SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DANIEL COHEN and PAMELA DIENER	:	Case Number: 2018 CA 6284 M
v.	:	Judge Florence Y. Pan
MEDSTAR WASHINGTON HOSPITAL CENTER	:	

ORDER

This matter comes before the Court on consideration of plaintiffs' Praecipe Concerning Attorney Time and Expenses for Sanctions Motion ("Pls. Praecipe"), filed on December 20, 2019; defendant's Motion to Strike the Declaration of Patrick Malone and Objection to Fees Claimed ("Def. Mot."), filed on December 23, 2019; plaintiffs' Opposition ("Pls. Opp."), filed on December 31, 2019; and defendant's Reply ("Def. Reply"), filed on January 6, 2020.[1] The Court has considered the papers and the relevant law. For the following reasons, the Court awards the fees requested by plaintiffs, and denies defendant's Motion.

On December 20, 2019, the Court granted plaintiffs' Motion for Sanctions under D.C. Super. Ct. Civ. R. 30(d)(2), filed on October 31, 2019, based on a finding that defendant and defendant's counsel violated Rule 30(c)(2) at the deposition of Dr. James Jelinek, defendant's corporate designee. The Court ruled that it would award attorney's fees and costs incurred in litigating the Motion for Sanctions to plaintiffs. The Court also had ruled, on August 12, 2019, that it would award attorney's fees and costs to plaintiffs associated with litigating defendant's prior Motion for Protective Order to Preclude Corporate Designee Deposition under D.C. Super. Ct. Civ. R. 37(b)(2). On December 20, 2019, as directed by the Court, plaintiffs' counsel,

[1] On October 31, 2019, plaintiffs filed an Opposed Motion to File a Second Amended Complaint. The parties have since represented that they have agreed to a resolution of plaintiffs' Motion and would like the Court to sign a proposed order. The Court directs the parties to file their proposed order in accordance with its Supplement to the General Order. *See* Supplement to the General Order – Judge Florence Pan, available at: https://www.dccourts.gov/sites/default/files/matters-docs/General%20Order%20pdf/Supplement-to-General-Order-Judge-Pan_0.pdf ("Proposed orders shall be submitted through CaseFileXpress. Any proposed consent order must be filed with a motion requesting the relief sought, and explaining the basis for the request.").

Patrick Malone, Esq., filed a declaration documenting plaintiffs' reasonable fees and expenses for both motions. *See* Pls. Praecipe.

Plaintiffs represent that they incurred $43,793.75 in attorney's fees and $1,120.00 in costs related to the motions at issue. *See* Declaration of Patrick Malone Concerning Motion for Sanctions ("Malone Dec."). Mr. Malone reports that he spent 3.75 hours litigating the Motion for Protective Order, 2.5 hours deposing Dr. Jelinek, and 60 hours litigating the Motion for Sanctions. *See id.* ¶¶ 3-7. Mr. Malone anticipates that a second deposition of Dr. Jelinek will take 2.5 hours. *See id.* ¶ 7. Mr. Malone represents that, as an attorney with over 31 years of experience, a reasonable hourly rate for his work is $637.00 under the United States Attorney's Office for the District of Columbia's fee matrix (the "*Laffey* matrix"). *See id.* ¶ 10. Finally, Mr. Malone states that the court-reporting fee for Dr. Jelinek's deposition was $722.50, and the video-recording fee was $397.50. *See id.* ¶ 5.

On December 23, 2019, defendant filed its Motion to Strike, arguing that (1) the amount that plaintiffs request should not be awarded because Mr. Malone did not keep contemporaneous time records; (2) Mr. Malone's descriptions of his time are vague, redundant, or otherwise inadequate; (3) plaintiffs spent an unreasonable amount of time litigating the motions; and (4) plaintiffs inappropriately request sanctions for future work. *See* Def. Mot. Plaintiffs contend that attorneys are not required to contemporaneously document their time, and that the amount of time expended by counsel was reasonable. *See* Pls. Opp. Plaintiffs also reiterate their request that sanctions be levied against defendant's counsel personally as well as against defendant, to deter future misconduct by defense counsel. *See id.* at 9.

Under D.C. Super. Ct. Civ. R. 30(d)(2), the Court "may impose an appropriate sanction -- including the reasonable expenses and attorney's fees incurred by any party -- on a person who

impedes, delays, or frustrates the fair examination of the deponent." The Court also "must" order a party or a party's attorney who "fails to obey an order to provide or permit discovery" to "pay the reasonable expenses, including attorney's fees," caused by the failure. *See* D.C. Super. Ct. Civ. R. 37(b)(2). In determining whether attorney's fees are reasonable, courts calculate the "number of hours reasonably expended on a task multiplied by a reasonable hourly rate." *See Tenants of 710 Jefferson St. v. D.C. Rental Hous. Comm'n*, 123 A.3d 170, 180 (D.C. 2015); *Hampton Courts Tenants Ass'n v. D.C. Rental Hous. Comm'n*, 599 A.2d 1113, 1115-16 (D.C. 1991).[2]

Defendant argues that plaintiffs are barred from receiving a fee award because Mr. Malone did not keep contemporaneous records of his time while litigating the motions. *See* Pl. Mot. ¶¶ 1-2, 4-6 (citing *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319 (D.C. Cir. 1982), and *Weisberg v. Webster*, 749 F.2d 864 (D.C. Cir. 1984)). Contrary to defendant's assertion, there is no rule requiring attorneys to maintain contemporaneous, minute-by-minute time records in order to recover fees. *See 710 Jefferson St.*, 123 A.3d at 187 (finding that although "contemporaneous, complete and standardized time records *may* be called for to support a disputed fee request[,] . . . [i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney") (emphasis added). "[S]ome fairly definite information as to the hours devoted to various general activities, *e.g.*, pretrial discovery," is all that is required. *See id.*

Nor does the federal case law cited by defendant support a strict time-keeping requirement. *Concerned Veterans* found that the "*better practice* is to prepare detailed summaries based on contemporaneous time records indicating the work performed by each

[2] Hourly rates consistent with the *Laffey* matrix are reasonable. *See, e.g.*, *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 898 (D.C. 2007). The Court finds that plaintiffs' reading of the matrix is correct, and that $637.00 is a reasonable hourly fee for Mr. Malone. *See* Pls. Opp at 7; *see also* Def. Mot., Ex. A (*Laffey* matrix).

attorney for whom fees are sought," but that fee requests "need not present the exact number of minutes spent nor the precise activity to which each hour was devoted." *See Concerned Veterans*, 675 F.2d at 1327 (emphasis added). Similarly, in *Weisberg*, the court remanded the issue of whether a government attorney's estimate of his hours was reasonable because "very helpful" information relevant to assessing the issue was never presented to the trial court. *See Weisberg*, 749 F.2d at 873.

Here, it is unsurprising to the Court that Mr. Malone does not keep contemporaneous time records, considering the nature of his law practice. *See* Malone Dec. ¶ 9; Pls. Opp. at 2. Mr. Malone made a conservative calculation of the time expended to litigate the motions based his on recollection and on information such as emails sent to colleagues and plaintiffs about his progress. *See* Malone Dec. ¶ 9. Additionally, as in *Weisberg*, Mr. Malone's declaration was submitted just after argument on plaintiffs' Motion for Sanctions. *See Weisberg*, 749 F.2d at 873. Thus, there is no basis to deny a fee award based on the alleged inadequacy of Mr. Malone's record-keeping.

The Court further finds that Mr. Malone's description of his time is "sufficiently detailed" to allow "an independent determination [of] whether or not the hours claimed are justified." *See 710 Jefferson St.*, 123 A.3d at 187. Mr. Malone's entries are not vague and do not list multiple, unrelated tasks, "making it impossible to evaluate their reasonableness." *See Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C. Cir. 2004). Rather, each entry describes specific tasks, such as work on a motion or a topic of research. *See* Malone Dec. ¶ 6. When the entries do address multiple tasks, they are interrelated or are smaller tasks, which appear to be listed to provide a detailed description of a general project. *See, e.g.*, *id.* ("Oct. 22,

2019: 7.0 hours: Continue drafting argument; add discussion of rules and caselaw on deposition conduct; research and incorporate law on objections").

Based on these descriptions, the Court finds that the documented time was reasonable and justified under the circumstances. *See 710 Jefferson St.*, 123 A.3d at 187 (hours are not reasonably expended if they are "excessive, redundant, or otherwise unnecessary"). At the hearing on the Motion for Sanctions, Mr. Malone represented that the conduct of defendant's counsel was extreme and unprecedented, in his experience. He explained that a thorough presentation of the circumstances was necessary in order for the Court to fully appreciate what had transpired. The papers and the video presentation reflected careful and detailed work that effectively communicated plaintiffs' position. Mr. Malone also reasonably filed a Reply to defendant's Opposition, and an Opposition to defendant's Motion to File a Surreply, both of which were helpful to the Court.

Because Mr. Malone would have conducted a deposition regardless of defendant's discovery behavior, however, the Court does not find it appropriate to sanction defendant for fees and costs associated with two depositions. Accordingly, the Court will not award plaintiffs the $1,592.50 anticipated for the second deposition of Dr. Jelinek. *See* Malone Dec. ¶ 7.[3]

Plaintiffs request that the Court sanction defendant's counsel, Crystal Deese, Esq., because her "continuing pattern" of behavior shows that she "doesn't appreciate the seriousness of her misconduct;" and because she should be personally deterred from "being tempted to cross the line." *See* Pls. Opp. at 9; *see also* Pls. Mot. for Sanctions at 42-44. Sanctions may be

[3] Defendant also objects to an award of attorney's fees and costs incurred in taking Dr. Jelenik's initial deposition. *See* Def. Mot. ¶ 7f-7h. Defendant argues that "but for causation is required for the expense to be recoverable." *See id. ¶* 7f (citing *Fonville v. District of Columbia*, 38 F. Supp. 3d 1, 17 (D.D.C. 2014)). *Fonville*, however, addresses Rule 37, which provides that "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure." *See* D.C. Super. Ct. Civ. R. 37(b)(2)(C); *Fonville*, 38 F. Supp. 3d at 17). Defendant, however, has also been sanctioned under Rule 30(d)(2), which allows the Court to issue any "appropriate" sanction.

imposed against any "person who impedes, delays, or frustrates the fair examination of the deponent," including a party's attorney. *See* D.C. Super. Ct. Civ. R. 30(d)(2). Sanctions are appropriately "levied to penalize" an attorney, "and to enforce compliance" with the rules of discovery. *See Edwards v. Climate Conditioning Corp.*, 942 A.2d 1148, 1154 (D.C. 2008). The Court does not lightly consider sanctioning individual attorneys, and believes that Ms. Deese has not intentionally engaged in any misconduct. But by filing the Motion to Strike, Ms. Deese has subjected the Court to yet another round of largely meritless litigation, and has required the Court to expend resources that could have been directed to other cases. *See id.* at 1154 ("Pretrial discovery is intended to operate via the parties' voluntary cooperation with a minimum of judicial oversight"). The Court therefore finds it appropriate to require Ms. Deese to personally pay $1,592.50 of the total sanctions awarded, which is equivalent to the attorney's fees that plaintiffs incurred in taking Dr. Jelinek's initial deposition.

Accordingly, this 10th day of January, 2020, it is hereby

ORDERED that defendant's Motion to Strike the Declaration of Patrick Malone and Objection to Fees Claimed is **DENIED**; and it is further

ORDERED that defendant shall make a corporate designee available within 30 days after this Order to respond to topic numbers 6 and 7 of the second amended notice of Rule 30(b)(6) deposition; that the designee shall be prepared to answer all questions about the imaging study; and that plaintiffs are permitted to re-ask any line of questions that the witness was instructed not to answer at the first deposition; and it is further

ORDERED that defendant is to pay plaintiffs an amount of $41,728.75 in attorney's fees and costs,[4] and that Crystal Deese, Esq., is to pay plaintiffs an amount of $1,592.50 in attorney's fees, as sanctions for defendant's failure to comply with discovery rules; and it is further

ORDERED that defendant shall make Dr. Jonathan Hwang available for deposition on the two documents (the audit trail and request to import images) that were not provided before his first deposition, and on the identity of his employer in May 2017; and it is further

ORDERED defendant shall provide an unredacted audit trail report for plaintiff Daniel Cohen's magnetic resonance imaging ("MRI") study from February of 2017 through July of 2017.

SO ORDERED.

Judge Florence Y. Pan
Superior Court of the District of Columbia

Copies to:

Patrick Malone, Esq.
Daniel Scialpi, Esq.
Alfred Clarke, Esq.
Counsel for Plaintiffs

Crystal Deese, Esq.
Counsel for Defendant

[4] $41,728.75 is equal to the total attorney's fees and costs requested by plaintiffs' ($44,913.75), minus plaintiffs' estimated attorney's fees for Dr. Jelinek's second deposition ($1,592.50), which the Court declines to award, and minus plaintiffs' attorney's fees for the initial deposition of Dr. Jelinek ($1,592.50), which defendant's counsel must personally pay to plaintiffs.