

51,124
E
9p.

1517239

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

1

SYLVIA MARTINEZ, et al.,

Plaintiffs,

vs.

No. CV-93-1156 LH/DJS

BENJAMIN J. and GERALDINE
M. ROSCOE,

Defendants.

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR AWARD OF ATTORNEYS' FEES**

INTRODUCTION

On October 8, 1993, this Court entered an Order Certifying Class Membership and Granting Permanent Injunction ("Injunction") against Benjamin and Geraldine Roscoe ("Defendants") which, among other things, prohibited the Defendants from assuming managerial duties at VDNA, substituting leases which are not HUD approved leases, demanding rents from, and seeking to evict tenants, and violating the various rules and regulations implementing § 236 of the National Housing Act.

In June 1995, Defendant Benjamin Roscoe sent a letter to VDNA tenants, stating that the HUD-approved manager for the property was terminated and that Roscoe's own management company was taking over management. Permanent Injunction

entered on August 22, 1995 ("Permanent Injunction"), 1 I(1). He also informed tenants that the current leases were being superseded by a new lease, and filed eviction proceedings in Bernalillo County Metropolitan Court against three VDNA tenants, claiming non-payment of rent. Permanent Injunction, 1 I(1) and I(2).

Thereafter, Plaintiffs retained the Legal Aid Society of Albuquerque, Inc. to obtain injunctive relief to enjoin the Defendants from further violating the Court's Injunction of October 1993. On August 22, 1995, this Court entered a second Permanent Injunction in this action based, in part, on its finding that Defendants engaged in illegal actions that violated this Court's Injunction of October 1993, the Settlement Agreement, the Regulatory Agreement, the terms of Defendants' suspension by HUD, HUD's Final Determination of Debarment, and other HUD law and regulations. Permanent Injunction, f[I.

I. ATTORNEYS FEES REQUESTED

Plaintiffs seek attorneys' fees, in the total amount of **\$28,200.00**, for the efforts required to force compliance with this Court's October 1993 Injunction. The affidavits of Karen J. Meyers, Alma Rosa Delgado, James Orgass, Gabrielle Marks, and Philip B. Davis are attached hereto as additional support for the fees requested herein. Work was performed in this matter by a number of attorneys, including counsel of

record in addition to other counsel. The work performed by each is detailed in the attached affidavits.

Karen J. Meyers, Esu.

57.8 hrs. @ \$175/hr. \$10,115.00

Alma Rosa Delgado, Esq.

36.8 hrs. @ \$125.00/hr. \$ 4,600.00

James Orsass, Esq.

36.0 hrs. @ \$110.00/hr. \$ 3,960.00

Gabrielle Marks, Esq.

76.2 hrs. @ \$125/hr. \$ 9,525.00

Cindy Hendrickson, Law Clerk

85 hrs. @ \$ 45.00/hr. No Charge

II. AN AWARD OF ATTORNEYS' FEES IN THIS CASE IS PROPER

The traditional "American Rule" ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization. However, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Hall v. Cole, 412 U.S. 1, 4, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973). Federal courts do not hesitate to exercise this inherent equitable power whenever overriding considerations indicate the need for such recovery. *Id.* Courts have uniformly held that a party's acting in "bad faith" is grounds for an award of attorneys' fees. "It is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' In this class of cases, the underlying rationale of 'fee shifting' is, of course, punitive, and the

essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." *Id.*; See also Alveska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (recognized "bad faith" exception).

Under the "bad faith" exception, bad faith may arise both out of the actions that preceded the law suit and the conduct of the litigation. Hall v. Cole, 412 U.S. at 15, 93 S.Ct. at 1951; McOuiston v. Marsh, 707 F.2d 1082, 1086 (9th Cir. 1983) ("Bad faith may be found either in the action that led to the lawsuit or in the conduct of the litigation."); Kraeger v. Solomon sc Flanagan, P.A., 775 F.2d 1541, 1543 (11th Cir. 1985) ("The exception also encompasses bad faith acts preceding and during litigation."); Doqherra v. Safeway Stores, Inc., 679 F.2d 1293, 1298 (9th Cir. 1982) (same).

In addition, courts consistently hold that willful disobedience of a court order is an independent exception to the American Rule, justifying the assessment of attorneys' fees against a defendant. Alveska Pipeline Service Co. v. The Wilderness Society, 421 U.S. at 258; Kraeger v. Solomon & Flanagan, P.A., 775 F.2d 1541, 1543 (11th Cir. 1985).

These grounds for awarding attorneys' fees are clearly established in the Tenth Circuit. See Ryan v. Hatfield, 578 F.2d 275, 277 (10th Cir. 1978), citing Hall v. Cole, 412 U.S. 1, 4-5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973); J. Moore, W. Taggert & J. Wicker, 6 Moore's Federal Practice 7 54.77[21,

at 1709 (2d ed. 1976); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n. 4, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

In determining the propriety of a bad faith fee award, the inquiry focuses on the conduct and motive of a party. Kraeger v. Solomon & Flanagan, P.A., 775 F.2d 1541, 1543 (11th Cir. 1985). In this case, there is ample evidence to justify a finding that Defendants defiance of the Injunction was in bad faith, vexatious, and wanton, necessitating Plaintiffs' recourse to this Court to enjoin Defendants from further violating the October 1993 Injunction.

In the Permanent Injunction, this Court found that Defendants' conduct prior to Plaintiffs' most recent request for injunctive relief was illegal and directly violated the Injunction. Permanent Injunction, y I. As set forth in Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, Defendants' claim that the Injunction of October 1993 was ambiguous is not an excuse for noncompliance. In addition, both counsel for Plaintiffs and HUD advised Defendants that their proposed actions were in conflict with the prohibitions of the Injunction. Defendants chose to disregard this warning. Therefore, Defendants' failure to determine whether or not their actions were in compliance with the Injunction constitutes bad faith and well as willful disobedience of this Court's Injunction.

Consequently, an award of attorneys' fees in this case is appropriate.

III. ATTORNEYS' FEES AWARDS FACTORS

In Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983), the Tenth Circuit set out the factors to determine attorneys' fees in civil rights cases, citing Henslev v. Eckerhart, 461 U.S. 424 (1983). "The **most** useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Ramos, 713 F.2d at 552. See also Blum v. Stenson, 465 U.S. 886, 888, 893 (1984). These factors equally apply to fees awarded pursuant to the court's equitable powers.

IV. HOURS REASONABLY AND NECESSARILY SPENT

The affidavits filed by counsel provide the basis for calculating the hours on which attorneys' fees should be awarded. These affidavits satisfy the Ramos court's requirement **that time records be "meticulous [and] contemporaneous."** 713 F.2d at 553.

In determining what is a reasonable time in which to perform a given task or to prosecute the litigation as a whole, the court should consider that what is reasonable in a particular case can depend upon factors such as the complexity of the case, the number of reasonable strategies pursued, and the responses necessitated by the maneuvering of the other side.

a. at 554. The time summaries included in counsel's affidavits detail their efforts in prosecution of this case as

well as the time spent thereon, and demonstrate that the hours counsel spent were reasonable and necessary.

The hours spent by Plaintiffs' counsel reaped substantial benefits for Plaintiffs and the Class they represent, who, as a result of the Permanent Injunction, are secure in the continued benefits of their low income § 236 housing, and are assured that they will not be subject to illegal lease provisions, rent increases, and improper evictions. When plaintiffs "have obtained excellent results, their attorney should recover a fully compensatory fee." Henslev v. Eckerhart, 461 U.S. at 435.

V. **MARKET RATES AND PREVIOUS FEE AWARDS**

Plaintiffs' counsel are entitled to at least the reasonable hourly rates requested in their affidavits. These rates are based on prevailing market rates for "what lawyers of comparable skill and experience practicing in the area in which the litigation occurs would charge for their time." Ramos, 713 F.2d at 555. Plaintiffs' counsel have established their particular experience in their respective affidavits. Their skill and experience entitles counsel to the rates set forth in their affidavits. See Affidavit of Philip B. Davis.

The determination of prevailing market rates for private counsel of comparable experience and skill in the relevant community in providing comparable legal services is also relevant to the Court's assessment of appropriate hourly

rates. Blum v. Stenson, 465 U.S. at 895, 895-96 n.11. See Affidavit of Philip B. Davis.

The Legal Aid Society does not require its clients to pay attorneys' fees. However, this contractual arrangement between Plaintiffs and counsel, necessitated by Plaintiffs' inability to pay counsel's hourly rates, is no bar to a fee award to Plaintiffs' counsel, nor does it affect the reasonable hourly rates, based on the market, to which counsel are entitled. See Blum v. Stetson, 465 U.S. 886, 893 (1984) (attorney fee award to a non-profit legal services organization under 42 U.S.C. 5 1988 was appropriate) ; New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70-71, n. 9 (1980) (same); King v. Palmer, 906 F.2d 762, 766 (D.C. Cir. 1990), rev'd on other grounds, 950 F.2d 771 (D.C.Cir. 1991); Rodrisuez v. Taylor, 420 F. Supp. 893 (E.D.Pa. 1976); Frvar v. Johnson, 93 N.M. 485, 601 P.2d 718 (1979) (no distinction between whether an attorney is in private practice or paid by a non-profit legal services program).

In view of the "excellent results" achieved, the quality of the services rendered, their experience in federal litigation, and the prevailing fees paid to New Mexico attorneys of comparable experience, Plaintiffs' counsel are entitled to the hourly rates requested herein.

VI. FEEES FOR OBTAINING FEES

It is well established that the time expended in proving and pursuing the fee claim itself is to be compensated as any

other attorney time. Love v. Mayor, City of Cheyenne, Wyoming, 620 F.2d 235 (10th Cir. 1980). Undersigned counsel, whose role in this **case** involves the prosecution of this motion for fees and costs, has submitted their affidavits detailing their time **and costs to date**. Based on Defendants' opposition to the requested award of fees and costs, counsel's work is not complete. Evidence of counsel's additional time spent and expenses will be proved through supplemental affidavits.

CONCLUSION

Plaintiffs' request for attorneys' fees and costs, plus applicable gross receipts tax, together with interest thereon, is reasonable and well supported and should be awarded in its entirety.

Respectfully submitted,

LEGAL AID SOCIETY OF ALBUQUERQUE, INC.

By: _____

Karen J. Meyers
Alma Rosa Delgado
Attorneys for Plaintiffs
121 Tijeras, N.E., Suite 3100
Albuquerque, New Mexico 87102