Spooner v. Town of Topsham, No. 129-7-04 Oecv (DiMauro, J., Aug. 14, 2009)

STATE OF VERMONT
ORANGE COUNTY, SS.

JAMES H. SPOONER	**Superior Court of Vermont**
v.	**Orange County**
TOWN OF TOPSHAM	**Docket No. 129-7-04 Oecv**

OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND EXPENSES and MOTION FOR ATTORNEYS' [FEES] ON APPEAL and ADDITIONAL ATTORNEYS' FEES AND EXPENSES SINCE TRIAL

Plaintiff filed a complaint seeking compensatory and punitive damages for alleged age discrimination and intentional infliction of emotional distress. After hearing the evidence presented at jury trial, the court directed a verdict for the Defendant on the claim for intentional infliction of emotional distress and the request for punitive damages. The jury found for the Plaintiff on the claim for age discrimination and awarded compensatory damages of $241,116.

Plaintiff subsequently filed his motion for attorneys' fees and expenses on June 2, 2008. On August 28, 2008, the court issued an Entry Order seeking additional briefing on a number of issues presented by Plaintiff's motion.[1]

Since that time, there has been extensive discovery regarding the request for attorneys' fees, including the disclosure of expert witnesses and the taking of depositions. On May 4, 2009, the Vermont Supreme Court issued its decision on the Town's appeal, affirming this court's denial of the Town's motion for a new trial. Plaintiff has filed another motion for attorneys' fees on appeal and additional attorneys' fees and expenses since trial.

[1] Specifically, questions presented by the motion included (a) whether he may bill for time spent on administrative review; (b) whether his request for fees based on time spent on the interlocutory appeal may be time barred under V.R.A.P. 39(f); (c) whether it is reasonable to bill for time spent by two attorneys at trial; (d) whether it is reasonable to award an additur for success; and (e) whether plaintiff may be awarded a prospective amount for the pending appeal.

The record is clear that Plaintiff is the prevailing party. He has a statutory right to recover reasonable attorney's fees and costs under 21 V.S.A. § 495b(b) and he has filed an appropriate motion under V.R.C.P. 54. "The court shall, insofar as possible, resolve issues relating to fees without extensive evidentiary hearings . . . ." V.R.C.P. 54(d)(2)(D). Given the extensive briefing and discovery on the issue, the court determined that an evidentiary hearing was not necessary but scheduled the matter for oral argument which took place on August 3, 2009.

Determination of Reasonable Attorney's Fees

"When determining an award of attorney's fees, the trial court must make a determination based on the specific facts of each case." *L'Esperance v. Benware*, 2003 VT 43, ¶ 21, 175 Vt. 292. "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); see also *L'Esperance*, 2003 VT 43, ¶ 22 (explaining that 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).[2] The court should exclude all hours not "reasonably expended," including any incurred as a result of case overstaffing or the expenditure of excessive, redundant or unnecessary efforts. *Hensley*, 461 U.S. at 434.

"'Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims.'" *Perez*, 2006 VT 123, ¶ 13 (*quoting Human Rights Comm. v. LaBrie, Inc.*, 164 Vt. 237, 250 (1995)).

> Accordingly, time entries must be accurate and allow the court to assess whether the work performed was related to the litigation at issue . . . . The superior court at most should . . . . reduce[] the fee award only by the specific number of hours listed for entries that the court conclude[s] were not reasonably related to the litigation or redundant.

Perez, 2006 VT 123, ¶ 13. "Regarding a reasonable hourly rate for claimant's attorney, the standard is relatively flexible and requires only that the party seeking fees provide a basis for comparing the rates requested to prevailing rates." *Id.*, ¶ 14 (citation and footnote omitted).

[2] The full list of twelve factors are as follows: (1) time and labor required, (2) novelty and difficulty of the questions, (3) skill requisite to perform the legal service properly, (4) 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 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. *Hensley*, 461 U.S. at 430 n.3.

Attorney's Fees and Costs for Attorney Edwin Hobson

Plaintiff's motion for attorneys' fees requests an hourly rate of $225 and an additur of $35 per hour for success at trial. However, Plaintiff's expert, Attorney Robert Hemley, took the position that an additur of $25 per hour was appropriate and Plaintiff has since modified his request to reflect a total combined rate of $250 per hour. The Town does not necessarily oppose an hourly rate of $225 but considers it an "ample" hourly rate given counsel's experience and the relatively straightforward nature of the issues in the case. The Town, however, criticizes the fee claim because associate, paralegal, and secretarial work is included in the fee application at a partner rate. Accordingly, the Town urges the court to reduce the claim to an associate rate of $150 per hour for legal research, allow a paralegal rate of $85 for paralegal work, and strike secretarial work.

Attorney Edwin Hobson does not typically bill clients on an hourly basis. His rate depicted in his 2004 contingent fee agreement with Mr. Spooner was $195. Mr. Hobson has been a sole practitioner since the early 1990's. He has no employees and did not hire a paralegal in connection with this lawsuit. He does not have a secretary and does his own typing, scheduling, and billing.

The Town contends that, while Attorney Edwin Hobson's decision to practice law in this manner is entirely appropriate, it is not the most efficient practice of law. In addition to legal research performed by associates, secretarial and paralegal staff can prepare subpoenas, make phone calls to court reporters to schedule depositions or order transcripts, call the court, and perform other scheduling tasks. The Town contends that clients should not be billed at attorney rates for paralegal tasks, and should not be billed at all for secretarial work because that work is part of an attorney fee structure.

The fact remains, however, that Attorney Hobson does not have an associate or paralegal and he does all of the work that might otherwise be done by an associate or paralegal in a larger firm. The court declines to go through the billing or make an across-the-board reduction for those activities that could have been done by an associate or paralegal. However, regardless of the size of the firm, the cost of secretarial work is typically considered as part of the office overhead or overall fee structure charged by the attorneys in the firm. While Attorney Hobson may be making all of his telephone calls to do his scheduling, for example, a reasonable paying client would not be inclined to pay $30-$40 for that telephone call. Accordingly, the court will reduce the overall fee award by 10% to account for such activities.

Plaintiff contends that because the jury awarded him all of the damages he sought, he should receive an additional $25 per hour for all of the hours spent on the case. This was a straightforward age discrimination case. The parties took two days to put in the evidence. Plaintiff called 12 witnesses to testify, and ten of those witnesses completed their testimony on the first day of trial. Closing arguments were made to the

jury the morning of the third day, and the jury rendered its verdict that afternoon. While Plaintiff obtained a judgment that reflected his economist's opinion, that has more to do with having a trier of fact that was receptive to his position rather than there being anything particularly novel or unique about the case itself. An hourly rate of $225 is reasonable in this case and the court declines to increase that amount.

In his June 2, 2008 billing, Attorney Edwin Hobson reports having spent 423.20 hours on this case between October 8, 2002 and May 29, 2008 which, at an hourly rate of $225, would total $95,220.

Another billing dated September 22, 2008 for the period May 31, 2008 through September 10, 2008 reflects an additional 28.45 hours or $6,401.25.

A May 13, 2009 billing for the period May 31, 2008 through March 12, 2009 reflects an additional 62.6 ($14,085) excluding hours expended on the second appeal, discussed below. *See Appendices to Motion for Attorneys' Fees on Appeal and Additional Attorneys' Fees and Expenses Since Trial, Appendix 6.*

A July 30, 2009 billing for the period May 12, 2009 through July 30, 2009 reflects an additional 18.30 hours or $4,117.50 (calculated on the statement as $4,575 which would equate to $250 per hour).

Total hours exclusive of the second appeal for work on the case, including litigation on the issue of attorney's fees, is 532.55. At a rate of $225 per hour, attorney's fees amount to $119,823.75 but, with a 10% reduction, $107,841.38 will be awarded to the Plaintiff.

Plaintiff has a statutory right to recover costs under 21 V.S.A. § 495b(b). There is no basis in the statutory language for awarding costs in superior courts beyond those normally allowed under V.R.C.P. 54(d). The Town takes no position on this issue, leaving it to the court's discretion.

"Costs" are allowed to the prevailing party under V.R.C.P. 54(d), (e) and (g). Under Rule 54(c)(1), the prevailing party is entitled to reimbursement for traditional costs such as the filing fee plus expenses for service of process. Under Rule 54(g), the

> taxing of costs in the taking of depositions shall be subject to the discretion of the court. No costs shall be allowed unless the court finds that the taking of the deposition was reasonably necessary, whether or not the deposition was actually used at trial. Taxable costs may include the cost of service of subpoena upon the deponent, the reasonable fee of the officer before whom the deposition is taken, the stenographer=s reasonable fee for attendance, and the cost of the original transcript of the testimony or such part thereof as the court may fix.

Expenses in this matter for the period August 9, 2004 through May 13, 2009 are listed as $15.007.78. See *Appendices to Motion for Attorneys' Fees on Appeal and Additional Attorneys' Fees and Expenses since Trial, Appendix 9.* There are, however, three separate billings for a copy of the transcript of Plaintiff's deposition. As noted above, the cost of the original transcript is allowed but not multiple copies. The court will strike the billing on April 25, 2006 ($93) and on July 31, 2007 ($191.50), leaving a balance of $14,723.28. Westlaw expenses between May 2008 and February 2009 total $556.38. See *Appendices to Motion for Attorneys' Fees on Appeal and Additional Attorneys' Fees and Expenses Since Trial, Appendix 8.* The court will award Plaintiff costs of $15,279.66.

Plaintiff=s Motion for Prejudgment Interest

Plaintiff requests that the court award prejudgment interest at the rate of 12% per annum on all costs incurred in this case from the date of commencement of this litigation with the service fee on August 8, 2004 through May 13, 2009.

"Prejudgment interest may be awarded as damages for detention of money due for breach or default. This interest is awarded as of right when the principal sum recovered is liquidated or capable of ready ascertainment and may be awarded in the court=s discretion for other forms of damage." *Bull v. Pinkham Engineering Assocs., Inc.*, 170 Vt. 450, 463 (2000) (quoting *Newport Sand & Gravel Co. v. Miller Concrete Constr., Inc.*, 159 Vt. 66, 71 (1992)); see also Reporter=s Notes to 1981 Amendment, V.R.C.P. 54(a). The party entitled to such relief need not have demanded it in its pleadings. V.R.C.P. 54(a). Prejudgment interest is to be calculated at the statutory legal rate, set at 12% per annum under 9 V.S.A. ' 41a(a). The interest ordinarily runs from the time of maturity or demand for payment or the time of default, which may be the time that the action is commenced. See *Pillsbury v. Taylor*, 117 Vt. 399 (1952) (maturity of note); *VanVelsor v. Dzewaltowski*, 136 Vt. 103 (1978) (commencement of suit and counterclaim in action on construction contract).

Prejudgment interest is intended to make the plaintiff whole where there has been a delay between the date of the injury and the date of the compensatory award. *Turcotte v. Estate of LaRose*, 153 Vt. 196, 199 (1989); *Wells v. Village of Orleans, Inc.*, 132 Vt. 216, 224 (1974). The principal rationale for awarding prejudgment interest as of right is that, where damages are liquidated or readily ascertainable, Athe defendant can avoid the accrual of interest by simply tendering to the plaintiff a sum equal to the amount of damages.@ *Agency of Natural Resources v. Glens Falls Ins. Co.*, 169 Vt. 426, 435 (1999) (citation omitted). The fact that the amount of damages is uncertain or disputed does not bar an award of prejudgment interest. *Id.* AEven if the damages [are] not readily ascertainable, . . . the trial court maintains the ability to award prejudgment interest in a discretionary capacity to avoid injustice.@ *Estate of Fleming v. Nicholson*, 168 Vt. 495, 500 (1998).

Costs incurred during the pendency of a case are not readily ascertainable upon the filing of the lawsuit, and are not the same as compensatory damages. While a defendant may avoid the accrual of interest by tendering a sum equal to the amount of damages, the same cannot be said for costs for there is simply no way of knowing what those will be at the commencement of a case. Accordingly, prejudgment interest will not be awarded on costs.

Attorney's Fees and Costs for Attorney Edwin Hobson in Connection with Appeal

Attorney Edwin Hobson's billing statement dated May 13, 2009 reflects 49.3 hours expended in connection with the Town's appeal to the Vermont Supreme Court following this court's denial of its motion for a new trial. The time spent and the activities listed in the entries all appear reasonable so the court will award attorney's fees of $11,092.50. Taxation of costs in the Vermont Supreme Court is $257.05 and will be awarded as well. V.R.A.P. 39.

Attorney's Fees and Costs for Attorney John Hobson

Attorney John Hobson seeks attorney's fees of $20,405 for an eight day period between January 22, 2009 and May 5, 2008. *Appendix B, Plaintiff's Motion for Attorney's Fees and Expenses, filed June 3, 2008.* He also seeks $1,278.04 for expenses ($225 filing fee; $586.29 for meals/lodging; $443.75 for travel; $23 for Lexis/Pacer/Westlaw research). In addition, Attorney John Hobson seeks attorney's fees for 14 hours of time spent on this case between September 22, 2008 and October 2, 2008 in connection with the appeal to the Vermont Supreme Court. The Town requests that all of Attorney John Hobson's attorney's fees and costs be stricken.

Attorney Edwin Hobson represented the Plaintiff as a sole practitioner in this matter since 2003. The representation included the administrative proceedings and the Superior Court proceedings. He handled the jury draw on January 7, 2008. On Thursday, January 17, 2008, three business days before trial, Attorney Hobson filed a motion for pro hac vice admission of his brother, John Hobson, to appear in the case. The Town objected to having to pay attorney's fees and costs associated with the necessary time expended by Attorney John Hobson to replicate the knowledge currently held by Attorney Edwin Hobson. The court allowed Attorney John Hobson to appear in the case provided it did not impede the progress of the trial or presentation of evidence. The issue of increased attorney's fees due to his entry days before the trial commenced was reserved for any future proceedings.

Plaintiff asserts that his decision to be represented by out-of-state counsel is protected and he felt that he needed an additional attorney to assist with the presentation of evidence. The Town has never taken the position that Plaintiff could not hire counsel of his own choosing. Rather, the basis for the objection was that Attorney

Edwin Hobson was intimately familiar with the facts of the case and the law and the Town did not want to pay Attorney John Hobson's costs and attorney's fees associated with his time replicating the knowledge already held by Attorney Edwin Hobson. Further, the Town asserts that a second attorney at this short trial was not necessary and Attorney John Hobson's participation does not meet the "hours reasonably expended" prong of the lodestar analysis.

If Plaintiff subjectively wanted to bring another attorney into the case just days before the jury trial, then that was a tactical decision he was entitled to make. Neither the Town nor the court interfered with his ability to do so.

Requiring the other party to pay for a second attorney, however, is a different matter. The Second Circuit has been following an objective standard in which the court reviews the fee application based upon the perspective of a reasonable paying client who wishes to pay the least amount necessary to litigate a case effectively. *Arbor Hill Concerned Citizens Neighborhood Ass'n. v. County of Albany*, 522 F.3d 182, 183–84 (2d. Cir. 2008). From this objective perspective, the court exercises its discretion to determine whether to include time spent by more than one attorney in the fee award, based upon factors such as the complexity of the legal and factual subject matter and the amount of overlap or duplication of effort involved. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1146–47 (2d Cir. 1983); *Hogan v. General Elec. Co.*, 144 F.Supp.2d 138, 142 (N.D.N.Y. 2001).

Here, the objective circumstances do not warrant an award for time billed by a second attorney. The legal and factual subject matter of the case was not difficult, exceptional, or complex. Both experts agreed that the lawsuit involved well-established employment law. The factual issues centered upon one public meeting and testimony from various witnesses about what was said by the selectboard members at that meeting. All of the testimony and evidence was presented in less than two days. None of these factors tend to suggest the need for a second lawyer to litigate the case effectively.

Moreover, the second attorney came into the case only three business days before the trial. A paying client would reasonably question why two attorneys were suddenly necessary to try a case that was effectively handled by one solo practitioner for more than five years. It would also be reasonable for the client to question whether he must pay for the duplicative effort necessary for the attorney to become familiar with the evidence and the law of the case.

In arriving at a fee award, it is not the role of the court to determine whether or not Plaintiff subjectively appreciated the assistance provided by Attorney John Hobson during the jury trial. Plaintiff surely did. Instead, the role of the court is to review the fee application in light of the objective scope and complexity of the litigation, *Carey*, 711 F.2d at 1146, and determine whether the amount requested was reasonably necessary to litigate the case effectively. *Arbor Hill*, 522 F.3d at 183–84. Here, in light of the

straightforward legal and factual issues presented by the case, and the duplication of effort needed to bring the second attorney up to speed on the eve of trial, the court concludes that the fee award should not include a component for time billed by the second attorney.

Interlocutory Appeal

Plaintiff seeks attorney's fees of $38,250 and costs of $241.71 for a total of $38,491.71 associated with his efforts to obtain the testimony of one witness: Henry Buermeyer, a newspaper reporter. See *Topsham's Memo Opposing Plaintiff's Fee Petition, Ex. 11.* The Town takes the position that these fees and costs should not be allowed.

Plaintiff filed his complaint with this court in July 2004. Plaintiff listed Mr. Buermeyer as a witness in his case and noticed the taking of his deposition. The Town also sought to take his deposition. Attorney Robert Hemley represented Mr. Buermeyer and filed a motion to quash the subpoena issued for his deposition. In an interesting turn of events, Attorney Hemley has been retained as Plaintiff's expert witness on the reasonableness of his attorney's fees--including the attorney's fees incurred in opposing (1) the motion to quash in Orange Superior Court as well as (2) the interlocutory appeal to the Vermont Supreme Court.

Mr. Buermeyer, through Attorney Hemley, filed a Motion to Quash his subpoena to a deposition on August 2, 2005. Proceedings were held in the trial court and, on March 14, 2006, the court granted the motion to quash. On March 28, 2006, Plaintiff filed his motion for permission to appeal that decision to the Vermont Supreme Court. The trial court denied the motion on April 24, 2006. Plaintiff sought permission from the Supreme Court, which agreed to hear the case. The Town took no position in that interlocutory appeal. The Vermont Supreme Court's decision was issued on September 7, 2007. In January 2008, four months later, the case went to trial.

One of the bases upon which the Plaintiff justifies the amount of attorney's fees in this case is that the case has been pending since 2004 and did not go to trial until 2008, attributing the delay for the most part to the Town. The Town, however, is not responsible for the delay in connection with the interlocutory appeal on the so-called Buermeyer matter. The delay of more than two years involved in litigating the issue of whether Mr. Buermeyer would testify in the Superior Court and in the Vermont Supreme Court is attributable to Attorney Hemley filing of the motion to quash, Attorney Hemley prevailing on that motion in the Superior Court, and then Attorney Edwin Hobson taking an interlocutory appeal to the Vermont Supreme Court. The Town's brief to the Supreme Court was less than two pages and the Town asked for only two minutes of oral argument. See *Town's Response to 05/15/09 Motion for Attorneys [Fees] on*

Appeal and Additional Attorney's Fees and Expenses Since Trial. Once the Vermont Supreme Court issued its decision, the case was tried four months later.

Further, the need to pursue this testimony is debatable. Plaintiff's own expert, Attorney Hemley, has taken differing positions regarding the importance of Mr. Buermeyer's testimony depending on what role he is playing. In seeking to quash the subpoena, Attorney Hemley took the position that:

> Plaintiff cannot satisfy his burden to make a clear and specific showing that Mr. Buermeyer has information that is necessary or critical to the maintenance of the claim or that the information is not obtainable from other available sources, namely, the numerous other witnesses who attended the Topsham Selectboard meeting.

See *Henry Buermeyer's Motion to Quash Subpoena and Incorporated Memorandum of Law* at 12-13 (Aug. 1, 2005).

However, in his affidavit in support of the Plaintiff's requested attorneys' fees, Attorney Hemley characterized the need to litigate the enforceability of the subpoena as "critical to the case." *Affidavit of Robert B. Hemley in Support of Plaintiff's Application for Legal Fees and Expenses* at 5.

Finally, the court cannot conclude that it was reasonable to spend almost $40,000 to secure the testimony of one witness, nor is this an amount that "a reasonable paying client would be willing to pay." *Arbor Hill*, 522 F.3d at 183-84.

It is clear to this court that the Town is not responsible for any of the attorney's fees and costs incurred in connection with any litigation on this issue. Even so, Plaintiff takes the position that this was simply a cost of litigation which the Town is responsible for because it engaged in age discrimination and whatever it takes to win the litigation is the responsibility of the Town. The court simply does not accept this rationale. It would allow one party to incur attorney's fees without consideration of whether they were reasonable or necessary if the losing party were held responsible for paying all fees as a cost of litigation. Accordingly, the court will not allow the requested attorney's fees and costs incurred in connection with this issue ($38,491.71).

ORDER

Based on the foregoing, Plaintiff is awarded attorney's fees of $118,933.88 and costs of $15,536.71. A separate Final Judgment for Attorney's Fees shall issue pursuant to V.R.C.P. 54(d)(2)(C).

Dated at Hartford, Vermont, this _____ day of August 2009.

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Hon. Theresa S. DiMauro
Superior Court Judge