

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

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UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
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DEC 27 1995

SYLVIA MARTINEZ, et al.,
Plaintiffs,

(1,

-vs -

No. CIV 93-1156 LH/DJS

BENJAMIN J. ROSCOE and I
GERALDINE M. ROSCOE,
Defendants.

ENTERED ON DOCKET

12-29-95

MEMORANDUM OPINION

THIS MATTER is before the Court on Plaintiffs' Motion for Award of Attorneys' Fees (Docket No. 36). Plaintiffs seek attorneys' fees in the total amount of \$28,200, in connection with efforts taken by their attorneys at the Legal Aid Society of Albuquerque, Inc., to obtain injunctive relief.' These efforts were successful, resulting in a permanent injunction entered by this Court on August 22, 1995. Plaintiffs have submitted five affidavits in support of this motion. Defendant Benjamin Roscoe filed a Response to Plaintiffs' Motion for Award of Attorneys' Fees and a Memorandum in Support of Response to Plaintiffs' Motion for Award of Attorneys' Fees (Docket Nos. 38 and 39).

In light of this evidence in the record, and that presented at numerous previous evidentiary hearings, combined with the general familiarity of the Court with this case and the extensive factual and legal findings which are contained in the two

¹ The Court had previously entered a permanent injunction, on October 8, 1993 (Docket No. 10).

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injunctions it has entered in this matter, the Court finds that a hearing on this issue is unnecessary. Due process is satisfied so long as the Court gives the person against whom sanctions are requested an opportunity to file a brief or otherwise be heard before imposing sanctions, as has been done here. See *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987). At the trial court level, the sanction inquiry may properly be limited to the record in most instances. *Id.* at 1515.'

For reasons set forth below, Plaintiffs' motion is granted, and they are hereby awarded \$16,955 in attorney fees to be paid by Defendants.

ANALYSIS

The traditional "American Rule" ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization. In this case, there is no 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. *HalI v. Cole*, 412 U.S. 1 (1973). Several exceptions to the American Rule have been recognized. The court may award attorneys' fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 6. Other exceptions

² A hearing is especially unnecessary where abuse of the judicial process is abundantly clear from the pleadings and motions filed. See *Colorado Chiropractic Council v. Porter Memorial Hosp.*, 650 F. Supp. 231, 243 (D. Colo. 1986). Where the record speaks for itself, a court should not further protract the litigation by requiring a hearing. See *Shields v. Shetler*, 120 F.R.D. 123, 127, n.2 (D. Colo. 1988).

have been recognized but are not relevant here. Plaintiffs assert what I will call the "bad faith exception" and argue that it would allow the Court to award attorney fees in the present case.

This Court is aware that the bad faith exception is drawn very narrowly in this Circuit, and may be resorted to "only in exceptional cases and for dominating reasons of justice." 6 J. MOORE, MOORE'S FEDERAL PRACTICE 1 54.77[2] (2d ed. 1972), *cited in Sterling Energy, Ltd. v. Friendly Nat'l Bank*, 744 F.2d 1433, 1437 (10th Cir. 1984). The Tenth Circuit makes clear that before such an award is made, a trial judge should make a finding of bad intent or improper motive by the guilty party, along with an explanation of the factual basis for such a finding. *Id.* The Tenth Circuit seems to require sufficient information from which it can determine whether or not the trial court is making a finding of "conscious wrongdoing." *Id.*

Under this exception, bad faith may arise both out of the actions that preceded the lawsuit and the conduct during the litigation. *Hall v. Cole*, 412 U.S. at 15. In addition, the Supreme Court has held that willful disobedience of a court order is an independent exception to the American Rule, justifying the assessment of attorneys' fees. *Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y*, 421 U.S. 240, 258 (1975). In essence, the narrow exceptions to the American Rule effectively limit a court's inherent power to impose attorneys' fees as a sanction to cases in which a litigant had engaged in bad-faith conduct or willful disobedience of a court's orders. *Chambers v. NASCO, Inc.*, 501

U.S. 32, 47 (1991), reh'g denied. The Court concludes that Defendants' conduct falls under both categories.

In this case, there is ample evidence to justify a finding that Defendants' defiance of the Court's 1993 injunction was willful disobedience and that it was in bad faith, vexatious and wanton. Although the Roscoes are not the plaintiffs in this action, it was their conduct which necessitated Plaintiffs' recourse to this Court to enjoin Defendants from further violations of the Court's prior injunction. The August 22, 1995 permanent injunction, entered following a lengthy evidentiary hearing and full briefing by the parties, highlights the bad faith, vexatious and wanton conduct:

- I. Defendants have engaged in the following illegal actions:
 - (1) On June 1, 1995, Defendant Benjamin J. Roscoe sent a letter to various VDNA tenants, stating that the HUD-approved manager for the property was terminated and that King's Property Management Inc. was taking over management. He also informed them that the current leases were being superseded by a new month-to-month lease attached to the letter.
 - (2) Defendant Benjamin Roscoe filed eviction proceedings in Bernalillo County Metropolitan Court against Sylvia Martinez, Yvonne Lovato and Elsie Mares, claiming non-payment of rent for July, 1995. Robert Salazar is a named defendant in these proceedings.

These unilateral attempts to assume managerial duties at VDNA, to substitute leases which are not HUD approved leases, to demand rents from tenants, to seek evictions of Plaintiffs and other members of the class, constitute violations of this Court's prior injunction, the Settlement Agreement, the Regulatory Agreement (Ex. 1), the terms of Defendants' suspension by HUD (Ex. 5) HUD's Final Determination of Debarment, (Ex. 7) and other HUD law and regulations.

Injunction at 2 (emphasis added).

These are not acts taken innocently or inadvertently in violation of this Court's ruling or of numerous HUD rulings. Rather, these were intentional acts, improperly motivated for reasons of evasion of these rulings and oppression of these tenants. As I stated in my oral ruling at the August 18, 1995 hearing, "[I]t is my belief that Mr. Roscoe has some view of his situation here that gives him the right to disregard the laws of the United States and the orders of this Court." Tr. at 105-106. This willful and flagrant disobedience of a court order constitutes an "extraordinary case".

In the *Sterling Energy* case, the Tenth Circuit expressed concern with the "unnecessary burdens on the courts and opposing parties resulting from congested dockets combined with dilatory or otherwise vexatious tactics on the part of attorneys or their clients." *Id.* at 1437-38. The Court has searched this district's docket and finds 14 cases showing Roscoe as a litigant (11 times as a plaintiff), including one against Robert Salazar.³ In a memorandum opinion dismissing that case, Chief Judge John Conway summarized the posture of Mr. Roscoe as a litigant in this district:

Plaintiff has a long history of litigation against the United States before this Court. Virtually all of these lawsuits involve similar claims against HUD or its employees. Moreover, practically all of these

³ This action alleged that Robert Salazar, an employee of HUD, had deprived Mr. Roscoe of his due process rights by committing perjury to a grand jury. *Roscoe v. Salazar*, No. CIV 95-0936 JC/LCS (D.N.M.).

claims have been dismissed or found to be frivolous. Including this matter, Plaintiff has filed ten lawsuits against federal employees. Brief for Defendant at 6-7. As a result of all of these frivolous suits, Senior Judge Mechem enjoined Plaintiff Roscoe from filing any further actions whatsoever in this district, unless represented by a licensed attorney or by specific approval of a district judge. *Roscoe v. United States*, No. CIV 94-0638 M (D.N.M. October 17, 1995).

This lawsuit, when coupled with all of Plaintiff's previous actions leads to but one conclusion: Plaintiff Roscoe has embarked upon a course of harassment against the United States and its employees. Plaintiff's behavior has wasted scarce judicial resources, the time and energy of numerous federal employees, and federal funds. Therefore, Plaintiff shall be ordered to pay the United States its costs and fees for this litigation.

Roscoe v. Salazar, No. CIV 95-0936 JC/LCS (D.N.M. December 11, 1995).

On October 2, 1995, Mr. Roscoe filed a civil action in the Metropolitan Court, suing the undersigned judge, alleging that his actions in this case are "incompetent and/or malfeasant and/or misfeasant and/or malicious, are in violation of Plaintiff's constitutional rights, are outside the scope of [Judge Hansen's] subject-matter jurisdiction." This action was swiftly and summarily dismissed by the Metropolitan Court judge. The Court has read a pleading Mr. Roscoe sent on September 15, 1995, to this Court's law clerk, threatening to report her "recalcitrance to the proper disciplinary boards" if she did not take certain actions.

While not pertaining directly to the landlord-tenant dispute before the Court in this matter, these actions illustrate the unnecessary burdens which Defendants have placed upon this

court with their dilatory, oppressive, threatening and otherwise vexatious tactics. Vexatious is defined as "troublesome; annoying. . . . disorderly." Listed synonyms include: disturbing, provoking, irritating. RANDOM HOUSE UNABRIDGED DICTIONARY 2117 (2d ed. 1993). This Court agrees with Judge Conway's conclusion that Mr. Roscoe's litigation strategy includes a course of harassment; it is a troublesome and provoking strategy which has wasted scarce judicial resources. I conclude that the motivation for these tactics in this case has been to attempt to avoid Defendants' obligations under the law and under court orders and to attempt to sidestep the effect of these orders. I further conclude that Defendants' conduct which necessitated Plaintiffs' recourse to this Court was conscious wrongdoing underwritten by bad intent and improper motive. This conclusion justifies an award of attorney fees to Plaintiffs.

Defendants have not established that they are indigent, yet they refuse to hire an attorney to handle these legal matters. Because of Defendants' lack of legal training, their pleadings are generally confusing and unhelpful to the court, as are their court appearances. The pro se status of Defendants and their obstreperous tactics contribute significantly to the vexatious nature of this litigation. These problems are noted and addressed by the above-mentioned order of Senior Judge Mechem.

Plaintiffs are low income individuals who have retained the Legal Aid Society of Albuquerque, Inc., to represent their legal issues in this landlord-tenant law suit. The Legal Aid

Society does not require its clients to pay attorneys' fees. Upon initial review of this motion, the Court was concerned about whether it would be proper to award attorneys' fees to a not-for-profit organization.

Plaintiffs cite the Court to some cases wherein attorney fee awards to non-profit legal services organizations were awarded or upheld under 42 U.S.C. § 1988, *see, e.g., Blum v. Stenson*, 465 U.S. 886, 893 (1984); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70-71, n-9 (1980); or under the Federal Age Discrimination in Employment Act, *see Rodriguez v. Taylor*, 420 F. Supp. 893 (E.D. Pa. 1976). The rationale used in these cases is based upon the legislative history of the applicable acts. Plaintiffs do not cite the Court to any cases wherein attorney fee awards to non-profit legal services organizations were awarded or upheld under the "bad faith" exception to the American Rule.

In cases qualifying under the bad faith exception, "the underlying rationale of 'fee shifting' is 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." *Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975). In the rare instance where fees are awarded under this exception, the legal and financial status of the recipient of the fees is not the critical inquiry--rather, it is whether the amount awarded will tend to deter such future conduct.

In *Rodriguez v. Taylor*, *supra.*, the court considered the issue of whether Community Legal Services, Inc., a publicly-funded

agency that provides civil legal services for certain qualified indigent persons, was entitled to receive attorney fees under the Federal Age Discrimination in Employment Act. The court concluded that an award of such fees was appropriate. The court noted that it "is of no moment that the plaintiff himself may not owe or otherwise be obligated to pay counsel an attorney's fee, because the statute provides the attorney with a direct interest." *Id.* at 895.

The Court went on to state:

There is no logical reason to lessen defendant's burden simply because an indigent plaintiff obtains representation by an entity such as CLS. The extent of defendant's liability should not depend upon the ability of plaintiff to hire private counsel. Because CLS is publicly financed, reimbursement to it for the time and effort its attorneys and staff expended in vindicating the rights of plaintiff individually and the plaintiff class is all the more compelling. By awarding reasonable fees to CLS, its limited resources will be increased to expand its present services, or conversely, the same services may be rendered with less expenditure of public funds. In either event the public benefits, and at no greater expense to defendants than if plaintiffs had privately retained an attorney.

Id. Based on this rationale, the Court concludes that it would be proper to impose attorney fees against Defendants, despite the fact that Plaintiffs' representation was provided without expense to them.

AMOUNT OF AWARD

Defendants do not effectively dispute the factual allegations of the affidavits submitted in support of Plaintiffs' motion. The affidavits appear to set forth the relevant information that must be taken into account in awarding counsel fees, under the guidelines of *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983). Ms. Karen J. Meyers and her assisting attorneys, Alma Rosa Delgado, James Orgass, and Gabrielle L. Marks, are all employed as attorneys at the Legal Aid Society of Albuquerque, Inc. The affidavits itemize the dates, hours, nature of work and services, and identification of personnel that performed attorney services on behalf of Plaintiffs.

As a starting point, I have considered the issue of whether the number of hours listed in each affidavit was reasonably spent by Plaintiffs' attorneys. I have considered the number of hours reported by each lawyer--Ms. Meyers claims 52.8 out-of-court hours and 5 in-court hours; Ms. Delgado claims 31.8 out-of-court hours and 5 in-court hours; Mr. Orgass claims 32 out-of-court hours and 4 in-court hours; and Ms. Marks claims 76.2 out-of-court hours. I have scrutinized the hours allotted to specific tasks and have considered what is reasonable in this case considering the complexity of the case, the number of reasonable strategies pursued, and the responses necessitated by the maneuvering of the other side. I have considered the potential duplication of services. Besides the blanket assertion that the fees being sought

are unnecessary and excessive, potential duplication is the primary objection of Defendants to the amount of these fees.

I note that Ms. Meyers' affidavit states that she exercised billing judgment and did not report all hours spent on the litigation. I note that Plaintiffs are not seeking fees for a third-year law student who worked 85 hours in this matter. I note that the fees incurred by Mr. Orgass were primarily related to the Metropolitan Court proceeding, whereas the other three lawyers' time was spent in this federal court proceeding. The Metropolitan Court proceeding was precipitated by some of the same illegal conduct as was this proceeding. There is no evidence before the Court as to whether any fees were awarded against Defendants in the Metropolitan Court proceeding.

The pleadings prepared by Plaintiffs' counsel are among the finest the Court has had the opportunity to review. The Court notes the short time frame involved in this type of proceeding which partially justifies more than one attorney working on this matter. The eviction hearing in this matter was originally scheduled in Metropolitan Court for July 25, 1995 and a motion and memorandum in support of a temporary restraining order were filed in this Court on July 27, 1995. A hearing was held on July 28, 1995. Various pleadings were filed by Defendants and responded to by Plaintiffs on August 16, 1995. A second hearing was held in this Court on August 18, 1995 and the Permanent Injunction was entered on August 22, 1995. In light of the intensity and scope of the proceedings in two judicial forums, I am unable to conclude

that the fees sought reflect unnecessary duplication. Utilizing more than one attorney under these circumstances was reasonable. In fact, in light of all circumstances, including the legal and factual complexity of the matter, coupled with the short time frame, I conclude that the number of hours charged is reasonable.

The Court next turns to the issue of what is a reasonable hourly rate of compensation. The establishment of hourly rates in awarding attorneys' fees is within the discretion of the trial judge who is familiar with the case and the prevailing rates in the area. *Gurule v. Wilson*, 635 F.2d 782, 794 (10th Cir. 1980). Plaintiffs seek an hourly rate of \$175 for Ms. Meyers, who has been a licensed attorney since 1978; an hourly rate of \$125 for Ms. Delgado and Ms. Marks, who have been licensed attorneys since 1991; and \$110 per hour for Mr. Orgass, who has been a licensed attorney since 1992.

In the civil rights case of *Ramos v. Lamm*, the Tenth Circuit noted that when Congress enacted 51988, it made no distinction between the compensation to be awarded to private lawyers and that to be awarded to lawyers working in public interest law firms. 713 F.2d at 551. That Court also noted that salaried public interest firm lawyers should be assigned a billing rate equal to their counterparts in expertise in private practice. *Id.* at 555. The Court is instructed by *Ramos* to "establish, from the information provided to it and from its own analysis of the level of performance and skills of each lawyer whose work is to be compensated, a billing rate for each lawyer based upon the norm for

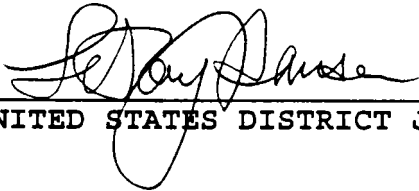
comparable private firm lawyers in the area in which the court sits...." *Id.*

The burden of production here is upon the Plaintiffs, who have submitted an un rebutted affidavit from Philip B. Davis, which states that his expert opinion is that these hourly rates are reasonable. In *Bee v. Greaves*, 910 F.2d 686, 689, n.4 (10th Cir. 1991), the Tenth Circuit stated,

[A] district judge may turn to [his] own knowledge of prevailing market rates as well as other indicia of a reasonable market rate. See *Lucero v. City of Trinidad*, 815 F.2d 1384, 1385 (10th Cir. 1987). We have also noted that expert testimony on appropriate fees "is not very helpful." *Rarnos v. Lam*, 713 F.2d 546, 555 n.6 (10th Cir. 1983).

The opinion of Mr. Davis that the prevailing Albuquerque market rate for an attorney with 17 years of experience is \$175, for an attorney with 4 years of experience is \$125, and for an attorney with 3 years of experience is \$110, does not comport with this Court's knowledge of prevailing market rates. This evidence will be disregarded. Given the absence of information about prevailing market rates, I will turn to other indicia of a reasonable market rate, as provided by Congress in the Equal Access to Justice Act, 28 U.S.C. 82412 (EAJA). This approach was cited with approval in *Lucero v. City of Trinidad*, 815 F.2d 1384 (10th Cir. 1987). Comparing the EAJA rates with my knowledge of the prevailing market rate, I conclude that these rates (\$75/hour/maximum) are a bit low in the Albuquerque market for an attorney of Ms. Meyers' experience and expertise level. One hundred dollars per hour is a reasonable rate for Ms. Meyers; the \$75 per hour rate for the other three

attorneys is reasonable. Based upon these rates, Defendants are liable in the amount of \$5780 for fees for Ms. Meyers and \$11,175 for the combined fees of the other three attorneys, for a total of \$16,955. This is an amount substantial enough in size to punish and deter Defendants from further bad faith conduct in this Court. A Judgement shall be entered in conformance with this Memorandum Opinion.


UNITED STATES DISTRICT JUDGE

For Plaintiffs:

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