Gurwin Jewish Nursing & Rehabilitation Ctr. of Long Is. v Seidman
2013 NY Slip Op 32673(U)
April 22, 2013
Sup Ct, Suffolk County
Docket Number: 0027880/2010
Judge: Jr., John J.J. Jones

SHORT FORM ORDER

INDEX NO.: 0027880/2010
SUBMIT DATE: 2-20-2013
MTN. SEQ.#: 003 & 004

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

Present:

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

MOTION DATE: 003: 1-9-2013
004: 2-13-2013
MOTION NO.: 003: MOT D
004: MD

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GURWIN JEWISH NURSING & REHABILITATION CENTER OF LONG ISLAND,

Plaintiff,

-against-

ROSLYN SEIDMAN and LESTER SEIDMAN,

Defendants.

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Upon the following papers numbered 1 to 28 read on this application for an order finding that $16,323.85 constitutes the reasonable attorneys' fees and costs incurred by the plaintiff; an order granting leave to renew a prior order and, upon renewal, vacating the Court's order dated November 14, 2012; Notice of Motion/Order to Show Cause and supporting papers 1-11; 12-28 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 29-38 ; Replying Affidavits and supporting papers ____; Other ____; it is

ORDERED that the application on behalf of the plaintiff, Gurwin Jewish Nursing & Rehabilitation Center of Long Island ["Gurwin" or "the plaintiff"], for an order granting the plaintiff $16,323.85 in attorneys' fees and costs in connection with the filing of a Motion to Compel and for Sanctions, (motion sequence 003), and the motion by the defendants Roslyn Seidman and Lester Seidman ["the defendants"], for an order granting leave to renew pursuant to CPLR 2221(d), and upon such leave vacating the Courts' Order dated November 19, 2012, (motion sequence 004), are decided together; and it is further

ORDERED that Gurwin's application for an order granting the plaintiff reasonable attorneys' fees and costs in a sum certain in connection with the filing of a Motion to Compel and for Sanctions, is decided as follows; and it is further

ORDERED that the motion by the defendants for an order granting leave to renew pursuant to CPLR 2221(d), and upon renewal, vacating the Courts' Order dated November 19, 2012, is denied.

The background that led up to the instant applications is described in this Court's previous Order dated November 19, 2012, and will not be repeated here except to inform the instant decision. Suffice to say that Gurwin's previous unopposed application to compel the defendants to respond to Gurwin's long-outstanding discovery requests and for reasonable attorneys' fees and costs in connection with its motion to compel was granted. The decision provided, inter alia, that plaintiff's attorneys could submit a request for the reasonable attorneys' fees and costs in connection with the motion to compel supported by contemporaneous time records, within twenty days of entry of the order (or by December 13, 2012), which plaintiff's counsel has now done on this application.

The previous Order chronicles a long history of repeated and heretofore unexcused defaults by the defendants in responding to Gurwin's 2011 discovery demands despite repeated requests and extensions of professional courtesies by Gurwin's attorneys to no avail, hence, the order granting reasonable attorneys' fees and costs of the motion. Gurwin now seeks attorneys' fees to prepare the motion, including time spent by a paralegal, in the total amount of $15,380.50. Gurwin also seeks disbursements in the amount of $943.35.

The attorneys' fee request is based on an hourly rate of $337.00, a discounted rate to the client, and $172.00 per hour for the paralegal. The motion was jointly prepared by two associates of the firm, both of whom graduated law school in 2010. One associate billed 30.40 hours on the motion ($10,244.80); the second associate billed an additional 13.30 hours on the motion ($4,482.10). The paralegal spent 3.80 hours ($653.60), for a total fee application in the amount of $15,380.50.

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]). "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." (***Matter of Gamache v. Steinhaus***, 7 A.D.3d 525, 526-27 [2d Dept. 2004]).

Regarding the hourly rate, notably the plaintiff's law firm is located in New York City where the prevailing hourly rate is considerably higher than that in Suffolk County where this action is venued *(see* ***Simmons v. New York City Transit Authority***, 575 F.3d 170, 175 [2d Cir. 2009]). Thus, the hourly rate to be applied here is based upon what a reasonable client would be willing to pay in Suffolk County, rather than in Manhattan.

Notably, the fee application contained no description of counsels' legal experience and reputation. The Attorney Directory of the New York State Unified Court System indicates that the two associates who worked on the motion graduated in 2010. Based on a review of comparable rates in Suffolk County, and the fact that both attorneys who worked on the motion are recently admitted attorneys, the court has applied an hourly rate of $225.00 in connection with their preparation of the motion to compel; $100 is a reasonable hourly rate for the paralegal's time. The court's decision is informed by other awards in similar types of cases on Long Island and specifically, in Suffolk County *(see e.g.*, ***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]).

Regarding the time expended to prepare the motion, without in any way disparaging the admirable quality of the work performed, forty-three hours to prepare a relatively straightforward motion to compel a response to discovery requests and for sanctions for the failure to comply is excessive. The crux of the motion that warranted an award of attorneys' fees as a sanction was the unrefuted description of Gurwin's frustrated efforts to obtain responses from the defendants over the course of over one year. The time records submitted show a duplication of effort in researching, writing, analyzing, and editing the motion by the two associates involved. Even twenty hours for this type of simple motion is excessive.

The court finds that an award based on fifteen hours at $225 per hour for the attorney's time, and 3.80 hours at $100 per hour for the paralegal's time, is reasonable under all the circumstances. The total award for attorneys' fees is $3,755; in addition, Gurwin is awarded motion costs in the maximum amount of $100 (*see* ***CPLR*** 8106; ***CPLR*** 8202).

The defendants Roslyn Seidman and Lester Seidman ["the defendants"], seek by way of Order to Show Cause dated January 23, 2012, an order granting leave to renew pursuant to CPLR 2221(d), and upon such leave, vacating the Courts' Order dated November 19, 2012, awarding the plaintiff attorneys' fees and costs in connection with the motion to compel. The Order to Show Cause granted defense counsel's request that his supporting affirmation be viewed *in camera*. Suffice to say, counsel offers as an excuse for the numerous failures to provide discovery, comply with deadlines and extensions, and to oppose the plaintiff's motion to compel, a confluence of personal, physical, financial and business-related difficulties. No affidavit of merit from a person with knowledge refuting or explaining why the defendants have made no payment of the unpaid balance for Roslyn Seidman's care at Gurwin since February of 2010, accompanied the motion to renew.

Prescinding from the issue of whether defendants' motion is, or should be considered, a motion to vacate the defendants' default rather than a motion to renew, the repeated failure to respond to the discovery requests first propounded by Gurwin in 2011 and incorporated in a court order more than warrants the sanction imposed. Defense counsel blames law office failure as the explanation for failing to timely oppose the motion to compel and for sanctions, and affirms that on November 13, 2012, one day before the motion's return date, he, in fact, served responses to the Plaintiff's Interrogatories as well as a Response to Plaintiff's Discovery and Inspection Notice.

Even if the court were to accept the explanation for the failure to oppose the motion, the defendants' perfunctory responses purportedly supplied on November 13, 2012, were woefully inadequate. Having waited over one year to respond to the plaintiff's discovery requests, the defendants were not entitled to make non-privilege objections to the demands and to refuse to provide responses based on those objections (*see generally* ***McKinney's NY Prac. Commentaries,*** C3124:2, pp. 431-2).

Thus, even if the court had received the belated responses first provided on the instant motion to renew, the Court's decision would not differ. The defendants' repeated failures to abide by deadlines, extensions, and at least one court order requiring complete responses to Gurwin's discovery requests warrant the sanction imposed.

The Court is not insensitive to the personal and financial difficulties faced by defense counsel. However, it bears repeating that the discovery requests were first served in November of 2011, and that a so-ordered compliance conference order extended the defendants' deadline to comply with the Plaintiff's discovery demands and document request, until April 11, 2012. The motion to compel and for sanctions was made on June 28, 2012. Notably, Gurwin's Notice of Motion did not seek to strike the defendants' Answer (*see* ***CPLR*** § 3126). Thus, the court did not consider whether the ultimate sanction of striking the defendants' Answer was warranted under the circumstances (*see* ***Arpino v. F.J.F. & Sons Elec. Co., Inc.***, 102 A.D.3d 201, 959 N.Y.S.2d 74 [2d Dept. 2012]).

The parties are directed to appear for a compliance conference on May 15, 2013 at 9:30 AM on the fourth floor of the Arthur M. Cromarty Court Complex, 210 Center Drive, Riverhead, New York 11901. The parties are to confer in good faith before that time to resolve any remaining discovery issues. At the conference on May 15, 2013, the parties' attorneys shall be prepared to demonstrate that they have complied with the Uniform Rules for Trial Courts, 22 NYCRR §202.7, in resolving any remaining discovery issues.

DATED: 22 April 2013

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

CHECK ONE: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION