LEHMAN BROTHERS HOLDINGS INC. v. GATEWAY FUNDING DIVERSIFIED MORTGAGE SERVICES,

2015 | Cited 0 times | E.D. Pennsylvania | October 22, 2015

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEHMAN BROTHERS HOLDINGS, INC.,

: : : Plaintiff, : CIVIL ACTION : No. 11-6089

v. : : GATEWAY FUNDING DIVERSIFIED MORTGAGE SERVICES, L.P.,

: : : : Defendant. :

MEMORANDUM October 22, 2015 ANITA B. BRODY, J.

a contract , Arlington Capital Mortgage Corporation

. I held that Arlington had breached its contractual obligations with respect to all but one of the loans, and that Gateway was liable for the loans that were breached under the de facto merger doctrine. See ECF Nos. 46, 92. Gateway appealed my ruling, and, on May 7, 2015, the Third Circuit affirmed.

On December 31, 2013, Lehman had filed a motion to award attorneys fees and to fix prejudgment interest pursuant to Federal Rule of Civil Procedure 54. See ECF No. 94. On June 8, 2015, Lehman filed an application for an award of attorneys fees for the appeal. See ECF No.

114. On July 21, 2015, the Third Circuit remanded Lehm for me to decide. Lehman now moves for an award of these fees.

I. BACKGROUND 1 In August 2001, Arlington and Lehman entered into a Loan Purchase Agreement , under which Lehman purchased four mortgage loans from Arlington. The LPA that provided various representations, warranties, and covenants. In 2007, Arlington acknowledged misrepresentations in three of the four loans. Arlington entered into an Indemnification Agreement with Lehman in which it agreed to indemnify Lehman for any losses suffered on these three loans. Arlington never paid Lehman on the Indemnification Agreement. Lehman claimed that a fourt also contained misrepresentations, although Arlington never admitted any such misstatements. In 2008, Arlington sold most of its assets to Gateway. On September 28, 2011, Lehman sued Gateway,

claiming that it was liable for LPA and the Indemnification Agreement. On January 31, 2013, Lehman moved for summary judgment. On April 25, 2013, I found that there was no dispute as to whether Arlington breached the Indemnification Agreement with respect to three of the four loans. See ECF No. 46, at 20. But questions of fact remained as to whether the McNair Loan had been breached. There were also genuine issues of material fact regarding whether Gateway was liable for these breaches under the de facto merger doctrine. See id. at 17-19. After a bench trial on August 21 and 22, 2013, I held that Gateway had entered into a de facto merger with Arlington, and was therefore also held that Arlington had not breached its contractual obligations with respect to the McNair Loan. Gateway

1 Unless otherwise stated, the facts are taken from my Findings of Fact and Conclusions of Law. See ECF No. 89.

appealed, and on May 7, 2015, the Third Circuit affirmed the ruling. See Lehman Bros. Holdings, Inc. v. Gateway Funding Diversified Mortgage Servs., L.P., 785 F.3d 96 (3d Cir. 2015). Lehman now seeks $ s for the district court litigation. See ECF No. 94 at 7, 9. It also requests and $15,672.69 in expenses for the appeal. See ECF No. 114, at 9-10. Gateway challenges both

requests. As explained below, I will award s for reimbursement of expenses for both the district

court and appellate litigation.

II. DISCUSSION

a. Fees for the District Court Litigation

i. Applicable Law 2

which provides that: In addition to any and all other obligations of Seller hereunder, Seller agrees without limitation, the repurchase obligation . . . .

at 21. 3

Erie Chin v. Chrysler LLC, 538 F.3d 272, 279 (3d Cir. 2008).

2

of any rights or remedies that [Lehman] . . . may See ECF No. 36, Ex. J. In any event, Gateway does not contest 3 No. 94.

enforceab Chyi Liu, Nos. 99-3344, 00-3666, 2002 WL 31375509, at *3 (E.D. Pa. Oct 17, 2002). State law

Blanchette v. Cataldo, 734 F.2d 869, 878 (1st Cir. 1984); , 67 F.3d 1470, 1479 (9th itself, and a state right to an attorne

provides that it at 21. Because contractual provisions governing

are valid under New York law enforceable. , Nos. 09-1819, 09-4123, 2013 WL 5525093, at *3 (E.D. Pa. Oct. 4, 2013) (collecting New York state court cases). New York courts Id. at

*3 & n.8; see Matakov v. Kel-Tech Const., Inc., 924 N.Y.S.2d 344, 346 (N.Y. App. Div. 2011) settlement agreement); see also GFI Secs., LLC v. Levin, No. 102411/08, 2009 WL 1575183, at

*5 (N.Y. Sup. Ct. 2009). The court may then adjust the lodestar amount based on various case- necessity therefor, the nature of the issues involved, the professional standing of counsel, and the

Bankers Fed. Sav. Bank FSB v. Off W. Broadway Developers, 638 N.Y.S.2d 72, 74 (N.Y. App. Div. 1996) (internal quotation marks omitted).

ii.

fees based on contractual agreements must be raised during trial, and cannot be sought through a

post-trial motion under Federal Rule of Civil Procedure 54.

be made by motion unless the

P. 54(d)(2)(A). See Richardson v. Wells Fargo Bank, N.A., 740 F.3d 1035, 1037 (5th Cir. 2014) (applying Texas

law to determine whether, under Rule 54(d)(2)(A), an element of damages). New York courts do not require element of damages. See Elkins v. Cinera Realty, Inc., 402 N.Y.S.2d 432, 433 (N.Y. App. Div.

see also Gamache v. Steinhaus, 776 N.Y.S.2d 310, 312 (N.Y. App. Div. 2004) (emphasizing that a party -trial motion); 737 Park Ave. Acquisition, LLC v. Jetter, 997 N.Y.S.2d 101 (N.Y. Civ. Ct. 2014) (involving a post- not require Lehman to prove its a fees is timely. 4

4 Rule 54 itself does not preclude a post- . apply to fees recoverable as an element of damages, as advisory cmte. note (1993), several circuit e pursued in a Rule 54 motion. See Richardson, 740 F.3d at 1039-40; Rissman v. Rissman, 229 F.3d 586, 587-88 (7th Cir. 2000); Capital Asset Research Corp. v. Finnegan, 216 F.3d 1268, 1270 (11th Cir. 2000) (per curiam). a party seeking legal fees among the items of damages for example, fees that were incurred by the plaintiff before the litigation begins . . . must raise its claim in Rissman during the case should be sought after decision, when the prevailing party

has been identified and it is

iii. Hourly Rate Under the lodestar method, the reasonableness of spent by counsel on the litigation. To determine the appropriateness hourly rate, a

with like experience and of comparable reputation to those by whom the prevailing party was

Gamache v. Steinhaus, 776 N.Y.S.2d 310, 311 (N.Y. App. Div. 2004) (internal quotation marks omitted); accord Rahmey v. Blum, 95 A.D.2d 294, 302 (N.Y. App. Div. 1983). Attorney Matthew Spohn, who charged an hourly rate of $385 in 2012 and $395 in 2013, billed the majority of the time spent on the district court litigation. See ECF No. 94, Spohn Decl., at 3. In addition, attorney Caleb Durling billed significant hours on this case; he charged an hourly rate of $340 in 2012 and $375 in 2013. See id., Durling Decl., at 2. Local counsel, Thomas Donnelly, billed $250 per hour over the relevant time period. See id., Donnelly Decl., at 2. 5

To support the reasonableness of these hourly of Peter Smith, a Philadelphia attorney who attested that the rates background and experience. Id., Smith Decl., at 2-3.

Gateway argues that the rates charged by Mr. Spohn and Mr. Durling are excessive because local counsel, Mr. Donnelly, has more experience but charged only $250 per hour. Id. Courts in this district have also allowed parties to pursue contractual

See, e.g., Inc., No. 01-680, 2003 WL 22462236, at *3 (E.D. Pa. Oct. 28, 2003). 5 paralegals. See ECF No. 94, Smith Decl., at 2-3. However, Gateway does not dispute the rates charged by these individuals, and they are reasonable.

Mr. Donnelly. Compare ECF No. 94, Spohn Decl., at 2 (indicating that Mr. Spohn graduated law school in 2001) with id., Donnelly Decl., at 2 (stating that Mr. Donnelly graduated in 2003). Both Mr. Spohn and Mr. Durling also graduated from law school with honors and obtained judicial clerkships. See id., Spohn Decl., at 2; id., Durling Decl., at 2. Mr. Durling has been recognized Id., Durling Decl., at 2. In short, Mr. Spohn and Mr.

Durli s skill and experience justify the higher hourly rates they charged; their rates are reasonable. 6 In one respect, however, the rate charged by Mr. Spohn is excessive. Mr. Spohn spent 12.4 hours traveling to Philadelphia and back for a pretrial conference between July 31 and August 1, 2013. He typically charged half his hourly rate (or $197.50) while traveling, a practice that seems reasonable. See Gonzalez v. Bustleton Servs., Inc., No. 08-4703, 2010 WL 3282623, at *3 (E.D. Pa. Aug. 18, 2010); RMP Capital, Corp. v. Victory Jet, LLC, No. 6197-12, 2013 WL 5303582, at *12 (N.Y. Sup. Ct. 2013). But for this particular trip, he only billed 6.3 hours at this reduced rate. See ECF No. 94, Spohn Decl., Ex. A. The remaining 6.1 hours were improperly billed at his full hourly rate of $395. Id. I will therefore by $1,204.75 7

to account for this excessive charge for travel time. iv. Number of Hours 6 ECF No. 96, at 3. But New York courts have held that a hearing is not necessary as long as the court possesses SO/Bluestar, LLC v. Canarsie Hotel Corp., 825 N.Y.S.2d 80, 82 (N.Y. App. Div. Bankers Fed. Sav. Bank, 638 N.Y.S.2d at 72, Gateway has not submitted any affidavit or contrary evidence that See Podhorecki , 607 N.Y.S.2d 818, 819 decision to reso pon the affidavits and documents submitted by plaintiffs without 7 This figure is reached by multiplying the 6.1 hours by the difference between $395 and $197.50.

The reas Katzer v. Cty. of Rensselaer, 767 N.Y.S.2d 474,

476 nsel billed 484 hours. See ECF No. 94, at 7. To justify these hours, Lehman has submitted contemporaneous records indicating the date, the number of hours billed, the attorney billing those hours, and the tasks performed during those hours. See Rahmey, 95 A.D.2d at 300 (stating worked, an explanation of how the hours were spent . . . and identifying the specific claim to

see also Gamache, 776 N.Y.S.2d at 312 (concluding that the attorneys had failed to establish the reasonableness of the hours spent where they did not submit contemporaneous time sheets).

Gateway has submitted a list of various billing entries that it claims are either duplicative or erroneous. See ECF No. 96, Ex. A. records, I conclude that they are largely reasonable given the type and complexity of the work

involved. However, the 23.2 hours spent by counsel on drafting a post-trial supplemental brief were excessive. See ECF No. 94, Spohn Decl., Ex. A. This brief did not require new legal research; many of the citations and legal arguments are identical to those contained in summary-judgment brief. Compare ECF No. 87 with ECF No. 33. Instead, the additional work

that went into producing this brief consisted of reviewing the 433 page trial transcript and drafting 12 pages of legal argument. The brief could have reasonably been prepared in 16 hours 6 hours to review the transcript and 10 hours for drafting. See Social Sec., No. 09- Case 2:11-cv-06089-AB Document 117 Filed 10/22/15 Page 8 of 17 unreasonable in the expenditure of 6 hours to review the 460- ; Seifert , No. 10-188J, 2013 WL 357568, at *3 (W.D. Pa. Jan. 29, 2013) (reducing time spent on a 32 page brief to 25 hours where the issues raised were familiar to counsel). I will reduce the requested hours for preparing the post-trial supplemental brief from 23.2 to 16 hours. This equates to a reduction in the fee award of $2,844. 8

v. Adjustment for Limited Success Gateway contends cause it did not prevail on its claim that Arlington made misrepresentations regarding the McNair Loan. See ECF No. 96, at 6-7. Under New York law, a court must account for several factors in determining the , including amount involved and benefit resulting to the client from the services . . . [and] the results Diaz v. Audi of Am., Inc., 57 A.D.3d 828, 830 (N.Y. App. Div. 2008); see also Matter of Freeman, 311 N.E.2d 480, 484 (N.Y. 1974).

In this case, Lehman sought damages for losses on four different loans. Gateway essentially conceded that Arlington breached its contractual obligations with respect to three of the loans. See ECF No. 46, at 20. Lehman succeeded in proving that Gateway was liable for the losses on these three loans under the de facto merger doctrine. Lehman failed, however, to demonstrate that Arlington itself had violated its agreement with respect to the McNair Loan. Ultimately, Lehman obtained monetary recovery for the losses suffered on three of the four loans. Thus, a 25% reduction in the fee award will fees with the results its counsel obtained, and I will therefore reduce the fee award by $36,501.87. 9

See, e.g., RMP

8 This figure is reached $395. 9 This figure is 25% of $146,007.47 lodestar amount after reductions for improperly billed travel and excessive time spent on the post-trial brief.

Capital, Corp. e of damages only GFI Secs., LLC

-thirds where the party only prevailed on one of its three claims).

vi. Reimbursement for Expenses Lehman also seeks to recover $15,694.95 for legal research 10

and travel expenses 11 incurred during the course of the litigation. See ECF No. 94, at 9. New York courts treat research and , and do not award reimbursement for these types of expenses. See In re City of New York, 913 N.Y.S.2d 512, 527 (N.Y. Sup. Ct. 2010) (omputer research is merely a substitute for an at time that is compensable and is not a separately taxable cost and declining to

cal counsel (internal quotation marks omitted)); Cox v. Microsoft Corp., No. 105193/2000, 2007 WL 7045224, at *4 (N.Y. Sup. Ct. 2007) (treating ; Meyers v. State, 634 N.Y.S.2d 642, 646 n.2 (N.Y. Ct. Cl. 1995) (finding that travel expenses and 12

As such, I will decline to award Lehman the $15,694.95 in expenses it seeks.

vii. Summary After reducing the requested fee award of $150,056.22 by $1,204.75 for improperly-billed travel time, and $2,844 for the hours unreasonably spent on the post-trial supplemental 10 These expenses are related to the costs of using the Westlaw and Lexis electronic databases. 11 In addition to billing at half-rate for the hours spent traveling, counsel also charged for the expenses for s Denver-based attorneys to travel to Philadelphia, including airfare and hotels. 12 Lehman does not point to any New York caselaw to the contrary, and no such authority has been located.

district court litigation, this amount will be reduced by 25%. Thus, Lehman is entitled to a reasonable fee award of $109,505.60. Lehman cannot recover for the travel and research costs incurred by counsel.

b. Fees for Appeal Lehman also seeks $154,408.00 in and $15,672.69 in expenses for its . See ECF No. 114, at 9-10. It argues that it is entitled to these fees and expenses either under Federal Rule of Appellate Procedure 38, which authorizes courts of appeals to award damages and costs for frivolous appeals . I will award Lehman $121,017 in rea and will deny its request to be reimbursed for expenses incurred in using online legal research services. 13

i. Fees & Expenses Under Rule 38 Federal Rule of Appellate Procedure 38, which states appeal is P. 38. 14

Although, by its terms, Rule 38 refers to courts of appeals and not district courts, see Rossi v. Proctor & Gamble Co., No. 11-7238, 2014 WL 1050658, at *3 (D.N.J. Mar. 17, 2014), appellate 13

fees on appeal namely, that this claim should have been pursued at trial. As discussed above, New York ved at trial. It would be strange indeed to require Lehman to for a possible appeal during a trial on its substantive claims. 14 The Federal Rules of Appellate Procedure apply in diversity cases. See Hanna v. Plumer, 380 U.S. 460, 47 Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from see also Burlington N. R. Co. v. Woods, 480 U.S. 1, 8 (1987) (finding that Rule procedural rule).

to expenses, and to -1119 (3d Cir., filed July 21, 2015). The T thus obliges me to .

frivolousness of the appeal, the issues raised must be so meritless that, Quiroga v. Hasbro, Inc., 943 F.2d 346, 347 (3d Cir. 1991) (internal quotation marks omitted). That is, a court asks whether the appeal is Id. at 347; see also Hilmon Co. (V.I.) , 899 F.2d 250, 251 (3d Cir. 1990) (stating that a frivolous appeal is one that is ble arguments raised in support (citation omitted) (internal quotation marks omitted)).

The Third Circuit chastised Gateway for violating Federal Rule of Appellate Procedure 10 by failing to include in the appellate record the transcript of a hearing. This transcript, the Court of Appeals noted, was that I had improperly deemed one of its arguments waived. Lehman Bros. Holdings, Inc., 785 F.3d at 101. The Court of Appeals found Id. The Third Circuit then went on to address three other arguments raised by Gateway related to (1) my denial of a continuance to obtain expert witnesses; (2) my for contribution and indemnification; and (3) my finding that a de facto merger had occurred. Ultimately, the court found these c . Id. at 102.

T ments was potentially frivolous. But in order for the appeal to be frivolous, Rule 38 requires that it wholly Quiroga, 943 F.2d at 347 (emphasis added). While Lehman argues that Gateway had no appreciable hope of see ECF No. 114, at 16, Lehman has not demonstrated that these challenges meet the difficult standard for frivolousness under Rule 38. See Hilmon, 899 F.2d at 253 (cautioning that courts should be reluctant to classify an appeal as which has colorable support . . .

Although ments on appeal failed to persuade the Third Circuit, there were colorable bases to support at least some of its claims. For example, with respect to my denial of its motion to consolidate, Gateway pointed out that the two actions involved questions of fact that centered on the same series of transactions and occurrences. See Fed. R. Civ. P. 42(a) (noting that a court). Gateway also challenged my conclusion that Lehman had established continuity of ownership under the de facto merger doctrine. Given that continuity of ownership is one of the required elements of a de facto merger, see Fizzano Bros. Concrete Prods, Inc. v. XLN, Inc., 42 A.3d 951, argument was not so utterly without merit to be frivolous.

In sum, because a reasonable attorney might conceivably have expected to prevail on at s appeal, it was not wholly without merit, and Lehman is not entitled to attorne

ii.

s appeal was not frivolous, Lehman may still fees under , as interpreted in accordance with New York law. 15

1. The Hourly Rate Three attorneys billed significant hours on the appeal. Jonathan Franklin, a partner, billed $865 per hour in 2014 and $900 per hour in 2015. See ECF No. 114, at 8. Mr. Spohn, who also worked on the district court litigation, billed $415 per hour in 2014 and $500 per hour in 2015. See id. Finally, Benjamin Hayes, an associate, billed at an hourly rate of $280 in 2014 and $295 in 2015. See id. To support the reasonableness of these rates, Lehman submitted the affidavit of Barry E. Cohen, an attorney in Washington, D.C. with extensive experience in fee-setting and billing practices.

, however, because he only attests that er lawyers of comparable skill and experience in the Washington, D.C. market Id., Cohen Decl., at 6 (emphasis added). But New York courts have held that the relevant community for calculating the hourly rate is the district where the action is litigated which, in this case, is Philadelphia. See, e.g., RMP Capital, Corp., 2013 WL 5303582, at *8; Francis v. Atlantic Infiniti, Ltd., No. 19953/06, 2012 WL 398769, at *5 (N.Y. Sup. Ct. 2012); Daimlerchrysler Corp. v. Karman, 782 N.Y.S.2d 343, 346 (N.Y. Sup. Ct. 2004); see also Behavior Research Inst. v. Ambach, 535 hourly rates based on his knowledge of the local community where the case was litigated).

15 The court of appeals would also look to state law, as interpreted by state courts, in order to interpret the See Gares v. Willingboro Twp., 90 F.3d 720, 725 (3d Cir. e law, we are not free to impose our own view of what state law should be;

Because Lehman has submitted no evidence regarding prevailing market rates in Philadelphia in 2014 and 2015, I will utilize the fee schedule rates established by Community . See Maldonado v. Houstoun, 256 F.3d 181, 187-88 (3d Cir. 2001) (approving the use of the CLS schedule to fix hourly rates). 16

With respect to Mr. Franklin, the applicable range is $600-650. 17

For Mr. Spohn, who has approximately 15 years of legal experience, the CLS range is $350-420. Finally, for Mr. Hayes, who graduated law school in 2014, the relevant CLS range is $180-200. Using these benchmark rates, and accounting for each professional reputation and accomplishments, I determine that the reasonable hourly rates are: $650 for Mr. Franklin; $420 for Mr. Spohn, will therefore be adjusted accordingly.

2. Number of Hours Lehman lled 342.9 hours for the appeal: 78.1 hours for Mr. Franklin, 77.6 hours for Mr. Spohn, and 188.3 hours for Mr. Hayes. See ECF No. 114, at 9. Gateway contends that these hours are excessive, but it has not identified which hours it is challenging and why it s billing to be unreasonable. Instead, it merely requests a hearing on reasonableness. Without any appellate fees motion is not justified. See SO/Bluestar, LLC, 825 N.Y.S.2d at 82; Podhorecki, 607 N.Y.S.2d at 819.

appellate fee petition, I find that 342.9 hours is reasonable in order to research and draft the 47 pages of legal 16 See Attorney Fees, Community Legal Services (effective Sept. 12, 2014), http://clsphila.org/about- cls/attorney-fees. 17 Even though Mr. Franklin had been in the legal profession for 25 years at the time of the appeal, for which the relevant CLS range is $520-590, his skill and accomplishments justify a higher hourly rate. Notably, Mr. Franklin clerked on the Third Circuit, has argued numerous cases before the Supreme Court and the courts of appeals, and is the head of the appellate division of Norton Rose Fulbright LLP. See ECF No. 114, Spohn Decl., at 2-3.

argument in the appellate brief, produce a supplemental appendix, and prepare for oral argument (even though oral argument was ultimately not held in the case). 18

Notably, a relatively new associate billed se hours, and courts in this district have found that of consultations and research, which would be considered exces may be more reasonable for an attorney with limited experience. Laura P. v. Haverford Sch.

Dist., No. 07-5395, 2009 WL 1651286, at *7 (E.D. Pa. June 12, 2009).

3. Reimbursement for Expenses Lehman seeks reimbursement of $15,672.69, primarily for online research expenses. See ECF No. 114, at 9-10. As noted above, however, New York courts treat research expenses as base fee, and do not permit separate recovery for these expenses. See In re City of New York, 913 N.Y.S.2d at 527; Cox, 2007 WL 7045224, at *4; Meyers, 634 N.Y.S.2d at 646 n.2.

iii. Summary edure 38 because at least some of the issues raised were supported by a colorable legal or factual basis. Nevertheless, Lehman is still entitled to reasonable fees of $121,017 Guide. 19

Because counsel was entirely successful on appeal, awarding this full amount accords with the benefit to Lehman. But, as with its district court expenses, Lehman cannot recover for e.

c. Prejudgment Interest 18 Some of the hours for which Lehman seeks reimbursement were e provision requiring payment of may preclude recovery for these expenses. See 214 Wall Street Assocs., LLC v. Medical Arts-Huntington

Realty, 953 N.Y.S.2d 124, 126 (N.Y. App. Div. 2012). However, Gateway does not raise this legal issue of contract interpretation, and it is therefore waived. 19 This figure was arrived at by multiplying the hours worked by each attorney by the reasonable hourly rate derived from the CLS schedule.

In entering judgment in favor of Lehman, I held that it was entitled to $448,533.08 plus 6% prejudgment interest. See ECF No. 93. interest rules Jarvis v. Johnson, 668 F.2d 740, 746 (3d Cir. 1982). As I previously determined, the Indemnification Agreement breached by Arlington is governed by Pennsylvania law, and Pennsylvania courts calculate prejudgment interest at 6% per annum from the date that payment was wrongfully withheld. See ECF No. 46, at 21; see also Daset Min. Corp. v. Indus. Fuels Corp., 473 A.2d 584, 595 (Pa. Super. 1984).

In this case, prejudgment interest should be calculated starting on June 8, 2011, when the 30-day deadline imposed by the Indemnification Agreement for Gateway to respond to See ECF No. 46, at 19. Final judgment in the case was ente withholding of payment and the entry of final judgment, Lehman is entitled to $68,054.14 in prejudgment interest.

III. CONCLUSION

fees for the district court litigation and appeal. With respect to the district court motion (ECF No.

94) $109,505.60, and will deny its request for reimbursement of research and travel expenses. I will also fix prejudgment interest at $68,054.14. With regard , I will award Lehman $121,017 and deny it reimbursement for research expenses.

s/Anita B. Brody _____

ANITA B. BRODY, J.