**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**
**ABINGDON DIVISION**

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| **DOUBLE K PROPERTIES, LLC**, | ) | |
| | ) | |
| Plaintiff, | ) | Case No. 1:03CV00044 |
| | ) | |
| v. | ) | **OPINION AND ORDER** |
| | ) | |
| **AARON RENTS, INC.,** | ) | By: James P. Jones |
| | ) | United States District Judge |
| Defendant. | ) | |

*Mark L. Esposito, Penn, Stuart & Eskridge, Bristol, Virginia/Tennessee, for Plaintiff; Richard C. Maxwell, Woods, Rogers P.L.C., Roanoke, Virginia, and Alfred S. Lurey, Kilpatrick Stockton, LLP, Atlanta, Georgia, for Defendant.*

This case is before me on the defendant's Motion for Award of Attorneys' Fees and Costs made pursuant to Federal Rule of Civil Procedure 54(d)(2). The lease that is the subject of the action provides for the award of reasonable attorneys' fees and expenses, and the defendant requests an award in the amount of $72,123.34. The plaintiff objects that the contractual attorneys' fees provision is inapplicable because the dispute was not decided under the terms of the lease, or, in the alternative, that the fees and expenses are "excessive, duplicitous, and unsupportable under applicable law." (Pl.'s Resp. Def.'s Mot. for Att'y's Fees 2-3.) Because I find that the plain language of the lease compels that the attorneys' fees provision ought to apply, I

award such fees and costs to the defendant. However, I agree with the plaintiff that the fees and costs ought to be reduced, and I therefore order an award to the defendant in the amount of $37,387.34.

I

The plaintiff filed this action for a declaratory judgment asking the court to interpret a disputed provision of a commercial real estate lease.[1] The primary question was whether an extension option described in a commercial real estate lease as personal to the original tenant was nevertheless exercisable by an assignee from the debtor under section 365(f) of the Bankruptcy Code.[2] The plaintiff, as landlord, asserted that the right to extend the lease was personal to the original tenant and was not available to the defendant, who had purchased its interest as tenant in the lease from the original tenant when the latter liquidated its assets during Chapter 11 bankruptcy proceedings. The plaintiff also sought an injunction preventing the defendant from occupying the leased premises. The defendant counterclaimed, asserting that it was entitled to exercise the option under the Bankruptcy Code. I

[1] Jurisdiction of this court exists pursuant to diversity of citizenship and amount in controversy. *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2003).

[2] *See* 11 U.S.C.A. § 365(f) (West 1993).

granted summary judgment in favor of the defendant, holding that section 365(f) of the Bankruptcy Code, which invalidates any lease or contract provision "which burdens the debtor's ability to make an effective assignment by modifying . . . [the lease] so that the assignee receives a different agreement than the debtor had," trumps the extension restriction of the lease and allows the new tenant to exercise the option to extend the lease. *Double K Props., LLC v. Aaron Rents, Inc.*, No. 1:03CV00044, 2003 WL 21657914, at *2 (W.D. Va. July 15, 2003) (quoting *In re David Orgell, Inc.*, 117 B.R. 574, 576 (Bankr. C.D. Cal. 1990)).

The defendant then filed its Motion for Award of Attorneys' Fees and Costs, claiming that as the prevailing party it was entitled to recover under the terms of the lease. The defendant submitted an affidavit and billing statements from its attorneys verifying the amounts claimed. The plaintiff, in its response to the motion, objected to the allowance of attorneys' fees on the ground that the lease provision did not apply to the present litigation. In the alternative, the plaintiff disputed the amounts requested by the defendant and attached its attorney's affidavit and billing statements as a contrast to the sums claimed by the defendant. The motion and the objections to it have been briefed and argued and are now ripe for decision. This opinion constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 54(d)(2)(C).

II

The plaintiff's first contention is that the attorneys' fees provision in the lease in question is inapplicable because the court's judgment arose out of bankruptcy law and not out of the lease.

A federal court sitting pursuant to its diversity jurisdiction must apply the choice of law rules of the state in which it sits. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). In general, Virginia adheres to the "American rule," under which a prevailing party may not recover attorneys' fees from a losing party, unless a specific contractual or statutory provision to the contrary exists. *See Mullins v. Richlands Nat'l Bank*, 403 S.E.2d 334, 335 (Va. 1991). The validity and interpretation of contractual provisions are determined with reference to the law of the place where the contract was made, unless the parties' express intention appears to be to the contrary. *See C.I.T. Corp. v. Guy*, 195 S.E. 659, 661 (Va. 1938). The lease here expressly states that it is to be "construed under the law of the state in which the Premises are located," which is Virginia. (Compl. Ex. A.) The parties do not dispute that Virginia law applies in the resolution of the matters at hand.

The law with respect to contractual interpretation instructs that contractual terms that are clear and unambiguous must be construed according to their plain meaning. *See Marriott Corp. v. Combined Props., Ltd. P'ship*, 391 S.E.2d 313, 316 (Va. 1990).

A court construing a contractual provision may not read into the contract, to the advantage of one of the litigants, "an exception or condition which the parties omitted from their contract by design or neglect." *Bridgestone/Firestone, Inc. v. Prince William Square Assocs.*, 463 S.E.2d 661, 664 (Va. 1995). The court may not indulge in the exercise of creating a new contract and must read the contract in line with the parties' intent in drafting it, as manifested by the actual words written. *See Amos v. Coffey*, 320 S.E.2d 335, 337 (Va. 1984).

Paragraph 38 of the lease speaks to attorneys' fees and costs and provides:

> If Tenant or Landlord shall bring any action against the other arising out of this Lease, including any suit by Landlord for the . . . possession of the Premises, the losing party shall pay the prevailing party a reasonable sum for attorneys' fees and costs in such suit, at trial and on appeal, and such attorneys' fees and costs shall be deemed to have accrued on the commencement of such action.

(Compl. Ex. A.) This provision's language referencing "any action . . . arising out of this Lease" plainly includes this dispute, as the action would not have existed were it not for the assignability provisions of the Lease. In addition, the provision's explicit mention of suits by the Landlord for the "possession of the Premises" clearly includes the case at hand. Under the unambiguous language and plain meaning of the provision, reasonable attorneys' fees and costs are available to the defendant as the prevailing party.

III

The plaintiff's alternative contention is that the attorneys' fees and expenses as requested by the defendant are excessive and unreasonable and that, under Virginia law, the amount awarded should be reduced. In determining what would constitute "reasonable" attorneys' fees and costs in this case, I must once again heed Virginia law. *See Gregory v. Chem. Waste Mgmt., Inc.*, 38 F. Supp. 2d 598, 626 (W.D. Tenn. 1996) (applying state law standard of reasonableness of attorneys' fees in state law claim).

In assessing the reasonableness of attorneys' fees and costs, the Virginia Supreme Court has allowed that "a fact finder may consider, inter alia, the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate." *Chawla v. BurgerBusters, Inc.*, 499 S.E.2d 829, 833 (Va. 1998); *see also Mozley v. Prestwould Bd. of Dirs.*, 570 S.E.2d 817, 821-22 (Va. 2002) (holding award of attorneys' fees reasonable in light of the risks posed by the litigation to prevailing party); *Va. Elec. & Power Co. v. Mitchell*, 167 S.E. 424, 425 (Va. 1933) (holding reasonableness of attorneys' fees to be assessed based on "the work involved in the preparation and presentation of the

case"). In addition, the professional skill and experience required by the case, the character and standing of the attorneys in their profession, whether the fee was an absolute or contingent one, the reasonableness of the hourly rates charged, the accuracy of the time billed, whether future services in connection with the case will be necessary, and "other attendant circumstances" also impact the reasonableness of an award. *Mullins*, 403 S.E.2d at 335; *see also Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven, Ltd. P'ship*, 480 S.E.2d 471, 472-73 (Va. 1997) (holding trial court erred in ruling that evidence of reasonable hourly rate, reasonable time billed, and accuracy of billing did not constitute prima facie evidence of reasonable attorneys' fees); *Tazewell Oil Co. v. United Va. Bank/Crestar Bank*, 413 S.E.2d 611, 620-21 (Va. 1992) (holding award of attorneys' fees reasonable based on hourly rates charged and accurate time billing); *Beale v. King*, 132 S.E.2d 476, 478-79 (Va. 1963) (holding court's own experience and knowledge of legal services were relevant to assessment of reasonable attorneys' fees and costs); *Maupin v. Maupin*, 164 S.E. 557, 560 (Va. 1932) (endorsing jury instruction referencing wide range of factors in assessing reasonable attorneys' fees and costs).

Moreover, it is settled under Virginia law that "[t]he party claiming the legal fees has the burden of proving *prima facie* that the fees are reasonable and were necessary." *Chawla*, 499 S.E.2d at 833.

The defendant requests an award for attorneys' fees and expenses in the amount of $72,123.34 and has provided its attorneys' billing statements to substantiate the request. The defendant contends that the amount is excessive in several respects. Its primary argument, however, is that the hourly rate charged is unreasonable for this litigation. The defendant was represented by two law firms in this case: the defendant's usual outside counsel from Atlanta, and local counsel located in this district. The lead Atlanta attorney who worked on the case for the defendant charged a rate of $550 per hour, contrasted to the highest rate for the defendant's local counsel of $210 per hour and of the plaintiff's counsel of $170 per hour.

A rule of this court prohibits lawyers not admitted in Virginia from admission to practice in this court, except on a pro hac vice basis in association with a member of the bar of this court. *See* Rule of Court Governing the Admission of Attorneys and Other Matters Related to Appearance in the Court ¶ 4 (1988), *available at* http://www.vawd.uscourts.gov/storders/attorneyadmiss.htm. The defendant was entitled to be represented by counsel of its choice, including its regular corporate attorney. The fact that this lawyer could not be admitted to practice here required the association of local counsel, thus necessitating some duplication of services. Nevertheless, the reasonableness of attorneys' fees in a litigated matter when

calculated for the purpose of shifting them to the opposing party must reflect an examination of similar services provided in the geographical location of the court. *See Davison v. FastComm Communications Corp.*, 42 Va. Cir. 76, 81 (Va. Cir. Ct. 1997) (holding that reasonable fees in litigation in Loudoun County, Virginia, must be determined by hourly rates charged by similar trial attorneys there, rather than by Washington, D.C., rates). Accordingly, I will limit the hourly rate for all the defendant's attorneys to $210, the rate charged by defendant's local counsel, a lawyer experienced in this type of litigation in this court.

While the present case potentially involved a large sum,[3] it was not of such complexity or nature as to require counsel outside of the area or of a highly specialized practice. *Compare Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 178-79 (4th Cir. 1994) (upholding higher hourly rates for out-of-state counsel because case involved issues that could be "politically sensitive" for a local firm), *with Powell Valley Bankshares, Inc. v. Wynn*, No. 2:01CV00079, 2002 WL 728348,

[3] The defendant contends that the amount at stake in the litigation was "at least $545,000." (Lurey Aff. ¶ 6.) The plaintiff disputes the reliability of this figure, because its calculation relies on the suppositions that (1) the five dollars per square foot rent increase initially proposed by the landlord would not have been reduced through further negotiation; and (2) the tenant will decide to exercise the second lease extension, which is a contingency some years away. In any event, it is clear that the outcome of the litigation was significant to the parties.

at *3 (W.D. Va. Apr. 11, 2002) (reducing Richmond, Virginia, hourly rate for "run-of-the-mine litigation" in Big Stone Gap, Virginia).

The defendant reduced its request for attorneys' fees from the amount actually invoiced by the defendant's Atlanta firm, representing, according to the defendant, "time spent in preparation for oral argument on the transfer of venue motion." (Mot. Award Att'ys' Fees & Costs ¶ 7.) The defendant initially moved to transfer venue of the action to the Eastern District of Virginia, but withdrew that motion at oral argument. The plaintiff objects that other time spent in researching and preparing the change of venue motion was not similarly removed from the fee request.

From a close examination of the time records, it is not apparent how much additional time was actually spent researching and preparing the change of venue motion, since certain of the time entries also may encompass other issues in the case. In any event, I find that the filing of the motion to transfer was reasonable under the circumstances. While the motion would likely have been denied, had it not been withdrawn, I find that under the circumstances of this case, it was a reasonable legal argument for the defendant to assert. While I will reduce the award for the time incurred in preparation for argument on this motion as conceded by the defendant (11.5 hours x $210), I will not otherwise change the amount.

The plaintiff also objects to the time spent by the defendant's local counsel as duplicative, as well as Atlanta counsel's travel time to this court. However, as noted above, the requirement that local counsel be associated often will require some duplication of services. I do not find any such duplication unnecessary or excessive in this case. The defendant was entitled to be represented by its Atlanta counsel and the reasonable travel time and expense incurred by that attorney is properly awarded. *See Colonial Williamsburg Foundation v. Kittinger Co.*, 38 F.3d 133, 138 (4th Cir. 1994) (holding that party's regular out-of-state counsel was entitled to compensation for travel time and expense); *Spell v. McDaniel*, 616 F. Supp. 1069, 1099 (E.D.N.C. 1985) (holding that reasonable travel time presumptively billed at same rate as for legal services), *rev'd on other grounds*, 824 F.2d 1380 (4th Cir. 1987).

Finally, the plaintiff objects to the award of time for lead counsel for the defendant in legal research and brief writing. However, the reduction in the hourly rate that I have imposed satisfies this objection.

In summary, all legal services for the defendant in this case will be reduced to a maximum rate of $210 per hour; the balance will be further reduced by 11.5 hours at that rate for time spent in preparing for oral argument on the transfer motion; and finally I will add an additional $1,000 as requested for the estimated time spent in connection with the present motion seeking attorneys' fees. After a careful review

of the relevant factors under Virginia law, I find that the resulting attorneys' fees and expenses awarded are reasonable.

IV

For the foregoing reasons, it is **ORDERED** as follows:

1. The Motion for Award of Attorneys' Fees and Costs [Doc. No. 26] is granted in part and denied in part; and

2. Judgment for attorneys' fees and expenses is entered in favor of Aaron Rents, Inc. against Double K Properties, Inc. in the amount of $37,387.34.

ENTER: November 13, 2003

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United States District Judge