

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

JACQUELINE A. RUBIO,

Plaintiff,

-vs-

Case No. 6:10-cv-468-Orl-35DAB

FMS, INC.,

Defendant.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION: PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS (Doc. No. 27)

FILED: December 20, 2010

THEREON it is RECOMMENDED that the motion be GRANTED in part and DENIED in part.

Background

On March 29, 2010, Plaintiff filed a short, one count Complaint alleging violation of the Fair Debt Collection Practices Act ("FDCPA" or "the Act"), 15 U.S.C. 1692, *et seq.* (Doc. No. 1). A waiver of service was returned, and Defendant filed an Answer and Affirmative Defenses on May 25, 2010 (Doc. No. 10). The parties filed their case management report (Doc. No. 14), and Plaintiff filed a motion to compel on November 12, 2010 (Doc. No. 17), indicating that Plaintiff's deposition was

taken and Plaintiff propounded written discovery. By contrast, Defendant has represented that “no depositions were ever taken in the case.” (Doc. No. 29).

The parties reached a settlement on December 1, 2010, whereby Plaintiff will receive \$750.00 to satisfy her underlying claim, with Plaintiff’s attorney’s fees and costs to be determined by the parties or, if necessary, by the court (Doc. Nos. 21, 27). Plaintiff withdrew her motion to compel (Doc. No. 23), and filed her first Motion for Attorney Fees (Doc. No. 25). Judge Scriven struck the motion for failure to comply with Local Rule 3.01(g), and directed the parties to confer regarding the appropriate amount of attorney’s fees and costs (Doc. Nos. 25 and 26). The motion was renewed on December 20, 2010, a response was filed January 14, 2011 (Doc. No. 29), and the matter was referred to the undersigned on April 12, 2011. For the reasons set forth below, it is **recommended** that the motion be **granted, in part and denied, in part** and that the Court award attorney’s fees in the amount of \$3,815.00, with costs taxed in the amount of \$350.00.

Issues and Analysis

Although Plaintiff devotes a large portion of her memorandum to the issue of entitlement to fees under the Act, as made clear by Judge Scriven’s Order, the settlement agreement between the parties sets forth the amount of damages owed to Plaintiff and contains a stipulation that the Defendant would not contest Plaintiff’s entitlement to attorneys’ fees and costs, leaving only the amount of fees and costs to be determined (Doc. No. 28).¹ With respect to the only matter at issue, Plaintiff seeks an award of attorney’s fees in the amount of \$8,959.50, comprised of 30.4 hours of attorney time at hourly rates ranging from \$255.00 per hour to \$395.00 per hour, and 3.9 hours of law

¹Even without Defendant’s acknowledgment as to entitlement, a successful plaintiff is entitled to an award of reasonable attorneys’ fees under the FDCPA. 15 U.S.C. § 1692k(a)(3); *Hollis v. Roberts*, 984 F.2d 1159, 1161 (11th Cir. 1993).

clerk and/or paralegal time at a rate of \$125.00 per hour. The Court finds this amount to be excessive and unsupportable.

In determining the reasonableness of attorneys' fees pursuant to a fee-shifting statute, the lodestar generally is recognized as a reasonable fee. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). The lodestar is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate. "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing *Blum v. Stenson*, 465 U.S. 886, 895-96 n. 11 (1984)). Additional factors to be considered in determining a reasonable fee include:

- (1) the time and labor required; (2) the novelty and difficulty of the issues;
- (3) the skill required to perform the legal services properly; (4) preclusion of other employment; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Norman, 836 F.2d at 1292 (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

"The fee applicant bears the burden of establishing entitlement and documenting the appropriate hours and hourly rate." *Id.* at 1303. An applicant may meet his or her burden by producing either direct evidence of rates charged under similar circumstances, or opinion evidence of reasonable rates. *Norman*, 836 F.2d at 1299. In addition, the court may use its own expertise and judgment to make an appropriate independent assessment of the value of an attorney's services. *Id.* at 1303. With respect to hours, if an applicant's documentation "is inadequate, the district court may

reduce the award accordingly.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). “Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.” *Id.* at 434.

Plaintiff claims the following hours and rates:

ATTORNEY	HOURS	RATE	TOTAL
James Pacitti	9.10	\$325	\$2,957.50
Scott Cohen	0.50	\$395	\$197.50
Adam Hill	19.50	\$255	\$4,972.50
Alicia Mandolini	1.30	\$265	\$344.50
Paralegals / law clerks	3.90	\$125	\$487.00

TOTAL ATTORNEYS’ FEES: \$ 8,959.50

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plying the standards of law set forth above, the Court finds the evidence does not support either the number of hours claimed nor the hourly rates sought.

Reasonable Rates

In support of the requested hourly rates, Plaintiff attaches the Consumer Law Attorney Fee Survey (2007), an unsigned Biography of Krohn & Moss, LTD. Attorneys, and Declarations from Mr. Pacitti, Mr. Hill, Mr. Cohen, and Ms. Mandolini, which generally state that their respective time entries are reasonable and accurate, and that their biographies accurately reflects their experience (Doc. No. 27-exhibits). In the Motion, Plaintiff also cites to The National Law Journal’s 2007 survey of billing rates for the largest law firms in the United States in support of the hourly rates requested, as well as the “Laffey Matrix,” prepared by the United States Attorney’s Office for the District of

Columbia (Doc. No. 27). Defendant objects to these rates, contending that a maximum rate of \$250 an hour is all that is warranted here (Doc. No. 29).

The going rate in the community is the most critical factor in setting the fee rate. *Martin v. University of South Alabama*, 911 F.2d 604, 610 (11th Cir.1990). The relevant community here is Orlando, Florida. Plaintiff cites no case where a local court awarded these rates for similar services, and local precedent is to the contrary.

Magistrate Judge Kelly recently addressed identical arguments from these attorneys (both plaintiff's and defense counsel), in a similar case under the Act. *Jennifer Morua v. United Recovery Systems, Inc.*, Case No. 6:10-cv-296-Orl-19-GJK. In a Report and Recommendation dated April 18, 2011, Judge Kelly found a reasonable rate for Mr. Pacitti to be \$250; a reasonable rate for Mr. Hill to be \$200; and a reasonable rate for Ms. Mandolini to be \$200, noting:

Other courts in the Middle District of Florida have rejected the use of the Consumer Law Attorney Fee Survey as sufficient evidence to support a requested hourly rate in the relevant legal community. *See Sheeley v. Advanced Check Processing*, Case No. 3:10-cv-0231-J-34JBT, 2010 WL 4569868 at *3 (M.D. Fla. Sept. 13, 2010) (rejecting the Consumer Law Attorney Fee Survey and finding James Pacitti's reasonable hourly rate to be \$200.00); *Selby v. Christian Nicholas & Associates, Inc.*, Case No. 3:09-cv-121-J-34JRK, 2010 WL 745748 at *5 (M.D. Fla. Feb. 26, 2010) (rejecting requested hourly rates based on Consumer Law Attorney Fee Survey, including Adam Hill's requested rate of \$225.00, and setting reasonable hourly rate of \$200.00 because counsel failed to provide any other information supporting requested rates).

In this case, Plaintiff's counsel do not rely solely on the Consumer Law Attorney Fee Survey, but also rely on a biography for each attorney who worked on the case, and the affidavits of three attorneys stating that the biographical statements are accurate. Doc. Nos. 27-3 at 1-3, 27-4 at 1-7. As set forth therein, Mr. Pacitti has been practicing law for fifteen years and has exclusively focused on FDCPA cases for the past ten years. Doc. Nos. 27-3 at 1-2, 27-4 at 2. * * *. Mr. Hill has practiced law since 2007 and has focused his practice on FDCPA litigation. Doc. Nos. 27-3 at 2-3, 27-4 at 4. Ms. Mandolini has practiced law since 2000, but her biography does not state how long she has practiced FDCPA litigation. Doc. Nos. 27-3 at 3, 27-4 at 7.

This case involved is a routine, straightforward FDCPA action. *See generally Selby*, 2010 WL 745748 at *5 ("The Court notes that this sort of FDCPA action is of a

routine, straightforward nature.”). Mr. Pacitti, who requests an hourly rate of \$325.00 in this case, and Mr. Hill, who requests an hourly rate of \$255.00 per hour in this case, have recently been awarded reasonable hourly rates in similar FDCPA cases as low as \$200.00 per hour in the Middle District of Florida. *See Sheeley*, 2010 WL 4569868 at *3 (M.D. Fla. Sept. 13, 2010) (finding Mr. Pacitti’s reasonable hourly rate to be \$200.00); *Selby*, 2010 WL 745748 at *5 (M.D. Fla. Feb. 26, 2010) (finding Mr. Hill’s reasonable hourly rate to be \$200.00). Plaintiff’s counsel also fail to cite to any case within the Orlando Division of the Middle District of Florida where they have been awarded the hourly rates requested.

Morua, Case No. 6:10-cv-296-Orl-19-GJK, at Doc. No. 31. Judge Kelly also determined that a reasonable rate for paralegals and law clerks in this market is \$95.00. *Id.*

The *Morua* case is virtually on all fours with the instant motion, and the reasoning set forth in that opinion mirrors the experience of this Court. As such, Judge Kelly’s analysis is equally applicable and persuasive here.²

Reasonable Hours

From the motion and the attachments, Plaintiff claims it took *four* attorneys and over 30 hours to prosecute a one count, garden variety action under the Act that yielded Plaintiff a settlement of \$750.00. While the Court does not find the recovery to be nominal in view of the purpose of the Act, nor that the fees obtained by counsel must always be proportional to the amount awarded, it does find that the hours spent must be warranted by the task at hand. In this Court’s experience, it does not require four attorneys to prosecute a simple Fair Debt Collection case that was never tried, had limited discovery, and involved hardly any motion practice. While the Court does not agree with Defendant’s suggestion that an across-the-board reduction of 80% is appropriate here, it does agree that the

²In addition to these counsel, Attorney Scott Cohen billed a half hour here, at \$395 an hour. Because the Court finds this time to be non-compensable, it need not address whether Mr. Cohen’s rate is reasonable.

number of cooks in this small kitchen resulted in numerous duplicative,³ excessive or otherwise unnecessary entries of time.

The billing sheets are replete with entries of attorneys conferring with each other, reviewing each other's work product, and otherwise doing the same tasks. *See* entries at April 5, 2010, April 6, 2010, May 6, 2010, May 11, 2010, September 9, 2010, September 15, 2010, October 1, 2010, among others. As a particularly glaring example, on November 4, 2010, Attorney Scott Cohen billed a half hour (at \$395 per hour) for work consisting solely of reviewing a motion drafted by Attorney Hill, and exchanging emails with Attorneys Hill and Pacitti. There is no showing why *three* attorneys, let alone three who are well qualified and experienced, were needed to prosecute a routine discovery motion which was, in fact, later withdrawn. In view of the claimed expertise of his colleagues, Mr. Cohen's services did nothing to advance the case and are not shown to be necessary. As such, this time is *per se* unreasonable, and it is **recommended** that no award for it be made here.

The time sheets also reflect time spent on ministerial tasks involving purely clerical work, such as reviewing receipts of electronic filing notifications. The Court agrees with Defendant's assertion that time spent doing purely clerical tasks is not compensable. *See Scelta v. Delicatessen Support Services, Inc.*, 203 F.Supp.2d 1328, 1334 (M.D. Fla. 2002). Considering all of the *Johnson* factors, the Court cannot recommend approval of over thirty hours of attorney time to prosecute this matter.

"When a district court finds the number of hours claimed is unreasonably high, the court has two choices: it may conduct an hour-by-hour analysis or it may reduce hours with an across-the-board cut." *Bivens v. Wrap It Up, Inc.*, 548 F.3d 1348, 1350 (11th Cir. 2008). In this case, as the

³*See, e.g.:*

Mon Dec 13, 2010 Adam Hill 1.00 - Prepared time entries in final attempt to resolve fees and costs prior to filing fee petition; Tue Dec 7, 2010 Adam Hill 1.00 - Prepared time entries in final attempt to resolve fees and costs prior to filing fee petition;

deficiencies noted above appear throughout the billing, and the use of block billing makes it difficult to parse through an entry to determine how much is properly compensable, it is **respectfully recommended** that the motion be **granted, in part and denied, in part** and that an award be made in accordance with the following hours found to be reasonable:

<u>Attorney</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
James Pacitti	2.5	\$250	\$625.00
Adam Hill	9.0	\$200	\$1,800.00
A. Mandolini	6.0	\$200	\$1,200.00
Paralegals/clerks	2.0	\$95	\$190.00
		TOTAL	\$3,815.00

Costs include the filing fee, which is compensable and should be awarded, for a total **recommended** award of **\$4,165.00**.

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen (14) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Recommended in Orlando, Florida on April 26, 2011.

David A. Baker

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge
Counsel of Record
Courtroom Deputy