

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

ON AIR ENTERTAINMENT CORP., : CIVIL ACTION
NISE PRODUCTIONS, INC. and :
MICHAEL NISE, : NO. 96-2597
Plaintiffs, :
v. :
NATIONAL INDEMNITY CO., :
Defendant. :

MEMORANDUM AND ORDER

BUCKWALTER, J.

October 7, 1998

Defendant has filed a post-trial motion to my finding in favor of plaintiff in the principal amount of \$45,675.12, plus interest in the amount of \$17,924.96, for an aggregate award of \$63,600.08.

Defendant believes the correct amount should be \$28,597.31 principal and \$11,459.45 interest for an aggregate award of \$40,056.76.

Broken down, plaintiff claimed \$35,033.56 for attorney's fees from 1/91 (incorrectly stated in my memorandum of 8/14/98 as 1/92) to 2/92. Defendant believes this amount should only be \$28,597.31. Plaintiff also claimed attorney's fees after 2/92 in excess of \$20,000. Defendant believes none of this is due and owing while I awarded \$10,641.76 of that post 2/92 claim

for work done not only for the benefit of defendant but at its request.

POST 2/92

The much referred to letter of 2/26/92, in effect told Ms. Myers that "you will continue to attempt to settle this matter...." but goes on to say that defendant will not pay for it. Ms. Myers does not specifically recall this and moreover, her continuing contact with Dan Gallagher of National Indemnity Co. belied defendant's present contention that the issue of payment had been resolved by the Myers' letter (See N.T. at 40, 41). The fact is that Ms. Myers continued to be involved in the settlement of the Festa action until Ms. Daly took over the defense and Ms. Myers formally withdrew as counsel in June of 1992. Prior to that, Ms. Myers was working under an oral contract with defendant to attempt to settle the Festa claim. This is evidenced by contacts with Mr. Gallagher of National Indemnity Co. (N.T. at 41-42), and Ms. Daly's lack of activity until June of 1992 (N.T. at 68).

PRE 2/92

Plaintiff in its post-trial brief believes that I should not have included in my award \$6,122.75 due Miller, Dunham, and other bills totaling \$1,940.83, for work done by other counsel, apparently because this work did not relate to the defense of the Festa matter. It is important in this regard to

understand that defendant through counsel conceded "that from the time that the Festa case was on file until we agreed to have Joan Daly come in and defend it in February of 1992 we owe the fees for that time that were incurred in the defense of the case. If there were any that were not incurred in defense of the case but in giving advice on coverage or matters that had nothing to do with actually defending the case we wouldn't agree to that, but that's a small percentage of the fees. So the total fees up until basically the end of February when the case could have been taken over by Joan Daly, the fees totaled somewhere in the vicinity of \$27,000." (N.T. at 11-12). What defendant wants to deduct from pre 2/92 fees can hardly be considered a small percentage; \$8,063 out of \$35,033 is at least 23%.

For whatever reason, it does not appear that defendant cross examined plaintiff on the bills for the Festa matter except those occurring after 2/92. Instead, by way of exhibit attached to its memorandum of law filed after the non-jury trial held on June 30, 1998, defendant wants the court to take notice that certain matters it has highlighted on the bill could not have been incurred for the Festa defense. I simply cannot conclude from that highlighting whether defendant's contention is correct or not. Plaintiff testified that the bills are for Festa and Vadakin as broken down on Plaintiff's Exhibit 42. Defendant neither rebutted that contention at trial nor post-trial in his

memorandum pointing to areas which it alleges were not related to the defense of Festa. Defendant could have, of course, examined the lawyer or lawyers who generated the bills but chose only to do so with post 2/92 billings. Based upon that examination, I did disallow certain post 2/92 bills.

Based upon the foregoing, the following order is entered:

O R D E R

AND NOW, this 7th day of October, 1998, it is hereby ORDERED that Defendant's Post-Trial Motion (Docket No. 76) is DENIED.

BY THE COURT:

RONALD L. BUCKWALTER, J.