

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

EMPLOYEES' RETIREMENT PLAN OF
CONSOLIDATED ELECTRICAL
DISTRIBUTORS, INC., an employee
pension benefit trust,

Plaintiff,

vs.

Case No. 2014-947-CB

HARBOR THIRTEEN MILE – 20600 LLC,
a Michigan limited liability company, and
CRAIG SCHUBINER,

Defendant.

OPINION AND ORDER

The matter before the Court is Plaintiff's request for attorney fees and costs. Defendant Craig Schubiner has filed a response and requests that the matter be denied.

I. Factual and Procedural History

This matter arises out of a loan evidenced by a series of promissory notes executed by Defendants Harbor Thirteen Mile-20600, LLC ("Defendant Harbor") beginning with a note executed in favor of Plaintiff's predecessor in interest, Charter One Bank, N.A. ("Charter"), in the amount of \$4,040,000.00 on August 28, 1998 ("Loan"). The Loan was executed in order to acquire commercial real property located at 20600 13 Mile Rd, Roseville, MI ("Subject Property"), and was secured by a mortgage on the Subject Property ("Mortgage"). The Loan was also secured by a guaranty executed by Defendant Craig Schubiner ("Defendant Schubiner") on the same day, wherein Defendant Schubiner

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guaranteed repayment of only up to 25% of the Loan amount upon the execution of a satisfactory lease.

The Loan was subsequently amended several times. On July 5, 2000, Defendant Harbor executed a modification agreement to the Loan to increase the principal to \$4,490,000.00 ("First Amended Loan") for tenant improvements. On July 30, 2002, Defendant Harbor executed a second modification to increase the principle to \$4,600,000.00 for additional tenant improvements. On the same date, a "Restated and Amended Promissory Note and Modification of Mortgage, and a Restated Guaranty" (collectively, "Restated Loan Docs") were also executed. The Restated Guaranty removed the 25% cap.

On May 31, 2005 Charter assigned the Restated Loan Docs to Plaintiff. On October 31, 2011, the parties executed a "Second Restated and Amended Promissory Note" for a decreased principle of \$3,410,710.14. On October 31, 2012, the parties executed a "Modification of Loan Documents" that extended the maturity date of the loan to February 1, 2013. On October 29, 2013, the parties executed a "Third Restated and Amended Promissory Note" that further decreased the principle loan balance to \$3,137,212.82. The parties also executed a "Second Modification of Loan Documents" that extended the maturity date to August 1, 2014.

In its complaint, Plaintiff alleged that Defendant Harbor failed to make the required monthly payments under the loan documents, and is therefore in default. Plaintiff thereafter accelerated the balance and demanded repayment in full. Defendant Harbor failed to pay as demanded. In its first amended complaint ("Complaint"), Plaintiff alleges claims for: Count I- Claim and Delivery against Defendant Harbor, Count II- Breach of

Contract against Defendant Harbor and Breach of Guaranties against Defendant Schubiner, and Count III- Appointment of a Receiver over Defendant Harbor. Plaintiff's claims against Defendant Harbor have since been dismissed with prejudice pursuant to a February 4, 2016 stipulated order of dismissal.

On January 12, 2016, the Court issued its Opinion and Order, *inter alia*, granting Plaintiff's motion for summary disposition as to the Count II against Defendant Schubiner, which is the only claim remaining open in this case. Specifically, the Court held that Defendant Schubiner is liable under his guaranties, as reaffirmed in the Second Modified Loan Docs. The Court has since denied Defendant Schubiner's motion to reconsider the January 12, 2016 Opinion and Order.

Liability having been decided, the issue of damages was heard at a February 1, 2016 bench trial. On March 10, 2016, the Court entered its Opinion and Order in which it held that Plaintiff is entitled to recover the \$3,033,259.52 loan balance, interest of \$1,081,626.64, property taxes in the amount of \$129,574.51, late charges of \$10,793.45 and insurance premiums of \$4,009.00 from Defendant Schubiner. In addition, the Court held that Plaintiff is entitled to recover its costs of collection in accordance with ¶8.9 of the Third Restated Note in an amount to be determined.

On May 11, 2016, the Court held a hearing on the issue of the amount of collection costs Plaintiff is entitled to recover from Defendant Schubiner. At the conclusion of the hearing the Court took the matter under advisement. Having reviewing the materials and testimony presented by the parties, the Court is now prepared to render its decision.

II. Arguments and Analysis

Plaintiff's right to recover its costs of collection incurred in this matter is authorized

by ¶8.9 of the Third Restated Note, which provides:

If any payment under this Note is not paid in full when due, whether at maturity, by acceleration or otherwise, [Defendant Harbor] promises to pay all costs of [collection] incurred by [Plaintiff], including without limitation reasonable attorneys' fees to the fullest extent permitted by applicable law, and all expenses incurred by [Plaintiff] in connection with the protection and realization of any collateral, whether or not suit is filed hereon or on any instrument granting a security interest.

(See Trial Exhibit 6, at ¶8.9)

While Defendant Schubiner is not a party to the Third Restated Note, the October 29, 2013 Second Modification of Loan Documents ("10/13 Modification") contains a reaffirmation of Defendant Schubiner's obligation to guaranty the payments and all of the other undertakings, promises and agreements provided in the loan documents between Plaintiff and Defendant Harbor. (See Trial Exhibits A, 2, 3 and 7.) One category of Defendant Harbor's promises is the promise set forth in ¶8.9 of the Third Restated Note. Consequently, although Defendant Schubiner is not a party to the Third Restated Note, he is still obligated to pay Plaintiff in accordance with ¶8.9.

Defendant Schubiner also asserts that even if he is liable to Plaintiff for its costs of collection, some of the items Plaintiff's counsel billed for are unreasonable. First, Defendant Schubiner contends that the fees and costs incurred in connection with Plaintiff's foreclosure efforts are unreasonable as it was not authorized by the laws of this state to pursue such relief while also seeking to pursue an action on the Guaranty. With respect to the fees charged in connection with Plaintiff's foreclosure efforts, this Court has previously held, in its May 4, 2015 Opinion and Order, that Plaintiff could not, pursuant to MCL 600.3204 and *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284; 818 NW2d 460 (2012), pursue a foreclosure by advertisement since it had initiated an action

on the guaranty. Consequently, Plaintiff's activities in pursuing foreclosure by advertisement were not authorized by law. As a result, the Court is convinced that all of the fees and costs Plaintiff incurred in pursuing the foreclosure are not recoverable on the basis that allowing such a recovery would be unreasonable. In this case, the bills Plaintiff has submitted reflect \$2,252.00 in fees and \$352.00 in costs that were billed in connection with its foreclosure efforts. For the reasons discussed above, the Court is satisfied that Plaintiff's request to recover those fees and costs must be denied.

Defendant Schubiner also contends that Plaintiff may not recover the fees it incurred in connection with motion and other proceeding that it lost in whole or in part. Specifically, Defendant Schubiner focuses on Plaintiff's efforts to have a receiver appointed and in opposing Defendant Schubiner's motion to compel that was ultimately granted in part. As a preliminary matter, the Court notes that Defendant Schubiner has failed to present any authority supporting his position that fees incurred in connection with motions that were denied or in connection with opposing motions that were granted are not reasonable. A party may not merely state a position and then leave it to the Court to rationalize and discover the basis for the claim, nor may he leave it to the Court to search for authority to sustain or reject his position. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Based on Defendant Schubiner's failure to support his position, his assertion is properly denied.

In addition, Defendant Schubiner asserts that a portion of the fees and costs are duplicative because they were incurred in connection with coming up to speed after substituting in for previous counsel. Specifically, Plaintiff's objection is that such charges are duplicative since they were for reviewing work that Plaintiff's former counsel had

already billed for; however, Plaintiff is not seeking to recover the fees and costs it was billed for by its prior counsel. Consequently, the Court is convinced that such charges do not seek to recover twice for the same services. As a result, the Court is satisfied that Plaintiff's position is without merit.

Defendant Schubiner also contends that Plaintiff may not recover costs it incurred in having its counsel pursue efforts to sell the mortgage, note and guaranty at the center of this matter. Indeed, the Court is satisfied that Plaintiff's efforts to sell its interest in the note, guaranty and mortgage to a third party are not efforts that were required to collect the amounts it was owed under the note and/or guaranty. Consequently, the \$327.00 in fees incurred in connection with the sale efforts are not recoverable.

Finally, Defendant Schubiner asserts that a May 4, 2015 charge of \$317.00 for "legal research regarding applicable case law" is not recoverable because it is unclear what the research was used for. Indeed, Mr. Ropke could not provide any explanation as to the subject matter he researched. Consequently, the Court is convinced that the fee in question is not recoverable.

Having decided what fees are unreasonable on their face, the Court will now address whether Plaintiff has established that the remaining fees are reasonable. The party requesting attorney fees bears the burden of proving they were incurred and that they are reasonable. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005). The procedure for determining whether the fees requested is reasonable was set forth in *Smith v Khouri*, 481 Mich 519, 537; 751 NW2d 472 (2008) and clarified by the Michigan Court of Appeals in *Van Elslander v Thomas Sebold & Associates, Inc*, 297 Mich App 204; -- NW2d -- (2012). In *Van Elslander*, the Court, in relying on *Smith*, held:

It is incumbent on the trial court "to consider the totality of special circumstances applicable to the case at hand." Citing the factors elucidated in *Wood v. Detroit Automobile Inter-Ins. Exch.*, 413 Mich 573, 321 N.W.2d 653 (1982), the *Smith* Court identified six factors to be considered in determining a reasonable attorney fee:

(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.

The Court also recognized the following eight factors delineated in the Michigan Rules of Professional Conduct (MRPC) 1.5(a), noting an overlap with *Wood*:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

The Court further recognized the value of data available in surveys such as the Economics of the Law Practice Surveys, as routinely compiled by the State Bar of Michigan.

Van Elslander, supra, at 10.

Specifically, the Court, citing *Smith*, held that the trial court should utilize the above-referenced factors in the following manner:

[A] trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be

multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood* /MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors.

Van Elslander, supra, at 10.

Accordingly, the first task before this Court is to determine the fee customarily charged in Macomb County for similar legal services. *Id.*

A. Fee Customarily Charged

In this matter, Plaintiff requests that the Court award it the fees it has paid Miller, Canfield, Paddock and Stone, PLC (“Miller Canfield”) for the services provided by Nelson O. Ropke, as lead counsel, Stephanie Collins, as a paralegal, and Steven Roach and Charles Ryan. In particular, Plaintiff seeks to recover \$360.00 per hour for the service provided by Mr. Ropke in 2014, \$370.00 per hour for the services Mr. Ropke provided in 2015, \$205.00 per hour for the services provided by Ms. Collins, \$265.00 per hour for the services provided by Mr. Ryan, and \$505.00 per hour for the services provided by Mr. Roach.

As a preliminary matter, while Plaintiff requests the fees incurred for services provided by Mr. Ryan and Mr. Roach, it has failed to provide any support for its position that the rate charged by those individuals is reasonable. Consequently, Plaintiff’s request to recover the \$101.00 attributable to Mr. Roach and the \$53.00 charge attributable to Mr. Ryan will not be granted. Additionally, as to the charges attributable to Ms. Collins, Plaintiff has failed to present any evidence that \$205.00 per hour is a reasonable rate to

charge for a paralegal of Mr. Collins' experience. Moreover, Plaintiff has failed to present any evidence by which the Court could determine what a reasonable rate would be if \$205.00 is not reasonable. Consequently, the Court is satisfied that Plaintiff has failed to establish that the fees incurred by Ms. Collins are reasonable. As a result, its request to recover the remaining \$348.50 in fees attributable to Ms. Collins must be denied. Accordingly, the only remaining fees are those billed by Mr. Ropke.

In *Van Elslander*, the Court provided the following procedure for determining the fee customarily charged:

The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. "The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question." We emphasize that "the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." The fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality. Both the parties and the trial courts of this state should avail themselves of the most relevant available data. For example, as noted earlier, in this case defendant submitted an article from the Michigan Bar Journal regarding the economic status of attorneys in Michigan. By recognizing the importance of such data, we note that the State Bar of Michigan, as well as other private entities, can provide a valuable service by regularly publishing studies on the prevailing market rates for legal services in this state. We also note that the benefit of such studies would be magnified by more specific data relevant to variations in locality, experience, and practice area.

Van Elslander, supra, at 11.

In support of its request, Plaintiff has provided, and relied upon, the 2014 Economics of Law Practice Attorney Income and Billing Rate Summary Report ("Summary Report").

Pursuant to the Summary Report, the mean and median rates charged in the Mt. Clemens area are \$232.00 and \$225.00 per hour respectively, the mean and median rates for collection practice are \$225.00 and \$200.00 per hour respectively and the mean and median rates in Macomb County are \$262.00 and \$250.00 per hour respectively. (See Summary Report at 5-8.)

Mr. Ropke testified that he is a non-equity partner with Miller Canfield, a firm with over 50 attorneys. Mr. Ropke's requested fee of \$360-\$370 is squarely between the mean of \$330/hr and the 75th percentile of \$400/hr. (See Summary Report at Table 3.) Further, Mr. Ropke's rate is less than the mean of \$377/hr for attorneys practicing at firms with more than 50 attorneys (Id. at Table 5.) In addition, Mr. Ropke testified that he has been practicing law for 13 years. Mr. Ropke's requested rate is between the 75th (\$300/hr) and 95th (\$435/hr) percentiles for attorneys practicing between 11 and 15 years. (Id. at Table 4.)

As discussed above, Mr. Ropke's requested rate is on the higher end based on his years of practice and his status as a non-equity partner; however, his rate is actually below average for an attorney working at a large firm. Although the Court recognizes that \$360/370 per hour also above well above the mean rate for attorneys in Macomb County and the 16th Circuit (both \$262/hr), the Court also notes that Miller Canfield is an exceptionally large firm whose size and reputation clients pay a premium for, and whose resources command a higher cost than average size firms. For these reasons, the Court is satisfied that Mr. Ropke's requested rate is reasonable.

B. Reasonable Hours

The fee applicant has the burden of supporting their claimed hours with evidentiary

support, including detailed billing records, which the opposing party may contest. *Smith, supra*, at 532. However, an itemized bill of costs by itself is insufficient to establish the reasonableness of the hours claimed. *Petterman v Haverhill Farms, Inc.*, 125 Mich App 30, 33; 335 NW2d 710 (1983). The fee applicant must establish by documentary evidence, specific testimony, or both, that the time identified as expended on a bill was actually and reasonably expended. *Id.* at 33.

In this matter, Mr. Ropke have submitted itemized bills in support of their requests for fees. Further, Mr. Ropke testified that the services, and corresponding charges, referenced in their bills were actually provided and accurately billed. Based on that evidence, the Court is convinced that with the exception of those charges specifically excluded above, the fees in this case are reasonable as to the amount of hours billed.

C. Smith, Wood and MRPC 1.5(A) Factors

The factors set forth in MRPC 1.5(A), *Smith* and *Wood* are to be addressed after a baseline figure has been established by multiplying the reasonable hours and the reasonable rate. See *Smith, supra*, at 533. For the reasons discussed above, the Court is satisfied that Mr. Ropke's requested rate is reasonable. After multiplying that rate by the hours of work not excluded above, the balance in fees owed is \$95,046.00 (\$98,444.50 in total fees less the \$3,398.50 in fees excluded above.)

With respect to those factors set forth in MRPC 1.5(A), *Smith* and *Wood* that have not already been addressed in this Opinion and Order, the parties have failed to make any argument that any of the remaining factors necessitate increasing or decreasing the amount of fees sought. Consequently, the Court will not adjust the total award in this case based on those factors.

The final issue before the Court is to decide whether Plaintiff is entitled to recover the costs it has incurred in this matter. Except for those costs previously excluded, Defendant does not challenge any of the costs that Plaintiff seeks to recover, and does not challenge that Plaintiff is entitled to recover the costs under the Third Restated Note. Consequently, the Court is persuaded that Plaintiff is entitled to recover the \$4,267.46 in costs requested that have not been previously excluded (\$4,619.46 in total costs less the \$352.00 in costs excluded above).

III. Conclusion

Based upon the reasons set forth above, Plaintiff is entitled to recover \$95,046.00 in attorney fees and \$4,267.46 in costs from Defendant Schubiner. Plaintiff shall submit a proposed judgment consistent with this Court's March 10, 2016 Opinion and Order and this Opinion and Order within 21 days of the date of this Opinion and Order. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order resolve the last claim and CLOSES the case.

IT IS SO ORDERED.

Date: JUN 22 2016

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge