

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

VISTAL LAND & HOME DEVELOPMENT, LLC,
THE MARIA A CERVI AND AMERICO CERVI
REVOCABLE LIVING TRUST DATED FEBRUARY 12, 2016,
AMERICO CERVI AND MARIA A. CERVI.

Plaintiffs,

Case No. 2017-160937-CB

v.

Hon. Martha D. Anderson

VISTAL COTHERY, LLC a/k/a VISTAL CIC, LLC,

Defendant/Cross-Plaintiff,

v.

STEWART TITLE GUARANTY COMPANY,
TRANSWORLD TITLE COMPANY, LLC and
COVE CREEK LIMITED PARTNERSHIP,

Defendants/Cross-Defendants.

OPINION AND ORDER

This matter is before the Court on Cross-Defendant Cove Creek Limited Partnership's ("CCLP") Motion for Award of Attorney Fees and Costs against Cross-Plaintiff Vistal Cothery LLC a/k/a Vistal CIC, LLC. On March 27, 2019, the Court granted Cross-Defendant CCLP's motion, pursuant to the Purchase Agreement dated October 31, 2003, and scheduled the matter for an evidentiary hearing on May 6, 2019 relative to the reasonableness of the attorney fees requested, *Miller v Meijer Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996). At the conclusion of the evidentiary hearing, the Court took this matter under advisement.

The Court's analysis relative to "reasonableness" is governed by *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). "The burden of proving the reasonableness of the requested fees rests with the party requesting them." *Id* at 528-29. In *Smith*, the Michigan Supreme Court discussed the existing multi-factor approach for determining the reasonableness of requested fees, which includes the six factors set forth in *Wood v Detroit*

Automobile Inter-Ins Exch (DAIIE), 413 Mich 573, 588; 321 NW2d 653 (1982), and the eight factors set forth in Rule 1.5(a) of the Michigan Rules of Professional Conduct (MRPC). *Smith, supra* at 529-30.

The *Wood* factors include: (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. *Smith, supra*. The factors listed in Rule 1.5(a) of the MRPC overlap the *Wood* factors and include:

- (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. [MRPC 1.5(a).] *Smith, supra* at 530.

Upon review of the *Wood* and MRPC 1.5(a) factors, the *Smith* Court determined that the current multi-factor approach needed “some fine-tuning.” *Id* at 530. Under *Smith*, a trial court is required to make specific calculations. *Id* at 533. First, the court must determine “the fee customarily charged in the locality for similar legal services, i.e. factor 3 under MRPC 1.5a.” *Id* at 530. This number is then to “be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*).” *Id* at 531. This resulting number serves “as the starting point for calculating a reasonable attorney fee.” *Id*. “Multiplying the reasonable hourly rate by the reasonable hours billed will produce a baseline figure.” *Id* at 533. Thereafter, the Court should “consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate.” *Id*. at 531.

The *Smith* Court emphasized 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.” *Id* at 531, citing *Blum v Stenson*, 465 US 886, 895 n11; 104 S Ct 1541; 79 L Ed 2d 891 (1984). 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; however, the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality. *Smith, supra* at 531-32.

Further, in considering the time and labor involved, the court shall determine the reasonable number of hours expended by each attorney. *Id* at 532. Again, the burden is on the fee applicant to support his or her claimed hours with evidentiary support, including detailed billing records, which the court shall examine, and the opposing party may contest for reasonableness. *Id*. The *Smith* Court reiterated that, the amount awarded is for reasonable fees, not actual fees. *Id* at 528, n12 (noting that reasonable attorney fees are not equivalent to the actual fees charged).

In this case, Cross-Defendant CCLP presented the 2017 Economics of Law Practice Attorney Income and Billing Rate Summary Report (the “Report”). The Report lists hourly litigation billing rates at various percentiles. The rates vary based upon a variety of factors, including firm size, years in practice and field of practice. Attorneys Sara Sturing and Seth Goldner testified relative to their respective education, background and legal experience as well as the detailed billing and accounting records for the requested attorney fees. The billing records document the various tasks performed by Defendants’ attorneys, ranging from identification and development of the issues, conducting legal research, reviewing and drafting pleadings, motions, briefs and other papers filed with this Court, as well as preparing and appearing for hearings and similar matters. The Court has considered Cross-Plaintiff’s objections concerning the work performed by the respective attorneys in making the following determinations. The rate of \$165.00 per hour is sought for Attorneys Sturing and Goldner.

Licensed in 2007, after graduating from Michigan State University College of Law, Attorney Sturing has nearly 12 years of experience as an attorney. Following law school, Attorney Sturing practiced as an Assistant City Attorney for the Lansing City Attorney’s Office representing the city on real estate and commercial matters, and thereafter continued the same as an Assistant City Attorney for the Warren City Attorney’s Office. For

the last four and one-half years, Attorney Sturing has been a practicing litigator employed by Aidenbaum Schloff and Bloom, PLLC (in Oakland County, Michigan, south of M-59) representing clients on real estate and commercial matters.

As to Attorney Sturing, the Report shows the median billable rate for an attorney with 12 years of practice experience as Attorney Sturing is \$250.00 per hour. The median billable rate for a business/commercial litigation attorney is \$295.00 per hour. The median billable rate for an attorney practicing in Oakland County and in Oakland County Circuit Court is \$250.00 per hour, and the median billable rate for an attorney practicing with an office location in Oakland County (south of M-59) is \$275.00. Based on such evidence, the Court finds a billable rate of \$165.00 per hour for Attorney Sturing (as requested by Cross-Defendant) to be in “line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Smith, supra* at 531.

Licensed in 1991, after graduating from the University of Michigan, Attorney Goldner began practicing law as a solo practitioner representing clients on a wide range of litigation matters. Currently, his office is located in Oakland County, Michigan, south of M-59. In 2002, Attorney Goldner obtained his Michigan real estate license to provide further instruction in his representation of buyers and sellers in real estate transactional matters and in litigation. Attorney Goldner acts as an independent contractor for law firms on specific cases, and in this case, Attorney Goldner was Cross-Defendant CCLP’s lead litigation counsel.

As to Attorney Goldner, the Report shows the median billable rate for an attorney with 28 years of practice experience as Attorney Goldner is \$250.00 per hour. The median billable rate for a business/commercial litigation attorney and real estate attorney is \$295.00 per hour and \$250.00, respectively. The median billable rate for an attorney practicing in Oakland County and in Oakland County Circuit Court is \$250.00 per hour, and the median billable rate for an attorney practicing with an office location in Oakland County (south of M-59) is \$275.00. Based on such evidence, the Court finds a billable rate of \$165.00 per hour for Attorney Goldner (as requested by Cross-Defendant) to be in “line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Smith, supra* at 531.

Next, according to *Smith*, this Court must determine the amount of reasonable hours to be awarded. *Id* at 531. This determination involves consideration of “the time and labor involved (factor 1 under MRPC 1.5(a), and factor 2 under *Wood, supra*.)” *Id* at 532. Factor 1 under the MRPC 1.5(a) is “the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.” *Id* at 530. Factor 2 under *Wood* is “the skill, time and labor involved.” *Id* at 529. In making its determination, this Court should exclude “excessive, redundant or otherwise unnecessary” hours regardless of the attorneys’ skill, reputation experience.” *Id*, n7.

The Court has reviewed in great detail the billing and accounting records submitted by Cross-Defendant CCLP for the period October 11, 2017 through the present. Pursuant to the Court’s calculations, Cross-Defendant CCLP is entitled to payment for 120 hours, which hours the Court finds to be reasonable in this case.

Under *Smith*, the Court, having determined the reasonable hourly rate and the reasonable number of hours billed, must next multiply these figures together. *Smith, supra* at 531. The resulting number serves “as the starting point for calculating a reasonable attorney fee.” *Id*. In other words, the calculation produces a “baseline figure.” *Id* at 533.

Here, pursuant to the Court’s calculations, the baseline figure for Attorney Sturing and Attorney Goldner is \$19,800.00, which amount is calculated by multiplying 120 hours by \$165.00 per hour.

Based on *Smith*, this Court must now “consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate.” *Smith v Khouri*, 481 Mich 519, 531 (2008). These remaining factors include: (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. *Smith, supra* at 530, citing MRPC 1.5(a). The Court has considered these factors and finds no adjustment either up or down is warranted.

With respect to the factor concerning the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, the Court finds that this factor does not warrant any adjustment. The Cross-Complaint against Cross-Defendant CCLP involved claims for breach of contract/purchase agreement and misrepresentation, which claims were not particularly complex under the facts alleged against these Cross-Defendant CCLP.

With respect to the factors concerning the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer, as well as the time limitations imposed by the client or by the circumstances, the Court finds that Cross-Defendant CCLP failed to present evidence relative to this factor, precluding any adjustment in the attorney fees relative thereto.

With respect to the factors concerning the fee customarily charged in the locality for similar legal services as well as whether the fee is fixed or contingent, the Court finds that no adjustment is necessary. Here, the fees incurred by Cross-Defendant CCLP were based on hourly rates, which the Court took into consideration in its determination of the hourly rate for Attorneys Sturing and Goldner.

With respect to the factor concerning the amount involved and the results obtained, the Court finds that this factor does not support any adjustment in the attorney fees. Here, Cross-Defendant CCLP was successful in this case, achieving a good result. However, this is precisely the expectation with good lawyering.

With respect to the nature and length of the professional relationship with the client, the Court finds that this factor does not support any adjustment in the attorney fees.

Finally, with respect to the experience, reputation and ability of the lawyer or lawyers performing the services, the Court finds that this factor does not warrant any adjustment. The fee which has been determined reflects this Court's consideration of the experience, reputation and ability of the lawyer.

There being no adjustment to the Court's previous calculations, the Court awards the total amount of \$19,800.00 in attorney fees.

Next, the Court shall assess the amount of costs to be awarded to Defendants in this matter. Here, Cross-Defendant CCLP requested total costs in the amount of \$107.92. Having reviewed the evidence presented, the Court finds the requested costs are reasonable under the circumstances.

Therefore, Cross-Defendant CCLP shall submit a judgment under MCR 2.602(B) in accordance with this Opinion and Order, which includes an award of the requested taxable costs as well as the reasonable attorney fees delineated herein.

IT IS SO ORDERED.

Dated: 12/19/2019.



HON. MARTHA D. ANDERSON
Chief Circuit Judge Pro Tem