SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of the Application of

SHEILA GRAVES, JOAN HILLER and FRANK RIZZUTO, on behalf of themselves and all others similarly situated,

Petitioners-Plaintiffs,

FRED KAMINTZKY, on behalf of himself and all others similarly situated,

Proposed Petitioner-Plaintiff Intervenor,

For a Judgment pursuant to §3001 and Articles 9, 78 and 86 of the C.P.L.R. and 42 U.S.C. §1983,

-against-

ROBERT DOAR, as Commissioner of the Office of the Temporary and Disability Assistance of the New York State Department of Family Assistance, and JOHN E. IMHOF, as Commissioner of the Nassau County Department of Social Services,

Respondents-Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 10218/06
Motion Seq. Nos.: 11 & 12

DECISION AND ORDER

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In motion sequence number one, the Plaintiffs move for reasonable attorneys' fees, costs and disbursements. In motion sequence number two, the Plaintiffs move for supplemental attorneys' fees, costs and disbursements.

Petitioners/Plaintiffs (hereafter "Plaintiffs") Graves, Hiller, and Rizzuto commenced this hybrid proceeding/class action in June 2006, challenging reductions in their food stamp benefits. The reductions were made pursuant to a pilot project entitled the Group Home Standardized Benefit Program ("GHSBP"), instituted by Respondent/Defendant Doar ("the State Defendant"), who is the Commissioner of the Office of Temporary and Disability Assistance ("OTDA") of the New York State Department of Family Assistance.

In the course of the proceedings herein, Plaintiffs were granted partial summary judgment on their claim that the State Defendant's implementation of GHSBP violated the state constitutional and statutory rulemaking requirements, Intervenor Kamintsky was granted leave to intervene, the application for certification of the Plaintiff class was denied, and the State Defendant's motion for summary judgment was denied. By decision and order dated May 19, 2009, the Appellate Division,

Second Department, reversed the denial of class certification and identified the Plaintiff class as "consisting of all recipients of food stamps in the State of New York whose food stamp benefits were determined and reduced under the Group Home Standardized Benefit Program and whose monthly income included payments of Supplemental Security Income benefits"[*Graves v Doar*, 62 AD3d 874 (2nd Dept 2009)].

In their class action complaint Plaintiffs sought an order requiring Defendants, *inter alia*, to pay the costs and disbursements, including reasonable attorneys' fees, of the Plaintiffs and the Plaintiff class pursuant to the State Equal Access to Justice Act (the "State EAJA," found at CPLR §8600 et seq.) and CPLR §909. At this time, Plaintiffs seek payment of these expenditures by the State Defendant.

After Plaintiffs made their motion for attorneys' fees, costs and disbursements, the motion was marked off the calendar on June 17, 2009, pending the outcome of settlement discussions. While settlement discussions were pending, the State Defendant moved to reargue the propriety of the certification of the Plaintiff class. This motion to reargue was denied by the Appellate Division, Second Department, by decision and order dated August 25, 2009. Within thirty (30) days of this denial, Plaintiffs restored their original motion for attorneys' fees to the calendar and made their motion for supplemental attorneys' fees, costs, and disbursements incurred since June 18, 2009. In terms of specifics, the total amount sought by Plaintiffs in both motions, for attorneys' fees, costs, and expenses is $352,745.02. This amount includes a 10% reduction of hours for attorneys Vollmer and Castellano in the exercise of billing judgment.

Pursuant to the State EAJA, an application for an award of attorneys' fees and other expenses must be made "within thirty (30) days of final judgment in the action." A judgment is "final" for State EAJA purposes if it is "final and not appealable" [CPLR §8602(c)]. The decision and order of the

Appellate Division, Second Department, dated August 25, 2009, denying reargument of the certification of the Plaintiff class is not appealable, and therefore it is final.

The Statutory Basis for Relief

Entitlement to attorneys' fees is governed by the New York Equal Access to Justice Act ("the State EAJA"), found at CPLR Article 86. The State EAJA is modeled on the Federal Equal Access to Justice Act, found at 28 USC 2412(d), and the case law construing that Act. The State EAJA provides that "a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the State was substantially justified or that special circumstances make an award unjust" [CPLR §8601(a)]. The parties vigorously dispute whether Plaintiffs meet the statutory standard for relief.

Plaintiffs are the Prevailing Party

The State EAJA defines "prevailing party" to mean "a Plaintiff or petitioner in the civil action against the state who prevails in whole or in substantial part where such party and the state prevail upon separate issues" [CPLR §8602(f)]. The threshold question presented is whether Plaintiffs come within this definition.

A party has "prevailed" within the meaning of the State EAJA if it has succeeded in acquiring a substantial part of the relief sought in the lawsuit [*Matter of New York State Clinical Laboratory Association v Kaladjian*, 85 NY2d 346, 355(1995)]. The Plaintiff must identify "the original goals of the litigation" and demonstrate "the comparative substantiality of the relief actually obtained" [Id.].

In this case the goal of the litigation was to enjoin the State Defendant from implementing GHSBP and to obtain retroactive relief. In their fourth cause of action, Plaintiffs alleged that the State Defendant's implementation of GHSBP violated the rule-making requirements of Article IV §8 of the

New York State Constitution and Article 2 of the State Administrative Procedure Act ("SAPA"), because no GHSBP-related documents were filed with the New York Department of State, no state regulations were ever promulgated to govern the operation of GHSBP, and no GHSBP documents were published in the New York State Register. This Court agreed, and declared that the implementation of GHSBP violated the aforementioned provisions of the State Constitution and SAPA.

By Partial Final Judgment dated December 13, 2007 (Exhibit 2 to Vollmer affirmation in support of original motion), this Court enjoined the State Defendant from operating the GHSBP until it complied with SAPA and the State Constitution, reinstated the food stamp benefits issued to Plaintiffs immediately prior to GHSBP, and enjoined the State Defendant to retroactively restore food stamp benefits to Plaintiffs to the month prior to the application of GHSBP. As a result of the class certification directed by the Appellate Division, Second Department, cessation of the GHSBP will benefit approximately 18,500 SSI recipients who reside in group homes across New York State. Under these circumstances, it is clear that Plaintiffs' succeeded in acquiring a substantial part of, if not the complete, relief sought in this litigation. There can be no doubt that Plaintiffs are a "prevailing party" for the purposes of the State EAJA.

No Substantial Justification

"Substantially justified" has been interpreted to mean "justified to a degree that could satisfy a reasonable person" or having a "reasonable basis both in law and fact" [*Matter of New York State Clinical Laboratory Association* at 356, quoting *Pierce v Underwood*, 487 US 552, 565 (1988); see also *Serio v New York State Dept. of Correctional Services*, 215 AD2d 835 (3rd Dept 1995)].

In this Court's Decision and Order granting partial summary judgment to Plaintiffs, this Court noted as follows:

> Review of the implementation of GHSBP to blind and disabled group home residents who receive PA (Public Assistance) or SSI (Supplemental Social Security Income), reveals that in the interests of easier and more accurate bookkeeping, food stamp benefits were slashed according to a simple formula (parentheticals added).

Decision and Order dated October 1, 2007 (Exhibit 1 to Vollmer affirmation in support of original motion at p.7). Furthermore, that simple formula lacked a rational basis, as admitted in internal memoranda of the State Defendant and quoted by this Court as follows:

> Given that grants of equal amounts are being paid to the provider for the clients in their care regardless of whether the resident receives TA (Temporary Assistance) or SSI, we have no reasonable basis, for using different amounts when calculating and establishing the FS countable income (parenthetical added).

See Hedderman Memorandum (Exhibit 12 to Vollmer Reply Affirmation, at p.5). See also Decision and Order dated March 31, 2009 (Exhibit 5 to Vollmer affirmation in support of original motion, at p.7).

On this record Plaintiffs demonstrated the validity of their argument from the beginning, that there was no reasonable basis for giving SSI group home residents a lower food stamp benefit than their PA (public assistance) counterparts in view of their identical living arrangements and monthly income. While the State Defendant argues that it was a case of first impression, even a case of first impression requires an underpinning that has a reasonable basis in fact. The State Defendant's opposition in this action had none.

As to reasonableness in law, the State Defendant offers no illuminating arguments. The State Defendant's insistence that SAPA did not apply to GHSBP, because it was a federal program, does not withstand scrutiny. As noted by Plaintiffs, if federal approval of a state plan or project absolved the State Defendant from compliance with state rulemaking requirements, then vast portions of this State's

Social Services regulations would be rendered superfluous. Since the State Defendant and its predecessors promulgated regulations to implement other federally approved programs of limited duration (such as HEAP, the Home Energy Assistance Program, at 18 NYCRR Part 393, and the Family Assistance Program at 18 NYCRR at Part 369), the State cannot claim to have a reasonable belief that regulations were not required for GHSBP until the program acquired permanent status at the end of its 5-year term.

In any event, the State Defendant had the authority to file emergency regulations for expedited review and adoption [SAPA §202(6)].

Overall, the State Defendant has failed to meet its burden, as no reasonable basis in law has been shown for the conduct of the State Defendant in this action.

No Special Circumstances

The "special circumstances" referred to in the State EAJA have been described as a "safety valve," giving a court discretion to deny an award of attorneys' fees and expenses, where "equitable considerations dictate that an award should not be made" [*Scarborough v Princeps*, 541 US 401, 423 (2004), citing the legislative history of the federal EAJA, on which the State EAJA is based], and it is the Defendant's burden to establish such special circumstances [*Mid-Hudson Legal Services Inc. v G&U, Inc.*, 578 F2d 34, 38 (2d Cir. 1978)]. Here, the State Defendant has not even addressed this "safety valve," although it has attempted to demonstrate its good faith in the implementation of GHSBP. Suffice it to say that good faith conduct by the state is not a special circumstance that would warrant the denial of a request for attorneys' fees [*Williams v Hanover Housing Authority*, 113 F3d 1294, 1302 (1st Cir. 1997)]. On this record, the Court has found no equitable considerations that would dictate the denial of Plaintiffs' application for this award.

The Reasonableness of Plaintiffs' Fee Application

The fees to be awarded under the State EAJA are "reasonable attorney fees" [CPLR §8602(b)], which "shall be determined pursuant to prevailing market rates for the kind and quality of the services furnished" [CPLR §8601(a)]. The formula for determining a fee application is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate" [*Hensley v Eckerhart*, 461 US 424, 433-35 (1983)]. The correct standard for determining Plaintiffs' request is "what a reasonable paying client would be willing to pay" [*Arbor Hill Concerned Citizens Neighborhood Association v County of Albany and Albany County Bd of Elections*, 522 F3d 182, 184 (2d Cir. 2008)]. A court must apply a presumption in favor of applying the prevailing rates of its district [*Simmons v New York City Transit Authority*, 575 F3d 170 (2d Cir. 2009), here, the Eastern District of New York which includes Nassau County.

At the outset, this was not a garden variety action. The State Defendant describes this action as "novel" and "highly complex" (Logue Affirmations at pp. 6-7, 9, 11 and 24). Plaintiffs note that their file occupies 1 ½ lateral file drawers and consists of 92 distinct court submissions (see Reply Memo of Law at p.48). With this perspective, the Court turns to the number of hours at issue.

The Court has reviewed the time records presented by Attorneys Vollmer and Castellano and finds that these records provide adequately detailed information regarding each legal service provided in increments of no smaller than five minutes. When combining the figures for each attorney on the two motions, the total hours for services rendered from 7/14/06 to 9/24/09 for Vollmer are 683.15 hours. The total hours for services rendered from 2/06 to 9/24/09 for Castellano are 272.35 hours. As noted above, both attorneys have reduced their "raw" time by 10%, in the exercise of billing judgment. In addition, each attorney has billed separately for clerical time as follows: Vollmer - 68.55 hours;

Castellano 17.15 hours. Time sheets are also submitted for paralegal services rendered by Eugene Doyle in the total of 393.10 hours.

The State Defendant complains that Plaintiffs overstaffed the case, and the fees sought are therefore excessive and unnecessary. They object to paying fees for two senior attorneys and a paralegal. Yet as Plaintiffs point out, conferences in this action were attended by two government attorneys (Assistant Attorney General Toni Logue and Deputy Nassau County Attorney Michelle Faraci), and an occasional junior associate or paralegal. Especially given the novel and complicated issues presented, and the way that Mr. Castellano's expertise supplemented rather than duplicated that of Mr. Vollmer, the State Defendant's objection cannot be sustained.

For the record, Plaintiffs have never burdened this Court with duplicative papers such as those presented by the State Defendant herein, where the only difference between the State's 25-page affirmation in opposition to the original motion for attorneys' fees (with exhibits), and the State's 25-page affirmation in opposition to the motion for supplemental attorneys' fees (with exhibits), was the addition of the word "supplemental" in the title, and the misnumbering of the footnotes.

The Court further considers the expertise of Attorneys Vollmer and Castellano. Mr. Vollmer had more than 20 years of legal experience at the commencement of this action, including extensive experience in litigating class actions involving government entitlement cases. His appellate experience is considerable. He has represented indigent appellants at 290 administrative fair hearings and commenced 180 lawsuits in state and federal courts. He notes that of the 171 cases decided to date, his clients prevailed in whole or in substantial part in 136 cases (Plaintiffs' memorandum at pp. 27).

Mr. Castellano has devoted 33 years to poverty law practice. He has been employed by the Mental Health Law Project of Nassau/Suffolk Law Services Committee, Inc., and MFY Legal Services

Inc. For more than twelve years he has served as the Attorney in Charge of the Mercy Advocacy Program, a law office that provides free legal services to the poor, primarily those living with mental illness and housed by Mercy Haven, Inc. in Nassau and Suffolk Counties. He handles approximately 240 open cases, writes funding proposals and supervises staff at the Mercy Advocacy Program.

Both attorneys have billed at an hourly rate of $325. The State Defendant begrudgingly accepts Mr. Vollmer's billing rate of $325 per hour, but argues that Mr. Castellano's rate should be less, because Mr. Castellano functioned as an associate. The record does not bear this out.

Mr. Castellano argues that his multiple responsibilities have diminished his available time to devote to this litigation, not any lack of professional skill or expertise. For this reason Mr. Vollmer took the lead in many aspects of this case, although it was Mr. Castellano who identified the procedural and substantive deficiencies of GHSBP, attempted to address these issues through administrative advocacy, and ultimately drafted the class action petition herein.

Prevailing market rates in the community are the proper basis for an award of attorneys' fees [*Miele v NYS Teamsters Conference Pension & Retirement Fund*, 831 F2d 407, 409 (2d Cir. 1987)]. The prevailing market rate for attorneys with more than 25 years experience in this area appears to be $350-$400 per hour [*Luca v County of Nassau*, __ F Supp 2d __, 2010 WL 307027 (EDNY 2010) (County proposed rate of $325 per hour, which it described as the "prevailing rate for partners"; $400 per hour awarded in Title VII litigation); *Olsen v County of Nassau*, 2010 WL 376642 (EDNY 2010)($375-400 per hour for partners found reasonable in case involving Title VII and 1983 claims); *Green v City of New York*, 2010 WL 148128 (EDNY 2010) ($300-375 per hour for partners in class action); *Cruz v Henry Modell & Co., Inc.*, 2008 WL 905351 (EDNY 2008) ($325 per hour awarded in connection with claims of intentional discrimination pursuant to 1981, false imprisonment, and

negligence); see generally *Melnick v Press,* 2009 WL 2824586 (EDNY 2009) (current rate in EDNY is $200-375 per hour for partners; charging lien case)]. Under these circumstances the Court finds that the hourly rate requested of $325 per hour for Attorneys Vollmer and Castellano is reasonable.

The paralegal, Mr. Doyle, holds a masters degree in social work, and has provided social work advocacy services to low-income families and individuals since 1972. His services for 393 hours and 10 minutes were billed at the rate of $85 per hour. As $75 per hour was considered the prevailing rate for paralegals in this district in 1998 [*Siconolfi v Apfel*, 1998 WL 827433 (EDNY 1998), cited with approval *Cruz v Apfel*, 48 F Supp 2d 226, 230 (EDNY 1999)], this Court concludes that $85 per hour is a reasonable rate for paralegals in this district in 2010.

Given the scope and complexity of the facts and legal issues raised in this action, the amount of time expended by Plaintiffs' counsel is, for the most part, reasonable. The State Defendant has expressly identified a small number of instances where the submitted attorney hours are unreasonable, and therefore some deductions must be made. Indeed, the Court finds that Plaintiffs' concessions on these limited objections, as set forth in their reply papers are appropriate, and therefore directs the following deductions from the amounts requested in the two motions:

(1) Travel time - 5 hours of attorneys' fees, and 17 ½ hours of paralegal fees to be reduced to clerical rate. Attorney Vollmer reduced the charge for travel time from his hourly rate of $325 to the clerical rate of $25.00 per hour; also, paralegal rate of $85 per hour was reduced to $25 per hour for travel time.

(2) Lobbying and media interactions - 25 attorney hours to be deducted (21 hours from Mr. Vollmer and four hours from Mr. Castellano), for lobbying to eliminate the "government operations rule" by statutory amendment.

(3) Amicus-related activity - 26 hours attorney hours, and one paralegal hour to be deducted (24 hours from Mr. Vollmer, two hours from Mr. Castellano, and one hour from Mr. Doyle), in connection with the Rivera amicus.

The remainder of the State Defendant's objections do not warrant discussion and have already been taken into account by the 10% reduction of raw time by both attorneys. After the three identified deductions are made from the totals requested in the original motion for attorneys' fees and the motion for supplemental attorneys' fees, the motions are **granted**.

Submit judgment.

This constitutes the Decision and Order of the Court.

DATED: April 16, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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