

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - November 10, 2010

EVENT DATE: 11/12/2010 EVENT TIME: 01:30:00 PM DEPT.: C-72

JUDICIAL OFFICER: Timothy Taylor

CASE NO.: 37-2008-00092383-CU-FR-CTL

CASE TITLE: LINSPIRE INC VS. LONG

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Fraud

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED: Motion for Attorney Fees, 10/20/2010

1. Standard for Attorney's Fees.

California follows the "American rule under which each party to a dispute ordinarily must pay his, her, or its own attorney's fees." *Trope v. Katz*, 11 Cal.4th 274, 278 (1995); *Gray v. Don Miller & Associates, Inc.*, 35 Cal.3d 498, 504 (1984). Code of Civil Procedure section 1021 codifies the rule, providing that the measure and mode of attorney compensation is left to the agreement of the parties " [e]xcept as attorney's fees are specifically provided for by statute." Civil Code section 1717 is one such statute. It provides, in relevant part:

"In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

"Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

"The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section."

Thus, in an action on a contract, section 1717 permits an award of attorney's fees to the prevailing party. "[T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on

the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." § 1717, subd. (b), italics added. A declaratory relief action that seeks to establish the parties' rights under a contract is an action to enforce the contract. *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 710-711.

When a party obtains a "simple, unqualified win" by completely prevailing on, or defeating, the contract claims in the action and the contract contains a provision for attorney's fees, the successful party is entitled to attorney's fees as a matter of right, eliminating the trial court's discretion to deny fees under section 1717. *Hsu v. Abbara* (1995) 9 Cal.4th 863, 875-876 (*Hsu*). "If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109. "Because the statute allows such discretion, it must be presumed the trial court has also been empowered to identify the party obtaining 'a greater relief' by examining the results of the action in relative terms: the general term 'greater' includes '[l]arger in size than others of the same kind' as well as 'principal' and '[s]uperior in quality.' [Citation.]" *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1151.

When determining the prevailing party under section 1717, the trial court "is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." *Hsu, supra*, 9 Cal.4th at p. 876. Additionally, "in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.' For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective. [Citations.]" *Id.* at p. 877, italics omitted. A trial court has wide discretion in determining which party is the prevailing party under section 1717, and courts of appeal will not disturb the trial court's determination absent "a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence." *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 577.

A trial court has broad discretion in determining a reasonable amount of attorney fees. *PLCM Group, Inc. v. Drexler*, 22 Cal.4th 1084, 1095 (2000). "[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. . . . The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." *Id.*

Fee enhancements by means of multipliers or otherwise are well recognized in certain types of cases in California. *E.g., Serrano v. Priest*, 20 Cal. 3d 25 (1977) (*Serrano III*); *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407 (1991); *City of Oakland v. Oakland Raiders*, 203 Cal. App. 3d 78 (1988); *Kern River Public Access Com. v. City of Bakersfield* 170 Cal. App. 3d 1205 (1985). Under California law, the trial court begins by fixing the "lodestar" or "touchstone" reflecting a compilation of the time spent and reasonable hourly compensation of each attorney or legal professional involved in the presentation of the case. The court then adjusts this figure in light of a number of factors that militate in favor of *augmentation or diminution*. *Serrano III*, 20 Cal. 3d at 48-49 (emphasis by this court). The court must consider such factors as the nature and complexity of the case, the results obtained, the amount of work involved, the available resources, the nature of the issues and the burden of discovery, the skill required and the time consumed, the court's own knowledge and experience, the time spent, and rates charged in the community for similar work. See *Contractors Labor Pool, Inc. v. Westway Contractors*, 53 Cal. App. 4th 152, 168 (1997); see also *Ghirardo v. Antonioli*, 14 Cal. App. 4th 215, 219 (1993).

The purpose of a fee enhancement is not to reward attorneys for litigating certain kinds of cases, but to fix a reasonable fee in a particular action. Civil Code section 1717 thus authorizes an award of

reasonable attorney fees, not an award of reasonable fees plus an enhancement. Nonetheless, the courts recognize that some form of fee enhancement may be appropriate and necessary to attract competent representation in cases meriting legal assistance. In *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 322 (1983), our Supreme Court implicitly found that it would be appropriate to enhance an award by means of a multiplier "to reflect the broad public impact of the results obtained and to compensate for the high quality of work performed and the contingencies involved in undertaking this litigation." This does not mean, however, that the trial courts should enhance the lodestar figure in every case of uncertain outcome or where the work performed was of high quality. The challenge for the trial courts is to make an award that provides fair compensation to the attorneys involved in the litigation at hand and encourages litigation of claims that in the public interest merit litigation, without encouraging the unnecessary litigation of claims of little public value.

The classic situation justifying an upward adjustment of the lodestar figure was seen in the *Serrano* cases [*Serrano v. Priest*, 5 Cal. 3d 584 (1971)(*Serrano I*), *Serrano v. Priest*, 18 Cal. 3d 728 (1976)(*Serrano II*), and *Serrano III, supra*, 20 Cal. 3d 25]. The litigation there revolved around California's system for financing public schools. The plaintiffs succeeded in overturning the existing system, obtaining an order that it be replaced by a system designed to provide an equitable distribution of state funds between all public schools. The litigation resulted in no fund of money from which attorney fees might be paid, nor did it result in any monetary recovery by the plaintiffs. The plaintiffs were under no obligation to pay their attorneys for their efforts. It appears that the attorneys did, however, receive some funding from charities or public sources for the purposes of prosecuting cases of the character involved in that action--a factor the court found to be relevant in determining the size of an award of fees. (*Serrano III, supra*, 20 Cal. 3d at p. 49, fn. 24.) Finally, an award of fees was uncertain not only because of the complexity and difficulty of the legal issues involved, but because there was no clear statutory authority for shifting attorney fees to the defendant.

The court in *Weeks* contrasted that case with the situation in *Serrano III*: "the present case is in essence a personal injury action, brought by a single plaintiff to recover her own economic damages. Weeks and her attorneys had a fee agreement by which her attorneys were assured of a portion of any recovery. In addition, because of the availability of attorney fees under the FEHA, the attorneys had reason to assume that the amount of Weeks's recovery would not limit the amount of fees they ultimately received. Thus, the risk that Weeks's attorneys would not be compensated for their work was no greater than the risk of loss inherent in any contingency fee case; however, because of the availability of statutory fees the possibility of receiving full compensation for litigating the case was greater than that inherent in most contingency fee actions." 63 Cal. App. 4th at 1174.

2. Ruling on Motion.

Defendant/Cross-Complainant William A. Long's motion for award of attorney's fees is granted pursuant to Civil Code section 1717(a) and Section 14 of the Employment Agreement between Long and Plaintiff. Long is awarded \$212,360, based on Section 14 of the Employment Agreement, which stated that if any action at law or equity was necessary to enforce or interpret the terms of this letter agreement, the prevailing party shall be entitled to reasonable attorney's fees, costs, and necessary disbursements (see NOL, Ex. A). The court awards as reasonable and necessary attorney's fees the 655.80hrs. at \$300hr. for Attorney Greg Goonan's time (\$196,740) and the 105.20hrs. at \$100hr, and 36hrs. at \$125hr. for Associate Attorney Ann Evans' time (\$15,020). Long's counsel is also awarded the 8hrs., at \$75hr., for paralegal Ms. Williams (\$600), to assemble and organize documents and trial exhibits. This totals \$212,360. Based on its experience practicing law in California for over 20 years, and in ruling on dozens of attorneys' fee motions over the past 6 years, the court determines that the hourly rates are

well within the norm for San Diego, and indeed probably at the low end of the spectrum given the nature of the work and the results obtained. The court does not agree with Linspire's intimations of bill padding, and finds that the work for which fees are sought was appropriate and necessary to the representation.

Apportionment is not required when the issues in a case are "so interrelated that would have been impossible to separate them into claims for which attorney's fees are properly awarded and claims for which they are not. That was the case here and apportionment is not required. See *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App. 4th 1582, which determined on facts very similar to this one, that "allocation is not required when the issues are so interrelated that it would have been impossible to separate them into claims for which attorney's fees are properly awarded and claims for which they are not." *Id.* at 1603-04. Just as in *Amtower*, the claims in Long's cross-complaint all overlapped and were based on the same set of operative facts.

Fees incurred in a separate, ancillary matter (such as the federal action in this case) may be recovered when such fees were "reasonably expended" and "both useful and necessary and directly contributed to the resolution of the action." Even Linspire admits in its papers that a party can recover for work performed by the prevailing party's attorney in a collateral (or ancillary) action "closely related to the action in which fees are sought and useful to its resolution." *Children's Hosp. & Med. Ctr. V. Bonta* (2002) 97 Cal.App.4th 740, 775-81; see also P's Oppo Memorandum at 8:17-20). The federal action was "closely related" to the present case, and it was identical as concerns Long and Plaintiff. Long's counsel has only requested time from the federal action that was helpful or necessary to the resolution of this case. He seeks time for the following limited work in the Federal Action: (i) the pleadings; (ii) discovery; (iii) settlement proceedings; and (iv) pretrial proceedings. For example, Long has not sought time for the litigation in the federal case of the motion to dismiss.

All of the requested fees are reasonable as to the time incurred. It was not unreasonable for Long to redact certain information from his counsel's billings. It was not unreasonable for defense counsel to prepare deposition summaries as provided by Associate Attorney Ann Evans who spent 30.7hrs. reviewing and summarizing 742 pages from four (4) depositions. The fees claimed for the time related to the TRC involving Long's counsel's review and assembly of Long's exhibit list; review and preparation of objections to P's exhibits; review of the CACI instructions and research and prepare special instructions; and the time to participate in the drafting of the TRC Report, 38.4hrs., is all reasonable. It shows the conservative billing practices of Long's attorneys and demonstrates the reasonableness of Long's fee request, as does the time for Jury Instructions. The 43.6hrs. spent by Attorney Goonan's associate conducting legal research on jury instructions and other issues that arose during trial, was reasonable, as was the time spent, 32.9hrs., to prepare a Case Map database.

The court declines to award Long's counsel a 25% enhancement of this lodestar amount to \$265,450. Simply put, this is not a case in which an enhancement would be appropriate. The nature of the defense in this case (or the prosecution of Long's affirmative claims) was not particularly risky given section 14 of the Employment Agreement. Nor were the claims so unique, novel or "cutting edge" that an enhancement would be necessary to insure that persons similarly situated to Long in future cases would be able to obtain representation. Nor was there a broad public impact beyond Mr. Long's pecuniary interests (and those of the other parties). This is not to suggest that Long's counsel did not have to set aside other work while he was engaged in the trial of this matter. But that is the nature of small firm trial work, and is presumably built into the rate design agreed to between attorney and client. Nor should the court's denial of an enhancement be taken as any critique of Mr. Goonan's trial skills, which are formidable. As the cases summarized above make clear, however, not every case involving an uncertain outcome and excellent legal work will justify a multiplier.

The court also grants Defendant Long's motion for an award of pre-judgment interest pursuant to CC section 3287 et seq. The evidence at trial showed that Long was entitled under section 3(c)(i) of the

Employment Agreement to a lump sum payment at severance in an amount equal to six (6) months of Long's base salary. Long's base salary was \$145,000 on the day of his termination, He was thus owed \$72,500 and this was a fixed amount known to all. Where as here there is no dispute about the amount of damages, but only a dispute about the liability for such damages, the "certainty" required for an award of prejudgment interest is satisfied. See *Olson v. Cory* (1983) 35 Cal.3d 390, 402. Because the amount of Long's damages was certain, or capable of being made certain by a calculation, Long is entitled to an award of prejudgment interest pursuant to CC section 3287(a). Long used a 10% rate as no interest rate was stated in the Agreement. See CC 3289(b). This rate was applied from the date of Long's termination, 8/10/07. Although Long initially sought prejudgment interest of \$25,143 pursuant to CC 3287 et seq., in his Reply he agreed to accept \$22,958.16.

Finally, the Court notes that Long will be submitting a Memorandum of Costs to claim the costs he is entitled to recover under statute and will consider same as set forth in the CRC.

The court does, however, award Defendant Long the following additional disbursements pursuant to Section 14 of the Employment Agreement, which disbursements may not be claimed by Memorandum of Costs: (i) copying costs in the total amount of \$680.75; (ii) 333.58 for messenger charges and overnight delivery charges; (iii) \$1,6121.52 for computerized legal research charges; (iv) \$19.02 for postage charges and (v) \$39 for facsimile charges. These total \$2,683.87. The Goonan Declaration avers, and the court agrees, that all these charges were necessary to the litigation and recoverable under Section 14 if the Employment Agreement.

Long's cross-complaint specifically requested recovery of the cost disbursements, so apportionment is not required. Moreover, the law in the 4th District, not referenced by P's counsel, is that the prevailing party does not have to prove cost disbursements at trial but can recover such disbursements by a post-trial motion as Long seeks to do here. See *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1066-67.

In light of the foregoing, the clerk is ordered to interlineate in the Judgment filed 10/13/10 the court's awards of \$22,958.16 in prejudgment interest, \$212,360.00 in attorneys' fees as costs, and \$2,683.87 in additional costs. The cost award remains open.

3. Further Proceedings. The case is also scheduled for further trial proceedings regarding the indemnity claims, and the court requests that the parties be prepared to discuss the schedule for resolution of the remaining issues. The court understands that the parties contemplate a "trial on paper" on the following: A) the Carmony/Olsen indemnity claims against Linspire; and B) the Linspire indemnity claims against Carmony and Olsen. The court further understands that all indemnity disputes between Linspire on the one hand and Linnell, Brennan and Beshers on the other have been settled as stated in the Notice of Settlement filed 10/15/10. Finally, the court understands that Linspire's affirmative indemnity claims can proceed once the Long cost bill is finalized.