STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: April 8, 2015)

BENNIE SISTO, AS THE TRUSTEE OF THE GOAT ISLAND REALTY TRUST	:	
v.	:	**C.A. No. NC-2008-0119**
AMERICA CONDOMINIUM ASSOCIATION, INC. AND THE MEMBERS OF ITS EXECUTIVE BOARD, NATALIE D. VOLPE, MARY C. CONNOLLY, DIANE S. VANDEN DORPEL, EDMOND F. MCKEOWN AND SANDRA M. CONCA	:	

DECISION

CLIFTON, J. In its November 20, 2014 decision in the above-captioned matter,[1] this Court found that it possessed subject matter jurisdiction to award attorney fees incurred in defending the anti-SLAPP judgment upheld on appeal. Defendants America Condominium Association, Inc. (America Condominium), Natalie D. Volpe, Mary C. Connolly, Diane S. Vanden Dorpel, Edmond F. McKeown, and Sandra M. Conca (collectively, Defendants) have submitted a request for $29,748.65 in counsel fees, asserting that this amount represents such appellate fees. Now, the Court here determines the amount of fees to be awarded. Jurisdiction is pursuant to G.L. 1956 §§ 9-33-1, et seq.

* * *

[1] Sisto v. Am. Condo. Ass'n, Inc., 2014 WL 6709913, *1 (R.I. Super. Nov. 20, 2014).

The instant matter arises out of Plaintiff Bennie Sisto's (Mr. Sisto) proposal to expand his townhouse in the condominium community governed, in part, by Defendants.[2] Essentially, Mr. Sisto filed suit against Defendants alleging slander of title in response to Defendants' letter to the Coastal Resources Management Council (CRMC), claiming, inter alia, that Mr. Sisto did not own the land on which the expanded townhouse was proposed. In response, Defendants moved under Rhode Island's anti-SLAPP (Strategic Litigation Against Public Participation) statute, asserting that Mr. Sisto's suit was brought solely to interfere with their participation in a matter of public concern. On appeal, our Supreme Court was faced with two distinct issues: (a) whether the anti-SLAPP action was providently granted; and (b) whether, under the Rhode Island Condominiums Act, Mr. Sisto could expand his townhouse without the consent of Defendants. Upon confirmation of the anti-SLAPP judgment, the issue now before the Court is the award of appellate fees. Sisto, 68 A.3d at 617 (affirming "the judgment of the Superior Court . . . with respect to the anti-SLAPP issue").

The party seeking such an award "carr[ies] [the] burden of proof regarding the reasonableness of the attorney's fees." Peckham v. Hirschfeld, 570 A.2d 663, 670 (R.I. 1990); see also Phetosomphone v. Allison Reed Grp., Inc., 984 F.2d 4, 6 (1st Cir. 1993) (quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)) (holding that "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates"). Indeed, "a fee application must be accompanied by documentation . . . sufficient to satisfy the court . . . that the hours expended were actual, nonduplicative and reasonable, . . . and to apprise the court of the nature of the activity and the claim on which the hours were spent." Matter of Schiff, 684 A.2d 1126, 1131 (R.I. 1996) (internal citations omitted).

[2] A detailed retelling of the facts in that case is found in Sisto v. Am. Condo. Ass'n, Inc., 68 A.3d 603 (R.I. 2013).

In calculating attorney's fees, "[t]he starting point or 'lodestar' for determining the reasonableness of a fee is 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" Id. (quoting Hensley, 461 U.S. at 433); see Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 551 (2010) (stating that the "lodestar figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence") (internal citations omitted). In order to locate this guiding light—i.e., determine the reasonableness of a particular fee—the Court "consider[s] the factors enumerated in Rule 1.5" of the Supreme Court Rules of Professional Conduct. Keystone Elevator Co. v. Johnson & Wales Univ., 850 A.2d 912, 921 (R.I. 2004). Such factors include "the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the amount involved and the results obtained; and the time limitations imposed by the client or by the circumstances." Id. In order to qualify the reasonableness of a particular award, "attorneys 'are competent to testify as experts in determining what is a reasonable charge for legal services rendered.'" Colonial Plumbing & Heating Supply Co. v. Contemporary Constr. Co., 464 A.2d 741, 744 (R.I. 1983) (quoting Cottrell Emps. Credit Union v. Pavelski, 106 R.I. 29, 35, 255 A.2d 162, 165 (1969)). An affidavit submitted by counsel may constitute such testimony. Id. (citing Stewart v. Indus. Nat'l Bank, 458 A.2d 675, 676 (R.I. 1983)).

Rhode Island's anti-SLAPP statute provides, "the court shall award the prevailing party costs and reasonable attorney's fees, including those incurred for the motion and any related discovery matters." Sec. 9-33-2(d). "The statute does not provide, however, . . . a specific measure of reasonable attorneys' fees." Karousos v. Pardee, 992 A.2d 263, 272 (R.I. 2010). As such, "the amount awarded in counsel fees is within the sound discretion of the trial judge in light of the circumstances of each case[.]" Id. (quoting Schroff, Inc. v. Taylor–Peterson, 732

A.2d 719, 721 (R.I. 1999)). Nevertheless, the Court remains mindful that "[a] request for attorney's fees should not result in a second major litigation." Hensley, 461 U.S. at 437.

Here, to support Defendants' request, one of their attorneys, Timothy J. Groves (Mr. Groves), has submitted an affidavit attesting to the calculation of $29,748.65 as well as the reasonableness of this award. Accompanying the affidavit is a redacted copy of the relevant billing statements. An unredacted copy of these billing records has been provided to the Court for in camera review.

Mr. Sisto asserts that the total hours billed exceeds that amount reasonably necessary to defend the anti-SLAPP judgment on appeal.[3] He contends that—in light of the fact that Defendants' attorneys worked contemporaneously on the anti-SLAPP litigation and a tangentially-related declaratory judgment action on review by our Supreme Court in Sisto, 68 A.3d 603—Mr. Groves failed to adequately parse the time spent defending the anti-SLAPP judgment in the billing records. Mr. Sisto also contends that the hours billed are unreasonably high in light of the lack of novelty and difficulty of the questions involved in defending the anti-SLAPP judgment. Further, he asserts that incurring a fee of $29,748.65 to defend a judgment of $9685.31 is plainly unreasonable. This Court examines each of Mr. Sisto's arguments in turn.

Billing of Non-Anti-SLAPP Matters

Mr. Sisto contends that Mr. Groves "lumped" time spent on the declaratory judgment action with that spent on the anti-SLAPP appeal in his accounting of the requested fee award. Specifically, Mr. Sisto asserts that much of the listed time is wholly unrelated to the anti-SLAPP appeal. Further, he argues that many of the entries listed amalgamate work spent on the declaratory judgment appeal with that involving the anti-SLAPP action. Mr. Groves has attested

[3] Mr. Sisto does not dispute the hourly billing rates of Defendants' attorneys.

that this calculation does not include any fees "exclusively attributable" to the work performed on the declaratory judgment action. (Groves Aff., ¶ 6.)

Preliminarily, the Court notes that only those fees incurred relating to the anti-SLAPP litigation may be properly awarded. Sec. 9-33-2(d); see Dauray v. Mee, No. 2013-135-APPEAL, 2015 WL 500832, at *12, -- A.3d -- (R.I. Feb. 6, 2015) (holding that "[a]bsent express statutory authority, counsel fees are not awardable as part of the costs of litigation") (internal citations omitted); Bonner v. Guccione, 178 F.3d 581, 597 (2d Cir. 1999) (holding that "courts must guard against awarding attorney's fees where [the legislature] has not authorized [them]") (internal citations omitted); see also Christian Research Inst. v. Alnor, 81 Cal. Rptr. 3d 866, 874 (Cal. App. 4th Div. 2008) (upholding trial justice's refusal to "reimburse[] for non-anti-SLAPP efforts"); Polay v. McMahon, 468 Mass. 379, 390 (2014) (limiting request for attorney's fees on appeal encompassing a number of issues "to the costs and fees incurred in defending the [anti-SLAPP] fee award"). Indeed, considering the General Assembly's intent behind §§ 9-33-1, et seq. and Rhode Island's typically "staunch adherence to the 'American rule[,]'" Moore v. Ballard, 914 A.2d 487, 489 (R.I. 2007), "unrelated claims [ought to] be treated as if they had been raised in separate lawsuits" for the purposes of a fee award. Hensley, 461 U.S. at 435. Nevertheless, where multiple claims "involve a common core of facts or [are] based on related legal theories[,] [m]uch of counsel's time will be devoted generally to the litigation as a whole [such that the court cannot] divide the hours expended on a claim-by-claim basis." Id. If "the court reasonably concludes that there is not a complete overlap and separation is proper[,] . . . [it] [']may attempt to identify specific hours that should be eliminated, or it may simply reduce the award[.]'" Phetosomphone, 984 F.2d at 7 (quoting Hensley, 461 U.S. at 435).

Here, in the matter reviewed by our Supreme Court, Defendants were required to defend the decision in their favor on both the anti-SLAPP suit and a declaratory judgment action. The anti-SLAPP litigation was initiated by Defendants in response to Mr. Sisto's suit for slander of title, which, in turn, stemmed from Defendants' statement to the CRMC that Mr. Sisto did "not own the land on which he wants to expand" his townhouse. Sisto, 68 A.3d at 606. Only tangentially-related, the declaratory judgment action involved whether Mr. Sisto could indeed expand his unit. As such, while both issues stem from the same continuous narrative, the distinct claims are not so intertwined that this Court must treat work spent on the two matters as inextricable. See Stickle v. Heublein, Inc., 716 F.2d 1550, 1564 (Fed. Cir. 1983) (finding that trial court abused its discretion in awarding attorney's fees for both a fee-eligible claim and a "wholly separate and separable [non-fee-eligible] claim"); Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc., 122 F.3d 1211, 1230 (9th Cir. 1997) (holding, "under the rule requiring segregation of attorney's fees," that the court "should not have awarded . . . any attorney's fees incurred in doing work on [distinct non-fee-eligible] claims"). Preparing for the anti-SLAPP appeal here required examination of a largely different set of facts and law. See Hensley, 461 U.S at 434 (requiring segregation of awarded fees where case involves "distinctly different claims for relief that are based on different facts and legal theories"). Indeed, while preparation for the anti-SLAPP appeal involved the characterization of Defendants' arguments to the CRMC—as to whether or not such remarks were objectively baseless—the declaratory judgment looked to wholly unrelated law in determining the merits of Mr. Sisto's proposed expansion. Accordingly, Defendants are not entitled to reimbursement of fees incurred in defending the distinct declaratory judgment.

When conducting a determination of the reasonableness of proposed fees, the Court "may discount requested attorney hours if the attorney fails to keep meticulous, contemporaneous time records that reveal all hours for which compensation is requested and how those hours were allotted to specific tasks." Robinson v. City of Edmond, 160 F.3d 1275, 1281 (10th Cir. 1998) (internal citations omitted); see Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 297 (1st Cir. 2001) (holding that "prevailing parties who intend to seek counsel fee awards ordinarily must ensure that contemporaneous time records are kept in reasonable detail"); Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 952 (1st Cir. 1984) (stating that "the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance"). Moreover, where a fee award will only compensate a party for work on a particular claim, especially fastidious records are needed for the court to distinguish between performance by counsel on fee-eligible and non-fee eligible claims. See Carroll v. Sanderson Farms, Inc., No. CIV.A. H-10-3108, 2014 WL 549380, at *8 (S.D. Tex. Feb. 11, 2014) (internal citations omitted) (holding that a "fee applicant should exercise billing judgment and keep billing time records in a way that enables the reviewing court can identify distinct claims"); Colonial Plumbing, 464 A.2d at 744 (holding that "the factual issue of what is a reasonable fee requires particular facts upon which the trial court can base a decision"); see also Derfner & Wolf, Court Awarded Attorney's Fees, ¶ 16.02[7][b] (2011) ("The need for specifying precisely the work performed during each hour is particularly important when a fee award is apt to be made for less than the entire case.").

The billing records here do not even begin to approach a diligent accounting of the hours spent on the anti-SLAPP appeal. The stack of billing statements attached as an exhibit to Mr. Groves' affidavit provide figures that summate to $37,311.30 for the dates spanning December

28, 2010 through June 27, 2013. The Court cannot, by review of these records, both redacted and unredacted, distinguish between work performed on anti-SLAPP issues and that time dedicated to other matters. See Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 971 (D.C. Cir. 2004) (holding that "many time records lump together multiple tasks, making it impossible to evaluate their reasonableness"); Tenn. Gas Pipeline Co. v. 104 Acres of Land, More or Less, in Providence Cnty., State of R.I., 32 F.3d 632, 634 (1st Cir. 1994) (holding that "failure to include some description of the subject matter of the task made it impossible to determine if the time factor allocated was appropriate or excessive"). For example, it is impossible to determine how the seven hours spent "draft[ing the] appellate brief" on November 1, 2012 was divided between the two issues. (Groves Aff., Ex. 1, (Invoice dated Feb. 6, 2013)).

Furthermore, much of the time listings provide only vague mention of correspondences with clients, appellate strategizing, preparation of oral argument or drafting appellate briefs. See Tenn. Gas, 32 F.3d at 634 (finding that "time summaries . . . replete with time charges for such matters as 'Confer with co-counsel,' 'Confer with client,' 'Review materials,' 'Review documents,' and 'Legal Research' without any indication of the subject matter involved . . . [make] it impossible for the court to gage whether the task performed was warranted"); Hensley, 461 U.S. at 437 n.12 (holding that "counsel should identify the general subject matter of his time expenditures"). As one example, the billing records presented by Defendants list countless phone conversations regarding the "status of appeal" with each individual board member. Such entries, without further explication, provide little insight to the Court as to whether such phone calls were necessary or simply duplicative. See Anglo-Danish Fibre Indus., Ltd. v. Columbian Rope Co., No. 01-2133-GV, 2003 WL 223082, at *6 (W.D. Tenn. Jan. 28, 2003) ("Billing entries for conferences, . . . when the billing entries do not identify the subject matter of the

communication, are too vague to show whether the hours expended are reasonable.”). While a comparison between the redacted and unredacted billing statements demonstrates that Defendants made at least a minimal effort to reduce the requested award, there was no attempt to abate billing entries that encompassed both fee-eligible and non-fee-eligible work. See Deary v. City of Gloucester, 9 F.3d 191, 197-98 (1st Cir. 1993) (holding that failure to submit “a full and precise accounting of [the attorneys’] time, including specific information about number of hours, dates, and the nature of the work performed” should result in a requested award being “reduced or even denied altogether”).

It is clear beyond peradventure that the fee award requested comprises work done on the declaratory judgment appeal. Mr. Groves implicitly admits as much. In his affidavit, he states that the $29,748.65 figure “does not include any fees that [he] believe[s] were exclusively attributable to Count I [Declaratory Judgment] of the plaintiff’s complaint.” (Groves Aff., ¶ 6) (emphasis added). There is also some doubt as to whether the requested fee does indeed exclude all work “exclusively attributable” to the declaratory judgment. For example, the billing records presented list approximately eight hours for actions taken in response to Mr. Sisto’s Motion to Strike, a motion related exclusively to the declaratory judgment action.

After being awarded attorney’s fees for trial work in the anti-SLAPP litigation, Defendants certainly envisaged requesting appellate fees on the same matter. Nevertheless, the term “SLAPP” appears only a handful of times in their voluminous billing records. In fact, a view of the billing sheets gives the impression that no effort was made to distinguish the work performed on the separate matters. Accordingly, the failure to adequately describe the subject matter of the time billed falls squarely on Defendants’ shoulders. See Schiff, 684 A.2d at 1131 (holding that “a fee application must be accompanied by documentation . . . sufficient . . . to

apprise the court of the nature of the activity and the claim on which the hours were spent") (emphasis added); Role Models, 353 F.3d at 971 ("Although [party requesting fees] says it has deducted all time spent on [non-fee-eligible] matters, the lumping prevents us from verifying that it deducted the proper amount of time."); Anglo-Danish Fibre, 2003 WL 223082, at *6 (going so far as to hold that "entries that provide little guidance in ascertaining the purpose of the work during the time claimed do not merit an award") (internal citations omitted). Indeed, "[w]ithout a more detailed billing log, . . . this court cannot find that [Defendants] ha[ve] met [their] burden of showing that the amount of fees requested is reasonable." Cheng v. McCredit, No. 94 C 7520, 1995 WL 430953, at *4 (N.D. Ill. July 11, 1995) (finding only fifty-eight hours of time billed to be reasonable where 383 hours were requested).

"[T]he decision as to how to separate wheat from chaff in a fees contest, within broad limits, is a matter for the [trial] court's discretion." United States v. Metro. Dist. Comm'n, 847 F.2d 12, 17 (1st Cir. 1988). Accordingly, this Court must, based on the limited information provided, separate the wheat from the chaff in calculating a reasonable award for the fees incurred in the anti-SLAPP appellate work. See Hensley, 461 U.S. at 433 ("Where the documentation of hours is inadequate, the [trial] court may reduce the award accordingly."). Courts have held that "[a] fixed reduction is appropriate given the large number of entries that suffer from . . . the deficiencies . . . described." Role Models, 353 F.3d at 973; see also In re Agent Orange Prod. Liab. Litig., 818 F.2d 226, 237 (2d Cir. 1987) (upholding the court's "authority to make across-the-board percentage cuts in hours as a practical means of trimming fat from a fee application") (internal citations omitted). Furthermore, the Court remains mindful that Rhode Island's anti-SLAPP statute is designed to "minim[ize] cost to citizens who have participated in matters of public concern[,]" § 9-33-1, rather than provide the "recovery of fees

and costs as a windfall." Pistoresi v. Madera Irrigation Dist., No. CV-F-08-843-LJO-DLB, 2009 WL 302067, at *1 (E.D. Cal. Feb. 6, 2009) (internal citations omitted) (referring to California's version of the anti-SLAPP statute). Thus, a preliminary reduction of the fee by seventy-five percent is warranted to account for the relative apportionment between the reasonable time necessary to prepare the anti-SLAPP and declaratory judgment matters. See Role Models, 353 F.3d at 973 ("In view of all this—inadequate documentation, failure to justify the number of hours sought, inconsistencies, and improper billing entries—we will allow reimbursement for only fifty percent of the attorney hours that Role Models requests."); Hensley, 461 U.S. at 437 n.12 (quoting Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978)) ("[W]e would not view with sympathy any claim that a [trial] court abused its discretion in awarding unreasonably low attorney's fees . . . if counsel's records do not provide a proper basis for determining how much time was spent on particular claims.").

Complexity of SLAPP Claims

Mr. Sisto asserts that in calculating the lodestar for an award of attorney's fees, this Court must consider the difficulty of the legal work involved in defending the anti-SLAPP judgment. He contends that the work involved was not overly complex and that Defendants relied primarily on cases and arguments brought before this Court during the initial anti-SLAPP litigation. Defendants respond that Justice Goldberg's lengthy dissent in Sisto, 68 A.3d 603 serves as a testament to the intricate and novel aspects of the legal arguments involved.

Here, as discussed above, none of the billing statements provides any evidence as to the length of time spent researching and drafting arguments in relation to the anti-SLAPP claim. Indeed, "[t]he novelty and complexity of the issues presumably [a]re fully reflected in the number of billable hours recorded by counsel." Blum v. Stenson, 465 U.S. 886, 898 (1984). Our

Supreme Court's apparent struggle with whether Defendants' letter to the CRMC was "objectively baseless" serves as proof for the nuanced tact and meticulous crafting required by Defendants to ensure the anti-SLAPP judgment was upheld. Sisto, 68 A.3d at 616 (stating that "the language of the letter could have been more forthright"); id. at 619 (Goldberg, J., dissenting) (concluding "that summary dismissal and the mandatory award of attorney's fees was wrong" because the statements contained within Defendants' letter were "false"). As "the lodestar figure [may be adjusted] upward or downward to take account of such subjective factors as the . . . complexity of the litigation[,]" the Court here increases the already-reduced fee award by 5% to reach a lodestar of $8924.60. Cohen v. W. Haven Bd. of Police Comm'rs, 638 F.2d 496, 505 (2d Cir. 1980); see also Payan v. Nash Finch Co., 310 P.3d 212, 220 (Colo. App. 2012) (finding trial justice's reduction of five percent "for lack of complexity is not an abuse of discretion"); Heisman Trophy Trust v. Smack Apparel Co., 665 F. Supp. 2d 420, 425 (S.D.N.Y. 2009) aff'd, 379 F. App'x 12 (2d Cir. 2010) (reducing fees by ten percent due to the "uncomplicated nature of the case").

Proportionality of Award

Mr. Sisto asserts that a request for $29,748.65 in appellate attorney's fees is plainly unreasonable in light of the fact that Defendants only won less than ten thousand dollars in the initial action. Defendants respond that the existence of such a ratio is wholly immaterial.

"Where the award of attorney's fees is disproportionate to the amount of damages awarded, that difference by itself does not require a reduction of fees." Carroll, 2014 WL 549380, at *11. Indeed. "the court may not employ the derived ratio as an independent justification for a fee reduction." Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331,

340 (1st Cir. 1997) (citing City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) (plurality opinion)).

Under Rhode Island's anti-SLAPP statute, "an award of costs and reasonable attorneys' fees [i]s mandatory." Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 757 (R.I. 2004); see also § 9-33-2(d) (stating that "the court shall award the prevailing party costs and reasonable attorney's fees"). As Defendants had no choice but to defend the judgment upon Mr. Sisto's appeal, this Court refuses to reduce the award due to any perceived disproportionality. See Keystone Elevator, 850 A.2d at 920 (upholding "fees award of $12,383—when the award is only $11,075"). Factored into the calculation "of the amount of time reasonably necessary for a case is the vigor which the opponents bring to the dispute." Robinson, 160 F.3d at 1284. Mr. Sisto's decision to push for an appeal of the anti-SLAPP judgment necessarily required a response by Defendants. See City of Riverside, 477 U.S. at 580 n.11 (plurality opinion) (holding that a party "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response"). Further, as the calculated lodestar is now less than the fee award in the initial action, this argument is rendered moot.

Conclusion

The Court awards reasonable attorney's fees in the amount of $8924.60. Such a figure represents this Court's determination of reasonable attorney's fees incurred in defending the anti-SLAPP judgment upon appeal. Counsel for Defendants shall submit the appropriate order for judgment.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Sisto v. America Condominium Association, Inc., et al.**
CASE NO:	**NC-2008-0119**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**April 8, 2015**
JUSTICE/MAGISTRATE:	**Clifton, J.**
ATTORNEYS:	
For Plaintiff:	**Robert D. Wieck, Esq.**
For Defendant:	**Robert C. Shindell, Esq.** **C. Alexander Chiulli, Esq.**