United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7161 **September Term, 2017**

FILED ON: JUNE 6, 2018

DEMETRA BAYLOR,

APPELLANT

v.

MITCHELL RUBENSTEIN & ASSOCIATES, P.C.,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-01995)

Before: TATEL, WILKINS and KATSAS, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). Upon consideration of the foregoing, it is

ORDERED AND ADJUDGED that the January 6, 2015, order of the District Court be affirmed.

This appeal arises out of Plaintiff Demetra Baylor's efforts to recover $220,712 in attorney's fees under the Fair Debt Collection Practices Act ("FDCPA") for a lawsuit that was resolved via offer of judgment while Defendant Mitchell Rubenstein & Associates, P.C.'s ("MRA") motion to dismiss was pending. The first time we heard this case, we reversed the District Court's order approving a magistrate judge's report and recommendation ("R&R") reducing Baylor's fee award to $41,990 because the District Court conducted clear-error rather than *de novo* review. *See Baylor v. Mitchell Rubenstein & Assocs., P.C.* (*Baylor I*), 857 F.3d 939, 943 (D.C. Cir. 2017).

On remand, the District Court, reviewing the magistrate judge's R&R *de novo*, reduced the fee award to $17,000. *Baylor v. Mitchell Rubenstein & Assocs., P.C.* (*Baylor II*), 282 F. Supp. 3d 203, 214 (D.D.C. 2017). To arrive at this sum, the District Court decreased Baylor's requested rate from $450 per hour to the $325 per hour her counsel actually charged, *id.* at 210; reduced the number of hours reasonably expended from 490 to 73.9, *id.* at 211-12; and applied an across-the-

board deduction to reduce the lodestar from $24,017.50 to $17,000 "in order to balance the equities between the awards to plaintiff and her counsel, as well as to sanction counsel and deter her from submitting unreasonable fee requests in the future." *Id*. at 213.

Beginning with the hourly rate issue, the District Court appropriately relied on this Court's holding that "an attorney's usual billing rate is presumptively the reasonable rate," *Baylor II*, 282 F. Supp. 3d at 210 (quoting *Kattan ex rel. Thomas v. Dist. of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993)), to reduce the rate to $325 per hour. Baylor objects to the District Court's action on procedural and substantive grounds, neither of which has merit.

Procedurally, Baylor argues that MRA's failure to object to the rate until the R&R was filed precluded the District Court from considering the issue. Although the District Court may deem forfeited an objection not raised before the magistrate judge, *see Marshall v. Chater*, 75 F.3d 1421, 1426-27 (10th Cir. 1996) (collecting cases), *cited with approval in Students Against Genocide v. Dep't of State*, 257 F.3d 828, 834 & n.10 (D.C. Cir. 2001), nothing prohibits the court from reviewing a new objection, *see Williams v. McNeil*, 557 F.3d 1287, 1291 (11th Cir. 2009) (collecting cases). Here, the decision to consider MRA's objection was reasonable given our instruction to apply a more searching standard of review.

Substantively, Baylor suggests that her counsel's actual rate should not equate to the reasonable rate because the actual rate was discounted out of public-interest concerns. *See* Appellant's Br. 36. Although we have sometimes approved going above the actual billing rate when it was discounted for public-interest reasons, those cases had considerable evidence about prevailing market rates and public-interest motivations. *See, e.g.*, *Covington v. Dist. of Columbia*, 57 F.3d 1101, 1107, 1110 & n.19 (D.C. Cir. 1995); *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1524 (D.C. Cir. 1988). Baylor, by contrast, provides no such support for her assertion and falls well short of overcoming our deferential review.

Turning next to the adjustments to the hours reasonably expended, the District Court acted largely within its discretion to make deductions given its responsibility to ensure that the "fee applicant" meets her "burden of establishing entitlement to an award," *Eley v. Dist. of Columbia*, 793 F.3d 97, 100 (D.C. Cir. 2015) (quoting *Covington*, 57 F.3d at 1107-08), and all but one of the deductions seem eminently reasonable.

First, the District Court appropriately excluded the hours Baylor spent preparing an opposition to MRA's motion to dismiss, given that MRA had mailed a Rule 68 Offer of Judgment on the FDCPA claim for the maximum statutory penalty at least 10 days before the opposition brief was due. *See* FED. R. CIV. P. 68. Baylor argues, without citing any authority, that the hours should be counted because she did not retrieve the letter from the post office until a day after the filing was due. Baylor's argument is unavailing – her failure to timely retrieve the letter does not excuse her filing an opposition that would have been unnecessary had she checked her mail.

Second, the District Court did not abuse its discretion in reducing the hours claimed for certain tasks by 60% to account for the fact that Baylor prevailed on only one of her three claims. *See Williams v. First Gov't Mortg. & Inv'rs Corp*., 225 F.3d 738, 746 (D.C. Cir. 2000) ("Under settled law, [a litigant] may recover fees only for work related to the claim on which he prevailed,

and the fees awarded on that claim must be reasonable in relation to the success achieved.").

Finally, as to the hours Baylor's counsel spent preparing a fee petition, although such time may be compensated, "a court may punish an intolerably excessive fee request by denying any award at all," *Baylor I*, 857 F.3d at 957 (Henderson, J., concurring), and it may "'impose a lesser sanction, such as awarding a fee below what a "reasonable" fee would have been in order to discourage fee petitioners from submitting an excessive request,'" *id.* (quoting *Envtl. Def. Fund, Inc. v. Reilly*, 1 F.3d 1254, 1258 (D.C. Cir. 1993)). Here, where counsel billed more than 200 hours litigating fees when the merits only took 70 hours, the District Court acted well within its discretion to find that Baylor pursued an unreasonable strategy seeking exorbitant fees and that a reduction was warranted.

The District Court, however, made one erroneous deduction when it discounted all 55 hours Baylor's counsel spent on settlement efforts. The District Court explained that these activities occurred "prior to the commencement of th[e] lawsuit" and were "therefore outside of the scope of the statutory provision authorizing an award of attorney's fees to a prevailing party." *Baylor II*, 282 F. Supp. 3d at 211. As to the first point, this Court has held that "[c]ompensable time should not be limited to hours expended within the four corners of the litigation." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1335 (D.C. Cir. 1982) (per curiam). Rather, an attorney can recover for work when there is "a clear showing that the time was expended in pursuit of a successful resolution of the case in which fees are being claimed." *Id.* Accordingly, courts in this circuit have awarded fees for time spent on settlement negotiations outside the FDCPA context. *See, e.g.*, *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 218 F. Supp. 3d 27, 52 (D.D.C. 2016) (awarding fees for "work relate[d] to settlement negotiations" under the Freedom of Information Act). As to the second point, nothing in the text of the FDCPA's fee-shifting provision suggests a different result here. *See* 15 U.S.C. § 1692k(a)(3). Although the exclusion of hours spent on settlement was error, the error was harmless such that we need not reverse and needlessly prolong this litigation. We explain our reasoning below.

After making the stated deductions, the District Court calculated that Baylor's counsel reasonably expended 73.9 hours on the suit (or 108.7 hours if the opposition to the motion to dismiss were to be included). Based on a reasonable hourly rate of $325, the initial lodestar calculation was $24,017.50 (or $35,327.50). Regardless of whether the appropriate initial lodestar was the lower or higher sum, the District Court stated that it would make one additional deduction, reducing the final award to $17,000, to account for Baylor's limited success and the "unnecessary contentiousness of the litigation." *Baylor II*, 282 F. Supp. 3d at 213-14. Contrary to Baylor's argument that this was some impermissible "[double] punishment," Appellant's Br. 48, or required additional notice and hearing, *id.* at 38, downward adjustments from lodestar calculations are routine, *see Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) ("The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward . . . ."), and the District Court's departure here was appropriate. Baylor made excessive filings peppered with unnecessary attacks on the defendant. That underwhelming effort, along with the need to deter excessive fee requests, readily justifies the District Court's decision to depart below the lodestar.

This leads to the question of the erroneous exclusion of the settlement hours. In this case,

after applying the 60% discount for Baylor's limited success that the District Court settled on, that amounts to 22 hours for which Baylor received no credit. Were these hours included, the adjusted lodestar would be $31,167.50. Given that the District Court said that it would reduce either an award of $24,017.50 or $35,327.50 down to $17,000, we can safely presume that it would do the same for an award approximately in the middle of that range. And given that any reduction from that range down to $17,000 would not be an abuse of discretion, we affirm the District Court's decision.

One final matter: in its brief, MRA suggests that we remand the case for the District Court to consider whether the fee request was so "grossly excessive" that it should be denied in its entirety. Appellee's Br. 1. But MRA did not cross-appeal the District Court's judgment and is thus precluded from seeking additional relief from this Court. *See Grimes v. Dist. of Columbia*, 836 F.2d 647, 652 (D.C. Cir. 1988). Moreover, MRA's argument rests on a particular discrepancy in the billing logs that it never brought to the District Court's attention, so it was doubly forfeited. *See Belhas v. Ya'alon*, 515 F.3d 1279, 1284 (D.C. Cir. 2008).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(b).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk