



FILED
ALAMEDA COUNTY

DEC 10 2007

CLERK OF THE SUPERIOR COURT

By Vicki Daybell JD

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

STEPHEN J. BARRETT, M.D., TERRY
POLEVOY, M.D., CHRISTOPHER E.
GRELL,

Plaintiffs,

vs.

HULDA CLARK, TIM BOLEN, JAN
BOLEN, JURIMED, DR. CLARK
RESEARCH ASSOCIATION, DAVID P.
AMREIN, ILENA ROSENTHAL, and
DOES 1 to 100,

Defendants.

No. C-833021

ORDER GRANTING IN PART THE
MOTION OF DEFENDANT ILENA
ROSENTHAL FOR REASONABLE
ATTORNEYS' FEES AND EXPENSES

The Motion of Defendant Ilena Rosenthal ("Defendant") for Award of Reasonable Attorneys' Fees and Expenses came on regularly for hearing on October 31, 2007, in Department 31 of this Court, Judge Frank Roesch presiding. Defendant appeared by counsel Richard M. Pearl and Mark Goldowitz. Plaintiffs Stephen J. Barrett, Terry Polevoy and Christopher E. Grell (collectively "Plaintiffs") appeared by counsel Christopher E. Grell.

The Court has considered all of the papers filed on behalf of the parties, and the arguments of counsel at the hearing, and good cause appearing, hereby GRANTS THE MOTION IN PART for the reasons that follow.

A. Summary

The Court will award Defendant attorneys' fees pursuant to C.C.P. § 425.16(c) in an amount calculated as described below. This amount includes reasonable attorneys' fees incurred in connection with Defendants' successful efforts on appeal which led to affirmance of this Court's orders granting Defendant's special motion to strike and award of attorney's fees. (*See, e.g., Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 448; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499-1500.) It also includes reasonable attorneys' fees incurred in connection with the current fee motion. (*See Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1132-1133, 1141.) It further includes some of the legal services performed in connection with enforcing the attorney's fee award and resisting Plaintiffs' efforts to vacate it or restrain Defendant from enforcing it. (*See id.*, at p. 1141 n.6; *Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 Cal.App.4th 15.)

The Court has not included compensation for the time identified by Plaintiffs on the billing invoices between October 27, 2003 and August 28, 2007, relating to "collection" efforts after the appeal bond in the amount of \$50,800 was posted on November 8, 2001, with the exception of reasonable services expended to research collection law, demand payment, correspond with Plaintiffs and the client, and respond to

Plaintiffs' offers of settlement. (See Declaration of Dr. Stephen Barrett, filed 9/28/07, Exh. K.) In light of the posting of the appeal bond, which was in an amount nearly sufficient to cover the judgment even with interest added as of January 22, 2007 (for a total of \$51,750.47), the Court finds that the fees incurred for collection activities independent of that appeal bond (such as the notice of levy, the orders of examination, and corresponding with the Sheriff) were not reasonable or necessary. The Court also finds that the services expended in response to Plaintiffs' ex parte application to enjoin the notice of levy, and to oppose Plaintiff Christopher Grell's claims of exemption, were not reasonably incurred for the same reason – i.e. they were occasioned by Defendant's failure to pursue payment on the appeal bond that was available for purpose of securing the judgment on appeal.

Nevertheless, the Court has included the amounts incurred to respond to Plaintiffs' unsuccessful efforts to vacate the judgment, tax costs after judgment (first motion), and apply for a writ of mandate in the Court of appeal challenging the Court's denial of the motion to vacate judgment, since they were not occasioned by the failure to pursue the appeal bond.

With the exception of the above activities, the Court awards Defendant compensation for all hours described on the invoices as modified in Defendant's supplemental filings. The Court finds that, although the amount of time expended on the legal services was high, Defendant submitted detailed billing records supporting the request, which describe in detail the tasks performed and attest that all such services were

reasonably and necessarily performed in connection with the legal services described above. Defendant already exercised substantial billing judgment in reducing the fees from those sought in the original motion papers, and, with the exception of the collection efforts described above, Plaintiffs have not identified specific entries that describe work that was not reasonable or necessary. The time entries regarding e-mails and phone calls which do not always state their specific purpose are sufficiently identified in context of the surrounding time entries. The work identified on the invoices that pertains to amicus briefs was sufficiently related to achieving a victory for Defendant on appeal so as to be compensable. The work in connection with this fee motion was substantial, but Defendant has written off some of that work and the remainder of the work required to respond to the Court's orders continuing the motion for further submissions was all reasonably and necessarily incurred.

B. Total Fee Award

Accordingly, the Court allows compensation for the following hours:

- (1) Work in the California Court of Appeal: 336.8.
- (2) Work in the California Supreme Court: 355.9.
- (3) Work Related to Enforcement of the Judgment: 84.0 (48.7 were subtracted)
- (4) Work Related to Fee Claim: 167.9 hours.
- (5) Total Lodestar: 946.4.

Based on the Court's review of the declarations submitted by Defendant regarding the experience, qualifications and skills of her counsel, as well as the declarations

regarding prevailing market rates in various law firms in the Bay Area, and the Court's knowledge and experience with respect to the prevailing market rates of lawyers representing clients in the Alameda County Superior Court with similar skills as the counsel involved in the present lawsuit, the Court determines that the following reasonable hourly rates should apply to the services rendered in the present case: Mark Goldowitz - \$450; Richard Pearl - \$450; Paul Clifford - \$300; Jesper Rasmussen - \$300; Roger Myers - \$400; Katherine Keating - \$250; Lisa Sitkin - \$275; David Shagam - \$250.

The Court finds that it is appropriate in this case to adjust the lodestar by an additional fee enhancement with respect to the work in the Court of Appeal and the California Supreme Court. The Court has taken into consideration the important constitutional rights involved, the complexity of the issues, the seriousness of the allegations, the contingency of payment, and the risks of not being able to collect a fee award against Plaintiffs, and finds that an enhancement of 20% is appropriate for the work done in the Court of Appeal and an enhancement of 50% is appropriate for the work in the California Supreme Court. (*See Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1136-1139.) The Court is not including any fee enhancement with respect to the collection efforts or fee motion practice after Defendant prevailed on the anti-SLAPP motion in the California Supreme Court, as this would be improper. (*Id.* at pp. 1141-42.)

Based on the above reasonable hourly rates, and the records showing the number of hours spent by each attorney on the various services in this case, and utilizing a

multiplier of 1.2 for the work in the Court of Appeal and 1.5 for the work in the California Supreme Court, the Court has calculated the applicable amounts of compensation being awarded as follows:

<u>Attorney</u>	<u>Hours</u>	<u>Rate</u>	<u>Lodestar</u>	<u>Enhance</u>	<u>Total</u>
(1) Work in the California Court of Appeal:					
Goldowitz	143.8	\$450	\$64,710		
Rasmussen	172.8	\$300	\$51,840		
Clifford	20.2	\$300	\$6,060		
Total	336.8		\$122,610	1.2	\$147,132.00
(2) Work in the California Supreme Court:					
Goldowitz	69.8	\$450	\$31,410		
Myers	80.0	\$400	\$32,000		
Keating	47.4	\$250	\$11,850		
Sitkin	158.7	\$275	\$43,642.50		
Total	355.9		\$118,902.50	1.5	\$178,353.75
(3) Work Related to Enforcement of the Judgment:					
Goldowitz	58.9	\$450	\$26,505		
Shagam	19.6	\$250	\$4,900		
Clifford	5.5	\$300	\$1,650		
Total	84.0		\$33,055		\$33,055.00
(4) Work Related to Fee Claim:					
Goldowitz	125.4	\$450	\$56,430		
Pearl	42.5	\$450	\$19,125		
Total	167.9		\$75,555		\$75,555.00
(5) Total:	944.6		\$350,122.50		\$434,095.75

C. Apportionment

Except as to the work related to the present motion for attorneys' fees, the Court has apportioned the amounts among the various Plaintiffs in the manner reflected in Defendant's apportionment chart filed on October 12, 2007, taking into account the subtractions for collection efforts described above. Except as to the work related to the motion for fees, the Court finds that Defendant's method of allocation is reasonable, and was based on a well-reasoned and careful analysis of the services rendered. (*See, e.g., Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 837-838; *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231.) Plaintiffs have not provided a sufficient reason or basis to persuade the Court to alter that apportionment and have not presented any more reasonable alternative method of allocation.

As to the services related to the fee motion, the Court has apportioned the total amount by utilizing a weighted apportionment founded on the Defendants' proposed method of allocation but partly modified by the Court's determinations as to the extent to which each Plaintiff benefited from the work. That apportionment yields the following totals:

(1) Work in the California Court of Appeal:

Polevoy only	\$85,778.46
Grell only	\$ 5,554.28
Barrett only	\$ 5,056.17
Barrett and Polevoy	\$25,833.21
Barrett, Polevoy and Grell	\$24,909.88
Total	\$147,132.00

(2) Work in the California Supreme Court:

Polevoy only \$178,353.75

(3) Work Related to Enforcement of the Judgment:

Grell only \$5,717.60
Barrett only \$173.26
Barrett and Polevoy \$4,149.37
Barrett and Grell \$1,494.93
Barrett, Polevoy and Grell \$21,519.84

Total \$33,055.00

(4) Work Related to Fee Claim:

Grell \$11,588.86
Barrett \$16,117.88
Polevoy \$47,848.26

Total \$75,555

(5) Total Award

Polevoy only \$311,980.47
Grell only \$ 22,860.74
Barrett only \$ 21,347.31
Barrett and Polevoy \$ 29,982.58 (joint and several)
Grell and Barrett \$ 1,494.93 (joint and several)
Barrett, Polevoy and Grell \$ 46,429.72 (joint and several)

D. Plaintiffs' Challenge Based on Purported Assignment

The Court rejects Plaintiffs' challenge to the fee motion on the basis that Defendant has assigned her rights to collection of fees to her attorneys. (See C.C.P. § 368.5; *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 682 n.26; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 578.)

E. Plaintiffs' Miscellaneous and Other Objections

The Court OVERRULES the "Miscellaneous Objections" to Defendant's Motion set forth at pages 13-15 of Plaintiffs' Opposition memorandum filed on May 14, 2007, many or all of which are repeated in subsequent papers filed in opposition to the motion.

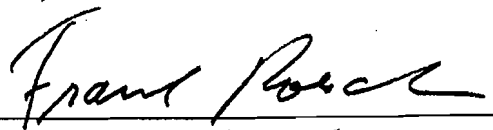
While the Court need not consider Plaintiffs' Objections filed on October 17, 2007, since the Court ordered no further papers to be submitted by Plaintiffs when it continued the hearing to October 19, 2007 (see Order of October 5, 2007), even if the Court considered that document, it would overrule all of the objections and deny the motion to strike on the grounds they are asserted.

F. Expenses

The Court DENIES WITHOUT PREJUDICE Defendant's request for "expenses" of \$9,140.70 for procedural reasons. The Court does not believe Defendant has provided the Court with authority for awarding such expenses pursuant to a motion under C.C.P. § 425.16(c), without preparing a Memorandum of Costs or statement of costs incurred after judgment, or that Defendant has provided the Court with sufficient authority regarding the extent to which the particular types of expenses sought are reimbursable, without reference to the costs permitted under C.C.P. § 1033.5.

Defendant shall submit a proposed amended judgment consistent with this order to the Clerk of Department 31, 201 13th Street, Oakland, CA 94612.

Dated 12/10/07



Frank Roesch
Judge of the Superior Court

CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing ORDER GRANTING IN PART THE MOTION OF DEFENDANT ILENA ROSENTHAL FOR REASONABLE ATTORNEYS' FEES AND EXPENSES to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

Christopher E. Grell, Esq.
LAW OFFICES OF CHRISTOPHER E. GRELL
The Broadlake Plaza
360 22nd Street, Suite 320
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Richard M. Pearl, Esq.
LAW OFFICES OF RICHARD M. PEARL
1816 Fifth Street
Berkeley, CA 94710

Mark Goldowitz, Esq.
CALIFORNIA ANTI-SLAPP PROJECT
2903 Sacramento Street
Berkeley, CA 94702

I declare under penalty of perjury that the same is true and correct.
Executed on December 11, 2007.

By: Vicki Daybell
Vicki Daybell, Deputy Clerk
Department 31