

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
DEX MEDIA, INC., <i>et al.</i> ,)	Case No. 16-11200(KG)
)	
<u>Reorganized Debtors.</u>)	
DEX MEDIA, INC.,)	
)	
Plaintiff,)	
)	
vs.)	Adv. Proc. No. 16-51026(KG)
)	
YELLOW PAGES PHOTOS, INC.,)	
)	
<u>Defendant.</u>)	Re: Dkt No. 64

MEMORANDUM OPINION

The case before the Court has a somewhat convoluted history which the Court will not fully repeat here. The issues before the Court are limited to the imposition of attorneys' fees. It is sufficient for present circumstances for the Court to note that the action began with Yellow Pages Photos, Inc. ("YPPI") bringing suit against Dex Media, Inc. ("Dex Media") in Florida District Court for copyright infringement (the "Florida Action"). Dex Media then sought to have the Court preside and filed an adversary proceeding in the Court. The Court was knowledgeable about the parties, having presided over Dex Media's bankruptcy case and previously a similar case brought against Dex Media's predecessor, SuperMedia, Inc. ("SuperMedia").¹ The Court

¹ YPPI brought a copyright action against SuperMedia commencing May 30, 2013, Case No. 13-10546 and Adversary Proceeding No. 15-50044. The case was vigorously litigated. The Court's earlier opinions better describe the case. *See SuperMedia, LLC v. Yellow Pages Photos, Inc.*, 2016 WL 1367070 (Bankr. D. Del. Apr. 4, 2016); 540 B.R. 85 (Bankr. D. Del. 2015); and 2014 WL 7403448 (Bankr. D. Del. Dec. 29, 2014)

therefore accepted jurisdiction over the dispute. *See* Order Denying Motion to Dismiss or Stay, dated September 16, 2016 (D.I. 18).

Following briefing and oral argument, the Court next dismissed the adversary proceeding on the grounds of collateral estoppel, judicial estoppel and *res judicata*. The Court found that the suit which YPPI brought against Dex Media was part of a series of connected transactions, and that a trial of the action against Dex Media would be a retrial of the SuperMedia litigation.

With the adversary proceeding dismissed, Dex Media moved for its attorneys' fees and costs (the "Fee Motion"). YPPI, which had appealed the Court's dismissal of the adversary proceeding to the District Court, asked the Court to stay its consideration of the Fee Motion while the appeal was pending. The Court denied the stay and the Fee Motion was fully briefed with supporting declarations and the Court heard argument on January 11, 2018.

FACTS

The Court will focus on only a few facts which are relevant to the Fee Motion and YPPI's objection. First, it is certainly true that Dex Media was forced to address the Florida Action. It did. The Florida Action was, however, a separate litigation.

Second, Dex Media's lawyers billed Dex Media and Dex Media paid them in full for their work which consisted of \$1,032.70 hours and \$768,998.50 in fees plus \$2,522.45 in expenses. Dex Media is now seeking to recover the amount it paid its lawyers.

Third, the Court believes its dismissal of YPPI's claims against Dex Media was correct. The ruling is, however, now on appeal. If the District Court overturns the

Court's dismissal, Dex Media will have to return any money it receives from YPPI on the Fee Motion.

Fourth, the applicable rates for the lawyers² involved in the case on behalf of Dex Media are³:

Eric Leon	\$1,225 - \$1,295 per hour
Kuan Huang	\$850.00 - \$905 per hour
Nathan Taylor	\$650.00 - \$680 per hour
Elizabeth Groden	\$525.00 - \$555 per hour
Eric Dellon	\$325.00 per hour
Patrick Jackson	\$515.00 per hour

DISCUSSION

The Copyright Act provides that a court may "award a reasonable attorney's fee" and costs to the "prevailing party" in a copyright action. 17 U.S.C. § 505. Although the statute uses the word "may," a discretionary term, some courts have held that awarding fees to the prevailing party is the "rule rather than the exception." *See Webloyalty.com, Inc. v. Consumer Innovations, LLC*, 388 F. Supp. 2d 435, 443 (D. Del. 2005). In fact, YPPI itself argued exactly as such in a copyright infringement action brought against Ziplocal, LP and Yellow Pages Group, LLC in the District Court for the Middle District of Florida. YPPI told the court that "Section 505 of the Copyright Act expressly authorizes courts to award 'full costs' which may include reasonable attorney's fees, to the prevailing party." YPPI's Motion for Attorney's Fees and Nontaxable Costs, Case

² With the exception of Patrick Jackson who practices in Delaware ("Local Counsel"), the Court will refer to the others as "Non-Local Counsel."

³ For purposes of the Fee Motion, attorneys' hourly rates changed in January 2017. The Court will apply the applicable rates in its formulation.

No. 8:12-CV-755-T-26EAJ (D. MD. Fla.). YPPI further argued that awarding fees is the rule and not an exception. *Id.*, at 2.

The Court views YPPI's argument as correct, that a court may not award attorney's fees as a matter of course but only after making a "particularized case - by - case assessment." *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1985 (2016). A court simply may not award attorney's fees as a matter of course on Section 505 motions. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994); *Leonard v. Stemtech Int'l, Inc.*, 834 F. 3d 376, 403 (3d Cir. 2016). The Court is convinced beyond near certainty that YPPI's lawsuit against Dex Media was a situation of "objective unreasonableness." *Kirtsaeng*, 136 S. Ct. At 1985. In its lawsuit YPPI is making claims contrary to its previous representations to the Court in the SuperMedia action. For instance, in the prior SuperMedia action, YPPI claimed that the license was valid, enforceable and that print advertisements were not infringement. In its new action, YPPI instead claims that the License was not valid and therefore SuperMedia and its affiliates and customers had no right to use the License. There are other inconsistencies. It is therefore very important for SuperMedia to end YPPI's harassment.

The reason for awarding fees, according to YPPI, is to penalize the losing party, to deter meritless suits or defenses. Dex Media also argues about the need for deterrence and how that need is promoted by awarding fees to the prevailing party. Here, assessing the case on a particularized basis, YPPI filed the Dex Media lawsuit mere weeks after the Court's ruling in the SuperMedia case. YPPI waited months to serve Dex Media with the Complaint in the Florida Action. The Complaint in the

Florida Action also asserts positions contrary to YPPI's claims in previous litigation. Deterrence is therefore an important consideration. Fee shifting will deter the filing of weak law suits. *Kirtsaeng*, 136 S. Ct. at 1986; *Stemtech Int'l, Inc.*, 834 F. 3d at 403. What is required to collect the fee money?

1. Be the prevailing party. Dex Media was clearly the prevailing party. It obtained the dismissal of the litigation against it.

2. Be reasonable. Section 505 provides that a court may award reasonable fees. The Court is satisfied that fees in excess of \$760,000 at an early stage of the case are excessive and therefore not reasonable.

A. Fee Rates

The lawyers for Dex Media billed their hourly rates and Dex Media paid those rates. YPPI argues, however, that Dex Media is entitled now only to forum rates paid for the nature of work its lawyers performed. Therefore, according to YPPI, Dex Media may receive only hourly rates charged in Delaware by lawyers with Non-Local Counsel's level of experience. YPPI cites *Interfaith Comm. Org. v. Honeywell Int'l, Inc.*, 426 F. 3d 694, 705 (3d Cir. 2005). There, the Third Circuit wrote:

[T]o determine "the prevailing rates in the relevant community," a court must "assess the expertise and skill of the prevailing party's attorneys and compare their rates to the prevailing rates in the community for similar services by lawyers of reasonably comparable skill, expertise and reputation.

Id. at 708 (quoting from *Loughner v. Univ. Of Pittsburgh*, 260 F. 3d 173, 180 (3d Cir. 2001)).

The hourly rates which YPPI challenges are those charged by Dex Media's Non-Local Counsel, Eric Leon (\$1,225-\$1,295 per hour), Kuan Huang (\$850-\$905 per hour), Nathan

Taylor (\$650- \$680 per hour), Elizabeth Groden (\$525-\$555 per hour) and Eric Dellon (paralegal) (\$325 per hour). The Non-Local Counsel charged a total of 927.1 hours.

The Court finds that YPPI's objection to the rates charged by Non-Local Counsel is ill-founded. First, the cases applying market rates in the community such as *Blum v. Stenson*, 465 U.S. 886 (1984), *Interfaith Comm. and Student Public Research Group of New Jersey, Inc. v. AT&T Bell Laboratories*, 842 F. 2d 1436 (3d Cir. 1988) and others, are cases involving public interest lawyers who did not have customary private practices and charged clients less than the market rate. *See, e.g., Student Public Research Group*, 842 F. 2d at 1438.

Second, in *Dow Chemical Canada Inc. v. HRD Corp.*, 2013 WL 3942052 at *2 (D. Del. July 29, 2013), the District Court ruled that:

In litigation where one party, usually the plaintiff, does not actually pay the attorneys' fees, there is no client check on what the attorneys spend. In such a case, the need for court scrutiny is greater than in a case such as this, where the client was a sophisticated (Fortune 500) business entity that had its own attorney managing the litigative efforts of outside counsel. To some extent, the fact that Dow has already paid the fees seems to me to be evidence that they were reasonable. In particular, some of the matters that come up in typical federal fee litigation, such as, the reasonableness of an attorneys' hourly rate given the attorneys' level of experience, the complexity of the work, and the local market for such work, is not, in my opinion, something that I would consider contested absent some evidence calling the matter into question. A sophisticated consumer's arms-length purchasing of the services establishes that reasonableness, at least in the absence of any contrary evidence. I believe that is also true of the number of hours billed.

Here, Dex Media hired and paid the hourly rates of its Non-Local Counsel, which is the best evidence of the value of their services. *See also In re Fine Paper Antitrust Litigation*, 751 F. 2d 562, 590 (3d Cir. 1984) in which the Third Circuit held that the value of an

attorney's time is the price that time normally commands in the marketplace for legal services in which those services are offered, i.e., her normal billing rate.

In addition, the knowledge and expertise of Non-Local Counsel was critical to Dex Media's success in the litigation. The SuperMedia litigation was essential to the arguments which proved successful in the Dex Media proceeding. New or different counsel would not have had the knowledge of the SuperMedia action which brought about the dismissal of the Dex Media action. *Interfaith Comm.* is satisfied because it explicitly holds that "if a prevailing party can show that it required the particular expertise of counsel from another vicinage, or that local counsel were unwilling to take on the litigation, then it will be entitled to compensation based on prevailing rates in the community in which its attorneys practice. *Interfaith Comm.*, 426 F. 3d at 699. The expertise of Non-Local Counsel was clearly required and, accordingly, it is appropriate to calculate their fees based upon their normal hourly rates.

B. Time Spent

One of the reasons for awarding fees to a prevailing party is deterrence against harassment of repeated litigation. It is clear that YPPI is now in the business of litigation. It has no income from the sale of its photographs, but has brought suit against SuperMedia, Dex Media, TaTa, Inc. and others. See Supplemental Declaration of William Trent Moore, dated January 9, 2018. Deterrence is appropriate. However, the fees charged and which Dex Media seeks from YPPI, \$768,998.50, for the motion to dismiss are troublesome to the Court and must be reduced. While it is true that the

SuperMedia litigation was of critical importance to the motion to dismiss, the Non-Local Counsel already knew the SuperMedia litigation inside and out.

Similarly, it was important for Dex Media to move the litigation from Florida to Delaware because the Court had tried the SuperMedia case and the arguments in support of dismissal of the DexMedia case were more readily understood than would have another court. Nonetheless, the Court will not permit the Florida Action to be a charge against YPPI. It is true that YPPI gave Dex Media fits in having the Court hear the matter. YPPI took the following actions: (1) filed its copyright lawsuit against SuperMedia's parent company, Dex Media, in Florida using the theory that was inconsistent with what it argued in the SuperMedia action, (2) did not serve the complaint in the Florida Action for more than 100 days, (3) refused Dex Media the courtesy of an extension of time to answer, move or otherwise plead in the Florida Action, (4) moved to dismiss the action that Dex Media had filed in Delaware and (5) sought in the Florida Action to enjoin Dex Media from proceeding in Delaware. YPPI's efforts failed. It is little wonder that Dex Media is seeking fees for its work in the Florida Action.

The work done in the Florida Action is, however, not work for which the Court will award compensation in the action before it. The Florida Action may have been a hindrance to Dex Media, but the work in the Florida Action (unlike the SuperMedia litigation) was not "work product that was actually utilized in the instant litigation." *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corporation*, 995 F. 2d 414, 420 (3d Cir. 1993). The court in the Florida Action did not take action which Dex Media was

able to use here. The Court will not award fees based on the Florida Action. In addition to denying fees for the Florida Action, there are other reductions which follow.

The Court reviewed the Dex Media attorney’s time records – line by line. See Declarations of Kuangyan Huang, dated March 22, 2017 and Patrick A. Jackson, dated March 22, 2017. For each and every time recorded, the Court used its independent judgment to approximate the time necessary for the dispute. Here are the results:

Time Keeper	Billed Time (hours)	Reduced Time (hours)	Fees Reduced (dollars)
E. Leon	112.0	19.9	24,377.50
K. Huang	305.5	74.1	63,023.50
N. Taylor	200.9	57.2	38,896.00
E. Groden	243.1	63.7	33,523.50
E. Dellon	43.2	3.7	1,202.50
Totals	904.7	218.6	161,023.00

The fees for the Florida Action will not be paid on the present application of Dex Media and those reductions are:

Florida Counsel	\$51,105.00
Non-Local Counsel	\$52,845.00
Total Florida Action Reductions	\$103,950.00

The total reductions between the Florida Action and Non-Local Counsel Fees is \$264,973.00.

The Court is not reducing travel time or the cost of Local Counsel. Both costs were reasonable and necessary. Travel time is appropriately billed because Non-Local

Counsel worked on the case and needed to get to Wilmington from New York. Local Counsel was required and participated and after reviewing his time records the Court could not find a reason to reduce Local Counsel's fees.

Financial Ruination

The Court has ruled that Dex Media's Non-Local Counsel are entitled to their normal, market rate fees, but that the time the Dex Media attorneys spent and seek to charge YPPI for the motion to dismiss was excessive. The Court will therefore reduce fees from \$768,998.50 to \$504,025.50.

YPPI argues that the Third Circuit law is clear that "fees and costs awarded under Section 505 of the Copyright Act should not result in 'financial ruination' of the party against whom they are assessed." YPPI then cites *Lieb v. Topstone Indus., Inc.*, 788 F. 2d 151, 156 (3d Cir. 1986). In *Lieb*, the Third Circuit stated that: "We emphasize that the aims of the statute are compensation and deterrence where appropriate, but not ruination." *Id.*

YPPI has not presented a clear record of its financial circumstances. Dex Media argues that since 2009, YPPI earned more than \$4 million from copyright lawsuits and therefore Trent Moore's Supplemental Declaration filed in opposition to the Fee Motion is misleading where he declares that YPPI has only \$1,016.23 cash on hand. Supplemental Declaration ¶ 5. But YPPI has made large distributions to its principal, Trent Moore. Dex Media is entitled to the award of attorneys' fees and will be able to ferret out whether or not YPPI has funds to satisfy the award and what to do to collect its fees.

CONCLUSION

It is never comfortable for the Court to award fees to the prevailing party and against the losing party, or to examine time spent and reduce the fees requested. Yet, there are circumstances that require the Court to take such action and such is the case here. The Court must deter YPPI from bringing other baseless copyright actions. Ordering YPPI to pay Dex Media its attorney's fees may be such a deterrence. And, the amount awarded must be reasonable. Accordingly, the Court will award Dex Media fees paid to its lawyers in the sum of \$504,025.50 and \$2,522.45 for their expenses.

Date: January 30, 2018



KEVIN GROSS, U.S.B.J.

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ORDER

Dex Media, Inc. ("Dex Media"), the prevailing party in the captioned adversary proceeding, moved for the imposition of attorneys' fees and expenses against Yellow Pages Photos, Inc. ("YPPI"). For the reasons explained in the accompanying opinion, IT IS HEREBY ORDERED that Dex Media is awarded \$504,025.50 as reimbursement of fees it paid to its attorneys and \$2,522.45 in expenses, both fees and expenses to be paid by YPPI.

SO ORDERED.

Dated: January 30, 2018



KEVIN GROSS, U.S.B.J.