

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

HORIZON UNLIMITED, INC. : CIVIL ACTION
:
v. :
:
RICHARD SILVA and SNA, Inc. : NO. 97-7430

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

August 15th, 2002

Plaintiff Horizon Unlimited, Inc. ("Horizon"),¹ alleging violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-1 et seq.,² filed an action against defendants Richard Silva ("Silva") and SNA, Inc. ("SNA").³ This court granted defendants' motion for contempt and sanctions against plaintiff's lead counsel, Martin Pedata, plaintiff's local counsel, Tracey Oandasen, and the president of Horizon, Paul Array, following an evidentiary hearing.⁴ Horizon Unltd., Inc. v. Richard Silva & SNA, Inc., No. Civ. A. 97-7430, 2000 WL 730340 (E.D. Pa. June 7, 2000). The

¹ John Hare was originally a plaintiff as well, but his motion for voluntary dismissal was granted by Order of March 11, 1999.

² Plaintiffs' other claims for negligence/ negligent misrepresentation, fraud and deceit, and breach of warranty were dismissed by Memorandum and Order dated February 26, 1998; plaintiffs' motion for reconsideration was denied by Memorandum and Order dated March 27, 1999.

³ By Order of August 31, 1999, the action was dismissed with prejudice; limited attorney's fees and costs were later awarded to defendants.

⁴A Motion for Reconsideration was subsequently denied.

court also granted leave to defendants to file an itemized petition for fees and costs incurred in the filing of the contempt motion.

Defendants, timely filing a petition for fees and costs, seek \$16,986.00 in fees (89.4 hours at \$190.00/hour) and \$464.70 in costs: a total request of \$17,450.70. For the reasons stated below, defendants' petition will be granted in part and denied in part. Defendants also move to update the hourly rate of their counsel in this award of fees. That motion will be denied.

DISCUSSION⁵

I. Petition for Fees and Costs

A. Standard of Review

"Sanctions for civil contempt serve two purposes: to coerce the defendant into compliance with the court's order and to compensate for losses sustained by the disobedience." Robin Woods, Inc. v. Robin F. Woods, et al., 28 F.3d 396, 400 (3d Cir. 1994) (internal quotations, citation omitted), quoting McDonald's Corp. v. Victory Investments, 727 F.2d 82, 87 (3d Cir. 1984). Only with an award of attorney's fees can defendants be restored to the position they would have occupied had plaintiff complied

⁵The background of this action and defendants' motion for contempt and sanctions are set forth in this court's prior opinions.

with this court's order: an award of attorney's fees is necessary. See id.

This court enjoys wide discretion in adjudicating defendants' petition for fees. See Elkin v. Fauver, 969 F.2d 48, 52 (3d Cir. 1992) ("The framing of sanctions for civil contempt is committed to the sound discretion of the trial court ... [but] this discretion is not unlimited. Compensatory sanctions ... must not exceed the actual loss suffered by the party that was wronged.), cert. denied, 113 S. Ct. 473 (1992). The formula for awarding attorney's fees incurred during pursuit of a contempt citation is "generous" since "the innocent party is entitled to be made whole for the losses it incurs as the result of the contemnors' violations, including reasonable ... fees and expenses." Halderman, et al. v. Pennhurst State School & Hospital, et al., 49 F.3d 939, 941 (3d Cir. 1995).

B. Amount of Award

To determine appropriate attorney's fees, courts calculate a "lodestar:" the reasonable hourly rate multiplied by the number of hours reasonably expended on successful claims. Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp., 487 F.2d 161, 167-68 (3d Cir. 1973) ("Lindy I"); see also Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (en banc) ("Lindy II").

1. Reasonable Hourly Rate

A reasonable rate will attract adequate counsel but will not produce a windfall to the attorneys. Public Interest Research Group v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995); Haymond, et al. v. Lundy, 205 F. Supp. 2d 403 (E.D. Pa. 2002). The prevailing market rate is generally deemed reasonable. Id.

The [petitioner] bears the burden of producing sufficient evidence of what constitutes a reasonable market rate for the essential character and complexity of the legal services rendered in order to make out a prima facie case. Once the [petitioner] has carried this burden, [the opposing party] may contest that prima facie case only with appropriate record evidence. In the absence of such evidence, the [petitioner] must be awarded attorney's fees at her requested rate.

Smith v. Philadelphia Housing Auth., 107 F.3d 223, 225 (3d Cir. 1997).

Defense counsel Terry Elizabeth Silva ("Ms. Silva") petitions for an award based on a rate of \$190/hour.⁶ Ms. Silva submits an affidavit from Peter Konolige, Esq., another Philadelphia-area attorney admitted to practice before this court; Konolige supports Ms. Silva's requested rate as reasonable and customary. Ms. Silva also submits her own affidavit certifying \$190/hour is a reasonable and customary rate for her performance of this type of work. Oandasen does not challenge Ms. Silva's hourly rate.

⁶On May 22, 2002, defendants filed a motion to update Ms. Silva's hourly rate. That motion will be addressed infra.

Pedata, citing a case in which Ms. Silva was awarded \$150/hour, challenges this rate. He neither submits nor cites any record evidence in support of his challenge. Pedata is correct that in James v. Chichester School Bd., 1999 WL 124478 (E.D. Pa. March 2, 1999), the court awarded Ms. Silva \$150/hour, which was the rate she sought in that action. Ms. Silva billed for litigation of the contempt citation in this action in 2001, approximately two years after she billed for the relevant work in James. In James, Ms. Silva represented citizens challenging a state court-ordered reapportionment of electoral regions for the Chichester School Board. See James v. Chichester School Bd., 1998 WL 54398 (E.D. Pa. January 30, 1998). In this action, she represents a corporate client. Ms. Silva informed this court in her affidavit attached to the fee petition that her rates range "between \$140.00 per hour (for non profit institutions) through to \$240.00 per hour, depending upon retainer charges, the venue, complexity, level of practice, the rigors of a particular case and/or the ability of the client to support said charges." James does not require a reduction of the hourly rate in this action.

With her own affidavit and that of Attorney Konolige, Ms. Silva met her burden to establish a prima facie case that \$190/hour is a reasonable rate for her work performed in pursuing contempt and sanctions. See Black Grievance Committee v. Philadelphia Elec. Co., 802 F.2d 648, 652-53 (3d Cir. 1986)

(district court may not disregard attorney's affidavit on reasonable fees when it is uncontradicted); Cunningham v. City of McKeesport, 753 F.2d 262, 268 (3d Cir. 1985) (no material issue of fact when affidavit is uncontradicted), vacated on other grounds, 478 U.S. 1015 (1986).

In his filings and during a hearing held February 12, 2001, concerning defendant's petition for fees and costs, Pedata has produced no "appropriate record evidence" to challenge Ms. Silva's prima facie case. Smith, 107 F.3d 223, 225. Based on the evidence before this court, a rate of \$190/hour is reasonable and customary for a lawyer of Ms. Silva's reputation and experience pursuing a contempt citation to protect to protect a corporate client against dissemination of trade secrets. Accord Goodman v. Pennsylvania Turnpike Commission, et al., 293 F.3d 655, 676-77 (3d Cir. 2002) (noting "several cases suggest that \$200 is within the range of reasonableness for fee awards in the Eastern District of Pennsylvania[;]" collecting cases).

2. Hours Reasonably Expended

Defendants seek an award of attorney's fees for 89.4 hours spent in connection with their motion for contempt and sanctions.⁷ Plaintiff's counsel contests 65 of these hours.

⁷This figure includes 3.2 hours spent in preparation of the instant fee petition. On March 8, 2001, this court ordered Ms. Silva to submit justification for these hours; she did so on March 15, 2001. Plaintiff does not contest these hours.

Excessive, redundant, or otherwise unnecessary hours will be excluded from the fees awarded. Accord Hensley v. Eckerhart, 461 U.S. 424, 434 (1983); Maldonado v. Houstoun, 256 F.3d 181 (3d Cir. 2001).

Ms. Silva billed defendants 37.1 hours for researching and writing briefs to this court concerning citations for contempt and related remedies. Pedata argues 34.2 of these hours are excessive and a result of Ms. Silva's limited experience litigating contempt citations. Fortunately, contempt citations need rarely be sought against attorneys practicing before this court; it is unlikely any attorney admitted to practice before the court has encyclopedic knowledge of the related law. Ms. Silva's bills for 37.1 hours of research and writing to litigate defendants' motion for contempt and sanctions against plaintiff's counsel (including the 34.2 contested hours) are reasonable.

On December 17, 1999, Ms. Silva billed 0.2 hours for filing an unidentified document with the court and counsel, and another 0.2 hours for a telephone call with her client. Pedata argues this time should be disallowed because Ms. Silva "does not state what exactly was done." Pedata Mem. at 5. On December 17, 1999, defendants filed a Motion for Sanctions for violation of this court's protective order. Spending twelve minutes to prepare the motion for filing and another twelve discussing it with the client was not unreasonable.

On March 22, 2000, Ms. Silva billed 4.1 hours for preparing her client for a hearing to be held on March 23, 2000, and for reviewing related documents. Pedata argues this time should be disallowed because there were few documents to review and no one testified on behalf of defendants at the hearing. But, as defendants argue in their reply brief, Ms. Silva had to prepare witnesses in case they were required to rebut testimony offered by witnesses for the plaintiff. Charging these 4.1 hours was not unreasonable.

Ms. Silva billed approximately 11.9 hours on matters related to the deposition of the president of plaintiff Horizon, Inc., Paul Array.⁸ Pedata argues much of this time was spent unsuccessfully pursuing depositions of three attorneys and that the deposition of Array was used primarily to further other litigation. The deposition of Array was related to defendants' petition for a contempt citation. Assuming some of the 11.9 hours were spent attempting to depose these attorneys, in the context of a contempt citation it is not necessary for counsel to prevail on a particular argument in order for her client to be awarded related attorney's fees. See Halderman, 49 F.3d at 941. Charging these 11.9 hours was not unreasonable.

On April 25, 2000, Ms. Silva billed 2.1 hours to prepare a

⁸Ms. Silva sought to depose Array and three attorneys for plaintiff; this court issued a protective order permitting only the deposition of Mr. Array.

witness for potential testimony and review documents. On April 27, 2000, she billed 1.3 hours to prepare for a hearing, meet with a potential witness and select exhibits. Pedata again argues the preparation was unnecessary because the witnesses were never called to testify. But plaintiff never stipulated to facts at issue in the relevant hearing, held on April 27, 2000; it was reasonable for Ms. Silva to prepare to rebut evidence on disputed issues of fact surrounding the contempt petition.

Pedata argues it was excessive for Ms. Silva to bill one hour for reviewing a cover letter and expert report, another hour for reviewing this court's written opinion granting defendants' motion for contempt and sanctions, and 0.9 hours for writing a letter to her clients concerning the opinion. Because neither document is voluminous, the bills for reviewing them are excessive; defendants will be awarded attorney's fees of one-half hour for review of each document. Forty-eight minutes is not an unreasonable length of time to summarize this court's opinion in layman's terms for Ms. Silva's clients, so that charge will not be discounted.

Finally, Pedata challenges bills Ms. Silva submitted 8.5 hours spent in preparation of this fee petition. Time spent preparing a petition for fees is recoverable. "A party entitled to an award of attorneys' fees is also entitled to reimbursement for the time spent litigating its fee application." Planned

Parenthood of New Jersey v. Attorney General, 2002 U.S. App. LEXIS 13915 (3d Cir. July 11, 2002). Approximately one work day, in total, is not an unreasonable amount of time to spend researching and drafting a memorandum of law concerning a fee petition and itemizing expenses in detail.⁹

Because only one hour billed by Ms. Silva was excessive, defendants will be awarded attorney's fees for 88.4 hours. Accordingly, the lodestar is:

Attorney	Reasonable Hours	Rate/Hour	Total
Terry Silva	88.4	\$190.00	\$16,796.00

3. Costs

Defendants seek \$464.70 in costs related to the petition for contempt and sanctions and this fee petition. The costs include copying costs, delivery charges, a transcript and audio tapes for hearings before this court, and a charge for service.

Pedata argues costs in preparation of a fee petition are not recoverable. However, costs were specifically awarded by this

⁹Specifically, Ms. Silva bills 1.1 hours for drafting the fee petition, 0.9 hours drafting her affidavit in support, 3.9 hours for research on costs legally recoverable, 0.4 hours to calculate expenses, 0.3 hours to review and correct her bills, and 1.9 hours to revise and finalize the petition, related exhibits and memorandum of law.

court's Order of June 7, 2001.¹⁰

On June 6, 2000, Ms. Silva ordered audio tapes and transcripts of March 22, 2000, and April 27, 2000, hearings in this action. Pedata argues the tapes and transcript ordered by Ms. Silva were not used in furtherance of the contempt petition, but in furtherance of unrelated litigation.

Pedata provides a declaration signed by Ms. Silva and filed in an unrelated civil action in the Middle District of Florida. In the May 20, 2000, declaration, Ms. Silva states she had previously ordered the tape recording of the April 27, 2000, hearing in this action. Ms. Silva argues: (1) she ordered the tape and transcript in furtherance of the contempt petition in this action; (2) they were used in preparation of the instant fee petition; and (3) nothing in the May 20, 2000, declaration contradicts this.

These costs were all incurred prior to final adjudication of the contempt petition (on June 19, 2000, Pedata filed a Motion to Reconsider this court's contempt finding), and prior to filing of the instant petition for fees and costs on June 27, 2000. It was not unreasonable for Ms. Silva to order tapes and transcripts of hearings in this action to argue about those hearings and to petition for fees and costs related to the hearings.

¹⁰Accord Prandini v. National Tea Co., 585 F.2d 47, 53-4 (3d Cir. 1978) (costs incurred in pursuit of fee award under statutory fee authorization recoverable by attorney).

Pedata also argues costs for 1,340 total pages of photocopies (\$261.00) are unreasonable. Although filings and correspondence in this matter had to be copied to at least five attorneys, during oral argument before this court on February 12, 2001, Ms. Silva agreed on behalf of defendants to waive 2/3 of the copying costs. Defendants will be awarded \$87.00 (\$261.00 multiplied by 1/3) for copying costs.

Ms. Silva properly submitted an itemized bill of costs; defendants will be awarded \$290.70 in costs.

II. Defendants' Motion to Update their Attorney's Billing Rate

Defendants first filed their motion for attorney's fees and costs related to pursuit of the contempt citation on June 27, 2000. Defendants ask the court to compensate them by updating Ms. Silva's relevant hourly rate to her current charge of \$220.00. In the alternative, they seek a "delay multiplier" as compensation.

In awarding the prevailing party attorney's fees in a federal civil rights action, this court would have discretion to update counsel's hourly rate or to award a delay multiplier. See Keenan v. City of Philadelphia, 983 F.2d 459 (3d Cir. 1992). In this action, to place defendants in the position they would have occupied had they never been forced to seek an adjudication of contempt and sanctions, it is most appropriate to award interest on the fee award. Accord Halderman, 49 F.3d at 941. An award of

interest will compensate defendants for the interest they would have earned on their money over the intervening months. This court will award six-percent simple interest per annum in accordance with the legal rate of interest under Pennsylvania law.¹¹ See 41 Pa. Cons. Stat. Ann. § 202 (2002).

CONCLUSION

For the foregoing reasons, defendants' petition for fees and costs and their motion to update counsel's hourly rate will each be granted in part and denied in part. Defendants will be awarded \$16,796.00 in attorney's fees and \$290.70 in costs, a total of \$17,086.70, plus 6% interest from June 27, 2000.

An appropriate order follows.

¹¹The court takes judicial notice of the fact that relatively low interest rates have prevailed in the United States for most of the past two years, so an award of 6% interest will adequately compensate defendants for the delay.

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

HORIZON UNLIMITED, INC. : CIVIL ACTION
 :
 v. :
 :
 RICHARD SILVA and SNA, Inc. : NO. 97-7430

ORDER

AND NOW, this 15th day of August, 2002, it is hereby
ORDERED that:

1. Defendant's Motion to Update Counsel's Hourly Rate
[#186] is **DENIED**.

2. Defendants' Petition for Fees and Costs [#150] is
GRANTED IN PART AND DENIED IN PART. Within 20 days of the date
of this Order, defendants shall be paid \$17,086.70, plus 6%
interest from June 27, 2000, as follows:

a. Paul Array and Martin Pedata shall jointly pay
75% of the above-stated amount.

b. Tracey Oandasen shall pay 25% of the above-
stated amount.

Norma L. Shapiro, S.J.