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Trials&TRIBULATIONS

A look at applications for attorneys' fees

*Just because you ask for it
doesn't mean you'll get it*

A recent case from Supreme Court, Queens County, *Francis v. Atlantic Infiniti, Ltd*, 34 Misc.3d 1221(A) (decided Feb. 7), provides an interesting overview of the hurdles facing a party making an application for attorneys' fees. The underlying facts of the fee application involved in *Francis* are somewhat unique — involving almost \$100,000 in attorneys' fees incurred in the course of litigating an action apparently worth \$20,949.

The court's decision highlights the discretion afforded to the court when considering a party's fee application. Moreover, a party making an application for attorneys' fees must be prepared to defend the hourly rates charged by its attorneys and staff, or else it will be placed at the mercy of the court and its opponent to provide the basis for determining what rates are reasonable.

The plaintiff was the prevailing party in a "Lemon Law" action under General Business Law § 198-b. The plaintiff purchased a used Infiniti automobile from the defendant for \$20,949. The automobile turned out to have many mechanical problems, which the defendant failed to timely fix.

As a result, plaintiff retained the law firm of Sadis & Goldberg LLP, which claimed to specialize in Lemon Law cases. Sadis moved for summary judgment, which was denied, and thereafter appealed. On appeal, summary judgment was granted as to liability.

The Lemon Law provides for attorneys' fees for a prevailing plaintiff, subject to the court's discretion. See General Business Law § 198-b(f)(5). Under that statute, the plaintiff made an application for "reasonable" attorneys' fees, costs and expenses, seeking a total award of \$99,505 in attorneys' fees, plus \$3,055.60 in statutory expenses incurred in making its application for attorneys' fees, for a total of \$102,560.60. Predictably, the defendant contested these fees.

Although the firm apparently specialized in Lemon Law cases, the plaintiff's case was handled by an associate who had no prior experience with such cases. The associate's rate was \$410 per

hour and he claimed to have performed 227 hours of work, for a total of \$83,886 in fees. The associate was also supervised by an attorney who had only been practicing one year longer (for a total of 3 years), and who was billed at \$330 per hour (oddly, less than the associate he was supervising). Additionally, paralegals performed 61 hours of work on the case.

The court ultimately reduced Sadis' total award to \$30,361.14, including \$27,824.50 for attorneys' fees and \$2,536.64 for statutory costs. The court began by striking or reducing those attorneys' fees that it believed were improperly charged.

For example, the court disallowed all fees of the associate incurred in preparing a motion to compel which was never filed, *Id.* at *9. It also reduced the amount of fees sought with respect to the supervising attorney from 19.2 hours to 10 hours, finding much of his work to be duplicative of the associate's work, *Id.* Lastly, lending credence to the defendant's argument that the bulk of the paralegals' time was spent "copying, collating, typing, etc.," the court determined that approximately half of the 61 hours of paralegal time was improperly billed, *Id.* at *10.

The court also analyzed the amounts charged per hour by the associate, the supervising attorney and the paralegals. The court first noted that it is the prevailing party's burden to establish that the hourly rates charged by its attorneys and paralegals are customary for such services in the community, *Id.* at *11-12.

Where, as here, the prevailing party fails to meet its burden by failing to submit "sworn admissible evidence reflecting the training, background, experience and skill" of those attorneys and support staff who worked on the case to support its hourly rate charges, the court can, and in this case did, embark on its own analysis to determine reasonable hourly rates. In doing so, the court can consider evidence presented by the party opposing the fee application, *Id.* at *13.

After reviewing the defendant's evidence and analyzing several Second Circuit cases addressing the reasonableness of attorneys' hourly rates, the court determined that the rates charged by the associate, the supervising attorney and the paralegals were not reasonable. It therefore reduced the associate's hourly

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rate from \$410 to \$225 and the supervising attorney's hourly rate from \$330 to \$250, *Id.* at *16.

The court relied on a case from the Fifth Circuit Court of Appeals, *Johnson v. Georgia Highway Express*, 488 F.2d 714 (1974), to provide guidance with respect to factors that a court can consider in increasing or decreasing fees awarded.

These factors include the following: (1) the novelty and difficulty of the issues involved in the matter, (2) the level of skill needed to perform the legal services, (3) whether an attorney forewent other potential clients to focus on the case, (4) whether the fee is fixed or contingent, (5) the amount of time the attorney has to perform the services, (6) whether the attorney has a long-standing relationship with the client, (7) the amount of money involved and the degree of success in the outcome, (8) the undesirability of the case, and (9) a comparison to awards obtained in other similar cases, *Id.* at *16-17.

Although the court here relied on a Fifth Circuit case, New York courts have adopted a very similar list of factors to be considered with respect to determining reasonable attorneys' fees. See, generally, *In re Freeman's Estate*, 34 N.Y.2d 1, *9 (1974); *Matter of Marion C.W.*, 83 A.D.3d 1087, 1088 (2d Dep't 2011); *Matter of Gargaro*, 23 A.D.3d 1099, 1100 (4th Dep't 2005); *Morgan & Finnegan v. Howe Chem. Co.*, 210 A.D.2d 62, 63 (1st Dep't 1994); *Hovanec Builders & Developers Corp. v. Hines*, 173 A.D.2d 951, 952 (3d Dep't 1991).

The *Francis* court considered several of these factors and indicated why its reduction in the attorneys' fees award was appropriate. The court expressly noted that the Sadis firm had significant experience with Lemon Law cases, and that, therefore, the associate could (and did in this case) utilize papers drafted for prior Lemon Law cases, *Id.* at *19.

The court also took into consideration the amount of experi-

ence possessed by the associate who was primarily in charge of the case. The court noted that the associate had "limited expertise and experience" and also that he "was a complete novice in prosecuting the appeal [of the denial of the summary judgment motion], having spent an inordinate amount of time in performing legal tasks on a relatively simple, routine and uncomplicated fact pattern" [*Id.* at *22], further justifying its reduction of attorneys' fees awarded.

Finally, the court pointed out that, although the fee award cannot be reduced solely because it is disproportionate to the damages sought or obtained in the underlying action, the court found it unreasonable that Sadis apparently billed \$102,560.60 to obtain \$20,949 (i.e., a full refund for the purchase of the automobile). After its analysis, the court reduced the plaintiff's fee by 45 percent to compensate for "(1) excessiveness, (2) padding and (3) inefficiency," *Id.* at *23.

In sum, the *Francis* court disallowed approximately \$71,000 in attorneys' fees for the various reasons discussed above. This case is somewhat unique. Although Sadis apparently specialized in the type of case involved here, "[t]his case did not involve any extensive discovery, depositions, expert witnesses or motion practice other than plaintiff's motion for summary judgment and no trial [and] did not raise any novel or complex issues or even ones that required expert proof," *Id.* at *21.

It appears that the court's general purpose in so thoroughly analyzing the plaintiff's fee application was to reinforce the notion that "[h]ours not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority" [*Id.* at *6] — an important premise to keep in mind when seeking or defending against an application for attorneys' fees.

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