

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CORY SCHEIDLER,

Plaintiff,

v.

UNITED WISCONSIN INSURANCE
COMPANY and EXTRUSION DIES, INC.

Defendants.

OPINION
and
ORDER

00-C-0393-C

In an order dated September 19, 2001, granting defendant Extrusion Dies, Inc.'s summary judgment motion against plaintiff Cory Scheidler, I determined that Extrusion Dies is entitled to the reasonable attorney fees and costs it incurred in successfully defending itself against Scheidler's claims brought under 29 U.S.C. §§ 1132(a)(2) and (a)(3) of the Employee Retirement Income Security Act. In the same order, I determined that defendant Extrusion Dies was not entitled to the attorney fees and costs it incurred in successfully seeking the dismissal of defendant "Extrusion Dies, Inc. Employee Group Welfare Benefit Plan" from this case. Presently before the court is defendant Extrusion Dies' petition for attorney fees and costs.

ATTORNEY FEES

Defendant Extrusion Dies has submitted an itemized accounting of its fees and costs that generally does not distinguish between the amount of time it spent successfully defending plaintiff's §§ 1132(a)(2) and (a)(3) claims as opposed to the time it spent having the defendant Plan dismissed from the case. Because defendant Extrusion Dies is entitled to attorney fees and costs incurred in achieving the former result but not the latter, it has proposed a method, discussed below, for discounting the total fees and costs it incurred to reflect only those charges recoverable pursuant to the court's September 19 order.

Defendant Extrusion Dies notes first that its work on this case was charged at two different billing rates. In February 2001, defendant Extrusion Dies paid its lawyer \$150 an hour for 13.8 hours of work. Beginning in March 2001, when defendant Extrusion Dies' insurance company began paying for the defense of the case, the billing rate dropped to \$110 an hour. Ultimately, 149.8 hours was charged at this lower rate. Defendant Extrusion Dies seeks also to recover fees for 3.5 hours at the \$110 rate for preparation of the petition for fees and costs presently before the court. After making certain reductions, Extrusion Dies multiplies the hours said to have been spent on the case by its lawyer by the applicable hourly rates to arrive at a "lodestar" of \$16,480. Although plaintiff does not object to the hourly rates, he does object to certain charges and the discounting method used by defendant Extrusion Dies in its effort to comply with the court's September 19 order.

Defendant Extrusion Dies incurred attorney fees of \$2070 in February 2001 (13.8 hours at \$150) and seeks reimbursement for that full amount. Plaintiff objects to two specific entries in the billing records submitted for that period. First, because defendant Extrusion Dies' lawyer also entered an appearance on behalf of defendant Extrusion Dies, Inc. Employee Group Welfare Benefit Plan, the hour spent reviewing plaintiff's complaint should be proportionately discounted. Next, the answer and affirmative defenses filed by defendant Extrusion Dies were submitted on behalf of both Extrusion Dies and the defendant Plan. Therefore, plaintiff argues, the three hours spent drafting the answer and affirmative defenses should also be proportionately discounted. I agree. Nevertheless, a significant majority of the answer and affirmative defenses dealt with plaintiff's §§ 1132(a)(2) and (a)(3) claims against defendant Extrusion Dies, as opposed to claims against the defendant Plan. Accordingly, I conclude that the charges for reviewing plaintiff's complaint and drafting an answer (4 hours at \$150) should be reduced by 25%, or \$150 (\$600 multiplied by 0.25). Therefore, the amount of attorney fees reimbursable for February 2001 will be reduced from \$2,070 to \$1,920.

After February 2001, defendant Extrusion Dies incurred \$16,478 in fees (149.8 hours at \$110) and now argues that it incurred \$14,025 of that amount in defending plaintiff's §§ 1132(a)(2) and (a)(3) claims. Defendant Extrusion Dies reaches this figure by employing a two-part methodology. First, it subtracts certain charges identified specifically in its billing

records as dealing with matters wholly unrelated to the §§ 1132(a)(2) and (a)(3) claims. Next, it identifies those billing entries that relate specifically to the parties' cross motions for summary judgment. Defendant Extrusion Dies reduces these amounts by 25%, estimating that this percentage reflects the amount of time it devoted to its argument that defendant Extrusion Dies, Inc. Employee Group Welfare Benefit Plan was not a proper defendant (for which it may not recover attorney fees), while the remaining 75% of the time spent preparing and briefing those motions was devoted to the §§ 1132(a)(2) and (a)(3) issues (for which it may recover attorney fees).

I find these estimates reasonable. Admittedly, it is difficult to break out precisely the amount of time defendant Extrusion Dies' lawyer spent defending plaintiff's §§ 1132(a)(2) and (a)(3) claims. However, this is largely because those claims were framed in a vague and confusing manner that invited overlap with plaintiff's claims against the other defendants. Plaintiff argued variously that defendant Extrusion Dies had breached a fiduciary duty by failing to fund the plan properly (even though it was undisputed that Extrusion Dies paid 100% of the premiums for Scheidler's disability policy) or by failing to forward certain information to defendant United Wisconsin Insurance Company. On this basis, plaintiff maintained that he should be "permit[ted] . . . to maintain his breach of fiduciary duty claim [under § 1132(a)(2)] against defendant EDI until EDI shows plaintiff will receive adequate relief through his claim under" § 1132(a)(1)(B) against defendant United Wisconsin.

Having used § 1132(a)(2) as a hook to require defendant Extrusion Dies to insure that plaintiff received “adequate relief,” plaintiff must compensate Extrusion Dies for its efforts to show why it was not required to compensate plaintiff under *any* circumstances. Further, a review of the parties’ summary judgment briefs demonstrates that at least 75% of defendant Extrusion Dies arguments were directed toward rebutting plaintiff’s §§ 1132(a)(2) and (a)(3) theories of liability.

Nevertheless, defendant Extrusion Dies’ methodology falls short in another regard. Defendant fails to address the vast majority of billable hours recorded between March 1, 2001 and the court’s September 19, 2001 order granting defendant Extrusion Dies’ summary judgment motion. These charges are mostly for research, discovery-related activities and communication among defendant Extrusion Dies’ lawyer, his clients and counsel for defendant United Wisconsin. The billing entries do not always indicate the plaintiff’s theories of liability to which the work relates. Seizing on this lack of detail, plaintiff argues first that no fees should be awarded for communications between defendant Extrusion Dies’ lawyer and defendant United Wisconsin’s lawyers because the two defendants had no common interest in insuring that Extrusion Dies avoided liability as a fiduciary under §§ 1132(a)(2) or (a)(3). I cannot agree. As noted above, plaintiff attempted to use § 1132(a)(2) to keep defendant Extrusion Dies on the hook for damages should his claims against defendant United Wisconsin fail. Further, plaintiff contended that defendant

Extrusion Dies had breached a fiduciary duty by failing to forward certain documents to defendant United Wisconsin. Under these circumstances, it is understandable that Extrusion Dies would seek to avoid liability as a fiduciary by coordinating its defense with United Wisconsin.

However, plaintiff argues persuasively that the numerous research, discovery and communications charges not addressed explicitly in defendant Extrusion Dies' fee petition should be reduced. By my calculation, 91.7 of the 149.8 hours billed after March 1, 2001 have not been reduced or otherwise explained by defendant Extrusion Dies. Plaintiff argues that it would be reasonable to charge him for only 25% of these hours. I believe that figure is too low. Defendant Extrusion Dies' presence in this suit was founded primarily on plaintiff's claim that he could properly recover individual benefits from Extrusion Dies under §§ 1132(a)(2) because it is a plan fiduciary. However, as I noted in the September 19 order, plaintiff failed to offer evidence that defendant Extrusion Dies breached any fiduciary duty and also ignored United States Supreme Court precedent holding that individual benefits could not be recovered under § 1132(a)(2). Defendant Extrusion Dies was put to great expense to defend a claim that had little grounding in fact or law. Although defendant Extrusion Dies' lawyer also entered an appearance on behalf of defendant Extrusion Dies, Inc. Employee Group Welfare Benefit Plan, his work in having this non-existent entity dismissed from the case amounted to a small fraction of the time spent defending Extrusion

Dies against plaintiff's §§ 1132(a)(2) and (a)(3) claims.

Even though these factors weigh in favor of allowing defendant Extrusion Dies to recover a substantial portion of its fees, the fact that Extrusion Dies has not explained why the vast majority of its billable hours for research, communication and discovery should not be subject to any reduction whatsoever cuts against it. "The party requesting fees has the burden of substantiating the reasonableness of the hours expended and the hourly rate." McNabola v. Chicago Transit Authority, 10 F.3d 501, 518 (7th Cir. 1993); Ross v. Diversified Benefit Plans, Inc., 978 F. Supp. 795, 798 (N.D. Ill 1997) (party seeking fees carries "burden to show reasonableness of fees sought"). Accordingly, I find that reducing the 91.7 hours that defendant Extrusion Dies has not discounted or specifically identified with a particular theory of liability by 50% is reasonable. Accordingly, defendant Extrusion Dies' request for \$14,025 in compensation for work performed after March 1, 2001 will be reduced by \$5,043.50 (91.7 hours multiplied by 0.5 equals 45.85, multiplied by \$110), to reach a total of \$8,981.50.

Finally, defendant Extrusion Dies seeks \$385 in fees to cover the cost of preparing the attorney fees and costs petition presently before the court (3.5 hours at \$110). This amount is reasonable. Plaintiff will be ordered to pay defendant Extrusion Dies \$11,286.50 in attorney fees (\$1,920 for fees accumulated before March 1, 2001; \$8,981.50 for fees accumulated after March 1, 2001; and \$385 for fees accumulated in preparing its petition

for fees and costs).

COSTS

Defendant Extrusion Dies seeks \$314.05 in costs, which represents the total costs incurred in defending plaintiff's claims against both Extrusion Dies and defendant Extrusion Dies, Inc. Employee Group Welfare Benefit Plan. The total amount of the bills submitted by defendant Extrusion Dies is actually \$313.52 (Extrusion Dies appears to have inadvertently included a \$0.53 copying charge twice). Defendant Extrusion Dies has not attempted to identify the costs associated with its defense of the §§ 1132(a)(2) and (a)(3) claims as opposed to its successful effort to have the Plan dismissed as a defendant, a fact that plaintiff suggests requires the costs be reduced by 50%. Instead, I will reduce the costs by 25% (\$78.38) in recognition of the fact that it is significantly more difficult to associate costs, as opposed to attorney fees, with a particular theory of liability. Defendant Extrusion Dies will be awarded \$235.14 in costs.

ORDER

IT IS ORDERED that defendant Extrusion Dies, Inc. is awarded \$11,286.50 in

attorney fees and \$235.14 in costs.

Entered this 29th day of November, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge