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United States District Court, S.D. New York.

Debra CIRAOLO, Plaintiff,
v.
THE CITY OF NEW YORK, Police Department of the City of New York, Detective Christin Morgillo, Shield No. 2233, Jane Does 1-2, Shield Nos. Unknown, and Julie Fontanella Defendants.

No. 97 CIV. 8208(RPP). | Oct. 13, 2000.

Attorneys and Law Firms

Stephen H. Weiner, New York, Counsel for Plaintiff.

Michael D. Hess, Corporation Counsel for the City of New York, New York, By Lisa A. Weiss, Counsel for Defendants.

Opinion

OPINION AND ORDER

PATTERSON, D.J.

***1** Subsequent to trial, Plaintiff moves for attorney's fees and costs pursuant to 42 U.S.C. § 1988. Defendants cross-move for costs incurred subsequent to their offer of pre-trial judgment under Federal Rule of Civil Procedure ("Fed. R. Civ.P.") 68. For the reasons articulated herein, both motions are granted in the amounts specified below.

BACKGROUND

Plaintiff Deborah Ciraolo had a longstanding dispute with her neighbor and cousin, Julie Fontanella. In January 1997, following a complaint by Fontanella, Detective Morgillo of the New York City Police Department ("NYPD") arrested Plaintiff for aggravated harassment in the second degree, a misdemeanor. Plaintiff was taken to Central Booking, where she was subjected to a strip and cavity search by two female Corrections Department employees. Although the charges against her were later dismissed, Plaintiff was traumatized by the experience and subsequently diagnosed with post-traumatic stress disorder.

Plaintiff brought suit under 42 U.S.C. § 1983 against New York City, the NYPD, and the individual officers involved in her case, claiming that she had been falsely arrested, that the police had employed excessive force, and that the strip search violated her Fourth Amendment right against unreasonable search and seizure. Plaintiff also alleged a state law claim of battery.

On May 3, 1999 a four-day jury trial commenced on Plaintiff's claims.[1] The Court granted a directed verdict for Plaintiff under Fed.R.Civ.P. 50 with respect to the strip search. The jury rendered a verdict in favor of Defendants on the claims of unlawful arrest, excessive force and battery. The jury awarded Plaintiff $19,645 in compensatory damages for violating Plaintiff's right against unreasonable search and seizure, as well as punitive damages in the amount of $5,000,000. On appeal, the Second Circuit reversed the award of punitive damages, citing *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), which held that, ordinarily, municipalities are immune from punitive damages under 42 U.S.C. § 1983.

Prior to trial, Defendants made an offer of judgment under Rule 68 in the amount of $25,001 plus reasonable attorney's fees accrued up to July 17, 1998, the date of the offer. Plaintiff did not accept the offer, which was ultimately $5,356 more than the judgment awarded in compensatory damages.

DISCUSSION

(a) ***Application of Federal Rule of Civil Procedure 68***
Both Plaintiff's and Defendants' motions require examination of the application of Fed.R.Civ.P. 68. The United States Supreme Court has explained that "[t]he purpose of Rule 68 is to encourage the settlement of litigation." *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 352, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981). Rule 68 provides, in part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property to the effect specified in the offer, with costs then accrued.... If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the

offer.

***2** Fed.R.Civ.P. 68. Offers under Rule 68 that are not accepted within 10 days are deemed withdrawn. *Id.*

In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial. *Delta Air Lines,* 450 U.S. at 352. Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain. *Id.* If a plaintiff rejects a Rule 68 settlement offer, the plaintiff will lose some of the benefits of victory if the final recovery is less than the pre-trial offer. *Id.* Thus, Rule 68 requires plaintiffs to "think very hard" about whether continued litigation is worthwhile. *Marek v. Chesny,* 473 U.S. 1, 11, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985).

Under Rule 68 a defendant's settlement offer must be sufficient to justify serious consideration by the plaintiff and made in good faith. *See Delta Airlines,* 450 U.S. at 349. If these conditions are met, and if the plaintiff's final recovery is less than the pre-trial offer, the plaintiff must cover the defendant's costs from the date of the offer. Fed.R.Civ.P. 68. *See Jolly v. Coughlin,* 1999 U.S. Dist. LEXIS 349 at *30.

The word "costs" under Rule 68 refers to all costs properly awardable under the relevant substantive statute or other authority. *Marek v. Chesny,* 473 U.S. at 9. Prevailing plaintiffs may recover attorney's fees as part of their costs in cases brought under 42 U.S.C. § 1983. *Id.* In *Marek,* the Supreme Court held that a Rule 68 pre-trial offer of judgment precludes a plaintiff's recovery of attorney's fees as costs in a § 1983 case where the fees were incurred subsequent to the defendant's offer. *Id.* The Supreme Court recognized that the results to plaintiffs who reject Rule 68 offers could be particularly harsh in suits brought under 42 U.S.C. § 1983, where prevailing plaintiffs could otherwise recover their attorneys' fees as part of their costs. *Marek,* 473 U.S. at 11.

Here, Defendants offered Plaintiff a pre-trial Rule 68 offer of judgment in the amount of $25,001, which Plaintiff rejected. Plaintiff ultimately recovered a judgment of $19,645, an amount less than the pre-trial offer of judgment. No allegations have been made that Defendants' offer was not made in good faith, and the $25,001 amount arguably warranted serious consideration by Plaintiff. Consequently, under Rule 68 Plaintiff cannot recover costs or attorney's fees incurred subsequent to Defendants' July 17, 1998, pre-trial offer of judgment. Defendants' motion for costs incurred subsequent to the July 17, 1998, pre-trial offer of judgment is granted, as hereinafter adjusted.

(b) ***Attorney's Fees Under 42 U.S.C. § 1988***

Plaintiff seeks recovery of attorney's fees pursuant to 42 U.S.C. § 1988. A plaintiff must be a "prevailing party" to recover an attorney's fee under 42 U.S.C. § 1988, which provides, in part:

> ***3** [I]n any action or proceeding to enforce a provision of section ... 1983 of this title, ... 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....

42 U.S.C. § 1988. Generally, plaintiffs are considered "prevailing parties" for attorney's fees purposes if they "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278-279 (1st Cir.1978)). Here, Plaintiff prevailed on the claim of unreasonable search and seizure under the Fourth Amendment, which was a significant issue in this § 1983 litigation. Accordingly, Plaintiff's motion for costs and attorney's fees is granted as to those costs and fees incurred prior to the July 17, 1998, Rule 68 pre-trial offer of judgment, as hereinafter adjusted.

(c) ***Calculation of Attorney's Fees and Costs***

1. ***Plaintiff's Attorney's Fees***

In determining the amount of "reasonable attorney's fees," the court must first establish a "lodestar" figure by multiplying the number of hours reasonably expended by the party's attorneys by a reasonable hourly rate. *See Kirsch v. Fleet Street, Ltd.,* 148 F.3d 149, 172 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). An attorney must show that "requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson,* 465 U.S. 886, 896, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

For purposes of determining Plaintiff's lodestar figure, only those hours accrued prior to the July 17, 1998, pre-trial offer of judgment will be counted because of the application of Rule 68. Based on the figures submitted to the Court, Plaintiff's attorney, Mr. Stephen Weiner, reasonably expended 58 hours prior to July 17, 1998. Mr. Weiner claims a $225 per hour rate, which is consistent with the rates charged by New York City attorneys with his level of professional experience. Multiplying Mr.

Weiner's hours expended by his hourly rate results in a lodestar figure of $13,050 in attorney's fees.

Plaintiff also submits timekeeping records reflecting 7.5 hours of consultation work done prior to July 17, 1998 by Mr. Scott Korenbaum. Mr. Korenbaum also charges a $225 per hour rate, which is consistent with the rates charged by New York attorneys with his level of experience. Multiplying Mr. Korenbaum's hours by his hourly rate of $225 yields a lodestar figure of $1,687.50 in attorney's fees. Accordingly, Plaintiff's lodestar figure is $13,050 plus $1,687.50, totaling $14,737.50.

Defendants argue that these hours should be reduced due to the lack of complexity of the case and the vagueness of Plaintiff's timekeeping records. *See Pino v. Loscasio,* 101 F.3d 235, 239 (2d. Cir.1996) (stating that "[t]he vast majority of civil rights litigation does not result in ground-breaking conclusions of law...."). However, the case at hand was not so straightforward as to warrant a 30% reduction in fees. Moreover, although the records submitted by Plaintiff are far from comprehensive, Plaintiff's award will not be reduced for vagueness. Plaintiff's counsel are reminded, however, to maintain accurate, detailed and contemporaneous billing records showing the nature of services rendered. *See New York State Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d 1136, 1147-1148 (2d. Cir.1983).

2. ***Plaintiff's Costs***

***4** Plaintiff seeks $7,484.59 to cover her total litigation costs. However, the Local Civil Rules of this Court bar recovery for some of Plaintiff's costs. Under Local Civil Rule 54.1(c)(5), the costs of convenience photocopies are not recoverable. S.D.N.Y. Civ. R. 54.1(c)(5). Accordingly, the amount of Plaintiff's total disbursements is reduced by the claim for photocopying costs, $43.90. In addition, Local Civil Rule 54.1(c)(3) only permits recovery for expert witnesses with prior approval by the court. S.D.N.Y. Civ. R. 54.1(c)(3). Plaintiff did not show that she sought prior approval from the Court for expert witness Timothy White, Ph.D. For this reason, Plaintiff cannot recover the $2,700 expert witness fee for Mr. White.

Computerized research is considered to be part of attorney's fees and not assessed separately. *See United States of America ex rel. Evergreen Pipeline Construction Co., Inc. v. Merritt-Meridian Construction Corp.,* 95 F.3d 153, 173 (2d. Cir.1996). Thus, the amount claimed for computerized research, $223.35, is excluded from Plaintiff's recoverable costs.

As noted above, Plaintiff's recovery of costs is limited to those litigation expenses incurred prior to the July 17, 1998, pre-trial offer of judgment. Thus, the following costs incurred after the Rule 68 offer of judgment was made are excluded: $50 for service of a subpoena on Officer Alice Figueroa; $52.39 in postage; and $36 for the transportation of trial exhibits.

After subtracting costs for the expert witness, photocopies, computerized research, and those costs incurred after the July 17, 1998, pre-trial offer of judgment, Plaintiff is granted $4,378.95 in total costs.

3. ***Defendants' Costs***

Defendants seek costs incurred subsequent to their Rule 68 offer of judgment of July 17, 1998. Defendants request $12,654.89 to cover the cost of court transcripts, deposition transcripts, and the services of a private investigator. Recoverable costs should only include those that are "incidental and necessary" to the representation of a client. *Amato v. City of Saratoga Springs,* 991 F.Supp. 62, 68 (N.D.N.Y.1998) (citing *Northcross v. Board of Education,* 611 F.2d 624, 639 (6th Cir.1979)). Since Defendants have not shown that the services of the private investigator were necessary to refute Plaintiff's claim, the cost of the private investigator, $1,600.35, is not recoverable.

Defendants seek $3,016.14 for the deposition transcripts of Julie Fontanella, who settled in advance and never testified at trial. Local Rule 54.1(c)(2) only allows recovery for the cost of deposition transcripts used or received into evidence at trial. S.D.N.Y. Civ. R. 54.1(c)(2). Here, Defendants have not shown that this transcript was used or received into evidence at trial. Consequently, the $3,016.14 requested for the Fontanella transcripts is not recoverable.

After subtracting the costs of the private investigator and the Fontanella transcripts, Defendants are entitled to recover $8,038.40 as necessary and incidental costs incurred after their July 17, 1998, pre-trial offer of judgment.

CONCLUSION

***5** Plaintiff's motion for attorney's fees and costs prior to Defendants' July 17, 1998, Rule 68 pre-trial offer of judgment is granted in the amount of $19,116.45, reflecting $4,378.95 in costs and $14,737.50 in attorney's fees. Defendants' motion for costs subsequent to the July 17, 1998, pre-trial offer of judgment is granted in the amount of $8,038.40.

IT IS SO ORDERED.

Footnotes

1 Plaintiff settled her claims against Defendant Fontanella during a pre-trial conference held April 26, 1999.