Matter of Legal Aid Socy. v New York County Dist. Attorney's Off.
2019 NY Slip Op 31106(U)
April 11, 2019
Supreme Court, New York County
Docket Number: 160892/2017
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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INDEX NO. 160892/2017

In the Matter of

MOTION DATE 10/18/2018

THE LEGAL AID SOCIETY,

MOTION SEQ. NO. 002

Petitioner,

- v -

NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE, **DECISION AND ORDER**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42

were read on this motion to/for ATTORNEY - FEES.

The petitioner, The Legal Aid Society, moves pursuant to Public Officers Law § 89(4) for an award of attorneys' fees in connection with its request for documents under the Freedom of Information Law (Public Officers Law § 84, et seq.; hereinafter FOIL). The New York County District Attorney's Office (the DA) opposes the motion. It contends that, in response to the petition, it reconsidered and reversed its initial denial of the petitioner's request for documents, and produced all documents in its possession that were responsive to the request. It argues that the petitioner thus did not substantially prevail on the petition, and that it had a reasonable justification for denying the FOIL request in the first instance. The motion is granted to the extent that the petitioner is awarded reasonable attorneys' fees in the sum of $12,450.20 for work undertaken up to and including the DA's production of the agency records on April 9, 2018, and the motion is otherwise denied.

The petitioner sought records from the DA referable to whether New York City or New York State law-enforcement agencies employed the services of Geofedia, Inc., Media Sonar Technologies Inc., or X1 Discover, Inc., to collect data from social media websites and

applications permitting the identification of suspects and witnesses in connection with law-enforcement operations. The DA had initially denied the request pursuant to the non-routine procedures exemption of Public Officers Law § 87(2)(e)(iv), and issued a so-called *Glomar* response, declining to confirm or deny the existence of those documents (*see Phillippi v CIA*, 546 F2d 1009 [DC Cir 1976] [permitting the CIA employ such a response in reply to a federal Freedom of Information Act request for documentation concerning an oceanic research vessel known as the Hughes Glomar Explorer]). The petitioner commenced this proceeding, seeking judicial review of the DA's administrative denial of its request. In response to the petition, the DA reconsidered its position based on several factors, and agreed to produce all documents in its possession that were responsive to the request. The petitioner and the DA thus settled the substantive aspects of this proceeding, and, by order dated October 26, 2018 (Hagler, J.), the petition was permitted to be withdrawn.

The petitioner thereafter requested that the DA pay its reasonable attorneys' fees incurred in prosecuting the proceeding up to that point. The DA denied the request. The petitioner now moves for an award of attorneys' fees, including those incurred both in connection with the petition and its resolution, and in making the instant motion.

Pursuant to FOIL's fee-shifting provision, a court

> "shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access"

(Public Officers Law § 89[4][c][ii]). Prior to 2006, the law required that, for attorneys' fees to be awarded, the documents involved must be of clearly significant interest to the general public. Pursuant to L 2006, ch 492, the Legislature amended FOIL to remove that statutory requirement.

As explained by the Court of Appeals, "[o]nly after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys'

fees" (*Beechwood Restorative Care Ctr. v. Signor,* 5 N.Y.3d 435, 441 [2005]). Where, as here, "it was the initiation of this proceeding [that] brought about the release of the documents" (*Matter of Powhida v City of Albany*, 147 AD2d 236, 239 [3d Dept 1989]), the petitioner is deemed to have "substantially prevailed" (*see Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 79 [2018]). Moreover, although New York recognizes an agency's right to assert the *Glomar* exemption where it is warranted (*see Matter of Abdur-Rashid v New York City Police Dept.*, 140 AD3d 419 [1st Dept 2016], *affd* 31 NY3d 217 [2018]), the DA lacked a rational basis to assert that exemption here, where the petitioner only sought information as to whether City and State law-enforcement agencies were employing enumerated commercial data-mining programs; unlike *Abdur-Rashid*, the petitioner did not seek documents that may have revealed whether certain locations or organizations were the targets of surveillance, or seek specific information as to whom law enforcements agencies had identified as suspects, witnesses, gang members, or terrorists by using those programs. The DA's quick reversal of its denial of access belies its argument that it had a rational basis to deny access to those records under the law enforcement and public safety exemptions of Public Officers Law §§ 87(2)(e) and (f), let alone the non-routine procedures exemption of Public Officers Law § 87(2)(e)(iv).

Hence, the petitioner is entitled to an award of reasonable attorneys' fees incurred up to the time that the DA produced the subject records.

Contrary to the petitioner's contention, however, it is not entitled to an award of attorneys' fees incurred in prosecuting the instant motion. An award of so-called "fees on fees" must "be based on a statute or on an agreement" (*Sage Realty Corp. v Proskauer Rose*, 288 AD2d 14, 15, 732 NYS2d 162 [1st Dept 2001]), and then only when the language of the statute or relevant agreement is "unmistakably clear" (*Batsidis v Wallack Mgt. Co., Inc.*, 126 AD3d 551, 552 [1st Dept 2015]) that such an award is authorized (*see Jones v Voskresenskaya*, 125 A.D.3d 532, 534 [1st Dept 2015]; *546-552 W. 146th St., LLC v Arfa*, 99 AD3d 117, 122 [1st Dept 2012]). The petitioner has cited, and research has revealed, no decision addressing the issue

of whether fees on fees are recoverable in a successful FOIL proceeding. FOIL's vague and general fee-shifting provision is not unmistakably clear that such fees are authorized. Hence, the court concludes that an award of fees on fees is not permissible here.

While "fees on fees" are recoverable under RPL 234 in a landlord-tenant proceeding or action (*Senfeld v I.S.T.A. Holding Co.*, 235 AD2d 345, 345-346 [1st Dept 1997]; *Kumble v Windsor Plaza Co.*, 161 AD2d 259, 261 [1st Dept 1990]) and under Debtor and Creditor Law § 276-a in an action alleging a fraudulent conveyance (*see Posner v S. Paul Posner 1976 Irrevocable Fam. Trust*, 12 AD3d 177, 179 [1st Dept 2004]), courts have ruled that they are not authorized in compulsory arbitrations to recover no-fault benefits (*see Hempstead Gen. Hosp. v Allstate Gen. Ins. Co.*, 106 AD2d 429 [2d Dept 1984], *affd* 64 NY2d 958 [1985]; *see also Smithtown Gen. Hosp. v. State Farm Mut. Auto. Ins. Co.*, 228 A.D.2d 576 [2d Dept 1996]), actions litigated under the whistleblower provisions of Labor Law § 741 (*see Tomo v. Episcopal Health Servs., Inc.*, 112 AD3d 612, 614 [2d Dept 2013]), actions under Business Corporation Law § 722 for the indemnification of corporate directors (*see Baker v Health Mgt. Sys.*, 98 NY2d 80, 88 [2002]), and actions under Limited Liability Company Law § 420 for the indemnification of LLC members (*see 546-552 W. 146th St., LLC v Arfa*, 99 AD3d at 120-121).

As the Court of Appeals explained it in *Baker*, when the Legislature amended the Business Corporation Law to make it easier for officers and directors to obtain indemnification from a corporation when they were sued, it surveyed the law in other states and borrowed from the Model Business Corporation Act, as well as the California and Indiana incorporation laws, all of which contained express provisions permitting fees on fees; since the Legislature did not add an equivalent provision to the Business Corporation Law, it could not be presumed that it intended to authorize fees on fees. In *546-552 W. 146th St.,* the prevailing party argued that the member indemnification provision of the Limited Liability Company Law was written in a broader fashion than that in the Business Corporation Law. It thus asserted that it should be entitled to recover fees on fees. The Appellate Division, First Department, rejected that contention,

explaining that "[w]hile the language 'any and all claims and demands whatsoever' in Limited Liability Company Law § 420 may be broader than Business Corporation Law § 722(a), it does not explicitly provide for an award of fees on fees. Nor does the dissent point to anything in the legislative history that would support such an award" (*546-552 W. 146th St., LLC v Arfa*, 99 AD3d at 121).

The language of the FOIL fee-shifting provision---directing the assessment of reasonable attorney's fees and other litigation costs reasonably incurred by a prevailing claimant in any case under FOIL---is even less robust than the Limited Liability Company Law provision authorizing an award of attorneys' fees. A fortiori, the court concludes that it cannot reasonably infer that the Legislature intended FOIL to authorize an award of fees on fees.

Usually, where a party legitimately challenges the amount claimed for attorneys' fees and the legal services performed, a court's award of attorneys' fees may only occur following an adversarial hearing (*see Dupuis v 424 East 77th Street Owners Corp.*, 9 Misc 3d 1121[A], 2005 NY Slip Op 51715[U] [Sup Ct, N.Y. County, Sep. 12, 2005] [Acosta, J.]). Here, however, the parties have stipulated to permit the court to determine, on submitted papers, the value of the legal services reasonably and necessarily performed by the petitioner's attorneys in successfully compelling the DA to produce the requested documents.

"The relevant factors in the determination of the value of legal services are the nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, and the results achieved" (*Jordan v Freeman*, 40 AD2d 656, 656 [1st Dept 1972]; *see 542 E. 4th St., LLC v Lee*, 66 AD3d 18, 24 [1st Dept 2009]). Where, as here, the work performed by the attorneys is sufficiently detailed, and supported by the attorneys' sworn statements, there is a proper basis upon which to award fees (*see Zacharius v Kensington Publ. Corp.*, 167 AD3d 452 [1st Dept 2018]; *Freidman v Yakov*, 138 AD3d 554 [1st Dept 2016]).

The hourly billing rates requested by the petitioner's attorneys reasonably reflect their training, experience, and ability in the field of FOIL litigation, and are within the range of rates that are typically charged by similar attorneys in the New York City metropolitan area (*see Arbor Hill Concerned Citizens Neighborhood Assoc. v County of Albany*, 522 F3d 182 [2d Cir 2008]). Thus, the petitioner's attorneys are entitled to a fee award at the rate of $338 per hour for time reasonably expended by Christopher Cariello and Anthony Tartaglio, $567 per hour for time reasonably expended by Rene Kathawala, and $583 per hour for time reasonably expended by Alex Chachkes.

The court notes that, to secure a successful outcome to this dispute, it was necessary for the petitioner's attorneys only to undertake a modest amount of legal research and draft a 2-page notice of petition, 16-page petition, affidavits, and a 7-page reply memorandum, as well as to fill out various forms required by the court. Unnecessary or duplicative work occurs when a firm bills twice for work done once (*see 235 E. 83 Realty, LLC v Fleming*, 18 Misc 3d 1142[A], 2008 NY Slip Op 50412[U] [Civ Ct, N.Y. County, Mar. 3, 2008] [Lebovitz, J.]; *see also Nestor v Britt*, NYLJ, July 2, 1998, at 32, col 1 [App Term 1st Dept], *affd* 270 AD2d 192 [1st Dept 2000]; *Goldman v Rosen*, 10 Misc 3d 1065[A], 2005 NY Slip Op 52152[U] [Civ Ct, NY County, Dec. 22, 2005], *mod other grounds* 15 Misc 3d 135[A], 2007 NY Slip Op 50743[U], [App Term, 1st Dept 2007]). The court concludes that not all of the hours billed by the petitioner's attorneys were necessarily expended in performing that work, and that many of the hours billed represented unnecessary or duplicative work.

Thus, of the 37.9 hours of time billed by Christopher Cariello between November 6, 2017, and April 9, 2018, the court finds that only 19.7 hours were necessarily expended, and that the tasks set forth as entry numbers 2, 5, 6, 7, 9, 10, 11, 12, 16, and 17 on his submitted time sheets were unnecessary or duplicative. Of the 19.4 hours billed by Anthony Tartaglio between November 2, 2017, and January 2, 2018, the court finds that only 16.1 hours were necessarily expended, and that the tasks set forth as entry numbers 9 through 17 on his

submitted time sheets were unnecessary or duplicative. The court finds that the 0.43 hours billed by Rene A. Kathawala on March 1, 2018, were unnecessary or duplicative. The court finds that, of the 7.7 hours billed by Alex V. Chachkes between November 6, 2017, and December 18, 2017, only 0.6 hours were necessarily expended, and that the tasks set forth as entry numbers 1 through 3 on his submitted time sheet were unnecessary or duplicative. Hence, the petitioners are entitled to an award of $6,658.60 for Cariello's work (19.7 x $338), $5,441.80 for Tartaglio's work (16.1 x $338), and $349.80 for Chachkes's work (0.6 x 583), for a total of $12,450.20.

Accordingly, it is

ORDERED that the petitioner's motion is granted to the extent that the petitioner is awarded its reasonable attorneys' fees in the sum of $12,450.20 that were incurred through April 9, 2018, the date that the respondent finally produced all documents responsive to the petitioner's request, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk of the court is directed to enter a money judgment for attorneys' fees in favor of the petitioner, The Legal Aid Society, and against the respondent, New York County District Attorney's Office, in the sum of $12,450.20, plus costs in an action pursuant to CPLR 8101 and 8201 and disbursements pursuant to CPLR 8301(a)(7).

This constitutes the Decision and Order of the court.

4/11/2019
DATE

JOHN J. KELLEY, J.S.C.

HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE