Filed in First Judicial District Court
1/26/2018 3:38 PM
Carver County, MN

STATE OF MINNESOTA

COUNTY OF CARVER

FIRST JUDICIAL DISTRICT
DISTRICT COURT
PROBATE DIVISION

In re:

Estate of Prince Rogers Nelson,

Decedent.

Court File No. 10-PR-16-46
Judge Kevin W. Eide

SNJ'S OBJECTION TO TO COMERICA'S ATTORNEYS' FEES

INTRODUCTION

It is apparent from the declaration and attachments of Comerica Bank & Trust N.A.'s ("Comerica") lawyers that legal fees were excessive and the bill was unnecessarily run up with as many personnel as they had available. Fredrikson & Byron ("Fredrikson") did not have one or two or three or four or five or six or seven or even eight lawyers that collectively could respond to the Petition filed by Sharon Nelson, Norrine Nelson, and John Nelson (collectively "SNJ"). Nope, it took no less than ten talented, highly educated, and highly priced Fredrikson employees including nine lawyers (six of which are shareholders/partners) and one paralegal billing the file to submit one legal memorandum and affidavits attaching exhibits at a requested fee of $148,540.00. Rather than economically and judiciously respond to SNJ's Petition, Comerica gave its lawyers a blank check to make sure Comerica remained the Personal Representative at any cost.

ARGUMENT

COMERICA DID NOT ASK FOR FEES

First, neither Comerica nor its lawyers asked for attorneys' fees in their submissions to the Court. Therefore, this Court's decision to request the fee information from Comerica is concerning and troubling. The issue of any award of Comerica's attorneys' fees was not briefed

Filed in First Judicial District Court
1/26/2018 3:38 PM
Carver County, MN

nor argued. Since this issue was raised *sua sponte*, without any argument to the Court, SNJ feel compelled to respond to Fredrikson's exorbitant bill.

THE COURT HAS NOT ALLOWED ANY DISCOVERY ON ANY ISSUE

Despite billing 354.10 hours, not one minute was spent on discovery as this Court has not permitted any discovery. Instead, Fredrikson incurred over 354 hours of "billable time" simply responding to SNJ's Petition and preparing for the hearing.

THIS COURT DID NOT MAKE SUFFICIENT FINDINGS TO SUPPORT AN AWARD OF ATTORNEYS' FEES

The Minnesota Rules of Professional Conduct set forth an eight part test to determine the reasonableness of attorneys' fees. Minn. R. Prof. Con. 1.5. The factors and an analysis thereof are as follows:

1. **The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.**

SNJ'S Petition to remove Comerica as the personal representative did not involve unique or complex issues. The Petition to remove Comerica is controlled by a specific statute with specific legal standards. Comerica and its lawyers touted themselves as experts, "[t]he Personal Representative and the team it has assembled are uniquely qualified to administer an estate of this complexity and magnitude." (*See* Comerica's Response to the Petition, p. 2). If in fact Comerica's attorneys are so experienced in the estate area of the law that they are uniquely qualified, it should not have taken over 354 hours of time to respond to the Petition. Although the time records reflect significant legal research, it is astonishing that in the 49 pages Comerica submitted there is very little legal analysis by Comerica's attorneys, and the scant

Filed in First Judicial District Court
1/26/2018 3:38 PM
Carver County, MN

analysis performed by the Fredrikson firm contains frivolous arguments like the "law of the case" doctrine. (Comerica's Response to the Petition, p. 39).

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

SNJ's Petition would not have had any material impact on Fredrikson's ability to take on other cases. In fact, it is clear that the law firm had a horde of attorneys available to work on this one response to a petition. Not one of the declarations submitted by Comerica or any attorney for Fredrikson even claims that they turned away business due to SNJ's Petition to Remove. In fact, it was Fredrikson's own representation that they had the people to properly represent Comerica. With 243 lawyers in the firm, this element does not weigh in favor of an award of attorneys' fees.

3. The fee customarily charged in the locality for similar legal services.

The most expensive lawyer that Comerica had working on responding to the Petition was Mark Greiner at the rate of $650 per hour. For the response to the Petition to Remove, Comerica's lawyers billed as follows:

Attorney/Professional	Hourly Rate	Hours
Mark Greiner	$650	33.60
Lora Friedemann	$590	.20
A. Wessberg	$500	1.90
K. Sandler	$475	20.8
J. Cassioppi	$430	118.3
S. Olson	$405	68.8
E. Unger	$370	77.0
A. Gyurisin	$210	.7
Paralegal	$165	3.1
Total		354.10

Filed in First Judicial District Court
1/26/2018 3:38 PM
Carver County, MN

4. The amount involved and the results obtained.

The fees are particularly egregious given the result. The result is that Comerica remains the Personal Representative. While Comerica benefits, the estate itself does not.

5. The time limitations imposed by the client or by the circumstances.

There were no extraordinary time limits put on Comerica or its legal team during the pendency of the Petition to Remove as evidenced by Comerica not objecting to the briefing schedule this Court set or asking for additional time.

6. The nature and length of the professional relationship with the client.

There is no evidence that Fredrikson had any past relationship with Comerica. So this factor does not need any further analysis.

7. The experience, reputation, and ability of the lawyer or lawyers performing the services.

Five of the lawyers billing for the objection to the Petition to Remove are identified on Fredrikson's website as being part of the Estate and Trusts team. If these five have specialized knowledge and experience in estates, what was the need for nine lawyers working on this one response?

8. Whether the fee is fixed or contingent.

All of the attorneys billed hourly. The fees incurred by Comerica were not reasonable and certainly not necessary. In *Hensley v. Eckerhart*, the Supreme Court of the United States observed:

> Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. 'In the private sector, "billing judgment" is an important component

Filed in First Judicial District Court
1/26/2018 3:38 PM
Carver County, MN

> in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.' Copeland v. Marshall, 205 U.S.App.D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original).

461 U.S. 424, 434 (1983).

Courts routinely refuse to award hours requested in a fee petition when they determine the time spent was excessive or unnecessary. *See Bucko v. First Minn. Say. Bank, F.B.S.*, 471 N.W.2d 95, 101 (Minn. 1991) (affirming trial court's reduction of fee award where the trial court determined the number of hours claimed by the lead attorney for three plaintiffs was excessive); *see also Carroll v. DeTella*, No. 96 CV 2371, 1999 WL 413475, at *4 (N.D. Ill. May 28, 1999) (concluding, where a less experienced and a more experienced attorney represented the same party at trial, the less experienced attorney alone could have tried the case, and therefore disallowing an award for the more experienced attorney's fees); *Martinez v. Thompson*, No. 9:04-CV-0440, 2008 WL 5157395, at *16 (N.D.N.Y. Dec. 8, 2008) (determining that having two experienced attorneys present throughout trial was an extravagance meriting a downward departure in the lodestar figure).

On November 10, 2017, Comerica's lawyers filed the objection to being removed as Personal Representative. **Comerica's lawyers billed a total of 42.80 hours for that single day using seven lawyers**. In addition, during the time period after serving Comerica's objection on November 10 and prior to the hearing on November 20, 2017, Comerica's lawyers billed an additional breathtaking 115.20 hours. This does not include the actual hearing date wherein Comerica's lawyers billed the following:

a. 7.70 hours billed on the day of the hearing by Mr. Cassioppi ($3,311.00);
b. 5.0 hours billed by Mr. Greiner ($3,250.00);
c. 4.10 hours billed by Ms. Olson ($1,660.50)

Filed in First Judicial District Court
1/26/2018 3:38 PM
Carver County, MN

The hearing did not last for more than two hours, but that did not stop Mr. Cassioppi from billing 7.70 hours for that day alone or Comerica's team of lawyers billing over 13 hours for three lawyers. This did not include a fourth lawyer that billed 0.20 hours that day. Given the Court's concern that attorneys are getting rich off the estate, with potentially little left for the heirs, the Court should refuse to accept Fredrikson's outlandish $148,540 bill for responding to SNJ's Petition.

Comerica's attorneys' time records contain significant block billing with very vague descriptions. A fee petition must contain sufficient detail in each entry to make it possible to determine whether the time expended was reasonable. *See, e.g., H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991) (affirming reductions of attorney fee award due to vague billing entries). For *each* item listed in an entry, it must be possible to "attribute a particular attorney's specific time to a distinct issue or claim." *Id.* Examples of time entries determined to be impermissibly vague include: "legal research," "trial prep," "met w/ client," gather information," "respond to client's request," "identify and prepare documents," "correspondence," "review memos," "review documents and issues," and "maintenance of pleading documents for electronic clip." *Id.; Bores v. Domino's Pizza LLC*, No. 05-2498, 2008 WL 4755834, at *6-8 (D. Minn. Oct. 27, 2008). In *Anderson v. Hunter, Keith, Marshall & Co., Inc.*, the Minnesota Supreme Court instructed that the trial court would have to make specific findings on the reasonableness of vague time entries such as time expended on "file review" and "preparation for trial." 417 N.W.2d 619, 629 (Minn. 1988).

Filed in First Judicial District Court
1/26/2018 3:38 PM
Carver County, MN

CONCLUSION

SNJ does not believe any award of attorneys' fees to Comerica's lawyers is appropriate. If the Court were to grant the outrageous and excessive fees Comerica's lawyers submitted, the Court might as well give a blank check to Comerica to spend whatever it wants without regard to the benefit to the Estate. SNJ filed and served a Petition to Remove Comerica in the good faith belief that Comerica had failed in a number of ways acting as the Personal Representative. The Court did not allow any rebuttal by SNJ's lawyer at the hearing nor has it allowed any discovery. The Court has now threatened to award attorneys' fees against SNJ, without a hearing, simply because SNJ exercised their rights under Minnesota law. SNJ want to be treated fairly and to have their concerns addressed. Awarding Fredrikson's requested attorneys' fees is effectively sanctioning SNJ for seeking relief permitted by the law and does little to rebuild bridges or restore confidence, outcomes the Court has repeatedly stated it hopes to achieve.

SKOLNICK & JOYCE, P.A.

Dated: January 26, 2018

By: /s/ William R. Skolnick
William R. Skolnick, #137182
wskolnick@skolnickjoyce.com
Samuel M. Johnson, #395451
sjohnson@skolnickjoyce.com
527 Marquette Avenue, Suite 2100
Minneapolis, Minnesota 55402
Telephone: (612) 677-7600
Facsimile: (612) 677-7601
ATTORNEYS FOR SHARON, NORRINE, AND JOHN NELSON

1999 WL 413475
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

Ronnie W. CARROLL, Plaintiff,
v.
George DETELLA, Jerome Springborn, Jeffrey White and Diane Jockisch, Defendants.

No. 96 CV 2371.
|
May 28, 1999.

MEMORANDUM OPINION AND ORDER

LEINENWEBER, J.

*1 Before the court are plaintiff Ronnie Carroll's motions for attorney's fees and costs, defendants George DeTella's, Diane Jockisch's, and Jerome Springborn's motion for costs, and defendant Jeffrey White's motion for judgment as a matter of law or in the alternative, for a new trial, or in the alternative, for remittur.

FACTUAL BACKGROUND

The following factual background is based on the evidence offered at trial. Officer White has moved for judgment as a matter of law, and so the facts are presented here in the light least favorable to him. *Florez v. Delbovo,* 939 F.Supp. 1341, 1342 (N.D.Ill.1996).

On May 27, 1994, plaintiff Ronnie W. Carroll, a prisoner of the Illinois Department of Corrections, was in his cell at Stateville Correctional Center when three inmate gang members approached the door. The gang members informed him a gang leader had called a "gang violation" on Carroll and that as a punishment for the violation they were going to perform a beating on him. The gang members left and returned accompanied by defendant Jeffrey White, a Stateville correctional officer. Officer White asked the plaintiff, "Are you ready?" Officer White then directed the control officer to open the electric door to Carroll's cell. Once the door was open, Officer White and the three gang members entered the cell. Once inside the cell, one of the inmates proceeded to beat Carroll with leather gloves containing a metal bar while Officer White watched. Carroll lost consciousness during the beating. When Carroll came to, he was on the floor of his cell bleeding from his mouth, nose, and forehead. Carroll was trying to stop the bleeding when Officer White called him to the cell door in order to examine his injuries. Officer White told Carroll that he would get him some Band–Aids.

Carroll sued Officer White, the Illinois Department of Corrections, Odie Washington, George DeTella, Jerome Springborn, and Diane Jockisch under 42 U.S.C. § 1983. Defendants Washington, DeTella, Springborn, and Jockisch are Corrections Department administrators. The Corrections Department was dismissed as a defendant at the inception of this action. The court granted summary judgment for Washington prior to trial. A jury trial was held for the remaining four defendants. On February 4, 1999, the jury found DeTella, Springborn and Jockisch not liable and found Officer White liable. The jury assessed $1,000.00 in compensatory damages and $2,000.00 in punitive damages against Officer White.

CARROLL'S MOTION FOR ATTORNEYS' FEES AND COSTS

A. Carroll's Requested Fees

Carroll has requested a total of $231,879.00 in attorneys' fees and costs, calculated as follows. (All figures have been rounded to the nearest dollar.)

Attorneys' fees through trial	$ 195,859.00
Costs	15,544.00
Post-trial fees	20,626.00
Plaintiff's agreed reduction in costs	(150.00)

Total	$ 231,879.00

*2 The court notes plaintiff's assertion that plaintiff is not requesting fees of $33,745.00 incurred between February 28, 1997 through January 28, 1998. Those fees were principally incurred for a client meeting, early discovery, and research and analysis of legal issues.

B. Nominal Damage Award Issue

If a plaintiff wins a nominal award, such as one dollar, the reasonable fee may be zero. *Hyde v. Small,* 123 F.3d 583, 585 (7th Cir.1997). The court finds that a $3,000.00, while not an enormous sum, is more than a nominal amount. Moreover, "[t]here is no minimum amount in controversy required in civil rights cases and no federal small claims court," and so it is no abuse of the federal district courts to bring a relatively low-dollar civil rights lawsuit. *Hyde* at 585.

C. The Prisoner Litigation Reform Act

Defendants argue that Carroll filed this suit on July 5, 1996, and therefore his fee petition is governed by the Prison Litigation Reform Act ("PLRA"). The court finds no basis for defendants' assertion that this case was filed on July 5, 1996. Rather, the date stamp on Carroll's complaint clearly indicates that the case was filed on April 22, 1996. Exhibit A to Plaintiff's Reply in Support of Petition for Fees. The CHASER computerized docket system likewise indicates that the case was filed on April 22, 1996. The PLRA was signed into law on April 26, 1996, a few days after Carroll's complaint was filed. The Sixth and Tenth Circuits, as well as Judge Coar in this judicial district, have held that the PLRA does not apply to cases filed prior to the April 26, 1996 enactment date. *Hadix v. Johnson,* 143 F.3d 246 (6th Cir.1998), *cert. granted,* 119 S.Ct. 518 (1998), *Craig v. Eberly,* 164 F.3d 490 (10th Cir.1998), *Barnes v. Ramos,* No. 94 C 7541, 1998 WL 120351 (N.D.Ill. March 13, 1998). There is apparently no Seventh Circuit precedent on this issue, and the U.S. Supreme Court has yet to rule on the *Hadix* appeal. The court therefore chooses to follow the lead of *Hadix, Craig,* and *Barnes* and finds that the PLRA does not apply to cases filed before the April 26, 1996 enactment date. As Carroll's case was filed prior to the enactment date, the defendants' arguments based on the PLRA are not applicable.

D. Unduly Prolonging the Litigation

Defendants argue, citing *Fisher v. Kelly,* 105 F.3d 350 (7th Cir.1997), is that Carroll is not a "prevailing party" and therefore not entitled to attorneys' fees because he rejected a settlement offer significantly greater than the $3,000.00 he won at trial. Defendants assert that prior to trial defendants offered Carroll a settlement consisting of $5,000.00 plus unspecified "substantial non-monetary terms." Affidavit of Diann Marsalek, Exhibit to Defendants' Amended Response to Plaintiff's Petition for Attorneys' Fees.

Plaintiff responds that *Fisher* applies only to Rule 68 offers and that defendants themselves acknowledge that a Rule 68 offer was not made. Further, plaintiff argues that the $3,000.00 won at trial is actually greater than the $5,000.00 settlement offer because by winning at trial plaintiff also won the right to petition for attorneys' fees.

*3 The court will first address plaintiff's argument that the $3,000 .00 jury award is larger than the $5,000.00 settlement because the $3,000.00 award carried with it the right to seek attorneys' fees. The court agrees with Carroll that $3,000.00 plus attorneys' fees could produce a higher total than $5,000.00 without attorneys' fees, and in this case that is exactly what has happened. Nevertheless, from Carroll's point of view $5,000.00 without attorneys' fees is preferable to $3,000.00 with attorneys' fees. As Carroll is an indigent defendant represented pro bono, he is not required to pay his attorneys' fees from his own pocket. Whether or not attorneys' fees are awarded is of no financial significance to him. Therefore, looking at the two awards from Carroll's perspective, Carroll would have been better off to have taken the $5,000.00.

The court agrees with Carroll that no Rule 68 offer was made and that therefore *Fisher* is inapplicable. A district court cannot reduce attorneys' fees pursuant to Rule 68 if

the settlement offer is not a Rule 68 offer. *Clark v. Sims,* 28 F.3d 420, 423–424 (4th Cir.1994), *Cooper v. State of Utah,* 894 F.2d 1169, 1172 (10th Cir.1990). Nevertheless, rejection of a non-Rule 68 offer can be evidence that the plaintiff unduly prolonged the litigation. In *Connolly v. National School Bus Service, Inc.,* No. 98–1679, __ F.3d __ 1999 U.S.App. LEXIS 8134 (7th Cir. April 28, 1999), the Seventh Circuit upheld a reduction of fees where plaintiff's counsel rejected three settlement offers, none of which were Rule 68 offers. The plaintiff argued on appeal that the fees should not be reduced because none of the rejected offers were Rule 68 offers. The court dismissed this argument as irrelevant, holding that the defendants' decision not to make a Rule 68 offer "had nothing to do with whether [plaintiff's counsel] unduly prolonged the litigation." *Connolly* at *12. The court therefore finds that Carroll's rejection of the settlement offer, while not triggering the application of Rule 68, is evidence that Carroll (although not his attorneys) unduly prolonged this litigation.

As the settlement offer was made prior to trial, accepting the offer would have eliminated the substantial fees incurred during the trial. Therefore, the court will incorporate the prolongation-of-litigation factor into the disallowance of the trial-related fees incurred by attorney Robert L. Byman, which will be discussed in detail in the next section.

E. Calculation of the Lodestar Figure

In determining a reasonable fee, the first step is to calculate a "lodestar figure." To do so, the court multiplies the hours reasonably spent on the case by each attorney's reasonable hourly rate. *Connolly v. National School Bus Service,* 992 F.Supp. 1032, 1036 (N.D.Ill.1998). Approximately seventeen attorneys and paralegals at the law firm of Jenner & Block billed time on this case. All of the billing rates are the actual billing rates at which the firm billed its clients during the years in which each attorney or paralegal rendered his services. Byman Affidavit, Exhibit F to Plaintiff's Petition for Attorneys' Fees; Jacobs Affidavit, Exhibit G to Plaintiff's Petition for Attorneys' Fees. "[T]he best measure of the cost of an attorney's time is what that attorney could earn from paying clients," so the hourly rates requested by plaintiff's counsel are presumptively reasonable. *Gusman v. Unisys Corp.,* 986 F.2d 1146, 1150 (7th Cir.1993). Most of Jenner & Block's practice involves corporate litigation, and so the court must also consider whether Jenner & Block's actual billing rates are also reasonable for civil rights litigation. *Cooper v. Casey,* 97 F.3d 914, 920 (7th Cir.1996). The Seventh Circuit recently approved a rate of $275 an hour for a civil rights case, *Cooper* at 921, and that a district court in this district recently approved a rate of $300 an hour for Section 1983 case. *Gaytan v. Kapus,* 181 F.R.D. 573, 581 (N.D.Ill.1998). In the instant case the two principal attorneys billed at the following rates: Robert L. Byman, $300–$325, and Andrew M. Jacobs, $205–$245. The variation in the rates reflect the increases in changes in the billing rates during the years 1997–1999. Approximately fifteen other attorneys and paralegals billed at least some time on the case, and their rates ranged from $180 to $60. The court finds these rates to be reasonable for this litigation. Byman's rate of $300–$325 is relatively high, but the court finds that the rate is reasonable because of his 29 years of experience as a lawyer and his experience in litigating Section 1983 actions. Section 1983 cases resulting in reported decisions in which Byman has participated include *Naguib v. Ill. Dept. of Prof'l Reg.,* 986 F.Supp. 1082 (N.D.Ill.1997) and *Black v. Brown,* 524 F.Supp. 856 (N.D.Ill.1981).

***4** Having determined the reasonable hourly billing rates, the first half of the lodestar equation, the court proceeds to the second half of the equation, the number of hours reasonably spent on the case. *Connolly* at 1036. The defendants challenge a number of the time charges offered by the plaintiff. For example, defendants challenge a time charge of 3.25 hours for reviewing the plaintiff's master file at the Department of Corrections' Chicago office, arguing that the work was unnecessary because the file was produced during discovery. First, the court notes that on September 23, 1998 it ordered that the file be produced at the Chicago office for plaintiff counsel's inspection. The court fails to see how an activity could be unnecessary to the litigation when that very action was taken pursuant to an order of the court explicitly allowing such action. Second, as plaintiff notes, the reason why the file was reviewed in Chicago was that the Department of Corrections refused to allow plaintiff's counsel to review the file at the Tamms Correctional Center, where the file is normally kept. Had the defendants simply allowed access to the file at Tamms, time might have been saved. Third, plaintiff has asserted that the master file reviewed in Chicago contained documents not previously produced during discovery. For these reasons the court rejects

defendants' challenge to the 3.25 hour time charge relating to the review of the master file. The court has also reviewed defendants' other challenges to the time charges and finds that those challenges are similarly without merit.

The court will impose one fee reduction of its own. The plaintiff claims 74.75 hours for Byman and 186.25 hours for Jacobs for trial preparation and trial. The court finds that Jacobs alone could have adequately prepared for and tried this case to the jury. In addition, as discussed above, the entire trial would never had happened had the plaintiff not unduly prolonged the litigation by refusing to accept a settlement offer. The court therefore disallows the 74.75 hours claimed by Byman for trial preparation and trial, for a total reduction of $24,294.00. (74.75 hours multiplied by $325/hour equals $24,294.00.) The court finds that the lodestar amount is $192,191.00 ($195,859.00 for fees through trial plus $20,626.00 in post-trial fees, minus the $24,294.00 adjustment discussed above).

F. Reduction of the Lodestar Figure

Having calculated a lodestar figure, the court now considers whether the lodestar should be reduced to reflect plaintiffs' limited success. "If ... a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley v. Eckerhart,* 461 U.S. 424, 436, 103 S.Ct. 1933, 1941 (1983).

Defendants argue that the jury award of $3,000.00 is much smaller than the requested attorneys' fees, and that the fees should therefore be reduced to an amount proportional to the amount recovered. Plaintiff responds that $3,000.00, including $2,000.00 in punitive damages, is a substantial recognition of a wrong that was done to the plaintiff. Plaintiff further responds that the defendants' uncooperative attitude caused plaintiff to expend time on tasks which otherwise would have been unnecessary.

***5** The court notes that the lodestar amount of $192,191.00 exceeds the jury award of $3,000.00 by a factor of more than 60 to 1. In other words, if the lodestar amount were to be awarded, the plaintiff would receive more than $60.00 in attorneys' fees for every $1.00 he received in actual damages. Moreover, the plaintiff failed to prove liability against four of the five defendants. The court finds that awarding the lodestar amount would therefore not be reasonable given plaintiff's limited success.

The court also finds, however, that several circumstances justify a fee award somewhat larger than what might be granted otherwise. First, the court finds that the plaintiff's fees were inflated by defendants' own actions. Defendants refused to agree to any of plaintiff counsel's motions in limine, thus requiring plaintiff's counsel to brief every issue. Defendants also submitted a witness list of 38 witnesses, thus requiring plaintiff's counsel to prepare to examine all 38 potential witnesses. Second, the fees requested do not cover Jenner & Block's full cost of litigating this action. The firm has not requested reimbursement for $33,745.00 in attorneys' fees. This voluntary decision to reduce its fees weighs against further reduction by this court. Third, the external benefits (benefits not reaped by the plaintiff himself) created by this litigation warrant a fee greater than that justified by the damage award alone. *Lenard v. Argento,* 808 F 2d 1242, 1248 (7th Cir.1987). Carroll's victory may well cause the Department of Corrections to adopt systemic changes designed to prevent correctional officers from abusing inmates. This potential external benefit justifies a higher fee award. Fourth, the court recognizes that a jury is likely to give a prison inmate a lower award than that jury would give a free person complaining of a comparable wrong. If attorneys' fees were to be strictly linked to the size of the damage award, attorneys would be less likely to take on inmate lawsuits, where the damage award is likely to be low even where the wrong is severe.

Having considered the factors weighing against reduction against the small size of the damage award and the failure to prove liability against four of the five defendants, the court finds that a reasonable reduction in the lodestar is four-fifths, or 80 percent. Reducing the lodestar by 80 percent produces a adjusted figure of $38,438.00. ($192,191.00 multiplied by 0.2 equals $38,438.00.) Although the adjusted figure is still about thirteen times higher than the damage award given by the jury, the court finds that this disproportionately large fee award is justified by the special circumstances discussed above. Attorneys' fees are therefore awarded in the amount of $38,438.00.

PLAINTIFF'S BILL OF COSTS

Plaintiff submitted a bill of costs totaling $15,544.00, later subtracting $150.00 for a final figure of $15,394.00. The $150.00 subtraction is for the lodging at the Springfield Hilton during plaintiff counsel's trip to visit a prison in the area. Defendants had objected that cheaper lodging is available in the Springfield area, and so plaintiff voluntarily agreed to drop that charge. The court finds that defendants' other objections to plaintiffs' fees are without merit. For example, defendants object to costs for a meal at McDonald's charged during one of Jacobs' trips Downstate. Defendants cite no authority to support their contention that meals consumed while traveling are not a recoverable cost. In fact, meals are a recoverable cost. *David v. AM International,* 131 F.R.D. 86, 90 (E.D.Penn.1990). Moreover, the court's review of the receipts show that Jacobs' business meals were quite inexpensive. Submitted receipts include a $3.59 lunch at Burger King, a $3.67 lunch at Taco Bell, and what may be the cheapest business lunch ever recorded, a $1.85 lunch purchased from the vending machines at Tamms Correctional Center. The court warns Jacobs that reliance on fast food and vending machines may over the long term be detrimental to his health, but commends him for his frugality with regard to business expenses. The court therefore grants the plaintiff's petition for costs in the amount of $15,394.00.

DEFENDANTS' PETITION FOR COSTS

***6** Defendants DeTella, Jockisch and Springborn, the defendants who were found not liable by the jury, request $3,068.00 in costs under Fed.R.Civ.P. 54(d). The practical effect of assessing $3,068.00 in costs against Carroll would be to leave him $68.00 poorer than he would have been had he never filed this suit ($3,000.00 judgment minus $3,068.00 in costs equals a negative $68.00). Carroll is currently indigent, with a negative balance of $4.00 in his prison trust account. Exhibit 2 to Plaintiff's Response to Defendant's Bill of Costs. Further, it appears that in the near future Carroll may be assessed a charge of $1,274.00 in connection with an unrelated case pending in Illinois state court. Plaintiff's Response to Defendant's Bill of Costs at 4–5. "[I]t is within the discretion of the district court to consider a plaintiff's indigency in denying costs under Rule 54(d)." *Badillo v. Central Steel & Wire Co.,* 717 F.2d 1160, 1165 (7th Cir.1983). The court therefore denies the defendants' petition for costs on the basis of the plaintiff's indigency.

DEFENDANT JEFFREY WHITE'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE, FOR A NEW TRIAL, OR IN THE ALTERNATIVE, FOR REMITTUR

Judgment as a matter of law is proper only if, when the evidence is viewed in the light least favorable to the moving party, the verdict is unsupported. *Isaksen v. Vermont Castings, Inc.,* 825 F .2d 1158, 1163 (7th Cir.1987). When viewed in the light least favorable to Officer White, the evidence shows that he approached Carroll's cell door accompanied by three inmates, that Officer White signaled for the door to be opened, and that he entered the cell along with the other inmates and watched while one of the other inmates beat Carroll until he was unconscious. Such evidence is clearly sufficient to fulfill the legal standard for a prison employee's liability for fostering an assault. *Billman v. Indiana Department of Corrections,* 56 F.3d 785, 788 (7th Cir.1995). The motion of judgment as a matter of law is therefore denied.

White has moved in the alternative for a new trial. A district court has broad discretion in determining whether or not to grant a new trial. *McNabola v. Chicago Transit Authority,* 10 F.3d 501, 516 (7th Cir.1993). In disposing of a motion for a new trial, the district court must decide if the verdict is against the weight of the evidence, or if the trial was unfair to the moving party for some other reason. *Valbert v. Pass,* 866 F.3d 237, 239 (7th Cir.1989).

It appears that White has adopted a "kitchen sink" strategy in filing his motion for a new trial, as he takes virtually every unfavorable ruling made by this court as grounds for a new trial. White's numerous arguments can be grouped into five categories: (1) the verdict was against the weight of the evidence; (2) the court erroneously admitted Carroll's polygraph test results into evidence; (3) various jury instructions were improper; (4) various exhibits were erroneously admitted into evidence or erroneously excluded; and (5) "several witnesses" (only one of which is actually named in White's motion) were barred from testifying. The court finds that: (1) The verdict was not against the weight of the evidence. White himself testified that he observed Carroll

in his cell bleeding on the day of the alleged assault. A reasonable jury could infer from this testimony and Carroll's testimony that Carroll would not be bleeding unless he had been assaulted, and that he could not have been assaulted unless White had opened the locked door to Carroll's cell. (2) The court acted within its discretion in admitting Carroll's polygraph test results, *Simmons, Inc. v. Pinkerton's, Inc.*, 762 F.2d 591, 604 (7th Cir.1985).(3) The jury instructions were not improper. (4) The court did not err in admitting or excluding the challenged exhibits into evidence. (5) The court did not err in barring the defendant's witnesses from testifying. The social worker who counseled Carroll was properly barred from testifying because her conversations with Carroll were privileged. White's challenge to the court's decision to exclude "several witnesses" not named in White's motion need not be addressed given White's failure to identify the witnesses he refers to. In sum, none of the many objections raised by the defendant show that the verdict was against the weight of the evidence or that the trial was unfair, and so White's motion for a new trial is denied.

***7** White has moved in the alternative for remittur. "A trial judge may vacate a jury's verdict for excessiveness only when the award was monstrously excessive or the award has no rational connection to the evidence." *DiBiasio v. Illinois Central Railroad,* 52 F.3d 678, 687 (7th Cir.1995) (internal quotation marks omitted). When making this decision the court may take into consideration whether the award is out of line when compared to other awards in similar cases. *Id.* Other courts have upheld much higher damage awards in similar cases. In *Blissett v. Coughlin,* 66 F.3d 531, 536 (2d Cir.1995), the court upheld a compensatory award of $75,000.00 where several prison guards beat and choked an inmate until he fell unconscious. In *Cooper v. Casey,* 97 F.3d 914 (7th Cir.1996) the court upheld a punitive damage award of $22,500.00 in a prison beating case. The court therefore finds that an award of $1,000.00 in compensatory and $2,000.00 in punitive damages is not excessive and denies White's motion for remittur.

CONCLUSION

For the above-stated reasons, plaintiff's motion for attorneys' fees is GRANTED in the amount of $38,438.00, and the plaintiff's motion for costs is GRANTED in the amount of $15,394.00, for a total of $53,832.00. Defendants DeTella's, Jockisch's, and Springborn's motion for costs is DENIED. Defendant White's motion for judgment as a matter of law or in the alternative, for a new trial, or in the alternative, for remittur is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 1999 WL 413475

End of Document

KeyCite Red Flag - Severe Negative Treatment
Declined to Follow by Lore v. City of Syracuse, 2nd Cir.(N.Y.), February 2, 2012

2008 WL 5157395
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Angel L. MARTINEZ, Plaintiff,
v.
Scott THOMPSON, et al., Defendants.

Civil Action No. 9:04-CV-0440 (DEP).
|
Dec. 8, 2008.

Attorneys and Law Firms

Sivin, Miller Law Firm, Edward Sivin, Esq., Glenn D. Miller, Esq., of Counsel, New York, NY, for Plaintiff.

Hon. Andrew M. Cuomo, Office of the Attorney General, State of New York, Timothy P. Mulvey, Esq., Senta B. Siuda, Esq., Assistant Attorneys General, of Counsel, Syracuse, NY, for Defendants.

DECISION AND ORDER

DAVID E. PEEBLES, United States Magistrate Judge.

***1** Plaintiff Angel Martinez, a former New York State prison inmate, commenced this action against several employees of the New York State Department of Correctional Services (the "DOCS") pursuant to 42 U.S.C. § 1983, alleging deprivation of his civil rights. Included among the claims asserted by Martinez were causes of action alleging 1) the use of excessive force and the failure to protect him from harm, based upon two separate incidents occurring on February 25, 2003 and March 5, 2003; 2) unlawful retaliation, arising both from the use of force on March 5, 2003 and the issuance of a misbehavior report charging him with violating prison policies, both occurring after he threatened to complain regarding the February 25, 2003 incident; 3) deprivation of procedural due process, based upon a disciplinary hearing conducted to address the charges set forth in the misbehavior report; and 4) malicious prosecution, stemming from the pursuit of criminal charges against him arising out of the February 25, 2003 incident. Plaintiff's complaint, as later amended, sought various relief, including awards of compensatory and punitive damages.

A jury trial was held in the matter, beginning on September 8, 2008. After the close of evidence plaintiff's claims for excessive force, failure to protect, unlawful retaliation, and malicious prosecution were submitted to the jury for determination, the court having dismissed plaintiff's procedural due process cause of action as a matter of law during the course of the trial. Following its deliberations the jury, utilizing a form prepared for its use, returned a verdict finding in the plaintiff's favor on each of the four claims against some, though not all, of the defendants under consideration with respect to each of those causes of action. While only nominal damages were conferred in connection with plaintiff's retaliation and malicious prosecution claims, in light of the court's instructions limiting damages on those claims based upon the fact that plaintiff suffered no physical injury as a result of the occurrences, the jury awarded significant amounts of compensatory and punitive damages against the defendants found accountable for the use of excessive force and the failure to protect him from harm, resulting in the entry of judgment in plaintiff's favor in a total cumulative amount of $1,400,006.

Currently pending before the court are cross-motions filed by the parties. In their motion, defendants seek an order granting them judgment as a matter of law, notwithstanding the jury's verdict or, alternatively, a new trial. Plaintiff has countered with a request for an award of costs and attorneys' fees, pursuant to 42 U.S.C. § 1988. Because the jury's finding of liability and compensatory damage awards are well supported by the evidence adduced during the trial, and the plaintiff, as a prevailing party, is entitled to an award of costs and attorneys' fees, I will grant plaintiff's motion and deny defendants' motion for judgment as a matter of law. Based upon my finding that the jury's punitive damage awards are shockingly excessive, however, I will grant defendants' motion for a new trial unless the plaintiff agrees to remit a portion of the punitive damages awarded by the jury, as described below.

I. *BACKGROUND*

***2** At the times relevant to his claims Martinez, a self-described former heroin addict, was a prison

inmate entrusted to the care and custody of the DOCS, and was designated by that agency to the Oneida Correctional Facility ("Oneida"), located in Rome, New York. On February 25, 2003, after returning to his assigned dormitory at Oneida from an outside medical appointment, plaintiff became embroiled in a physical altercation, initially only with defendant Scott Thompson, a corrections officer at the facility, but subsequently involving other corrections workers who appeared at the scene to offer assistance, including defendants Larry Sisco, Scott Myers, Thomas Novak, and Donna Temple. Plaintiff was ultimately placed in mechanical restraints and taken to the facility's medical unit, where photographs were taken and he received some treatment for injuries suffered during the course of the incident. Following treatment, plaintiff was escorted to the facility's special housing unit ("SHU").

Corrections Officer Thompson issued an inmate misbehavior report to the plaintiff on the day after the incident, charging him with refusal to obey a direct order, assault on staff, engaging in violent conduct, and creating a disturbance, in violation of established prison rules. A disciplinary hearing was conducted to address the charges, beginning on February 28, 2003 and continuing on March 14, 2003, with defendant Lane, a corrections captain, presiding as the hearing officer. At the conclusion of the hearing, Captain Lane found the plaintiff guilty of all violations alleged and imposed a penalty principally consisting of twenty-four months of disciplinary SHU confinement, with a corresponding loss of various other privileges. [1]

A second altercation involving the plaintiff and corrections workers occurred on March 5, 2003 in the Oneida SHU. On that occasion, plaintiff was assaulted without provocation by defendants Michael Duvall and Roland LaBrague, two corrections officers, while being returned to his cell after being permitted to inspect his personal property at a nearby location. According to Martinez, Raymond Sipley arrived on the scene shortly after the onset of the incident and either participated in the assault or failed to protect him from the actions of his co-workers.

On April 24, 2003, plaintiff was criminally charged in Oneida County with three counts of assault in the second degree, based upon the February 25, 2003 incident. Cooperating in the investigation which led to that prosecution were defendants Scott Thompson, Larry Sisco, Scott Myers, and Thomas Novak, each of whom provided a supporting deposition regarding the incident for use by law enforcement officers. In their statements defendants Thomson, Sisco, and Myers indicated a desire to have plaintiff criminally prosecuted for his conduct; the supporting deposition of defendant Novak, which was prepared on a different form than the others, did not contain such a statement. Upon presentment of the matter to an Oneida County grand jury a "no bill" was returned, and all criminal charges against the plaintiff arising out of the incident were ultimately dismissed.

***3** On December 1, 2006, plaintiff was released from prison. Martinez is now married, and resides in Brooklyn, New York. While a broken rib suffered as a result of the relevant events has healed, Martinez has suffered from lingering pain as a result of the lumbar back condition which he attributes to the two beatings. In addition, plaintiff has been diagnosed as suffering from post-traumatic stress disorder ("PTSD") and has experienced ongoing symptomology which has included repeated thoughts of suicide, recurrent nightmares and flashbacks of the assaults, fear of the presence of law enforcement officials, and other signs of anxiety. The severity of these symptoms has required the plaintiff to obtain ongoing treatment, including from Christine Janick, a licensed clinical social worker employed at the Bellevue Hospital, located in New York City, who specializes in the treatment of victims of crimes and domestic violence. At trial Janick, who has treated Martinez virtually on a weekly basis since August of 2007, convincingly testified that despite the passage of five and one-half years since the relevant events, plaintiff experiences significant ongoing effects including sleeplessness, recurring nightmares, panic attacks, trauma, fear of being on the street, and depression, and that he has been tearful throughout the entire therapeutic process.

II. *PROCEDURAL HISTORY*

Plaintiff commenced this action on April 19, 2004, naming as defendants ten DOCS employees by name, and several others identified only as "Doe" defendants. Dkt. No. 1. Following the joinder of issue, pretrial discovery, the granting of a motion filed by the defendants seeking partial summary judgment, and the filing of an amended complaint, with court leave, to add a claim for punitive

damages, the matter was the subject of a jury trial over which I presided, commencing on September 8, 2008. [2]

On September 12, 2008, the jury returned a verdict on the remaining claims in the action. [3] In its verdict, the jury found 1) defendants Thompson and Sisco liable with respect to the February 25, 2003 incident, exonerating defendant Myers, Novak, and Temple in connection with plaintiff's excessive force and failure to protect claim arising from that occurrence; 2) defendants Duvall and LaBrague liable with respect to the March 5, 2003 incident, clearing defendant Sipley in connection with plaintiff's claim against him stemming from that event; 3) in plaintiff's favor and against defendants Thompson, Duvall, and LaBrague, but not defendants Temple and Sipley, with regard to plaintiff's retaliation cause of action; and 4) against defendants Thompson, Sisco, and Myers, but not defendant Novak, in connection with plaintiff's malicious prosecution count. In its verdict the jury also declined to find that any of the defendants found liable on plaintiff's various substantive claims should nonetheless be entitled to qualified immunity from suit, a finding in which the court joins. [4]

***4** The portion of the jury's verdict concerning damages was diverse. Following the court's instructions regarding the unavailability of compensatory damages for mental anguish and emotional distress in connection with plaintiff's retaliation and malicious prosecution claims, based upon 42 U.S.C. § 1997e(e), the jury awarded Martinez only nominal damages on those claims. With respect to plaintiff's excessive force and failure to protect causes of action, however, the jury awarded compensatory damages in the amount of $200,000 against defendant Thompson, $150,000 against defendant Sisco, $100,000 against defendant Duvall, and $50,000 against defendant LaBrague. In addition, the jury determined that awards of punitive damages in connection with plaintiff's excessive force and failure to protect claims were appropriate, granting plaintiff an additional $500,000 against defendant Thompson, $200,000 against defendant Duvall, $150,000 against defendant Sisco, and $50,000 against defendant LaBrague. Judgment was entered based upon the jury's verdict on September 12, 2008. Dkt. No. 172.

On September 26, 2008, defendants moved for judgment as a matter of law dismissing plaintiff's claims or, in the alternative, for a new trial, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, respectively. Dkt. No. 173. Plaintiff has since countered, opposing defendants' motion and requesting an award of costs and attorneys' fees. Dkt. No. 180. With the receipt of papers on behalf of the defendants in opposition to plaintiff's motion for attorneys' fees on October 27, 2008, Dkt. No. 183, and the filing of a reply declaration and memorandum of law on behalf of plaintiff in further support of his motion on October 29, 2008, Dkt. Nos. 184, 185, briefing is complete, and the parties' post-trial motions are now ripe for determination.

III. *DISCUSSION*

A. *Defendants' Post-Trial Motions*

1. *Governing Standards of Review*

The standards which govern motions for judgment as a matter of law ("JMOL") and for a new trial, while not entirely dissimilar, are distinctly different. Despite their differences, however, both are tempered by Rule 61 of the Federal Rules of Civil Procedure, which provides that

> [u]nless justice requires otherwise, no error in admitting or excluding evidence-or any other error by the court or a party-is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Fed.R.Civ.P. 61; *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 553-54, 104 S.Ct. 845, 848-49 (1984); 11 Charles Alan Wright, *et al.,* Federal Practice & Procedure § 2882 (2d ed.1995).

a) *JMOL*

Motions seeking JMOL, following a jury trial, are governed by Rule 50(b) of the Federal Rules of Civil Procedure. That rule provides, in relevant part, that

> ***5** [i]f the court does not grant a motion for judgment as a matter of law made under Rule 50(a),

> the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment-or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged-the movant may file a renewed motion or judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.

Fed.R.Civ.P. 50(b). The rule goes on to provide that in ruling upon such a motion following the return of a jury verdict, a court may allow the judgment to stand, order a new trial, or direct the entry of judgment as a matter of law notwithstanding that a verdict was returned against the moving party. *Id.;* 9B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2538 (2d ed.1995).

The burden which a litigant faces when seeking JMOL in the face of an adverse jury verdict, while not insurmountable, is substantial. JMOL notwithstanding a contrary jury verdict is appropriately entered only when the evidence, viewed in the light most favorable to the non-moving party, is susceptible of supporting only one possible verdict, in favor of the moving party. *Jund v. Town of Hempstead,* 941 F.2d 1271, 1290 (2d Cir.1991) (citations omitted); *Chang v. City of Albany,* 150 F.R.D. 456, 459 (N.D.N.Y.1993) (McAvoy, C.J.) (citing, *inter alia, Jund*). The granting of such relief is warranted when

> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.

Jund, 941 F.2d at 1290 (quoting, *inter alia, Mattivi v. South African Marine Corp.,* 618 F.2d 163, 168 (2d Cir.1980)); *see also Nimely v. City of New York,* 414 F.3d 381, 390 (2d Cir.2005). In deciding a motion for JMOL, the court must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence, as those functions properly fall within the jury's province. *Mickle v. Morin,* 297 F.3d 114, 120 (2d Cir.2002) (citations omitted); 9B Wright & Miller, Federal Practice & Procedure § 2527; *see also Jund,* 941 F.2d at 1290.

b) *New Trial*

Post-trial motions seeking a new trial are governed by Rule 59 of the Federal Rules of Civil Procedure. That rule provides, in pertinent part, that

> [t]he court may, on motion, grant a new trial on all or some of the issues-and to any party-... after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court[.]

Fed.R.Civ.P. 59(a)(1)(A). Applying this standard, the Second Circuit has cautioned that ordering a new trial is justified only when the court is convinced that the jury has reached a "seriously erroneous result" or that the verdict represents a "miscarriage of justice." *Nimely,* 414 F.3d at 392 (quotations and citations omitted); *see also Kosmynka v. Polaris Indus., Inc.,* 462 F.3d 74, 82 (2d Cir.2006); *Sorlucco v. New York City Police Dept.,* 971 F.2d 864, 875 (2d Cir.1992); *see also DLC Mgmt. Corp. v. Town of Hyde Park,* 163 F.3d 124, 133 (2d Cir.1998); *Atkins v. New York City,* 143 F.3d 100, 102 (2d Cir.1998) (citation omitted); 11 Wright, *et al.,* Federal Practice & Procedure § 2805.

***6** Unlike a motion for JMOL under Rule 50(b), when addressing a new trial motion a court is permitted to weigh the evidence presented at trial, and is not necessarily bound to view it in a light most favorable to the non-moving party. *DLC Mgmt. Corp.,* 163 F.3d at 133-34 (citation omitted). A jury's credibility determinations, however, are entitled to great deference, and mere disagreement by the court with a jury's verdict, without more, does not entitle a party to relief under Rule 59. *Meiselman v. Byrom,* 207 F.Supp.2d 40, 42 (E.D.N.Y.2002) (citing, *inter alia, United States v. Landau,* 155 F.3d 93, 105 (2d Cir.1998)). A court should generally be indisposed to disturb a jury's verdict on a Rule 59 motion unless the verdict is considered to have been " 'egregious.' " *Id.* (quoting, *inter alia, DLC Mgmt. Corp.,* 163 F.3d at 134).

2. *Defendants' Motion*

In their motion, defendants set forth four separate grounds for the entry of JMOL or, alternatively, for a new trial.

a) *Jury Verdict Inconsistency*

The first argument offered in support of defendants' post-trial motion centers upon what they perceive to be inconsistencies in the jury's verdict. Focusing principally on the February 25, 2003 incident, defendants argue that while plaintiff testified that all five of the DOCS workers accused in connection with that incident, including defendants Thompson, Sisco, Myers, Novak, and Temple, were present during all or at least a portion of the incident and either actively participated in the assault or, having an opportunity to do so, failed to intervene and protect him from the assault, the jury verdict found only defendants Thompson and Sisco accountable for that beating. [5] Dkt. No. 173 at p. 2. Defendants claim this discrepancy creates an irreconcilable inconsistency in the jury's verdict.

When confronted with an argument by the losing party that a jury's verdict is internally inconsistent, the trial court is tasked with determining whether the verdict can be rationally reconciled, "adopt[ing] a view of the case, if there is one, that resolves any seeming inconsistency." *Auwood v. Harry Brandt Booking Office, Inc.,* 850 F.2d 884, 891 (2d Cir.1988) (citation omitted). When attempting to harmonize allegedly inconsistent verdicts a court must "bear in mind that the jury was entitled to believe some parts and disbelieve other parts of the testimony of any given witness." *Tolbert v. Queens College,* 242 F.3d 58, 74 (2d Cir.2001); *see also Fiacco v. City of Rensselaer,* 783 F.2d 319, 325 (2d Cir.1986). If, after engaging in this exercise, the court is left with a firm conviction that the answers of the jury are "ineluctably inconsistent", then it may set aside the verdict and order a new trial. *Id.* at 74 (citations omitted); *see also Brooks v. Brattleboro Memorial Hosp.,* 958 F.2d 525, 529 (2d Cir.1992) (citations omitted).

In this instance, the jury's verdict can be readily reconciled with the evidence presented at trial. Each of the five defendants accused of having violated plaintiff's constitutional rights had varying degrees of involvement in the underlying incident. At the onset, the February 25, 2003 confrontation involved only the plaintiff and Corrections Officer Thompson, with Corrections Officer Sisco arriving shortly on the scene and actively assisting Thompson to subdue the plaintiff. The remaining three defendants, including Corrections Officers Myers and Novak and Corrections Sergeant Temple, arrived a short time later and, the jury could well have found, after the beating had ended. In short, despite defendants' arguments to the contrary, the jury's verdict not only is not inconsistent, but in fact could be viewed as extremely discriminating, evincing careful consideration by the jury of the events precipitating plaintiff's claims and the distinct roles played by the defendants involved.

***7** Similarly, with respect to the March 5, 2003 incident, the jury's verdict reflects its apparent belief that defendants Duvall and LaBrague, who together escorted plaintiff back to his SHU cell following an inspection of his property, participated in the use of excessive force on that occasion, and that by the time defendant Sipley arrived, the use of force had effectively ended and thus he lacked the opportunity to intervene and protect the plaintiff from harm, thereby crediting Sipley's trial testimony to that effect. This distinction between Duvall and LaBrague on the one hand, and Sipley on the other, is well supported by the evidence adduced at trial.

The basis for the portion of the jury's verdict regarding malicious prosecution, and its distinction between defendant Novak, who was exonerated, and the remaining three defendants found liable on that claim, is similarly apparent from the evidence. While each of the four gave a supporting deposition regarding the February 25, 2003 incident, only defendants Thompson, Sisco, and Meyers included within them a statement that they wished to have plaintiff prosecuted, while defendant Novak did not. This variance provided a proper basis to find against Thompson, Sisco, and Meyers on that cause of action, but in Novak's favor on the claim.

In short, the jury's verdict is neither inconsistent, nor does it lack the support of evidence in the record, considered in a light most favorable to the plaintiff.

b) *Testimony Regarding Plaintiff's Diagnoses of PTSD*

In their motion, defendants assign error to the fact that Christine Janick, a licensed clinical social worker, was permitted to refer to plaintiff's PTSD diagnosis during testimony regarding her treatment of Martinez. At best, this argument implicates an evidentiary ruling which

generally will not result in casting aside a jury's verdict, absent extenuating circumstances. *See* Fed.R.Civ.P. 61 (errors in admitting or excluding evidence are not grounds for granting a new trial or setting aside a verdict unless they affect a party's "substantial rights"); *Parker v. Reda,* 327 F.3d 211, 213 (2d Cir.2003) (quoting *Luciano v. Olsten Corp.,* 110 F.3d 210, 217 (2d Cir.1997)) ("This Court will order a new trial only if the inadmissible evidence was 'a clear abuse of discretion and was so clearly prejudicial to the outcome of the trial that we are convinced that the jury has reached a seriously erroneous result of that the verdict is a miscarriage of justice.' ") (quotations omitted); *see also Bank of China v. NBM LLC,* 359 F.3d 171, 182-83 (2d Cir.2004) (erroneous rulings regarding the admission of expert testimony, like other erroneous evidentiary rulings, are reviewed under the "harmless error" standard); *Hygh v. Jacobs,* 961 F.2d 359, 364-65 (2d Cir.1992) (same). In any event, the PTSD diagnosis is squarely reflected in medical records, including those from the Bronx-Lebanon Hospital Center, which were received in evidence at trial, and did not depend upon the testimony of Ms. Janick, who in fact was expressly precluded by the court from offering a diagnosis of the plaintiff's condition. This, then, provides no basis to set aside the jury's verdict or grant a new trial. *Cf. U.S. v. Garcia,* 413 F.3d 201, 217-18 (2d Cir.2005) (erroneous admission of opinion testimony was harmless error where, *inter alia,* the testimony was cumulative of other properly admitted evidence).

c) *Excessive Verdict*

***8** Defendants next argue that the jury's awards of compensatory and punitive damages are excessive. Citing cases which are significantly inapposite, for the most part involving garden variety claims for mental anguish and emotional distress based wholly or principally upon the testimony of the claimant concerning his or her symptomology, defendants urge setting aside of the verdict altogether or reduction of the awards rendered, although no appropriate amounts are proposed.

The amount of damages, including punitive damages, to be awarded in a particular case falls within the province of the jury. *Ismail v. Cohen,* 899 F.2d 183, 186 (2d Cir.1990). While undeniably subject to oversight by both the trial and appellate courts, juries are afforded considerable latitude in awarding damages, and a jury's award should not lightly be set aside. *Nairn v. Nat'l R.R. Passenger Corp.,* 837 F.2d 565, 566 (2d Cir.1988); *Ahlf v. CSX Transp., Inc.,* 386 F.Supp.2d 83, 87 (N.D.N.Y.2005); *see also Lee v. Edwards,* 101 F.3d 805, 808 (2d Cir.1996). When asked to review a jury's damage award on a motion for a new trial, the trial court must determine whether the amount awarded is "so high as to shock the judicial conscience and constitute a denial of justice." *Hughes v. Patrolmen's Benev. Ass'n of City of New York, Inc.,* 850 F.2d 876, 883 (2d Cir.1988) (quoting *Zarcone v. Perry,* 572 F.2d 52, 56-57 (2d Cir.1978)), *cert. denied,* 488 U.S. 967, 109 S.Ct. 495 (1988); *see also Lee,* 101 F.3d at 808. If a court determines that this high threshold showing has been made, a trial court "may order a new trial, a new trial limited to damages, or, under the practice of remittitur, may condition a denial of a motion for a new trial on the plaintiff's accepting damages in a reduced amount." *Tingley Sys., Inc. v. Norse Sys., Inc.,* 49 F.3d 93, 96 (2d Cir.1995) (citation omitted); *see also Lee,* 101 F.3d at 808; *Ahlf,* 386 F.Supp.2d at 87.

1. *Compensatory Damages*

The evidence adduced at trial regarding the lingering effects of the excessive force applied to the plaintiff on February 25, 2003, and again on March 5, 2003, was both extensive and diverse. The evidence reflected that plaintiff physically suffered a broken rib as a result of the incidents and has experienced an ongoing lumbar back condition involving at least one herniated disc, which a jury could fairly have attributed to the assaults. Plaintiff also testified that during the first incident he lost consciousness, and has since developed chronic headaches, and further noted that the beating was so severe that he defecated himself, a matter which is corroborated by photographs taken following the incident.

The evidence regarding the psychological impacts of the defendants' actions was equally, if not more, compelling. Plaintiff testified to experiencing repeated thoughts of suicide, recurrent nightmares and flashbacks of the incidents, debilitating fear of the presence of law enforcement officers, fear of crossing the street, and other severe anxiety, stemming from the events at Oneida. That testimony was buttressed by medical records revealing that Martinez has been diagnosed with PTSD, and the testimony of licensed clinical social worker Janick who has treated the plaintiff on an ongoing, weekly basis since the initiation of their social worker/patient relationship.

***9** Against this backdrop, the court does not view the jury's award of compensatory damages for pain and suffering, mental anguish, and emotional distress

as excessive. Unlike economic loss, which can often be quantified to a reasonable degree of mathematical certainty, assessment of damages for pain and suffering, mental anguish, and emotional distress does not lend itself to the same degree of precision. For this reason, a jury's award of such damages should not be overturned unless the amount clearly exceeds the damages which a reasonable jury could award based upon the evidence adduced and the court's jury instructions. *Ahlf,* 386 F.Supp.2d at 87; *see also Tinnerholm v. Parke, Davis & Co.,* 411 F.2d 48, 55 (2d Cir.1969); *Morgan v. Consol. Rail Corp.,* 509 F.Supp. 281, 287 (S.D.N.Y.1980).

In this instance, the jury's awards of compensatory damages for pain and suffering, mental anguish, and emotional distress compare favorably to other comparable cases where medical proof of serious physical and/or psychological injury resulting from a civil rights deprivation or other actionable conduct is demonstrated. *See, e.g ., Ismail,* 899 F.2d at 186-87 (upholding $650,000 in compensatory damages to a plaintiff who as a result of a beating by a police officer sustained head trauma, displaced vertebrae, cracked ribs, and suffered from considerable mental and emotional injury); *Park v. Shiflett,* 250 F.3d 843, 853-54 (4th Cir.2001) (awarding $300,000 in compensatory damages to a plaintiff that was sprayed twice in the face with pepper spray by sheriff's deputies and developed PTSD as a result of the incident); *Hygh v. Jabobs,* 961 F.2d 359, 361, 366 (2d Cir.1992) (upholding a compensatory damages award in the amount of $216,000 for use of excessive force by a police officer where plaintiff suffered a blow to his face which fractured his cheekbone and required surgery, but no evidence of mental, emotional, or psychological suffering was offered).

Based upon the foregoing, I conclude that the jury's compensatory damage award does not fall outside of the range of what a reasonable jury could grant under the circumstances presented, and therefore decline the defendants' invitation to disturb the jury's verdict and either order a new trial or order a remittitur regarding compensatory damages.

2. *Punitive Damages*

In their motion, defendants also complain of the jury's award of punitive damages, totaling $900,000. The defendants' attack on the jury's punitive damage award is two-pronged. First, defendants complain of the procedure utilized by the court, whereupon the jury was first asked whether punitive damages should be awarded and then, after affording the parties an opportunity to offer additional proof, the jury was instructed to return to deliberate further and consider the amount of punitive damages to be awarded. Additionally, the defendants assert that the punitive damage award is shockingly excessive.

The first argument raised by the defendants in support of their challenge to the punitive damage award is easily dispensed with. While the court could have requested that the jury consider the amount of punitive damages to be awarded as part of its initial deliberations, I chose instead to follow the established procedure in this court, by which the jury is first asked whether punitive damages should be awarded and then, after affording the parties an opportunity to make additional evidentiary submissions, the jury is next requested to consider the appropriate amount of punitive damages to be awarded. *See Vasbinder v. Ambach,* 926 F.2d 1333, 1344 (2d Cir.1991). After the jury signaled its intention to award punitive damages, a recess was taken in order to allow the attorneys to consult with their respective clients and determine whether any additional evidentiary materials would be offered on the question of the amount of punitive damages to be awarded. When court was reconvened, both sides announced that they did not desire to offer any further proof on the question of punitive damages. At no time did defendants object to the procedure utilized by the court, nor was an adjournment requested in order to permit additional evidence to be secured. Under these circumstances, defendants have waived any claim of prejudice associated with this procedure. *See Smith v. Lightning Bolt Prod., Inc.,* 861 F.2d 363, 373-74 (2d Cir.1988); *see also Caruso v. Forslund,* 47 F.3d 27, 30-31 (2d Cir.1995).

***10** The more troublesome issue concerns the amounts awarded. Punitive damages were awarded by the jury against four individuals, all corrections officers employed by the DOCS, in varying amounts ranging from a low of $50,000 up to $500,000, in the case of defendant Thompson. Defendants assert that these awards are excessive.

Punitive damages may be awarded in a section 1983 action "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or

callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. 30, 56, 103 S.Ct. 1625, 1640 (1983); *see also Lee,* 101 F.3d at 808. A jury's award of punitive damages is subject to scrutiny by the trial court, and may be deemed excessive if it is " 'so high as to shock the judicial conscience and constitute a denial of justice.' " *Hughes,* 850 F.2d at 883 (citation omitted); *Ismail,* 899 F.2d at 186 (citation omitted). Analysis of whether a punitive damage award is unduly excessive is informed by the "guideposts" enunciated by the United States Supreme Court in *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574-75, 116 S.Ct. 1589, 1598-99 (1996), including 1) the level of reprehensibility of the underlying conduct; 2) the ratio of punitive damages to compensatory damages awarded; and 3) comparison between this remedy and civil penalties authorized or imposed in comparable cases. *Lee,* 101 F.3d at 809.

Consideration of the first *Gore* factor does not support defendants' argument. In this instance the punitive damage awards against the four defendants relate to their use of excessive force upon the plaintiff, or their failure to protect him from assaults by fellow officers. It goes without saying that the jury obviously regarded such conduct as significantly unconscionable and reprehensible, a factor which supports an award of punitive damages in significant amounts. *See DiSorbo v. Hoy,* 343 F.3d 172, 186-87 (2d Cir.2003).

Turning to the ratio between compensatory and punitive damages, it should be noted that there is no bright line test to be applied. In *Gore,* the Court concluded that a 500:1 ratio was "breathtaking" and could not be sustained. 517 U.S. at 583, 116 S.Ct. at 1603. The comparisons between the compensatory and punitive damage awards in this case, including 5:2 in the case of defendant Thompson, 1:1 for defendants Sisco and LaBrague, and 2:1 for defendant Duvall, do not come anywhere near approaching that ratio. The court finds no reason to conclude that the ratios involved in this case are unduly disproportionate. *See Patterson v. Balsamico,* 440 F.3d 104, 121 (2d Cir.2006) (citing *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 23-24, 111 S.Ct. 1032, 1046 (1991)) (upholding a punitive damage award of "more than 4 times the amount of compensatory damages").

It is in the third *Gore* arena that the verdict in this case comes into question. Similar cases in which punitive damages have been awarded against corrections workers in section 1983 cases disclose that the damages awarded in this instance are exceedingly disproportionate, and that the defendants could not have reasonably anticipated such awards based upon their conduct. *See King v. Macri,* 993 F.2d 294, 298-99 (2d Cir.1993) (finding punitive awards for an excessive force claim, which included allegations by the plaintiff of being punched and put in a choke-hold after he was handcuffed by two court security officers, in the amounts of $175,000 and $75,000 were excessive and reducing the amounts to $100,000 and $50,000, respectively); *Lee,* 101 F.3d at 812-13 (reducing a punitive damage award to a victim of a police assault from $200,000 to $75,000); *Ismail,* 899 F.2d at 186 (upholding a punitive damage award in the amount of $150,000 where the plaintiff suffered two displaced vertebrae, a cracked rib, and serious head trauma as the result of a police assault); *O'Neill v. Krzeminski,* 839 F.2d 9, 13-14 (2d Cir.1988) (upholding an aggregate punitive damages award in the amount of $185,000 against two defendants for excessive force and denial of medical care where the plaintiff was beaten about the face and head while handcuffed and dragged by the throat to a holding cell where he was left bleeding).

***11** Comparing the award to other comparable cases, I conclude that each of the four punitive damage awards in this case is shockingly excessive, and therefore will grant defendants' motion for a new trial unless plaintiff agrees to accept remittiturs, as follows:

Defendant	Original Punitive Award	Remittitur Amount	Revised Punitive Damage Award
Scott Thompson	$500,000	$400,000	$100,000
Michael Duvall	$200,000	$125,000	$ 75,000
Larry Sisco	$150,000	$125,000	$ 25,000

Rolland LaBrague	$50,000	$40,000	$10,000

d) *Comment During Plaintiff's Summation*

The fourth and final argument asserted by the defendants in support of their application for a new trial centers upon a statement made by plaintiff's counsel during summation, characterized by the defendants as a deliberate misrepresentation offered with the intent to confuse or inflame the jury. The comment in dispute relates to defendants' failure to produce and offer into evidence a log book for the Oneida dormitory in which plaintiff was housed on February 25, 2003, the suggestion being that it would have demonstrated that defendant Thompson was lying about what that log book would have demonstrated. [6]

There are several reasons why this portion of defendants' motion does not justify setting aside the jury's verdict and/or granting a new trial. On the outset, it should be noted that a party seeking a new trial on the basis of the conduct of trial counsel, and in particular allegedly improper statements in the jury's presence, is confronted with a substantial burden; "[r]arely will an attorney's conduct so infect a trial with undue prejudice or passion as to require reversal." *Reilly v. Natwest Markets Group Inc.,* 181 F .3d 253, 271 (2d Cir.1999) (citation and quotations omitted), *cert. denied,* 528 U.S. 1119, 1120 S.Ct. 940 (2000). When a jury's verdict is supported by the evidence at trial, statements improperly made by trial counsel are generally regarded as *de minimis* when placed in the context of the trial as a whole. *Marcic v. Reinauer Transp. Cos.,* 397 F.3d 120, 124 (2d Cir.2005) (citing *Pappas v. Middle Earth Condo., Ass'n,* 963 F.2d 534, 540 (2d Cir.1992)).

With this as a backdrop, I note that that defendants did not object to this statement at a time when a proper curative instruction could have been granted, had the court discerned an impropriety. This failure itself provides an independent basis on which the court could deny this portion of defendants' motion absent a conviction that the statement was egregious as to deprive the defendants of a fair trial, a finding which this court is not prepared to make. *Ragona v. Wal-Mart Stores, Inc.,* 210 F.3d 355 (2d Cir.2000).

Moreover, defendants' argument must be considered in light of the court's jury instruction, which the jury is presumed to have followed, *see U.S. v. Elfgech,* 515 F.3d 100, 131 (2d Cir.2008), advising that "the law [does not] require any party to produce as exhibits all papers and things mentioned in evidence in this case." Consequently, while plaintiff's counsel may well both have suggested the availability of the M dormitory log books and intimated that they were not produced because they would not support officer Thompson's testimony, the jury was made aware that defendants were under no obligation to produce that document.

***12** Having carefully reviewed the summation of plaintiff's counsel, if there was an inappropriate remark made, I find no basis to conclude that it was sufficiently flagrant to deprive plaintiff of a fair trial. This, then, provides no basis for the grant of a new trial.

B. *Plaintiff's Cross-Motion*

In his cross-motion plaintiff seeks recovery of attorneys' fees in the amount of $242,083, together with an additional award of costs and disbursements of $10,356.83. [7] Dkt. Nos. 180, 184-86. Plaintiff's motion is supported by a summary, purportedly derived from contemporaneous time records, of the attorney's efforts expended on plaintiff's behalf, as well as an itemization of disbursements involved. [8]

1. *Attorneys' Fees Generally*

A party who succeeds in establishing a constitutional deprivation in an action pursuant to 42 U.S.C. § 1983 is permitted by statute to recover litigation costs, including reasonable attorneys' fees. 42 U.S.C. § 1988. [9] Under section 1988-which represents a significant departure from the general "American Rule", requiring that a litigant, however successful in the pursuit of claims, bear his or her costs and attorneys' fees-a prevailing plaintiff in a section 1983 action is generally entitled to recover reasonable costs and attorneys' fees. *Marek v. Chesny,* 473 U.S. 1, 8-9, 105 S.Ct. 3012, 3016-17 (1985). The practice of awarding attorneys' fees to prevailing plaintiffs in civil rights actions such as this serves "to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel." *Kerr v. Quinn,* 692 F.2d 875, 877 (2d Cir.1982). Since plaintiff is clearly a prevailing party in this matter, and the

defendants do not argue otherwise, I find that an award of costs and attorneys' fees is warranted.

The question of how much to award as costs and attorneys' fees is a matter entrusted to the sound discretion of the court. *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1183 (2d Cir.1996) (citation omitted). For many years the methodology to be employed in exercising the discretion, at least in this circuit, was well-established and widely understood. *See, e.g., Reed,* 95 F.3d at 1183-84; *Hogan v. General Elec. Co.,* 144 F.Supp.2d 138, 141-42 (N.D.N.Y.2001) (Hurd, J.); *Doe v. Kaiser,* No. 6:06-CV-1045, 2007 WL 2027824, at *9 (N.D.N.Y. July 9, 2007) (Peebles, M.J.). Earlier this year, however, a panel of the United States Court of Appeals for the Second Circuit, which included now-retired Supreme Court Justice Sandra Day O'Connor, sitting by designation, took occasion to revisit the issue. *See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F.3d 182, 183-84 (2d Cir.2008). After briefly reviewing the history of attorneys' fees jurisprudence, including within the Second Circuit, the *Arbor Hill* court constructed a new framework for examining fee applications, eschewing the traditional, two-step process of making the "lodestar" calculation, followed by an adjustment of the lodestar amount to account for case-specific factors, referred to in that decision as "an equitable inquiry of varying methodology while making a pretense of mathematical precision", *id.* at 189 (citation omitted), in favor of a new " 'presumptively reasonable fee' " model. *Id.* at 183-89 (citation omitted).

***13** Under the newly-announced protocol, a court must first consider whether the rates at which compensation is sought are those which a "reasonable, paying client would be willing to pay," before multiplying the number of hours expended by that figure. *Id.* at 183-184; *see also Lewis v. City of Albany Police Dep't,* 554 F.Supp.2d 297, 298 (N.D.N.Y., 2008) (Hurd, J.) (noting that "[a]ttorney's fees are awarded by determining a presumptively reasonable fee, reached by multiplying a reasonable hourly rate by the number of reasonably expended hours"). Determination of the rate at which a reasonable client would willingly compensate an attorney for the services rendered is informed by several factors of varying degrees of relevance,

> including, but not limited to, the complexity and difficulty of the case, the available expertise and capacity of the client's other counsel (if any), the resources required to prosecute the case effectively ... the timing demands of the case, [and] whether an attorney might have an interest (independent of that of his client) in achieving the ends of the litigation[.]

Arbor Hill, 522 F.3d at 184.[10] The court in *Arbor Hill* cautioned that a court should also "bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively." *Id.* at 190. In making the final determination of an amount to be awarded to a prevailing party in a case such as this, the court "must 'examine the hours expended by counsel and the value of the work product of the particular expenditures to the client's case' " and consider " 'its own familiarity with the case and its experience generally [in addition] to the evidentiary submissions and arguments of the parties' " to determine the reasonableness of the fee request. *Arbor Hill,* No. 03-CV-502, 2005 WL 670307, at *7-8 (N.D.N.Y. Mar. 22, 2005) (Homer, M.J.) (quoting *DiFilippo v. Morizio,* 759 F.2d 231, 235-36 (2d Cir.1985)).

2. *PLRA Attorneys' Fee Limitations*

As a threshold matter, the court must determine the effect, if any, of 42 U.S.C. § 1997e(d) on plaintiff's fee application in this case. Section 1997e(d) effectively caps an attorney's fee application in certain circumstances, and directs that at least a portion of the fees should initially be offset against any judgment obtained by an inmate litigant.

The inmate litigation landscape was considerably altered in 1996 with the passage of the Prison Litigation Reform Act ("PLRA"), Pub.L. 104-134, 110 Stat. 1321 (1996). One feature introduced under the PLRA was a provision which effectively caps recovery under 42 U.S.C. § 1988 of attorneys' fees in an inmate civil rights action to 150% of the amount of the judgment entered in the case.[11] *Torres v. Walker,* 356 F.3d 238, 242 (2d Cir.2004). That section also goes on to restrict the hourly rate to be used in calculating such fee awards. 42 U.S.C. § 1997e(d)(3).

As defendants tacitly acknowledge by not having addressed this issue, the strictures of section 1997e(d) do not apply in an action filed by a former prison inmate after his or her release, even if the civil rights violation at issue is alleged to have occurred while the plaintiff was incarcerated. *Kerr v. Puckett,* 138 F.3d 321, 323 (7th

Cir.1998); *Morris v. Eversley,* 343 F.Supp.2d 234, 239-40 (S.D.N.Y.2004). Section 1997e is therefore not directly applicable in plaintiff's case, since he had been released from custody by the time of trial.

3. *Calculating the Appropriate Reasonable Hourly Rate*

***14** In his application, plaintiff seeks recovery of fees calculated at an hourly rate of $350 for both of the attorneys who worked on the case. Defendants challenge the hourly rates claimed as excessive in light of the nature of the work and the geographical region in which it was performed.

Although the law offices of plaintiff's attorneys are located in New York City, the appropriate rates to apply are the prevailing rates within the Northern District of New York. *See Luciano v. Olsten Corp.* 109 F.3d 111, 115-16 (2d Cir.1997) (finding that is was proper for a district judge to use the rates of the Eastern District of New York instead of the Southern District, where plaintiff's lawyer was from, in a Title VI I case where the action "was commenced and litigated" in the Eastern District). While roundly criticized by the Second Circuit, to the extent that it sought to establish a schedule of firm hourly rates for all fee applications submitted in the Northern District of New York regardless of the nature of the particular case and type of legal services involved, this court's decision in *Arbor Hill* nonetheless provides a helpful frame of reference for determining the rates which a reasonable, paying client would be willing to pay to obtain services of the type rendered by plaintiff's counsel in this action in Central New York. In *Arbor Hill,* a case in which the plaintiffs sued seeking vindication of rights secured under the Voting Rights Act, 42 U.S.C. § 1973 *et seq.,* the court found it appropriate, based upon the particular circumstances of that case, to grant recovery calculated based upon the hourly rates of "$210 for experienced attorneys, $150 for associates with more than four years of experience, $120 for less experienced associates, $80 for paralegals[,] and the traditional one-half of these rates for time spent traveling." *See Arbor Hill,* 419 F.Supp.2d at 211, *aff'g, Arbor Hill,* 2005 WL 670307, at *6.

To be sure, the rates articulated in *Arbor Hill* are not necessarily dispositive of those which appropriately should apply in this instance. As plaintiff notes, the decision setting out those rates was issued in 2005 and one would reasonably expect that the controlling market rates have increased significantly since that time. Although some jurists from this district have adhered to the *Arbor Hill* rate schedule, despite the passage of time and the Second Circuit's criticism of such a fixed approach, *see, e.g., Lewis,* 554 F.Supp.2d at 298-301; *Picinich v. United Parcel Serv.,* No. 5:01-CV-01868, 2008 WL 1766746, at *2 (N.D.N.Y. Apr. 14, 2008) (McCurn, J.); *Paramount Pictures Corp. v. Hopkins,* No. 5:07-CV-593, 2008 WL 314541, at *5 (N.D.N.Y. Feb. 4, 2008) (Scullin, S.J.), others have resisted a wooden application of *the Arbor Hill* rates and have awarded fees calculated at higher rates. *See, e.g., Trudeau v. Bockstein,* No. 05-cv-1019, 2008 WL 3413903, at *5-6 (N.D.N.Y. Aug. 8, 2008) (Sharpe, J.) (awarding attorneys' fees at hourly rates of $345, $275, $250, and $190 for local counsel); *Luessenhop v. Clinton County, N. Y.,* 558 F.Supp.2d 247, 266-67 (N.D.N.Y.2008) (Treece, M.J.) (noting that the "prevailing market hourly rate is now higher than $210" and awarding attorney's fees at a rate of $235) (citation omitted); *Overcash v. United Abstract Group, Inc.,* 549 F.Supp.2d 193, 197 (N.D.N.Y.2008) (Sharpe, J.) (awarding attorney's fees at an hourly rate of $250 to a local attorney); *Kaiser,* 2007 WL 2027824, at *9-10 (attorney's fee award calculated at an hourly rate of $250 based on consideration of what a reasonable client of the Syracuse, New York community would pay and the experience of the attorney); *Hoblock v. Albany County Bd. of Elections,* No. 1:04-CV-1205, 2006 WL 3248402, at *3 (N.D.N.Y, Nov. 7, 2006) (Kahn, J.) (awarding attorney's fees at an hourly rate of $225).

***15** Unfortunately, neither plaintiff's fee application nor defendants' response provides any information regarding the prevailing market rates in the Northern District of New York for trial attorneys experienced in the field of civil rights litigation. Given this void, the court is left to draw upon its own experiences and familiarity with rates within the district, as well as those awarded in other, similar cases. *See Arbor Hill,* 2005 WL 670307, at *5-6; *Farbotko v. Clinton County of N. Y.,* 433 F.3d 204, 209-11 (2d Cir.2005); *Luessenhop,* 558 F.Supp.2d at 263-65.

Perhaps chief among the relevant factors to be considered in determining the appropriate rates to be applied are the experience, reputation and ability of the attorneys involved. *Johnson,* 488 F.2d at 717-19; *Luca v. County of Nassau,* No. 04-CV-4898, 2008 WL 2435569, at *8-10 (E.D.N.Y. June 16, 2008) (modifying rates based on the attorneys' level of experience). Attorney Sivin has been licensed to practice law for twenty-six years. Siven's partner, Glenn Miller, has been practicing for twenty-four

years. Over the course of their legal careers both have been involved in litigating "dozens" of cases involving civil rights violations. The experience and background of attorneys Sivin and Miller have led to a finding by another court, in 2006, that the rate of $350.00 per hour was reasonable for their services. *See Sylvester v. The City of New York,* No. 03 Civ. 8760, 2006 WL 3230152, at *5-6 (S.D.N.Y. Nov. 8, 2006).

In addition to considering the experience levels and regular billing rates of the attorneys in question, I have drawn upon my experience and familiarity with rates charged within this district for services of the nature involved in this litigation. Having considered all available information and relevant factors, I conclude that attorneys' fees in this case should be awarded utilizing the hourly rates of $275 per hour for each of the two attorneys involved.

4. *Presumptively Reasonable Fee*

The next step in the fee calculation algorithm requires multiplication of the appropriate hourly rates by the number of hours reasonably expended by the respective professionals in representing the plaintiff. In assessing plaintiff's fee application, I have taken note of the central principle that reasonableness is the touchstone upon which fees should be awarded. *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983). I have also considered that hours not " 'reasonably expended' " by an attorney or firm may be excluded from the calculation of the total fee application, *id.* at 434, 103 S.Ct. at 1939 (citing S. REP. NO. 94-1011, at 6 (1976)), and further that any hours deemed to be "excessive, redundant, or otherwise unnecessary" may similarly be excluded from the fee request. *Id.* at 434, 103 S.Ct. at 1939-40; *see also Lake v. Schoharie County Comm'r of Soc. Serv.,* No. 9:01-CV-1284, 2006 WL 1891141, at *6-7 (N.D.N.Y. May 16, 2006); *Arbor Hill,* 2005 WL 670307, at *8 (quoting *Gierlinger v. Gleason,* 160 F.3d 858, 876 (2d Cir.1998)).

***16** In addition to their challenge of the hourly rate sought, defendants have raised several objections to plaintiff's fee application. One such objection concerns the use of two attorneys to represent the plaintiff, including during the trial. Utilization of more than one attorney in connection with a particular litigation task, including at trial, is not necessarily *per se* unreasonable; when confronted with a claim of impermissible duplication or overlap,

> a trial judge may decline to compensate hours spent by collaborating lawyers or may limit the hours allowed for specific tasks, but for the most part such decisions are best made by the district court on the basis of its own assessment of what is appropriate for the scope and complexity of the particular litigation.

New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1146 (2d Cir.1983). In this instance, I find that some downward adjustment is required in order to account for the duplication of effort on the part of plaintiff's counsel. Throughout the course of trial, plaintiff was represented by two attorneys, both of whom are experienced attorneys billing at high rates. I find nothing in the record now before me to justify such a practice in this case, and conclude that absent unusual circumstances not now presented, a reasonable paying client would not generally be willing to readily compensate for such an extravagance. While having two attorneys present at a trial in a matter of this magnitude may be somewhat defensible, there should be some adjustment to reflect the overlap. [12]

Another of defendants' objections to the plaintiff's fee application concerns the use of "block billing", where large amounts of time are recorded on the fee application with only such corresponding summary descriptions as "trial", "trial prep", and "review". The use of the such summary descriptions is not particularly helpful in permitting the court to assess the reasonableness of the time expended. Nonetheless, given the amount of time involved and the nature of the services rendered, I find it would be unreasonable to require a particularization of the time spent at trial and for trial preparation, as well as for review of the file accumulated prior to the appearance of counsel, and conclude that the descriptions provided "conform to what a reasonable client compensating [his] or her attorneys on an hourly basis might expect them to delineate in periodic invoices seeking the payment of fees." *Sylvester,* 2006 WL 3230152, at *6. I therefore have opted not to make a further downward adjustment to reflect the block billing practices of plaintiff's counsel.

In determining the appropriate fee to approve, I have looked to awards in similar cases as providing an

additional guidepost for determining reasonableness. In this instance it appears that plaintiff's fee application, as I contemplate adjusting it, compares favorably to awards made in other similar cases. *See Markon v. Bd. of Educ. of the City of Chicago,* 525 F.Supp.2d 980, 981, 984 (N .D. Ill.2007) (awarding $181,966.22 in fees and costs in a single-plaintiff ADEA action); *Baker v. John Morrell & Co.,* 263 F.Supp.2d 1161, 1209 (N.D.Iowa 2003) (awarding $174,927.14 in fees and costs in a single-plaintiff Title VII discrimination suit); *Kulling v. Grinders for Industry, Inc.,* 185 F.Supp.2d 800, 803, 826 (E.D.Mich.2002) (awarding $190,197.33 in attorney's fees and costs in three-plaintiff ADEA action); *Reeves v. Sanderson Plumbing Products, Inc.,* No. 1:96-CV-197-S-D, 2001 WL 1524412, at *9 (N.D.Miss. May 14, 2001) (awarding fees and costs totaling $184,571.39 in a case involving ADEA and state law claims); *Rabin v. Wilson-Coker,* 425 F.Supp.2d. 269, 275 (D.Conn.2006) (awarding fees and costs in the amount of $145,437.11 in a section 1983 action); *Lake,* 2006 WL 1891141, at *12 (awarding $143,774.55 in costs and attorneys' fees in a section 1983 action); *Diamond "D" Const. Corp. v. New York State Dept. of Labor,* 2005 WL 2614955, at *10 (W.D.N.Y.2005) (awarding $264,162.96 in attorneys' fees in a section 1983 action); *Tsombanidis v. City of West Haven,* 208 F.Supp.2d 263, 288 (D.Conn.2002) (awarding $234,254.63 in attorneys' fees and costs in a section 1983 action).

***17** Applying the controlling fee award catechism, based upon my familiarity with the case and the legal fee landscape in this district, and reducing the award out of concern over the duplication of attorney effort, particularly at trial, I conclude that the fee application, calculated based upon the $275 per hour rate which I have found to be reasonable and the numbers of hours expended, should be adjusted downward by a total of 20%, yielding a total fee recovery of $151,997.80 calculated as follows:

Attorney	***Rate***	***Hours Expended***	***Subtotal***
Glenn Miller, Esq.	$275.00	282.00	$ 77,550.00
Edward Sivin, Esq.	$275.00	408.90	$112,447.50
		Total:	$189,997.50
		80% of Total:	$151,997.80

5. *Costs*

In addition to attorneys' fees, plaintiff has sought recovery of a total of $10,356.83 in costs. Included within that figure, *inter alia,* are hotel charges in the amount of $2,452.26, process server expenses of $1,592.00, and transcript fees totaling $3,952.75. Defendants oppose plaintiff's request for recovery of costs in part, arguing that they are excessive and largely unrecoverable.

In cases of this nature, a claim by a prevailing party for an award of attorney's fees may include those taxable under Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920, as well as others beyond the ambit of those provisions, including "those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients."[13] *Lake,* 2006 WL 1891141, at *11 (quoting *United States Football League v. National Football League,* 887 F.2d 408, 416 (2d Cir.1989)); *see also Hogan v. General Elec. Co.,* 144 F.Supp.2d 138, 143 (N.D.N.Y.2001) (Hurd, J.). A prevailing plaintiff may not, however, recover unexceptional, incidental overhead expenses. *LeBlanc-Sternberg v. Fletcher,* 143 F.3d 748, 763 (2d Cir.1998). "Whether a particular item constitutes ordinary overhead or an awardable cost depends on whether the item is one normally absorbed within the attorney's fee or separately charged to a client." *Arbor Hill,* 2005 WL 670307, at *12 (citing *LeBlanc-Sternberg,* 143 F.3d at 763). Typical of costs which are recoverable under circumstances such as those now presented are travel expenses, postage costs, photocopying charges, and the expense of placing telephone calls. *See Amato v. City of Saratoga Springs,* 991 F. Supp 62, 68 (N.D.N.Y.1998) (citations omitted).

Defendants object to portions of plaintiff's application for recovery of costs. First, defendants assert that plaintiff is not entitled to reimbursement for the cost of obtaining the trial transcript. Despite defendants' objection, the court finds that the expense associated with obtaining a copy of the trial transcript is compensable under section 1988. *See Mercy v. Suffolk County,* 748 F.2d 52, 54 (2d Cir.1984).

Defendants next challenge plaintiff's application for reimbursement of hotel room charges, totaling $2,405.26 and apparently representing the cost associated with hotel charges not only for Attorneys Sivin and Miller, but additionally witness Janick, the plaintiff, and members of plaintiff's family. Defendants' point on this issue is well taken. While the expense associated with plaintiff's attorneys staying in a hotel, and reimbursement for their meals, are the types of charges which a paying client would customarily expect to be invoiced, there is no authority for granting costs under section 1988 associated with room and board for the litigating plaintiff. *Cf. Bridges v. Eastman Kodak Co.,* No. 91 Civ. 7985, 1996 WL 47304, at *14 (S.D.N.Y. Feb. 6, 1996); *U.S. Media Corp., Inc. v. Edde Entm't, Inc.,* No. 94 Civ. 4849, 1999 WL 498216, *8 (S.D.N.Y. July 14, 1999). Similarly, although the court has considerable discretion in this regard, the expense associated with the hotel room for a witness who testified briefly during the trial is not justified. *Cf. Raniola v. Bratton,* 2003 WL 1907865, at *8 (S.D.N.Y. April 21, 2003); *Bridges,* 1996 WL 47304, at *15. Accordingly, I will discount the hotel expense and award half of the amount sought, or $1,236.13.

***18** Defendants' third objection relates to expense associated with providing a court interpreter who was not used at trial. The court agrees that this amount is not compensable under the circumstances presented.

Defendants' next objection relates to the amount sought in connection with witness Christine Janick, including the cost of her air transportation and car fare, totaling $516.00. Once again I agree with defendants, who argue that compensation for witness Janick should be limited to her per diem rate of $40, plus statutory mileage. The court has determined that the distance between Ossining, New York where Ms. Janick apparently resides, and Syracuse, New York is 233 miles, making a round trip to and from Syracuse equal to 466 miles. Reimbursed at the applicable mileage rate in effect at the time of trial, or 58.5 cents per mile, plaintiff is entitled to recovery for $272.61 in mileage and an additional $40, representing her per diem witness fees, for a total of $312.61.

Another objection registered by the defendants concerns the amount sought for photocopying, in the sum of $166.73. The reasonable expense associated with photocopying is generally allowable in a case such as this. *See, e.g., LeBlanc-Sternberg,* 143 F.3d at 763. While more in the way of specifics could have been provided, the court does not conclude that the amount sought is patently unreasonable, and therefore will award $166.73 as reimbursement for photocopies made in Syracuse.

Defendants' last objection relates to various miscellaneous expenses reimbursement of which are now sought, including for retention of a private investigator ($492.42), services of an agency for the service of subpoenas ($1,361), and the costs of obtaining medical records ($412.12). Recognizing that the touchstone of whether to award these costs includes whether a reasonable paying client would expect to be invoiced these expenses, and not whether they relate to witnesses who necessarily testified at trial, as perhaps would be the case with an application made or a bill of costs filed under Rule 54(d) and section 1920, I find that the expenses in question are recoverable.

Under the circumstances, I will approve the award of costs and disbursements sought by the plaintiff, as modified consistent with this opinion, calculated as follows:

Category	***Amount***
Wunder Investigations	$ 492.42
Medical records	$ 412.12
Gas and tolls to and From Syracuse	$ 197.55
Hotel Charges	$1,236.13

Parking in Syracuse		$ 45.00
Mileage and Per Diem for Christine Janick		$ 312.61
United Process Service		$1,592.00
Federal Express		$ 80.00
Photocopies in Syracuse		$ 166.73
Trial Transcript (Eileen McDonough)		$3,952.75
	Total:	$8,487.31

IV. *SUMMARY AND CONCLUSION*

After hearing nearly a week's worth of testimony and reviewing hundreds of pages of documents received in evidence, and following a fairly lengthy period of deliberation, the jury in this case rendered a verdict finding in plaintiff's favor against certain but not all of the defendants in each of the four remaining claims in the action, and awarded significant amounts of compensatory and punitive damages. When the jury's verdict is measured against the evidence offered at trial, viewed in a light most favorable to the plaintiff, it is well supported and the compensatory damage awards made are not unduly excessive. The punitive damage awards rendered, however, are shockingly excessive, and I therefore will grant defendants' motion for a new trial unless the plaintiff agrees to accept remittiturs in the amounts described above.

***19** Turning to plaintiff's cross-motion, as a prevailing party Martinez is entitled to an award of costs, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988. Having carefully considered plaintiff's fee application, the court will award fees in the amount of $151,997.80 and costs in an additional amount of $8,487.31.

Based upon the foregoing, it is hereby

ORDERED as follows:

1) Defendants' motion for judgment as a matter of law (Dkt. No. 173) is DENIED.

2) Defendants' motion for a new trial (Dkt. No. 173) is GRANTED unless plaintiff agrees to remit portions of the punitive damage awards returned by the jury, including $400,000 of the award against defendant Scott Thompson, $125,000 of the award against defendant Michael Duvall, $125,000 of the award against defendant Larry Sisco, and $40,000 of the award against defendant Robert LaBrague.

3) Plaintiff's cross-motion for an award of costs, including reasonable attorneys' fees (Dkt. No. 180), is GRANTED, subject to the adjustments reflected above.

4) If the plaintiff accepts the remittitur, the clerk is directed to enter an amended judgment in this action reflecting the revised punitive damages amounts and the additional award of attorneys' fees in the sum of $151,997.80, and disbursements in the additional amount of $8,487.31, for a total award of costs in the amount of $160,485.11.

5) The clerk is directed to promptly forward copies of this order to the parties pursuant to the court's local rules.

All Citations

Not Reported in F.Supp.2d, 2008 WL 5157395

Footnotes

1 The penalty was later reduced, on appeal to Assistant DOCS Commissioner Selsky, to twelve months of SHU confinement based upon a finding that "the nature of the incident does not warrant penalty imposed", and eventually was reversed altogether, on agreement of the parties.

2 This matter is before me on consent of the parties, pursuant to 28 U.S.C. § 636(c). *See* Dkt. No. 149.

3 During the course of trial, I granted a motion by defendants for judgment as a matter of law dismissing plaintiff's procedural due process cause of action pursuant to Rule 50 of the Federal Rules of Civil Procedure.

4 Entitlement to qualified immunity from suit implicates a question of law, for resolution by the court. *Stephenson v. Doe,* 332 F.3d 68, 80-81 (2d Cir.2003). In resolving the issue, however, a trial court can properly be guided by answers to special interrogatories. *Id.* at 81.

5 The portion of defendants' memorandum asserting jury verdict inconsistency addresses only the February 25, 2003 incident. In their counsel's supporting affidavit, however, defendants also appear to argue fatal inconsistency with regard to the March 5, 2003 assault, and in connection with plaintiff's malicious prosecution claim.

6 While defendants do not specifically note the precise language of which they now complain, it appears that their argument relates to the following statements of plaintiff's counsel:

> [a]nd what is most interesting, and you might have just picked up on this this morning during my questioning of Officer Sipley, there is a log book for all the dorms, all the housing units, and the M dorm had a log book that morning. And presumably, we haven't seen the log book, they have not produced this log book, that log book would answer the question as to whether or not Officer Thompson was on duty in the morning when Angel Martinez went out for his medical trip, because once he comes on duty, he stamps that template, he is now on duty. Anything that happens after he comes on duty gets recorded line by line chronologically in the log book.
>
> So, if Thompson were telling the truth, this log book would have Angel leaving the dorm at some point and then later on it would have Thompson coming on duty. If that were the case, guess what, we'd see the log book. If the log book had, as we are arguing, Thompson coming on duty in the morning and then underneath there inmate Martinez going to his medical trip, they would not produce that. Because if they produced that log book, do you know what you all would say? Thompson's lying. He knew he was out on that medical trip, there was no emergency when he came back. That door was not left unlocked because this unknown stranger is coming into his dorm.

Transcript of September 11, 2008 Trial Proceedings (Dkt. No. 178) at pp. 758-59.

7 In his application plaintiff does not seek compensation for work performed by the firm's office manager, who also serves as a licensed paralegal, or for work performed by third-year and first-year law students. It is estimated that the time expended collectively by those individuals in connection with this action exceeded 200 hours.

8 In his initial application, plaintiff sought recovery of costs and disbursements in the amount of $10,125.83 and attorneys' fees totaling $236,530. *See* Dkt. No. 180. That request was later revised to reflect an additional eight hours of work, bringing the total to $239,633, and additional charges of $231 billed to plaintiff's attorneys by United Process Service, a company engaged to effectuate service of subpoenas in the case. *See* Dkt. No. 184. Plaintiff's attorneys have since submitted an amended exhibit regarding the hours expended on the case by Glenn Miller, indicating that his total time was actually 282 hours, as opposed to 274.9 hours. *See* Dkt. No. 186. Based upon plaintiff's latest submission, his total fee request now amounts to $242,083.

9 That section authorizes the court, in its discretion, to "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" in a civil rights action brought under 42 U.S.C. § 1983. 42 U.S.C. § 1988(b).

10 *Arbor Hill* also reinforced the appropriateness of considering the so-called *"Johnson* factors", when establishing a reasonable rate; those factors include

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

See Arbor Hill, 522 F.3d at 186-87, n. 3, 190 (discussing *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d, 714, 717-19 (5th Cir.1974), *abrogated on other grounds by Blanchard v. Bergeron,* 489 U.S. 87 (1989)).

11 42 U.S.C. § 1997e(d) provides, in relevant part, as follows:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that-
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and
>
> (B) (I) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> 42 U.S.C. § 1997e(d)(1) & (2) (internal footnotes omitted).

12 It is noted that at trial, the defendants were represented by a single attorney, although as plaintiff notes he likely was assisted behind the scenes by his colleagues in the Attorney General's office.

13 In their opposition to plaintiff's application for an award of costs, defendants argue that plaintiff may properly seek only those costs taxable under Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920, relying upon this court's decision in *Silvera v. Burge,* Civil Action No. 9:02-CV-882 (DEP) (N.D.N.Y ., filed July 5, 2002). That case, however, is inapposite since the opinion was issued in response to the filing of a bill of costs by the prevailing plaintiff in that action. In that instance neither Silvera nor his appointed, *pro bono* counsel applied to the court for costs and attorneys' fees under 42 U.S.C. § 1988.

End of Document

2008 WL 4755834
Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

Kevin BORES, et al., Plaintiffs,
v.
DOMINO'S PIZZA LLC, Defendant.

Civ. No. 05–2498 (RHK/JSM).
|
Oct. 27, 2008.

West KeySummary

1 **Federal Civil Procedure**
Particular types of cases

Federal Civil Procedure
Attorney fees

A prevailing party's request to recover attorney fees and costs incurred in connection with a breach of contract action in the amount of $1.2 million was not reasonable under the parties' franchise agreements, and thus, the party was entitled to $450,000 in attorneys' fees and costs. The hourly rates charged by some of the prevailing party's attorneys was excessive when compared to the reasonable hourly rate in the relevant legal community for similar services provided by lawyers of comparable skill, experience, and reputation. The prevailing party made no attempt to justify the use of out-of-town counsel with very high rates to assist it in this matter. Further, many of the time records submitted by the prevailing party lacked sufficient detail to ascertain if the time expended was reasonably necessary, redundant or excessive, as the records were replete with vague entries such as "gather information and respond to client's requests," "identify and prepare documents," and other similarly vague entries.

5 Cases that cite this headnote

Attorneys and Law Firms

J. Michael Dady, Scott E. Korzenowski, Dady & Garner, P.A., Minneapolis, MN, Thomas W. Pahl, Joseph M. Barnett, Foley & Mansfield, Minneapolis, MN, for Plaintiffs.

Michael R. Gray, Quentin R. Wittrock, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN, for Defendant.

MEMORANDUM OPINION AND ORDER

RICHARD H. KYLE, District Judge.

INTRODUCTION

*1 This matter is before the Court on the Motion of Defendant Domino's Pizza LLC ("Dominos")[1] for Entry of Judgment and Determination of the Amount of Attorneys' Fees and Costs Pursuant to Section 22.2 of the Franchise Agreements (Doc. No. 336). Dominos seeks an award of slightly over $1.2 million in attorneys' fees and costs incurred in connection with this case. For the reasons set forth below, Dominos' Motion will be granted in part and denied in part.

BACKGROUND

The factual background of this case is set forth in detail in the Court's prior opinion, *see Bores v. Domino's Pizza LLC*, 489 F.Supp.2d 940 (D.Minn.2007), and will not be repeated here; familiarity with the Court's prior opinion is assumed.

Dominos appealed the Court's grant of summary judgment on Plaintiffs' breach-of-contract claim to the Eighth Circuit.[2] The appellate court reversed and remanded with instructions that this Court "grant Domino's motion to dismiss and enter judgment in its favor." Having now obtained a Judgment dismissing all of Plaintiffs' claims, Dominos seeks to recover the attorneys' fees and costs it incurred in connection with this action, totaling $1,226,065.54. It relies on Section 22.2 of Plaintiffs' Franchise Agreements, which provides:

> If any legal or equitable action is commenced, either to challenge, interpret, or to secure or protect our rights under or to enforce the terms of this Agreement, in addition to any judgment entered in our favor, [Dominos] shall be entitled to recover such reasonable attorney's fees as [Dominos] may have incurred together with court costs and expenses of litigation. [3]

Plaintiffs argue that Dominos is not entitled to recover fees or costs and that, were the Court to render such an award, the amount sought by Dominos must be reduced.

ANALYSIS

I. Dominos is entitled to recover fees and costs

At the outset, there can be little doubt that this case falls within Section 22.2 of the Franchise Agreements—that is, the action is a "legal ... action ... commenced ... to challenge [or] interpret ... [Dominos'] rights under" the Franchise Agreements. Indeed, Plaintiffs admit that the crux of their case was their breach-of-contract claim, in which they asserted that the Franchise Agreements "prohibited Dominos from requiring the Plaintiffs to purchase one computer hardware system from one designated source (IBM) and one computer software system from one designated source (Domino's)." (Mem. in Opp'n at 7.) Accordingly, Section 22.2 of the Franchise Agreements, on its face, entitles Dominos to recover its reasonable fees and costs.

Nevertheless, Plaintiffs raise several arguments why Dominos cannot recover. None is persuasive.

A. Plaintiffs had sufficient notice that Dominos would be seeking fees

Plaintiffs first argue that Dominos cannot recover because fees and costs are "special damages" that must be pleaded under Federal Rule of Civil Procedure 9(g). (Mem. in Opp'n at 16–18.) Specifically, Plaintiffs note that Dominos failed to plead an entitlement to attorneys' fees in connection with its first counterclaim (seeking a declaration that it could force Plaintiffs to install PULSE), but *did* plead such an entitlement in connection with its second counterclaim (for breach of contract). Because Dominos only succeeded on the former claim and not the latter, Plaintiffs argue that Dominos is barred from recovering its litigation expenses. There are several flaws with this argument.

***2** First, what Dominos did or did not plead in connection with its counterclaims is irrelevant under the express language of Section 22 .2. In fact, had Dominos not asserted counterclaims at all and, instead, simply defended Plaintiffs' claims, it still would have been entitled to recover its fees because the nature of this case would have been the same: a "legal ... action ... commenced ... to challenge [or] interpret ... [Dominos'] rights under" the Franchise Agreements. [4]

Second, even if Dominos technically violated Rule 9(g), it nevertheless complied with the spirit of that rule. While the Eighth Circuit has recognized that attorneys' fees "are 'special damages' that parties are required to plead under Rule 9(g)," *Nat'l Liberty Corp. v. Wal–Mart Stores, Inc.*, 120 F.3d 913, 916 (8th Cir.1997), [5] the purpose of the rule "is to guard against unfair surprise," *Bowles v. Osmose Utils. Servs., Inc.*, 443 F.3d 671, 675 (8th Cir.2006). Plaintiffs cannot reasonably claim surprise from Dominos' attempt to recover its fees here. Indeed, Dominos' second counterclaim alerted Plaintiffs that Dominos sought to recover all of its fees and litigation expenses under Section 22.2. (*See* Answer and Counterclaims (Doc. No. 4) ¶ 23.) In the absence of surprise, Dominos' alleged failure to comply with Rule 9(g) is harmless and must be overlooked by the Court. *See* Fed.R.Civ.P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

B. Dominos' release of certain Plaintiffs does not undermine its Motion

Plaintiffs next argue that because Dominos has settled its claims with certain Plaintiffs (*see* note 2, *supra*), it is barred from seeking fees and costs from the remaining Plaintiffs. The Court does not agree.

Plaintiffs cite several decisions in support of their argument, most of which are tort cases involving joint tortfeasors. (*See* Mem. in Opp'n at 21–24.) "The general rule of law is that a release of one joint tortfeasor releases all others." *Frey v. Snelgrove,* 269 N.W.2d 918, 921 (Minn.1978). The reason for this rule is clear: the obligations owed by parties jointly liable cannot be separated from one another, so a release as to one necessarily must serve as a release as to all. Where parties

are jointly and *severally* liable, however, their obligations *can* be separated and, as a result, the release of one generally will not release the others. Hence, "the release of one joint and several party does not discharge any other party to [a] contract." *Holland v. United States,* 74 Fed. Cl. 225, 252 n. 16 (2006); *accord* Restatement (Second) of Contracts § 294(1)(b) (1981) (where a promisor under a contract is "discharge[d] ... by release[,] ... co-promisors who are bound by joint and several duties ... are not discharged"); *Bank One Trust Co. NA v. Alma Prods. I, Inc.,* 137 Fed. Appx. 68, 69–70 (9th Cir.2005) (release in exchange for partial payment of attorneys' fees did not preclude plaintiff from seeking fees against other, jointly and severally liable party).

***3** Here, Plaintiffs concede that they are jointly and severally liable for any fees to which Dominos might be entitled. (*See* Mem. in Opp'n at 22.) Accordingly, Dominos' release of certain Plaintiffs does not impair its ability to seek fees from those Plaintiffs remaining in this case. *See also* Minn.Stat. § 548.20 (noting that jointly and severally liable parties "may be sued jointly, or separate actions may be brought against each or any of them, and judgment rendered in each, *without barring an action against any of those not included in such judgment, or releasing any of those not sued* ") (emphasis added).

Plaintiffs also argue that even if the aforementioned settlement does not preclude Dominos from recovering its fees and costs, the amount thereof must be reduced by an amount equal to what Dominos received from the settling Plaintiffs. (*See* Mem. in Opp'n at 23–24.) Plaintiffs are correct that they are entitled to such a reduction, lest Dominos double recover. *See* Restatement (Second) of Contracts § 294(3) (1981) ("Any consideration received ... for discharge of one promisor discharges the duty of each other promisor ... to the extent of the amount or value received ."). This rule is of no benefit to the remaining Plaintiffs, however, because the released Plaintiffs paid nothing to Dominos to settle. (*See* Graziani Decl. ¶ 7.)

C. Dominos' request for fees does not violate its contractual obligations

Plaintiffs next argue that the Motion should be denied because Dominos, "by asserting its claim for attorneys' fees, is violating its contractual obligation to 'exercise reasonable judgment with respect to all determinations to be made by [it] under the terms of' " the Franchise Agreements. (Mem. in Opp'n at 24–25.) Specifically, Plaintiffs argue that the fee request is "unreasonable" because (1) it is unnecessarily large, given the simple nature of the claims in this case, (2) Dominos is attempting to deny Plaintiffs the benefit of their bargains, and (3) there existed a legitimate dispute concerning whether Dominos could mandate PULSE. (*Id.* at 27–32.) Although the Franchise Agreements do require Dominos to exercise "reasonable judgment" in enforcing the terms thereof, the Court finds no merit to Plaintiffs' arguments.

First, in the Court's opinion, the allegedly unreasonable manner in which Dominos litigated this case does not provide a proper basis to deny fees *in their entirety.* Rather, that alleged unreasonableness only requires the Court to reduce the amount of fees Dominos may recover (which the Court has done, *see infra* at 10–20). That conclusion is consistent with Section 22.2 of the Franchise Agreements, pursuant to which Dominos may only recover its "*reasonable* attorney's fees[,] court costs and expenses of litigation."

Second, the Court discerns no basis upon which to conclude that Dominos is attempting to deny Plaintiffs the benefit of their bargains. According to Plaintiffs, Dominos knows that they are unable to pay even a small portion of the fees it seeks. (Mem. in Opp'n at 30.) Hence, Plaintiffs believe that Dominos is using its fee request as an effort to drive Plaintiffs out of business, thereby depriving them of the benefit of the Franchise Agreements. Yet, Plaintiffs (who are long-time Dominos franchisees) willingly signed the Franchise Agreements, fully aware that by litigating with Dominos, they ran the risk that they might be required to reimburse the company for its litigation expenses. Having taken that gamble and lost, Plaintiffs cannot now claim penury to avoid the consequences of their decision. Moreover, to deny fees to Dominos would be to deny the company the benefit of *its* bargain, since the parties contractually agreed that Dominos could recover fees and costs in the event of litigation. Plaintiffs' purported inability to pay does not change that result.

***4** Third, the reasonableness of Plaintiffs' claims is simply irrelevant to Dominos' fee request. Section 22.2 of the Franchise Agreements does not state that Dominos may recover its fees only for "unreasonable" or "unfounded" claims. Rather, it entitles Dominos to recover fees and costs expended in *any* "action ... commenced ... to challenge [or] interpret ... [Dominos']

rights under" the Franchise Agreements. It is not unreasonable for Dominos to seek to enforce its bargained for, contractual rights. [6]

D. The *Noerr–Pennington* doctrine is inapplicable

Plaintiffs next argue that the *Noerr–Pennington* doctrine bars Dominos' Motion. (Mem. in Opp'n at 32–34.) Derived from the Supreme Court cases *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), the *Noerr–Pennington* doctrine generally shields from damages those who petition the government for redress, including those who file lawsuits. *E.g., Hinshaw v. Smith,* 436 F.3d 997, 1003 (8th Cir.2006); *Porous Media Corp. v. Pall Corp.,* 186 F.3d 1077, 1080 n. 4 (8th Cir.1999). The doctrine is predicated on First Amendment concerns; because individuals and entities enjoy the right to petition the government for redress, the doctrine holds that no penalties may be imposed when that right is exercised by the commencement of an action, lest the exercise thereof be chilled in the future. *See, e.g., Schneck v. Saucon Valley Sch. Dist.,* 340 F.Supp.2d 558, 573 (E.D.Pa.2004).

An understanding of the concerns underpinning the *Noerr–Pennington* doctrine lays bare why it cannot assist Plaintiffs here. While it may be true that an award of fees to Dominos would, in some sense, be tantamount to penalizing Plaintiffs for seeking redress from the courts, such a penalty would not implicate Plaintiffs' First Amendment rights because they *contractually agreed to pay such a penalty in the event of litigation.* In other words, Plaintiffs bargained away any protection *Noerr–Pennington* may have offered them. Taken to its logical conclusion, Plaintiffs' argument would mean that attorney-fee provisions in contracts would in all cases be invalid under the First Amendment, which is clearly not the law. *See Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.,* 814 F.2d 358, 373 (7th Cir.1987) ("The proposition that the first amendment precludes the award of the costs of litigation as damages implies the startling result that fee-shifting rules are unconstitutional.... The exercise of rights may be costly, and the first amendment does not prevent ... requiring a person to pay the costs incurred in exercising a right."). Plaintiffs have cited no authority suggesting that *Noerr–Pennington* precludes a court from awarding fees in accordance with the terms of a valid contract, and the Court has found none.

II. The Court will reduce the amount of fees and costs that Dominos seeks

***5** Having concluded that Dominos is entitled to an award of fees and costs, the Court must next determine the appropriate amount to be awarded under the Franchise Agreements, which provide for an award of "reasonable attorney's fees" to Dominos. In order to calculate a "reasonable" fee, the Court will apply the lodestar method, which requires the Court to multiply the reasonable number of hours expended by a reasonable hourly rate for each attorney performing work in connection with this case. *City of Burlington v. Dague,* 505 U.S. 557, 559–60, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). The Court may then adjust the lodestar amount upward or downward based on "other considerations" to achieve a more reasonable fee under the circumstances. *E.g., Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). [7]

Dominos calculates the lodestar amount at slightly under $1.1 million for 2200 hours of work, and it also seeks approximately $200,000 in costs. Having carefully reviewed the voluminous records submitted by Dominos' counsel in support of its Motion, the Court determines that those fees and costs must be reduced. [8]

A. Reasonable hourly rates

The Court first determines that the hourly rates charged by some of Dominos' attorneys are excessive.

A reasonable hourly rate is the prevailing market rate in the *relevant legal community* for similar services provided by lawyers of comparable skill, experience, and reputation. *Blum v. Stenson,* 465 U.S. 886, 895 & n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). "Generally, when determining a reasonable hourly rate, the relevant legal community is the forum in which the district court sits." *Camacho v. Bridgeport Fin., Inc.,* 523 F.3d 973, 979 (9th Cir.2008); *accord Fish v. St. Cloud State Univ.,* 295 F.3d 849, 851 (8th Cir.2002). Here, Dominos seeks reimbursement for work performed, *inter alia,* by lawyers from the Washington, D.C. office of the law firm Latham & Watkins, many of whom charge rates substantially out of line with rates charged in the Twin Cities area. For

example, an associate at Latham & Watkins with 5 years' experience, Alexander Maltas, charged $480 per hour, while Dominos' lead local counsel—Quentin Wittrock, a partner with the law firm Gray, Plant, Mooty, Mooty & Bennett who has over 20 years' experience, specializing in franchise disputes—billed no more than $425 per hour over the course of this case. In some instances Dominos seeks reimbursement for Latham & Watkins lawyers charging over $800 per hour, nearly double that charged by local counsel. (*See* Graziani Decl. at 12–13.) Dominos also seeks reimbursement for work performed by lawyers in the Chicago office of DLA Piper and the Dallas office of Haynes and Boone, often at well over $500 per hour. (*See id.* at 5, 10.)

Although parties may be reimbursed for work performed by out-of-town lawyers charging out-of-town rates, generally this is permitted only when in-town counsel with expertise in a particular area cannot be located. *See, e.g., Avalon Cinema Corp. v. Thompson,* 689 F.2d 137, 140–41 (8th Cir.1982); *Howard Johnson Int'l, Inc. v. Inn Dev., Inc.,* Civ. No. 07–1024, 2008 WL 2563463, at *1 (D.S.D. June 23, 2008). Dominos has made no attempt to justify the use of out-of-town counsel (with very high rates) to assist it in this matter. *See Avalon,* 689 F.2d at 140–41 (burden rests with party seeking fees to show why out-of-town counsel was necessary). Nor does the Court believe that these hourly rates are in line with those charged by lawyers of similar skill and experience in the Twin Cities area.

***6** In addition, the billing records submitted by Dominos indicate that more than 20 lawyers and paralegals have billed time in connection with this case,[9] but Dominos has not submitted sufficient evidence to justify the hourly rates charged by them. *See, e.g., Hensley,* 461 U.S. at 433 ("The party seeking an award of fees should submit evidence supporting the ... rates claimed."). Typically, such evidence would include affidavits from other lawyers opining on the reasonableness of the rates or citations to similar cases in which fees were awarded. *E.g., Norman v. Hous. Auth. of City of Montgomery,* 836 F.2d 1292, 1299 (11th Cir.1988) ("Evidence of [reasonable hourly] rates may be adduced through direct evidence of charges by lawyers under similar circumstances or by opinion evidence."); *Dye v. Bellsouth Telecomms., Inc.,* 462 F.Supp.2d 845, 855 (W.D.Tenn.2006) (noting that fee applicant should submit "affidavits of other attorneys, case precedents, [or] fee studies" to justify hourly rates sought). Dominos has not submitted such evidence here. Nor has it proffered evidence concerning the background or qualifications of many of the attorneys who worked on this case. For instance, the Declaration of Dominos' in-house counsel, Joel Graziani, sets forth the experience and background of Michael Gray and Quentin Wittrock, two attorneys with the Gray Plant Mooty law firm. (*See* Graziani Decl. ¶¶ 8(A)-(B).) But Dominos seeks fees for work performed by at least six other lawyers (in addition to several paralegals) at that firm. While the Court can glean some general information about those attorneys and paralegals from the Gray Plant Mooty website, it cannot locate sufficient information to determine whether their hourly rates are reasonable.[10] The same is true of lawyers working for other law firms who expended time on Dominos' behalf—the dearth of information submitted leaves the Court unable to determine the reasonableness of their requested hourly rates.

For all of these reasons, an hourly rate reduction is appropriate.[11]

B. Reasonable number of hours

The Court next determines that the number of hours claimed by Dominos must be reduced.

In calculating the reasonable number of hours expended by a lawyer, the Court must exclude "excessive, redundant, or otherwise unnecessary" hours. *Hensley,* 461 U.S. at 434. The burden rests with Dominos to demonstrate that the hours its counsel expended were reasonable. *Id.* at 437; *H.J. Inc. v. Flygt Corp.* ., 925 F.2d 257, 260 (8th Cir.1991). In this case, there exist several reasons why the Court will reduce the hours claimed by Dominos' counsel.

First, many of the submitted time records lack sufficient detail to permit the Court to ascertain if the time expended was reasonably necessary, redundant, or excessive. The records are replete with vague entries such as "[g]ather information and respond to client's request," "[i]dentify and prepare documents," "appeal communications," "correspondence," "review memos," "review documents and issues," "review background materials," "maintenance of pleading documents for electronic clip," "document research," etc. It is appropriate to reduce the compensable number of hours on this basis. *See Miller v. Woodharbor Molding &*

Millworks, Inc., 174 F.3d 948, 950 (8th Cir.1999) (noting that inadequate documentation may result in a reduced fee). Similarly, Dominos' counsel has heavily redacted the time sheets submitted with the Motion, and those redactions generally leave the Court in the dark as to the precise nature of the work performed. Courts routinely reduce fee requests where redactions leave it impossible to discern the appropriateness of counsel's work. *See, e.g., Strand v. Auto. Machinists Pension Trust*, Civ. No. 06–1193, 2007 WL 2029068, at *6 (D.Or. July 11, 2007); *Synagro Techs., Inc. v. GMP Haw., Inc.*, Civ. No. 04–509, 2007 WL 851271, at * 13 (D.Haw. Mar. 15, 2007); *Okla. Natural Gas Co. v. Apache Corp.*, 355 F.Supp.2d 1246, 1258 (N.D.Okla.2004). [12]

***7** Second, there are several billing entries in the records submitted by Dominos' counsel that involve tasks for which Dominos cannot reasonably request compensation under the Franchise Agreements. For example, Dominos' counsel billed for time spent responding to inquiries from Dominos' auditors. Such time is tangential to this action and must be excluded. *See, e.g., Trustees of Univ. of Penn. v. Lexington Ins. Co.*, Civ. No. 84–1581, 1986 WL 2785, at *3 (E.D.Pa. Feb.27, 1986), *aff'd in part, rev'd in part on other grounds*, 815 F.2d 890 (3rd Cir.1987). Similarly, the time records include entries for matters such as "[a]nalyze issue regarding domain registrations" and "[a]nalyze tax returns and other financial documents for underreporting issues" that have no obvious connection to this case.

Third, the time records contain a bevy of entries for ministerial and/or secretarial tasks, such as making and sending copies, organizing files, preparing case binders, retrieving documents, and the like. Purely clerical or secretarial tasks are not compensable. *See, e.g., Shrader v. OMC Aluminum Boat Group, Inc.*, 128 F.3d 1218, 1222 (8th Cir.1997); *Gorman v. Easley*, Civ. No. 95–0475, 1999 WL 34808611, at *5 (W.D.Mo. Oct.28, 1999). Likewise, the Court will not reimburse Dominos for time spent reviewing simple documents, such as notices of appearance and similar items. "The court does not expect counsel to bill for reviewing every simple document." *Barnes v. Sec'y of Health & Human Servs.*, No. 90–1101V, 1999 WL 797468, at *4 (Fed.Cl. Sept. 17, 1999). Instead, counsel is expected to exercise "billing judgment," which in the Court's view does not include seeking reimbursement for *de minimis* tasks. *Hensley*, 461 U.S. at 437.

Fourth, as noted above, no fewer than twenty attorneys and paralegals have billed time in connection with this case. While the Court is cognizant that this action has been pending for almost three years and has involved extensive discovery, motion practice, and an appeal, it is nevertheless left with the impression that Dominos and its counsel have "overlawyered" this case. Dominos has nowhere explained why it required the services of so many different lawyers. And, the involvement of so many "cooks in the kitchen" has resulted in a significant amount of redundancy and overlapping billing. As the *Gorman* court noted, "[i]t may be reasonable to expect a client to pay the cost of having several lawyers ..., and of course a client can elect to pay an unreasonable sum for his or her representation. However, the issue deserves scrutiny when the prevailing party asks the losing party to assume that extra financial burden." 1999 WL 34808611, at *5.

Moreover, in the overall context of this case, many of these attorneys had, at most, a *de minimis* impact on its outcome. More than 2200 hours have been billed by Dominos' lawyers in this action, but the records submitted in connection with the instant Motion include entries from some attorneys who billed only a handful of hours. (*See, e.g.*, Sheyka Decl. (noting *inter alia* 3.6 hours expended by Sonya Braunschweig); Mazero Decl. (noting *inter alia* 1.2 hours expended by Denise Stilz).) The Court does not believe that such time should be compensated. *See, e.g., Rodriguez ex rel. Kelly v. McLoughlin*, 84 F.Supp.2d 417, 424 (S.D.N.Y.1999) (excluding request for reimbursement for four attorneys who billed 1.0 hour, 1.0 hour, .5 hour, and .5 hour, respectively, because "it is unlikely that counsel could have made a meaningful contribution to the case in such a brief period of time"); *United Phosphorous, Ltd. v. Midland Fumigant, Inc.*, 21 F.Supp.2d 1255, 1260 (D.Kan.1998) (declining to award fees for attorneys who billed less than forty hours on case, since their role in lawsuit could be "characterized as minimal"; "There is a difference between assistance of co-counsel which is merely comforting or helpful and that which is essential to proper representation."), *aff'd in part, rev'd in part on other grounds*, 205 F.3d 1219 (10th Cir.2000).

***8** Fifth, and finally, but perhaps most importantly, the Court concludes that the overall number of hours expended in this action was excessive. As Dominos concedes, this case, at its core, has always been a simple contract dispute concerning the terms of contracts (the Franchise Agreements) that both sides agree are

unambiguous. (*See* Def. Mem. at 3 ("As this Court correctly recognized, both sides' claims ultimately turned on the plain language of the Franchise Agreements.").) The parties engaged in (often acrimonious) discovery for more than a year, and yet at the end of the day that discovery turned out to be largely unnecessary to resolve the case, since the interpretation of an unambiguous contract is a legal question, not a factual one. *Bores v. Domino's Pizza, LLC*, 530 F.3d 671, 674 (8th Cir.2008). Dominos could have—and should have—short-circuited all of that discovery by simply moving for summary judgment at an early stage of the case, based on its (and Plaintiffs') assertion that the Franchise Agreements are unambiguous. Dominos, and its counsel, should not be rewarded for the failure to do so. While the Court recognizes that "it takes two to tango" and that Plaintiffs are also guilty of driving up Dominos' fees (and presumably their own), under the circumstances a substantial reduction is appropriate for the hundreds of thousands of dollars in fees devoted to ultimately unnecessary discovery. [13]

C. Amount to be awarded

Because Dominos has failed to justify the hourly rates it seeks, has failed to provide adequate fee documentation to the Court, and has sought significant fees (and costs) for "excessive, redundant, and unnecessary" work, the Court concludes that a substantial reduction of the amount it seeks for attorneys' fees and costs is warranted. Having taken into consideration all of the "other considerations" set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), [14] and having carefully reviewed the time sheets submitted by Dominos' counsel, the Court concludes that an appropriate award, given the nature and length of the case and the required time and labor, is $450,000 for attorneys' fees and costs.

III. The fee judgment will be entered against all of the remaining Plaintiffs

Plaintiffs argue that any fee judgment should be entered against only the corporate entities remaining in this case—in other words, not against Plaintiffs Bores and Huber. The Court rejects this argument because Bores and Huber admitted in their Reply to Dominos' Counterclaims that they have personally guaranteed their corporate franchisees' obligations. (*See* Plaintiffs' Reply (Doc. No. 9) ¶ 1 (admitting that Bores and Huber "have personally guaranteed the franchisees' performance of the [F]ranchise [A]greements").)

CONCLUSION

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that Defendant's Motion for Entry of Judgment and Determination of the Amount of Attorneys' Fees and Costs Pursuant to Section 22.2 of the Franchise Agreements (Doc. No. 336) is **GRANTED IN PART** and **DENIED IN PART** as follows: Defendant Domino's Pizza LLC shall recover of Plaintiffs Blue Earth Enterprises, Inc., Mid America Pizza LLC, Rising Dough, Inc., RJ Inc ., Kevin Bores, and Jennifer Huber, jointly and severally, the sum of $450,000 in attorneys' fees and costs.

***9 LET JUDGMENT BE ENTERED ACCORDINGLY.**

All Citations

Not Reported in F.Supp.2d, 2008 WL 4755834

Footnotes

1 The Court will refer to the Defendant as "Dominos" in order to avoid the odd appearance of the possessive "Domino's'."

2 Following the Court's summary-judgment ruling, Dominos settled with Plaintiffs Christopher McCormick, Galleons Inc., Try Our Pizza, Inc., M & M Pizza, J Triple T, Inc., and FBN, Inc. As a result, only Blue Earth Enterprises, Inc., Mid America Pizza LLC, Rising Dough, Inc., RJ Inc., and their principals, Kevin Bores and Jennifer Huber, remain as Plaintiffs in this case. The Court refers to those parties collectively herein as "Plaintiffs" or the "remaining Plaintiffs."

3 The Franchise Agreements of two Plaintiffs use slightly different language (*see* Mem. in Opp'n at 19 n. 6), but the differences are immaterial to the Court's resolution of the instant Motion.

4 For this same reason, the Court rejects Plaintiffs' argument that Dominos cannot recover fees because Section 22.2 "does not expressly apply to a claim for declaratory judgment." (Mem. in Opp'n at 18–20.)

5 *But see Wiley v. Mitchell,* 106 Fed. Appx. 517, 522–23 (8th Cir.2004) (attorneys' fees sought pursuant to contract are not element of damages that must be pleaded under Rule 9(g)).

6 The attorney-fee provision in the Franchise Agreements is extremely broad—so broad, in fact, that if read and applied literally, Dominos likely need not even demonstrate that it is a prevailing party in order to recover fees.

7 Because the Court is sitting in diversity, it must apply state substantive law and federal procedural law. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The award of attorneys' fees is a substantive issue to which the Court must apply state law. *E.g., Bannister v. Bemis Co.,* Civ. No. 07–1662, 2008 WL 2002087, at *1 (D.Minn. May 6, 2008) (Kyle, J.), *appeal docketed,* No. 08–1634 (8th Cir. Mar. 21, 2008). Here, the remaining Plaintiffs are located in Minnesota, Maine, and Missouri, and hence the amount of fees to be awarded must be determined in accordance with the law of those states. *See Bores v. Domino's Pizza, LLC,* 530 F.3d 671, 674 (8th Cir.2008). Yet, courts in both Minnesota and Maine have endorsed the use of the lodestar method in setting a reasonable fee, *see Milner v. Farmers Ins. Exch.,* 748 N.W.2d 608, 620 (Minn.2008); *Poussard v. Commercial Credit Plan, Inc. of Lewiston,* 479 A.2d 881, 884–85 (Me.1984), and Missouri courts set fees by analyzing factors similar to those used under the lodestar method. *Compare Higgins v. McElwee,* 680 S.W.2d 335, 344 (Mo.Ct.App.1984) (factors analyzed under Missouri law) with *Allen v. Tobacco Superstore, Inc.,* 475 F.3d 931, 944 n. 3 (8th Cir.2007) (factors analyzed under lodestar method). Accordingly, the Court concludes that application of the lodestar method is appropriate here.

8 The Court pauses to note that Dominos has made very little effort to justify the amount of fees and costs it seeks. It is axiomatic that a fee applicant "bears the burden of establishing entitlement to an award [of fees] and documenting the appropriate hours expended and hourly rates." *H.J. Inc. v. Flygt Corp.,* 925 F.2d 257, 260 (8th Cir.1991) (quoting *Hensley,* 461 U.S. at 437). Here, Dominos has (inappropriately) opted to dump on the Court the voluminous time records of its counsel, with little explanation concerning the hourly rates charged and even less explanation of the propriety of the hours expended. As one court has noted, "[t]here is a practical limit to what a busy trial judge may be expected to do with the massive fee detail engendered by protracted litigation.... Miscellaneous fee data cannot just be dumped on the bench for the judge to sort through and resolve." *Ohio–Sealy Mattress Mfg. Co. v. Sealy Inc.,* 776 F.2d 646, 664 (7th Cir.1985); *accord FMC Corp. v. Varonos,* 892 F.2d 1308, 1316 (7th Cir.1990) ("the party seeking fees should not stack a pile of time sheets on the bench for the district court to analyze"). Although the Court could have denied the Motion in its entirety on this basis, *see Morris v. Wachovia Sec., Inc.,* 448 F.3d 268, 284 (4th Cir.2006) ("A party seeking attorneys' fees must present a request from which the correct amount may be computed with reasonable dispatch. The failure to do this justifies a rejection of the request."), or could have required further submissions from Dominos supporting its request, *see FMC Corp.,* 892 F.2d at 1316, it has opted instead to reduce the amount of fees and costs sought. *See Morris,* 448 F.3d at 284 (district court need not provide applicant with opportunity to submit more detailed fee application, because doing so would encourage "satellite litigation over fees"); *see also Hensley,* 461 U.S. at 437 ("A request for attorney's fees should not result in a second major litigation.").

9 Legal work performed by a paralegal generally is compensable as part of an attorney-fee award. *See Missouri v. Jenkins,* 491 U.S. 274, 284–89, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989).

10 In fact, in some instances the Court cannot even discern whether the individual billing time is a paralegal or an attorney.

11 In reducing the hourly rates, the Court in no way suggests that the rates charged were senseless or irrational. As Judge Mary Beck Briscoe of the Tenth Circuit has noted, the phrase "reasonable hourly rate" would appear "to imply that, by definition, any other rate actually charged to a client is somehow unreasonable or unfair. That, of course, is not the case." *Robinson v. City of Edmond,* 160 F.3d 1275, 1288 n. 4 (10th Cir.1998) (Briscoe, J., concurring in part and dissenting in part). Private parties, like Dominos, may agree to whatever rates with their lawyers that they choose. *Id.* Those rates, however, must be circumscribed when the prevailing party seeks to shift its litigation expenses onto the its opponent. In other words, the "selection of counsel is generally within the sound discretion of the client; however, where the fee for that counsel is to be shifted to another party, that discretion must be carefully exercised." *In re Valley Historic Ltd. P'ship,* 307 B.R. 508, 517 (Bankr.E.D.Va.2003).

12 Although the time entries were redacted to protect attorney-client privileged material, the Court believes that they could have been redacted in such a fashion as to preserve their general subject matter. For example, instead of stating "review and analyze comments regarding [REDACTED]," an entry could have stated "review and analyze comments regarding summary judgment brief." *See Signature Networks, Inc. v. Estefan,* Civ. No. 03–4796, 2005 WL 1249522, at *8 (N.D.Cal. May 25, 2005) (reducing amount of fees sought where party redacted time entries and omitted "a general description of the subject matter" of items billed). In any event, Dominos could have submitted unredacted time records under seal for *in camera* review by the Court, but it failed to do so. *See Chamberlain Mfg. Corp. v. Maremont Corp.,* No. 92–C–

356, 1995 WL 769782, at *7 (N.D.Ill.Dec. 29, 1995) (noting that party seeking fees had submitted unredacted version of attorney time records for *in camera* review).

13 The costs and other expenses sought by Dominos shall be reduced for this same reason—if the hours expended on discovery were largely unnecessary, then the costs incurred during that discovery were also largely unnecessary.

14 In *Easley v. Anheuser–Busch, Inc.,* the Eighth Circuit noted that it has "adopted the guidelines for determining attorneys' fees set forth in *Johnson.*" 758 F.2d 251, 264 n. 25 (8th Cir.1985). Those factors include, among other things, the time and labor required, the novelty and difficulty of the questions presented, the amount involved, the results obtained, and the nature and length of the case. *Id.*

End of Document