

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX AT KINGSHILL

DIAMOND CREST, LTD.,)	CIVIL NO. 591/01
Plaintiff,)	
)	
v.)	ACTION TO RECOVER
)	POSSESSION OF REAL
FNA SERVICE STATION, INC., NAYEF)	ESTATE
YOSEF ASAD d/b/a FNA SERVICE)	
STATION and THE BANK OF NOVA)	
SCOTIA,)	<u>NOT FOR PUBLICATION</u>
Defendants.)	
)	

Kevin A. Rames, Esq.
211 Company Street, Suite 3
P.O. Box 3030
St. Croix, V.I. 00822
(Attorney for Plaintiff)

Pamela Lynn Colon, Esq.
27 & 28 King Cross Street, 1st floor
Phoenix Court Business Center
St Croix, V.I. 00820
(Attorney for Plaintiff)

Bruce P. Bennett, Esq.
Hunter, Cole & Bennett
Pentheny Bldg. 3rd Floor
1138 King St. Suite 301
St. Croix, V.I. 00820
(Attorney for Defendants FNA & Asad)

Francis J. D'Eramo, Esq.
Nichols, Newman, Logan & D'Eramo, P.C.
1131 King St. Suite 204
St. Croix, V.I. 00820-5008
(Attorney for Defendant Bank of Nova Scotia)

Maria M. Cabret, Presiding Judge

MEMORANDUM OPINION

(Filed June ~~14~~ 2006)

THIS MATTER is before the Court on the issue of what damages, if any, Plaintiff, Diamond Crest, Ltd., may be entitled to receive. Additionally, Defendants, FNA Service Station, Inc. and Nayef Yosef Asad, filed a Motion to Set Bond and to Stay Execution of the writ of restitution until there is a final judgment in this case which can be reviewed by the Appellate Division. Because the parties are awaiting a decision on damages there is no final judgment from which they can appeal. Plaintiff opposes Defendants' motion, arguing that should Defendants prevail, they will be able to adequately establish damages and a monetary judgment will fully compensate them for any loss. For the following reasons, Plaintiff's request for damages will be granted in part, and Defendants' Motion to Set Bond and to Stay Execution of the writ of restitution pending appeal will be denied as moot.

I. Facts and Procedural Background

Plaintiff, Diamond Crest, Ltd., initiated this action in order to evict Defendants,¹ FNA Service Station, Inc. and Nayef Yosef Asad, ["Defendants"] from commercial property that is currently being leased from Plaintiff. Plaintiff alleged that Defendants violated numerous provisions of the parties' lease agreement. Plaintiff asserted that it served Defendants with a Notice of Default of the License Agreement between the parties and that Defendants failed to cure the violations and defaults.

On July 15, 2003 Plaintiff filed a Motion for Summary Judgment requesting an order from the Court evicting Defendants and returning the property to Plaintiff. Defendants failed to respond to Plaintiff's motion and on August 25, 2003, Plaintiff filed a Motion to Deem Motion for Summary Judgment Conceded. On March 4, 2004, the Court issued an Order granting Plaintiff's Motion to Deem Motion for Summary Judgment Conceded. The Court's order evicted Defendants, returned the property to Plaintiff and set a date for a hearing on

¹ Defendant Nayef Yosef Asad entered into the license agreement with Plaintiff on or about June 27, 1995 and thereafter, with the approval of the Plaintiff, assigned the license to Defendant FNA Service Station, Inc. on November 7, 1995. Defendant Asad remained the guarantor of the assignee, FNA Service Station, Inc., and is the sole shareholder and principal officer of Assignee. (Am. Compl. Ex. A.)

Plaintiff's damages. On March 11, 2004, Defendants filed a Motion to Reconsider Grant of Summary Judgment as Conceded and subsequently filed a memorandum in support of this motion. On August 4, 2004, the Clerk of the Superior Court prepared a Writ of Restitution, which was not executed, pending determination of Defendants' motions, including the Motion to Quash Writ of Restitution, filed on August 18, 2004.² On November 18, 2004, this Court entered an order denying Defendants' Motion to Reconsider Grant of Summary Judgment as Conceded and Motion to Quash Writ of Restitution. The Court also ordered that the Territorial Marshal execute the Writ of Restitution dated August 4, 2004. Execution of the writ was stayed when Defendants filed a notice of appeal, which has since been withdrawn.

On March 3, 2005, Defendants FNA Service Station, Inc. and Nayef Yosef Asad filed a Motion to Set Bond and to Stay Execution of the Writ of Restitution. This motion was not accompanied by a memorandum of law or supporting affidavits or exhibits as required by Local Rule of Civil Procedure 7.1(e). In their motion, Defendants point out that because the parties are awaiting a decision on damages there is no final judgment from which they can appeal. Defendants argue that a stay is necessary in order to prevent their eviction from the subject premises until such time that this Court issues a final appealable order, and Defendants can appeal this case to the Appellate Division. Defendants further argue that to restore the property to the Plaintiff before Defendants can pursue an appeal of the summary judgment entered by this court evicting Defendants, could result in an irreparable and wrongful deprivation to Defendants. Additionally, Defendants argue that the Plaintiff will not be prejudiced if the Court were to set a bond, in the amount of a reasonable rent differential, to secure plaintiff's position.

² Defendants' Motion to Quash Writ of Execution was actually signed and dated by Defense Counsel as having been submitted on "18 Aug 03". However, the document was stamped by the Clerk of Court as having been received by the Court as of "04 AUG 18 P3:19".

The Court convened a hearing on damages on May 8, 2005, which was continued to June 20, 2005 because Defendants had not received discovery from Plaintiff. Prior to adjourning, Defendants made an oral Motion to Dismiss their pending counterclaims against Plaintiff which Plaintiff did not oppose. On May 27, 2005, Defendants' oral Motion to Dismiss their pending counterclaims against Plaintiff was granted by this court. A hearing on Plaintiff's damages was held on June 20, 2005.

II. Damages

The court must decide what damages, if any, Plaintiff may be entitled to receive as a result of the judgment entered by this Court on March 4, 2004, evicting Defendants and returning the property to Plaintiff.³ To this end, in addition to granting Plaintiff's summary judgment and evicting Defendants and returning the property to Plaintiff on March 4, 2004, the Court granted Plaintiff's request for a hearing on damages pursuant to that judgment.⁴ At the hearing on damages that was held on June 20, 2005, Plaintiff requested damages consisting of attorney's fees and costs incurred in prosecuting this action. Plaintiff submitted Plaintiff's Exhibit 1, a copy of the License Agreement, which shows Plaintiff is entitled to all reasonable costs, including attorney's fees, incurred by Plaintiff in enforcing its rights under the agreement. (Pl's. Ex. 1 at sec. 8(e).) At the damages hearing, Plaintiff also submitted Plaintiff's Exhibit 2, which includes attorney's invoices, cancelled checks, and a summary page. Plaintiff claims it is entitled to \$55,834.75 in attorney's fees and costs based upon the fees that were paid to its various attorneys. Defendants maintain that attorney's fees and costs should either be disallowed or limited and alternatively argue that should the court find that the Plaintiff is allowed any fees pursuant to title 5 section 541 of the Virgin Islands Code or under

³ The approach to determining the amount of an award of attorneys' fees in this jurisdiction has long been based on several Third Circuit opinions, e.g., *Acosta v. Honda Motor Co.*, 717 F.2d 828, 843-44 (3d Cir. 1983); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166 (3d Cir. 1973) ("Lindy I").

⁴ Information necessary for determining the amount of a reasonable award of attorneys' fees, can be supplied by affidavits, stipulations or a hearing. *Estien v. Christian*, 507 F.2d 61, 64 (3d Cir. 1975).

the License Agreement, the fees Plaintiff requests are not reasonable considering the nature of the claims.

Defendants argue in their trial memorandum that Plaintiff should have filed its complaint as an action of forcible entry and detainer ("FED"), not as an action to recover possession of real estate, and that as such Plaintiff is only entitled to damages of \$2.00 as allowed in an FED action. The Defendants are incorrect. The Third Circuit Court of Appeals has described an FED proceeding under Virgin Islands law as "a simple summary proceeding, with time requirements substantially shorter than those provided in ordinary civil actions and with the issues sharply restricted." *C.M.L. Inc. v. Dunagan*, 904 F.2d 189, 190-91 (3d Cir.1990). The Third Circuit Court of Appeals has further explained that "the jurisdiction of the Court in FED cases is confined to determining the issue of peaceable possession and does not extend to (a) an adjudication of title or (b) the right to possession; nor can the justice adjudicate a right of possession that depends on an equitable interest in the premises or inquire into equitable rights and give relief to which the party might be entitled in equity." *Estate Thomas Mall, Inc. v. Territorial Court*, 923 F.2d 258 (3d Cir. 1991), cert. denied, 502 U.S. 808, 112 S. Ct. 50, 116 L. Ed. 2d 28 (1991). In contrast, an action to recover possession is afforded the full discovery and pre-trial proceedings associated with any usual civil action. *Mapes Monde, Ltd. v. A.H. Riise Gift Shop, Inc.*, 337 F.Supp.2d 704 (D.V.I. App. Div. 2004). The record demonstrates that this matter was not adjudicated in a summary manner typical of FED proceedings. This action could not have been filed as an FED, as it would have exceeded the scope of the Court's jurisdiction in a summary proceeding.

Additionally, Defendants argue that counsel fees are not appropriate in an action filed pursuant 28 to V.I.C. § 281. Again, the Defendants are incorrect as fees are allowed in an action to recover possession. *Mapes Monde*, 337 F.Supp at 706. Alternatively, Defendants argue that if fees are allowed, Plaintiff has submitted fees for some expenses that should not be

allowed. Defendants claim that pursuant to *Dr. Bernard Heller Found. v. Lee*, 847 F.2d 83, 89 (3d Cir. 1988), expenses related to client meetings are non-reimbursable under 5 V.I.C. § 541. This position misstates the holding of the Court in that case. The Court was specifically referring to client meetings with co-counsel, and not all meetings with clients. *Dr. Bernard Heller Found.*, 847 F.2d at 89. Additionally, Defendants argue that Plaintiff should not be allowed to recover fees for depositions that were taken in this action because the Plaintiff obtained a judgment of eviction based upon the felony conviction of Defendant Asad, therefore the depositions were unnecessary. This argument fails because the depositions were taken before Defendant Asad's conviction was final and before Plaintiff was aware of the conviction. (Pl's Mot. Sum. J. at 2-3.)

III. Discussion

Awards of attorney's fees under title 5 section 541 of the Virgin Islands Code are within the discretion of the court. *Acosta v. Honda Motor Co.*, 717 F2d 828, 844 (3d Cir. 1983). While the Court agrees that Plaintiff is entitled, as a prevailing party, to attorney's fees, under title 5 section 541 of the Virgin Islands Code and under section 8(e) of the License Agreement,⁵ the amount claimed by Plaintiff is unreasonable. The Virgin Islands Code and the Licensing Agreement both allow the Plaintiff to recover reasonable attorney's fees and costs in this action. The License Agreement is silent as to how reasonability is to be determined under the agreement but section 23 of the License Agreement provides that the agreement shall be construed and interpreted in accordance with the laws of the U.S. Virgin Islands.⁶ Accordingly, the Court will use the standard of reasonability used to award attorney's fees

⁵ Section 8(e) of the License Agreement provides that "Licensee shall reimburse Licensor on demand for all reasonable costs (including attorneys' fees) incurred by Licensor in enforcing its rights or remedies hereunder.

⁶ Section 23 of the License Agreement provides that "It is the intent of the parties that this License Agreement shall be construed and interpreted, and that all questions arising thereunder, shall be determined in accordance with the provisions of the laws of the U.S. Virgin Islands."

under title 5 section 541 of the Virgin Islands Code. The Code provides, in pertinent part:

§ 541. Costs defined

(a) Costs which may be allowed in a civil action include:

- (1) Fees of officers, witnesses, and jurors;
- (2) Necessary expenses of taking depositions which were reasonably necessary in the action;
- (3) Expenses of publication of the summons or notices, and the postage when they are served by mail;
- (4) Compensation of a master as provided in Rule 53 of the Federal Rules of Civil Procedure;
- (5) Necessary expense of copying any public record, book, or document used as evidence on the trial; and
- (6) Attorney's fees as provided in subsection (b) of this section.

(b) The measure and mode of compensation of attorneys shall be left to the agreement, express or implied, of the parties; but there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defenses thereto...

5 V.I. CODE ANN. § 541 (1997).

The Court finds that numerous charges claimed by the Plaintiff are not recoverable under the statute including, overhead costs such as photocopying,⁷ telephone calls, postage, and computer research charges. *Lempert v. Singer*, 29 V.I. 169, 172 (D.V.I. 1993); *Wenner v. Gov't of the Virgin Islands*, 29 V.I. 158, 163 (D.V.I. 1993); *Jo-Ann's Launder Ctr., Inc. v. Chase Manhattan Bank*, 31 V.I. 227, 236 (D.V.I. 1995); *Morcher v. Nash*, 40 V.I. 256 (D.V.I. 1998). The court also notes that the Plaintiff is asking for fees associated with each new attorney reviewing the file when the Plaintiff changed attorneys. This duplication of work will not be billed to the Defendant. *Good Timez, Inc. v. Phoenix Fire and Marine Ins. Co., Ltd.*, 754 F. Supp. 459, 464 (D.V.I. 1991); *Jo-Ann's Launder Ctr., Inc. v. Chase Manhattan Bank*, 31 V.I. 227, 235 (D.V.I. 1995).

⁷ Costs for copying and other types of reproductions should be allowed when they are shown to be necessary or they are introduced in evidence. *John v. Christian* 26 V.I. 129 (Terr. Ct. 1991). That showing has not been made in this case and accordingly these costs are viewed as overhead and not allowed.

During the course of the present litigation, Plaintiff employed multiple attorneys and law firms. The Plaintiff has submitted invoices from various counsel who have made appearances in this case including the law firm of Alkon, Meaney & Hart, Attorney Pamela Colon, and Attorney Kevin Rames. In addition to the fees and costs of attorneys who have made an appearance in this action, Plaintiff has requested fees for the services of Attorney Eric Chancellor and Attorney Paul Covell. The billing statements from these five attorneys and law firms comprise Plaintiff's claim for damages. A review of these records indicates that some of the requested fees and costs are not recoverable because they fall under the above mentioned charges or because the work was not part of this action.

This Court must first inquire into the services provided and the time billed by the attorneys and the value of that time before granting an award of costs in this matter. *Estien v. Christian*, 507 F.2d 61, 63 (3d Cir. 1975) applying *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973) ("Lindy I"). The value of an attorney's time generally is reflected in his normal billing rate. *Lindy I* at 167. The Court notes that hourly rates within this jurisdiction range from \$200.00 to \$400.00 an hour depending on the experience of the lawyer. To that end the Court has closely examined Plaintiff's Exhibit 2 which consists of more than 100 pages of documents, most of which contain numerous entries. Before going through the categories of costs that are not allowable, the Court will deny Plaintiff's request of fees for the services of Attorney Eric Chancellor and Attorney Paul Covell because neither attorney appeared on behalf of the Plaintiff in the present action and from the documents submitted there is no justification for indemnifying the Plaintiff for these costs. The invoices submitted to the Court from these attorneys are mostly for services provided before this action was filed and nothing in the invoices indicates that the services were part of the current litigation.

There exists in the record a number of charges related to the researching, filing and prosecution of a forcible entry and detainer action. This action is separate from the present litigation; therefore, these costs are not recoverable in this action to recover possession of real estate, and none of these costs will be allowed.⁸ Finally, the Court will not allow the numerous claims for overhead costs that are not recoverable under the laws of the Virgin Islands. *Lempert 29 V.I. at 172.* These include costs for postage, copies, courier services, and unexplained charges.

The court now turns to the hours and costs charged by the remaining attorneys for whom bills have been submitted. The Plaintiff has produced billing from Alkon & Meaney for 83.9 hours, which includes charges for time spent on a forcible entry and detainer action, 16.66 hours, and a Motion for Sanctions and Attorney's Fees, 6 hours. The forcible entry and detainer action was a separate action from the one before the Court here and the Motion for Sanctions and Attorney's Fees was denied by the Court on March 31, 2003. Accordingly, no fees for these matters will be allowed. This leaves 61.24 hours billed by Alkon & Meaney at \$250.00 per hour which equals \$15,310.00. James Meaney prosecuted this action for the firm of Alkon & Meaney. The Court notes that James Meaney is an experienced litigator who has often appeared before this Court and given his experience and expertise, the hourly rate is reasonable and within the standard rates charged within this jurisdiction. Additionally, the Court is awarding costs of \$1256.89; this amount represents the allowable costs submitted by Alkon & Meaney but does not include costs for postage and copies. Therefore, the Court will award \$15,310.00 for attorney's fees and \$1256.89 for costs.

Next, the Court considers the bills submitted for Attorney Pamela Colon. Plaintiff has submitted bills for 21.5 hours from Attorney Colon billed at \$300.00 per hour. This includes 6.5 hours to review the file when it was transferred from Alkon & Meaney, and 2 hours to

⁸ Additionally, the Plaintiff did not prevail in that action, and, had Plaintiff prevailed, it would have been entitled to only the \$2.00 fee allowed by title 28 section 794 of the Virgin Islands Code.

prepare the file for transfer to Kevin Rames. Fees that were incurred in the transfer of the file from one attorney to another will not be allowed. Additionally, the court will not allow \$70.26 in computer research charges requested by the Plaintiff as it has not been shown that this research was outside the scope of normally conducted research which is considered part of overhead. *Morcher v. Nash*, 40 V.I. 256 (D.V.I. 1998). The Court notes that Pamela Colon is an experienced and excellent litigator who has often appeared before this Court and given her experience and expertise, the hourly rate is reasonable and within the standard rates charged within this jurisdiction. This leaves 13 hours billed by Attorney Colon at \$300.00 per hour which equals \$3,900.00, and which the Court will allow.

Next the Court considered the bills submitted for the Law Office of Kevin Rames. Plaintiff has submitted bills for 67.35 hours from the office of Attorney Rames. This includes .95 hours to review the file when it was transferred from Attorney Colon. As stated earlier fees for transferring the file will not be allowed. This leaves 66.4 hours that the Court finds allowable. Of these, 2.85 hours were billed at \$75.00 an hour, 3.25 hours were billed at \$250.00 an hour, 46

.75 hours were billed at \$285.00 an hour and 13.55 were billed at \$300.00 per hour, which equals a total of \$18,415.00 for allowed hours. The Court notes that Kevin Rames is an experienced litigator who has often appeared before this Court and given his experience and expertise, the hourly rates are reasonable and within the standard rates charged within this jurisdiction. Additionally, Plaintiff has submitted bills for costs of \$412.25, of this \$382.25 is for overhead items including postage, copies and courier services and an unexplained charge for payment to the Virgin Islands Government that will not be allowed. Costs of \$30.00 for service of the Termination of Lease Agreement will be allowed. Therefore, the Court will allow \$18,415.00 for attorney's fees and \$30.00 for costs.

As stated earlier the value of an attorney's time is generally reflected in the normal billing rate of the attorney. The Court again notes that hourly rates within this jurisdiction range from \$200.00 to \$400.00 an hour depending on the lawyer. Accordingly, after considering the experience of the attorneys that have submitted bills in this matter, the Court finds that the rates charged are reasonable. The above determinations represent the lodestar of the Court's fee determination and provide a reasonably objective basis for valuing the attorneys' services. The Court now considers the other factors that must be taken into account in computing the value of an attorney's services. These include the contingent nature or likelihood of success and the quality of work. *Lindy I* at 168. Here there is no evidence that the attorney's fees were contingent on success and the likelihood of success was high, accordingly there is no need to increase the attorney's compensation based on the likelihood of success. As to the quality of work, while the issues in this action were not novel or complex, they were zealously fought by Defendants' counsel. Defendants' earlier attorney defended on points that were unlikely to prevail but nonetheless required Plaintiff's attorneys to expend an inflated amount of effort, and hours, on this case. After considering the degree of skill necessary to pursue this matter along with the contentious nature of the proceedings, the Court finds that the hours billed in this matter to be reasonable and there is no justification for an increase or decrease in fees to adjust for the quality of work. The value of the work done in this case bears a reasonable relationship to the hourly compensation that was billed. Accordingly, the Court will award costs of \$1286.89 and attorney's fees totaling \$37,625.00. This amount represents the reasonable costs recoverable under the law.

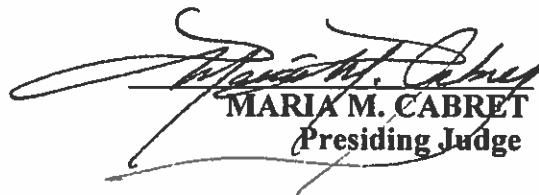
IV. Motion to Set Bond and to Stay Execution

Defendants moved the Court to stay the writ of restitution dated August 4, 2004, pending a decision on damages in this matter. Defendants have already, through their motion and orally through counsel at the damages hearing, put the Court on notice that Defendants will appeal

the grant of Summary Judgment once a final judgment on damages has been entered. As the Court is now issuing a judgment on damages in this matter the Defendants' motion will be denied as moot.

V. Conclusion

For the foregoing reasons, a judgment of damages will be entered in favor of Plaintiff and Defendants' Motion to Set Bond and to Stay Execution of the Writ of Restitution will be denied as moot. Furthermore, the Court will order that the Marshal of the Superior Court execute the Writ of Restitution previously ordered in this matter.


MARIA M. CABRET
Presiding Judge

ATTEST:

DENISE D. ABRAMSEN

Clerk of the Court

By: 
Deputy Clerk

Dated: 