

Aff'd in part  
2010 VT 12 C2/24/19

STATE OF VERMONT  
RUTLAND COUNTY

FRANK VASTANO and TRACY LEES )  
Plaintiffs, )  
v. )  
KILLINGTON VALLEY REAL ESTATE )  
Defendant. )

Rutland Superior Court  
Docket No. 751-12-01 Rdcv

ORIGINAL FILED  
RUTLAND SUPERIOR COURT

APR 03 2008

**RULING ON ATTORNEYS' FEES**

Plaintiffs' entitlement to liability and damages in the amount of \$7,875.00 has been established by prior rulings of the Vermont Supreme Court and this court. Plaintiff is also entitled to attorneys' fees, as the claim is based on the Consumer Fraud Act. 9 V.S.A. § 2461(b).

A hearing on attorneys' fees was held on March 13, 2008. Plaintiffs' Attorney Kimberley Cheney and Defendant KVRE's Attorney Christopher Ekman were present. Upon consideration of the arguments of counsel and the affidavit of Michael Marks, which was submitted by Defendant with no objection by Plaintiffs, the court makes the following findings and conclusions concerning the amount of attorneys' fees to be included in the Judgment.

Plaintiffs have submitted an original request and a supplement showing fees for identified work performed by specified attorneys for the period from October, 2001 to December, 2007. The total amount requested is \$74,988.00. Defendants dispute the reasonableness of the hourly rate, and argue that if their proposed lower hourly rate is used, the lodestar amount would be \$52,945.75. Defendants also seek further reductions from that amount for a variety of reasons described in this ruling.

*Reasonableness of Hourly Rates*

Plaintiffs seek fees at an hourly rate applied to all past work at the rate of \$225 for the lead attorney and \$175 for work performed by an associate. Defendant argues that the rates are not reasonable rates for work performed as early as 2001. Based on the affidavit of Michael Marks, which states that \$150 was the reasonable rate for Plaintiffs' counsel in 2001, Defendant has submitted a grid based on the affidavit showing step increases for partners and associates from 2001 to the present. Plaintiffs' counsel acknowledges that an hourly rate of \$150 is reasonable for 2001, but seeks the higher current amount of \$225 for all work done on the case since 2001 as fair because it includes a component to reflect the time value of money, which is requested in this form instead of in the form of interest on the lower amount.

Defendants' affidavit and grid present more accurate information about reasonable rates that were charged at the time that the work was done. Nonetheless, it is also reasonable for Plaintiff to receive interest. Otherwise, either the client or the attorney is not being fairly reimbursed or compensated. The court will add to Defendants' figures, adjusted as described below, simple interest at 12% per year on the total sum for each calendar year.

The court has made several modifications to the grid as submitted. For the purposes of calculating interest, each year is calculated separately. Based on the Marks affidavit, a reasonable hourly rate for Mr. Cheney would have been \$150 in 2001, and a reasonable hourly rate in 2007 (for the purposes of this calculation) would have been \$200. The rates for other years are scaled evenly. In addition, the associates' rates are scaled evenly between \$90 and \$135, and the associates' total hours have been reduced between 2002 and 2004 to account for the hours spent on discovery attributable to the Performance Group, which Mr. Cheney has conceded are inappropriate for inclusion in this attorneys' fees request. The court then added simple interest at 12% per year on the total sum for each calendar year. The results are shown below in Table A.

**TABLE A: ATTORNEYS FEES BY YEAR, WITH INTEREST**

| Name                                                 | Year | Hours         | Rate     | Subtotal           | Monthly Interest | Number of Months to 3/31/08 | Interest Subtotal  | Total              |
|------------------------------------------------------|------|---------------|----------|--------------------|------------------|-----------------------------|--------------------|--------------------|
| Kimberly Cheney                                      | 2001 | 1.40          | \$150.00 | \$210.00           | \$2.10           | 75                          | \$157.50           | \$367.50           |
|                                                      | 2002 | 4.40          | \$158.33 | \$696.65           | \$6.97           | 63                          | \$438.89           | \$1,135.54         |
|                                                      | 2003 | 26.30         | \$166.67 | \$4,383.42         | \$43.83          | 51                          | \$2,235.54         | \$6,618.97         |
|                                                      | 2004 | 10.30         | \$175.00 | \$1,802.50         | \$18.03          | 39                          | \$702.98           | \$2,505.48         |
|                                                      | 2005 | 113.30        | \$183.33 | \$20,771.29        | \$207.71         | 27                          | \$5,608.25         | \$26,379.54        |
|                                                      | 2006 | 0.00          | \$191.67 | \$0.00             | \$0.00           | 15                          | \$0.00             | \$0.00             |
|                                                      | 2007 | 23.80         | \$200.00 | \$4,760.00         | \$47.60          | 3                           | \$142.80           | \$4,902.80         |
| <b>Kimberly Cheney Subtotals:</b>                    |      | <b>179.50</b> |          | <b>\$32,623.86</b> | <b>\$326.24</b>  |                             | <b>\$9,285.96</b>  | <b>\$41,909.82</b> |
| Associates<br>(Nanci Smith and<br>Christopher Smart) | 2001 | 42.60         | \$90.00  | \$3,834.00         | \$38.34          | 75                          | \$2,875.50         | \$6,709.50         |
|                                                      | 2002 | 10.05         | \$101.25 | \$1,017.56         | \$10.18          | 63                          | \$641.06           | \$1,658.63         |
|                                                      | 2003 | 56.70         | \$112.50 | \$6,378.75         | \$63.79          | 51                          | \$3,253.16         | \$9,631.91         |
|                                                      | 2004 | 54.72         | \$123.75 | \$6,771.60         | \$67.72          | 39                          | \$2,640.92         | \$9,412.52         |
|                                                      | 2005 | 35.10         | \$135.00 | \$4,738.50         | \$47.39          | 27                          | \$1,279.40         | \$6,017.90         |
| <b>Associates Subtotals:</b>                         |      | <b>199.17</b> |          | <b>\$22,740.41</b> | <b>\$227.40</b>  |                             | <b>\$10,690.05</b> | <b>\$33,430.46</b> |
| <b>TOTAL ATTORNEYS FEES:</b>                         |      |               |          |                    |                  |                             |                    | <b>\$75,340.28</b> |

Using the standard calculation for interest at the legal rate, applied to the rates that were reasonable at the time the work was performed, results in attorneys' fees that very closely match (and actually exceed) the amount requested by Mr. Cheney, which was \$74,988. This shows that the total amount requested by Mr. Cheney is a reasonable reflection of the time value of money, even though the hourly rates of \$225 and \$175 he used were not reasonable rates in 2001. For this reason, the court accepts the request of Mr. Cheney for attorneys' fees in the amount of \$74,988.00.

*Reduction for Work not reasonably related to the CFA claim.*

Plaintiffs concede that a portion of the bills for which compensation was originally requested were not related to the CFA claim. Therefore, the court has reduced the hours on the grid by the amounts indicated in Plaintiffs' memo of February 14, 2008. The court has verified that discovery certificates related to the Performance Group were filed by Nanci Smith between 2002 and 2004, and has approximated the concessions made by Mr. Cheney by adjusting the total hours accordingly.

*Reductions requested by Defendants for Excessive Hours*

Defendants ask the court to eliminate hours from Plaintiffs' request attributable to: (a) billing for work by two attorneys (a partner and an associate) on a summary judgment motion in 2003, (b) work related to presenting expert testimony on health effects of exposure to contaminants that was not admitted at trial, and (c) billing for work by two attorneys (a partner and an associate) for appearance in court at a motion hearing.

The court declines to make these reductions. Defendants have not shown that it was unreasonable for this work to be undertaken to responsibly prepare the case in the context of the nature of the claim, and the difficulty of predicting what proof would need to be made in order to show materiality of the well monitoring. Moreover, it is not unreasonable for an attorney and associate to work together and appear together in court on a motion for summary judgment. The standard is not what appears in hindsight would have been sufficient, but what was reasonably undertaken at the time it was done.

*Adjustments requested by Defendants based on Other Factors*

~~Defendants argue that the court should take into account that as a result of its ruling on damages, the damages award is only \$7,875, and that an attorneys' fees award of tens of thousands of dollars would be out of proportion to the 'results obtained' factor in making adjustments to the lodestar amount under the *Hensley v. Eckerhart* analysis. 461 U.S. 424 (1983). Plaintiffs counter that the amount requested represents the actual cost of proving the claim, and that unless compensation is provided for the true cost of bringing a case and proving a claim, the public policy function of the CFA in encouraging private policing of the marketplace will not be realized. The court finds Plaintiffs' argument persuasive on this point. CFA claims are statutory, and deterrence of fraud in the marketplace is at least as important a statutory objective as is compensation to the individual plaintiff. Private plaintiffs should be able to count on recovering the actual fair total cost of proving a claim, or such claims will not be pursued. Therefore, comparison of the amount of actual damages with the cost of obtaining it is not as relevant a factor in a CFA case as it might be in a different type of legal claim.~~

Relying on *Slayton v. Ford*, 140 Vt. 27 (1981), Defendant argues that the court should compel disclosure of Plaintiffs' settlement with the other realtor in the case so that the settlement can be treated as a set-off against this case, both as to damages and because the attorneys' work was related to the claims against the settling Defendant as well as the remaining Defendant. *Slayton* was not a CFA case, and this is an important distinguishing factor. The CFA is not simply about making plaintiffs whole, which is the overriding principle in most contract and tort claims. Given the public policy of

deterrence of fraud in commerce that is the fundamental basis of the CFA, each individual defendant should be responsible for not only the damages portion of any claim, but for the cost in attorneys' fees reasonably necessary to prove the claim. As Plaintiffs argued, if the attorneys' fees portion of a CFA is not taken seriously, the cost of consumer fraud may not be sufficient to deter the objectionable conduct.

Finally, Defendants argue that the amount should be reduced for two reasons of public policy. First, Defendants argue that Plaintiffs' claim was not for \$7,875, but for \$225,000 plus punitive damages—a claim of nearly \$900,000, and recovery was only \$7,875 plus interest. Thus, Defendants argue, Plaintiffs should not be fully compensated when what happened was that they undertook a risky lawsuit in which they did not succeed. Plaintiffs did succeed in proving a CFA claim, however, even if they had hoped for a higher recovery. Given the statutory language, their request for relief was not unreasonable, as the discussion in the Ruling on Damages demonstrates. The important point is that even if the amount of damages turned out to be smaller than hoped, Plaintiffs performed the public service of private enforcement of the CFA in a manner that should have the effect of deterring repetition of similar conduct in the marketplace. Under the statute, they are entitled to be compensated for the reasonable value of the cost of performing that function.

In a second public policy argument, Defendants highlight that Plaintiffs' counsel agreed in writing to accept the greater of 1/3 of any recovery or \$150 per hour for work performed; thus, attorneys' fees should be capped at \$150 per hour which represents the attorney's written agreement and still provides a reasonable level of compensation.

There is no dispute that \$150 was a reasonable hourly fee at the time the case started. The court declines to cap attorneys' fees at that level for all work on a case that has taken 7 ½ years to reach judgment, during which time the reasonable hourly rate of attorney services increased. For Plaintiffs' attorney to be fairly compensated at a level that represents the reasonable value of the work performed, the award of attorneys' fees should also track the increases that occurred during that period. As shown by Table A, the lodestar figure proposed by Mr. Cheney very closely matches the figures obtained by applying reasonable rates to each calendar year of work, and adding simple interest.

#### *Summary*

For the reasons stated herein, attorneys' fees are awarded in the amount of \$74,988.00. It is the court's conclusion that this sum represents the fair value of the attorney work reasonably undertaken in order to successfully pursue Plaintiffs' claim under the CFA, and that for the reasons stated above, it is reasonable for Defendant KVRE to pay the full amount.

*Prejudgment Interest*

Prior rulings of this court have established that Plaintiffs are entitled to \$7,875 plus prejudgment interest to date of judgment, plus postjudgment interest to the date of payment, plus attorneys' fees. Prejudgment interest from November 30, 2000, to March 31, 2008, on the amount of \$7,875.00 is \$6,930.00.

**Order**


For the reasons set forth above,

- 1) Plaintiffs' Updated Motion for Attorneys Fees, filed January 25, 2008, is *granted*,
- 2) Defendant's Motion to Reduce Damage Award, filed February 21, 2008, is *denied*, and
- 3) Defendant's Motion for Disclosure of Plaintiffs' Settlement with [Codefendant], filed March 20, 2008, is *denied*.

The court has issued a Judgment incorporating the rulings of the court.

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Dated at Rutland, Vermont this 1st day of April, 2008.

  
Mary Miles Teachout  
Superior Court Judge

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JUDGMENT

Based upon the rulings of the court,

It is ORDERED and ADJUDGED that the Plaintiff shall recover of the Defendant Killington Valley Real Estate damages in the amount of \$7,875.00 plus interest of \$6,930.00 to March 31, 2008, plus attorneys' fees in the amount of \$74,988.00, for a total of \$89,793.00. Interest shall accrue on \$82,863.00 at the legal rate.

~~Dated at Rutland, Vermont this 1<sup>st</sup> day of April, 2008.~~

*Mary Miles Teachout*  
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Hon. Mary Miles Teachout  
Presiding Judge