SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 84R

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HARRY JONES, on behalf of ARCOVIS LLC

Plaintff,

Index No.: 652092/13

-against-

NATALYA VOSKRESENSKAYA
and DISCOVER TECHNOLOGIES, INC.,

Defendants,

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JEREMY R. FEINBERG, SPECIAL REFEREE:

By Order dated February 6, 2014, the Honorable Melvin L. Schweitzer sent this matter to the Special Referee Part for assignment to a referee to hear and determine the amount of attorneys' fees and costs in this action (the "February 6, 2014 Order").

This matter was assigned to me on March 19, 2014, and I held a conference with the parties on that date. Thereafter, the hearing took place on April 3, 2014.[1] Plaintiff Harry Jones, on behalf of Arcovis LLC (hereafter "Arcovis") was represented by Adam Peska, Esq. of Peska & Associates, P.C. Defendant Discover Technologies, Inc. ("Discover") was represented by James W. Perkins, Esq. and John J. Elliott, Esq., of Greenberg Traurig,

[1] References to the transcript of the April 3, 2014 hearing will be in the form of "Tr. __". References to the post-trial briefs submitted by the parties will be in the form of "Def. Mem. __," "Def. Rep. Mem. __," and "Pl. Mem. __," respectively.

LLP ("Greenberg Traurig"). Defendant Voskresenskaya, who, as described below, was separately represented in the underlying litigation, did not appear but Discover called her counsel, Thomas M. Mullaney, Esq. of the Law Office of Thomas M. Mullaney, as a witness at the hearing to testify about his background and legal experience. Elliott took the direct testimony of Perkins regarding the amount and nature of legal services Greenberg Traurig performed in this case. Although Peska cross-examined Perkins, Arcovis called no witnesses.

Discover submitted 22 exhibits into evidence including biographies of the Greenberg Traurig professionals who worked on the matter (Def. Ex. A); various pleadings and correspondence between and among counsel (Def. Ex. B-L, R-T); the transcript of a deposition taken of Mullaney (Def. Ex. M); Greenberg Traurig's Engagement Letter with Discover (Def. Ex. N); a collection of billing statements rendered in this matter (Def. Ex. O); a summary of the fees generated in this matter (Def. Ex. P); copies of checks sent to Greenberg Traurig by Discover to pay its fees (Def. Ex. Q); and, Mullaney's engagement letter, billing materials and checks with respect to his representation of Voskresenskaya (Def. Ex. U). Arcovis submitted two exhibits: records relating to Greenberg Traurig's computer-assisted legal research costs and billing in this case (Pl. Ex. 1-2).

The parties ordered the transcript and submitted post-

hearing briefs. In addition to the testimony and exhibits, I have taken judicial notice of the uncontroverted matters that are contained in the county clerk file and on the court's computerized records (*Khatibi v. Weill*, 8 AD3d 485, 485-86 [2d Dept 2004]).

BACKGROUND

The instant matter involves a purported breach of a non-disclosure agreement (the "NDA") Arcovis and Discover entered into while engaging in discussions about a potential business relationship (Def. Ex. B ¶¶ 15-18, Tab B [NDA]). The business relationship did not blossom as the parties had hoped, and Voskresenskaya, who had been a member of Arcovis, subsequently joined Discover. Arcovis ultimately brought suit by summons and complaint dated June 13, 2013, alleging that Discover breached the NDA and Voskresenskaya breached her fiduciary duty and tortiously interfered with contractual relations (Def. Ex. B).

Defendants each moved to dismiss the complaint. Justice Schweitzer granted the motions as to each defendant in two separate orders dated November 4, 2013, but did not indicate whether attorneys' fees were being awarded under the NDA. Accordingly, Discover filed a motion dated December 16, 2013 to appoint a referee and fix fees and costs. Justice Schweitzer granted that relief in the February 6, 2014 Order.

THE ATTORNEYS' FEES HEARING

Perkins testified that he is a commercial litigator with 26 years of experience and he served as lead counsel in this litigation. He was joined by Elliott, an eighth year associate and who handled the day-to-day tasks on the case; Roy Taub, a senior associate who assisted on reply papers on one motion; and, two summer associates who handled certain legal research tasks (Tr. 15-18; Def. Ex. A [firm bios]).

Perkins described the nature of the litigation - a $5 million commercial matter brought against Discover and Voskresenskaya as set forth in the complaint (Tr. 18-19; Def. Ex. B). After review of the complaint and discussions with the client, Perkins explained, he concluded that it was appropriate to retain separate counsel for the individual defendant. Thus, he contacted Mullaney, who he had known for many years since they formerly worked together at White & Case. Following Mullaney clearing a conflict check, he took on the representation of Voskresenskaya (Tr. 20).

Perkins outlined a number of the litigation tasks that he and Mullaney (on his client's behalf) undertook. At the outset, these included responding to a cease and desist letter issued by Arcovis (Tr. 21-22; Def. Ex. C, D); raising certain procedural defects in the complaint and requesting that it be withdrawn, re-filed, and re-served (Tr. 23-24; Def. Ex. E, F); and, filing a

motion to dismiss the complaint when it was not withdrawn, based on failure to state a claim for breach of contract and an unrelated procedural defect. Perkins also testified that Mullaney filed a motion to dismiss on behalf of Voskresenskaya, based at least in part on Greenberg Traurig's work product. Due to a procedural defect pointed out by Arcovis (the governing pleading was not attached), Mullaney ultimately refiled his motion (Tr. 25-26).

Perkins testified that Justice Schweitzer granted both Discover's and Voskresenskaya's motions to dismiss in short orders dated November 4, 2013, without holding oral argument (Def. Ex. H, I; Tr. 26, 28). Subsequently, Discover wrote to Arcovis claiming entitlement to attorneys' fees under the NDA in light of these decisions. Arcovis refused to pay the fees. Discover then filed a motion to assign a referee to determine the fees in the case (Tr. 26-27, 31; Def. Ex. J, K). The Court issued the February 6, 2013 Order establishing the reference in this case (Tr. 32; *see also* Def. Ex. L).

Perkins next described Greenberg Traurig's efforts to collect information and prepare for the fees hearing. Among other issues, he explained, Discover wished to memorialize the testimony of Mullaney in advance of the initial hearing date (March 19, 2013) when Mullaney was unavailable. The parties were unable to agree to adjournment of the hearing date, Perkins

testified, so Elliott took Mullaney's deposition on March 13, 2014 (Tr. 33-37; Def. Ex. M).

Perkins also described his and Greenberg Traurig's billing practices, including the use of retainer agreements. He explained that Greenberg Traurig entered into an engagement letter with Discover on or about June 19, 2013 (Tr. 37-38; Def. Ex. N). Perkins also identified the collection of billing invoices that Greenberg Traurig sent to Discover for work on this case. The first bill was rendered in July, 2013 and the last in April, 2014. They were provided monthly (Tr. 39; Def. Ex. O, P [summary of bills prepared from Def. Ex. O]).[2] In describing the invoices, Perkins testified that Westlaw costs are separately identified by timekeeper. He indicated that computer-assisted legal research costs are specifically identified in the engagement letter as a cost that Greenberg Traurig passes along to the client (Tr. 40).

Perkins testified that his hourly billing rate was $720 per hour at the time the case started and increased to $750 per hour. He indicated that Elliott's billing rate started at $485 and increased to $515 per hour (Tr. 44-45). Perkins explained that Discover has thus far paid Greenberg Traurig's bills (through but

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[2] Perkins explained that certain entries in the invoices were partially redacted to preserve material that would be subject to the attorney-client privilege and/or work product protections (Tr. 40).

not including the April 2, 2014 invoice) through a series of checks (Tr. 47-48; Def. Ex. Q).

On cross examination, Perkins admitted that the complaint alleged that Voskresenskaya is a member of Arcovis and that she is presently an employee of Discover (Tr. 53). He testified that he was not aware of any document that terminated her involvement with or separated her from Arcovis (Tr. 54).

Referring to two documents that were produced at the hearing in response to a notice to produce, Perkins identified the materials as printouts from Greenberg Traurig containing a detailed breakdown of Westlaw charges (Tr. 56-57; Pl. Ex. 1-2). He indicated that he did not know what the legend "[c]lient cost recovery targeted" referred to in the documents. He explained that his understanding is that the documents reflect the actual charges that were passed through to the client for the work performed (Tr. 57-58, 60). He added that if there were any discounts, these too would be passed through to the client (Tr. 58). In response to questions from me, he indicated that he was aware that large firms such as his own have entered into flat fee arrangements with computer assisted legal research providers such as Westlaw, but testified that he did not know whether his firm had done so (Tr. 67).

Perkins also clarified that the Mullaney deposition was taken to preserve his testimony, particularly to the extent it

authenticated certain documents, in case the hearing went forward while Mullaney was away on vacation (Tr. 61-62). On re-direct examination, Perkins explained that there was an exchange of letters between counsel leading up to that deposition, and that Discover had made clear its intention to take the deposition to preserve the testimony if the hearing was going to move forward in Mullaney's absence (Tr. 69-70; Def. Ex. R, S, T).

Perkins also testified that the total amount of fees and costs Greenberg Traurig charged was $105,221.53 and conceded that the majority of those fees were incurred after Justice Schweitzer's November 4, 2013 decision (Tr. 66).

The parties stipulated to the admissibility of Mullaney's retainer letter, billing materials, and payments received (Tr. 78-80; Def. Ex. U). Mullaney, as a result, testified briefly as to his educational background and experience (Tr. 75-77).

DISCUSSION

A. Voskresenskaya's Attorneys' Fees

In addition to the usual analysis that is required in determining the reasonable attorneys' fees to be awarded in a case such as this, Discover has raised another key issue that I must resolve at the outset: should the fees accrued by Mullaney, on behalf of Defendant Voskresenskaya, be included in the award

here.

It is undisputed that Mullaney was hired to represent Voskresenskaya after Greenberg Traurig concluded that it would be appropriate for the defendants to have separate counsel (Tr. 20). Discover paid the bills that Mullaney charged for his representation (Tr. 50; Def. Ex. U [retainer letter between Mullaney and Voskresenskaya]). It is also undisputed that Mullaney's fees total $12,875 (Def Ex. U; Def. Mem. 13).

The language of the relevant portion of the NDA states, "*[t]he prevailing party* in any action to enforce this Agreement shall be entitled to costs and attorneys' fees." (Def. Ex. B Tab B ¶ 3 [emphasis supplied]). As Arcovis correctly points out, the parties to the NDA are Arcovis and Discover, not Voskresenskaya (Def. Ex. B Tab B at 2 [signature block]; Pl. Mem. at 5).

In response, Discover argues that it made the decision at the inception of the case to hire and pay for separate counsel for Voskresenskaya and that Arcovis should have been aware that Discover would have covered her defense because of the overlapping allegations (Def Mem. at 17). Moreover, Discover argues, because it paid for the fees that her lawyer charged, those fees should be properly compensable.

I conclude that it would be inappropriate to award Voskresenskaya's fees in these circumstances. Justice

Schweitzer's order of reference says nothing about awarding attorneys' fees to or for Voskresenskaya (February 6, 2013 Order at 1 ["after the Special Referee has determined the amount of attorneys' fees to be awarded to *defendant*, defendant shall submit a Proposed Judgment to the Court."][emphasis added]). I decline to read this relief into the order.[3]

Although Discover may well have appropriately complied with its obligations under the applicable ethical rules (Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.7, 1.13) in seeking and paying for separate counsel for an individual defendant here, that alone does not entitle it to recovery of those fees. Voskresenskaya is not a party to the NDA and thus not a prevailing party under the fee-shifting provision therein. Simply put, I discern no "statute, agreement or court rule" authorizing me to award this relief (*US Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 NY3d 592, 597 [2004]).

Accordingly, I deduct the entirety of Mullaney's fee, or $12,875.00 from the amount Discover may recover.

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[3] I note separately that in none of the pleadings that led up to the fee hearing before me, did Discover make any reference to seeking Voskresenskaya's fees. Neither Discover's December 16, 2013 opening brief on this application, nor its January 14, 2014 reply brief, both of which I have judicially noticed, make any reference to seeking Voskresenskaya's fees and only refer to Discover as the prevailing party.

B. Discover's Attorneys' Fees and Costs

Initially, I note that although Perkins has an interest in the outcome of this hearing to the extent of a larger fee award for Greenberg Traurig, I find his testimony to be credible. In this instance, I do not believe that whatever interest he has in collecting attorneys' fees colored his testimony, which is otherwise supported by the documentary evidence in this matter.

To determine reasonable attorneys' fees, I must weigh the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate or what is generally referred to as the "lodestar" method. (*Hensley v Eckerhart*, 461 US 424, 430 [1982].) I am also to consider:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved 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.

(*Id.* at 430 n.3; *see also Matter of Freeman*, 34 NY2d 1 [1974]; *Bankers Fed. Sav. Bank FSB v. Off W. Broadway Dev.*, 224 AD2d 376 [1st Dept 1996].)

1. Reasonable Hourly Rates

As a starting point, I conclude that the rates charged by Greenberg Traurig professionals in this case are reasonable. In particular, for large law firm attorneys in Manhattan, I conclude that it is reasonable for partners with the experience and pedigree of Perkins to command rates of between $720-$750 per hour, associates such as Elliott and Taub to be billed at $400-$515 per hour, summer associates to be billed at $295 per hour and paralegal assistance to be billed at less than $200 per hour (Def. Ex. A; Tr. 44-45). I further note, as additional evidence of the reasonableness of the rates, that Arcovis has made no meaningful attempt to challenge the rates themselves, and that Discover has paid the bills that have been sent to it thus far (Tr. 47-48).

2. Reasonable Hours Expended

As a general matter, having reviewed the invoices and the testimony concerning the tasks performed, I find that the work of Discover's counsel in this case was reasonable and efficient. By and large, the work was necessary, non-duplicative, and appropriate to achieve the results obtained in this commercial dispute (*Schoenau v. Lek*, 283 AD2d 200 [1st Dept 2001] [affirming Referee's award of fees and noting "[i]t was proper for the referee to employ his own knowledge, experience and expertise as to the time required to perform similar legal services"]). I

note specifically in this regard that although I have disallowed the time incurred by Mullaney on behalf of Voskresenskaya, I do not believe further deductions are warranted to time Greenberg Traurig lawyers spent conferring with Mullaney. I conclude that these billed amounts are appropriate and led to synergies in the defense of the action.

The Greenberg Traurig lawyers in this case are guilty to some degree of engaging in the time-keeping practice of "block billing" - stringing together multiple entries under the same time charge. Block billing does not render the attorneys' fees unreasonable *per se* (*J. Remora Maintenance v. Efromovich*, 103 AD3d 501, 503 [1st Dept 2013]). In this case, I did not have difficulty discerning the nature of the work or amount of work reflected in the time entries. Accordingly, I do not disallow any time on this basis.

3. Other Factors

There is little question that Discover's counsel obtained a great result - dismissal of a multi-million dollar lawsuit through the efficient means of a pre-answer motion to dismiss (Def. Ex. H, I). On the other hand, this was, for the most part, not an overly complex case. There was no discovery in this action. There may have been need for an additional motion to establish entitlement to attorneys' fees (Def. Ex. J, K, L), but otherwise this was a case that quickly reached the point of

resolution pending appeal. On balance, I conclude that these factors offset each other - neither the great result nor the relative simplicity of the case warrant an adjustment to the fees at issue, nor do any of the other factors set forth in *Hensley*.

4. Fees on Fees

Finally, I must consider whether Discover is entitled to "fees on fees" for time spent preparing for the attorneys' fees hearing at issue on this matter. In New York, "an award of fees on fees must be based on a statute or on an agreement." (*546-552 W. 146th St. LLC v. Arfa*, 99 AD3d 117, 123 [1st Dept 2012]; *Sage v. Proskauer*, 288 AD2D 14, 15 [1st Dept 2001].) Here, the attorneys' fees award is based on language found in NDA. As noted above, the relevant portion of the NDA states that "[t]he prevailing party in any action to enforce this Agreement *shall be entitled to costs and attorneys' fees*" (Def. Ex. B Tab B ¶ 3 [emphasis added]).

I have considered the relevant language and do not discern a basis to award fees on fees in this case - although there is no question that attorneys' fees are to be awarded under the NDA, it is not "unmistakably clear" that fees on fees were contemplated therein. (*cf. Arfa*, 99 AD3d at 122 [citations omitted]). The NDA merely states that "costs and attorneys' fees" are to be awarded - without more, this does not support the additional relief of a

fees on fees award.

The parties also disagree on *when* the work that constitutes fees on fees starts. Arcovis argues that any time after the decisions on the motion to dismiss were issued on November 4, 2013 should be viewed as fees on fees (Pl. Mem at 4). Discover counters that because Arcovis challenged whether Discover was a prevailing party, and additional motion practice was necessary, it was not until after February 14, 2014, when a Special Referee was appointed, that fees on fees started (Def. Mem at 14; Def. Rep. Mem at 4-5).

Although neither side has pointed me to a squarely-controlling case on this issue, I conclude that Discover has the better of the argument. The "clock" on fees and fees starts no sooner than when the parties begin preparations for the fee hearing and certainly not while the parties litigated whether there was an entitlement to any attorneys' fees at all (*cf. Square Mile Structured Debt [One] LLC v. Swig*, 2013 NY Slip Op 31803 [Sup Ct, NY County 2013] at 11-12). I therefore deduct, as fees on fees, only those amounts incurred starting with Greenberg Traurig's March 18, 2014 invoice (reflecting work performed starting on February 14, 2014). In the aggregate, this amounts to $23,470.35 in fees and $603.91 in disbursements (Def. Ex. O [invoices of March 18, 2014 and April 2, 2014]; *see also* Def. Mem at 13).

5. Disbursements

With one exception, Arcovis largely ignores Discover's claims to disbursements which are otherwise reasonable, and therefore I award them in full. The parties disagree, however, on the propriety of Westlaw charges that Greenberg Traurig incurred on Discover's behalf. Perkins testified, and Discover argued, that the fees for Westlaw usage were both agreed to in the retainer letter between attorney and client and whatever costs were incurred were passed through to the client without markup. Arcovis focuses on language contained in a pair of reports provided by the firm using the language "client cost recovery target," urging that this indicated that the amount Greenberg Traurig was charged was somehow not what the client was billed (*Compare* Pl. Mem 4-5, Pl. Ex. 1-2 and Tr. 56-57 *with* Def. Rep. Mem at 8; Ex. N, P and Tr. 40, 57-58).

Although the question is not beyond doubt, I conclude that there is no justifiable basis to reject Perkins' credible testimony that the actual Westlaw costs are passed on to the client, with the client having agreed to pay such fees in the retainer letter (Tr. 40, 57-58). As such, I conclude that the Westlaw charges are appropriate in this case (*In re Aitken,* 160 Misc2d 587, 590-591 [Sur Ct NY County 1994]; *Arbor Hill Concerned Citizens Neighborhood Assn. v County of Albany,* 369 F3d 91, 97-98 [2d Cir 2004]).

I recognize that there is contrary authority from various trial courts in New York State that conclude as a general matter that computer assisted legal research is part of overhead and should be built into a lawyers' rate (*see Bell v Helmsley*, 2003 NY Slip Op 50866(U) [Sup Ct, NY County 2003]). I am persuaded however, by the reasoning of the Second Circuit in *Arbor Hill*, which I believe to be most applicable here:

> We agree that the use of online research services likely reduces the number of hours required for an attorney's manual research, thereby lowering the lodestar, and that in the context of a fee-shifting provision, the charges for such online research may properly be included in a fee award. If [the firm] normally bills its paying clients for the cost of online research services, that expenses should be included in the fee award.

Arbor Hill, 369 F3d at 98.

In sum, I disallow $36,345.00 in attorneys' fees and $603.91 in disbursements (consisting all of the "fees on fees" work from February 14, 2014 to the present, and fees for Mullaney's work on Voskresenskaya's behalf). I conclude that Discover is entitled to $76,104.00 in attorneys' fees and $5,043.27 in disbursements.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that Discover is entitled to $76,104.00

in attorneys' fees and $5,043.27 in disbursements.

Pursuant to Justice Schweitzer's February 6, 2014 Order, Discover shall submit a proposed judgment to the Court consistent with this determination.

The parties are directed to contact the Clerk of the Special Referee Part to make arrangements to retrieve the original exhibits submitted as evidence in this case by June 30, 2014. Thereafter, said exhibits will be discarded.

Dated: June 11, 2014

JEREMY R. FEINBERG

Special Referee