

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

QUINCY M. NERI and RODNEY RIGSBY,

Plaintiffs,

v.

OPINION and ORDER

11-cv-429-slc

MELINDA MONROE, STEVE LARSON,
ARCHITECTURAL BUILDING ARTS, INC.,
LESLIE SAGER, FRITZ SCHOMBURG,
ERIC FERGUSON and
RURAL MUTUAL INSURANCE COMPANY,

Defendants.

Defendants' Motions for Attorneys' Fees

In a September 21, 2012 order in this copyright infringement case, I granted summary judgment in favor of defendants Architectural Building Arts, Inc., Melinda Monroe, Steven Larson, Leslie Sager and Eric Ferguson. These defendants (plus intervenor defendant Rural Mutual Insurance Company) seek an award of in fees pursuant to 17 U.S.C. § 505, which provides in relevant part:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

In determining whether to exercise that discretion and award costs and fees, the Court may look to a number of nonexclusive factors accepted by the Supreme Court: (1) the objective unreasonableness of the action; (2) the losing party's motivations for filing or contesting the action; (3) the frivolousness of the action; and (4) the need to "advance considerations of compensation and deterrence." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 535 n.19, (1994) (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (3rd Cir.1986) (internal quotations omitted)).

The Court of Appeals for the Seventh Circuit has refined this standard further. According to the Seventh Circuit, the “two most important [of these] considerations . . . are the strength of the prevailing party's case and the amount of damages or other relief the party obtained.” *Assessment Techs. of Wisconsin, LLC v. Wire Data, Inc.*, 361 F.3d 434, 436 (7th Cir. 2004). Furthermore, the court has specifically noted that, while “prevailing plaintiffs and prevailing defendants are to be treated alike,” there is a strong presumption in favor of awarding fees to a prevailing defendant:

[T]he prevailing party in a copyright case in which the monetary stakes are small should have a presumptive entitlement to an award of attorneys' fees. When the prevailing party is the defendant, who by definition receives not a small award but no award, the presumption in favor of awarding fees is very strong. For without the prospect of such an award, the party might be forced into a nuisance settlement or deterred all together from exercising his rights. *Id.* at 437.

The circumstances surrounding the current case present no reason to depart from this presumption. First, plaintiffs knew or should have known that they needed a valid copyright registration for the “Mendota Reflection” sculpture in order to pursue an infringement action, and as the summary judgment order shows, they did not come close to showing that their haphazard application successfully registered the sculpture in any of several different categories of works.

Second, it is clear that defendants (architects, a lighting designer and a photographer) were not attempting to “knock off” the sculpture or otherwise interfere with plaintiffs’ ability to profit off of the sculpture; they merely used pictures of the *entire renovated condominium entryway* to advertise their own services.

Third, plaintiffs, with no apparent sense of irony, label the defendants as the bad guys here, proclaiming that this court should sanction the defendants for “multipl[ying] the proceedings . . . unreasonably and vexatiously.” 28 U.S.C. § 1927. How did defendants do this? According to plaintiffs, “[t]here is no reason why Defendants should have dragged out this litigation by not settling sooner” This is like blaming your brother for breaking the living room window because you threw a rock at him and he ducked. The record of this case clearly establishes that the plaintiffs vigorously pushed this ill-advised lawsuit while the defendants logically, reasonably—and successfully—denied any liability.

Having considered all of the relevant circumstances, I conclude that it is appropriate to award reasonable attorney fees to each of the defendants who requested them. These are the requests:

- Eric Ferguson - \$48,104 for about 295 hours of work
- Architectural Building Arts, Inc., Steven Larson, Melinda Monroe - \$50,846 for about 350 hours of work
- Rural Mutual Insurance Company - \$16,198 for about 125 hours of work
- Lesley Sager - \$21,232.20 for about 135 hours of work.

As the starting point, I find that the hourly rates charged by the various attorneys for defendants—ranging from \$75 for paralegals to \$190 for lawyers—all are reasonable as well within the standard market rate for work of this sort. Having reviewed the itemized billing records provided by defendants Architectural Building Arts, Larson, Monroe (*see* Barber Declaration & Exh. A, dkt. 173) and by defendant Sager (*see* Pliner Affidavit & “Exhibit,” dkt.

178), I conclude that the total amount charged is reasonable, so I will grant their respective motions.

However, because defendants Ferguson and Rural Mutual have not provided itemized records, I cannot adequately determine whether the amount of time spent on this case by their attorneys was reasonable. Therefore, I will stay a decision on their motions and give them an opportunity to provide detailed records.

When this court grants motions for an award of attorneys' fees, sometimes it sets deadlines for payment, sometimes not. In this case, factors point in both directions. On the one hand, plaintiff Neri, who filed this case alone, has proceeded *in forma pauperis* throughout this case and recently claimed to have no income and no assets. See Neri Affidavit, dkt. 155. It's not as if setting a deadline for payment is going to affect her ability to pay the tens of thousands of dollars claimed by the defendants. Plaintiff Rigsby's financial situation is less apparent, but I would be surprised if he is in a position to pay the amounts assessed against him in this order. That said, every loose end this court can tie off in this case leaves that much less uncertainty and ambiguity as fodder for future disputes between the parties. I will hold the plaintiffs jointly and severally liable to pay the ordered attorneys' fees within four months, by September 30, 2013, the end of the third quarter of the calendar year.

Plaintiff Neri's Motion for Issuance of Subpoenas Duces Tecum

More than three months after entry of judgment against her in this case, plaintiff Neri filed a motion for issuance of subpoenas duces tecum to obtain documents, mainly from the work logs of the attorneys for the defendants. *See* dkt. 212 & attachments. Plaintiff states that “plaintiffs” [plural] need these documents for ongoing state court cases and for the appeal in this case.

This motion is frivolous on multiple levels and will be denied. For starters, given the timing of the motion and this order, the request may well be moot. Apart from this, there is absolutely no basis for plaintiffs to attempt to take discovery at this point in this case; the discovery deadline passed long ago; more saliently, the court already has entered judgment in favor of the defendants. If plaintiffs want to conduct discovery in their state court cases, then they should take discovery in their state court cases. Plaintiffs’ appeal in this case will be decided based on the existing record and the applicable law, not on any new evidence. Regardless of all this, it appears that many of the documents plaintiffs seek are communications protected by lawyer-client privilege or documents protected as attorney work product, so they would not be discoverable even had plaintiffs made their requests at an appropriate time.

Defendants ask for cost-shifting to pay for their opposition to this motion. Pursuant to F.R. Civ. Pro. 37(a)(5)(B), the defendants are entitled to payment of their reasonable costs incurred opposing Neri’s ill-advised attempt at discovery. Defendants may submit their itemized costs and fees, and plaintiff Neri, the unsuccessful movant, may respond.

ORDER

It is ORDERED that:

- (1) Defendants Architectural Building Arts, Inc., Steven Larson and Melinda Monroe's motion for attorney fees under 17 U.S.C. § 505, dkt. 171, is GRANTED; these defendants are awarded \$50,846.00 against plaintiffs Quincy Neri and Rodney Rigsby. Quincy Neri and Rodney Rigsby are jointly and severally liable to pay this amount not later than September 30, 2013.
- (2) Defendant Lesley Sager's motion for attorney fees under 17 U.S.C. § 505, dkt. 177, is GRANTED; Sager is awarded \$21,232.20 against plaintiffs Quincy Neri and Rodney Rigsby. Quincy Neri and Rodney Rigsby are jointly and severally liable to pay this amount not later than September 30, 2013.
- (3) Defendant Eric Ferguson's and intervenor defendant Rural Mutual Insurance Company's motions for attorney fees under 17 U.S.C. § 505, dkt. 168, 174, are STAYED, pending submission of itemized billing sheets.
- (4) Plaintiffs Neri's motion for issuance of subpoenas, dkt. 212, is DENIED.
- (5) Defendants may have until June 7, 2013, in which to submit an itemization of the costs and attorney fees incurred in responding to plaintiff Quincy Neri's motion for issuance of subpoenas. Plaintiff Neri may have until June 14, 2013 to respond to defendants' request for cost-shifting on her subpoena motion.

Entered this 24th day of May, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge