

Malave v Venettozzi
2019 NY Slip Op 33955(U)
April 19, 2019
Supreme Court, Albany County
Docket Number: 905983-17
Judge: Gerald William Connolly
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Court/County: _____

Case Title: _____

Docket Number: _____

Judge: Gerald W. Connoly

EXPERT(s): _____

File date: _____ Type: _____

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	Interrogatories	_IN	Questions only or questions and answers
	Trial Deposition and Discovery	_TD	Reports (JV ONLY) Requests for production of documents (JV ONLY) Depositions (FULL) (JV partials OK) Civil deposition affidavits
	Trial Filing	_TF	Statements Reports
	Original Transcript	_OT	Transcripts of hearings and trials (FULL)
	Verdict, Agreement and Settlement (actuals)	_VS	Verdict forms submitted to jury Signed settlement agreements with no attached order Signed stipulations with no attached order Signed plea agreements with no attached order
	Jury Instruction (actual)	_JI	Proposed and submitted jury instructions
	Expert Depositions	_ED	FULL
	Expert Transcripts	_ET	FULL
	Partial Expert Testimony	_EP	Partial Depos or Transcripts
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	Proposed Order, Agreement, and Settlement	_PR	(ALL are JV ONLY) Proposed trial order Proposed plea agreement Proposed settlement agreement Proposed verdicts Proposed judgments Findings with proposed orders Stipulations with proposed orders Unsigned stipulations; Unsigned findings; Unsigned orders or verdict sheets
	Paper Only	_PO	Letters, Correspondence, other docs as instructed (JV and Court Express Archive)
	CV	_CV	Curriculum Vitae

STATE OF NEW YORK
SUPREME COURT
ANTHONY MALAVE,

COUNTY OF ALBANY

Petitioner, **DECISION and ORDER**
Index No.: 905983-17

-against-

D. VENETTOZZI, DIRECTOR, SPECIAL
HOUSING/INMATE DISCIPLINARY PROGRAM, NEW
YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION,

Respondent.

 ORIGINAL

(Supreme Court, Albany County)

APPEARANCES:

Thomas Terrizzi, Esq.
Law Office of Thomas Terrizzi
Attorney for Petitioner
P.O. Box 175
Wilmington, New York 12997

Hon. Letitia A. James
Attorney General of the State of New York
Attorney for Respondent
(Lynn Knapp Blake, Esq. Assistant Attorney General, of counsel)
The Capitol
Albany, New York 12224-0341

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Connolly, J.:

Petitioner moves for an order pursuant to the New York State Equal Access to Justice Act (“EAJA”), CPLR 8601, granting petitioner’s request for attorney’s fees and expenses. Respondent opposes the motion.

Petitioner asserts that this matter was transferred to the Appellate Division, Third Department by a Transfer Order entered December 8, 2017. Via Memorandum and Judgment of November 15, 2018, the Third Department granted the petition holding that there was no evidence to support the agency determination that petitioner was guilty of the three violations with which he was charged and directed that the Commissioner of DOCCS expunge all references to the matter from petitioner’s

institutional record and restore any loss of good time. Petitioner asserts that accordingly, he is the prevailing party as defined in CPLR §8602(a). Petitioner asserts that he meets the financial eligibility requirements for an award of attorney's fees under CPLR 8602(d). Having prevailed in the Article 78 proceeding, petitioner asserts that he is entitled to recover reasonable attorney's fees and expenses unless respondent can show that the respondent's position was substantially justified. Petitioner submits that, as the Third Department held that the evidence did not support the charges and that the Hearing Officer improperly refused to consider relevant documentary evidence, respondent cannot meet his burden of showing that the agency decision was substantially justified.

Petitioner's attorney has submitted his time records with respect to the prosecution of the Article 78 proceeding and in preparing this motion for attorney's fees. He requests to be compensated for 30.4 hours for the successful prosecution of the Article 78 proceeding including time preparing and drafting the petition, organizing the exhibits, reviewing respondent's answer and return, assembling and reviewing the stipulated record, researching and drafting the brief on behalf of petitioner, and reviewing and researching matters raised in respondent's brief. He is also requesting compensation for 3 hours travel time to interview petitioner at the Mid-State Correctional Facility. He requests compensation for 9.3 hours with respect to work performed for this fee application. He requests compensation at the rate of \$300.00 per hour for legal services and \$150.00 for his travel time, noting that he is an experienced attorney with over 45 years of litigation experience in state and federal courts regarding issues affecting prisoners. He further notes that he may seek compensation for time spent enforcing the Third Department's Judgment. Presently, he is seeking compensation in the aggregate total of \$12,360.00 (30.4 hours with respect to the Article 78 application; 3 hours for Article 78 travel time; and 9.3 hours with respect to the instant EAJA motion).

In opposition, respondent asserts that the motion should be denied as untimely and as respondent's position was substantially justified within the meaning of CPLR §8601(a). If however, the Court determines attorney's fees should be awarded, respondent requests that the Court exercise its discretion to exclude ineligible fees and reduce the amount of the proposed award.

Initially, respondent argues that CPLR 8601(b) expressly provides that "[a] party seeking an award of fees ... shall, within thirty days of final judgment in the action, submit to the court an application [for fees] ..." and that CPLR 8602(c) defines "final judgment" as "a judgment that is final and not appealable". Respondent asserts that the Appellate Division decision was decided and entered on November 15, 2018 and served with notice of entry on November 21, 2018 and pursuant to CPLR 5601, respondent did not have a right to appeal and accordingly, the Judgment was a final judgment pursuant to which petitioner had 30 days to submit such application from November 15, 2018, however, such application was not submitted until January 14, 2019.

Petitioner notes however, that while respondent did not have the right to appeal the Third Department Judgment, respondent could have moved for permission to appeal within the thirty days following the service on him of the Judgment and Notice of Entry (*see* CPLR 5513(b)). Petitioner asserts that respondent was served with the Judgment via first class mail on November 21, 2018 which means respondent had an additional five days before the 30 day period commenced for moving for permission to appeal and therefore the 30 day period for respondent to move for permission to appeal commenced on November 26, 2018 and the Judgment became a final Judgment 30 days later on December 26, 2018. Petitioner notes that it filed and served this motion for attorney's fees on January 14, 2019 within 30 days of the final judgment. Based upon the foregoing, petitioner has demonstrated that the instant motion was timely filed.

Respondent further argues that the motion should be denied as the position of the state was substantially justified. Respondent asserts that the phrase “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 Clinical Lab. Ass’n v Kaladjian*, 85 NY2d 346, 356 [1995]). According to the record, petitioner was found guilty of violating several prison disciplinary rules including smuggling, “phone program violation” and “facility visiting violation”. The Appellate Division Third Department annulled the determination finding that substantial evidence did not support the determination of guilt. The Court specifically noted that no evidence was presented that an actual exchange of money was made between petitioner and his wife during the visit or that petitioner used the telephone or visiting room to facilitate such an exchange. While the fact that an administrative determination is found to be unsupported by substantial evidence does not automatically equate to the conclusion that it lacks substantial justification, in this case while the administrative record may have indicated a basis for suspicion that smuggling may occur, there is no physical evidence of smuggling having occurred. (*compare, Santos v Coughlin*, 222 AD2d 870 [3d Dept 1995]). Accordingly, based upon review of the administrative record submitted to the Court, including a copy of a tape recording of specific telephone conversations of the petitioner submitted *in camera*, respondent has failed to meet their burden of establishing that the position of the State was substantially justified.

As to the reasonableness of the attorney’s fees sought, petitioner’s counsel has provided a record of time spent on this proceeding. CPLR 8602(b) provides, *inter alia*, that a party seeking an award of fees and other expenses, shall ... submit to the court an application which sets forth ... an itemized statement from every attorney or expert witness for whom fees or expenses are sought stating the actual time expended and the rate at which such fees and expenses are claimed”. CPLR

8601(a) provides that “[f]ees shall be determined pursuant to prevailing market rates for the kind and quality of the services furnished.” Respondent argues that the time records submitted contain many entries where services and tasks are lumped together and provides a listing of dates with respect to billing entries for the Court to review, however, respondent provides no specific argument or analysis with respect to any of such entries. Based upon a review of petitioner’s attorney billing statements, the Court does not find such specifically noted entries to be vague and nonspecific so as to require a reduction in the hours expended.

Respondent further conclusorily argues that a reduction of hours is proper as the case does not involve complex law or facts and the administrative record is not voluminous, noting that the hearing transcript is only 30 pages and there is just one tape of recorded telephone conversations. Again, however, respondent provided no analysis or legal authority supporting such conclusory assertion nor any indication of how much time specifically should be discounted. Respondent further argues that petitioner’s attorney has no right to seek additional compensation in the future.

As to the rate, petitioner’s counsel has submitted the affidavit of Michael E. Cassidy, Esq., Litigation Coordinator and Managing Attorney of Prisoners’ Legal Services of New York, noting that he has requested and been awarded attorney’s fees in a number of prisoner Article 78 proceedings at an hourly rate of \$275.00. Accordingly, while petitioner’s counsel requests \$300.00 an hour with respect to his services (unrelated to travel expenses), the Court will authorize a rate of \$275.00 an hour.

Upon the Court’s review and there being no adequate opposition to the amounts sought, the Court finds petitioner’s application complies with CPLR 8601(b) and that petitioner’s papers support a finding that the fees sought decreased to an hourly rate of \$275.00 with respect to the 39.7 hours charged prior to the filing of the reply, and \$150.00 with respect to the 3 hours of travel time, are

reasonable and consistent with the prevailing market rates for the kind and quality of services furnished. With respect to the reply furnished in this matter, the Court finds that 6 hours is excessive given that the initial application required 9.3 hours and accordingly, will only authorize 3 hours of attorney's fees and the Court will not permit recovery of prospective future attorney's fees.

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

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

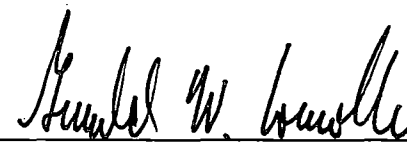
Based upon the foregoing, it is hereby

ORDERED that the relief requested in petitioner's application is granted in part in that petitioner is awarded \$12,192.50 in attorney's fees to be paid directly to petitioner's counsel within thirty days of notice of entry herein.

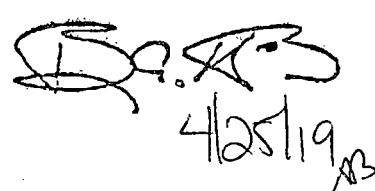
This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being forwarded to the County Clerk for filing. A copy of this Decision and Order is being provided to the petitioner. Counsel is not relieved from the applicable provisions of CPLR 2220 with respect to notice of entry of the Decision and Order.

SO ORDERED.
ENTER.

Dated: April 19, 2019
Albany, New York



Gerald W. Connolly
Acting Supreme Court Justice



Papers Considered:

1. Notice of Motion dated January 14, 2019; affirmation of Thomas Terrizzi, dated January 14, 2019 with Exhibits 1-5 annexed thereto; and Memorandum of Law dated January 14, 2019;
2. Affirmation in Opposition of Lynn Knapp Blake, dated January 28, 2019, with Exhibits 1-2 annexed thereto (including a tape recording submitted for *in camera* review comprising exhibit H of Exhibit 1); Affirmation of William E. Storrs dated January 25, 2019 with exhibit;
3. Reply Affirmation of Thomas Terrizzi dated February 1, 2019 with Exhibits A-D annexed thereto;
4. Amended Letter Order of the Court dated April 18, 2019.