

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LLOYD J. MARSHALL, JR.,)
d/b/a MARSHALL ASSOCIATES,)
)
Plaintiff)
)
v.)
)
SCOTIA PRINCE CRUISES LIMITED,)
)
Defendant)

Docket No. 03-26-P-H

RECOMMENDED DECISION ON MOTION FOR ATTORNEY FEES

The defendant, Scotia Prince Cruises Limited, seeks an award of attorney fees pursuant to 17 U.S.C. § 505 after the entry of summary judgment in its favor on all counts of the plaintiff's complaint. The plaintiff opposes the request, contending that the great majority of counsel's time in this case was directed at matters other than his copyright claim, the only basis for an award of fees. I recommend that the court grant the motion in part.

The complaint asserted claims of copyright infringement, breach of contract, unfair trade practices in violation of state and federal law and deceptive trade practices in violation of state law. Complaint (Docket No. 1) at 3-8. The statute invoked by the defendant here provides remedies for copyright infringement.

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505. There is no question that the defendant is the prevailing party in this case.

The Supreme Court had noted with approval “several nonexclusive factors” that courts should consider in making awards of attorney fees under the Copyright Act, including “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994).

The defendant seeks \$24,903.07 in attorney fees, apparently the total amount incurred in its defense of all of the claims in this action. Defendant’s Motion for Attorney’s Fees, etc. (“Motion”) (Docket No. 27) at 1 & Affidavit of Leonard W. Langer in Support of Defendant’s Request for Attorneys [sic] Fees (Docket No. 28) ¶ 3. It contends that the plaintiff’s copyright claim was objectively unreasonable, frivolous and brought with vindictive intent, and that an award of attorney fees will advance considerations of compensation and deterrence and serve the purpose of the Copyright Act. Motion at 2-6. It also asserts that the copyright claim was so entwined with the plaintiff’s other claims that the fee award should not be reduced in recognition of the fact that section 505 provides a remedy only for the copyright claim. *Id.* at 7.

The plaintiff responds that this case “was principally a state law action” and that the time spent by his counsel on the copyright claim was “*de minimis*.” Plaintiff’s Objection to Defendant’s Motion for Attorney’s Fees (“Objection”) (Docket No. 30) at 1-2. He points out that only one entry in the detailed time sheets attached to the Langer Affidavit refers directly to the copyright claim. *Id.* at 1. He contends that the court “must consider the ‘chilling effect’ such an award would have on individuals and small companies advancing their reasonable claims against large corporations.” *Id.* at 5.

The plaintiff’s copyright claim in this case was not necessarily frivolous. A claim could possibly have been asserted based on the pleadings that would not have been totally lacking in merit. Nor is the claim appropriately characterized as “*de minimis*,” considering the time and effort devoted to it by both parties.

However, as the plaintiff presented the claim after the defendant filed its motion for summary judgment, the claim was objectively unreasonable, for the reasons set out in my recommended decision on the motion for summary judgment. Recommended Decision on Defendant’s Motion for Summary Judgment (Docket No. 24) at 6-8. I find the defendant’s proffered evidence of improper motivation, Motion at 5, unconvincing. Given the apparent relative economic positions of the parties, I do not find compensation to be a compelling factor. There has been no showing that the plaintiff is likely to bring such claims again, so deterrence is not a factor with respect to the plaintiff, and I conclude that, while a modest deterrent effect on others may result from the publication of this recommended decision, deterrence alone would not justify the imposition of attorney fees in this case. The defendant has made no showing that the purposes of the Copyright Act have been served by its victory in this case in any particular way; no boundary of copyright law was demarcated in the recommended decision on the summary judgment motion. *See Fogarty*, 510 U.S. at 527.

On balance, I conclude that some award of attorney fees is appropriate in this case. Contrary to the defendant’s position, Reply Memorandum in Support of Defendant’s Motion for Attorney’s Fees (“Reply”) (Docket No. 33) at 5-6, the plaintiff’s state-law claims of unfair trade practices and deceptive practices were not “virtually indistinguishable” from the copyright claim. Summary judgment was recommended on those claims on very distinct grounds. Recommended Decision at 11-14. The plaintiff’s contract claim, which presented the closest question, was also clearly distinct from the copyright claim. *Id.* at 9-11. While all of the claims did arise from “a common core of facts,” Reply at 5, *see Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983), the same could be said of the claims asserted in many, if not most, civil complaints. That fact alone is not sufficient to establish that the claims presented with the copyright claim were so intertwined that it not only is “impossible to parse out hours reasonably expended for each,” Motion at 7, but that an equal amount of time would have been spent on the case by defense counsel if the

copyright claim had not been present. The plaintiff has not objected to the number of hours claimed by the defendant nor the hourly rates charged by its counsel. Given the professed inability of defense counsel to show separately the amount of time devoted to the copyright claim, the objective unreasonableness of that claim as presented, the deterrent value of an award of attorney fees, *see generally Matthews v. Freedman*, 157 F.3d 25, 29 (1st Cir. 1998), and “the significance of the overall relief obtained . . . in relation to the hours reasonably expended on the litigation,” *Hensley*, 461 U.S. at 435, I recommend that the court award the defendants \$12,500 in attorney fees, approximately half the amount requested.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 4th day of March, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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