligations shall be due and payable without demand or notice, and Purchaser shall not purchase any further Accounts from Seller." Since all Obligations

shall immediately become due and payable without demand, such includes the Factoring Fee and Paragraph 20.3.2 cannot be read as an open ended provision that continues beyond termination. Therefore, in keeping with these provisions, the Court cannot permit the running of the factoring fee to the date of judgment. The Court will award factoring fees until the month of termination, that is, for June 2011 ($16,134.99), July ($16,925.90), August ($17,275.10), and September ($17,063.93), for a total of $67,399.92. Plaintiff will be entitled to pre-judgment interest at the legal rate of 9% (*see* CPLR§§ 5001[a], 5004). The date of the breach and termination of the Agreement is declared to be October 11, 2011 (*see* CPLR§ 5004).

As for the legal fee application, plaintiff's counsel has submitted and Affidavit of Services and a printout of billing this client (*see* Pl. Ex. 3). Plaintiff seeks $68,389.00 in attorney fees and $2,906.92 in disbursements, for a total of $71,295.92. Plaintiff details the difficulties encountered due to the pending Bankruptcy filing and the out-of-state service on the individual guarantors. After service of the complaint and the respective answers, no discovery was held and the summary judgment motion centered on the unqualified waivers set forth in the written guarantees. Upon this Court's short form order granting summary judgment, limited discovery on the issue of damages was authorized and defendants filed a motion to reargue the granted motion. A trial was held on July 11, 2013 on the issue of damages.

A compilation of hours expended by each attorney and the hourly rate is set forth in the submission as follows:

Jerome Reisman - admitted 1967 - partner - 92.45 hours - $415.00 billing rate - $38,587.75
Joseph Capobianco - admitted 1986 - partner - 19.90 hours - $400.00 billing rate - $7,890.00
Lisa K. Doran - admitted 1997- associate - 2.80 hours - $385.00 billing rate - $1,078.00
Josephine Marrali - admitted 2003 - associate - 10.20 hours - $350.00 billing rate - $3,570.00
Gabrielle R. Schaich - admitted 2004 - associate - 29.70 hours - $375.00 billing rate - $11,050.50
James R. Stevens - admitted 2012 - associate - 5.25 hours - $325.00 billing rate - $1,706.25
Janice Stanley - paralegal - 11.80 hours - $150.00 billing rate - $1,543.50

It has long been recognized that courts have traditional authority to supervise the charging of fees for professional services under the court's inherent and statutory power to regulate the practice of law (*see* ***Greenwald v Scheinman***, 94 AD2d 842, 463 NYS2d 303 [3d Dept 1983]; ***Hom v Hom***, 210 AD2d 296, 622 NYS2d 282 [2d Dept 1994]). The attorney's obligations transcend those prevailing in the commercial marketplace (*see* ***Matter of Cooperman***, 83 NY2d 465, 633 NYS2d 1069 [1994]).

In that light, the terms of a retainer agreement no longer serves to establish the sole standard for the attorney's compensation (*see* ***Stair v Calhoun***, 722 FSupp2d 258 [EDNY 2010]). The amount of the fee must be fixed not alone upon the basis of a retainer contract "but also upon a foundation

built of the volume and quality of the professional services actually and necessarily performed" (***Tillman v Komar***, 259 NY 133, 136 [1932]). Fair and reasonable value is what must be determined. No retainer agreement was submitted to the Court. Such does not prevent an attorney from recovering fees in quantum meruit (*see* ***Seth Rubenstein, P.C. v Ganea***, 41 AD3d 54, 833 NYS2d 566 [2d Dept 2007]). The Court will rely upon prevailing case law.

New York Courts have broad discretion in determining what constitutes reasonable compensation for legal services. For instance, "[t]he determination of what constitutes reasonable fees is a matter 'within the sound discretion of the Surrogate, who is in a superior position to judge factors such as the time, effort and skills required'"(***Matter of McCann***, 236 AD2d 405, 654 NYS2d 578 [2d Dept 1997], *citing* ***Matter of Papadogiannis***, 196 AD2d 871, 872, 602 NYS2d 68 [2d Dept 1993]). Reasonable attorney's fees are commonly understood to be those fees which represent the reasonable value of the services rendered (*see* ***NYCTL 1998-1 Trust v Oneg Shabbos, Inc.***, 37 AD3d 789, 830 NYS2d 763 [2d Dept 2007]). A court may consider its own knowledge and experience and may form an independent judgment from the facts and evidence before it as to the nature and extent of the services rendered (*see* ***Jordan v Freeman***, 40 AD2d 656, 336 NYS2d 671 [1st Dept 1972]).

The fixation of lawyer's fees is to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved (***In re Freeman's Estate*** 34 NY2d 1, 355 NYS2d 336 [1974]; ***In re Sucheron***, 95 AD3d 892, 894 [2d Dept 2012]).

As a general rule, the "'reasonable hourly rate [for an attorney] should be based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented'" (***Gamache v Steinhaus***, 7 AD3d 525, 776 NYS2d 310 [2d Dept 2004], *quoting* ***Getty Petroleum Corp. v G.M. Triple S. Corp.***, 187 AD2d 483, 483–484, 589 NYS2d 577 [2d Dept 1992]; *see* ***also Gutierrez v Direct Mktg. Credit Servs.***, 267 AD2d 427, 701 NYS2d 116 [2d Dept 1999]). The burden is on the fee applicant to establish the prevailing hourly rate for the work performed (*id.*, ***Gutierrez v Direct Mktg. Credit Servs., Inc.***). 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 (*see* ***In re Freeman's Estate*** 34 NY2d 1, *supra*).

Federal courts, upon an examination of New York case law, have created case-specific criteria to be followed in ascertaining "the presumptively reasonable fee." In assessing the amount of an attorney's fee on a quantum meruit basis, a court should consider: (1) "the difficulty of the matter";

(2) "the nature and extent of the services rendered"; (3) "the time reasonably expended on those services"; (4) "the quality of performance by counsel"; (5) "the qualifications of counsel"; (6) "the amount at issue"; and (7) "the results obtained (to the extent known)" (***Sequa Corp. v GBJ Corp***., 156 F3d 136, 148 [2d Cir 1998]). In calculating a reasonable attorney's fee, courts should also apply what was formerly referred to as the "lodestar" method, but more recently called "the presumptively reasonable fee" (*see* ***Arbor Hill Concerned Citizens Neighborhood Assn. v County of Albany***, 522 F3d 182, 190 [2d Cir 2008]). To reach a specific dollar figure for the value of the services rendered, the presumptively reasonable fee is comprised of a reasonable hourly rate multiplied by a reasonable number of expended hours (*see* ***Finkel v Omega Communication Servs., Inc.***, 543 FSupp2d 156, 164 [EDNY 2008]; *see also* ***Arbor Hill Concerned Citizens Neighborhood Assn. v County of Albany***, 522 F3d *at* 189, *supra*; ***Melnick v Press***, 2009 WL 2824586 [EDNY 2009]).

The court should assess the case-specific considerations at the outset and factor them into its determination of a reasonable hourly rate, which is then multiplied by a reasonable number of hours expended to reach the presumptively reasonable fee (*see* ***McDaniel v City of Schenectady***, 595 F3d 411, 420 [2d Cir 2010]). In summary, the hours actually expended and the rates actually charged are not dispositive of the amount at which an attorney fee should be fixed.

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 (*see* ***Gamache v Steinhaus***, 7 AD3d 525, *supra, citing* ***Gutierrez v Direct Mktg. Credit Servs***., 267 AD2d 427, *supra* at 428). The burden is on the party seeking attorney's fees to submit sufficient evidence to support the hours worked and the rates claimed (*see* ***Hensley v Eckerhart***, 461 US 424, 453, 103 SCt 1933, 76 LEd2d 40 [1983]). Finally, as instructed by the Supreme Court in ***Fox v Vice***, – US – , 131 SCt 2205, 2216, 180 LEd2d 45 (2011), when trial courts examine a fee application, they "need not, and indeed should not, become green-eyeshade accountants."

In light of the Court's familiarity with this year long litigation and the nature and quality of the work performed on this counsel fee request, the Court feels particularly qualified to determine this application.

Before turning to the issue of the hourly rate, there are some initial observations. First, the Court notes that throughout the invoices, one can find various examples of attorney conferences, either by telephone, e-mail, or in person, between the several counsel involved on behalf of plaintiff (*see e.g.* 10/20/11; 3/7/12; 9/19/12; 9/27/12; 1/6/12). Additionally, the Court notes numerous entries that offer no explanation for time devoted to the case aside from "issues," "work on case," and "litigation." However, in light of the Court's determination as set forth below, the Court does not see the need to address these issues directly.

Reasonable Hourly Rate

In determining a reasonable hourly rate, courts consider whether "the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation" (***Blum v Stenson***, 465 US 886, 895 n. 11, 104 SCt 1541, 79 LEd2d 891 [1984]; *see* ***Savino v Computer Credit, Inc.***, 164 F3d 81, 87 [2d Cir 1998]). Here, the relevant community is Suffolk County, or by extension, the Eastern District of the Federal Court. The reasonable hourly rate should take into account all of the case-specific factors as set forth above.

The burden is on the applicant to establish the prevailing hourly rate for the work performed (*see* ***Gutierrez Direct Mktg. Credit Servs., Inc.***, 267 AD2d 427, *supra*). At the trial on damages, the Court accepted the suggestion of a written submission, and one was provided by Jerome Reisman Esq., who is one of the founding partners of the firm. The affidavit spoke to the experience of the attorneys who worked on this matter, and to the reasonableness of the attorney fee requested. Aside from this partner affirmatively supporting the firm's fee request and the experience of the attorneys who handled the matter, no other evidence was offered to demonstrate the prevailing market rates in Suffolk County. Moreover, without in any way detracting from the firm's reputation in the legal community, which is of the highest caliber, the Court was troubled by the testimony on this important issue from one who has a self-interest in the outcome. The firm will benefit from the ruling of the Court. Such casts doubt on the opinion offered to support the claim that the requested rates are in line with those prevailing in the community.

Since the affidavit was of little help to the "case-specific inquiry" that must be conducted to determine the prevailing market rates for counsel of similar experience and skill, and no other evidence of the prevailing market rates in Suffolk County was forthcoming, the Court is required to turn to case law to guide its determination. The Court has researched the prevailing market rates in the Eastern District of New York. In ***Melnick v Press***, 2009 WL 2824586 at *9 (collecting cases), *supra*, Judge Bianco performed an exhaustive review of the case law discussing the "prevailing market rates in the Eastern District of New York for lawyers in comparable cases involving real property disputes." Judge Bianco concluded that "the range of appropriate billing rates is $200- $375 per hour for partners and $100- $295 per hour for associates" (*id.*). Numerous courts have followed Judge Bianco's conclusions in ascertaining a reasonable hourly rate (*see* ***Barney v Con Edison***, 2010 WL 8497627 [EDNY 2010]; ***4B's Realty 1530 CR39, LLC v Toscano***, 818 FSupp2d 654 [EDNY 2011]; ***Gesualdi v Diacomelli Tile Inc.***, 2010 WL 1049262 [EDNY 2010]; ***Penberg v Healthbridge Mgt.***, 2011 WL 1100103, at *6 [EDNY 2011]).

With regard to the hourly rate of the partner, Jerome Reisman Esq., this Court certainly believes that he has an outstanding amount of experience and can be expected to command hourly rates near the top of the scale. However, his experience does not support an hourly rate in excess of the prevailing rate for attorneys in this community involved in commercial disputes. The Court finds that the hourly rate of $375 takes into account his legal experience.

As for Joseph Capobianco Esq., in light of his limited involvement as reflected in the billing, the Court finds that the hourly rate of $350 takes into account his limited expenditure of time and oversight in this litigation.

Next, it is noted that Lisa K. Doran, Esq., is not a partner, but, at best, can be considered a senior associate and, therefore, does not command partner rates. The average current rate for senior associates in the Eastern District is $200- $295. Since no biographical information was offered to support the reasonableness of the rate of the remaining attorneys, the Court may use its discretion to award fees at a lower rate than requested. This Court certainly believes that a senior associate possesses the requisite amount of experience to command hourly rates near the top of the scale. However, her experience does not support an hourly rate in excess of the prevailing rate for non-partner attorneys in this community involved in commercial litigation, once one examines the case-specific factors listed above. The Court finds that the hourly rate of $280 takes into account her legal experience but also the nature of the action before this Court that centered on the unqualified guarantees.

Concerning associates Josephine Marrali, Esq., and Gabrielle R. Schaich, Esq., while not newly admitted, upon consideration of the case-specific factors, the Court will reduce their rate to $250. The firm has submitted no evidence to justify departure from these market rates.

With regard to the hourly rate of James R. Stevens, Esq., and upon an examination of the seven factors listed above, the Court must express some reservations. First, he is a newly admitted associate. As more detailed later in this decision, on occasion, not all of the actions undertaken by the associates were reasonable. Upon detailed examination by this Court of the factors, in particular, "the difficulty of the matter", "the nature and extent of the services rendered", and "the time reasonably expended on those services", one can not expect the legal services provided herein to command hourly rates near the top of the scale. Therefore, the Court will reduce his rate to $150 (*see* ***Pilitz v Incorporated Vil. of Freeport***, 762 FSupp2d 580, 583 [EDNY 2011] [$100- $200 per hour for junior associates]). Upon consideration of the case-specific factors, the Court finds that any rate higher than these are not warranted.

Finally, as to the hourly rate for the paralegal, Janice Stanley, the Court holds that based upon applicable case law, the rate should be set at $80 (*see* ***L.I. Head Start Child Dev. Servs., Inc. v Economic Opportunity Commn. of Nassau County, Inc.***, 865 FSupp2d 284, 293 [EDNY 2012][$75 per hour]; ***Penberg v Healthbridge Mgt.***, 2011 WL 1100103 at *6-7 [EDNY 2011] [$70- $80 per hour]; ***Brady v Wal-Mart Stores, Inc.***, 2010 WL 4392566 at *5 [EDNY 2010][$70- $100 for paralegal assistants]; ***Stair v Calhoun***, 722 FSupp2d 258 [EDNY 2010][$80 per hour]).

Hours Expended

In determining the presumptively reasonable fee, a court may adjust the hours actually billed to a number the court determines to have been "reasonably expended on the litigation" (***Hensley v***

Eckerhart, 461 US at 433, *supra*). The number of hours claimed must not be excessive or duplicative and courts can exclude hours not "reasonably expended" (*id.* at 434). In reviewing fee applications, it is unrealistic to expect courts to "evaluate and rule on every entry in an application" (***New York State Assn. For Retarded Children, Inc. v Carey***, 711 F2d 1136, 1146 [2d Cir 1983]). Where a court finds the claim to be excessive, or that the time spent was wasteful or otherwise unnecessary, it may decrease or disallow certain hours or order an across-the-board percentage reduction in compensable hours (*see* ***Gierlinger v Gleason***, 160 F3d 858, 882 [2d Cir 1998]; ***Kirsch v Fleet Street, Ltd.***, 148 F3d 149, 173 [2d Cir 1998]; ***Stair v Calhoun***, 722 FSupp2d 258 [EDNY 2010]). Hours that reflect inefficiency (*see* ***Seigel v Merrick***, 619 F2d 160, 164, n. 9 [2d Cir 1980]) or padding, that is, hours that are excessive or otherwise unnecessary, are disallowed (*see* ***Matter of Rahmey v Blum***, 95 AD2d 294, 300-01, 466 NYS2d 350 [2d Dept 1983]; *see also* ***Quarantino v Tiffany & Co.***, 166 F3d 422, 425 [2d Cir 2009]).

As recently noted in an article entitled, "Does hourly billing encourage padding of legal bills?," in the Suffolk Lawyer, May 2013 edition, (Allison C. Shields, p 17 col 1):

> "Padding" legal bills, even unintentionally, is an inherent problem when hours are used as the basis for fees. It is human nature to want to make more money, and hourly billing encourages making more money by putting in more hours, whether those hours are valuable to the client and the ultimate result or not. Instead of emphasizing results, service and outcomes, hourly billing rewards expenditure of time - and that is always going to result in some level of 'padding.'

In arriving at a determination of whether the claimed hours were reasonably expended, the Court must examine the case-specific factors noted above. With regard to the factor concerning the results obtained, it is noted that while the firm was successful on the summary judgment motion, the issue of damages only produced partial success. Where, as here, a party achieved, only limited success in the litigation, the award of fees should be reasonable in relation to the results obtained.

Knowing that hourly billing rewards expenditure of time, it is left to this Court to determine whether those hours are valuable to the client and the ultimate result.

The greatest difficulty in this case centered on the effort expended to review and analyze the Factoring Agreement, as reflected in the billing. Otherwise, this was not a difficult case, since, as set forth above, the guarantees controlled the outcome of the liability branch of this case. The action did not involve discovery, depositions, or expert witnesses. The Court believes that the motion practice and the work performed thereon could have been performed in substantially less time and more efficiently. The hours listed reflects some level of excessiveness and inefficiency (*see* ***Francis v Atlantic Infiniti, Ltd.***, 34 Misc3d 1221(A), 950 NYS2d 608 [Sup Ct Queens County 2012]). The amount of time devoted to the preparation for the damage trial, seems excessive (*see e.g.* ***Antonmarchi v Consolidated Edison Co. of New York, Inc.***, 2010 WL 3359477 [SDNY 2010]). Similarly, the time spent on opposing the motion to reargue and in support of the underlying motion, also appears to be

excessive. The Court finds that the time spent by counsel was not entirely reasonable or productive. Moreover, the services rendered were often routine, straightforward, and relatively simple. The motion papers and the post-trial memorandum failed to reference appropriate provisions of the Factoring Agreement. The Court is not convinced that the hours expended added value to the plaintiff's case and they should be substantially discounted.

A review of the record and the case-specific factors, leads to the conclusion that the nature, extent, and quality of the work was not reasonable. It has been held that a loser "should not have to pay for a limousine when a sedan could have done the job" (***Simmons v New York City Tr. Auth.***, 575 F3d 170, 177 [2d Cir 2009]).

Additionally, in reviewing the billing records, the Court notes block-billed entries or mixed entries in the billing statements. Block billing - the "lumping together of discrete tasks" - "makes it difficult for the court to allocate time to individual activities in order to gauge the reasonableness of time expended on each activity" (***Penberg v Healthbridge Mgt.***, 2011 WL 1100103 at *9 [EDNY 2011]). There exists a substantial and repeated use of block-billing in the hours of Mr. Reisman, Mr. Capobianco, and Mr. Stevens. Under such circumstances, courts have utilized percentage reductions "as a practical means of trimming fat from a fee application" (***New York State Assn. For Retarded Children, Inc. v Carey***, 711 F2d at 1146, *supra*). Just on the single issue of substantial use of block-billing, courts have ordered a 15% reduction to billed hours (*see* ***Melnick v Press***, 2009 WL 2824586 at *6 [EDNY 2009] [compilation of cases]), or even a 25% reduction (*see* ***Penberg v Healthbridge Mgt.***, 2011 WL 1100103 at *9 [EDNY 2011]).

An additional factor supports a reduction of the hours expended. The Court notes entries that warrant additional deductions, that is, hours expended in traveling to the various court dates (*see e.g.*, 2/8/13 [total of 3.5 hours billed]; 3/8/13 [total of 3.1 hours billed]; 5/22/13 [total of 4 hours billed]; 7/11/13 [total of 10 hours billed]). Presumably, some amount of the time billed was for travel time between counsel's Garden City office and Riverhead. "Travel time is appropriately compensated at half of the counsel's normal billing rate" (***Rozell v Ross-Holst***, 576 FSupp2d 537, 540 [SDNY 2008]; ***Barfield v NY Health & Hosp. Corp.***, 537 F3d 132, 139 [2d Cir 2008]; ***Riverhead Sanitation & Carting Corp. v Hampton Hills Golf & Country Club***, 2013 WL 1401263 [Sup Ct Suffolk County 2013]).

Moreover, as previously noted, various attorney entries contain notations of telephone, e-mail, or in person conferences between each other. These in-house conference calls are a common occurrence on the billing records. No explanations are offered and the Court is left to surmise that these conferences were devoted to discussing, reviewing, revising, and rewriting work performed by the associates. Here, the Court is not persuaded that such activities added value to the plaintiffs' case and they should be substantially discounted.

Finally, as noted above, the billing records disclose instances where billing fails to offer any explanation except for time devoted to "issues," "work on case," and "litigation." These hours must be reduced when ascertaining the appropriate fee.

For the reasons discussed above, the Court directs an across-the-board percentage reduction in the hours expended of 25%, on account of the excessive and unnecessary billings and other deductions, as set forth above (*see* ***Estiverne v Esernio-Jenssen***, 908 FSupp2d 305, 312 [EDNY 2012] [25% reduction in hours billed]; *see also* ***Zhao v State Univ. of New York***, 2011 WL 3625133 [EDNY 2011] [30% reduction in hours billed]; ***Antonmarchi v Consolidated Edison Co. of New York, Inc.***, 2010 WL 3359477 [SDNY 2010] [35% reduction in hours allowed for lead counsel]; ***McDonald v Pension Plan***, 450 F3d 91, 96-97 [2d Cir 2006] [35% reduction in hours billed]; ***L.I. Head Start Child Dev. Servs., Inc. v Economic Opportunity Commn. of Nassau County, Inc.***, 865 FSupp2d 284 [EDNY 2012] [35% reduction in fees requested]; ***Cho v Koam Med. Serv.***, 524 FSupp2d 202, 207-208 [EDNY 2007] [40% reduction in hours billed]; ***Francis v Altantic Infiniti, Ltd.***, 34 Misc3d 1221(A), 950 NYS2d 608 [Sup Ct Queens County 2012] [45% reduction in fees requested]; ***LaBarbera v D & R Materials, Inc.***, 588 FSupp2d 342, 349 [EDNY 2008] [45% reduction in hours billed]; ***Daniels v Guntert***, 256 AD2d 940, 681 NYS2d 880 [3d Dept 1998] [nearly 50% reduction in attorney fees on a contempt application]; ***Southampton Day Camp Realty, LLC v Gorman***, 2012 WL 5893907 [Sup Ct Suffolk County 2012] [50% reduction in hours allowed for lead counsel]; ***Finkel v Omega Communication Servs., Inc.***, 543 FSupp2d 156 [EDNY] [50% reduction in hours billed]; ***Days Inn Worldwide, Inc. v Amar Hotels, Inc.***, 2008 WL 2485407, at *10 [SDNY 2008] [75% reduction in fees requested]; ***Riverhead Sanitation & Carting Corp. v Hampton Hills Golf & Country Club***, 2013 WL 1401263 [Sup Ct Suffolk County 2013] [88% downward adjustment to the hours allowed]; ***Dialcom LLC v AT&T Corp.***, 37 Misc3d 1228(A), 964 NYS2d 58 [Sup Ct Kings County 2012] [100% reduction in fees requested]).

After careful review of the record, the Court finds that the plaintiff is entitled to an award of attorney's fees for the reasonable value of the services rendered, subject to a 25% deduction in total hours expended by the firm, and a reduction in the hourly rate for each attorney, as discussed above.

Summary

hours - 25%	billing rate allowed
Jerome Reisman - 92.45 - 25% = 69.34	$375.00 = $26,002.50
Joseph Capobianco - 19.90 - 25% = 15	$350.00 = $ 5,250.00
Lisa K. Doran -- 2.80 - 25% = 2.1	$280.00 = $ 588.00
Josephine Marrali – 10.20 - 25% = 7.65	$250.00 = $ 1,912.50
Gabrielle R. Schaich - 29.70 - 25% = 22.42	$250.00 = $ 5,605.00
James R. Stevens - 5.25 - 25% = 3.94	$150.00 = $ 591.00
Janice Stanley - paralegal - 11.80 - 25% = 8.85	$ 80.00 = $ 708.00

Total = $40,657.00

Costs and Expenses

The Court has examined the invoices and calculated the disbursements and costs incurred in prosecuting the action, which consists largely of the court filing fees, process service charges, postage, and computerized legal research. Defendants do not dispute the requests for costs and expenses (*see* ***Stair v Calhoun***, 722 FSupp2d at 276, *supra*). The Court's review finds the expenditures to be reasonable (*see* ***Irushalmi v Ostroff***, 38 AD3d 608, 830 NYS2d 669 [2d Dept 2007] [investigation costs are chargeable]). The total that the Court finds to be reasonable is $2,906.92. Therefore, the Court will permit the sum of $2,906.92 as expenses allowed. The combined attorney fee figure is $43,563.92.

The Court considered the post-trial submissions, dated August 19, 2013, from each counsel in this determination. This constitutes the decision of the court pursuant to CPLR 4213(b) (*see also* CPLR 4405).

Submit judgment on notice.

DATED: 9/11/13

THOMAS F. WHELAN, J.S.C.