

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

MANUEL J. POMBO :
 :
 v. : C.A. No. 15-291ML
 :
 CITY OF PROVIDENCE :

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

This matter is presently before the Court on Plaintiff's Corrected Motion for an Award of Attorneys' Fees pursuant to 42 U.S.C. § 1988. (Document No. 17). In his Motion, Plaintiff seeks an award of attorneys' fees in the amount of \$27,551.25. Id. at 2. Defendant filed an Objection, to which Plaintiff replied. (Document Nos. 18, 21).

The Motion for an Award of Attorneys' Fees has been referred to me for preliminary review, findings and recommended disposition. 28 U.S.C. § 636(b)(1)(B) ; LR Cv 72. After reviewing the pleadings and considering relevant legal research, I recommend that the Motion be GRANTED in part and that Plaintiff be awarded \$21,610.50 for his attorneys' fees.

Background

Plaintiff is a street performer who plays his saxophone in public and accepts donations. In his Complaint, he alleged that the permitting scheme in the City of Providence infringed his Constitutional rights. Plaintiff filed his 42 U.S.C. § 1983 Complaint under the First and Fourteenth Amendments, seeking declaratory and injunctive relief, damages and costs under 42

U.S.C. §§ 1983 and 1988. Id. Ultimately, the parties entered into a Consent Judgment before Senior Judge Lisi on January 6, 2016. (Document No. 12).

The Award of Attorneys' Fees

Plaintiff seeks an award of fees under 42 U.S.C. § 1988(b), the “Civil Rights Attorney’s Fees Awards Act” (the “Act”). The Act provides that “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.” In the present action, the parties disagree as to whether Plaintiff is in fact a “prevailing party” and also whether the claimed fees, in their entirety, are “reasonable.”

I. Prevailing Party Status

Generally, a prevailing party in a case is entitled to recover attorneys’ fees pursuant to 42 U.S.C. § 1988 unless “special circumstances would render such an award unjust.” Pontarelli v. Stone, 781 F. Supp. 114, 119 (D.R.I. 1992) (citing Blanchard v. Bergeron, 489 U.S. 87, 89 n.1 (1989)). Accordingly, the Court must determine whether Plaintiff “prevailed.”

A party need not obtain a verdict or final judgment to prevail as “[a] plaintiff may be deemed a prevailing party if its law suit prompted the defendant to provide the relief sought under the aegis of a settlement or otherwise.” Id. To be successful, Plaintiff must demonstrate “a ‘material alteration of the legal relationship of the parties,’ with a sufficient ‘judicial imprimatur on the change.’” Aronov v. Napolitano, 562 F.3d 84, 89 (1st Cir. 2009) (citing Buckhannon Bd. & Care Home, Inc., v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 604-605 (2001)). In Aronov, the First Circuit Court of Appeals considered an attorneys’ fee claim under the Equal Access to Justice Act, a fee-shifting statute that contains the same

“prevailing party” terminology as 42 U.S.C. § 1988. The First Circuit has also recently noted that “prevailing party” is a “legal term of art” and stated that the “concepts that shape the term apply broadly to the entire universe of federal fee-shifting statutes.” Hutchinson v. Patrick, No. 10-1268, 2011 WL 540538, *3 (1st Cir. Feb. 17, 2011). Accordingly, Aronov and Hutchinson guide the Court in this case. In Aronov, the First Circuit noted that the prevailing party analysis could be satisfied either where there is a judgment on the merits or a settlement made enforceable by a consent decree. Id.

In the instant case, like in Aronov, there was not a judgment on the merits. Accordingly, the determination of whether Plaintiffs are prevailing parties turns on whether the Consent Judgment satisfies the standard for a prevailing party finding as set forth in Aronov. The First Circuit has set forth a tripartite test that governs this issue. Under that test, a settlement order or consent judgment can satisfy the “judicial imprimatur” standard when it (1) is a court-ordered change in the legal relationship of the parties; (2) is judicially approved with regard to the merits of the case; and (3) provides for judicial oversight of the parties. Aronov, 562 F.3d at 90.

Here, the parties’ settlement was not private, but instead was negotiated in conjunction with a Court-sanctioned mediation conference and ultimately memorialized in the Consent Judgment entered by the Court. The Consent Judgment provides that “[p]ursuant to Fed. R. Civ. P. 65(d)(2), this injunction is binding upon the parties.” (Document No. 12). Given this, it is clear that the change in legal relationship was Court-ordered, and thus the first prong of the test is satisfied.

Next, the second prong requires judicial approval “vis-a-vis the merits of the case.” Here, the Consent Judgment specifically states that “[b]ecause soliciting donations is protected speech under the First Amendment, the City of Providence is permanently enjoined from forbidding Plaintiff Pombo from soliciting or accepting donations for his performance in public places.” (Document No. 12, ¶ 3). Furthermore, as a result of the City’s “violation of [Plaintiff’s] constitutional rights” the Order awarded Plaintiff \$1,500.00 in compensatory damages. (Document No. 12, ¶ 5). Given these factors, a sufficient appraisal of the merits occurred in connection with the negotiation and entry of the Consent Judgment as required to fulfill the second prong of the tripartite test.

Finally, the third prong considers judicial oversight. To that end, the Consent Judgment states that “[p]ursuant to Fed. R. Civ. P. 65(d)(2), this injunction is binding upon the parties, the parties’ officers, agents, servants, employees, and other persons who are in active concert with them.” (Document No. 12, ¶ 4). Further, the Consent Judgment is an Order of this Court and thus subject to future enforcement if necessary. Accordingly, the third prong is satisfied.

Having considered each of the three prongs of the test, the Court finds that the Consent Judgment in this case involved the sort of judicial involvement typically found in a consent decree. The satisfaction of the tripartite test establishes that the Consent Judgment in this matter “create[s] the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.” Buckhannon, 533 U.S. at 604. Having determined that Plaintiff meets the “prevailing party” standard, I must now consider what constitutes a reasonable fee in this case.

II. Reasonable Fee Analysis

Although the Court has determined that Plaintiff is a prevailing party, the Court maintains broad discretion in determining a reasonable fee amount. Boston's Children First v. City of Boston, 395 F.3d 10, 14 (1st Cir. 2005). Plaintiffs are required to submit sufficient documentation to support the hours and rates claimed in their fee request. See O'Rourke v. City of Providence, 77 F. Supp 2d 258, 263 (D.R.I. 1999). Defendant, in turn, may submit countervailing evidence. Foley v. City of Lowell, 948 F.2d 10, 20-21 (1st Cir. 1991). If a plaintiff submits insufficient documentation or does not otherwise present evidence that the fee it seeks is reasonable, the Court may reduce the attorneys' fees awarded. O'Rourke, 77 F. Supp 2d at 263. This Court has noted that, "in order for the district court to properly evaluate attorneys' fees, the documentation provided must be full and specific, offering a description of both the time spent and the subject matter of the task performed." Rhode Island Med. Soc'y v. Whitehouse, 323 F. Supp. 2d 283, 288-289 (D.R.I. 2004). Without the required level of specificity, the Court is unable to "gauge whether the task performed was warranted" or "determine if the time factor allocated was appropriate or excessive." Id. Thus, where documentation is inadequate to support the claimed award, it must be eliminated. Id. (quoting O'Rourke, 77 F. Supp. 2d at 263).

In determining what constitutes a reasonable fee, the Court starts by calculating a lodestar. See Lipsett v. Blanco, 975 F.2d 934 (1st Cir. 1992). A lodestar is "the base amount of the fee to which the prevailing party is entitled...." Id. The lodestar is calculated by "multiplying the number of hours productively expended by counsel times a reasonable hourly rate." Id. In

determining the lodestar, the first step requires ascertaining the number of hours spent by each attorney and then subtracting time that was “duplicative, unproductive, excessive, or otherwise unnecessary.” Id. citing Grendel’s Den, Inc. v. Larkin, 749 F.2d 945, 950 (1st Cir. 1984). Then, the Court must determine a reasonable hourly rate by “taking into account the ‘prevailing rates in the community for comparably qualified attorneys.’” Id. (citation omitted). Finally, once the hours and the rate are determined, the fee is considered “reasonable” but can be subject to an upward or downward adjustment in certain circumstances. Id.

In the present case, Plaintiff requests an award of attorneys’ fees in the amount of \$27,551.25. Plaintiff’s counsel submitted an array of supporting documentation including contemporaneous time records, their own Affidavits, an Affidavit of disinterested counsel as well as citations to legal support for their claimed fees. Defendant’s Objection disputes the amount of fees claimed for several reasons. After considering all of the material presented, the Court resolves the dispute as set forth below.

A. Hourly Rate

First, the Court is tasked with ascertaining a reasonable hourly rate. Plaintiff bears the burden of demonstrating that the rates charged are “in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” Block v. Mollis, C.A. No. 09-047S, 2009 WL 2208107 *3 (D.R.I. July 22, 2009) (quoting Blum v. Stenson, 465 U.S. 886, 895-896 n.11 (1984)). To that end, Plaintiff’s counsel submitted their own individual Affidavits and the Affidavit of Attorney Richard Sinapi. (Document Nos. 14-2, 14-4, 15). The requested hourly rates are \$150.00 per hour for Attorney

Kurland and \$250.00 per hour for Attorney Dineen. After reviewing the materials submitted, and in light of the Defendant's concession that the rates are "reasonable in light of what comparable attorneys would charge for their time in Federal Court," I recommend that the District Court approve the requested rates. (Document No. 18-1, p. 8).

Defendant did, however, object to Attorney Kurland's hourly rate of \$75.00 for clerical work. It is well-recognized that "clerical or secretarial tasks ought not to be billed at lawyers' rates, even if a lawyer performs them." Lipsett v. Blanco, 975 F.2d 934, 940 (1st Cir. 1992) Attorney Kurland already reduced her rate by 50% for the tasks she deemed to be clerical. Defendant argues that the rate is still excessive. Courts typically approve rates from 40-50% for attorneys performing clerical tasks. See e.g., Foley v. Huppe, No. 10-cv-335-JL, 2012 WL 5467527 *8 (D.N.H. Nov. 9, 2012) (permitting clerical tasks to be compensated at 40% of the attorney's approved rate). Accordingly, the Court recommends that Attorney Kurland's hourly rate for clerical work be reduced to \$60.00 per hour, which is 40% of her hourly rate for legal work.

B. Number of Hours

Next, the Court must consider the number of hours claimed by Plaintiff's attorneys. Attorney Kurland seeks reimbursement for 107.25 hours spent on legal work. Defendant's Objection seeks reductions in the number of hours claimed by Attorney Kurland in several discrete categories. In total, Defendant requested that 45 hours of time be deducted from Attorney Kurland's time. Attorney Dineen seeks reimbursement for 43.2 hours spent on legal work. Defendant's Objection mounts a general challenge to Attorney Dineen's time as

duplicative of Attorney Kurland. In total, Defendant requests that 19 hours of Attorney Dineen's time be eliminated. In the context of a broader review of the hours submitted, the Court reviewed the specific areas of dispute set forth by Defendant and resolves them as set forth below.

1. Compensation for Drafting the Complaint

The first general area of Attorney Kurland's time that Defendant challenges is the time spent drafting the Complaint. Attorney Kurland seeks compensation for approximately 16.9 hours spent drafting the thirteen-page Complaint in this case. Defendant avers that over sixteen hours devoted to preparing and filing the Complaint in this case is "grossly excessive." (Document No. 18-1, p. 3). Defendant argues that the number of hours should be reduced to four because that is "ample time to draft a complaint." Id.

In her Reply, Plaintiff's attorney notes that drafting the Complaint required distilling a "significant level of factual detail regarding events that occurred over the previous twenty-five years" and that fact-checking and editing were crucial to providing a concise, clear complaint to the Court. (Document No. 21). A sampling of Attorney Kurland's time entries related to drafting the Complaint reads as follows: 3.5 hours for "Drafting complaint" (May 6, 2015), 6.8 hours for "Finish first draft of complaint," (May 7, 2015), 1.3 hours for "Revise draft complaint," (June 9, 2015). These basic descriptions are not very helpful to the Court. A reading of the Complaint, however, demonstrates that Attorney Kurland provided detailed factual background and that the Complaint was thorough and well-written. Nevertheless, the contemporaneous documentation does not provide enough information under the specificity standard, and a discounting of the fees requested is therefore in order. After considering the arguments set forth by the parties, I

recommend that Attorney Kurland's time allowed for drafting the Complaint be reduced by 8.5 hours, which is roughly half of the time for which she seeks compensation.

As noted, Defendants did not argue for a reduction of Attorney Dineen's time for the same discrete categories as Ms. Kurland, but instead, argued that much of his time was duplicative. In order to determine whether the hours were duplicative, the Court examined Attorney Dineen's entries related to drafting the Complaint. Mr. Dineen devoted approximately five hours to matters relating to the Complaint, as evidenced by the contemporaneous time records he submitted. Those entries include .8 hours for "miscellaneous emails and advice to co-counsel re complaint" (April 30, 2015); .4 hours for "review drafts of complaint, make suggestions" (May 8, 2015); .6 hours for "review of final drafts of complaint" (May 28, 2015); and several other charges for rewording or revising the Complaint in conjunction with Attorney Kurland. (See Document No. 15, pp. 3-4). Upon reviewing both attorneys' time entries, the Court concludes that Attorney Dineen's time spent on the Complaint is duplicative of Attorney Kurland and suggestive of a mentoring role. In reaching this determination, the Court conducted a careful review of the entries submitted and is mindful that "the mere fact that more than one lawyer toils on the same general task does not necessarily constitute excessive staffing." Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 297-298 (1st Cir. 2001). The use of two attorneys in this matter was not unreasonable, and thus some interoffice meetings and discussions are inevitable. There is, however, a point at which this can amount to duplication, and the entries pertaining to Attorney Dineen's time spent on the Complaint cross that line. Accordingly, the Court is recommending that his total time be reduced by three hours.

2. Compensation for Time Spent Drafting the Motion for Temporary Restraining Order

Second, Defendant objects to awarding Attorney Kurland any fees related to the preparation of the Motion for Temporary Restraining Order (“TRO”) and Preliminary Injunction. Defendant contends that the entirety of the time devoted to these filings was unnecessary as Plaintiff ultimately withdrew the Motion, and because, at all relevant times, Defendant was available to work with Plaintiff to ensure Defendant’s policies were lawful. (Document No. 18-1, pp. 3-4). Defendant contends that the contemporaneous time records indicate that Attorney Kurland devoted approximately fifteen hours to this issue. (Document No.18-1, p. 3).

Plaintiff’s Reply notes that the arguments set forth by Defendant misrepresent the posture of the case both when the Motion for TRO was filed and when the Plaintiff opted to withdraw it. As Plaintiff accurately points out, his withdrawal of that Motion was an acknowledgment that the parties were working towards a settlement and was a “strategy [that] emerged from the positive tone” of the Rule 16 Conference, but could not have been predicted prior to that Conference. It is reasonable to conclude that the arguments presented in that Motion helped the parties refine their positions and determine an appropriate resolution. Instead of being viewed as unnecessary to the resolution of the case, the Court adopts the arguments set forth by Plaintiff and views such Motion as one of several important factors that ultimately lead to the parties’ resolution of the dispute. Accordingly, I decline to recommend that all of the fees sought be denied.

Attorney Kurland's contemporaneous time records, however, do not support the hours she is claiming, because they do not meet the specificity standard. It appears her work on the Motion for TRO commenced on July 6, 2015 with the entry of 1.7 hours for "research case law- 1st Am TRO and PI." (Document No. 14-3, p. 1). As example, her subsequent time entries are for 7 hours on "case law research, draft TRO memo" (July 7, 2015), 5 hours on "memo" (July 8, 2015), and 1.2 hours on "Emails and revisions" (July 9, 2015). Even though the Court has determined that the work done in preparation of the Motion was of value to the case, the Court cannot effectively assess whether the amount of time spent was reasonable because the time entries lack specificity as to the tasks completed. The Court therefore recommends that Attorney Kurland's total hours be reduced by five to reflect the failure to meet the specificity standard.

A review of Attorney Dineen's time entries indicates he spent approximately four hours on legal work concerning the Motion for TRO. The entries indicate he spent 1.2 hours on "work on TRO memorandum issues, review counsel's drafts, locate prior memos in 1st Amendment cases" (July 9, 2015) and two hours on "TRO memorandum issues; review written drafts" (July 10, 2015). Taken as a whole, these entries, along with several other smaller entries related to this topic, are duplicative of the time Attorney Kurland seeks compensation for and should be reduced. I therefore recommend a reduction of two hours, or roughly half of Attorney Dineen's time on this task.

3. Compensation for Research

The next category of time entries challenged by Defendant is time devoted by Attorney Kurland to research. Attorney Kurland billed more than seventeen hours for research purposes.

Defendant objects to the hours expended and argues they should be “drastically reduced if not eliminated entirely” because it is not “Defendant’s obligation to pay for the Plaintiff to learn the law of the case.” (Document No. 18-1, p. 4). Plaintiff points out that the First Amendment issues presented were complex, and Plaintiff opted to present several distinct theories of liability. (Document No. 21, p. 6). After considering the arguments presented and reviewing the time records submitted, I find that Plaintiff’s research hours were reasonable given the complex facts and legal issues at play, and I do not recommend any reduction in the number of hours sought.

D. Compensation for Attorneys’ Fee Application

Defendant also takes issue with the time entries that relate to the present Motion. Defendant objects to Attorney Kurland’s time allotted in preparing Plaintiff’s Memorandum in Support of Awarding Attorneys’ Fees. Attorney Kurland seeks compensation for approximately 23.3 hours in pursuing her attorneys’ fees, whereas Attorney Dineen is requesting compensation for 9 hours in connection with the Motion for Attorneys’ Fees.

The First Circuit has repeatedly held that “time reasonably expended in connection with fee applications is itself compensable...but, since time spent in this exercise often amounts to little more than ‘documenting what a lawyer did and why he or she did it,’...it may fairly be compensated at a reduced rate.” Brewster v. Dukakis, 3 F.3d 488, 494 (1st Cir.1993); Baptista v. Mut. of Omaha Ins. Co., C.A. No. 10-467ML, 2012 WL 1123583, at *1 (D.R.I. Apr. 3, 2012). In Brewster, as well as in Westenfelder v. Ferguson, C.A. No. 97-478L, 2000 WL 303301 (D.R.I. Feb. 17, 2000), the courts found that compensation at a rate of \$80.00 per hour was reasonable for time expended in pursuing attorneys’ fees. More recently, this Court awarded a rate of

\$200.00 per hour for time incurred seeking attorneys' fees for lawyers whose approved, normal billing rate was \$425.00 to \$525.00 per hour. Baptista, 2012 WL 1123583 at *2. While there is no bright-line rule as to an appropriate hourly rate for pursuing attorneys' fees, the reductions in previous cases were in excess of 50% of the attorneys' normal billing rate. In the present case, the time entries reflect that both Attorneys Kurland and Dineen's time was reasonably spent in pursuing their award of fees. However, the hourly rate does require adjusting, and the Court finds that work related to supporting the request for attorneys' fees is reasonably compensated at \$100.00 per hour for both attorneys.

Finally, as noted, Defendant mounted a general objection to Mr. Dineen's time as excessive and/or duplicative. Rather than a wholesale cut of his time, the Court has considered each of the categories set forth by Defendant and applied reductions of his time throughout as appropriate. Accordingly, the Court rejects Defendant's general request to reduce by 50% the fees requested by Attorney Dineen.

Summary

Attorney Kurland seeks compensation for 107.25 hours at \$150.00 per hour. I recommend her total number of hours be reduced by 13.5 (8.5 hours for drafting the Complaint and 5 hours for drafting the Motion for TRO) because her contemporaneous time records were not sufficiently specific. Additionally, I recommend that she be compensated for the time spent pursuing attorneys' fees at a rate of \$100.00 per hour. From my review of her time records, it appears she spent 23.3 hours pursuing attorneys' fees. Her total fee therefore is 107.25 minus 13.5 minus 23.3 equals 70.45 hours times \$150.00 per hour equals \$10,567.50. For attorneys'

fees, 23.3 hours times \$100.00 per hour equals \$2,330.00. Ms. Kurland's clerical work amounted to 8.55 hours, and I recommend a rate of \$60.00 per hour equals \$513.00. The total amount for Attorney Kurland is \$10,567.50 plus \$2,330.00 plus \$513.00 equals \$13,410.50.

Attorney Dineen seeks compensation for 43.2 hours at a rate of \$250.00 per hour. I recommend his total number of hours be reduced by five because his contemporaneous time records indicated that some of his work as duplicative. Additionally, I recommend that he be compensated for the time spent pursuing attorneys' fees at a rate of \$100.00 per hour. From my review of his time records, it appears he spent nine hours pursuing attorneys' fees. His total fee, therefore is 43.2 hours minus 5 hours minus 9 hours equals 29.2 hours times \$250.00 per hour equals \$7,300.00. For attorneys fees, 9 hours times \$100.00 per hour equals \$900.00. The total for Attorney Dineen is \$7,300.00 plus \$900.00 equals \$8,200.00.

The total recommended fee is \$21,610.50. The Court is mindful that this number represents less than what Plaintiff sought to be compensated, and more than Defendant argued was reasonable. However, after reviewing the arguments and the time records, the Court is satisfied that the fee award is justified by the totality of the circumstances. See Brewster, 3 F.3d at 494 ("the fact that a fee award leaves both payer and payee somewhat sullen is often a sign of fairness all around").

Conclusion

For the foregoing reasons, I recommend that Plaintiff's Corrected Motion for an Award of Attorneys' Fees (Document No. 17) be GRANTED and that Plaintiff be awarded the sum of \$21,610.50 for attorneys' fees. Any objection to this Report and Recommendation must be

specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart. Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
June 3, 2016