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

MARTHA ("MOLLY") OTIS SCHEER,

Plaintiff,

v.

CITY OF HAYWARD, *et al.*,

Defendants.

OPINION AND ORDER

10-cv-447-slc

In this civil action, plaintiff Martha Otis Scheer sued defendants under 42 U.S.C. §§ 1983 and 1988 for violating her rights under the First and Fourteenth Amendments in adopting, applying and enforcing City of Hayward Music Ordinance #476. After defendants conceded liability on summary judgment, the case proceeded to trial on January 9, 2012 on the question of damages. The jury awarded Otis $400,000 in compensatory damages and $1,400 in punitive damages. Before the court is Otis's motion for attorney's fees in the amount of $249,414.25 and costs in the amount of $8,736.87, for a total of $258,151.12 pursuant to Fed. R. Civ. P. 54 and § 1988(b). Dkt. 100.

Defendants object to the requested amount on several grounds, arguing that many of the entries were duplicative, excessive or unnecessary. For the reasons discussed below, Otis's motion for attorney fees and costs will be granted in part and denied in part. I am awarding Otis fees in the amount of $216,378.44 and costs in the amount of $8,152.87 for a total of $224,531.31.

DISCUSSION

Under 42 U.S.C. § 1988(b), "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" in suits brought pursuant to 42 U.S.C. § 1983. "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 (1983). However, the Court has cautioned that "[a] request for attorney's fees should not result in a second major litigation." *Id.* at 437. "In light of this concern, as well as the fact that determining what qualifies as a 'reasonable' use of a lawyer's time is a highly contextual and fact-specific enterprise," the Court of Appeals for the Seventh Circuit grants "'wide latitude to district courts in setting awards of attorney's fees.'" *Sottoriva v. Claps,* 617 F.3d 971, 975 (7th Cir. 2010) (internal citations omitted). As the moving party, Otis has the burden to show that the lodestar amount is reasonable. *See Hensley*, 461 U.S. at 433.

Defendants do not contest that Otis is the prevailing party in this case or that her attorneys charged a reasonable hourly rate. Their objection is that the number of hours claimed is unreasonable because Otis over-lawyered her case. Defendants oppose several entries by Attorney Patricia Keahna on the ground that her efforts duplicated those of Attorney Glenn Stoddard and Attorney Carol Skinner in meeting with witnesses, attending court conferences, preparing for and attending depositions at which she did not question witnesses and preparing for and attending trial where she did not question witnesses or make any arguments. They also argue that they should not bear the cost of Skinner, who was hired only because of Stoddard's romantic relationship with and subsequent marriage to Otis.

Otis explains that Stoddard hired Keahna as an "Of-Counsel" associate to help him with several cases in his law firm and that her work saved time that Stoddard otherwise would have had to bill for himself at a higher rate. So far, so good. The court sees nothing wrong with having less experienced co-counsel handle some of the load and to be Stoddard's backup at trial. But Stoddard also reports that he hired Skinner because he needed experienced co-counsel to help him try the case. That's not an entirely accurate assessment, because Stoddard didn't *need*

a lawyer of Skinner's caliber to assist him. In their affidavits in support of Otis's fee request, Stoddard and Skinner both tout themselves as among the best civil rights attorneys in Wisconsin. I accept these averments as true, which means that either one of them was capable of handling this entire trial alone, although using a less experienced lawyer at second chair would be acceptable.

This is not to say that Skinner didn't add significant value to Otis's trial team, or that her work isn't worth the amount she is claiming. The point is that the defendants should not bear the cost of Otis deciding to field a three-attorney trial team with two first chairs.[1] It *is* fair to have defendants pay for this case as if Stoddard and Keahna had tried it without Skinner's assistance. The easiest way to account for this is to substitute Keahna's hourly rate for Skinner's hourly rate and then to subtract any entries on Keahna's time sheet that overlap temporally with Skinner's. This isn't a highly-tuned formula, but it provides a fair and reasonable outcome. The refinements to this formula cut in both directions, so the marginal value to either side of a tighter approach is minimal.

I. Attorney Keahna

I have reviewed the entries identified by defendants as duplicative and find that the time Keahna spent preparing for depositions and trial was reasonable, assuming that this was work that either Stoddard or Skinner would have to had done if Keahna hadn't done it.

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[1] Otis points out that defendants had four different lawyers working on their case, implying that it is hypocritical fo defendants to challenge Otis's three lawyer team. No, it's not. The defendants are bearing their own costs here, so they can spend as much as they want on attorneys. If *they* were in a position to ask for cost-shifting, then the court would apply the same formula to their claim that it is applying to Otis's claim.

Otis fails to explain why Keahna needed to participate along with Stoddard during the telephonic conference calls with the court concerning scheduling and case status matters. The most substantive hearing was the final pretrial conference, but both Stoddard and Skinner appeared for that hearing, Therefore, I will not allow the 4.5 hours or $945 that Keahna billed for attending the telephonic hearings (but as noted above, I will allow Skinner's time at Keahna's hourly rate).

Otis states that Keahna's presence at the depositions made them more efficient because she took notes, conferred with Stoddard, helped formulate follow-up questions and kept the exhibits organized. I agree that having two attorneys at a deposition of a key witness is not necessarily unreasonable. However, billing an associate's time at $210/hr for the clerical tasks that Stoddard describes is excessive. Further, those tasks would not have been necessary at the depositions of Otis, McDonald and Sunderland because Stoddard was defending. To account for this, I will reduce the 20.1 hours claimed by Attorney Keahna by half or $2,110.50. *See Stickle v. Heublein*, 590 F. Supp. 630, 636 (approximating reasonable amount of time rather than identifying specific incidents of excess).

Although I find most of Keahna's trial preparation time to be reasonable and not duplicative, I am disallowing the 11 hours ($2,310 at $210/ hr) and $59 in mileage she spent traveling to Hudson on December 6, 2011 to meet with the client, Skinner and Stoddard "to review [the] case and prep for trial." Similarly, I will not allow the six hours or $1,260 she billed for meeting with the client on January 4, 2012 because both Stoddard and Skinner also billed for that meeting.

Keahna claims 26.6 hours for trial attendance, including travel time. As explained above, I am deducting this time (which reduces the award by $5,586) and billing Skinner's trial time at Keahna's rate of $210/hr.

Finally, defendants object to the five hours that Keahna billed for her travel to the Minneapolis airport to pick up Adam Tobon, a Wine Bar employee. Otis claims that this time was needed to prepare Tobon for his trial testimony. I agree that five hours is an excessive amount of time to prepare a minor witness for trial testimony that lasted only a small portion of the morning on the second day of trial. Further, because Tobon would not have been in the car with Keahna for the ride to the airport, half of her claimed travel time was not spent preparing him for his testimony. Therefore, I am allowing only two hours for witness preparation time and reducing the award by $630. I will allow the claim for mileage associated with this trip because that is a cost that would have had to be incurred to transport the witness regardless of who accompanied him.

II. First Summary Judgment Motion

Defendants argue that the 38.6 hours billed by Attorney Stoddard and 25.8 hours billed by Attorney Keahna for drafting Otis's first summary judgment motion and supporting brief were excessive given that the 23-page brief involved a simple issue and was not opposed by defendants. Although 64 hours seems high for preparing a 23-page brief, the motion involved constitutional issues related to the First and Fourteenth Amendments. As the moving party, Otis also had to support her motion with proposed findings of fact and evidence. She submitted over 80 proposed findings of fact, two affidavits and several pieces of documentary evidence. The fact that defendants decided not to oppose liability is irrelevant because plaintiff's work

already was completed by that point. *See Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 774 (7th Cir. 2010) (reasoning that party preparing for summary judgment does not know if it will prevail and therefore has no incentive to incur excessive fees and costs). Therefore, I will allow the 64 hours claimed for preparation of the first summary judgment motion.

III. Damages Claim

Defendants argue that the 40 hours of time that Attorneys Stoddard and Keahna spent working on Otis's damages claim is excessive given that the issue involved very little testimony at trial and simple documentary evidence. Otis explains that to prepare her damage claim, her attorneys and accountant had to review and analyze several years of business financial records, tax returns, rental records and building and construction receipts related to three different businesses. Otis also notes that she called 14 witnesses at trial to explain her business operations and the effect of the ordinance on her business. Given that Otis's entire case following summary judgment consisted of her damages claim, I find 40 hours to be a reasonable amount of time to spend on the damages analysis.

IV. Attorney Skinner

Defendants assert that Skinner's time duplicated that of Stoddard in preparing for trial. They point out that the two attorneys spent more than 200 hours preparing for a two and a half day trial. I do not find the amount of time claimed to be excessive, but as noted above, I am not going to make defendants foot the bill for Otis hiring two A-list attorneys. Undoubtedly, Stoddard benefitted from having Skinner at his side during pretrial prep and at trial; most trial attorneys appreciate having a skilled, experienced colleague at the table sharing the work, ping-

ponging ideas and acting as a safety net. But this was a luxury, not a necessity. Because it would have been reasonable for Stoddard install Attorney Keahna as second chair, I will allow all of Skinner's time at Keahna's hourly rate. 123.41 hours at $210/hr = $25,916.10, a reduction of $14,194.31 from Skinner's claim (dkt. 103-1 at 3). (I am not deducting Joy Montgomery's time or Skinner's actual expenses attending trial since these are actual expenses incurred by Skinner and they appear to be reasonably incurred.

V. Stoddard Travel Time

Defendants object to Attorney Stoddard making a four-hour round trip drive from Hayward to Eau Claire to meet with Otis on nine different occasions in 2010 (August 5, 6, and 14; September 3 and 22; October 6 and 13; November 4; and December 23)), particularly given the fact that Stoddard had a romantic relationship with Otis. Otis contends that the meetings were strictly professional and had to be in person given the subject matter discussed.

After reviewing these entries, I agree that traveling to Eau Claire twice for back-to-back meetings on August 5 and 6 for drafting the complaint and document review is excessive. Therefore, I will cut one of the four-hour travel entries for those dates as well as the mileage. I also find that Stoddard could have met with Otis over the phone or video conference about discovery issues, case strategy and scheduling on August 14; reviewing defendants' answer, the motion to hold trial in Eau Claire and the parties' stipulation for non-enforcement of the ordinance on September 3; general "case prep" on September 22; and an unspecified 1.7 hour meeting on November 4. Therefore I will disallow another 16 hours in travel time for those days in addition to mileage. The remaining meetings appear to involve document research and review

with Otis, which I agree makes sense to do in person rather than over the telephone or via video conference. As a result, I will reduce the attorney's fee award by $6,000 and costs by $525.

VI. Overall Reduction in Fees

Defendants raise an objection to the overall reasonableness of a $249,414.25 fee award in a case involving only 20 hours of deposition testimony, one contested motion for partial summary judgment, no expert witnesses and a two and one-half day trial. They also assert that many of the time entries contain only vague descriptions, such as "doc review," "mtg" and "research caselaw." I have reviewed the time logs submitted by Otis's attorneys and, apart from the reductions discussed above, find them to be reasonable and compensable. Therefore, I will award Otis attorney fees in the amount of $216,378.44 and costs in the amount of $8,152.87.

ORDER

IT IS ORDERED that plaintiff motion for an award of attorneys' fees and costs is GRANTED in part and DENIED in part. Plaintiff is awarded fees in the amount of $216,378.44 and costs in the amount of $8,152.87, for a total of $224,531.31.

Entered this 23rd day of July, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge