USL Mar., LLC v
Adirondack Wild: Friends of the Forest Preserve

2025 NY Slip Op 35317(U)

January 15, 2025

Supreme Court, Franklin County

Docket Number: Index No. E2024-53

Judge: John T. Ellis

At a Term of the Supreme Court of the State of New York, held in and for the County of Franklin, at Tupper Lake, New York on November 15, 2024.

STATE OF NEW YORK
SUPREME COURT COUNTY OF FRANKLIN

USL MARINA, LLC,

Plaintiff,

-against-

ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE and **ADIRONDACK EXPLORER, INC.,**

Defendants.

DECISION & ORDER UPON MOTIONS # 1 & 2
Index No: E2024-53
RJI No.:16-1-2024-0097

APPEARANCES: *Norfolk Beier PLLC*, Lake Placid *(Matthew D. Norfolk, Esq.*, of counsel) for Plaintiff USL Marina, LLC;

Whiteman Osterman & Hannah LLP, Albany (*Philip H. Gitlen, Esq., Anna Seitelman, Esq., Peter R. Bryce, Esq.*, and *Arthur Nix, Esq.*, of counsel) and *Pace Environmental Litigation Clinic, Inc.*, White Plains (*Todd D. Ommen, Esq.*, of counsel) for Defendant Adirondack Wild: Friends of the Forest;

Schoeman Updike & Kaufman LLP, New York (*Charles B. Updike, Esq.*, and *Christopher M. McFadden Esq.*, of counsel) for Defendant Adirondack Explorer, Inc.;

HON. JOHN T. ELLIS, J.S.C.:

Presently before the Court is the issue of an award of costs and attorney's fees to Defendants Adirondack Wild: Friends of the Forest Preserve (hereinafter "Adk. Wild") and Adirondack Explorer, Inc. (hereinafter "Adk. Explorer") (collectively, "Defendants") pursuant to the Court's Decision and Order signed on August 22, 2024 (Motions # 1, 2 & 3) (hereinafter, "Decision and Order"), which, *inter alia*, granted Defendants' motions to dismiss Plaintiff USL Marina, LLC's (hereinafter "Plaintiff") Amended Complaint filed in this action, which was

deemed a SLAPP ("Strategic Lawsuit Against Public Participation") suit pursuant to the Court's Order. Based upon said dismissal, the Court ordered, in pertinent part, "that pursuant to CRL [Civil Rights Law] § 70-a(1)(a), Defendants Adirondack Wild and Adirondack Explorer are awarded their actual costs and reasonable attorney's fees, to be determined upon further proceedings." Consistent with the Court's Order, the parties have submitted supplemental papers in connection with the fee request. In reaching the determinations set forth herein, the Court read and considered: NYSCEF Doc Nos. 58-60, in support of Whiteman Osterman & Hannah LLP's ("WHO") claimed costs and fees in connection with their representation of Adk. Wild; NYSCEF Doc Nos. 61-63, in support of Pace Environmental Litigation Clinic, Inc.'s ("Pace") claimed costs and fees in connection with their representation of Adk. Wild; NYSCEF Doc Nos. 64-67, in support of Schoeman Updike & Kaufman LLP's claimed costs and fees in connection with their representation of Adk. Explorer; NYSCEF Doc Nos. 71-81, in opposition to the Defendants' requested fees;[1] NYSCEF Doc Nos. 90-93, Adk. Explorer's papers in reply; and NYSCEF Doc Nos. 93-95, WOH's papers in reply.[2] Upon reading and considering same, the Court finds that triable issues of fact have been raised, thereby necessitating a hearing before the Court can properly resolve the issue of an award of costs and attorney's fees (*see* CPLR 2218; *see also Lehman Commercial Paper, Inc.*, 146 AD3d 1192, 1195-1196 [3d Dept 2017]). Notwithstanding this conclusion, the Court takes this opportunity to address certain questions of law raised by the parties, to recount undisputed facts, and to set forth the parties' respective positions, all in an effort to narrow the issues before the Court.

[1] The Court notes that the documents filed in opposition to Defendants' fee request are duplicative insofar as it appears that the same set of documents were filed twice in NYSCEF. The Court disregarded this inadvertent error.
[2] The Court also read and considered NYSCEF Doc Nos. 70, and 83-88, which were generally concerned with rectifying omissions and various procedural matters in connection with the fee requests.

The instant Decision and Order assumes the reader's familiarity with prior proceedings had heretofore and further assumes familiarity with the Court's Decision and Order. Notwithstanding this assumption, certain passages are worth excerpting at length, pertinent as they are to the discussion to follow, to wit:

> [CRL § 70-a permits the recovery of fees in a SLAPP action provided that] (a) costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven . . . of the [CPLR], that the action involving public petition and participation was commenced or continued ***without a substantial basis in fact and law*** [*emphasis in original*] . . . .
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> Thus, per the plain language of CRL § 70-a(1)(a), costs and attorney's fees *shall* be recovered upon a demonstration that an action to which CRL § 76-a applies was commenced or continued without a substantial basis in law, as per CPLR 3211(g). Such is the case here and thus, at minimum, Defendants are entitled to recover the costs and attorney's fees associated with this action (*see Mora v Koch*, 79 Misc 3d 434, 442 [Sup Ct, Dutchess County 2023]). . . .
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> With respect to the mandatory award of costs and attorney's fees, this issue may be determined upon the papers alone as well, and only in certain circumstances, such as disputed facts, must the Court hold a hearing (*see Brinson v Brinson*, 178 AD3d 1367, 1369 [4th Dept 2019]; *see also Lamb v Amigone*, 12 AD3d 1165, 1165 [4th Dept 2004]). While an award of costs and fees is certain pursuant to CRL § 70-a(1)(a), the extent of such award is yet to be determined and the Court shall order the parties to submit further papers with the proper evidentiary support so that the Court can assess the *reasonableness* of the requested costs and fees (*see Hinman v Jay's Village Chevrolet Inc.*, 239 AD2d 748, 748 [3d Dept 1997]). Should it be necessary, the Court shall hold a hearing with respect to same (*see Lehman Commercial Paper, Inc. v Point Property Co., LLC*, 146 AD3d 1192, 1195-1196 [3d Dept 2017] [noting that while the determination to award attorney's fees can be based upon papers alone, a hearing is required where the required evidence — such as counsel's experience, ability, reputation, hourly rates, the prevailing hourly rate for similar work, itemized bills, the difficulty of the questions presented, and a multitude of other relevant factors — is lacking]).

Having framed the issue thusly in its prior Decision and Order, the Court now summarizes the parties' respective positions and those aspects of the parties' factual submissions which are, unless otherwise noted, undisputed. Senior Counsel for WOH, Phillip H. Gitlen, Esq, avers that WOH and Pace had an agreement in this matter to divide work. Among other things, Pace's student interns were tasked with the initial research and drafting of motion papers, which were then finalized by WOH. Though Plaintiff's counsel certainly disputes the assertion, each of

the Defendants' attorneys who submitted affirmations in support of the requested fees avers that it is their belief, based upon personal familiarity with the case and their own legal experience, that the hours expended, work performed, and fees charged were reasonable and/or necessary. Further, invoices and/or billing statements/records were submitted by counsel for the Defendants in support of the requested fees. The total number of hours chargeable to Adk. Wild by WOH through September 19, 2024 are 49.5. The hourly rates of the WOH attorneys involved in this matter varies from $295.00 to $350.00. It is asserted that these hourly rates are typical, if not lower than, the typical billing rates charged in this type of matter. Although WOH's initial submission omitted invoices and/or detailed billing records for the bulk of their work — an omission which Plaintiff was quick to note — the papers submitted in reply sets forth further billing records. The reply papers submitted by WOH on behalf of Adk. Wild further acknowledge a $140.00 billing error, which amount was redacted, leaving a total revised fee request by WOH on behalf of Adk. Wild in the amount of **$15,423.82** (which amount includes $91.32 in disbursements).

With respect to Pace's claimed fees on behalf of Adk. Wild, the Director of the Pace's Environmental Litigation Clinic, Professor Todd D. Ommen, Esq., aside from agreeing with certain statements made by WOH counsel in their affirmation, sets forth that the student interns who worked on the case were authorized to practice as attorneys pursuant to a Practice Order issued by the Appellate Division. It is further indicated that no time was billed for time spent in a teaching capacity or for students to become familiar with the instant action. Professor Ommen also indicates that his time billed through September 19, 2024 amounted to fifteen (15) hours at $350.00 per hour, for a total of $5,250.00. The total number of student intern hours amounts to 125.6 hours. Owing to the fact that the law students are not yet admitted, their time was billed at

a "very conservative" (NYSCEF Doc No. 61, ¶ 12) $180.00 hourly rate for paralegals in Pace's geographic location. Therefore, fees traceable to the student interns' efforts amount to $22,608.00. Total fees claimed by Pace on behalf of Adk. Wild thus amount to **$27,858.00.**[3] Accordingly, the total fee claimed by Adk. Wild is **$43,281.32**.

Regarding Adk. Explorer's claimed fees, Charles, B. Updike, Esq., member of Schoeman Updike & Kaufman LLP, notes, among other things, that Adk. Explorer is insured by Hiscox Insurance and that this entity is financing Adk. Explorer's defense. Adk. Explorer has a $10,000.00 deductible under their policy and incurred $1,732.50 fees before Hiscox Insurance was put on notice. This amount was deducted from the first invoice billed since it is properly payable by Adk. Explorer. Owing to Attorney Updike's relationship with the Adk. Explorer — that of a sitting board member — the $11,732.50 referenced above has been "deferred" until conclusion of the matter (NYSCEF Doc No. 64, ¶ 4). Attorney Updike indicates that his standard hourly rate, as well as that of a partner, is $715.00, but both were s reduced to $525.00 per hour. Another partner's rate was reduced from a standard $595.00 per hour to $460.00. It is further submitted that while Attorney Updike generally acts *pro bono* vis-à-vis the Adk. Explorer, an exception was made for this action due to its broad scope, and that his familiarity with the organization reduced the amount of time and effort an attorney otherwise would have expended in becoming acquainted with their client and potential defenses. Adk. Explorer's fee request is current through September 20, 2024, and by the Court's calculation amounts to 122.2 total hours. In total, Adk. Explorer thus seeks **$58,843.82** (inclusive of $350.32 in disbursements) for costs and fees in this matter, to be allocated among Hiscox Insurance and itself according to their respective interests. Thus, the total combined costs and attorney's fees

[3] On review, the Court did not note any out-of-pocket expenses/fees/disbursements listed in Pace's submissions.

sought by the Defendants in this matter amounts to **$102,125.64**.

Turning now to the papers submitted by Plaintiff in opposition to the requested costs and fees, Plaintiff's counsel, Matthew D. Norfolk, Esq., raises several issues, both factual and legal. Plaintiff's chief argument with respect to the fees requested is that both the hourly rates charged, and the number of hours expended by Defendants' counsel are excessive. For perspective, Plaintiff's counsel, located locally and in relatively close proximity to their client based in Franklin County, New York, notes that from start to finish, they have expended only 37.2 hours on this matter, with attorney rates ranging from $375.00 per hour for Attorney Norfolk, to rates of $190.00 to $200.00 per hour for associates.

As further support for this line of reasoning, Plaintiff offers the affirmation of Michael J. Hutter, Esq., a well-established figure in the legal community and professor at Albany Law School. Professor Hutter first addresses the hourly rates claimed on behalf of Adk. Explorer, referring to them as "shockingly excessive" (NYSCEF Doc No. 73, ¶ 9). These rates, it is indicated, while not atypical of firms located in Manhattan, are not in line with what is generally charged in Northern New York or Franklin County, where this action is centered. Professor Hutter states that $295.00 to $350.00 per hour would be more appropriate for attorneys with the experience of Adk. Explorer's counsel, and notes that Adk. Wild's WOH counsel appears to agree with that assessment, having indicated that this fee range is typical in a case of this type. Schoeman Updike & Kaufman LLP's 122.2 hours expended are also unjustified, it is asserted, and as and for his professional assessment, Professor Hutter indicates that no more than forty-five (45) hours should have been spent in defending Adk. Explorer's interests. Thus, based upon the foregoing assessments, Professor Hutter arrives at a figure for Schoeman Updike & Kaufman LLP's fees on behalf of Adk. Explorer of $13,500.00 to $15,750.00.

Similarly, with respect to Pace's claimed fees, Professor Hutter indicates, among other things, that the $180.00 per hour requested as a rate of reimbursement for the 125.6 law student hours expended in this matter is excessive. Noting the generally unpaid nature of student work performed in a clinical capacity, as well as their need to spend as much as twice the amount of time on a given task compared to an experienced attorney, Professor Hutter opines that no more than $85.00 per hour and half of the requested time (62.8 hours) would be more in the nature of a reasonable fee award, for a total of $5,338.00 in Pace law student fees. With respect to Professor Ommen's requested fees on behalf of Adk. Wild (15 hours at $350.00 per hour, totaling $5,250), Professor Hutter asserts that in his experience, it is considered double billing to charge a client for the duplicative efforts of law students and a supervising professor acting in a managing attorney role, especially given WOH's admitted supervisory role. Since Professor Ommen was acting in his professorial capacity, Professor Hutter argues that his time is not properly charged to Plaintiff as part of a reasonable award of fees.

Lastly, Professor Hutter asserts that at the time of his review, much of WOH's fee request was without evidentiary support and thus, by definition, cannot constitute a reasonable fee. As mentioned previously, however, WOH has since rectified this particular issue by way of its reply papers. Having set forth the material facts which are not in dispute and the parties' respective positions, the Court now turns to the various questions of law raised by Plaintiff in addressing Defendants' requested fees.

Plaintiff, in a Memorandum of Law (NYSCEF Doc No. 75) sets forth various legal arguments in connection with the fee request and proposes three courses: (1) denial of Defendants' motions and modification of the Court's prior Decision and Order; (2) alternatively, a reduction of the amount of the fee award to a nominal $1.00 for each Defendant; or (3)

alternatively, ordering a hearing on the issue of costs and fees. While the Court ultimately concludes that a hearing is necessary so that any and all factual issues can be explored, addressing the various legal arguments raised by Plaintiff's counsel in the Memorandum of Law will permit the Court to resolve those issues capable of resolution upon the papers alone, while highlighting those issues which remain in controversy. However, the Court can state without hesitation that having considered the first two avenues proposed by Plaintiff above, it roundly rejects same. As to the first argument, that the Court should modify its prior Decision and Order, there is no motion to renew or reargue before the Court (*see* CPLR 2221) and as will be addressed in further detail, there are simply no legal grounds stated which would warrant modification of the Court's prior Decision and Order. The supplemental submissions which the Court invited following entry of its Decision and Order were meant to address the issue of costs and fees and were not intended to afford second bites at the apple on settled issues. As to the second request, to award nominal costs and fees, the Court finds this proposal to be similarly lacking. Simply put, the CRL mandates an award of ***reasonable*** costs and attorney's fees and the Court does not perceive circumstances which would make a nominal award appropriate.

Plaintiff sets forth a variety of legal arguments which generally stand for the proposition that Defendants are entitled to little to no recovery of costs and fees. Among other arguments presented by Plaintiff are that Adk. Wild's legal work was performed largely by unpaid law students, that Adk. Explorer's legal defense will largely, if not entirely, be paid for by their insurer, that little fees have actually been incurred, and that the fees are generally unreasonable and excessive.

As to the Plaintiff's citation to the American rule and the disinclination of New York State courts to award costs and fees absent a statutory or contractual basis, the Court notes, as

Plaintiff must concede, that a SLAPP suit is one of those types of actions where the recovery of costs and fees is provided for by statute. Specifically — and not to rehash trodden ground — CRL §§ 70-a and 76-a are applicable and state in pertinent part:

> [CRL § 70-a]
> 1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, ***may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees***, from any person who commenced or continued such action; provided that [*emphasis added*]:
>
> ***(a) costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven*** or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, ***that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law*** and could not be supported by a substantial argument for the extension, modification or reversal of existing law [*emphasis added*];
>
> (b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and
>
> (c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights [*emphasis added*].
>
> [CRL § 76-a]
> 1. For purposes of this section:
> (a) An "action involving public petition and participation" is a claim based upon:
> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
> (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition. . . .
>
> 2. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

Keeping the foregoing provisions of the CRL in mind, the Court turns to the various arguments advanced by Plaintiff.

Plaintiff first asserts that the request for costs and fees and any order granting same would be premature since an appeal has been filed. The grounds for Plaintiff's appeal, among other things, is that the instant action had a substantial basis in law and was not a SLAPP suit at all, thereby negating the application of the unique provisions governing such actions. Again, while the Court will not entertain any arguments that this action is not a SLAPP suit such that the foregoing provisions of the CRL can be said to have been rendered inapplicable — there being no motion to renew or reargue and this issue having been definitely settled by the Court's prior Decision and Order, it is for the Appellate Division to address any such arguments — the Court will address the argument that an award of costs and/or fees would be premature given the pendency of an appeal. In a recent case, the Appellate Division, First Department, declined to impose a stay of trial court proceedings under similar circumstances in a SLAPP suit (*see Samuel D. Isaly, 2593 v Damian Garde and Delilah Burke*, 2024 NY Slip Op 71498[U] [1st Dept 2024]).

Further, stays pursuant to CPLR 2201 are discretionary and Plaintiff has not offered any convincing arguments as to why further proceedings before this Court should await a determination from the Appellate Division. While it is not for this Court to concern itself with the appellate process, it does not see why, if an appeal has been taken from the Court's Decision and Order, any award of costs and fees which is pursuant to that Order would not also be subject to reversal and/or remand if the facts and/or law warrant same, assuming, of course, that the appeal is properly taken and perfected and the Appellate Division is kept abreast of developments in the case. Put simply, if any aspects of this Court's determinations are found to be in error, to include an award of costs and/or fees, the Appellate Division can be trusted to reach all issues which are properly before it.

As to Plaintiff's next argument, that recovery of costs and fees are impermissible because Defendants have erred procedurally by pursuing same via motion instead of a separate action, claim, cross claim, or counterclaim, the Court disagrees. Plaintiff's argument in this regard is understandable based upon the language of the CRL, but nonetheless misplaced. While it is true that CRL § 70-a indicates that a Defendant in a SLAPP suit "***may***" maintain "an action, claim, cross claim or counterclaim to recover ***damages, including costs and attorney's fees*** [from the adverse party] [*emphasis added*]," Plaintiff is incorrect insofar as they assert that these are the *only* procedural vehicles whereby Defendants can recover costs and fees.

Plaintiff's reading of CRL § 70-a is selective, and ignores the subsequent language in the statute which indicates that: "(a) ***costs and attorney's fees shall be recovered*** upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven . . . that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law." The Court's prior Decision and Order made just such a finding and thus, costs and attorney's fees *shall* be recovered, to include by way of the same CPLR 3211(g) motion which led to dismissal of the Amended Complaint. In *Isaly v Garde* (83 Misc 3d 379 [Sup Ct, New York County 2024]), the New York County Supreme Court addressed this exact issue and concluded that while *discretionary* compensatory and punitive damages must be pursued via a separate action, claim, cross claim, or counterclaim, such was not the case with the *mandatory* award of costs and attorney's fees (*id.* at 387). The *Isaly* Court reasoned, among other things, that the Legislature signaled this intent by using the specific language that it did with respect to costs and fees versus compensatory and punitive damages. The Court agrees with the reasoning in *Isaly* and adopts it as its own. However, the Court need not rely only upon *Isaly* to support its conclusion that costs and attorney's fees may

be sought simply by motion, as other Courts have also reached the same conclusion (*see Goldman v Abraham Heschel Sch.*, 227 AD3d 544, 545 [1st Dept 2024] [noting that the trial court properly granted defendant's request for attorneys fees because adjudication of a CPLR 3211[g] motion in its favor entitles a defendant to costs and attorney's fees]; *see also Golan v Daily News, L.P.*, 2023 NY Slip Op 33135[U], *2 [Sup Ct, New York County 2023] [rejecting argument that the Appellate Division and not the trial court must decide the issue of entitlement to costs and attorney's fees under CRL § 70-a]).

With respect to Plaintiff's argument that Defendants are not entitled to an award of costs and attorney's fees because the Court's prior Decision and Order awarded Defendants "actual costs and reasonable attorney's fees" and Defendants have produced no evidence that they have suffered damages in the form of legal expenses, the Court finds this argument to be unavailing as well. First, though not overly germane to the discussion to follow, insofar as Plaintiff asserts that the purpose of an award of costs and attorney's fees is to reimburse a party for their expenses in defending a lawsuit (NYSCEF Doc No. 75 at 11), this is only partially correct in the context of SLAPP litigation. As discussed in the Court's prior Decision and Order, one of the primary purposes, if not *the* primary purpose, of such an award is to discourage meritless suits that are aimed at, or which have the effect of, chilling the exercise of first amendment speech rights. Thus, an award of costs and attorney's fees, at least in context of SLAPP litigation, is not a purely remedial measure, but serves a deterrent and protective purpose as well. While Plaintiff is correct that an award of costs and attorney's fees should not amount to a windfall for the prevailing Defendants based on inflated hours, rates, or any other factor, it is not accurate to say that the purpose behind CRL § 70-a is simply to reimburse a prevailing party.

In any case, Plaintiff's main point in making this argument is that to the extent attorney's

fees have yet to be paid or will never be paid, they are not properly recovered. The Court disagrees. Plaintiff cites no caselaw for this proposition and instead draws comparisons between CRL § 70-a and other fees shifting provisions such as 22 NYCRR § 130-1.1. The Court is not inclined to depart from the general rules regarding an award of costs and/or attorney's fees and is aware of no such rule that requires that the fees at issue be paid before the Court can enter an order awarding same. As Plaintiff's own submission shows, courts routinely look to what has been billed rather than what has been paid when analyzing a fee controversy (*see East Aurora Coop. Mkt., Inc. v Red Brink Plaza LLC*, 197 AD3d 874, 877 [4th Dept 2021]). Other reported cases are in accord with this view (*see Abitbol v Rice*, 2024 NY Slip Op 32305[U], *8 [Sup Ct, New York County 2024]). The Court would further note that the parties to the instant matter are sophisticated and represented by able counsel. To the extent that a party has been billed for legal services but has yet to pay for same, it is reasonable for the Court to assume that monies claimed to be legitimately owed will be paid. If not, the Court also thinks it fair to assume that the respective firms involved would take issue with any non-payment and act accordingly.

Regarding Plaintiff's argument that costs/fees cannot be recovered until actually paid as it relates to the Adk. Explorer specifically, Adk. Explorer is insured and it is their insurer, Hiscox Insurance, which has incurred the costs and attorney's fees on behalf of Adk. Explorer (other than the deferred amounts referenced above). Notwithstanding this fact, Adk. Explorer is still entitled to recover costs and attorney's fees consistent with the Court's Decision and Order. Adk. Explorer's counsel has provided an excerpt from Adk. Explorer's policy with Hiscox Insurance. In essence, the policy indicates that in the event Hiscox makes a payment under the policy, Adk. Explorer is required to cooperate with Hiscox in asserting rights to recovery and that any recovered amounts will be distributed between Hiscox and Adk. Explorer depending

upon the circumstances of the recovery. Under these circumstances, wherein Adk. Explorer is permitted to recover sums, which are then allocated among the insurer and the insured according to their pro rata share of the costs, Adk. Explorer's recovery of costs and attorney's fees is not precluded (*see American Ref-Fuel Co. of Hempstead v Resource Recycling, Inc.*, 307 AD2d 939, 942 [2d Dept 2003]). The case upon which Plaintiff places reliance (*Cardo v Board of Mgrs., Jefferson Vil. Condo 3*, 67 AD3d 945 [2d Dept 2009]) does not necessitate a different conclusion since that case is factually distinguishable from the matter at hand, there being proof before this Court that Adk. Explorer *does* have the right to seek attorney's fees on behalf of its insurer.[4]

Finally, the Court arrives at what it perceives to be Plaintiff's primary argument regarding the unreasonable and/or excessive nature of the costs and attorney's fees requested by the Defendants. A hearing is required on this subject, as will be further detailed below, and thus, with respect to this aspect of the cost and attorney fee application, the Court's merely seeks to narrow the parties' focus by disposing of issues which can be properly disposed of at this juncture. First, recovery of attorney's fees for the work of unpaid students, pro bono work, or the work of a director/managing attorney of a not-for-profit legal corporation utilizing student interns is not precluded and Courts have awarded fees for such services in the past (*see DiGennaro v Bowen*, 666 F Supp 426, 431-432 [ED NY 1987]; *see also Medina v Butler*, US Dist Ct, SD NY, 2019 WL 4370239, 15-cv-1955, Preska, J., 2019). Thus, while it may be argued, *inter alia*, that the hourly rates claimed by Pace are excessive, that the hours are excessive, and/or that hours are duplicative, as a matter of law Defendants are entitled to an

[4] Plaintiff's argument that attorney's fees are not recoverable until actually paid is further undercut by the body of caselaw which holds attorney's fees recoverable even when services are rendered on a *pro bono* basis (*see e.g. Entertainment Partners Group, Inc. v Davis*, 155 Misc 2d 894, 904 [Sup Ct, New York County 1992]). It is axiomatic that in a *pro bono* situation, no payment for services rendered is even contemplated. However, same is not a bar to recovery of fees (*id.*).

award of costs and attorney's fees for the work performed by Pace. It is the amount which remains in question, and which must await a hearing.

Second, with respect to disbursements, while Plaintiff is correct that the Court's Decision and Order awarded "actual costs and reasonable attorney's fees," Defendants are nonetheless entitled to an award of out-of-pocket expenditures for fees and disbursements (*see* CPLR Articles 80 and 83). In the Court's experience, the phrases "fees," "costs," and "disbursements" are often used interchangeably, and thus wrongly, since the phrases are terms of art which have specific meanings under CPLR Articles 80, 81, 82, and 83. The Court's Decision and Order ignored this distinction and utilized the phrase "costs" in the colloquial sense to describe Defendants' out-of-pocket expenses made in connection with these proceedings, i.e., their fees and disbursements. Thus, the Court's Order in this regard could have been more artfully worded. However, the Court takes this opportunity to clarify that, in awarding actual costs and reasonable attorney's fees to Defendants, the Court awards fees pursuant to Article 80, costs pursuant to Articles 81 and 82, and disbursements pursuant to Article 83. Put differently, in awarding attorney's fees pursuant to a statute or contract which provides for the recoupment of "costs and attorney's fees" or language of a similar nature, the phrase "costs" embraces any item which would properly be itemized in a bill of costs/statement for judgment.[5]

With respect to the hearing to be scheduled, the Court stresses that a same is necessary because, although the parties' papers supply a great deal of the information the Court requires to engage in a reasoned analysis and arrive a comprehensive determination (*see Lehman*

[5] Further, pursuant to CPLR 8101 and 8301(a), a party in whose favor judgment is entered is entitled to costs, and a party who is awarded costs in an action is entitled to tax his necessary disbursements (*see also Law Office of Thaniel J. Beinhart v Litinskaya*, 43 Misc 3d 1205[A], 2014 NY Slip Op 50504[U], *7 [Civ Ct, Kings County 2014]; *Entertainment Partners Group, Inc. v Davis*, 155 Misc 2d 894, 904 [Sup Ct, New York County 1992]). In this action, judgment will be entered in the Defendants' favor since the final adjudication of the parties' respective rights (*see* CPLR 5011) will be dismissal of the Amended Complaint.

Commercial Paper, Inc., 146 AD3d at 1195 [reciting factors to consider in an award of costs and fees]; *see also O'Malley v Town of Vestal Police Dept.*, 226 AD3d 1204, 1206 [3d Dept 2024]), enough material issues of fact are posited by Plaintiff as to make resolution of the present controversy inappropriate absent an opportunity to be heard (*see Lehman Commercial Paper, Inc.*, 146 AD3d at 1194-1196, citing *Kumble v Windsor Plaza Co.*, 128 AD2d 425, 426 [1st Dept 1987] [internal citations omitted] [noting that where issues were raised as to the amount claimed and the services performed, a hearing was required with respect to an award of attorney's fees]; *see also Brinson v Brinson*, 178 AD3d 1367, 1369 [4th Dept 2019], quoting *Matter of Kobel v Martelli*, 112 AD2d 756, 757 [4th Dept 1985] [holding that the trial court abused its discretion in awarding counsel fees without granting the opposing party an opportunity to elicit further information on the reasonable value of legal services rendered]; *Golan v Daily News, L.P.*, 2023 NY Slip Op 33135[U], *4 [Sup Ct, New York County 2023] [awarding fees on papers alone "in the absence of any opposition on the issue of the reasonableness or a request for a hearing"]; *Law Office of Thaniel J. Beinhart v Litinskaya*, 43 Misc 3d 1205[A], 2014 NY Slip Op 50504[U], *7 [internal citations omitted] [noting that where a party legitimately challenges the amount claimed and services performed, an award of counsel fees can occur only after an adversarial hearing]).[6]

Thus, the only issues to be raised at the hearing scheduled pursuant to the instant Decision and Order are those concerning disputed questions of fact. These issues include, but are not limited to: Plaintiff's claims of improper block billing; Plaintiff's claims of unnecessary

[6] The Court notes that the party seeking an award of attorney's fees bears the initial burden of establishing, in the first instance, the reasonableness of the requested fees (*see O'Malley v Town of Vestal Police Dept.*, 226 AD3d at 1205-1206, citing *Gutierrez v Direct Mktg. Credit Servs.*, 267 AD2d 427, 428 [2d Dept 1999]). It is also worth noting that upon applications for costs and fees in SLAPP cases, costs and fees may continue to accrue during the course of the proceedings concerning same (*see Golan v Daily News, L.P.*, 2023 NY Slip Op 33135[U], *2, citing *Sage Realty Corp. v Proskauer Rose LLP*, 288 AD2d 14, 15 [1st Dept 2001]; *see also Troy v Oberlander*, 181 AD2d 557, 557-558 [1st Dept 1992] [noting that counsel was entitled to additional fees for time expended in proving the value of services rendered, so called "fees on fees"]).

time expenditures, to include purportedly unnecessary research, drafting, and/or unfiled motions; Plaintiff's claims of vague or nonspecific time entries; Pace's relationship with WOH, how tasks were divided or handled between Pace and WOH, and the capacity in which Professor Ommen acted with respect to this action; the nature of the work performed and any compensation/credit received by the Pace law students involved in this matter; the relationship between Adk. Explorer, its counsel and/or its insurer; Plaintiff's claim of attorney's performing tasks which are, in actuality, more appropriately handled by administrative staff; and any other facts or factors which may aide the Court in arriving at a determination with respect to costs and fees.

Accordingly, the parties are directed to appear for a framed issue hearing to determine the reasonableness of the requested costs and fees (*Cardo v Board of Mgrs., Jefferson Vil. Condo 3*, 67 AD3d at 945). The Court further draws the parties' attention to the *Lehman* case cited above and explicitly cautions that the parties should be prepared to submit proofs in support of their claim or in opposition to same. To the extent that the Court has not expressly addressed an issue or argument raised, they have been examined and found to be without merit or rendered academic based upon the findings and determinations made herein.

ACCORDINGLY, IT IS HEREBY

ORDERED, that consistent with the reasoning and determinations set forth herein, the parties are directed to appear for an **IN-PERSON HEARING on February 13, 2025 2025 at 9:30a.m., at the Franklin County Courthouse, 355 W. Main St., Malone, NY 12953.**

THE FOREGOING CONSTITUTES THE DECISION AND ORDER OF THE COURT

Signed and Dated: January 15, 2025 ~~2024~~
Tupper Lake, New York

ENTER

Hon. John T. Ellis, J.S.C.