

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-011347

09/17/2018

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

MARK D GOLDMAN

DENNIS I WILENCHIK

v.

MARK KRISTOPHER SAHL, et al.

JOHN R CUNNINGHAM

JEFFERSON T COLLINS
PAUL J VAPOREAN
JUDGE KILEY

MINUTE ENTRY

In their Motion for Judgment on the Pleadings, Defendants Mark Sahl and Carpenter, Hazlewood, Delgado & Bolen, PLC (the "Attorney Defendants") sought judgment in their favor on the Abuse of Process claim alleged in Count Ten of the Complaint filed by Plaintiff Mark Goldman (the "Plaintiff"). The Court granted the Motion for Judgment on the Pleadings, and further granted the Attorney Defendants' request "for an award of fees and costs incurred in successfully defending the Plaintiff's Abuse of Process claim." Minute Entry of May 30, 2018 at p. 9.

The Attorney Defendants have filed an Application of Award of Attorneys' Fees as Sanction Under A.R.S. § 12-349 and Taxable Costs ("Fee Application"), in which they seek an award of attorney fees in excess of \$40,000 and "double damages" of \$5,000 pursuant to A.R.S. § 12-349. Fee Application at pp. 1, 3. In their Fee Application, the Attorney Defendants claim not only fees for "all time specifically describing work related to Plaintiff's allegations regarding the Bar Complaint, the Abuse of Process claim, the Motion for Partial Judgment on the Pleadings and Rule 48(1)," but also fees for "one-half (1/2) of their (counsel's) time" in the "overall general defense of [the] Plaintiff's lawsuit," such as "answering discovery," defending a deposition,

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“attending a scheduling conference,” and the like. *Id.* at p. 7. They also ask the Court to “consider” applying “a multiplier of 1.66” to the hourly rate of their counsel, to “increase” their counsel’s “below-market rates to a more reasonable hourly rate...” *Id.* at p. 8. They support their Fee Application with the Declaration of James L. Csontos (the “Csontos Declaration”) and the Affidavit of April A. Hancock Concerning Attorney’s Fees and Costs (the “Hancock Affidavit”).

After reviewing the Attorney Defendants’ Fee Application, the Plaintiff’s Response and Objection to Defendants’ Application for Attorney Fees (“Response”), and the Reply in Support of Application for Award of Attorneys’ Fees as Sanction Under A.R.S. § 12-349 and Taxable Costs (“Reply”), the Court agrees with the Plaintiff that the amount of the Attorney Defendants’ fee request “go[es] well beyond the express language of the Court’s Order” granting an award of fees. Response at p. 4. In granting the Attorney Defendants’ request “for an award of fees and costs incurred in successfully defending the Plaintiff’s Abuse of Process claim,” Minute Entry of May 30, 2018 at p. 9, it was the Court’s intent to award only those fees and costs that the Attorney Defendants would not have incurred but for the assertion of the Abuse of Process claim. The Court therefore agrees with the Plaintiff that it “is not required to, nor should it, impose any penalty beyond [an] award [of] fees to [the Attorney] Defendants for the actual cost for their defense against Count 10.” Response at p. 3. The Court will not, therefore, grant the Attorney Defendants’ request for an award of “one-half” of all fees incurred in the “overall general defense of [the] Plaintiff’s lawsuit.” Fee Application at p. 7.

Likewise, the Court never determined that it would award double damages of \$5,000 pursuant to A.R.S. § 12-349, and sees no justification for doing so. Although the Attorney Defendants cite *Standage v. Jaburg & Wilk, P.C.*, 177 Ariz. 221, 866 P.2d 899 (App. 1993), in support of their request, *Standage* involved conduct far more egregious, and therefore far more deserving of severe sanctions, than the conduct at issue here.¹ See *Standage*, 177 Ariz. at 223, 866 P.2d at 891 (imposing double damages of \$5,000 against plaintiff and his attorney for pursuing legal malpractice claim against , a lawsuit that the Court characterized as “one in a series of what can only be classified as vexatious lawsuits”).

¹ The Defendants also rely on *In re Alexander*, 232 Ariz. 1, 300 P.3d 536, (2013), an attorney discipline case in which the Court held that the respondent’s “knowing misconduct” in “maintaining” a racketeering suit “knowing it lacked legal and factual merit” merited a six-month suspension from the practice of law. *Id.* at 13, 14, 17, 300 P.3d at 548, 549, 551. *Alexander* is inapposite not only because it involves a matter of attorney discipline, but because, as the *Alexander* court itself recognized, the “unique” circumstances presented in that case, *i.e.*, “a deputy county attorney pursuing judges, elected officials, a client, and others for civil racketeering damages,” render it “difficult to make comparisons” to other cases. *Id.* at 15, 300 P.3d at 550. The Court finds that *Alexander* lends no support to the Defendants’ request for a discretionary award of damages in the amount of \$5,000.

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Finally, the Court declines the Attorney Defendants' suggestion that "a multiplier of 1.66" be applied to increase their counsel's hourly rate to a rate that is higher than counsel agreed to accept when undertaking the representation of the Attorney Defendants.

In Exhibit 2 to his Response, the Plaintiff has identified specific time entries in the billing records submitted by the Attorney Defendants which the Plaintiff acknowledges "relate, at least in part, directly to the defense of Count 10 and therefore, under the language of the Court's order of May 31, 2018, are properly considered in the pending award of attorney fees, at least in part." Response at p. 6 and Exhibit 2 thereto. The Court agrees, and will award such fees and costs, which total \$6,694.10. *See* Response at pp. 11-12.

The billing records reflect that the Attorney Defendants spent over twenty hours preparing the Fee Application and supporting documents. *See* Exhibit A to Csontos Declaration at pp. 94-102; Exhibit B to Hancock Affidavit at pp. 16-17. In light of the fact that the Court had already made a finding of the Attorney Defendants' entitlement to a fee award, leaving only the amount of the award to be decided, the Court agrees with the Plaintiff that the preparation of the Fee Application need not have taken so much time. Although the Plaintiff asserts that "less than five (5) hours of attorney time" was necessary to prepare the Fee Application, Response at p. 7, the Court finds that 7.5 hours is a reasonable amount of time to have spent reviewing the billing records and preparing the Fee Application and the supporting affidavits. The Court will therefore award the Attorney Defendants the sum of \$1,575.00 for the preparation of the Fee Application and supporting documents (7.5 hrs x \$210/hr = \$1,575).

In addition, the Court will award fees that are reflected in specific time entries set forth in the billing records submitted by the Attorney Defendants which, in the Court's view, are also related to the Abuse of Process claim, and which would not have been incurred but for the Abuse of Process claim. These fees are those associated with the following time entries contained in Exhibit A to the Csontos Declaration: 08/24/17 (\$378.00), 08/25/17 (\$168.00), 08/25/17 (\$189.00), 08/29/17 (\$304.50), 09/20/17 (\$273.00), 09/21/17 (\$63.00), 09/21/17 (\$42.00), 09/25/17 (\$42.00), 10/02/17 (\$42.00), 10/10/17 (\$63.00), 10/10/17 (\$84.00), 11/08/17 (\$63.00), 12/26/17 (\$42.00), 01/02/18 (\$21.00), 03/13/18 (\$84.00), 3/13/18 (\$42.00), 03/13/18 (\$63.00), 03/14/18 (\$231.00), 03/16/18 (\$42.00), 04/09/18 (\$84.00), 04/09/18 (\$42.00), 04/09/18 (\$21.00), 04/09/18 (\$63.00), 04/09/18 (\$84.00), 04/10/18 (\$63.00).

The Court finds that the Attorney Defendants reasonably and necessarily incurred the total amount of fees and costs awarded herein, \$10,862.60, in their successful defense of the Plaintiff's Abuse of Process claim, and that this amount is an appropriate sanction pursuant to A.R.S. § 12-349.

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Because the proposed form of Judgment lodged by the Attorney Defendants is not consistent with the award set forth herein, the Court will reject that proposed form of Judgment and order the Attorney Defendants to lodge a new one that is consistent with the award set forth herein.

In accordance with the foregoing,

IT IS ORDERED awarding the Attorney Defendants the sum of \$10,862.60 as and for reasonable attorney fees and costs incurred in their successful defense of Count Ten of the Complaint.

IT IS FURTHER ORDERED rejecting the proposed form of Judgment lodged by the Attorney Defendants.