

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

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BB SYNDICATION SERVICES, INC.,

Plaintiff,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendant.

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OPINION and ORDER

10-cv-195-wmc

Now before the court is plaintiff BB Syndication Services, Inc.'s ("BB Syndication") motion for attorneys' fees following entry of judgment in its favor. In an earlier ruling, the court found that plaintiff was entitled to all fees and expenses incurred while defending its deed of trust against priming construction liens in the Trilogy Adversary Proceeding held in Missouri. (Dkt. #155 at 36-40.) The court indicated that it was prepared to award all fees actually expended by plaintiff in that litigation -- it would "not impose any stringent standard for reasonableness, but simply confirm that the hours and rates billed were paid," and confirm that "billed hours correspond to work performed in defending against the priority of the liens." (*Id.* at 40.) Plaintiff complied with the court's instructions by submitting documentation in support of its fee request, and the court's task now is to determine if all requested hours satisfy the lenient standard set out above.

Plaintiff seeks reimbursement for work performed and costs incurred by their counsel, the Levi & Craig law firm, between January 11, 2010, and December 29, 2011.

The total request comes to \$247,763.25, comprising \$14,887.60 in costs and \$232,875.65 in fees. In support, plaintiff has submitted affidavits executed by its president, attesting that the fees have actually been paid, and a partner at Levi and Craig, attesting that the firm's attorneys billed their usual rate, and actually incurred the costs claimed. Plaintiff has also produced Levi and Craig's itemized billing records.

Defendant First American Title Insurance Company ("First American"), which has been ordered to pay plaintiff's bill, has advanced specific objections to numerous entries in the billing records, disputing a total of \$44,581.85 in claimed hourly work and costs. Defendant's objections are so numerous that instead of itemizing each in the body of their opposition brief, they have attached a 21-page exhibit with objections listed next to the individual hourly charges. The objections can, however, be grouped into the four categories discussed below.

#### **A. Objection that BB Syndication Miscalculated its Total Fee Request**

Defendant first objects that plaintiff has committed a math error by submitting a total bill of fees and costs \$7,947.52 higher than the sum of its individual invoice requests. Defendant contends that accounting for the math error, the requested bill should be \$239,815.73. Plaintiff concedes the math error, but explains that their revised request is for \$239,882.73, a slightly different figure.

The \$67.00 difference between defendant's and plaintiff's totals is produced by a disagreement about whether to count a single time entry for work performed on December 30, 2011: 12 minutes plaintiff's counsel spent reviewing the bankruptcy

judge's order setting out an agenda for a status conference. Although it initially requested fees for work performed through December 29 (the date of the bankruptcy court's order establishing the priority of creditors' claims), plaintiff now seeks to expand the time frame to include time spent "wrapping up" of the case. While plaintiff's new position is not unreasonable, it is untimely, so its request for fees incurred on December 30, 2011, will be rejected. Accordingly, the court will subtract \$7,947.52.

**B. Objection to Fees and Expenses Incurred Prior to the Commencement of Adversary Proceeding**

Next, defendant contends that it not liable for expenses incurred prior to the formal commencement (the filing in court) of the Adversary Proceeding. It cites the insurance policy, which says that the insurer is obligated to provide a defense "only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice . . . to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel."

In its second summary judgment order, the court suggested that legal fees incurred in anticipation of litigation, but before a case is filed, are compensable damages in an action for breach of the duty to defend. Upon reflection, these fees are more appropriately excluded from the fee award, at least as to a fee award for failing to undertake a duty to defend as defined by the insurance policy quoted above. By its own terms, the duty arises "in litigation in which any third party asserts a claim adverse to the title or interest [of the] insured." (Title Policy, dkt. #49-4 at 22.) The same policy

reserves to the insurer “the right to select counsel of its choice.” (*Id.*) Thus, the duty to defend did not arise until a third-party’s adverse claim was filed in litigation, and arguably not until even later, when defendant had been apprised of the suit and given the chance to “select counsel of its choice.” Thus, defendant’s duty to defend extends back only to the point at which the duty materialized -- the date the litigation began. All billing entries prior to January 28, 2010 will be excluded.<sup>1</sup>

Levi & Craig’s first invoice, for work done between January 11 and January 30, 2010, totals \$4,281.00. Of that, the only time billed on or after January 28 (i.e., the only compensable time) is 1.3 hours by attorney Scott Seitter, and 2.2 hours billed by attorney Julie Yanda. (Dkt. #160 at 1-3.) Both of these attorneys billed at \$285/hour (dkt. #156-2), so \$997.50 (3.5 hours at \$285/hour) of the January 2010 invoice is compensable. The remainder, \$3283.50, will be subtracted from plaintiff’s bill.

### **C. Objection to Fees for Legal Services Performed in Connection with Unrelated Litigation**

Next, defendant objects to a large number of individual hourly billing entries on grounds that the legal services described were rendered in connection with unrelated litigation: (1) plaintiff’s coverage dispute with defendant in this case, (2) complaints to

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<sup>1</sup> In a footnote, defendant characterizes the court’s summary judgment holding as having rejected defendant’s argument that it is liable only for the costs of defending covered or potentially-covered liens (as opposed to the entire costs of defensive litigation). That was not the court’s holding. Instead, the court said that right or wrong, the argument was irrelevant because *all of the liens were potentially covered* at the time the litigation began, and all were subject to a duty to defend. (This was because defendant relied exclusively upon Exclusion 3(a) as its defense to coverage for *all* of the liens, and the court has found that Exclusion 3(a) was an uncertain -- albeit ultimately successful -- defense to coverage.)

the offices of the Insurance Commissioners of the States of Wisconsin and Missouri, and (3) other miscellaneous legal services. As defendant correctly points out, these actions are beyond the scope of its duty to defend, which pertains only to the lien claims in the Trilogy Adversary Proceeding. Because the billing entries are undifferentiated, defendant also seeks to exclude any “blocks” of billed time that include at least some disqualified activity. The court is inclined to agree.

In reply, plaintiff flatly states that the “entire amount claimed . . . arose out of the Lien Suit,” but makes no attempt to account for various billing records that suggest otherwise. To take one representative example: on February 1, 2010, attorney Yanda billed 0.4 hours for time spent “on strategy to take in raising issue with FATICO’s counsel concerning apparent inconsistencies in FATICO’s positions in other *coverage claims*,” and an unidentified attorney, DJH, spent 0.5 hours researching “Missouri Department of Insurance procedures for submitting complaints; [and] prepar[ing] draft complaint letter regarding FATICO *title insurance claims*.” (Dkt. #163-2 at 6 (emphasis added).) These records certainly appear to be unrelated to the Trilogy Adversary Proceeding, and plaintiff’s failure to offer an alternative explanation speaks volumes.

As for defendant’s related request that the court wholly exclude all block-billed hours containing at least some disqualified time, plaintiff suggests this is improper because there is “no case law stating that block billing is disallowed in Wisconsin or Missouri.” Whether or not true (if not disallowed, block billing is increasingly disfavored by both courts and clients), as the proponent of the damages award, plaintiff has the “burden of proving the existence and amount of damages with reasonable certainty” and

without resort to speculation. *The Manors at Village Green Condominium, Inc. v. Ann Webb*, 341 S.W.3d 162, 164 (Mo. Ct. App. 2001). The block billing practice employed here makes it impossible for the court to determine what share of each tainted block of time is actually compensable, and where uncertainty exists the court will err in defendant's favor by excluding all of the time at least where plaintiff has not even attempted to reallocate time between compensable and clearly un-compensable time.

In total, defendant has identified 113.95 billed hours, corresponding to \$32,475.75 in fees, as wholly or partially outside the scope of litigation. Of this, the court has already excluded time worked before January 28, 2010, which accounts for 12.1 hours and \$3,283.50 of the total. Since plaintiff is unable or unwilling to provide a defense to any particular block (or portion of a block) of time beyond the general defenses rejected above, the court will exclude all of the remaining hours amounting to \$29,192.25.

#### **D. Objection to Fees Charged by Trilogy's Attorneys**

Defendants have only one objection to plaintiff's claim for costs. The objection concerns an invoice in the amount of \$4,158.58 from the law firm of McDowell, Rice, Smith & Buchanan, billed to Levy & Craig, purportedly for assistance in planning a potential appeal of the Trilogy Adversary Proceeding. The bill from McDowell Rice is listed as an expense in Levy and Craig's own 4/30/2011 invoice to plaintiff. On their face, the invoice and associated billing records appear to be relevant to the appeal of the Adversary Proceeding, which is itself covered by the duty to defend. Although the

McDowell firm was apparently never directly engaged to represent plaintiff, its limited involvement as an apparent consultant is not improper. Therefore, the court finds these costs appropriate, and will not exclude them.

**E. Summary of Fee Reductions**

The court's fee reductions are summarized as follows:

	Fees
Initial Fee Request	\$247,763.25 (Total) Costs = \$14,887.60 Fees = \$232,875.65
Plaintiff's Math Error	- \$7,947.52
Work before Jan. 28, 2010	- \$3,283.50
Work unrelated to defending priority of mortgage against lien claimants	- \$29,192.25
Subtotal of All Subtractions	- \$40,423.27
<b>Final Award</b>	<b>\$207,339.98</b>

ORDER

IT IS ORDERED that plaintiff BB Syndication Services Inc.'s motion for attorneys' fees and costs is GRANTED in the amount of \$207,339.98. The clerk is directed to enter fees and costs in this amount and close this case.

Entered this 1st day of July, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge