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NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

In re:) Case No. 09-91686-D-13
)
STEVE DUROSSETTE and)
JILL DUROSSETTE,)
)
Debtors.)
_____)
)
TRUSS DESIGN AND MANUFACTURING,) Adv. Pro. No. 09-9068-D
INC., A/K/A TRUSS DESIGN &)
MANUFACTURING, INC.,) Docket Control No. JLP-7
)
Plaintiff,)
)
v.)
)
STEVEN L. DUROSSETTE, A/K/A) DATE: March 8, 2012
STEVE DUROSSETTE, AND JILL) TIME: 10:00 a.m.
DUROSSETTE,) DEPT: D
)
Defendants.)
_____)

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

On December 27, 2011, plaintiff Truss Design & Manufacturing, Inc. (the "plaintiff") filed a Notice of Motion and Motion Seeking an Award of Attorneys' Fees and Costs Following Trial, Docket Control No. JLP-7 (the "Motion"). By way of the Motion, as thereafter supplemented, the plaintiff seeks

1 \$84,525.83 in attorney's fees, \$2,108.30 in costs,¹ and
2 \$12,614.39 in expert witness fees, to be awarded in favor of the
3 plaintiff as the prevailing party in this adversary proceeding.
4 The plaintiff's counsel is Pagano & Kass, APC ("Counsel").
5 Defendants Steve Durossette and Jill Durossette did not file
6 opposition to the Motion. For the reasons set forth below, the
7 court will grant the Motion in part.

8 I. BACKGROUND

9 On October 18, 2011, this court issued a judgment in this
10 adversary proceeding in the amount of \$300,000 in favor of the
11 plaintiff and against the defendants, and ordered that the
12 judgment is nondischargeable. The judgment referred to the
13 promissory note at issue in this proceeding as "contain[ing] a
14 provision that awarded attorneys' fees and reasonable costs of
15 suit to the prevailing party" The judgment also included
16 a statement that the plaintiff had prevailed in the proceeding.
17 The Motion followed.

18 II. ANALYSIS

19 This court has jurisdiction over the Motion pursuant to 28
20 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding
21 under 28 U.S.C. § 157(b)(2)(I).

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25 1. An amended notice filed March 6, 2012 refers to the
26 amount of costs requested as \$5,244; however, it is clear from a
27 supplemental declaration filed January 17, 2012 that the \$5,244
28 figure represents attorney's fees "for services that have yet to
be billed to Plaintiff." There is no other indication in the
record that the amount of requested costs is anything other than
\$2,108.30.

1 A. Standards for Award of Attorney's Fees in Dischargeability
2 Action

3 Since the decision of the Supreme Court in
4 Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.,
5 549 U.S. 443, 127 S. Ct. 1199, 167 L. Ed. 2d 178
6 (2007), the allowance of claims for attorney's fees in
7 bankruptcy generally is recognized as governed by state
law. Id. at 450-51. This is particularly true in
exception to discharge cases . . . where the litigation
ordinarily has no direct impact on the bankruptcy
estate.

8 Charlie Y., Inc. v. Carey (In re Carey), 446 B.R. 384, 390 (9th
9 Cir. BAP 2011), footnote omitted.

10 B. Standards Under California Law

11 California law permits recovery for attorney's
12 fees under two separate provisions. Section 1717
13 allows a party to recover attorney's fees incurred in
14 the litigation of a contract claim. . . . Section 1021
15 permits recovery of attorney's fees by agreement
between the parties, and does not limit recovery of
attorney's fees to actions on the contract. . . .
Attorney's fees for fraud claims may be recovered if
the contract so provides.

16 Terra Nova Indus. v. Chen (In re Chen), 345 B.R. 197, 200 (N.D.
17 Cal. 2006), citations and footnotes omitted.

18 The attorney's fee clause in the parties' contract need not
19 refer explicitly to actions for fraud in order for such actions
20 to be encompassed by it. Where, for example, the clause in a
21 contract for the purchase and sale of real property permitted
22 recovery of fees for "bring[ing] any suit . . . with respect to
23 the subject matter or enforcement of the Agreement," the clause
24 was broad enough to encompass the seller's attorney's fees
25 incurred in defending a claim that the seller failed to disclose
26 the presence of asbestos on the property. 3250 Wilshire
27 Boulevard Bldg. v. W. R. Grace & Co., 990 F.2d 487, 489 (9th Cir.

1 1993).²

2 The plaintiff quotes the applicable provision in the
3 promissory note that provides for attorney's fees in this matter,
4 and the defendants have not suggested that this adversary
5 proceeding does not fall within the scope of the provision or
6 that attorney's fees are not appropriately awarded under one or
7 the other of California's fee-shifting statutes cited above.

8 Therefore, the only question before the court is the
9 reasonableness of the fees requested. The party moving for an
10 award of attorney's fees has the burden of proof. City of Colton
11 v. Singletary, 206 Cal. App. 4th 751, 784 (May 30, 2012). The
12 court is to begin with the lodestar figure; that is, the product
13 of the number of hours reasonably spent and the reasonable hourly
14 rate prevailing in the community for similar services. Christian
15 Research Institute v. Alnor, 165 Cal. App. 4th 1315, 1321 (2008).

16
17 2.

18 The language of this provision includes not only
19 contract enforcement actions, but actions relating to
20 the "subject matter" of the agreement. The subject
21 matter of the agreement is obvious: the sale of the
22 3250 Wilshire Boulevard property by MetLife to
23 Wilshire. Wilshire's lawsuit claimed that MetLife
24 violated various duties by failing to disclose, prior
25 to the sale, the alleged fact that MetLife was
divesting itself of the building because of its
asbestos content. Such a lawsuit clearly relates to
the "subject matter" of the Purchase and Sale
Agreement, regardless of whether Wilshire's claims,
strictly speaking, sounded in tort or contract.
Accordingly, as the prevailing party, MetLife is
entitled to attorney's fees and expenses for defending
this action.

26 Id.; cf. Redwood Theaters, Inc. v. Davison (In re Davison), 289
27 B.R. 716, 725 (9th Cir. 2003) [the plaintiff alleged fraud but
28 "did not allege any breach of the Agreement or seek to enforce
any rights under the Agreement."].

1 The court should consider "whether the case was overstaffed,
2 how much time the attorneys spent on particular claims, and
3 whether the hours were reasonably expended," Christian Research
4 Institute, 165 Cal. App. 4th at 1320; inefficient or duplicative
5 services are not to be compensated. Id. at 1321.

6 [A]scertaining the fee amount is left to the trial
7 court's sound discretion. Trial judges are entrusted
8 with this discretionary determination because they are
in the best position to assess the value of the
professional services rendered in their courts.

9 Id., citations omitted.

10 C. The Fees Requested in This Case

11 Applying these standards to the fees requested in this case,
12 the court finds, first, that Counsel's hourly rates - \$245 and
13 \$225 for the two partners and \$175 and \$150 for the two
14 associates - are reasonable and well within prevailing rates in
15 this community during the time in which the services were
16 performed.

17 With that said, the court also finds that the case was
18 overstaffed. What the court finds striking is that Counsel found
19 it appropriate to utilize the services of two partners and two
20 associates in this case.³ While the legal and factual issues in
21 the case were not ordinary or common, the court does not believe
22 they were so complex as to require the services of four
23 attorneys, each billing relatively large amounts of time.

24 / / /

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26 3. The court recognizes that the lead partner on the case
27 was likely to be and ultimately was a witness at the trial, and
28 that Counsel thus had to have two attorneys at the trial itself.
This does not explain why it was necessary or reasonable to
utilize the services of three attorneys through the first ten
months of the case, adding a fourth in the final months.

1 The court also finds that the allocation of services among
2 these four attorneys resulted in some instances in unnecessary
3 duplication of effort. For example, Counsel's time records
4 reveal several instances of an associate preparing relatively
5 simple documents, such as various stipulations and the three
6 pretrial conference statements, and a partner reviewing and
7 revising those documents. Although in some of these instances,
8 the partner did not charge for his time, in others, he did. In
9 the case of a motion for summary judgment, an associate did the
10 bulk of the work, but his work was reviewed and revised by both
11 partners.

12 In addition, in the court's view, the amount of time spent
13 by Counsel on several of the documents filed with the court, such
14 as the various stipulations, the amended complaint (14 hours),
15 the three pretrial statements (22 hours), the trial brief/trial
16 statement (13 hours not including associate's time), and the
17 proposed findings of fact and conclusions of law (21 hours), was
18 excessive. Many of these documents repeated information
19 previously presented.

20 Further, the trial in this proceeding involved the issue of
21 damages only, the issue of liability having been resolved in the
22 plaintiff's favor by way of summary judgment. Between the time
23 the court granted the motion for summary judgment on liability
24 and the conclusion of the trial, Counsel billed at least \$44,000
25 in attorney's fees - on the damages issue alone. Beginning in
26 June 2011, ten months into the case, Counsel chose to assign
27 preparation of a trial brief to an associate who had not
28 previously worked on the case to prepare the trial brief, despite

1 the fact that two partners and another associate had already
2 worked extensively on the case and presumably had developed a
3 good deal of familiarity with the facts and the issues. It thus
4 appears Counsel did not delegate work on the case in a prudent
5 manner.

6 The time sheets indicate that the associate who had worked
7 on the case previously did not work on it at all after March
8 2011; the court recognizes the possibility that he had left the
9 firm. But that would not explain why one of the two partners who
10 had also been working on the case would not have been a more
11 cost-effective choice. As it turned out, the new associate spent
12 37 hours and billed \$6,545 for legal research, reviewing the
13 file, and preparing memos to the lead partner on the case, all
14 apparently in aid of the preparation of the trial brief, and the
15 partners spent another 13.7 hours and billed another \$3,246 for
16 legal research and preparation of the trial brief which, as had
17 been ordered by the court, was only five pages long and contained
18 almost no legal analysis or citations, focusing instead on the
19 factual issues surrounding the amount of the plaintiff's damages.

20 The court recognizes that it sees only the tip of the
21 iceberg in any given case, and is aware that many things play out
22 behind the scenes. Further, fee motions are unavoidably reviewed
23 in hindsight, and second-guessing a law firm's decisions as to
24 both the allocation of its resources and the amount of time its
25 attorneys ought reasonably to devote to a case is an undesirable
26 task. Nevertheless, particularly as here, where the obligation
27 for the requested fees is to be transferred to the non-prevailing
28 party, the court must exercise its discretion and deny fees as

1 appropriate.

2 Thus, the court will award attorney's fees payable by the
3 defendants to the plaintiff as follows. First, the court will
4 deduct \$3,381 from the amount of attorney's fees requested, on
5 account of the fees incurred in preparing a motion to file under
6 seal unredacted versions of Counsel's time records. That motion
7 was based on the contention that the substance of Counsel's
8 billing records is protected by the attorney-client privilege
9 and/or the work product rule.⁴ A quick call to an attorney
10 practicing regularly in this court would have informed Counsel
11 that attorney billing statements submitted in support of fee
12 applications are rarely, if ever, filed under seal, and are
13 rarely filed with significant redactions, if any.

14 Deducting \$3,381 from the total attorney's fees requested,
15 \$84,525.83, leaves \$81,144.83, of which the court will deduct 25%
16 on account of its findings of overstaffing, unnecessary
17 duplication of effort and time, inefficient allocation of
18 resources, and excessive time billed, all as discussed above.⁵
19 Thus, the fee award will be \$60,858.62 (\$81,144.83 - \$20,286.21).

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21 _____
22 4. The motion was denied, with the proviso that Counsel
should file redacted versions of the billing statements.

23 5. Attorney's fee awards proceeding from the lodestar
24 calculation and then enhancing or reducing the total by an
across-the-board percentage amount is acceptable under California
25 law. See, e.g., Serrano v. Unruh, 32 Cal. 3d 621, 625, 639, 644
26 (1982) [hours reduced by 20%]; City of Colton, 206 Cal. App. 4th
at 786 [fees reduced by 50%]; Building a Better Redondo, Inc. v.
27 City of Redondo Beach, 203 Cal. App. 4th 852, 872-73 (Jan. 25,
2012) [applying a 25% upward multiplier]; Christian Research
28 Institute, 165 Cal. App. 4th at 1323-29 [approving fees for 71
hours out of more than 600 hours requested, citing overstaffing,
duplicative and unnecessary work].

1 D. The Costs Requested in This Case

2 The court will award the plaintiff the amount of costs
3 incurred in this case, as itemized in the plaintiff's Amended
4 Bill of Costs, Ex. JLP-7 in support of the Motion, but will not
5 award the requested expert witness fees, \$12,614.39. As a
6 general rule, California law allowing an award of costs in favor
7 of a prevailing party, Cal. Code Civ. Proc. § 1032(b), does not
8 encompass fees of experts not ordered by the court. Cal. Code
9 Civ. Proc. § 1033.5(b)(1).⁶ The plaintiff cites Thrifty Payless,
10 Inc. v. Mariners Mile Gateway, LLC, 185 Cal. App. 4th 1050, 1066
11 (2010), in which the court awarded the prevailing party its
12 expert witness fees. However, first, the weight of California
13 case law is to the contrary. See Carwash of America-Po v.
14 Windswept Ventures No. 1, 97 Cal. App. 4th 540, 543-44 (2002),
15 and cases collected at p. 544.⁷

16 Second, the Thrifty Payless court awarded the prevailing
17 party its expert witness fees based solely on the fact that the
18 attorney's fee clause in the parties' contract specifically
19 provided that the prevailing party would be entitled to
20 "reasonable expenses," including "witness and expert fees." 185
21 Cal. App. 4th at 1066. In the present case, by contrast, the
22 attorney's fee clause in the promissory note covered "such sums
23 as are incurred for attorneys' fees and associated legal
24

25 6. Fees of expert witnesses ordered by the court are
26 recoverable. Cal. Code Civ. Proc. § 1033.5(a)(8).

27 7. Similarly, under federal law, taxable costs include
28 compensation of court appointed experts only. 28 U.S.C. §
1920(3); see also Lovell v. Chandler, 303 F.3d 1039, 1058 (9th
Cir. 2002).

1 expenses." The language does not refer to expert witness fees,
2 and the court cannot conclude that the defendants intended the
3 phrase "associated legal expenses" to obligate them for the
4 plaintiff's expert witness fees despite contrary prevailing
5 authority.

6 III. CONCLUSION

7 For the reasons set forth above, the Motion will be granted
8 in part and the court will award the plaintiff, as the prevailing
9 party herein, the sum of \$60,858.62 in attorney's fees and
10 \$2,108.30 in costs. The court will issue an appropriate order.

11
12 Dated: August 23, 2012

/s/

DAVID E. RUSSELL

United States Bankruptcy Judge