Trustees of the Building Trades Educational Benefit Fund et. al. v. Romero Electric LLC et. al.

2021 | Cited 0 times | E.D. New York | July 19, 2021

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK
----------X TRUSTEES OF THE BUILDING TRADES EDUCATIONAL BENEFIT FUND, THE BUILDING TRADES ANNUITY BENEFIT FUND, BUILDING TRADES WELFARE BENEFIT FUND and RETIREMENT FUND,

Plaintiffs, REPORT AND

RECOMMENDATION CV-19-3515 (DRH) (AYS) -against

ROMERO ELECTRIC LLC and JUAN CARLOS ROMERO, Individually, Defendants.
----------X ANNE Y. SHIELDS, United States Magistrate Judge:

Trustees of the Building Trades Educational Fund, The Building Trades Annuity Benefit (the or Romero Electric LLC and Juan Carlos Romero (CR pursuant to Section 502(a)(3) and Section 29 U.S.C. §§ 1132(a)(3) and 1145, and Section 301 of the Labor Management Relations Act of 29 U.S.C. § 185. Plaintiffs allege that Defendants have failed to make required employer contributions to employee benefit plans. See generally, Compl [1]. Since the withdrawal of Defendant counsel, see Order dated 10/07/2020, Defendants have

not timely appeared through new counsel or otherwise defended this action. See DE [37]. On February 11, 2019, Plaintiffs filed the instant motion for default judgment. DE [38]. Presently Plaintiffs motion for issuance of a Report and Recommendation as to whether Plaintiffs have establish motion should be granted. See Order Referring Motion dated 6/15/2021. For the reasons set forth

below, this Court recommends entry of judgment on behalf of the Funds and that total damages of $887,353.61 be awarded.

BACKGROUND I. Facts The following facts adduced from Plaintiff Complaint, and affidavit of Albert Alimenia Alimenia Aff Danielle M. Carney Carney Aff and Alan Rossi (Rossi Aff.) and the exhibits attached thereto, are undisputed and taken as true for purposes of deciding this motion. See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992) (citations omitted). The Funds are employer and employee trustees of multiemployer labor-management trust funds organized and operated in accordance with Section 302(c) of the LMRA, 29 U.S.C. § 186(c), and

employee benefit plans within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3). See Compl. ¶ 5. The Funds are administered at 50 Charles Lindbergh Blvd., Suite 207, Uniondale, NY 11553. Id. ¶ 7. Defendant Romero Electric, a foreign corporation, is an electrical contracting company with its principal place of business at 147 W 35 th

Street, New York, NY 10001. See Compl. ¶ 9; see also Alimenia Aff. ¶ 2, DE [39]. Defendant Juan Carlos Romero is/or was an officer, agent, partner and/or principal owner of Romero. Compl. ¶ 10. JCR resides at 103 W. Fort Lee rd., Bogata, NJ 07603. Id. ¶ 11 Plaintiffs contends that Romero was a party to, or manifested an intention to be bound by See

Compl. ¶ 12; see also Alimenia Aff. ¶ 2. Plaintiffs allege that the CBA imposed several obligations on Romero, including obligations, to:

1) submit contributions reports setting forth the hours that each of its employees worked and amount of contributions due pursuant to the rate schedules set forth in the CBA for all work performed by its employees covered by the CBA and to remit such contributions in accordance with the CBA, Compl. ¶ 13; 2) pay interest on the delinquent contributions calculated at the prime rate as stated in Federal Reserve Statistical Release on the date contributions are due plus two percent, id. ¶ 17; Alimenia Aff. ¶¶ 4-5, Ex. A. at p. 16 ¶(e), DE [39-1]. 3) pay an additional 20% percent of the total sum of contributions due and unpaid as liquidated damages, Compl. ¶ 17; 4) unpaid benefits. Compl. ¶ 17. ks and records revealed that Romero owes the Funds during the period of July 1, 2015 through November 30, 2018. Compl. ¶ 15; Carney Aff. ¶ 8, DE

[40]. II. Procedural Background Plaintiffs timely filed this action against Defendant. See Compl. Within a month, Plaintiffs filed their executed and returned summons which had been served upon Defendants. See DE [5], [6]. After extensions of time to answer, Defendants filed their Answer on September 6, 2019. DE [9]. After several months of discovery, see Discovery Scheduling Order dated 10/30/2019, counsel. 1 DE [15]. A conference was scheduled to discuss the motion, see Orders dated 3/02/2020 and 3/14/2021, but was ultimately adjourned when counsel withdrew his motion to withdraw as counsel. See DE [19] and Orders dated 3/18/2020. Following the withdrawal of the motion an amended discovery schedule was issued and discovery resumed. See Order dated 3/23/2020. conference was held to discuss the motion to withdraw, and the motion was granted. See Order

dated 10/07/2020. At the same conference, the Court directed Romero to appear through new counsel within thirty days because a corporation may not appear pro se in federal court and directed JCR to either also appear by new counsel in 30 days or elect to proceed pro se. Id.; See Grace v. Bank Leumi Trust Co. of N.Y., 443 F. 3d 180, 192 (2d Cir. 2006). Defendants were warned that failure to appear through new counsel or communicate with the Court may result in a recommendation to the District Court that an order of default be entered. See Order dated 10/07/2020. In that same Order, the Court scheduled a status conference for November 17, 2021. Id. to withdraw. See DE [27], [28], [29]. Defendants failed to appear for the November 17, 2020 conference, obtain new counsel, or

communicate with the Court prior to the conference explaining why new counsel could not be obtained, as previously directed by this Court. See Order dated 10/17/2020. Defendants were once again given thirty days to appear through new counsel and/or for JCR to elect to proceed

1. On January 21, 2020 the case was reassigned from the Honorable Gary R. Brown to the undersigned. pro se. Id. Defendants were also again cautioned that failure to appear or communicate with the Court may result in a recommendation to the District Court that an Order of Default be entered. Id. See DE [31]. Defendants thereafter failed to timely appear through new counsel or otherwise defend this action. See DE [33]. Plaintiffs requested a certificate of default, see DE [36], and a certificate of default was entered by the Clerk of the Court on February 5, 2021. Entry of Default, DE [37]. Plaintiffs subsequently filed the instant motion for default judgment. Mot. for Def. Judg., DE [38]. In support of their damages applications, Plaintiffs submitted the following affidavits and exhibits: an affida an affirmation of an auditor from the

CostaRothbort CPAs LLC firm, which performed the audits, Rossi Aff., DE [43]; a copy of the Assumption Agreement signed by JCR and a copy of the CBA, DE [39-1], Ex. A; copies of the records, DE [39-2], Ex. B, DE [39-3] Ex. C; the Collection Policy, DE [39-4], Ex. D; a statement of damages detailing the amounts owed, DE [39-5], Ex. E; a copy of the process server bills, DE [40-3], Ex. C; contemporaneous timesheet, DE [40-4], Ex. D; and copies of the audit invoices, DE [43-2], Ex.

A, DE [43-3], Ex. B. The Honorable Denis R. Hurley referred the instant motion to this Court for report and recommendation, see Order dated submissions.

DISCUSSION I. Legal Principles A. Default Judgment Liability

Plaintiffs move for a default judgment against Defendant pursuant to Federal Rule of FRCP 55 establishes a two-step process by which a party may obtain a default judgment. See City of N.Y. v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 128 (2d Cir. 2011); New York v. Green, 420 F.3d 99, 104 (2d Cir. 2005). First, when a party has failed to plead or otherwise defend, the Clerk of Court must enter a certificate of default. FRCP 55(a). Second, after this entry of default, if the party still fails to appear or move to set aside the default, then the moving party may make an application for entry of default judgment. FRCP 55(b). In this case, as noted above, the Clerk of Court entered a certificate of default, and Plaintiffs moved for entry of default judgment.

s failure to comply with a court's order that the defendant obtain Rule 55(a) such that an entry Leviton Mfg. Co. v. Fastmac Performance Upgrades, Inc., No. 13 Civ. 01629 (LGS), 2013 WL 4780045, at *2 (S.D.N.Y. July 8, 2013) (quoting FRCP 55(a)); see Glob. Auto, Inc. v. Hitrinov, No. 13 Civ. 2479 (SLT) (RER), 2015 WL 5793383, at *7 (E.D.N.Y. Sept. 30, 2015) orporation's failure to retain counsel results in a failure

reconsideration denied, No. 13 Civ. 2479 (SLT) (RER), 2015 WL 7430001 (E.D.N.Y. Nov. 19, 2015).

, 242 F.R.D. 69, 73 (S.D.N.Y. 2007) (citing Shah v. N.Y.S. , 168 F.3d 610, 615 (2d Cir. 1999)). Courts should be cautious when determining whether to grant a default judgment because it is an extreme remedy that should only be granted as a last resort. See Cody v. Mello, 59 F.3d 13, 15 (2d Cir. 1995) (citing Meehan v. Snow that must be assessed in order to decide whether to relieve a party from default or from a default

Bricklayers & Allied Craftworkers Local 2, Albany, N.Y. Pension Fund v. Moulton Masonry & Const., LLC, 779 F.3d 182, 186 (2d Cir. 2015) (citing Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993)). The three criteria are (1) whether the default was willful; (2) whether ignoring the default would prejudice the opposing party; and (3) whether the defaulting party has presented a meritorious defense. Id.

As to the first factor, Defendant failure to obtain new council or communicate with this Court sufficiently demonstrates willfulness. In the context of a default, courts will find S.E.C. v. McNulty, 137 F.3d 732, 738 (2d Cir. 1998). This includes where a

corporation fails to comply with a court order to obtain counsel. See Powerserve Int'l, Inc. v. Lavi, 239 F.3d 508, 514 (2d. Cir. 2001) (upholding default judgment where individual and corporate defendants did not obtain counsel in the time frame ordered by the court); Dow Chem. Pacific Ltd. v. Rascator Maritime S.A., 782 F.2d 329, 336 (2d Cir. 1986) (finding that there was court's order to obtain new counsel); S & S Mach. Corp. v. Wuhan Heavy Duty Mach. Tool Grp.

Co., No. 07 Civ. 4909 (NGG) (RER), 2012 WL 958527, at *3 (E.D.N.Y. Mar. 21, 2012) (noting that where a court has ordered a corporate entity to appear through counsel, it is appropriate to enter a default judgment when the entity willfully disregards the court order); Franco v. Ideal Mortg. Bankers, Ltd., No. 07 Civ. 3956 (JS) (AKT), 2010 WL 3780972, at *3 (E.D.N.Y. Aug. 23, 2010) against a corporate . Here, Defendants initially retained

counsel and filed a timely response to the Complaint. Since the withdrawal of Defendant counsel on October 7, 2020, however, Defendants have failed to appear with counsel and to comply with this Court s Orders directing Defendants to appear with counsel within 30 days, see Orders dated 10/07/2020 and 11/17/2020, despite being served with a copy of the Orders. See DE [27], [28], [29], [31]. Moreover, the Court finds Defendants have not opposed Plaintiffs motion for default judgment, despite also being served a copy of the motion. Affidavit of Service, DE [41-2]. Based on these facts, this Court finds Defendant conduct to be willful. See Powerserve Int l, 239 F.3d at 514; Dow Chem. Pacific, 782 F.2d at 336.

As to the second factor, in light of the defaulting Defendant failure to obtain new counsel and Plaintiffs interest in prosecuting their case, ignoring the default would prejudice Bridge Oil Ltd. v. Emerald Reefer Lines, LLC, No. 06 Civ. 14226 (RLC) (RLE), 2008 WL 5560868 at *2 (S.D.N.Y. Oct. 27, 2008). Without the entry of a default judgment, Plaintiffs will be unable to recover against

Defendants for the claims adequately set forth in their Complaint.

As to the final factor, although Defendants filed an Answer to the Complaint, this Court respectfully recommends that the Answer filed by Defendants be stricken sue sponte in light of Defendant failure to oppose Plaintiffs' motion for default judgment and Defendant failure to introduce any evidence that would constitute a meritorious defense. See Ainbinder v. Money Ctr. Fin. Grp., Inc., No. 10 Civ. 5270 (SJF) (AKT), 2013 WL 1335997, at *6 (E.D.N.Y. Feb. 28, 2013) (recommending that the answer of a corporate defendant be stricken because the defendant neither opposed the plaintiffs motion for default judgment nor introduced any evidence that would constitute a complete defense), R&R adopted, No. 10 Civ. 5270 (SJF) (AKT), 2013 WL 1335893 (E.D.N.Y. Mar. 25, 2013); Next Proteins, Inc. v. Distinct Beverages, Inc., No. 09 Civ. 4534 (DRH) (ETB), 2012 WL 314871, at *2 (E.D.N.Y. Feb. 1, 2012) judgment against a corporate defendant for failing to appear by counsel, it is also appropriate for

Eagle Assocs. v. Bank of Montreal, 926 F.2d 1305, 1305 (2d Cir. 1991)).

w so as to give the factfinder some Am. Alliance Ins. Co. v. Eagle Ins. Co. Ltd., 92 F.3d 57, 61 (2d Cir. 1996) proven at trial, would constitu McNulty, 137 F.3d at 740 (citations

required. Enron Oil Corp., 10 F.3d at 98. Here, although Defendants filed an answer to the

Complaint, the Answer contains only general denials and affirmative defenses, rendering it inadequate under the applicable law. See Compl.; Answer, DE [9]; Enron Oil Corp., 10 F.3d at 98; see also Lazic v. Dorian Owners, Inc., No. 10 Civ. 1824 BMC, 2011 WL 319879, at *2 (E.D.N.Y. Jan. 29, 2011) (denying defendants motion to vacate default judgment in part because the answer to the complaint included only general denials and affirmative defenses, which merely contradicted the allegations without providing any facts that would constitute a complete defense). Defendants have not opposed Plaintiffs motion for default judgment or otherwise introduced any evidence that would constitute a complete defense to Plaintiffs claims. Accordingly, this Court respectfully recommends that the Answer filed by Defendants be stricken and finds that the final factor as to the default judgment is satisfied.

Because all three factors are satisfied, a default judgment would be proper in the present circumstances provided that Plaintiffs has alleged facts that, taken as true, establish liability.

B. A default is a concession of all well-pleaded factual allegations of liability in the complaint, except for allegations relating to damages. See Bricklayers & Allied Craftworkers Local 2, Albany, N.Y. Pension Fund, 779 F.3d at 189 (citing Cement & Concrete Workers Dist. Council Welfare Fund v. Metrofoundation Contractors, Inc., 699 F.3d 230, 234 (2d Cir. 2012)); Unitrans Colsolidated, Inc. v. Classic Closeouts, LLC, No. 09 Civ. 2098 (SLT), 2010 WL 1265206, at *2 (E.D.N.Y. Mar. 31, 2010) -pleaded factual allegations in the complaint are deemed admitted upon a defendant thus whether

Plaintiffs allegations in the Complaint, if accepted as true, establish Defendant

liability for the claims. James v. Arango, No. 05 Civ. 2593 (TCP) (AKT), 2011 WL 1594832, at *9 (E.D.N.Y. Mar. 28, 2011) (citing Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992)). On a motion for a default judgment, the burden is on the plaintiff to establish an entitlement to recovery, and a failure to plead sufficient facts may require the denial of the motion. See Century Sur. Co. v. Euro-Paul Constr. Corp., No. 16 Civ. 5133 (MKB) (VMS), 2017 WL 4338790, at *3 (E.D.N.Y. Sept. 29, 2017); Lanzafame v. Dana Restoration, Inc., No. 09 Civ. 0873 (ENV) (JO), 2011 WL 1100111, at *2 (E.D.N.Y. Mar. 22, 2011).

i. ERISA The factual allegations in the Complaint are sufficient to establish liability under ERISA. ERISA does not impose any affirmative obligations on employers. See Finkel v. Metro Elec. Control Sys. Ltd., No. 10 Civ. 2012 (CBA) (JO), 2012 WL 4049803, at *4 (E.D.N.Y. Aug. 17, 2012). Id. In turn, on a motion for default judgment, factual allegations in the complaint that a defendant failed to comply with the payment rules established by the provisions of a CBA and any applicable contracts are sufficient to establish an ERISA violation. See Trustees of Local 813 Ins. Tr. Fund v. Bradley Funeral Serv., Inc., No. 11 Civ. 2885 (ARR) (RLM), 2012 WL 3871759, at *3 (E.D.N.Y. Aug. 10, 2012) (finding that the complaint); La Barbera v. Fed.

Metal & Glass Corp., 666 F. Supp. 2d 341, 348 (E.D.N.Y. 2009) defendant has failed to comply with its contractual obligations and with the statutory

Complaint establishes that Romero is an employer within the meaning of ERISA, was bound by

a CBA, and failed to make required contributions to the Funds. See Compl., ¶¶ 8, 12-29. The Complaint further alleges that JCR is the fiduciary of Romero and failed to discharge his duties as fiduciary in accordance with the CBA, thus failing to make the required contributions to the Funds. See Compl., ¶¶ 10, 35-57. These alleged facts, taken as true, establish liability under ERISA.

ii. LMRA The factual allegations in the Complaint are also sufficient to establish liability under the LMRA. Where a CBA requires remittance of dues to a union, a union may enforce its contractual rights under the LMRA. See 29 U.S.C. § 185(a) of contracts between an employer and a labor organization representing employees in an industry affecting Defendants and the Union, and that Defendants breached that contract by failing to remit certain contributions. See Compl., ¶¶ 12-18, 26-29. These alleged facts, taken as true, establish liability under the LMRA. See Flanagan v. Marson Grp., Ltd., No. 11 Civ. 2896 (ADS) (GRB), 2014 WL 4426277, at *3-4 (E.D.N.Y. Aug. 11, 2014).

C. In assessing damages, the court cannot rest upon the well-pleaded facts in the complaint. See Metro Elec. Control Sys. Ltd., No. 10 Civ. 2012 (CBA) (JO), 2012 WL 4049803, at *4. Rather, the amount of damages awarded, Credit Lyonnais Sec. (USA), Inc. v. Alcantara, 183 F.3d 151, 155 (2d Cir. 1999). A

court may evaluate the fairness of a proposed damages award by relying on affidavits and documentary evidence. See Tamarin v. Adam Caterers, Inc., 13 F.3d 51, 54 (2d Cir. 1993). Gesualdi v. Ava Shypula Testing &

Inspection, Inc., No. 13 Civ. 1873 (DRH) (GRB), 2014 WL 1399417, at *6 (E.D.N.Y. Apr. 10, 2014) (citing Transatlantic Marine Claims Agency v. Ace Shipping Corp., 109 F.3d 105, 111 (2d Cir. 1997)). In support of their motion for default judgment, Plaintiffs submitted multiple affidavits and exhibits. Having reviewed the supporting documents, this Court finds them adequate to determine damages without a hearing.

Under ERISA's civil enforcement provision, an award of 1) unpaid contributions, 2) interest on unpaid contributions, 3) liquidated damages, 4) reasonable attorney's fees and costs, and 5) such other legal and equitable relief as the Court Finkel v. Allstar Elec. Corp., No. 11 Civ. 3222 (KAM) (RER), 2013 WL 4806951, at *5 (E.D.N.Y. Sept. 9, 2013); see 29 U.S.C. § 1132(g)(1).

i. Unpaid Contributions ERISA provides that, upon a finding that an employer violated Section 515 of ERISA, 29 U.S.C. § 1145, the plan is entitled to judgment for the amount of unpaid contributions. See 29 U.S.C. § 1132(g)(2). Plaintiffs seek damages for unpaid contributions to the Funds under ERISA of $643,741.73 for the period of July 1, 2015, through November 30, 2018. Compl., ¶¶ 15, 25 49, 57; see Alimenia Aff., ¶ 4, Exs. C-E.

The payroll audits of Defendant books and records, which were submitted by Plaintiffs, see Alimenia Aff., Exs. C-D, support Plaintiffs' entitlement to this amount. Accordingly, this Court concludes that Defendants failed to remit contributions of $643,741.73 during the period from July 1, 2015, through November 30, 2018. Trustees of Metal Polishers Local 8A-28A Funds v. Prestige Restoration & Maint., LLC, 986 F.Supp.2d 159, 166 (E.D.N.Y. 2013) (audit by an independent auditor and affidavit of auditor, along with information in motion was sufficient to establish damages); Local No. 46 Metallic Lathers Union & Reinforcing Iron Workers Welfare Trust, Annuity Fund, Pension Fund, Apprenticeship Fund, Vacation Funds, Scholarship Fund, & Other Funds v. Brookman Const. Co., Inc., No. 12 Civ. 2180, 2013 WL 5304358, at *3 (E.D.N.Y. Sept. 19, 2013) (awarding damages based on the submission of affidavits from the plaintiff between plaintiffs counsel and defendant CBA).

Accordingly, this Court respectfully recommends awarding the Funds damages of $643,741.73 for unpaid contributions.

ii. Interest on Unpaid Contributions Plaintiffs request prejudgment interest on the unpaid contributions to the Funds. Compl., ¶¶ 17, 25, 49, 57; see Alimenia Aff., ¶ 4 prejudgment interest to a successful ERISA claimant, and that decision, like the decision to award attorney s Slupinski v. First Unum Life Ins. Co., 554 F.3d 38, 53-54 (2d Cir. 2009) (citation omitted); see Finkel, No. 11 Civ. 3222 (KAM) (RER), 2013 WL 4806951, at *5 entitles Plaintiff to recover interest on all ERISA Contributions that were unpaid at the time Plaintiff filed the Complaint and any unpaid contributions th Jones v.

UNUM Life Ins. Co. of

America, 223 F.3d 130, 139 (2d Cir. 2000). As such, this Court respectfully recommends Plaintiffs be awarded interest on the unpaid contributions as set forth below.

29 U.S.C. § 1132(g)(2). Here, pursuant to the CBA, interest on the

delinquent contributions are calculated at the prime rate as stated in Federal Reserve Statistical Release on the date contributions are due plus two percent, Compl. ¶ 17; Alimenia Aff. ¶¶ 4-5, Ex. A. at p. 16 ¶(e).

Under the CBA, contributions shall be made on or before the sixtieth (35th) day of the month following the payroll period. See Alimenia Aff., Ex. A. at p. 16 ¶(e). Plaintiffs assert that as of February 11, 2021, Defendants owed $100,058.00 in prejudgment interest on unpaid contributions. See Carney Aff., ¶ 8. Based on this Court s calculations this calculation is correct.

iii. Liquidated Damages Plaintiffs seek twenty percent liquidated damages on the amount of unpaid contributions. Compl., ¶¶ 17, 25, 49, 57; see Alimenia Aff., ¶ 4. amount equal to the greater of (i) interest on the unpaid contributions, or (ii) liquidated 29 U.S.C. § 1132(g)(2). Here, the Plaintiffs allege that the CBA, entitles Plaintiffs to collect liquidated damages on the unpaid contributions at a rate of twenty percent. See Alimenia Aff., Ex. A. at p. 16 ¶(e) ([T]he EMPLOYER shall see also Trustees of Pavers & Rd. Builders Dist. Council

Welfare v. Cole Partners, Inc., No. 13 Civ. 07103 (NGG) (RML), 2015 WL 861717, at *4 (E.D.N.Y. Feb. 27, 2015) (calculating liquidated damages at twenty percent pursuant to collection policy incorporated into a CBA).

Plaintiffs correctly calculated twenty percent of the unpaid contributions ($643,741.73) as $128,748.34. See Alimenia Aff., ¶ 4. Therefore, this Court respectfully recommends awarding liquidated damages of $128,748.34.

iv. Audit Fees Plaintiffs seek $8,975.79 for the costs of the audits in accordance with the applicable provisions of the Collection Agreement. Alimenia Aff. ¶¶ 4-5, Ex. D at § 3 ¶ 2 and § 6. 29 U.S.C. § 1132(g)(2) does not expressly provide for an award of audit fees, ... courts have used section 1132(g)(2)(E), which provides for such other legal or equitable relief as the court deems appropriate, as a basis for awarding audit Lanzafame v. L & M Larjo Co., 2006 WL 2795348, at *8 (E.D.N.Y. Sept. 26, 2006) (quotations omitted); see 29 U.S.C. § 1132(g)(2)(E). audit fees must be supported by records ... sufficient to allow the

v. Nexus Mech., Inc., No. 08-CV-3214 (RRM)(MDG), 2014 WL 1338377, at *8 (E.D.N.Y. Apr. 2, 2014) recovering audit fees charged and hour Gesualdi v. Diversified Carting, Inc., No. 10-2561 (SIL), 2014

WL 5475357, at *3 (E.D.N.Y. Oct. 29, 2014) (internal quotation marks and citation omitted).

Here, auditors worked 98.75 hours to prepare the Audit Reports at an hourly rate of $90.00 plus $88.29 for travel. Rossi Aff., ¶¶ 6-7, Ex. A and Ex. B s reflects that the cost of the audits performed by CostaRothbort CPAs LLC was $8,975.79. Id. Accordingly, this Court recommends that Plaintiffs be awarded $8,975.79 for the cost of the audits.

v. At Plaintiffs also seek an award of attorne s fees in the amount of $5,220. Carney Aff. ¶¶ 8, 14. ERISA entitles a prevailing party to an award of reasonable attorney s fees and costs. 29 U.S.C. § 1132(g)(2); see Labarbera v. Clestra Hauserman, Inc., 369 F.3d 224, 226 (2d Cir. 2004). The CBA Collection Agreement also provides for such fees and costs, see Alimenia Aff., Ex. A at 16 ¶ e, Ex. D § 3 ¶ 2 and § 6, and such costs are therefore recoverable under the LMRA, see 29 U.S.C. § 185(a); Brown v. C. Volante Corp., 194 F.3d 351, 354 (2d Cir. 1999) (citations omitted) (29 U.S.C. § 185(a) governs claim for failure to abide by a CBA); Trustees of New York City Dist. Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, & Apprenticeship, Journeyman Retraining, Educ. & Indus. Fund v. All. Workroom Corp., No. 13 Civ. 5096 (KPF), 2013 WL 6498165, at *6 (S.D.N.Y. Dec. 11, 2013) (awarding fees & costs in accordance with the CBA); Trustees of the Plumbers Local Union No. 1 Welfare Fund v. Aljer Plumbing & Heating Corp., No. 09 Civ. 1815 (RRM) (VVP), 2011 WL 1239878, at *4 (E.D.N.Y. Mar. 16, 2011), R&R adopted, No. 09 Civ. 1815 (RRM) (VVP), 2011 WL 1187815 (E.D.N.Y. Mar. 30, 2011) (same).

The Second Circuit requires courts to assess the reasonableness of attorney s fees. Bergerson v. N.Y. State Office of Mental Health, Cent. N.Y. Psychiatric Ctr., 652 F.3d 277, 290 (2d Cir. 2011). The prevailing method for determining a fee award is the lodestar method, by which the court multiples a reasonable hourly rate by the reasonable number of hours expended. See Perdue v. Kenny A., 559 U.S. 542, 546, 551, 130 S. Ct. 1662, 176 L. Ed. 2d 494 services by la Blum v.

Stenson, 465 U.S. 886, 896 n.11, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). In reviewing the reasonable number of hours expended, a district court should examine the particular hours expended by counsel with a view to the value of the work product of the specific expenditures to the client s case, and if it concludes that any expenditure of time was unreasonable, it should exclude these hours from the lodestar calculation. See Green v. City of New York, 403 F. App x 626, 630 (2d Cir. 2010); Green v. Torres, 361 F.3d 96, 98 (2d Cir. 2004); see also McMahon- Pitts v. Sokoloff, No. 15 Civ. 4975, 2017 WL 1011473, at *8 (E.D.N.Y. Mar. 15, 2017) (reducing the hours included in the lodestar calculation by 10% to account for hours exclusively spent working on an unsuccessful claim).

The burden is on the party seeking the fee award to prove that the requested fees and hours are reasonable. See N.Y.S. Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983). That party must substantiate its requested number of hours expended through contemporaneous time records. See id. at 1147 (2d Cir. 1983); U.S. Bank, N.A. v. Byrd, 854 F. Supp. 2d 278, 287 (E.D.N.Y. 2012). The determination of a reasonable fee is within the district court s discretion. See Millea v.

Metro-N. R. Co., 658 F.3d 154, 166 (2d Cir. 2011).

Here, Plaintiffs seek reimbursement for services rendered by attorney Danielle M. Carney $200.00 per hour. See Carney Aff. ¶ 14. Plaintiffs' submissions adequately set forth the background and experience level of Carney, see id. ¶ 15 have more than ... 20 ... years of experience prosecuting claims on behalf of

various ERISA), and the Trustees support their request with contemporaneous time records setting forth the tasks Carney completed for this case and the number of hours expended on each task, see DE [40-4]. Having reviewed such materials, the Court finds both the number of hours spent by Carney on this matter, 26.1, and the hourly rate of $200.00 reasonable. See Trustees of Laborers Union Local No. 1298 of Nassau & Suffolk Ctys. Benefit Funds v. Sitework Mgmt., Inc., No. 14-cv-3052, 2015 WL 1198665, at *17 (E.D.N.Y. Mar. 16, 2015) (recommending approval of Carney s on the low end for an attorney practicing for 17 years in this type of ERISA Accordingly, the Court respectfully recommends an award of $5,220 in attorney fees.

vi. Costs Finally, Plaintiffs seek to recover $609.75 in costs, which includes: (i) filing fees in the amount of $400.00; and (ii) a $209.75 process server fee. See Alimenia Aff. ¶ 8, Ex. D. ERISA provides for the recovery of costs associated with litigation, see 29 U.S.C. § -of-pocket expenses Finkel v. Jones Lang LaSalle Ams., Inc., No. 08-cv-2333, 2009 WL 5172869, at *6 (E.D.N.Y. Dec. 30, 2009) (quoting Reichman v. Bonsignore, Brignati & Mazzotta, P.C., 818 F.2d 278, 283 (2d Cir. 1987)). The Court finds the request for costs related to filing fees and service of process to be reasonable and adequately supported. See DE [1], [40-3]. Accordingly, the Court recommends that Plaintiffs be awarded a total of $609.75 in costs.

CONCLUSION For the foregoing reasons the Court respectfully recommends that Plaintiff motion for a default judgment, appearing as Docket Entry No. 38 herein, be granted. It is further recommended that damages be awarded to the Plaintiffs as follows:

Unpaid Contributions

$643,741.73 Interest

$100,058.00 Liquidated Damages

$128,748.34 Audit Fees $8,975.79 Attorneys Fees

$5,220.00 Costs + $609.75 Total $887,353.61

OBJECTIONS A copy of this Report and Recommendation is being provided to Plaintiff counsel via ECF. Furthermore, the Court directs Plaintiff counsel to serve a copy of this Report and

Trustees of the Building Trades Educational Benefit Fund et. al. v. Romero Electric LLC et. al.

2021 | Cited 0 times | E.D. New York | July 19, 2021

Recommendation to Defendants and to file proof of service on ECF by July 22, 2021. Any written objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this report. 28 U.S.C. § 636(b)(1) (2006 & Supp. V 2011); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the district judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court or Court of Appeals. Thomas v. Arn Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Central Islip, New York July 19, 2021 /s/ Anne Y. Shields Anne Y. Shields United States Magistrate Judge