

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOMINIC AVATO, ET AL. : CIVIL ACTION  
 :  
 v. :  
 :  
 GREEN TREE RUN CONDOMINIUM :  
 COMMUNITY ASSOCIATION, ET AL. : NO. 97-2868

MEMORANDUM and ORDER

Norma L. Shapiro, J.

April 22, 1998

Plaintiffs, nine residents at the Green Tree Run Condominium, alleging violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, et seq., filed this action against the Green Tree Run Condominium Community Association (the "Association"), Concept 91, Inc. ("Concept 91") and Property Management Group, Ltd. ("PMG"). The parties advised the court on November 7, 1997 that they had settled the case; by Order entered November 10, 1997, the court dismissed plaintiffs' action pursuant to Local Rule of Civil Procedure 41.1. Plaintiffs have filed a petition for attorney's fees and costs, to which defendants have objected. For the reasons stated below, plaintiffs' petition for fees will be granted and their petition for costs denied.

BACKGROUND

Plaintiffs, all handicapped individuals residing in Green Tree Run Section Two, alleged in their Complaint that the Association, a non-profit membership corporation comprised of condominium owners responsible for maintenance of the parking lots and other common areas, had relocated handicapped parking

spaces to a remote parking area and refused to assign spaces close to their units unless plaintiffs provided general medical releases for all of their medical records. Plaintiffs also sought to compel the Association to renovate the Tree House clubhouse which was not handicapped accessible. Plaintiffs claimed Concept 91, the building manager until March, 1997, and PMG, the building manager from then until the present, were liable as the Association's agents for the relocation of parking spaces.

Plaintiffs sought the following relief: 1) a declaration that defendants' policies violated the FHA; 2) an injunction preventing defendants from engaging in discriminatory practices in the future; 3) implementation of a parking plan assigning plaintiffs their own handicapped parking spaces near their units; 4) renovation of the Tree House to eliminate structural impediments to handicapped access; and 5) compensatory damages for emotional distress and property damage to plaintiffs' automobiles caused by malicious scratching or "keying" of the paint.

Under the terms of the settlement executed by the parties, the Association and its agents agreed to assign the plaintiffs "the closest available parking space to his or her unit" as a reserved, handicapped space. (Agreement § 3.A). Each reserved parking space is designated by the unit number painted on the

blacktop. The Association also agreed to accept a simplified medical certification form signed by a medical doctor, rather than require a general release of medical records or medical information. Certifications must be renewed every two years.

The Association and its agents also agreed to "investigate and evaluate reasonable and cost-effective measures and accommodations to improve accessibility to the Tree House facility by disabled members of the Association" within five years. (Id. § 3.D). The Association and its agents agreed to "implement and publish a procedure by which access to the Tree House will be made available to the plaintiffs who, due to their disabilities, cannot gain access through the front entrance. The procedure will permit access to the Tree House through the entrance to the exercise room." (Id. § 3.E). In the future, all Association meetings will be held "at locations within the Tree House or elsewhere which are accessible or may be made accessible to the Plaintiffs." (Id. § 3.F). Plaintiffs achieved success on their claim for assigned parking and achieved partial success on their claim for renovation of the Tree House; they did not obtain monetary damages.

#### **DISCUSSION**

As an initial matter, the court's November 10, 1997 Order of dismissal under Local Rule 41.1 stated the dismissal was "with prejudice, pursuant to agreement of counsel without costs." If

plaintiffs objected to the term of dismissal precluding recovery of costs by either party, they were required to move to modify the Order within ninety days after entry. See Local Rule Civ. P. 41.1(b). Plaintiffs did not do so, and are bound by the terms of the November Order. Plaintiffs' petition for costs will be denied.

### **I. Prevailing Party**

Plaintiffs seek to recover fees and costs under the FHA, 42 U.S.C. § 3613(c)(2), which states that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." "Prevailing party" has the same meaning under the FHA as it does under 42 U.S.C. § 1988. See 42 U.S.C. § 3602(o); Oxford House-A v. City of Univ. City, 87 F.3d 1022, 1024 (8th Cir. 1996); Perry v. Keulian, No. 96-1374, 1997 WL 459971, at \*1 n.1 (E.D. Pa. July 25, 1997).

"Courts have broadly defined a 'prevailing party' for purposes of triggering the application of a fee shifting statute." Public Interest Research Group of N.J., Inc. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995). "The test ... to determine prevailing party status is 'whether plaintiff achieved some of the benefit sought by the party bringing suit.'" Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, 964 F.2d 244, 250 (3d Cir. 1992) (citation omitted); see Texas

State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791 (1989); City of Riverside v. Rivera, 477 U.S. 561, 570 (1986) (plurality); Ashley v. Atlantic Richfield Co., 794 F.2d 128, 134 (3d Cir. 1986).

"The termination of a claim by an out-of-court settlement does not necessarily preclude the finding of a causal relationship." Clark v. Township of Falls, 890 F.2d 625, 627 (3d Cir. 1989) (citing Maher v. Gagne, 448 U.S. 122, 129 (1980)).

"It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment-- e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor."

Hewitt v. Helms, 482 U.S. 755, 760-61 (1987). The settlement must "'affect the behavior of the defendant toward the plaintiff.'" Farrar v. Hobby, 506 U.S. 103, 111 (1992) (quoting Rhodes v. Stewart, 488 U.S. 1, 4 (1988) (per curium)).

Even if a plaintiff has not obtained a court judgment, the plaintiff is entitled to attorney's fees as a "prevailing party" if: 1) plaintiff obtained some of the relief sought in the Complaint; and 2) the lawsuit was a "catalyst" for the relief obtained. See Baumgartner v. Harrisburg Housing Auth., 21 F.3d 541, 545 (3d Cir. 1994); James v. SEPTA, No. 93-5538, 1997 WL 698035, at \*1 (E.D. Pa. Nov. 4, 1997). The causal link between

plaintiffs' action and the relief obtained need not be "as direct as when the case is completely adjudicated in the district court itself or formally settled with the defendants in the context of the civil rights proceeding." Sullivan v. Pennsylvania Dept. of Labor & Indus., 663 F.2d 443, 448 (3d Cir. 1981), cert. denied, 455 U.S. 1020 (1982).

Defendants contend the plaintiffs did not obtain a declaration that they had violated the FHA or an injunction preventing defendants from violating the FHA in the future. But plaintiffs cannot be faulted for not obtained judicial relief when such relief was precluded by defendants' decision to settle the case. Plaintiffs' lack of "success" on their claims for declaratory and injunctive relief does not discount their ultimate success on other claims.

Plaintiffs abandoned their claims for compensatory damage for emotional distress and property damage to their automobiles under the terms of the settlement. The settlement agreement did not include any provision for payment of money to the plaintiffs. Defendants are correct that, on those two claims, plaintiffs did not prevail.

**A. Assigned Parking**

Defendants also argue plaintiffs were not prevailing parties on their claims for assigned parking spaces because the Association was developing a global parking plan prior to

initiation of plaintiffs' lawsuit. Jane Lowenstein ("Lowenstein"), a member of the Association's Board of Directors and chair of the parking committee, testified that in January and February, 1997, handicapped parking signs were posted on parking spaces near condominium owners' units after they provided the required medical documentation. Parking spaces were not reserved for any particular unit, but for handicapped persons in general.

In January and February, 1997, the parking committee also conducted meetings concerning the handicapped parking problem and sent a parking survey to all residents of Section Two, where plaintiffs reside. At the Board of Directors meeting on March 13, 1997, implementing a global parking plan assigning a parking space to each unit in the condominium complex was discussed.

The Board of Directors also discussed a letter dated March 11, 1997 from plaintiffs' counsel, Jacqueline Vigilante, Esq. ("Vigilante"), to the Association and Concept 91. Vigilante informed those defendants that their refusal to accommodate plaintiffs with assigned handicapped parking violated the FHA. No action was taken regarding the global parking plan or the Vigilante letter pending the outcome of the parking survey. Plaintiffs filed their Complaint on April 14, 1997.

Betty Rippel, a Section Two resident, offered credible testimony that the Association had been making "long, empty promises" of a global parking plan for years. The Association's

Board of Directors reserved handicapped certain parking spaces near individual units in January and February, 1997, before Vigilante first contacted the Association, but the settlement nevertheless affords plaintiffs something they wanted and did not previously have: handicapped spaces reserved for particular units, not just handicapped persons in general. The Association contends that it always intended the handicapped spaces to be reserved for particular units, but, prior to suit, the handicapped parking spaces were not designated for the exclusive use of the particular units owned by plaintiffs by signs or otherwise. In fact, the handicapped spaces were sometimes used by others, whether or not handicapped at that time.

Defendants also argue Vigilante only filed suit to recover attorney's fees. In view of the Association's years of delay in establishing a reserved handicapped parking plan, plaintiffs reasonably believed the lawsuit was necessary to achieve their goals. Their beliefs were confirmed by the Board of Directors' discussion of Vigilante's initial letter but failure to act at the meeting in which it was discussed. Lowenstein testified the Association accelerated the parking assignment process as a result of plaintiffs' filing suit.

Vigilante had a written agreement with her clients to bill them \$175 per hour for her services if she did not recover fees from defendants. Vigilante's clients initially instructed her

not to settle the case unless defendants agreed to pay her fees. Defendants' allegation that Vigilante unethically placed her own financial benefit ahead of her clients' interests is unjustified and totally unsupported by the facts of this case.

One of plaintiffs' primary goals in engaging Vigilante to file suit was to obtain handicapped parking spaces assigned specifically and exclusively to their units, and they obtained that relief under the terms of the settlement; plaintiffs were clearly "prevailing parties" on this claim.

Property management companies are bound by the FHA. See Stewart v. Furton, 774 F.2d 706, 707, 709 (6th Cir. 1985); Jeanty v. McKey & Poque, Inc., 496 F.2d 1119, 1120-21 (7th Cir. 1974). The Association is bound by the settlement to provide assigned handicapped parking for plaintiffs as long as they continue to qualify. As the Association's agent, PMG is required to comply with the terms of the settlement and ensure that the assigned parking spaces are used appropriately. However, Concept 91 has not been the property manager since March, 1997. Because the only parking relief plaintiffs obtained is prospective, Concept 91 has no power or obligation to perform under the settlement agreement. Therefore, plaintiffs did not prevail against Concept 91 on their FHA parking claim.

**B. Tree House**

Defendants contend plaintiffs did not prevail on their claim

for an Order compelling them to renovate the Tree House to eliminate structural impediments to handicapped access. Handicapped access is unavailable through the front entrance. Under the settlement agreement, the Association and its agent, PMG, are obliged to implement a procedure to assure handicapped access through the exercise room at all times. All future Association meetings will be held in handicapped accessible locations in the Tree House or other accessible facilities. Also, the Association agreed to investigate and evaluate measures for renovating the Tree House to make it handicapped accessible within five years.

Defendants are correct that plaintiffs did not obtain all of the relief they sought regarding the Tree House. Defendants did not agree to renovate the Tree House, just to investigate the possibility of doing so in the future. But the Association did agree to implement a procedure so that handicapped resident owners can at least gain access to the main floor of the Tree House and attend meetings of the condominium owners, which they had not always been able to do. While plaintiffs did not obtain the entire relief they sought for the Tree House, they were still "prevailing parties" and are entitled to fees for Vigilante's work on this claim. Because plaintiffs' relief is entirely prospective and Concept 91 is no longer the building manager, plaintiffs did not prevail against Concept 91 on this claim.

Of plaintiffs' four main claims, they obtained complete relief on one (assigned parking), partial relief on one (Tree House accessibility) and were unsuccessful on two (compensatory damage for emotional distress and property damage to their automobiles). Although plaintiffs' "primary goals" were the assigned parking and Tree House accessibility, their partial success on the Tree House claim and complete lack of success on the two damage claims affects the amount of fees that can be recovered.

### **C. Reasonable Fees**

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1988). Plaintiffs must "submit evidence supporting the hours worked and rates claimed." Id. at 433.

"In a statutory fee case, the party opposing the fee award then has the burden to challenge, by affidavit or brief with sufficient specificity to give fee applicants notice, the reasonableness of the requested fee." Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). "[T]he district court retains a great deal of discretion" to adjust the fee award once the opposing party has objected. Bell v. United Princeton Properties, Inc., 884 F.2d 713, 721 (3d Cir. 1989).

Plaintiffs seek to recover \$16,835.00 for 96.2 hours of work performed by Vigilante up to the time of the November, 1997 settlement at a rate of \$175 per hour.<sup>1</sup> Plaintiffs have submitted a supplemental fee petition for 20.3 hours for Vigilante's work in attempting to negotiate a fee settlement, as directed by the court, and in preparing the fee petition; the amount sought in the supplemental petition is \$3,552.50. A "prevailing party" is entitled to recover fees incurred in prosecuting a fee application in addition to the fees awarded for the underlying litigation. See David v. City of Scranton, 633 F.2d 676, 677 (3d Cir. 1980); Bagby v. Beal, 606 F.2d 411, 416 (3d Cir. 1979).

Attorney's fees "should only be awarded to the extent that the litigant was successful." Washington v. Philadelphia County Ct. of Comm. Pleas, 89 F.3d 1031, 1042 (3d Cir. 1996). But simple mathematical comparison of the total number of claims to the number of claims upon which plaintiff prevailed is inappropriate. See Hensley, 461 U.S. at 435 n.11. Attorney's fees need not be proportional to the damage amount. See Cunningham v. City of McKeesport, 807 F.2d 49, 52-54 (3d Cir. 1986), cert. denied, 481 U.S. 1049 (1987).

The hourly rate must be "in line with those prevailing in

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<sup>1</sup> Plaintiffs originally sought \$17,342.50 for this work, but Vigilante admitted at the hearing held on April 16, 1998 that 2.9 hours contained in her fee petition were duplicative.

the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984). "[T]he prevailing market rate can often be calculated based on a firm's normal billing rate because, in most cases, billing rates reflect market rates, and they provide an efficient and fair short cut for determining the market rate." Gulfstream III Assoc., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414, 422 (3d Cir. 1993).

Vigilante, admitted to the Pennsylvania bar in 1988, specializes in civil rights, disability and employment discrimination. Her customary fee is \$175 per hour. Vigilante exhibited experience and knowledge in conducting this litigation. The rate of \$175 per hour is reasonable for one of her experience in the Philadelphia community and will not be reduced.

Defendants object to the total number of hours that Vigilante spent communicating with her nine clients. According to defendants, Vigilante should have selected one client to serve as the "contact," to communicate with Vigilante and share her information with the other eight clients. Vigilante testified at the fee hearing that she did not want to obstruct her clients' access by establishing a rigid structure inhibiting her ability to speak with them regarding questions or concerns they had. The court does not find Vigilante's time spent communicating with these clients unreasonable.

Defendants also object to the number of hours billed because of plaintiffs' limited success (on only one and one-half of four main claims). Vigilante argues plaintiffs were most interested in obtaining the assigned parking, so they achieved their most important goal. While plaintiffs may have been successful on the most important claim, they did not prevail at all on half the claims raised in the Complaint. Plaintiffs cannot recover fees for the total amount of hours expended on unsuccessful claims, even though some of that time was inextricably intertwined with the time spent on prevailing claims. See Washington, 89 F.3d at 1042.

The fee awarded is not merely the product of reasonable hours times a reasonable rate. "There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" Hensley, 461 U.S. at 434. Because of plaintiffs' limited success, Vigilante's fees will be reduced by 33%. That amount fairly accounts for the importance of the two claims in which plaintiffs achieved success and plaintiffs' lack of success on their remaining claims. The court will award plaintiffs attorney's fees in the amount of \$13,591.67.

An appropriate Order follows.

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ORDER

AND NOW, this 22d day of April, 1998, upon consideration of plaintiffs petition for reasonable attorney's fees and costs, defendants' response thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Plaintiffs' petition for costs is **DENIED**.

2. Plaintiffs' petition for reasonable attorney's fees is **GRANTED** as to defendants Green Tree Run Condominium Association and Property Management Group, Ltd. and **DENIED** as to defendant Concept 91.

3. Fees are awarded to plaintiffs' counsel Jacqueline Vigilante, Esq., in the following amount:

116.5 hours (96.2 hours + 20.3 hours) x \$175/hour - 33% = **\$13,591.67**

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Norma L. Shapiro, J.