

Advance Magazine Publishers, Inc. v. Anichini, Inc., No. 150-6-08 Oecv (DiMauro, J., June 26, 2009)

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**STATE OF VERMONT
ORANGE COUNTY**

ADVANCE MAGAZINE)	
PUBLISHERS, INC.)	Orange Superior Court
)	Docket No. 150-6-08 Oecv
v.)	
)	
ANICHINI, INC.)	

DECISION

Trustee’s Motion for Attorneys’ Fees

The present matter before the court is the motion for attorneys’ fees filed by trustee Chittenden Bank. The trustee contends that it is entitled to an award of reasonable attorneys’ fees under 12 V.S.A. § 3083 because it appeared and submitted to examination under oath in response to a motion to adjudge trustee. The trustee seeks an award of \$19,165. Plaintiff Advance Magazine Publishers, Inc. acknowledges that the court may award attorneys’ fees under § 3083, but contends that the amount of any such award is limited to eight dollars by operation of Vermont Civil Procedure Rule 54(f)(1). In the alternative, Advance Magazine contends that the amount requested by Chittenden Bank is unreasonable.

The relevant procedural background is as follows. Chittenden Bank became involved in this case after Advance Magazine obtained a pre-judgment order approving attachment of any assets of the defendant held by the bank. Advance Magazine then served a trustee summons on the bank, and the bank disclosed that it held no funds belonging to the defendant.

Advance Magazine contested the trustee’s disclosure under oath, V.R.C.P. 4.2(g), pointing to a line of credit given by the bank to the defendant. Both parties submitted memoranda of law, and the court determined after an evidentiary hearing that the line of credit was not an attachable asset under the circumstances presented. The court therefore held that the bank was not liable for failing to disclose an asset in response to the trustee summons.

The present issue involves an award of reasonable attorneys' fees to Chittenden Bank. The trustee is entitled by statute to "his costs for travel and attendance, and such further sum as the court deems reasonable for his counsel fees and other necessary expenses." 12 V.S.A. § 3083. Here, Chittenden Bank has not requested any award of costs for travel and attendance, but has requested an award of \$19,165 for its counsel fees incurred in defending the motion. The requested fees include 93.4 hours of work performed by three partners and two associates of Primmer, Piper, Eggleston & Cramer, P.C.

The first question is whether the amount of attorneys' fees awarded under § 3083 is limited to eight dollars by operation of V.R.C.P. 54(f)(1). Rule 54(f)(1) sets forth a schedule of costs in trustee cases—the counsel fee for each term is three dollars, the counsel fee on actual hearing before the court is five dollars, the attendance of trustees before the commissioners is six cents per travel mile and two dollars per day, etc. These dollar amounts were taken "virtually verbatim" from the former county rules when the Rules of Civil Procedure were first enacted, and have not been updated since. V.R.C.P. 54, Reporter's Notes.

The court is not persuaded that Rule 54(f)(1) limits any award of attorneys' fees in trustee cases to eight dollars. The operative statute—12 V.S.A. § 3083—entitles the trustee to his costs for travel and attendance *plus* "such further sum as the court deems reasonable for his counsel fees and other necessary expenses." The statute requires the court to determine the reasonable amount of "counsel fees and other necessary expenses" in each case—presumably taking into consideration the circumstances presented by the case. Cf. *L'Esperance v. Benware*, 2003 VT 43, ¶ 21, 175 Vt. 292 ("When determining an award of attorneys' fees, the trial court must make a determination based on the specific facts of each case."). It does not make sense for the court's statutory authority to determine reasonable attorneys' fees to be limited by operation of rule to a plainly unreasonable amount.

Furthermore, Rule 54(f)(1) must be interpreted in a manner that does not abridge, enlarge, or modify any substantive rights provided to a person by statute. 12 V.S.A. § 1. Here, the interpretation of Rule 54(f)(1) advanced by plaintiff would abridge the substantive economic right of the trustee to reasonable attorneys' fees, as provided by statute. Such an interpretation is to be avoided under 12 V.S.A. § 1.

For these reasons, the court concludes that Rule 54(f)(1) provides a starting point for the award of fees and costs in a trustee cases. By its terms, the rule sets forth a schedule of costs and fees that "will" be awarded. The court then retains discretion under 12 V.S.A. § 3083 to award "such further sum as the court deems reasonable for his counsel fees and other necessary expenses."

“In deciding what constitutes reasonable attorneys’ fees, courts generally start with the lodestar amount, consisting of the number of hours reasonably expended, multiplied by a reasonable hourly rate, and then adjusted upward or downward depending upon various factors.” *Windsor Sch. Dist. v. State*, 2008 VT 27, ¶ 14, 183 Vt. 452; *Perez v. Travelers Ins. ex rel Ames Dep’t Stores, Inc.*, 2006 VT 123, ¶ 10, 181 Vt. 45; *Hensley v. Eckerhart*, 461 U.S. 424, 433–37 (1983). The factors for upward or downward adjustment include the results obtained in the litigation, the novelty of the issue, and the experience of the attorney. *L’Esperance*, 2003 VT 43, ¶ 21.

The court is not persuaded that the trustee proceedings reasonably required three partners and two associates to expend 93.4 hours of time. The motion ultimately presented a single question for review—whether a line of credit constitutes an attachable asset within the meaning of 12 V.S.A. § 3013. It is not apparent why researching and presenting the answer to that question required the work of five attorneys.

The supplemental affidavit of attorneys’ fees submitted in support of the motion shows that the attorneys spent a number of hours conferring with one another and with representatives from Chittenden Bank. It is reasonable for attorneys to provide their clients with attention and service, and to strategize with one another where appropriate, especially where substantial amounts of money are potentially at stake.

However, the court’s task is to determine the reasonable number of hours spent responding to the motion to adjudge trustee for the purpose of fashioning an award of reasonable attorney’s fees. In the court’s view, the number of hours reasonably expended is the amount of time that one attorney should have spent responding to and defending against the motion.

Attorney Gail Westgate, Esq., was the lead attorney in responding to the motion. She signed all of the pleadings relevant to the motion, and was primarily responsible for arguing the cause at the evidentiary hearing. The supplemental affidavit shows that she spent a total of 29.4 hours on the case at rates of either \$200 per hour (during calendar year 2008) or \$220 per hour (during calendar year 2009).

Some of the time billed by Attorney Westgate involved time spent either conferring with other attorneys about the case, or with the client about matters that appear to have been somewhat collateral to the motion. The court has reduced Attorney Westgate’s billing by 3.2 hours to reflect time that appears to have been

spent conferring and strategizing with other attorneys.¹ This reflects the court's focus on identifying the number of hours that one attorney reasonably should have spent in responding to the motion.

In addition, the court has also reduced Attorney Westgate's billing by 2.8 hours in connection with the evidentiary hearing held at the Orange Superior Court in Chelsea on March 23, 2009. Attorney Westgate billed 5.8 hours of time in connection with the approximately one-hour hearing. Allowing some leeway for travel, the court finds 3.0 hours to be a reasonable amount of time expended for the evidentiary hearing.

The court therefore finds that the number of hours reasonably expended by one attorney in response to the motion to adjudge trustee was 23.4 hours. The court has considered whether any hours should be added to this total to reflect research assistance provided by other attorneys. The court concludes, however, that 23.4 hours is a reasonable amount of time for an attorney to have spent in response to a motion seeking to adjudge a trustee based on the trustee's disclosure under oath, where the motion presented a discrete question for review.

The court finds the rates charged by Attorney Westgate—\$200 per hour during 2008, and \$220 per hour during 2009—to be reasonable rates based on its experience. Since Attorney Westgate has submitted the request for attorneys' fees using the separate rates, it makes sense for the court to use them as well. Thus, multiplying the hours reasonably expended by the reasonable rates as set forth in the supplemental affidavit of attorneys' fees, the court finds that the lodestar amount of attorneys' fees in this case is \$4,940.

The court declines to make any upward or downward adjustments to the lodestar amount. Here, the lodestar amount fairly reflects the results obtained in the litigation, the novelty of the issue, and the experience of the attorney. The court also declines to award attorneys' fees under any authority other than 12 V.S.A. § 3083.

ORDER

For the foregoing reasons, the court awards reasonable attorneys' fees to Chittenden Bank in the amount of \$4,940.00.

¹ Specifically, the court has reduced Attorney Westgate's billing as follows: ½ hour on 11/4/08 where the billing reflects time spent getting up to speed on the case; ½ hour on 11/18/08 where the billing reflects time spent emailing the client about the case; 0.3 hours on 2/18/08 where the billing reflects time discussing the case with other attorneys; 0.4 hours on 3/12/09 where the billing reflects time spent discussing depositions with corporate representatives; and 1½ hours on 3/16/09 where the billing reflects time spent in conference calls with others regarding depositions.

Dated at White River Junction, Vermont this ____ day of June, 2009.

Hon. Theresa S. DiMauro
Superior Court Judge