1994 WL 529487
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United States District Court, W.D. New York.

Akil AL–JUNDI, a/k/a Herbert Scott Deane; Big Black, a/k/a Frank Smith; Elizabeth Durham, Mother and Legal Representative of Allen Durham, deceased; Litho Lundy, Mother and Legal Representative of Charles Lundy, deceased; Theresa Hicks, Widow and Legal Representative of Thomas Hicks, deceased; Alice McNeil, Mother and Legal Representative of Lorenzo McNeil, deceased; Maria Santos, Mother and Legal Representative of Santiago Santos, deceased; Laverne Barkley, Mother and Legal Representative of L.D. Barkley, deceased; Jomo Joka Omowale, a/k/a Eric Thompson; Vernon LaFranque; Alfred Plummer; Herbert X. Blyden; Joseph Little; Robin Palmer; George "Che" Nieves; James B. "Red" Murphy; Thomas Louk; Peter Butler; Charles "Flip" Crowley; William Maynard, Jr.; Calvin Hudson; Kimanthi Mpingo, a/k/a Edward Dingle; Kendu Haiku, a/k/a Willie Stokes; Ooji Kwesi Sekou, a/k/a Chris Reed; Phillip "Wald" Shields; Jerome Rosenberg; Alphonso Ross; Frank Lott; Gary Richard Haynes; Raymond Sumpter; Omar Sekou Toure a/k/a Otis McGaughey; Dacajeweiah, a/k/a John Hill; and Johnnie Barnes, as the Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,
Plaintiffs,
v.
Kurt G. OSWALD, as Administrator of the Estate of Russell G. Oswald; John S. Keller, as the Administrator of the Estate of John Monahan; Vincent Mancusi; and Karl Pfeil, Defendants.

No. 75–CV–0132E(M).
|
Sept. 26, 1994.

Attorneys and Law Firms

Elizabeth M. Fink, Brooklyn, NY, Michael E. Deutsch, 1180 N. Milwaukee, Chicago, IL, Joseph Heath, Jamesville, NY, Dennis Cunningham, San Francisco, CA, Daniel Meyers, New York City, for plaintiffs.

John H. Stenger, Buffalo, NY, for defendant Oswald.

Joshua J. Effron, Delmar, NY, for defendant Keller.

Richard E. Moot, Buffalo, NY, for defendant Mancusi.

Irving C. Maghran, Buffalo, NY, for defendant Pfeil.

ORDER

ELFVIN, District Judge.

***1** By Order dated June 16, 1993 ("the June 16th Order") the United States Court of Appeals for the Second Circuit granted the plaintiff's motion, made pursuant to FRCvP[1] 11, to sanction Joshua J. Effron, Esq., the attorney of record for defendant Keller, for his "instituting a frivolous appeal" from this Court's denial of Keller's FRCvP 50(b) motion. The Court of Appeals granted the FRCvP 11 motion "to the extent that we award costs and reasonable attorneys' fees against appellant's attorney under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying the proceedings," but left to this Court the determination of the amount of such award.[2] Plaintiffs' counsel, Elizabeth M. Fink, Esq., now moves this Court, pursuant to the June 16th Order, to compel Effron to reimburse her for costs incurred and to pay her fees for legal services performed by her in defending against such appeal. Although not specifically contemplated by the June 16th Order, she also moves, pursuant to FRCvP 11, that Effron reimburse her for costs she incurred and pay her fees for work done while defending against Keller's allegedly frivolous related motion—made pursuant to 28 U.S.C. § 1292(b) and filed April 29, 1993—that this Court certify for interlocutory appeal the denial of the above-mentioned FRCvP 50(b) motion.

This satellite litigation began after a jury had been unable to reach a verdict as to deceased defendant Monahan's liability *vel non* for actions or omissions on Monahan's part. Keller, by his attorney Effron, had then moved pursuant to FRCvP 50(b) for judgment of dismissal as a matter of law, arguing that, under the standard set forth in *Whitley v. Albers,* 475 U.S. 312 (1986), the plaintiffs had failed to produce sufficient evidence to enable a

reasonable jury to find liability. By Order dated February 22, 1993 this Court denied such motion. A Notice of Appeal to the United States Court of Appeals for the Second Circuit was filed March 25th re this Order, but at a pre-argument conference held April 29th by the appellate court's personnel the appeal was withdrawn pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure by stipulation signed by Effron and Fink.[3] Fink's subsequent FRCvP 11 motion thereafter was filed and was determined as already noted. Also on April 29th Keller, through Effron, filed with this Court the above-mentioned section 1292(b) certification motion and, in response, Fink cross-moved for FRCvP 11 sanctions, arguing that the certification motion was frivolous. The certification motion was denied from the bench at oral argument June 11th but the motion for sanctions was not then acted on. In the wake of the appellate court's June 16th Order, Fink filed the motions now before this Court—*i.e.,* a renewal of the motion for sanctions for the certification motion, and a motion to fix the fees and costs due her for her opposition to the frivolous appeal. Oral argument on such was heard January 14, 1994.

***2** It is this Court's determination that FRCvP 11, which is too frequently and too easily invoked and more often than not inapplicable, does not come into play in this instance. As for the awarding of plaintiffs' attorney's costs and fees on the appeal, the United States Court of Appeals for the Second Circuit stated, flatly and clearly, that such award was to be made pursuant to section 1927. The earlier motion here for this Court's certification of less than all of this case for appeal was not brought to harass or cause unnecessary delay or needless increase in the cost of this litigation or for any other improper purpose. See FRCvP 11(b)(1). It was unwarranted and unfounded, as is evidenced by its being summarily denied, but it merely was a grossly-belated attempt to keep Keller's appellate ship from sinking by procuring this Court's certification of the litigative fragment so as to put a gloss of legitimacy on the appeal. Consequently, the whimsical motion for certification warrants only the penalties of section 1927. It was part and parcel of the appellate effort and should incur the punishment set forth in such section.

Fink has requested no costs, so fixing the amount of reasonable attorneys' fees is this Court's sole task. Although this Court has discretion, in appropriate circumstances, to award less than an amount reached by multiplying the number of hours reasonably expended by a reasonable hourly rate, *see Eastway Const. Corp. v. City of New York,* 821 F.2d at 121, 122–123 (2d Cir.), *cert. denied,* 484 U.S. 918 (1987) awarding the full amount in the instant circumstances is appropriate and would best serve the purpose of section 1927 because Effron can point to but one mitigating circumstance—*viz.,* that he withdrew his frivolous appeal at the pre-argument conference rather than wasting more of the appellate court's and opposing counsel's time.

The general rule in determining a reasonable hourly rate is to use that "employed in the district in which the reviewing court sits," regardless of where the attorney is officed and normally practices. *In Re Agent Orange Product Liability Litigation,* 818 F.2d 226, 232 (2d Cir.1987). However, exceptions exist if "the 'special expertise' of non-local counsel was essential to the case, it was clearly shown that local counsel was unwilling to take the case, or other special circumstances existed." *Ibid.* This Court agrees with Fink (who throughout this litigation has been officed in Brooklyn) that she is entitled to the rate which obtains in the western end of the Eastern District of New York. As she has pointed out, many fruitless attempts were made to find counsel for the plaintiff class herein before she, on the eve of the dismissal of this action, entered the case in 1981. These "special circumstances" clearly fall within the just-quoted exception to the general rule. "Special expertise" readily equates to "singular availability." Fink avers and Effron does not dispute that $250 per hour is the standard rate for experienced civil rights litigators in that area. This Court finds that such is the hourly rate to be applied.

***3** Turning to the time Fink spent defending against the appeal, she has submitted contemporaneous records indicating that she spent 35.5 hours and that a colleague spent 15 hours. In addition, at oral argument on this motion on January 14, 1994 Fink submitted an affirmation stating she had spent one hour preparing for and 1.3 hours attending the argument in Buffalo.[4] As Fink tacitly acknowledged at oral argument, her colleague's hours are duplicative and thus will not be considered. Effron's counsel, Michael G. O'Rourke, Esq., states that Fink's timesheet is vague and that the time allegedly expended "is grossly overstated and inflated," and is an attempt by Fink and her colleagues "to get whatever they can,"—*see* Reply Affirmation dated December 27, 1993 by O'Rourke at ¶ 23—but provides no proof to back up these conclusory allegations. Regardless, an examination of Fink's timesheet reveals that it is sufficiently particularized and generally reflects reasonable time expenditures for the work involved. However, for the reason mentioned above three hours will be deducted for

Fink's telephone conferences with her colleague. See Exhibit B to Fink Affirmation dated July 27, 1993. Further, without setting forth an analysis of each entry, this Court finds that the work could and should have been done somewhat more expeditiously and accordingly will reduce the hours by 10 percent. Thus, the reasonable hours expended are 31.32 (*i.e.,* 32.5 + 2.3 x .90) which, when multiplied by $250, renders reasonable attorneys' fees of $7,830.

Relative to the section 1292(b) motion Effron made on Keller's behalf, an award of fees is again appropriately calculated by the same method. Fink's contemporaneous timesheet indicates that she spent 24.6 hours defending against the motion. The timesheet is sufficiently particularized and generally reflects a reasonable amount of time for the work involved but seven hours will be deducted for duplicative conferences Fink had with her colleagues and it again appears that some of the work should have been done more expeditiously. Thus the remaining 17.6 hours will be reduced 10 percent to 15.84. Multiplying this by an hourly rate of $250 renders reasonable attorneys' fees of $3,960.

Accordingly it is hereby *ORDERED* that attorney Effron shall forthwith pay to Elizabeth M. Fink, Esq. the sum of $11,790.

All Citations

Not Reported in F.Supp., 1994 WL 529487

Footnotes

[1] Federal Rules of Civil Procedure.

[2] See Exhibit A to the July 27, 1993 Affirmation of Elizabeth M. Fink, Esq.

[3] The stipulation was "SO ORDERED" April 29, 1993 by the Chief Deputy Clerk Campbell of the United States Court of Appeals for the Second Circuit with the typed words "without costs and without attorneys' fees" lined out and such deletion initialled. See, for comparison, a similar stipulation re appellate docket no. 90–2467 (SO ORDERED November 23, 1990) of which the clause "without costs or attorneys fees" remained a viable part. Both stipulations are part of Exhibit C to Fink's Affirmation of July 27, 1993. Such inclusion or exclusion is expressly provided for in FRAppP 42(b).

[4] Fink also seeks the cost of her airplane fare in traveling to oral argument and compensation for her three hours of travel time. However, because she was scheduled to appear before this Court that day on another matter, such will not be granted.