Order Issued on Submitted Matter

(ENDORSED)
FILED
JAN 14 2015
DAVID H. YAMASAKI
Chief Executive Officer/Clerk,
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

vs.

CITY OF SAN JOSE AND BOARD OF ADMINISTRATORS FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE,

Defendants.

AND CONSOLIDATED ACTIONS.

Case No. 112CV225926
(and Consolidated Actions 112CV225928, 112CV226570, 112CV226574, and 112CV227864)

ORDER DETERMINING AMOUNT OF PLAINTIFFS' ATTORNEY FEES

In these consolidated cases, the parties agreed, by stipulation filed September 8, 2014, to bifurcate the issue of whether Plaintiffs are entitled to attorney fees pursuant to Code of Civil Procedure section 1021.5 from the issue of the amount of fees. On October 1, 2014, the court

entered an order determining that San Jose Police Officers' Association (POA), San Jose Retired Employees Association (REA), and AFSCME Local 101 (AFSCME) (collectively, Plaintiffs) are entitled to recover attorney fees. Following further briefing, the issue of the amount of fees to be awarded was heard and submitted on January 6, 2015.

The court is "afford[ed] considerable deference" in making the determination of the amount of fees and costs to be awarded. (*Collins v. City of Los Angeles* (2012) 205 Cal. App. 4th 140, 153 (*Collins*); *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal. App. 4th 691, 698.) The court has considered only admissible evidence, and has not considered evidence presented for the first time in reply which should have been presented in the moving papers.

I. PRINCIPLES GOVERNING SECTION 1021.5 FEE AWARDS

A. *The "Taxpayer Burden"*

Although the City argues in passing that the court should consider the fact that fee awards in this case will be paid to "the plaintiff-organizations" and payment will "fall upon the taxpayers of San Jose" (Opposition Memorandum, at 4:8-9), the City provides no authority for that proposition. While the Supreme Court, in affirming a trial court's fee award, noted that one of the "various relevant factors" the trial court considered was "the fact that an award against the state would ultimately fall upon the taxpayers", it did not explain whether or how this factor affected its decision. (*Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25, 49.) Subsequent cases have held that the fact that the payor is a governmental entity is not a valid reason to reduce a fee award, either by applying a negative multiplier (*Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal. App. 4th 1319, 1331-32) or by denying a positive multiplier where that would otherwise be appropriate. (*Horsford v. Board of Trustees* (2005) 132 Cal.App.4th 359, 400 ("Allowing properly documented attorneys' fees to be cut simply because a losing party is a governmental entity would defeat the purpose of the private attorney general doctrine codified in Code of Civil Procedure section 1021.5 and would also incentivize governmental entities to negligently or deliberately run up a claimant's attorneys' fees, without any concern for consequences.".) Accordingly, the court has not reduced the fee award based solely on the fact that the payor is a governmental entity.

B. *Partial Success on the Merits*

All parties acknowledge that the law requires a court faced with a section 1021.5 request to consider the extent to which the success of the moving party has been less than complete. The extent of success must be taken into account in determining reasonable fees. (*Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 248, 250 (*Sokolow*).) In a case of partial success, the lodestar may be excessive, even if the claims were "interrelated, nonfrivolous, and raised in good faith.... [T]he most critical factor is the degree of success obtained." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 436 (*Hensley*).) "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." (Id., at 440.)

The court must inquire whether charges included in the lodestar are "unrelated" to the moving party's successful claims; "[w]ork on an unsuccessful and unrelated claim generally will not be compensable." (*Environmental Protection Information Center v. Department of Forestry & Fire Protection* (2010) 190 Cal.App.4th 217, 238 (*EPIC*).) A claim is unrelated if based on different facts and legal theories. (Id., at 239.) If the court determines that the unsuccessful claims are not related to the successful claims, then the second step of the *Hensley* test is not required. (Id.) AFSCME misstates the law in suggesting that this second step is an alternative to the preliminary inquiry. (AFSCME Reply Memorandum, at 4:5-6.)

While the court continues to believe that the City's "issue-tallying" approach is not the legally correct analysis, neither are Plaintiffs' approaches sound. POA and REA urge that all claims asserted are related because they all challenge Measure B (POA Reply Memorandum, at 4:11-14; REA Reply Memorandum, at 2:3-4), while AFSCME and REA argue that all claims are related because they all affect vested rights. (AFSCME Reply Memorandum, at 5:5-6; REA Reply Memorandum, at 2:4-6.) REA also argues that all claims are related because the reservation of rights was a threshold issue. (REA Reply Memorandum, at 2:7-9.) Each of these points, and all three of them together, are too simple to account for the complexity of the claims presented to the court, and are not supported by the law.

"[A] common administrative record and a common procedural history are not sufficient on their own to establish that claims are related." (*EPIC*, *supra*, 190 Cal.App.4th at 244 (citation

omitted).) In *National Parks & Conservation Association v. County of Riverside* (2000) 81 Cal. App. 4th 234, although plaintiffs were successful in challenging one Environmental Impact Report and obtained an award of fees, they were not entitled to fees as to further litigation about a second EIR on the same project. Although "technically within the same action", the challenge to the second EIR was "a substantively discrete action." (Id., at 239-240.)

Distinct challenges to the same set of regulations are not "inseparable for the purposes of attorney's fees." (*Sierra Club*, *supra*, 769 F.2d at 803.) Like the challenges in *Sierra Club*, each of Plaintiffs' various challenges to Measure B "involves a particular substantive concern of the petitioners with a particular aspect of" the law, and "the different policy rationales and statutory provisions set forth by the [City] as support for its decisions on different issues make the different claims legally distinct." (Id.) As the analysis set forth in the Statement of Decision reflects, Plaintiffs' successful claims are not related to the unsuccessful claims for purposes of a section 1021.5 fee award.

Next, the court must determine how to adjust the fee award to take into account the unrelatedness of the unsuccessful claims. In making such an adjustment, the court need not identify specific hours to be eliminated but may instead reduce the award to account for limited success. (*Hensley*, *supra*, 461 U.S. at 436-37.) Such an adjustment would be accomplished through a negative multiplier. Although each Plaintiff urges the relative importance of the issues on which it prevailed and argues that the court has the discretion not to reduce a fee award for partial success, each Plaintiff has presented calculations that include a negative multiplier: for AFSCME and REA, a negative multiplier of .85, and for POA, .75. The City argues that a negative multiplier of .15 be applied to AFSCME and POA, and for REA, .20. The court is aided in this analysis by its extensive knowledge of the pretrial, trial and posttrial proceedings in this case, the claims and participation of each of the Plaintiffs, and the extent of the evidence and the complexity of the arguments as to each issue.

The meaning of the vested rights doctrine and the significance of the City's reservation of rights were important and complex threshold issues on which Plaintiffs prevailed. Plaintiffs also prevailed on two other issues: 1) the issue of pension contribution rates and the alternative

"Voluntary Election Program" (1506-A and 1507-A) which were subject to essentially identical analyses, and 2) the issue of emergency reduction in cost of living adjustments (1510-A). Of the issues on which Plaintiffs did not succeed, the more complex issues were the Supplemental Retiree Benefit Reserve (1511-A), disability retirement (1509-A), and retiree health care benefits (1512-A). The remaining issues on which Plaintiffs did not prevail were less involved, legally and factually: reservation of voter authority (1504-A), actuarial soundness (1513-A), alternative wage reduction (1514-A), severability (1515-A), promissory and equitable estoppel, and Bane Act violations. AFSCME asserted all these claims. POA asserted all but the estoppel claims. In addition to the threshold reservation of rights issue, REA succeeded only on the COLA claim, lost on the issues concerning SRBR, healthcare, actuarial soundness, voter authority, and severability, and did not argue the contribution rates/VEP, disability retirement, or wage reduction issues. Taking into account all the pertinent factors, the court determines that the appropriate negative multiplier for AFSCME and POA is .50, and for REA, .65.

Plaintiffs presented argument that the fees-on-fees portion of the award (i.e., fees spent on fee-related litigation) should not be subject to a negative multiplier, while the City argued that it should be so subject. Although all parties agreed that no published case addresses this point, AFSCME directed the court to *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal. 4th 553, 582-583 (*Graham*), focusing in particular on the portion of the Supreme Court's opinion addressing the application of multipliers to fee-related litigation. In remanding the case to the trial court for further consideration of entitlement to fees, the Supreme Court rejected the defendant's argument that a positive multiplier could never be applied to fees-on-fees, since "[s]uch a rule does not appear in harmony with the principle that the awarding of attorney fees and the calculation of attorney fee enhancements are highly fact-specific matters best left to the discretion of the trial court." (Id., at 581.) On remand, the trial court was directed to consider whether a positive multiplier should be applied to fees-on-fees.

Under *Graham*, the trial court has the discretion to treat fees-on-fees the same as or differently from lodestar fees for purposes of a multiplier, keeping in mind the policies underlying section 1021.5. In exercising its discretion in applying a negative multiplier when the

party entitled to fees accomplished only partial success, a trial court may consider the extent to which it is "in the interest of justice", given all the circumstances of the case, for that party to bear its own attorney fees. (*Collins, supra,* 205 Cal. App. 4th at 157-58.) In this case, given the partial extent of Plaintiffs' success on the merits, it is consistent with the policies underlying section 1021.5 to treat fee-related litigation in the same way as the lodestar fees, and to apply the negative multiplier to those fees to limit Plaintiffs' recovery.

C. *Plaintiffs' Financial Stake in the Outcome*

The City argues that, even apart from Plaintiffs' partial success on the merits, the court has authority to reduce the claimed fees by "apportioning" the payment of fees between them and the City, based on Plaintiffs' financial stake in the litigation. In this regard, the City relies on *Collins* in which a class of plaintiffs who had been arrested for driving under the influence of alcohol or drugs received bills from the City of Los Angeles for emergency response costs. The judgment entered after trial included a refund payment to class members totaling $464,218, as well as debt forgiveness of $896,185 for class members who had not paid the City's bill. The Court of Appeal considered both sums, holding that "in determining the amount of attorney fees that a plaintiff reasonably could be expected to bear for purposes of apportioning a fee award under section 1021.5, a court should consider not only the actual or expected monetary recovery but the full monetary value of the judgment." (*Collins, supra,* 205 Cal. App. 4th at 158.) On that basis, the appellate court held that it was reasonable to require plaintiffs to be responsible for fees to the extent of 25% of the value of the judgment, and affirmed the trial court's allocation.

Unlike *Collins* where the plaintiffs won a precisely quantified and current sum, partly in refunds and partly in debt forgiveness, here Plaintiffs' judgment deals with unquantified future sums. Therefore, *Collins* does not provide a basis to reduce Plaintiffs' fee award beyond the negative multiplier.

II. AFSCME

AFSCME seeks $513,441.25, which reflects a $275 blended hourly rate. The request is supported by a Memorandum and a Reply Memorandum, Declarations of Teague Patterson and Robert Bezemak, Reply Declaration of Vishtasp Soroughsian, and "Supplemental" Declaration

of Teague Patterson. AFSCME also makes a Request for Judicial Notice and a "Supplemental" Request for Judicial Notice, which are granted.

The City argues that some of the tasks performed were unnecessary and/or an unnecessarily large amount of time was spent on certain tasks. Generally, the court finds that the tasks performed and the amount of time spent was reasonable, with the exception of the fees incurred in the federal case in the amount of $27,280. California law gives the trial court discretion to award fees incurred in work on another case when that work was "useful to [the] resolution" of the action in which the fees are sought. (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal. App. 4th 740, 779-80.) In this case, the work in the federal case did not "materially contribute" to the resolution of any issues in the case, nor did it diminish the work of the court or counsel in this case. (Id., at 781.)

After subtracting the fees related to the federal case, the remaining fees are adjusted from $486,131.25 to $571,919.11 to back out AFSCME's negative multiplier of .85. Then, applying the negative multiplier of .50, the total for AFSCME fees is $285,959.55

III. POA

POA seeks $967,335, which reflects hourly rates from $175 to $450. The request is supported by a "Supplemental" Memorandum and Reply Memorandum, a Declaration of Franco Vado, "Supplemental" and "Second Supplemental" Declarations of Greg Adam, and a Reply Declaration of Gonzalo Martinez. POA clarifies in the "Supplemental" Memorandum at p.2, n. 1, that all points and authorities on which it relies in making this request are set forth therein.

The hourly rates identified in POA's motion are reasonable, with one caveat. POA requests an award of fees for work in which partners billed nearly as many hours as associates: 1,548 partner hours at $450 compared to 1,712 associate hours at $325 and 209.4 paralegal hours at $175. (Reply Memorandum, at 10:21-24.) This generally would not be considered an optimally efficient approach. Partner hourly rates are justified by the efficiency achieved in delegating work to the competent person with the lowest billing rate. Even in important litigation, attention to this principle is necessary to warrant higher rates for more experienced lawyers. There are significant inefficiencies when senior lawyers undertake to accomplish tasks

in which their level of experience is not utilized: that happened in this case. Accordingly, the partner billing rate is adjusted to $375.

The City argues that some of the tasks performed were unnecessary and/or an unnecessarily large amount of time was spent on certain tasks. Generally, the court finds that the tasks performed and the amount of time spent was reasonable, with certain exceptions. With respect to the POA's opposition to the City's successful motion to dismiss the seventh cause of action for violation of the MMBA, the City argues for deletion of 109.1 partner hours and 43.1 associate hours, to which POA provides no response. Accordingly, those hours will be deleted. The City also argues that POA should not recover for time spent (76 partner hours and 2.6 associate hours) on two motions that were never made: a motion for judgment on the pleadings and a motion to strike the City's summary adjudication motion. POA responds that the time spent was "***fully put to use*** in developing legal strategy and argument" to oppose the City's motion for summary adjudication. (Reply Memorandum, at 8:15 (emphasis in original).) However, POA's position that no reduction whatever is warranted is not plausible and is not supported either by the time entries or by the Martinez Declaration on which POA relies. While Mr. Martinez explains that he was able to "build on" the legal research done (Martinez Declaration, at 4:2), the time entries show that many hours were spent on drafting and "extensive revisions". Accordingly, 47.3 partner hours will be deleted. Finally, the proposed judgment was not efficiently handled, and 32 associate hours are deleted.

If the negative multiplier included in POA's calculations is backed out, the amount of fees would be $1,289,780. The reductions in hours detailed above bring the partner hours down from 1,548.3 to 1,391.9, and associate hours from 1,712 to 1,636.9. Applying the reduced billing rate of $375 and adding the paralegal hours, the revised total equals $1,081,438.75. Applying to this number a negative multiplier of .50 brings the total POA fees to $540,719.37.

IV. REA

REA seeks $532,340, which reflects hourly rates from $250 to $600. The request is supported by a "Supplemental" Memorandum and a Reply Memorandum, a "Supplemental" Declaration of Stephen Silver and a Declaration of Jacob Kalinski. REA also intends that the

court consider its brief and the Declaration of Mr. Silver filed July 30, 2014. That Declaration summarizes Mr. Silver's professional background, states the actual rates charged to REA, and also states that these rates are lower than those charged "in the community" (not specified).

The City argues that the hourly rates claimed by REA are not supported by proof and are unreasonable. The only information provided about the professional background and experience of REA attorneys other than Mr. Silver are parenthetical phrases in Mr. Silver's Declaration which do not supply the measure of proof required under *Ajaxo, Inc. v. E*Trade Group* (2005) 135 CA4th 21, 65. In the absence of such proof, the most persuasive evidence provided is the actual rates charged, so the court will adopt such rates for the other attorneys.

It does not appear that REA has presented evidence addressing the relevant Bay Area community rather than Los Angeles where counsel have their offices: a reasonable hourly rate for purposes of a fee award takes into account "the community" relevant to the inquiry. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095.) At the hearing, REA argued that Mr. Silver's professional accomplishments were at least equal to those of Mr. Adam representing POA, and that the court should therefore apply to Mr. Silver's time the "Bay Area rate" of $450 requested by POA. As to Mr. Silver's time, there is sufficient evidence to support such a rate.

With REA as well, the City argues that some of the tasks performed were unnecessary and/or an unnecessarily large amount of time was spent on certain tasks. Generally, the court finds that the tasks performed and the amount of time spent was reasonable, with two exceptions. First, given REA's limited role at trial, it was not reasonably necessary to have two lawyers present for the entire trial. REA's response, set forth in Mr. Kalinski's Reply Declaration at 11:8-19, is not convincing: neither his review of documents before trial nor his responsibilities for ensuring that REA's exhibits were offered into evidence justifies attendance in the courtroom all day every trial day. Accordingly, 46.3 hours of Mr. Kalinski's time are deleted. Second, the travel time is not reasonable, and 50.9 hours of Mr. Silver's time and 65.2 hours of Mr. Kalinski's time are deleted.

Deleting the hours listed above, adding in the hours on this motion, and using the hourly rates supported by the evidence, the revised lodestar is $327,897.50. Applying to this number a negative multiplier of .65 brings the total REA fees to $213,133.37.

Dated: January 13, 2015

Honorable Patricia M. Lucas
Judge of the Superior Court