

FILED

UNITED STATES COURT OF APPEALS

DEC 13 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARGRETTY RABANG; OLIVE
OSHIRO; DOMINADOR AURE;
CHRISTINA PEATO; ELIZABETH
OSHIRO,

Plaintiffs-Appellees,

v.

ROBERT KELLY, Jr.; RICK D.
GEORGE; AGRIPINA SMITH; BOB
SOLOMON; LONA JOHNSON;
KATHERINE CANETE; ELIZABETH
KING GEORGE; KATRICE ROMERO;
DONIA EDWARDS; RICKIE WAYNE
ARMSTRONG,

Defendants-Appellants.

No. 17-35427

D.C. No. 2:17-cv-00088-JCC
Western District of Washington,
Seattle

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

I
Background

Robert Kelly, Jr., and the other appellants (collectively, “Kelly”) filed an interlocutory appeal of the district court’s order denying Kelly’s motion to dismiss for lack of subject matter jurisdiction the lawsuit filed by Margretty Rabang and the other appellees (collectively, “Rabang”) pursuant to the Racketeer Influenced

and Corrupt Organizations Act, 18 U.S.C. § 1962(c)-(d). The parties filed appellate briefs and participated in oral argument.

Almost two weeks after oral argument, Kelly filed a notice stating that Kelly had filed a motion pursuant to Federal Rule of Civil Procedure 62.1 for an indicative ruling by the district court, if this court dismissed the appeal or remanded to the district court while retaining jurisdiction. The district court denied the motion, and Kelly notified the court of the district court's ruling.

Kelly then filed a motion to dismiss the appeal voluntarily pursuant to Federal Rule of Appellate Procedure 42(b), acknowledging in the motion that

Appellants Kelly understand and agree that they may be required to reimburse and pay to the Respondents all reasonable costs and attorneys' fees incurred by Respondents in the preparation and other legal work incidental to their defense against Appellants Kelly on this appeal. *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 678 (9th Cir. 1975)

Rabang filed a response to the motion stating that the court should condition dismissal on the payment of Rabang's attorneys' fees and costs "incurred in this appeal and other legal work incidental to this appeal." Rabang stated that the Rabang appellees incurred a total of \$105,753.97 in fees and costs and attached a declaration containing each of Rabang's attorneys' hourly rate and the total hours worked, but the declaration did not specify the dates of service, hours worked, or

tasks performed. Rabang also requested that the court order Kelly to post a bond in the amount of \$105,753.97 in the district court.

Kelly filed a reply to Rabang's response, stating that the court should follow *Shellman* and direct Rabang to submit a bill of costs and a fee motion pursuant to Ninth Circuit Rule 39-1.6, to which Kelly may have to opportunity to object.

Kelly also requested that the court deny Rabang's request that the court order Kelly to post a bond.

The merits panel granted the motion for voluntary dismissal, and ordered Kelly to pay Rabang's reasonable costs and attorneys' fees. The panel directed Rabang to file a motion for attorneys' fees pursuant to Ninth Circuit Rule 39-1.6, and permitted Kelly an opportunity to file an opposition. Rabang filed a fee request, Kelly filed an opposition to the fee request, and Rabang filed a reply to the opposition. The panel referred the fee request to the Appellate Commissioner for a determination of the amount of fees. *See* 9th Cir. R. 39-1.9. Pursuant to the Appellate Commissioner's order, Rabang filed a supplement to the fee request, Kelly filed a supplemental opposition, and Rabang filed a supplemental reply.

I
Analysis

Federal Rule of Appellate Procedure 42(b) permits the court to grant an appellant's motion to dismiss an appeal "on terms agreed to by the parties or fixed by the court." This court interprets Rule 42(b) to permit the court to award costs and attorneys' fees incurred by the appellee "in the preparation and other legal work incidental to its defense against [the appellant] on [the] appeal." *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 678 (9th Cir. 1976).

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983); *see Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013).

A Fee Request

Rabang requests attorneys' fees in the amount of \$107,347.00 for the work of seven timekeepers at the following hourly rates: 82.2 hours by Gabriel S. Galanda, Esq., at \$250 an hour; 82.9 hours by Anthony S. Broadman, Esq., at \$225 an hour; 55.7 hours by Ryan D. Dreveskracht, Esq., 149.7 hours by Bree R. Black Horse, Esq., and 138.7 hours by Elisabeth J. Guard, Esq., all at \$195 an hour; 12.6 hours by paralegal Wendy Foster at \$75 an hour; and 2 hours by legal assistant

Sean Foster at \$50 an hour. Rabang requests compensation for the work done by its timekeepers during this appeal in the district court and in this court.

B Hourly Rates

In response to Rabang's fee request, Kelly filed an opposition arguing, in part, that the fee motion lacked information concerning the experience or credentials of the attorneys and other timekeepers representing Rabang, which prevented the court from determining reasonable hourly rates. Rabang, pursuant to the Appellate Commissioner's order, filed a supplement to the fee motion with supporting evidence of the qualifications and experience of each attorney, paralegal, and legal assistant. Kelly filed a supplemental opposition, but did not renew the argument that the fee motion lacked sufficient information to set prevailing hourly rates for Rabang's timekeepers.

Rabang has submitted unopposed evidence demonstrating that the requested rates are "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); *see also United States v. \$28,000 in U.S. Currency*, 802 F.3d 1100, 1105 (9th Cir. 2015) (fee request is presumably reasonable if fee application is supported by sufficient evidence and opponent fails

to present countervailing evidence or supporting argument). Accordingly, the hourly rates for Rabang's timekeepers are awarded.

C Documentation Deficiencies

Kelly contends that the fee motion is defective because it contains no attestation that the fees were actually billed to and paid by Rabang, or otherwise failed to disclose the nature of fee agreement between Rabang and counsel. The panel's order granting fees implicitly rejected this argument. In any event, courts repeatedly have rejected the argument that a litigant must actually incur fees in order to be eligible for a fee award. *See Nadarajah v. Holder*, 569 F.3d 906, 916 (9th Cir. 2009); *Morrison v. C.I.R.*, 565 F.3d 658, 661-66 (9th Cir. 2009); *Centennial Archaeology, Inc. v. AECOM, Inc.*, 688 F.3d 673, 677-82 (10th Cir. 2012); *Turner v. Comm'r of Soc. Sec.*, 680 F.3d 721, 723-25 (6th Cir. 2012); *Murkeldove v. Astrue*, 635 F.3d 784, 790-94 (5th Cir. 2011). Furthermore, an award of attorney's fees under federal law is based on the prevailing market value of the services provided, and is not limited by the fee agreement or payment arrangement between an attorney and client. *See Blanchard v. Bergeron*, 489 U.S. 87, 90-96 (1989); *Blum v. Stenson*, 465 U.S. 886, 892-96 (1984).

Kelly also contends that the billing records attached to the fee motion inadequately describe the tasks performed by the various timekeepers. On the

contrary, the fee documentation is adequate to permit a meaningful review of the reasonableness of hours. *See Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000). Rabang submitted sufficient evidence supporting the hours claimed by listing the hours and “identify[ing] the general subject matter of [the] time expenditures.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983) (counsel “is not required to record in great detail how each minute of his time was expended”).

D Legal Work “Incidental” to the Appeal

Kelly contends that Rabang should not be compensated for the legal work performed by Rabang’s attorneys in the district court while this appeal was pending. Kelly argues that Rule 42(b) does not permit compensation for any fees except those incurred in the court of appeals. This contention lacks merit.

Because Rabang did not agree to any terms before Kelly filed the motion for voluntary dismissal, Rule 42(b) permits the court to condition the dismissal on the payment of the legal fees incurred in preparing the appeal “and other legal work incidental to [the appellant’s] defense . . . on [the] appeal.” *Shellman*, 528 F.2d at 678. The reasoning behind conditioning the appellant’s voluntary dismissal on the payment of the appellee’s legal fees is to prevent the appellant from abandoning its appeal if doing so would result in financial loss to the appellee. *See id.*

Kelly argues that, in the analogous setting of a voluntary dismissal with prejudice in the district court under Federal Rule of Civil Procedure 41(a)(2), the court may reimburse the defendant for “expenses incurred in preparing work product that will not be useful in subsequent litigation of the same claim.” *Cauley v. Wilson*, 754 F.2d 772 (7th Cir. 1985). This court has stated that the district court may permit a plaintiff to dismiss an action under Rule 41(a)(2) so long as the defendant is not prejudiced or “unfairly affected” by the dismissal. *See Stevedoring Servs. of Am. v. Armilla Int’l*, 889 F.2d 919, 921 (9th Cir. 1989).

Shellman, *Cauley*, and *Stevedoring Services* are consistent in that they recognize that a court may require the party wishing to dismiss an legal action to reimburse the other party for the expense occasioned by the legal action. The cited authorities do not limit reimbursement to the expenses incurred only in the action or appeal. So long as the appellee’s expense was caused by or would not have occurred but for the appeal, *Shellman* permits the court to order the appellant to order payment of that expense as a condition of granting the voluntary dismissal of the appeal. *See Shellman*, 528 F.2d at 678 (appellant may not abandon its appeal if it would cause financial loss to the appellee).

Rabang requests compensation for work performed in the district court that was directly tied to or necessitated by Kelly’s appeal, such as the tasks of

responding to Kelly's Federal Rule of Civil Procedure 62.1 motion for an indicative ruling and responding to Kelly's request to stay district court proceedings pending the appeal. Furthermore, the fee motion explains, and the district court records and billing statements confirm, that the other claimed time for district court work by Rabang's attorneys was directly related to the appeal and would not have occurred but for the appeal, such as preparing status reports concerning the appeal and discovery pleadings related to the district court stay pending appeal. Kelly fails to show that any of the claimed hours pertain to tasks that would not have occurred but for the appeal. Kelly also fails to argue or show that the requested time is unreasonable. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (court should, by and large, defer to the winning lawyer's professional judgment regarding the time required to spend on the case). Accordingly, the requested time for district court work related to the appeal is awarded.

E Reasonable Hours

1 Oral Argument

Kelly contends that Rabang seeks compensation for an excessive number of hours preparing for oral argument. This contention has merit.

The billing records confirm Kelly's assertion that Rabang requests compensation for 70.6 hours by Broadman, 22.5 hours by Guard, 6.3 hours by Galanda, 7.8 hours by Dreveskracht, and 3.6 hours by Black Horse--a total of 114.8--for preparing for and presenting oral argument. Contrary to Kelly's assertion otherwise, the billing records reflect that each attorney assisted oral argument in different roles: Broadman presented oral argument; Guard and Dreveskracht researched prior oral arguments by the panel and assisted with moot argument; and Black Horse and Galanda assisted with moot argument.

A review of the issues on appeal, the record, the billing records, and the briefing nonetheless shows that the time expended for tasks related to oral argument is excessive. Accordingly, the following hours are reasonable for preparing oral argument and are awarded: 40 hours by Broadman, 15 hours by Guard, 3 hours by Galanda, 3 hours by Dreveskracht, and 3.6 hours by Black Horse.

2 Response to Motion for Voluntary Dismissal

Kelly contends that Rabang's attorneys spent 55.3 hours responding to the motion for voluntary dismissal, and that the task reasonably could have been accomplished in fewer hours. This contention has merit.

Rabang's attorneys expended the following time preparing and filing the opposition to the motion for voluntary dismissal: 39.4 hours by Guard, 7.4 hours by Galanda, 5 hours by Broadman, 0.7 hours by Dreveskracht, and 2.8 hours by Black Horse. According to the billing records, Guard was the primary attorney preparing the opposition; Broadman, Dreveskracht, and Black Horse provided supporting research, editing, and conferences; and Galanda coordinated, supervised, and advised the other attorneys involved. The opposition was brief and argued that Kelly should pay a specific amount of fees, citing to two legal authorities.

The opposition required a preliminary review of Rabang's fee invoices to determine the amount of fees requested. Rabang's attorneys therefore reasonably expended a greater number of hours than would be expected by a four-page filing with little legal analysis. The number of hours requested for preparing the filing is excessive, however, given the course of the proceedings to date, the arguments made in the motion for voluntary dismissal and opposition, and the billing records. Rabang is awarded the following time for the work of Rabang's attorneys preparing the opposition to the motion for voluntary dismissal: 16 hours for Guard, 4 hours for Galanda, 1 hour for Broadman, 0.7 hours for Dreveskracht, and 1 hour for Black Horse.

3 Fee Pleadings and Cost Bill

Kelly next contends that 21.3 hours is an excessive amount of time for preparing the fee request and supporting materials. This contention lacks merit. Considering the contents of the fee motion and reply, the time required to redact and extract totals from the billing records, and the information and contents in the supplement to the fee motion and supplemental reply, the time requested for preparing the fee pleadings is reasonable. The requested hours are awarded.

III
Conclusion

Attorneys' fees in the amount of \$90,574.50 are awarded in favor of appellees Margretty Rabang, Olive Oshiro, Dominador Aure, Christina Peato, and Elizabeth Oshiro, and against appellants Robert Kelly, Jr., Rick D. George, Agripina Smith, Bob Solomon, Lona Johnson, Katherine Canete, Elizabeth King George, Katrice Romero, Donia Edwards, and Rickie Wayne Armstrong, jointly and severally.

This order amends the court's mandate.