



Biondo v. Kaleida Health d/b/a Buffalo General Medical Center

2016 | Cited 0 times | W.D. New York | May 12, 2016

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

KATHLEEN BIONDO, DECISION Plaintiff, and v.
ORDER KALEIDA HEALTH, 15-CV-362G(F) d/b/a Buffalo General Medical Center, Defendant.

APPEARANCES: EISENBERG & BAUM, LLP
Attorneys for Plaintiff ANDREW ROZYNSKI, LEAH WIEDERHORN, of Counsel 24 Union Square East, 4th Floor New York, New York 10003 ROACH, BROWN, MCCARTHY & GRUBER, P.C.
Attorneys for Defendant MARK R. AFFRONTI, of Counsel 1920 Liberty Building 424 Main Street Buffalo, New York 14202

and expenses incurred as a result of Plaintiff's motion, filed on March 16, 2016, the Declarations, and Leah Wiederhorn's motion was argued by Ms. Wiederhorn on behalf of Plaintiff on February 10, 2016 (Dkt. 27). Mr. Rozynski requests reimbursement for 8.4 hours of work at a billing rate of \$550/hr. for a total of \$4,620; Ms. Wiederhorn requests \$6,030 for 20.1 hours at \$300/hr. In opposition, Defendant filed the Attorney Affidavit of Mark R. Affronti who opposed Plaintiff

because such rates are based on the New York attorneys maintain their offices and not the prevailing rates for attorneys of similar skill and experience in the legal market in this district. Affronti Affidavit ¶ 6. Defendant, or on their face are excessive or duplicative. Dkt. 32-1 (passim). Defendant also contends it is improper to award attorneys fees pursuant to Fed.R.Civ.P. 37(a)(5)(A) in contingency fee basis. Affronti Affidavit ¶ 7.

closely approximating the 16.6 hours Defendant concedes as reasonable in this case.

See be 3.2 hours, and a reasonable expenditure of time for Attorney Wiederhorn would be 13.4 hours first addresses w , ,

should apply. Where a plaintiff elects to retain out-of-town counsel located in a market of substantially higher hourly billing rates than those geographical area, the court has discretion to utilize the billing rates of the retained

See Robbins & Myers, Inc. v. J.M. Huber, 2010 WL 3992215, at *5 (W.D.N.Y. Oct. 12, 2010) (citing On Time Aviation, Inc. v. Bombardier Capital, Inc., 354 Fed.Appx. 448, 452 (2d. Cir. 2009) (district court entitled to use out-of-district hourly rates to calculate attorneys fee awarded as a sanction rather than to shift fees)). Such discretion is exercised on out-of-town, as opposed to local, counsel. Id. Here,



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Plaintiff claims that Defendant to provide a sign- language translator for Plaintiff who is verbally and hearing impaired to facilitate firm where Mr. Rozynski and Ms. Wiederhorn practice because it has a practice area

which specializes in claims by hearing impaired plaintiffs under the ADA, headed by Mr. Rozynski, who is able to communicate with such plaintiffs by sign language. See Dkt. 33 at 5; Dkt. 33-1 ¶ 6. Thus, this case cannot be said to be a routine ADA matter; rather, it raises unusual issues under the ADA of the Eisenberg & Baum firm which specializes in this type of ADA claim to represent her. See *Simmons v. New York City Transit Auth.*, 575 F.3d 170, 174 (2d Cir. 2009) (litigant must show reasonable client would have selected out-of-town counsel with special communicate with Plaintiff using his signing skill will be of special benefit in preparing and prosecuting this action. See *id.* (recognizing out-of-town representation would benefit such case). Accordingly, the court in its discretion will

request required discovery. See *Southern New England Telephone Company v. Global NAPS,*

Inc., 624 F.3d 123, 149 (2d Cir. 2010). As Plaintiff does not appreciably (16.6 vs. 19 hrs.), the court focuses, as required, on the reasonableness of the respective Thus, the court need not exercise its discretion to further reduce the total amount of hours sought by Plaintiff to adjust for excessive overstaffing on Plaintiff motion or duplication of work. See *Lochren v. County of Suffolk*, 344 Fed.Appx. 706, 709 (2d Cir. 2009) (approving 25% across-the-board reduction in requested hours to address overstaffing and duplicative nd complexity of the matter). In awarding reasonable attorneys fees courts community for similar services by lawyers of reasonably comparable skill, experience,

and reputation. *Luciano v. Olsten*, 109 F.3d 111, 115 (2d Cir. 1997) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n. 11 (1984)). 1 further contention that attorneys fees as a sanction in a discovery dispute should not be awarded where a plaintiff is represented 1 The court declines to apply the 12 part test established by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5 th

Johnson See *Perdue v. Kenny A.*, 559 U.S. 542, 130 S.Ct. 1662, 1672 (2010) (approving the traditional lodestar method over the more subjective *Johnson Perdue* *Miller v. Metro-North Railroad Company*, 658 F.3d 154, 166 (2d Cir. 2011) (applying *Perdue* as requiring use of the lodestar method). on a contingency fee basis. See *Hubbard v. Total Communications, Inc.*, 2010 WL 1981560, at *3 (D.Conn. 2010) (contingency fee arrangement does not impose an automatic ceiling on an award of attorneys fees (citing *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989))). The question of what is the proper reasonable hourly rate turns on *Hubbard*, 2010 WL 1981560, at *2 (quoting , 522 F.3d 182, 190 (2d Cir. 2008)). In this case, Plaintiff has provided fee decisions by the district court in the Southern District supporting an hourly rate of \$475 for an experienced IDEA litigator and \$200-250/hr. for a first year associate. Dkt. 33 at 4 (citing *EF v. New* , No. 11-CIV-5243 (S.D.N.Y. Mar. 17, 2014)). Based on this standard, the court finds that as a litigating partner with four years experience, *Affronti Affidavit* ¶ 18, a reasonable hourly rate in the Southern District for Mr. Rozynski is \$450/hr; for Ms. Wiederhorn,



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as a nine-year associate, \$250/hr. Applying these rates to the reasonable hours each worked motion to compel, as Defendant concedes, Affronti Affidavit ¶ 19, and which amount the court finds reasonable, results in the following: Rozynski 3.2 hrs. x \$450 = \$1,440.00 Wiederhorn 13.4 hrs. x \$250 = \$3,350.00 Total fee award: \$4,790.00

Finally, in accordance with Rule 37(a)(5)(A), the court finds that such award should be the respons that -month delay in timely responding Document Requests was caused by Defendant.

CONCLUSION Based on the foregoing, Plaintiff is awarded \$4,790.00 pursuant to Rule

SO ORDERED. /s/ Leslie G. Foschio _____ LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE Dated: May 12, 2016 Buffalo, New York

