

Valenti v Going Grain, Inc.

2020 NY Slip Op 31782(U)

June 5, 2020

Supreme Court, New York County

Docket Number: 155293/12

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

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THOMAS VALENTI SR.,

Plaintiff(s),

-against-

GOING GRAIN, INC. et al

Defendant(s).
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DECISION AFTER HEARING

INDEX No.: 155293/12

Present:

Hon. Lynn R. Kotler, J.S.C.

This is a decision after an attorney’s fee hearing. In a decision dated August 30, 2017, the Honorable Ellen M. Coin directed that a special referee hear and report on the amount of attorney’s fees to be awarded to plaintiff. After a testimonial hearing, Special Referee Jeremy Feinberg issued his report dated January 7, 2019 (the “report”) in which he determined that plaintiff was entitled to recover fees in the amount of \$78,826.57, together with \$1,974.12 in disbursements along with the uncontested collection fees of \$7,735.75 incurred by Anthony Auciello, Esq.

In 2019, defendants moved pursuant to CPLR 4403, to reject or alternatively modify the report and plaintiff moved to confirm. In a decision dated June 10, 2019, this court rejected the report and ordered a new hearing because “there [wa]s an insufficient explanation of the nexus between plaintiff’s bills and the creation of the spreadsheets sufficient to satisfy this court” and “that the referee failed to delineate the specific tasks performed by plaintiff’s counsel and explain whether the fees sought were reasonable in light of the work performed” and that “these determinations are insufficient to fully establish that the awarded amount was reasonable and commensurate with the work

that was performed”.

The court conducted a hearing on October 3, 2019 and January 8, 2020 to determine what attorney’s fees plaintiff is entitled to recover as a result of the 8/30/17 Order and the 11/12/18 Stipulation. At the hearing, plaintiff called Thomas Conway, Esq., of Conway & Conway (the “firm”), on both dates. Defendants did not call any witnesses

At the conclusion of the hearing, the court reserved decision and the parties were granted an opportunity to submit post-hearing memoranda of law. Plaintiff submitted its post-hearing brief in support of their application for \$161,402.01 (in a footnote plaintiff indicated this amount includes interest from the date of August 22, 2016 through January 31, 2020). Defendant requested that plaintiff’s attorney’s fee award should be \$44,169.17 and that plaintiff’s request for attorneys’ fees was “unjustified, unsubstantiated and outright frivolous”.

Based upon the testimony and the evidence introduced at the hearing, the court makes the following findings of fact and conclusions of law.

Facts

Kevin Conway, Esq., managing attorney at Conway and Conway, whose firm’s focus is securities and commercial litigation, testified that he has been a practicing attorney for 40 years. Attorney Conway testified that the firm maintains a legal billing system on their computers that allows the attorney or paralegal to keep track of their professional time and in turn generates time sheets for review. He further testified that the hourly billing rates for a paralegal is \$250, for lawyers depending on experience, the range is \$350-\$375 and that as top billing attorney, his hourly rate is \$650. He testified

that he is familiar with attorneys Andrea Bonvicino, Christina Simpson, Fawn Lee, who worked on this matter/case, but did not provide any further details regarding these individuals' background or legal experience or for any other attorney or paralegal whose name appears on the time sheets.

Mr. Conway further testified that Toggle is the name of the computer billing program used at the firm and that the person working on a matter would identify the client, indicate the work performed and at the end of the work period the billing program calculates the time, which is done contemporaneous with the task performed. Mr. Conway testified that the time sheets for all clients are then printed and reviewed by him. He further testified that Plaintiff's Exhibit 1 is a billing spreadsheet which is comprised of the Toggl time sheets. Mr. Conway's time appears on Plaintiff's Exhibits 1, 2 and 3, but not on Exhibit 4. which exhibits were entered into evidence during the hearing. He explained that he records his time for legal work performed on a legal pad that he gives to his assistant who records it for each respective client and then after the info is inputted into the computer she gives it back to him to review and check for accuracy. Mr. Conway claimed that once the information is inputted, the legal pad is then disposed of. He testified that he's been recording his time like that for 40 years because "he is a creature of habit". Mr. Conway testified that his firm reduced the October/November 2018 (P Ex. 7) and January 2019 (P Ex. 8) bills by 30% based on the referee's recommendations. Mr. Conway testified that Auciello appeared before the Special Referee and submitted bills totaling \$7,735.75.

Defense counsel stated on the record that the Auciello bills are not an issue at this hearing and that he doesn't oppose the amount of the Auciello bills totaling

\$7,735.75, the amount previously submitted at the Special Referee's hearing.

Mr. Conway testified that he elected statutory interest date from August 30, 2017 because that was the date selected by the Special Referee.

In the post-trial memorandum submitted by plaintiff, the legal fees are itemized as follows:

Exhibit 1 – Billing Spreadsheet – February 2016 through April 2018 - \$94,479.50;

Exhibit 2 – May billing spreadsheet – May 2018 through June 6, 2018 -

\$8,183.00;

Exhibit 3 – June billing spreadsheet – June 2018 - \$830.00;

Exhibit 4 – Toggl Data – 2016 through December 2018;

Exhibit 7 – January 8, 2019 letter/bill – October -November 2018 - \$9,630.10;

Exhibit 8 – January 18, 2018 letter/bill – January 2019 - \$10,328.52 (reflect reduction to 70%)

On cross-examination, defense counsel questioned Mr. Conway on the amount of time it took to compute various legal services/tasks, the hourly rate of paralegals, \$250, attorneys' rates of \$350-\$375 and Mr. Conway's own rate of \$650 as well as the excessive and duplicative time to complete tasks/services. Defendants argue that the amount plaintiff is seeking in attorney's fees is excessive, not contemporaneous, block billing, duplicative and lacking in specificity.

LAW

"[T]he award of reasonable counsel fees is within the sound discretion of the trial court". *Ebrahimian v Long Island Railroad*, 269 AD2d 488, 489 [2d Dept 2000]; see also *Matter of Massey*, 73 AD3d 1179, 1179 [2d Dept 2010]).

Using the lodestar method to determine the reasonableness of attorney fees, the court will take into account the issues in the proceedings, the attorneys' skill and experience, the amount of time and labor involved, the results obtained, and the customary fee for similar services (*see Morgan & Finnegan v Howe Chem. Co., Inc.*, 210 AD2d 62, 63 [1st Dept 1994]; *Ross v Congregation B'Nai Abraham Mordechai*, 12 Misc3d 559, 566 [Hous Part, Civ Ct, NY Cty 2006]).

To arrive at a fair and appropriate award of attorneys' fees under the lodestar method the court shall determine whether the number of hours claimed were reasonably "expended from contemporaneous time sheets." *Becker v. Empire of America Federal Savings Bank*, 177 AD2d 958 (4th Dept 1991); *see also Matter of Rahmey v. Blum*, 95 AD2d 294, 300-301 (2d Dept 1983). The court need not automatically accept inadequately documented hours or those hours which reflect "padding, i.e., hours that are excessive or otherwise unnecessary." *Rahmey*, 95 AD2d at 301. The following factors are also to be considered in assessing the reasonable hours worked: the extent to which the hours reflect inefficiency or duplicative work; legal work versus non-legal work, investigations, and other work performed by non-lawyers; time spent in court differentiated from out-of-court efforts; and the court's own knowledge, experience and expertise as to the time required to complete a similar task. *Id.*; *see also Matter of Spingarn*, 164 Misc2d 891, 894 (Sup Ct, NY County 1995).

The court reviewed the following: plaintiff Exhibits 1, billing spreadsheet, the court calculated a total of 268.3175 hours spent for 2016, 2017 and 2018 by both attorneys and paralegals. In addition, Plaintiff's Exhibits 2 May Billing 15.64 hours for a total of \$8183.00; Exhibit 3 Final June Billing 4.10 hours for a total of \$830 and Exhibit 7

January 8, 2019 bill for a total \$9,630.10 and Exhibit 8 January 18, 2019 bill for a total of \$10,328.52 for work performed by Kevin Conway, Esq., William Bergeesh, Esq. and paralegal Dennis McGrath.

The court scrutinized the time sheets for both attorneys and paralegals and found multiple entries for duplicative work throughout the billing records by multiple attorneys as well as by the paralegals. In addition, when any two of plaintiffs' attorneys discussed the case with each other, each individual billed for his time, effectively doubling the billing.

While plaintiff reduced its hourly fee in Exhibits 7 and 8, these billing entries are worth noting. On the January 18, 2019 invoice, Mr. Conway billed 2 hours for a future court appearance. In addition, Mr. Bergesch's time entries listed approximately 17 hours to draft and edit a motion on January 16, 17 and 18, 2019 and paralegal Denis McGrath spent an additional 8.5 hours to research and draft motion. The court reviewed the ECF entries for the motion submitted by the Conway firm and noted that it was a motion to confirm the special referees report. These billing entries are not only duplicative for the same services but are also excessive given the lack of complexity of the legal issues involved.

With regard to Exhibit 4, Toggle printout, it spans from 2016 through 2019 and references multiple users. The court compared Exhibits 1 and 4 for billing time records and found the billing records unclear. For example, in Exhibit 4, Toggl printout, in 2016 and 2017 there were two law clerks referenced in the document as "Law Clerk 1" and "Law Clerk 2" with no other information to identify this person who worked on the Valenti case. Moreover, in 2017 there was no description of services/tasks by "Law Clerk 2".

Moreover, in 2017, “Law Clerk 2” spent over 33 hours to complete the Valenti Reply and affirmation in support, which was duplicative of time spent by attorneys drafting the Reply. And the same “Law Clerk 2” spent 3 hours, 18 minutes for “notice of entry”. The lack of clarity in the billing records required the court to expend precious judicial resources cross-referencing exhibits to determine the identity of the paralegals performing the various legal services as well as to scrutinize the hours that reflected inefficiency or duplicative work as well as legal versus non-legal work.

One law clerk in particular, Dennis McGrath, is worth mentioning. For the years 2017, 2018 and 2019 he billed over 210 hours with many of his time entries lacking a description of the service performed, billing excessively for ministerial services such as printing of documents - 3 hours on June 8, 2017 and July 13, 2017 - 4 ½ hours to print and sign information subpoenas. In 2019, Mr. McGrath used vague terms to indicate the service/task performed such as “billing, research, billing calculation” and often billed hours to complete these various tasks. The court is constrained to find that plaintiff is entitled to these fees without a further description of the services provided.

Based on a review of the submitted billing time sheets, the court finds it appropriate to reduce the billed hours, and thereby the total attorneys' fees awarded, by 40 percent. *See Perez v. Heckler*, 1984 U.S. Dist. LEXIS 18992, 1984 WL 62847 (SDNY 1984) (finding it reasonable to reduce the requested attorneys' fee award by fifty percent); *see also Spingarn*, 164 Misc 2d at 898 (reducing attorneys' fees due to duplicative and unnecessary legal billing); *see also Continental Bldg. Co., Inc. v. Town of North Salem*, 150 Misc 2d 145, 155, 567 N.Y.S.2d 328 (Sup Ct, Westchester County 1991). This 40 percent deduction reflects a reasonable estimation of unnecessary,

duplicative or otherwise improperly billed hours by the attorneys and paralegals.

The court, in assessing attorneys' fees, must next determine a reasonable hourly rate for each attorney and each category of services rendered. *Rahmey*, 95 AD2d at 301. This determination is guided in large part by the "customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented." *Id.* at 302. The applicable reasonable rate to be applied to each attorney should be "current rather than historic hourly rates." *Gierlinger v. Gleason*, 160 F3d 858, 882 (2d Cir 1998).

Here, while Kevin Conway testified that he's been a practicing attorney for 40 years, his firm's focus is on securities and commercial litigation and his hourly rate is \$650, he failed to provide any other relevant information on his career nor did he provide any information for other members, both attorneys and paralegals, of his firm whose bills were submitted. However, a court "may consider its own knowledge and experience concerning reasonable and proper fees" and be guided thereby in making a determination of the value of the attorneys' services. *Jordan v Freeman*, 40 AD2d 656, 657 (1st Dept 1972).

A deduction is warranted where there is insufficient evidence as to the identity, nature and extent of experience of plaintiff's attorneys. *Jordan v Freeman, supra* (party seeking fees must prove entitlement by demonstrating inter alia professional standing of counsel); *76th Street Owners' Corp. v Elshiekh*, 29 Misc. 3d 1225(A) (Hous Ct, NY Cty 2010).

The court finds that \$250 for paralegals is excessive given that many tasks by the were ministerial in nature and could have been performed by secretarial staff.

Therefore, the court will reduce the paralegal hourly rate from \$250 to \$175.

There was no evidence offered at the hearing as to the educational and work backgrounds for attorneys Andrea Bonacino, Fawn Lee or Christina Simpson. The court finds that the services they performed on the Valenti matter for the years 2016 through 2019 are reasonable and commensurate with services performed by associates in small to mid-sized firms. Attorney William Bergeesh appeared before the court and conducted the attorney's fees hearing. The court finds that the associates billing rate of \$350 shall be reduced to \$300, which is fair and reasonable under the circumstances. The court questioned Mr. Conway's credibility as to his own billing records and those of the members of his firm in light of the fact that he requested this court grant him over \$160,000. Therefore, the court reduces Mr. Conway's hourly rate to \$550 per hour from the requested \$650.

Based on the foregoing, the court reduces Mr. Conway's hourly rate to \$550, associates' hourly rate to \$300 and paralegals' hourly rate to \$175.

There was no testimony or credible evidence produced at the hearing to justify the expenses of \$1,948.12. Therefore, the court declines to award the sum of \$1,948.12 for expenses.

With regard to Anthony Auciello's legal bills, the parties stipulated to the amount of Attorney Auciello's bills in the amount of \$7,783. Therefore, the court will award the amount of \$7,783 to Anthony Auciello, Esq.

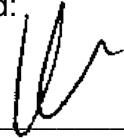
The award of attorney's fees to plaintiff is related to defendant's "post-judgment applications to the court", which is silent as to the accrual date for interest calculation. (See, J. Coin's August 30, 2017 Order). While plaintiff is not entitled to prejudgment

interest, the court finds that a more appropriate date is the date of Justice Coin's order, August 30, 2017.

Settle judgment on notice.

Dated: New York, New York
June 5, 2020

So Ordered:



Hon. Lynn R. Kotler, J.S.C.