

Estate of Savage v Kredentser
2017 NY Slip Op 32873(U)
March 24, 2017
Supreme Court, Albany County
Docket Number: 900156-2015
Judge: Gerald William Connolly
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ESTATE OF JOYCE SAVAGE, HOWARD ALVIN
SAVAGE, INDIVIDUALLY AND AS THE ESTATE
REPRESENTATIVE,

DECISION AND ORDER

Index No.: 900156-2015
RJI No.: 01-15-117128

Plaintiffs,

-against-

DR. DANIEL C. KREDETSER, WOMEN'S
CANCER CARE ASSOCIATES, LLC, ST. PETER'S
HOSPITAL CENTER OF THE CITY OF ALBANY,
INC., ST. PETER'S NURSING AND REHABILITATION
CENTER, INC. and JOHN DOES 1 THROUGH 50,

Defendants.

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: Denise L. Savage, Esq.
Savage Law PLLC
Attorneys for Plaintiffs
500 Carteret Street
Beaufort, South Carolina 29902

Amanda Kuryluk, Esq.
Maguire Cardona, P.C.
*Attorneys for Defendants St. Peter's Hospital of the City of Albany and
St. Peter's Hospital and Nursing Rehabilitation Center*
16 Sage Estate
Albany, New York 12204

Connolly, J.:

The Court, via Decision and Order dated October 19, 2016 incorporated herein, granted plaintiff's motion to the extent that the Court ordered monetary sanctions in favor of plaintiffs and against the St. Peter's Defendants and their counsel, each in the amount of that portion of the

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plaintiffs' attorneys' fees and costs incurred in connection with the St. Peter's Defendants' and their counsel's separate failures to comply with court-ordered discovery, including the attorneys' fees and costs incurred in bringing the motion for sanctions as demonstrated by an affidavit of service to be provided by plaintiff's counsel demonstrating the value of the work necessitated and amount of time and costs actually expended.

In such October 19, 2016 Decision and Order the Court discussed the issues with discovery and particularly the fact that although defendants advised the Court that documents had been produced additional discovery not previously provided to plaintiffs was subsequently provided consisting of hundreds of pages of documentation.

Facts

On October 5, 2015, St. Peter's defendants served plaintiffs with a Supplemental Response to Plaintiffs' Combined Discovery demands. On November 16, 2015, due to further discovery conflicts, the Court held a second discovery conference after which the Court entered an Amended Discovery Stipulation & Order dated November 16, 2015 which provided, *inter alia*, that all paper discovery be completed on or before December 31, 2015. Plaintiffs assert that on December 21, 2015, St. Peters served plaintiffs with its Second Supplemental Response to Plaintiff's Combined Discovery Demands, however, they provided no additional documents but annexed a privilege log in response to questions seeking certain documents. Plaintiffs assert that because they did not believe that they received all documents responsive to plaintiffs' demands, they filed a motion seeking sanctions against the St. Peter's defendants arising from its continued failure to produce all demanded documents. The Court held oral argument with respect to such motion, at which time,

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St. Peter's counsel represented to the Court that such defendants had produced all documents demanded by the plaintiffs', subject to any noted objections.

Plaintiffs have submitted a copy of the transcript from such oral argument of April 26, 2016, in which the St. Peter's Defendants' counsel represented that all of the responsive documents to plaintiffs' discovery requests that were within such defendants custody, control and upon which there has not been an assertion of privilege, had been produced. Plaintiffs sent a May 20, 2016 letter setting forth what demanded documents that they believed remained outstanding.

Via a letter to the Court dated June 1, 2016, Mr. Ezick, counsel for the St. Peter's Defendants noted that while during the April 25, 2016 oral argument, plaintiffs' counsel stated that she believed there were additional medical records relating to the care and treatment of the plaintiff's decedent in the possession of the St. Peter's Defendants which had not been produced, and that he had represented that

all the medical records in the possession of the [St. Peter's Defendants] had been produced with the exception of the quality assurance report that was identified in the privilege log... We are now in receipt of correspondence from plaintiff's counsel ... in which she asserts that it is her belief that we represented that all documents demanded in the plaintiff's Combined Document had been produced We would note that the plaintiff's Combined Document Demand contained 138 separate demands We apologize if there was any misunderstanding regarding [sic] my representation regarding what documents had been produced, but given the nature of the demands and the objections which had been specifically raised we certainly did not intend to suggest that all of the documents requested in the Combined Document Demand had been produced. ...”.

The St. Peter's Defendants requested a discovery conference which the Court, via letter dated July 1, 2016, denied. On July 5, 2016, plaintiffs' counsel was notified by one of its retained experts that documents from a hospital database called "Soarian" were not produced by St. Peter's. Via

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email dated July 5, 2016, plaintiffs' counsel notified St. Peter's counsel of such missing documents.

Plaintiffs then brought another motion returnable August 9, 2016 seeking an order: (i) finding defendants St. Peter's Hospital of the City of Albany, Inc. and St. Peter's Nursing and Rehabilitation (the "St. Peter's Defendants") and their counsel in contempt of Court orders and mandates; (ii) severely sanctioning the St. Peter's Defendants and their counsel; (iii) compelling such defendants to comply with the Court's orders; and, (iv) requiring such defendants and their counsel to pay plaintiffs' attorneys' fees, costs and expenses. The St. Peter's Defendants cross-moved for, *inter alia*, costs and sanctions pursuant to 22 NYCRR §130-1.1 and an order directing counsel for the plaintiffs to schedule a date and time to go over every item of discovery that she believes is outstanding and that plaintiffs' counsel be precluded, absent express authority from the Court, from bringing any further motion for sanctions against the St. Peter's Defendants. The Court held oral argument with respect to such motion on September 7, 2016. Via Order of September 22, 2016, the Court denied the St. Peter's Defendants cross-motion and directed that such defendants produce all documents in their possession, not already produced, requested in the plaintiffs' Combined Discovery Demand dated May 4, 2015, with the exception of a two page Report of November 23, 2011.

The Court in its Decision and Order of October 19, 2016, provided, that subject to Court approval, plaintiffs could be allowed monetary sanctions from the St. Peter's Defendants in the amount of "that portion of the plaintiffs' attorneys' fees incurred in connection with the defendants' failure to comply with court-ordered discovery (regarding such electronic records) including, those attorneys' fees and costs incurred in bringing the relevant portion of the instant motion, as

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demonstrated by plaintiffs via an affidavit of services ... demonstrating the value of the work necessitated and amount of time actually expended, is to be paid by the St. Peter's Defendants to the plaintiffs, subject to Court approval of such amount." As to the St. Peter's Defendants' counsel, the Court held that plaintiffs could be allowed monetary sanctions "in the amount of the plaintiffs' attorneys' fees and costs incurred in connection with the defendants' failure to comply with court-ordered discovery (regarding such unanswered discovery requests) including those attorneys' fees and costs incurred in bringing the relevant portion of the instant motion, as demonstrated by plaintiffs via an affidavit of services to be provided ...". The Court further provided that such attorneys' fees and costs may include the travel costs incurred by plaintiffs' counsel in appearing at the oral argument of September 7, 2016 in Albany, New York.

Plaintiffs' Submissions

Plaintiffs' counsel has submitted, *inter alia*, an affidavit in support of costs and services sanctions in which she originally asserts that she is entitled to sanctions in the amount of \$242,254.00 for billable fees (410.6 hours at \$590.00 an hour) and \$22,128.78 for costs and expenses. She has submitted time and expense billing records for the period of October 1, 2015 through October 19, 2016, which she revised in her submitted reply based upon certain assertions of defendants' in opposition. She has also submitted copies of invoices underlying the cost/expense charges set forth which she asserts reflect court costs for motion filings, Lexis-Nexis research charges, postage and shipping costs, paper costs, expenses paid to an expert in ascertaining the existence of missing charges and revisions to her report.

Plaintiffs' counsel notes that as to her expert, (who identified the existence of certain

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documents that the St. Peter's defendants turned over after the discovery deadline had passed and after denying the existence of any additional documents), such expert drafted an affidavit that plaintiffs' counsel notes was not permitted by the Court though plaintiffs' counsel asserts she was permitted at the September 7, 2016 oral argument to reiterate what was learned from such expert and the contents of her affidavit. She asserts that her expert needed to re-address the decedent's medical issues with the receipt of additional documents. She also notes that in addition to the billable time relating to all filed motions, letters, emails and research, Savage Law included billable time relating to the past drafting of Bills of Particular (as supplemented) and the supplementation thereof demanded by Dr. Kredentser and St. Peter's counsel.

Plaintiffs' counsel further asserts that all of Savage Law's clients are located in New York City and that, though the action is pending in Albany, the applicable, reasonable rate to be applied should be those prevailing in New York City. Further she asserts that her client was unable to convince any counsel in the Capital District to bring the action, so the client had no choice but to retain an out-of-district firm to represent plaintiffs. Plaintiffs' counsel further avers that she "typically engages in Intellectual Property, Commercial and Corporate litigation in the Federal Courts ..." and that Savage Law "is comprised of the undersigned and administrative staff". Such counsel avers that the hours billed "were eminently reasonable for the work performed, addressing complex litigation issues, and of superior quality and effectiveness".

Defendants' Opposition

The St. Peter's Defendants' oppose the application upon the grounds, *inter alia*, that the application seeks attorneys' fees and costs beyond the scope of those granted by the Court's October

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19, 2016 Decision and Order and that there is insufficient documentation to justify the hours charged for the work performed and the costs for which reimbursement is sought. Such defendants argue that as plaintiffs' counsel avers that she is seeking reimbursement for attorney time and expenses from October 1, 2015 through October 19, 2016, the majority of the requested fees and costs are unrelated to the specific categories identified by the Court for reimbursement.

Such defendants also make arguments that there was no violation of any court orders. Such arguments are not properly before the Court with respect to the instant motion.

Defendants also object to plaintiffs' counsel's asserted \$590 hourly rate as being inappropriately high and unreasonable for the local community and counsel's limited experience in the area of medical malpractice. Defendants argue that Courts have the authority to supervise the charging of fees for legal services and such an award must be based upon a showing of reasonableness with respect to hours and expended and the hourly rate in light of the relevant community standard. Further, they argue a lawyer's experience and expertise in a particular field should be considered. Additionally they note that Courts in the district where this litigation is venued have determined that hourly rate for attorneys experienced in the specific area of law in question to be between \$250-\$300 per hour.

Defendants also argue that plaintiffs' counsel's billing records do not appear to be contemporaneous and lack the specificity to determine if the time associated with the tasks is reasonable and fall within the scope of the Court's order. Defendants point to several entries as examples of their contentions that, *inter alia*, there is no indication of what certain "research" time was for, that such billing falls outside the scope of the Court's order and spans numerous day periods

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of time without proper specificity. They also object to being billed for the numerous hours plaintiffs' counsel has included reviewing and revising timesheets, gathering exhibits, researching the compensation issue and drafting the affidavit for this submission in the amount of 23.40 hours (i.e. \$13,806.00) and seeking to recover costs in the amount of almost \$1,800.00 for purchasing the LM Legal Intelligence Survey for inclusion with respect to fee rates applicable to this case.

Defendants also argue that a review and comparison of plaintiffs' January and August motion papers seeking, *inter alia*, relief against defendants for alleged discovery failures demonstrate that the papers are essentially similar. As to Lexis-Nexis billing costs for legal research, defendants assert that such entries fail to apprise the Court as to what case the research was being conducted for, the subject matter of the research or the time expended for the research and they note that the invoices do not match up with the entries. Defendants similarly object to the UPS and Priority Mail billing charges as they argue it is impossible to discern what the shipping charges pertained to. As to the "Savannah Airport Commiss" charges, they assert no description for such charges is provided.

As to plaintiffs' expert fees, such defendants argue that certain charges are unrelated to discovery issues (i.e. \$1,800 to review records; \$3,600 for affidavit which the Court would not consider as an improper sur-reply). Defendants continue to object to the billing entries for work performed with other aspects of the litigation that is not related to the discovery issues the Court addressed via its October 19, 2016 Decision and Order.

Plaintiffs' Reply

In reply, plaintiffs' counsel increases the request for attorneys' fees to \$245,853.00 and expenses and decreases the costs requested to \$21,971.27 for a total requested award of \$267,824.27.

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Plaintiffs' counsel sets forth her almost thirty-years of experience as an attorney noting, however, that she has litigated only one personal injury case and one medical malpractice action. She submits "that discovery issues (which, as this Court knows, exist in every litigation) are not specific to the practice of medical malpractice litigation."

Plaintiffs' counsel objects to the St. Peter's re-argument of the Court's Decision and Order. As to the hourly billable rate, plaintiffs' counsel argues that expert testimony is not required to prove a reasonable billable rate in light of the documentary evidence of rates that have been submitted which reflect that the hourly billable rate being requested is consistent with that of other comparable attorneys in the New York City area. Plaintiffs' counsel argues that the Albany County rates (or upstate New York rates) are inapplicable as the cases defendants rely upon related to "fee-shifting" statutes or via contract as opposed to cases in which sanctions have been awarded but notes that the Court has discretion to use out-of-district rates in fixing the amount of an attorneys' fee awarded as a sanction.

As to time and expense entries, plaintiffs' counsel has submitted another copy of the time and expense billing entries to clarify each entry by "(a) expressly equating each time and expense entry with each discovery motion, letter, call, LEXIS bill, number of documents printed off of LEXIS, and documents which the LEXIS research supported, etc., at issue; (b) providing tracking numbers and recipients for each mailing along with additional back-up invoices; (c) breaking down the 'block' billing for multiple dates into daily billing amounts derived from contemporaneous *handwritten* time records; and (d) clarifying all tasks". Plaintiffs' counsel notes that the time and expenses incurred in drafting this Second Affirmation was added to the entries.

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Standard

In ordering sanctions, a Court must set forth the conduct upon which the sanction was based, and accordingly, the Court hereby incorporates its Decision and Order of October 19, 2016.¹ A Court may impose an appropriate remedy, including sanctions, when a party fails to comply with a discovery order, the nature and degree of which is a matter committed to the court's sound discretion (see *Pangea Farm, Inc. v. Sack*, 51 AD3d 1352 [3d Dept 2008]; see also *Friedman, Harfenist, Langer & Kraut v Richard Bruce Rosenthal*, 79 AD3d 798 [2nd Dept 2010]). In setting the amount of such sanction, however, a Court may not provide a windfall to an attorney (see *Matter of John H.*, 60 AD3d 1168 [3d Dept 2009]). Based upon the record, that appears to be what plaintiffs' counsel is seeking, as such requested amount does not reflect attorneys' fees and costs associated with the St. Peter's Defendants and their counsel's failure to diligently supply requested discovery documents, but appears to essentially seek sanctions to recover the fees and costs of litigating the instant action to date.

Accordingly, while plaintiffs' counsel is seeking reimbursement of all attorneys' fees and expenses incurred from October 1, 2015 through October 19, 2016 relating to Savage Law's asserted separate efforts to obtain full document production "commencing from the time of St. Peter's initial and incomplete production of documents in September, 2015 through the signature of this Court's Decision on October 19, 2016", such request will only be granted as set forth below in a sharply reduced amount.

Discussion

¹ Additionally, the Court notes that neither party requested a hearing with respect to such attorneys' fees amount.

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The determination of reasonable counsel fees is a matter within the sound discretion of the trial court (*see Curtis v Nutmeg Ins. Co.*, 256 AD2d 758 [3d Dept 1998]). The attorney bears the burden of establishing the reasonable value of the services rendered, based upon a showing of the hours reasonably expended and the prevailing hourly rate for similar legal work in the community.”(*Lancer Indem. Co. v. JKH Realty Group, LLC*, 127 AD3d 1035 [2nd Dept 2015])[internal citations and quotations omitted]; *see also Rahmey v Blum*, 95 AD2d 294 [2nd Dept 1983]).

While the Court notes the plaintiffs’ contention that in *Lancer* and *Rahmey* the Court was not determining the amount of attorneys’ fees to be awarded as *sanctions*, plaintiffs’ counsel has failed to sufficiently demonstrate entitlement to a fee of \$590.00 an hour. While in the federal district case cited by plaintiffs’ counsel, the court has the discretion to apply an out-of-district rate, which plaintiffs’ counsel encourages, such discretion will not be exercised herein (*see, Arbor Hill v County of Albany*, 493 F3d 110 [2nd Cir., 2007]). In this case, while counsel has almost 30 years of legal expertise, such expertise is admittedly not in the area of medical malpractice actions and it cannot be said that plaintiff has successfully demonstrated that a paying client would pay such out-of-district requested rate rather than hire counsel whose rates are consistent with those charged locally in Albany County. Though plaintiffs’ counsel notes that plaintiff could not find an Albany attorney who would accept the case, plaintiffs’ counsel admits that Savage Law does not specialize in medical malpractice actions, and accordingly, while Savage Law may charge its clients in, *inter alia*, bankruptcy and commercial disputes, \$590 hourly, it has not been established that such charge is applicable in the instant medical malpractice case in Albany County.

In *Seidenfuss v Diversified Adjustment Servs.*, 2016 US Dist. LEXIS 33559 (NDNY 2016)

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the federal district court determined that “courts in this District have upheld hourly rates between \$250 and \$300 for experienced partners”. In *Berkshire Bank v Tedeschi*, 2015 US Dist. LEXIS 5349 (NDNY 2015), the Court held that “[r]ecent cases in the Northern District have upheld hourly rates between \$250 and \$345 for partners; between \$165 and \$200 for associates; and between \$80 and \$90 for paralegals”(Id. at 7). Based upon the circumstances herein which include plaintiffs’ counsel’s years of experience as an attorney but admittedly extremely limited experience in medical malpractice litigation, an hourly rate of \$250.00 is appropriate (*see also Kaygreen Realty Co. v IG Second Generation Partners, LP*, 78 AD3d 1008 [2nd Dept 2010]).

Total Hours Billed

As to whether the number of hours expended were reasonable, the court may consider factors, including, *inter alia*, the time and labor required, difficulty of the questions involved and skill required to handle such issue (*Lancer, supra* at 357-58). While plaintiffs’ counsel has provided billing records from October 5, 2015 through December 22, 2016, all of such hours were not permitted pursuant to the Court’s October 19, 2016 Decision and Order. The Court specifically permitted the possible allowance for fees incurred as a result of (i) the St. Peter’s Defendants’ failure to comply with discovery orders regarding the late provision of electronic records and a portion of the fees related to the relevant portion of plaintiffs’ motion returnable August 9, 2016 seeking, *inter alia*, contempt² and (ii) the St. Peter’s Defendants’ counsel’s failure to comply with court-ordered discovery regarding unanswered discovery requests and a portion of the fees related to the relevant portion of plaintiffs’ motion returnable August 9, 2016. Further, the Court provided that travel costs

² It should be noted that the contempt portion of the application was denied and no fees for such position will be assessed.

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incurred by plaintiffs' counsel in appearing at the oral argument of September 7, 2016 should be provided to the Court for consideration. Accordingly, plaintiffs' counsel's submission has left the Court to evaluate over a year of billing records, which plaintiffs' counsel admits includes general work with respect to issues relating to the litigation, including discovery issues, but is not narrowly tailored to the discovery failures addressed via the October 19, 2016 Decision and Order.

The discovery failures at issue involved the defendants' and their counsel's failure to identify existing documents with respect to plaintiffs' discovery demands, particularly, their acknowledgment on April 25, 2016, at oral argument that all documents had been provided and subsequent response by letter dated June 1, 2016 to plaintiffs' May 20, 2016 letter, that in fact, additional documents existed that had not before been released to plaintiffs' counsel. Accordingly, any requests for attorneys' fees or expenses for dates preceding such May 20, 2016 letter are not properly before the Court for consideration. Further, to the extent throughout the billing and expense report Lexis-Nexis searches or on-line research are being billed without any accompanying reference to a specific motion or letter, such research or accompanying charges are not being considered. Additionally, the Court will not consider or permit fees or expenses relating to, *inter alia*, the unauthorized sur-reply with respect to plaintiffs' second contempt motion, the protective order application of Dr. Kredentser, any metadata issues existing between the parties, review of discovery responses in general, extension issues or settlement discussions letters. Such issues were not authorized by the Court's October 2016 Decision and Order.

Plaintiffs' counsel asserts that she spent 2.1 hours drafting such May 20, 2016 letter which amount is permitted. With respect to the second motion for, *inter alia*, contempt with respect to the St. Peter's Defendants and their counsel's asserted failures to comply with the Court's discovery orders and opposition to the St. Peter's Defendants' cross-motion, plaintiffs' counsel asserts that she

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spent over 60 hours researching, drafting and revising with respect to the second motion (seeking, *inter alia*, contempt for discovery failures) including the filing of such motion (1 hour) and, over 15 hours performing Lexis-Nexis research with respect to her reply papers, reviewing and analyzing the opposition papers³. Plaintiffs' counsel asserts that she spent 2 hours in Court with respect to the hearing with respect to plaintiffs' second motion for contempt on September 7, 2016. As to the instant application for attorneys' fees and expenses, plaintiffs' counsel asserts that she spent over 50 hours researching compensation issues, "fact investigation/development", "time-sheets/gather exhibits/review ALM Survey/Research for compensation issue", drafting affidavits concerning attorneys' fees and expenses, conducting research & reviewing opposition including Lexis-Nexis Research.

As noted by the St. Peter's Defendants and is evident by the record before the Court, many of the legal issues raised by plaintiffs' counsel were raised in the first motion for contempt in early 2016, for which the Court is not permitting the recoupment of attorneys' fees or expenses. Accordingly, the majority of the over 60 hours of researching, drafting and revising with respect to such second motion will not be permitted as such request is unreasonable. As asserted by plaintiffs' counsel, discovery issues are common in all litigation and, the issue herein was the St. Peter's

³The Court notes that there are discrepancies in the billing and time report as there are charges relating to Document No. 67 after such reply was filed. Further, there do not appear to be any drafting related charges pertaining to such document in the updated time and bill report. As the Court did not authorize a sur-reply, the fees relating to the drafting of such sur-reply and accompanying exhibits (Document Nos. 69, 70 and 72) including the affidavit of Georgia Persky, R.N. will not be considered. To the extent plaintiffs' counsel seeks charges for "review additional Sorian records" with respect to Ms. Persky, such review would have to be done in the context of litigation and no proof that such charges would not have been incurred had such information been provided timely has been submitted. Accordingly, such fees will not be considered. The Court will also not permit charges relating to Georgia Persky Consulting LLC as of August 24, 2016 as such charges are related to development of an affidavit and papers that were not permitted by the Court as a sur-reply.

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Defendants and their counsel's alleged failure to provide discoverable documents which were requested. Such issue is not particularly complex (particularly given plaintiffs' counsel's asserted experience) and as much of the legal research was already done with respect to the first motion, the over 60 hours requested relating to asserted research, drafting and revising with respect to such issue must be disallowed. Accordingly, the Court will allow 12 hours of time to be recouped.

As to the reply papers, the Court will permit 6 of the hours requested with respect to work performed. The Court will also permit recoupment of the 2 hours of time spent in Court for oral argument in September of 2016.

Finally, as to the over 50 hours requested concerning the instant application for attorneys' fees, while such fees are subject to recoupment, upon review of the record, the instant request is unreasonable and the Court will permit 8 hours for such attorneys' fees. The request for attorneys' fees was not narrowly tailored to the Court's October 19, 2016 Decision and Order but instead attempted to recoup all litigation costs relating to any discovery issue that arose between October 5, 2015 and November 6, 2016. Such request was overly broad and accordingly, plaintiffs' counsel should not be permitted to recoup the costs involved in investigating and developing the record with respect to much of the instant application for such fees as much of such submissions are overbroad and not narrowly tailored to the scope of the Court's October 19, 2016 Decision. The Court will, however, allow the above mentioned ten (10) of such hours as plaintiffs' counsel had to expend time to draft an affidavit and reply affidavit with respect to such application. Accordingly, the Court will permit 30.1 hours of time to be recouped.

Expenses

As to expenses, on May 20, 2016 plaintiffs' counsel spent \$5.75 on mailing the letter,

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asserting that discoverable documents had not been provided, to the St. Peter's Defendants' counsel.

Such expense is permitted.

On July 11, 2016 plaintiffs' counsel asserts that \$22.31 was expended in mailing "Re: Letter Notice of Motion Doc. No. 52" and \$45.00 in motion costs for the second motion for contempt which costs the Court will allow. There is a charge for the "BARMAX Garage NY" for no description is provided and accordingly, such charge will not be considered. It is unclear why plaintiffs' counsel should have to pay a "cross-motion" fee with respect to her affidavit in opposition to the St. Peter's cross-motion and accordingly, such fee will not be permitted (08/16/2016). Plaintiffs' counsel has also asserted that the amount of \$448.75 was expended for costs associated with her appearance at the oral argument of September 7, 2017 (Car rental, plane ticket, parking garage charges and transcript) upon which costs the Court will allow recoupment of.⁴

As to the ALM Legal Intelligence Survey, which plaintiffs' counsel relied upon to demonstrate entitlement to a \$590.00 an hour attorneys' fee, such survey was not necessary to the instant application nor does it demonstrate the rate of attorneys' fees in Albany County and accordingly, such \$1,799.00 cost will not be allowed.

The Court will not accept any assertions of expenses concerning other discovery issues that the parties may have been corresponding upon as such issues are a necessary part of the litigation process. There are many line items upon which the Court will not permit recoupment, including, *inter alia*, Lexis-Nexis paper case print-outs, paper costs and copying costs as the bulk of the Lexis-Nexis paper case print-outs do not specify which motion they are related to, the paper costs "for all

⁴ The Court will not allow "Alamo Rent A Car Tolls, NY" charges in the amount of \$21.65 which occurred on September 19, 2016 (almost two weeks after the oral argument).

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Motions and Copies” do not delineate what motions or issues they are related to, and the copying of St. Peter’s Hospital documents for Georgia Persky Consulting to review is a necessary part of litigation costs and was not due to any discovery failures of the St. Peter’s Defendants or their counsel.

As to the differentiation between fees and expenses associated with the St. Peter’s Defendants discovery failures and their counsel’s discovery failures, plaintiffs have made no argument. As the fees and expenses the Court is permitting plaintiffs’ counsel to recoup against such parties relate to, *inter alia*, the motion costs pertaining to the second motion for, *inter alia*, contempt for failure to comply with discovery and related reply as well as the Court time and related expenses with respect to the September 2017 appearance with respect to such motion and certain hours relating to this application, such overall amount will be split in half with respect to the St. Peter’s Defendants and their counsel.

Accordingly, based upon the record, with respect to attorneys’ fees, the aggregate amount payable to plaintiffs is \$7,575 to be paid 50% by the St. Peter’s Defendants and 50% by their counsel. Similarly, with respect to the related expenses, the aggregate amount payable to plaintiffs is \$521.81 to be paid 50% by the St. Peter’s Defendants and 50% by their counsel. Such amounts are to be paid within sixty (60) days of the instant Decision and Order.

Otherwise, the Court has reviewed the parties’ remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court’s determination.

Accordingly, it is hereby

ORDERED that pursuant to the Court’s October 19, 2016 Decision and Order plaintiffs’ are entitled to attorneys’ fees in the aggregate amount of \$7,575.00, to be paid 50% by the St. Peter’s


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Defendants and 50% by their counsel, and are entitled to related expenses in the aggregate amount of \$521.81, to be paid 50% by the St. Peter's Defendants and 50% by their counsel. Such amounts are to be paid within sixty (60) days of the instant Decision and Order.

This shall constitute the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the plaintiffs. A copy of the Decision and Order along with the below referenced original papers are being transferred to the Albany County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

SO ORDERED.
ENTER

Dated: March 24, 2017
Albany, New York



Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Affidavit of Denise L. Savage, Esq. in Support of Costs and Services Sanctions Awarded by this Court dated November 17, 2016 with accompanying exhibits 1-3;
2. Affidavit in Opposition to Request for Attorneys' Fees and Costs of A. Cardona, Esq. dated December 9, 2016 with accompanying exhibits A-N;
3. D. Savage, Esq. Affirmation in Reply dated December 22, 2016 with accompanying exhibits A-K.