VERMONT SUPERIOR COURT
Lamoille Unit
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CIVIL DIVISION
Case No. 59-5-20 Lecv

Bourne's Inc. d/b/a vs. Lemelson

ENTRY ORDER

Attorney's Fees Determination

Plaintiff Bourne's Inc. seeks attorney's fees and costs for the expenses incurred in this collection action. The Court has already ruled Bourne's to be the prevailing party in this matter, and it has determined that Bourne's is entitled to reasonable attorney's fees under the terms and conditions of the service agreement between the parties. *Findings, Conclusions, and Judgment*, *Bourne's, Inc. v. Lemelson*, Dckt. No. 59-5-20 Lecv, at 8–9 (Nov. 8, 2023).

The Court held two hearings concerning Plaintiff's reasonable attorney's fees. The first, which was scheduled for February 6, 2024, was cancelled after Defendant Lemelson took an appeal to the Vermont Supreme Court. The second, which occurred on May 14, 2024 after the appeal had been dismissed as premature, was held at the Lamoille County Superior Court, and the Court took evidence from both parties. After the hearing, both parties were permitted to submit briefing.

Standard of Review

In determining the reasonableness of a fee award, the Court begins with the so-called "lodestar figure," which is the number of hours reasonably expended on the case multiplied by a reasonable hourly rate. *L'Esperance v. Benware*, 2003 VT 43, ¶ 22. This concept arises from United States Supreme Court case law that dictates that a Court reviewing a request for attorney's fees should begin this analysis by first looking at the number of hours expended by the prevailing party and established through documentation. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The Court should then exclude from this initial calculation any hours that were "not reasonably expended" on the case. Id. The Supreme Court explains that this can include situations where the case is overstaffed, where the hours are redundant, where the excess billing may be the result of differing attorney skill, and other elements that go into what is often called "billing judgment" in the private sector. Id.

In making this analysis, the Court is guided by the demands of the case and not necessarily the amount of the damages. The Vermont Supreme Court has expressly rejected this approach to attorney's fees, and it has affirmed attorney's fee awards that have exceeded the underlying damages by as much as 86%. *Vastano v. Killington Valley Real Estate*, 2010 VT 12, ¶ 9 (awarding $55,012 in attorney's fees after a $7,875 award of damages); see also *Kwon v. Eaton*, 2010 VT 73, ¶ 20 (re-affirming the holding of *Vastano* and its successor cases). This is particularly relevant in the present case where the demands of the case outstripped the value of the damages award.

After making this initial calculation, the Court may then adjust the amount upwards or downwards based on the circumstances of the case and factors including: 1) the novelty of the legal issue; 2) the experience of the attorney; and 3) the results obtained by the litigation. *L'Esperance*, 2003 VT 43, at ¶ 22. Of these factors, *Hensley* holds that the most important is the third. *Hensley*, 461 U.S. at 434. This may be broken down into an analysis of whether the plaintiff failed to prevail on part of its claims and did the plaintiff achieve the "level of success that makes the hours reasonably expended in a satisfactory basis for making a fee award?" Id. This does not mean that an attorney's fee is reduced simply because the plaintiff did not prevail on every contention raised in the lawsuit—particularly if those contentions were made in the alternative or go beyond what the court had to decide. Id at 435. "There is no precise rule or formula for making these determinations." Id. at 436. The trial court is given wide discretion in making these determinations. *L'Esperance*, 2003 VT 43, at ¶ 21.

Step One: Initial Calculation of the Lodestar

Totaling Plaintiff's Attorney invoices, the Court comes up with a total fee amount of **$61,428.00**. Plaintiff, through its expert witness has reduced this amount to **$54,907.40**. Even with this reduction, these amounts are somewhat complicated to breakdown into the lodestar formula. By the Court's count, Plaintiff's firm had no less than 3 different attorneys and 5 different paralegals billing on this account over the course of four years. Attorneys Grigas and Attorney Conolly were the lead attorney and lead supervising attorney, respectively, on this action. Attorney Grigas' billable rate began $230 per hour in January 2020 and rose to $300 as of February 2024. Attorney Conolly's rate began at $250 per hour in January 2020 and rose to $350 as of February 2024. These rates reflect the fair rate of compensation for attorneys at the level of experience and practice as Attorneys Conolly and Grigas. In addition to Attorney Conolly and Grigas' rates, the Court examined the firm's paralegals' rates. These rates varied from $125 to $235. Again, the Court finds these rates reflect reasonable hourly rates for paralegals performing litigation and office work.

While Plaintiffs also submitted hourly rates for Attorney French, the senior partner of the firm, the Court finds his billing to be redundant and strikes his charges entirely from the lodestar. In doing so, the Court finds no fault with Attorney French's hourly rates or the nature or quality of his work, but in examining the nature of the claim, it finds that the supervisory time was primarily performed by Attorney Conolly, and Attorney French's time for purposes of calculating the lodestar is not reasonable to include.

Plaintiffs have reported putting 242.8 hours of billable work into the present matter. The Court has closely examined the various monthly invoices that track these hours along with the respective attorneys or paralegals at their respective billing rates.[1] The Court notes that Plaintiffs did write off several entries by various paralegals, but there were no similar credits for the three attorneys. The Court also notes that Attorney Grigas and Attorney Conolly worked the case together, and there were several duplicative charges where both would attend a hearing or phone conference with clients. At the same time, Plaintiff's billing evinces an effort to avoid this duplication in some instances. Nevertheless, the Court finds that Plaintiff's billing must be further reduced by **$9,484.60** to reflect instances of redundancy, intra-office strategy conversations that are more reflective of the different skill levels of the attorneys than the nature of the matter, and the issue of excess that violates the Court's sense of "billing judgment."[2] This reduction brings the total lodestar of attorney's fees in this matter to **$45,423.00.**

Step Two: Adjustments to the Lodestar

In reviewing the docket sheets, and history of this case, the Court re-affirms its earlier findings that both parties quickly became focused on an escalating litigation strategy after initial efforts to resolve the invoice and removal of the tanks failed. While the case and the legal issues involved were neither novel, nor complex, the records shows that once the collection was commenced, Defendant expanded the scope and size of the litigation by asserting his affirmative defenses and counterclaims. The nature of these counterclaims and affirmative defenses moved the action from a mere collections case into a larger lawsuit involving claims for breach of contract, consumer fraud, and breach of the covenant of good faith and fair

[1] Due to the multiple billers, write-offs, and billing rates over the course of four years, the Court cannot simply multiple the 242.8 hours by a single rate. For the purposes of the first step in the lodestar analysis, it is sufficient for the Court to review the monthly invoices, look to the work reported, determine whether the hourly rates are reasonable, and remove any amounts that exceed the "billing judgment."

[2] It is really this last category where Attorney French's invoices fit. Given that Bourne's was an institutional client who was valued by the firm, and given that the case had proved so intractable, it is not unreasonable that Attorney French, as the senior partner, would take interest and offer his advice and insight as an experienced attorney, but such advice is simply not reasonable to bill to a small business or an opposing party. It is a necessary, but ultimately an internal, consideration that a good firm will exercise to ensure that they prevail, but one that often cannot be assigned to client or as part of the lodestar.

dealing. These counterclaims necessarily expanded the scope of discovery, the factual and legal claims to be litigated in the case, and by extension, the complexity of the case. The litigation moved from a simple question of whether Plaintiff provided propane at a certain rate and was entitled to payment on those amounts, to claims that necessarily implicated the greater relationship between the parties, the commercial practices of Plaintiff, and the meaning and interpretation of administrative regulations. The result was contested litigation that lasted for the better part of three years.

The tone of the litigation in this matter was contentious. As the case grew, the adversarial relationship between the parties increased and became a recipe for lengthy litigation. This in turn required substantial attorney time and evolved into a more complicated matter. The docket shows that both sides fought over both substantive areas of law as well as more straightforward and procedural issues in which both sides sought to obtain smaller advantages. While the Court will address the Plaintiff's role in escalating the litigation, the record shows that this effort was not one-sided.

In performing this analysis, the Court is not projecting judgment or seeking to qualify the nature of the strategic decisions made by either side in the case. Defendant appears to have had a good faith basis to assert his counterclaims, and he acted within his rights when he necessarily expanded the litigation to include these consumer fraud and breach of contract claims. Similarly, Plaintiff exercised a particular strategy to oppose some of Defendant's procedural motion as a way of trying to limit or frustrate the effort to continue or expand the legal action. Yet, in doing so, each side engaged in a certain risk that these steps would drive up the cost of the action and would either be born by one side or would receive no further compensation. This is feature of fee-shifting provisions. It adds an additional risk to litigation. In this respect, these provisions give parties further reason to settle or take steps to limit scope and expense of the litigation.

The next two factors listed under *L'Esperance* include the experience of the attorney and the outcome of the litigation. 2003 VT 43, at ¶ 22. In this case, these factors are interrelated. Much of Defendant's objections center around claims of redundant billing as well as undertaking an overly aggressive motion practice, including filing an expensive opposition to Defendant's motion to amend. The Court agrees, in part, with Defendant's points, and it concludes that the award of attorney's fees should be further reduced in light of these concerns.

As an initial point, the Court finds no problem with the fact that Attorney Grigas and Attorney Connolly both worked and billed on this collections matter. As an associate with limited experience, it was

only reasonable to have Attorney Grigas' work supervised and assisted by a more experienced partner.[3] As noted above, this case was not simply a collections case but expanded into more complicated contract and consumer fraud litigation. The need for co-counsel was fully merited and reasonable within the scope of the case.

Nevertheless, there is a difference between an associate working on a case and using the resources of more senior counsel to review, assist with litigation issues, and develop strategy and to have two attorneys effectively working the case. In this case, the Court has reviewed the billing history submitted by Plaintiff. Attorney Grigas was the primary attorney, and his hours are largely consistent with a younger associate who is working through a case of this size. The billing history also shows that Attorney Conolly's billing working on this matter was largely reasonable and consistent with her supervisory role, however, there were several times where Attorney Conolly's billing went beyond this supervisory role, and however circumstantially reasonable it may have been, it was not, in these portions, reasonable in scope for an award of attorney's fees.

In addition, the Court finds that Plaintiff's strategy to aggressively oppose some of Defendant's early motions were not reasonable within the scope of this case and reflect the early tendency that both parties showed, which was litigation for its own sake. In particular, the Court has analyzed the substantial time invested by Plaintiff in opposition to Defendant's motion to amend. While the Court does not fault Plaintiff for opposing the motion, the amount of time is not consistent with the scope or likelihood of success for such a motion or even the final work product. This is because motions to amend, unlike many other motions, are liberally granted, and courts are guided by well-established caselaw allowing such amendments. E.g., *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶¶ 4, 6 (noting the "generous standard governing Rule 15(a) motions to amend" and noting that denial should only be granted in "rare cases"). This is particularly true when the motion is made by new counsel who may be revising the party's strategy based off their new and independent review of the matter. Given this standard of relatively free permission to amend, the Court would expect any opposition to a motion to amend to be limited in scope and use of resources, quickly articulating prejudice or delay issues, but also recognizing that the motion is more than likely to be granted as it was in this case.[4]

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[3] The Court previous removed the amounts billed by Attorney Grigas' senior partner, Attorney French, as redundant in Step One of its analysis.

[4] This analysis would be different if there was a more substantive basis to oppose such a motion under the four grounds articulated in *Colby,* 2008 VT 20, at ¶ 4.

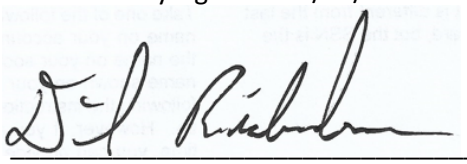
Plaintiff's response to the motion to amend is one example that when coupled with the scope of the litigation suggests an aggressive litigation strategy that was inconsistent with the needs and scope of the case and that ultimately did not contribute to the meritorious result but rather demonstrated a focus on litigation for its own sake or an attempt to crimp the opposing side's position in a manner that was unlikely to be successful given its inconsistency with the realities of civil practice and the Rules' allowances for generous room to bring claims forward.[5]

For these reasons, the Court finds that under Step 2 of its analysis that the attorney's fee award should be further reduced by **$6,367**. When subtracted from the resulting fee amount from Step 1, the Court finds that Plaintiff is entitled to a fee award of **$39,056.00.**

ORDER

Based on the lodestar analysis conducted by the Court, Plaintiff's request for attorney's fees is **Granted but Reduced to $39,056.00**. The Court further awards Plaintiff's fees and costs of **$6,694.97.** For a total award of **$45,750.97.** The Court shall enter final judgment consistent with this award and its previous findings and judgment.

Electronically signed on 8/15/2024 5:47 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge

[5] Again, the record is replete with examples from Defendant where similar procedural issues received substantial briefing and resources. For example, Defendant filled multiple briefs in opposition to his first counsel's motion to withdraw. It is the Court's experience that motions to withdraw rarely receive opposition, and it is exceedingly rare to see clients oppose the withdraw of their counsel through motion practice, let alone nearly 37 pages of filings and exhibits. Again, the Court's purpose here is not to criticize or second guess these choices and strategies, but simply to note that these procedural excursions did not advance the claims or counterclaims and should be taken into account when scrutinizing and appraising the "billing judgment" of Plaintiff's fees.