Filed 11/30/17 Lopez v. City of Beverly Hills CA2/3
Received for posting 12/1/17

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ELISA LOPEZ, Plaintiff and Respondent, v. CITY OF BEVERLY HILLS, Defendant and Appellant.	B268451 Los Angeles County Super. Ct. No. BC513593

APPEAL from an order of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

Horvitz & Levy, Lisa Perrochet, Shane H. McKenzie; Bryan Cave, Donald L. Samuels and Julie W. O'Dell for Defendant and Appellant.

LA SuperLawyers, William W. Bloch; Klapach & Klapach and Joseph S. Klapach for Plaintiff and Respondent.

INTRODUCTION

After two years of litigation, this employment discrimination case was tried to a jury. More than a dozen co-workers and supervisors testified against plaintiff and respondent Elisa Lopez. Nevertheless, the jury found in Lopez's favor on her retaliation claim against defendant and appellant City of Beverly Hills, and awarded her compensatory damages of $1 million. After reducing the lodestar and finding that application of a multiplier of 2.0 was appropriate, the trial court awarded Lopez $1,945,295 in attorneys' fees.

On appeal, the City challenges the court's decision to enhance the lodestar by a multiplier of 2.0.[1] The City contends the court employed impermissible considerations, and misapplied the prescribed factors, to enhance the lodestar. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. Lopez's Employment Discrimination Lawsuit

Lopez has been employed by the City since July 2001. In June 2013, Lopez commenced this action against the City and her supervisor, Gregory Routt, under the Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq., for (1) race and national origin discrimination; (2) retaliation; (3) harassment; and (4) breach of duty to prevent harassment and discrimination. Lopez withdrew the fourth cause of action against the City prior to the jury's verdict.

Lopez alleged that she was subjected to discrimination and harassment based on her Hispanic ethnicity and Mexican

---

[1] The City's motion for judicial notice is denied.

descent. She claimed Routt made derogatory comments at work and on his personal website. Lopez also alleged that Routt undermined her authority with her subordinate parking enforcement officers. In February 2011, Lopez submitted a formal complaint to the City concerning Routt's conduct. She claimed the City retaliated against her by not passing her through her probationary period as a supervisor and not appointing her as a supervisor when subsequent positions became available.

The matter proceeded to a jury trial in May and June 2015. After a 10-day trial, the jury returned a verdict in favor of Lopez on her retaliation claim against the City, and against Lopez on her remaining claims for discrimination and harassment. The jury awarded Lopez $1 million in compensatory damages.

2. Lopez's Motion for Attorneys' Fees

After the court entered judgment on the jury's verdict, Lopez filed a motion to recover her attorneys' fees from the City under FEHA. She sought attorneys' fees in the total amount of $2,533,167—a lodestar of $1,266,583.50 enhanced by a multiplier of 2.0.

Lopez argued the hours worked by her attorneys and their staff were reasonable in view of the "[s]ignificant amounts of discovery" conducted regarding her "employment and promotion to supervisor, the different areas of potential proof of [the City's] discriminatory and retaliatory animus," and to address "affirmative defenses the City raised." She maintained the City "engaged in a scorched earth litigation philosophy" and had "recruited many of [Lopez's] co-workers to assist in . . . ratifying the retaliation she experienced." In that regard, Lopez argued the "trial was difficult, involving about 24 witnesses, most of whom were deposed[,] and Plaintiff's counsel had to spend

substantial time preparing examination and impeachment of many of these witnesses." She also stressed that the case "involved numerous complex issues under the FEHA, and a substantial amount of time was required of all attorneys . . . in researching and arguing these various legal issues both prior to and during trial."

With respect to the lodestar's hourly rate component, Lopez submitted declarations from her counsel and other local attorneys who principally represented plaintiffs in employment discrimination matters. Those declarations generally attested that the "current prevailing billing or 'market' rates in the Los Angeles area for experienced employment discrimination attorneys range from approximately $500 to $700 per hour." On that basis, and given the "skill and experience" of her counsel, Lopez sought an hourly rate of $575 for her lead trial counsel, William Bloch, and between $550 and $100 for all other attorneys and support staff who worked on her case.

As for the requested multiplier, Lopez argued several factors justified a fee enhancement. First, she maintained there were "many challenging legal issues, such as those raised in the City's defense," its use of "an experienced investigator," and "the huge number of co-workers and supervisors who testified against [Lopez]." Second, Lopez argued the "financial risks to an attorney accepting a discrimination case on a contingency basis are substantial" and justified an enhancement to attract competent counsel. In that regard, Lopez stressed that her lead trial counsel was "forced to give up other lucrative cases, including hourly work, to take this case to trial." Third, she asserted that, in addition to working without pay for more than two years, her attorneys also "advance[d] approximately $100,000

for experts fees [*sic*], deposition costs, jury fees, court transcripts, and other necessary costs." Fourth, Lopez argued her counsel was "required to exhibit exceptionally specialized skill in employment discrimination law to prevail on the many legal issues presented during trial as well as prior to trial." She emphasized that the City had "free access to its hundreds of employees and its records," while her attorneys were required to expend "exceptional efforts" to obtain access to needed discovery.

Finally, Lopez noted that the sitting trial judge had "previously approved a multiplier of 2.0 for [a different] plaintiff's counsel, who also prevailed in a FEHA-based case." Referring to the court's statement of decision in that case, Lopez argued the trial court there recognized "the extreme risks of the FEHA-based case, and the need to give incentives to plaintiff's counsel and to compensate for the fact many of these cases result in a defense verdict." Lopez maintained her counsel's "representation of Plaintiff in this action also should support the application of a multiplier of 2.0."

The City opposed Lopez's motion. It argued that none of the *Ketchum* factors supported enhancing the "already unreasonable lodestar amount." In fact, the City asked the court to *reduce* the lodestar by at least 50 percent. According to the City, Lopez should only recover $316,645.88 in attorneys' fees to reflect her 25 percent success rate on her claims and her recovery of only 25 percent of the damages she requested.

3. The Court's Ruling on the Fee Motion

The court granted Lopez's motion, awarding her reasonable attorneys' fees in the total amount of $1,945,295. The court ruled that Lopez was the prevailing party, and that she should recover for the hours spent on the case without any apportionment

between the retaliation claim she won, and the discrimination and harassment claims she lost. The court explained that because all three of Lopez's FEHA causes of action were "intertwined," it would not be possible to separate the work done on her successful retaliation claim from the work done on her other two claims.

With respect to the lodestar calculation, the court ruled the requested hourly rates were reasonable, noting that it had "observed the quality of the work performed by plaintiff's counsel" and was "aware of the market rate for attorneys of this caliber and their paralegal and IT staff in the Los Angeles community." The court disallowed some of the requested hours to the extent Bloch had billed time for associate-level or paralegal work, one junior associate failed to submit a supporting declaration for his time, and certain staff billed for clerical and IT work not compensable in a fee request. After the reduction, the resulting lodestar figure was $1,030,747.50—approximately $250,000 less than Lopez requested.

The court then applied a 2.0 multiplier to the prejudgment portion of the lodestar to arrive at a final award of $1,945,295.[2] After observing that *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 (*Ketchum*) prescribed four factors to be considered in deciding whether to apply a multiplier—"(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and]

---

[2] After the parties stipulated to correcting certain mathematical errors, the court entered an order awarding Lopez $1,946,970 in attorneys' fees.

(4) the contingent nature of the fee award"—the court gave the following account of its reasons for granting the fee enhancement:

> "This court is unaware of any empirical data as to the percentage of FEHA retaliation cases that are won by plaintiffs. However, it is the experience of this court that approximately 50% of such cases that go to trial are won by plaintiffs and 50% are won by defendants. Further, given the lack of any empirical data to the contrary, the Court would normally assume such a 50/50 split.
>
> "Defense attorneys get paid whether they win or lose their case. Plaintiff's counsel, having taken their cases on a contingency basis, only get paid when they win.
>
> "After calculating the lodestar, 'the court must adjust the resulting fee to fulfill the statutory purpose of bringing "the financial incentives for attorneys enforcing important constitutional rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-service basis." ' [Citations.]
>
> "The above analysis would lead to the conclusion that if a plaintiff wins her FEHA case that goes to trial, plaintiff's counsel should normally receive a 2.0 multiplier to compensate counsel 'for contingent risk.' [Citation.]
>
> "The issues addressed in this FEHA action were not particularly novel.

> Nonetheless, the case presented difficult issues of fact that required extensive motion practice and a one-week jury trial. This has given the Court ample time to see evidence of counsels' skill in representing their client. The Court was particularly impressed with attorney Bloch's trial skills. The Court finds that at least three of the four criteria listed in *Ketchum* for the application of a multiplier exist in the present case. [Citation.]
>
> "The court is also aware that plaintiff's counsel began work on this case more than four years ago and has both fronted costs and worked without compensation for that length of time. [Citation.]
>
> "The Court finds that, considering all of the circumstances of this case, a multiplier of 2.0 is appropriate."

The City filed a timely notice of appeal.

DISCUSSION

1. Legal Principles and Standard of Review

FEHA provides that the trial court, "in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs." (Gov. Code, § 12965, subd. (b).) "The basic, underlying purpose of FEHA is to safeguard the right of Californians to seek, obtain, and hold employment without experiencing discrimination" on account of, among other things, race or national origin. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 582-583.) " ' "[W]ithout some mechanism authorizing the award

of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." ' [Citation.]" (*Ibid*.)

"[A] court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.' " (*Ketchum, supra,* 24 Cal.4th at pp. 1131-1132; *Serrano v. Priest* (1977) 20 Cal.3d 25, 48 & fn. 23.) In most cases, the trial court calculates the lodestar figure by "determining '*all* the hours *reasonably spent*' and multiplying that total by 'the hourly prevailing rate for private attorneys in the community conducting *noncontingent* litigation of the same type.' " (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 394 (*Horsford*); *Ketchum, supra,* 24 Cal.4th at p. 1133.)

The lodestar is the basic fee for comparable legal services in the community; it may be adjusted upward or downward based on the consideration of factors specific to the case. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1085, 1095; *Ketchum*, *supra*, 24 Cal.4th at p. 1132.) These factors include "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award." (*Ibid*.) "The adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes

a premium for the risk of nonpayment or delay in payment of attorney fees." (*Id.,* at p. 1138.)

"An appellate court may reverse a trial court decision concerning an award of attorney fees only upon a finding of a prejudicial abuse of discretion." (*Horsford, supra,* 132 Cal.App.4th at p. 393.) " 'The scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action." ' " (*Ibid.*) Thus, a trial court's exercise of discretion concerning a fee enhancement "must be based on a proper utilization of the lodestar adjustment method, both to determine the lodestar figure and to analyze the factors that might justify application of a multiplier." (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 647 (*Flannery*).) " 'Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion.' " (*Horsford,* at p. 393.)

2. The trial court did not abuse its discretion by applying a multiplier of 2.0 to the lodestar.

On appeal, the City does not challenge the trial court's lodestar calculation. Instead, the City challenges the court's discretionary decision to enhance the lodestar by a multiplier of 2.0. The City's main argument is that the court erred by presuming that a 2.0 multiplier was appropriate in contingency cases that proceed to trial. According to the City, "[s]tarting from that default position misconstrues the law, relieves the party seeking fees of her burden of proof, and inappropriately puts a thumb on the scale in favor of counsel's request to double an already sizeable fee award." In support of its argument, the City has seized on the court's statement in its written ruling that

"[t]he above analysis would lead to the conclusion that if a plaintiff wins her FEHA case that goes to trial, plaintiff's counsel should normally receive a 2.0 multiplier to compensate counsel 'for contingent risk.' "

The court's one-sentence statement in its 20-page ruling has been taken out of context by the City. In the very next section of its ruling, the court expressly found that "at least three of the four criteria listed in *Ketchum* for the application of a multiplier exist in the present case." That is, those *non*-contingency factors—for example, difficult issues of fact, and the skill displayed in presenting them—*also* weighed in favor of applying a multiplier. Indeed, the court expressly found "that, considering *all of the circumstances of this case*, a multiplier of 2.0 is appropriate." (Emphasis added.) It is apparent from the face of the court's order that in exercising its discretion, the court properly considered relevant factors notwithstanding its comment about contingency risk.

In any event, it was not inappropriate for the court to consider contingency risk as *one* relevant factor. Indeed, contingency risk is one of the most common fee enhancers (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579 (*Graham*)), and the court properly considered the *individual* circumstances of the case before deciding to apply a multiplier of 2.0. The court noted that plaintiff's counsel "began work on this case more than four years ago and has both fronted costs and worked without compensation for that length of time." By the time the attorneys' fee motion was filed, plaintiff's counsel had advanced $100,000 in costs. These circumstances, among others, amply support the court's application of a multiplier.

As with all orders and judgments, a fee order "is presumed correct, all intendments and presumptions are indulged in its favor, and ambiguities are resolved in favor of affirmance." (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 765–766, citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) In light of these well-established appellate principles, the City has not shown that the court incorrectly presumed plaintiff was *entitled* to a 2.0 multiplier based on one *Ketchum* factor, the contingency basis of the representation, or that the court failed to apply the *Ketchum* factors to the specific facts of the case before it.

Nor has the City met its burden of showing that the court's selection of the 2.0 multiplier was an abuse of discretion. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1250 [abuse of discretion standard also applies to the trial court's application of any multiplier].) At the outset, the City misconceives the purpose of the *Ketchum* factors, which are not inflexible rules with definable boundaries, but broad classes of issues to be considered by the trial court in ascertaining a reasonable fee award. Quite simply, there are no hard-and-fast rules limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation. (See *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 901.) "There are numerous such factors, and their evaluation is entrusted to a trial court's sound discretion; any one of those factors may be responsible for enhancing or reducing the lodestar." (*Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 947.)

In this case, the court expressly took the following factors into account before arriving at a 2.0 multiplier: the trial results;

the extraordinary trial skills employed by plaintiff's counsel; difficult issues of fact that required extensive motion practice and a jury trial; and the fact that plaintiff's counsel had not been paid for four years and fronted significant costs during this time period. The City argues that the court erred by improperly double counting several factors when applying the multiplier. The City insists that the court failed to consider the degree to which counsel's skills and the case's level of difficulty were already encompassed within the lodestar. In essence, the City seeks to elevate one factor above all others, or to view the factors in isolation. Such an approach is not warranted. Nor was the court required to explain *how* it weighed these factors, or which one, if any, was more important. (See *Graham*, *supra*, 34 Cal.4th at p. 584.)

Further, the fact that counsel's skills and experience, as well as the case's level of difficulty, are used to determine the lodestar does not mean that these factors are irrelevant for purposes of determining if a multiplier is warranted. While susceptible to improper double counting, a trial court properly applies a multiplier for exceptional representation "when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation." (*Ketchum*, *supra*, 24 Cal.4th at p. 1139.) Here, the court did just that by noting that it was "particularly impressed" with Lopez's counsel's trial skills.

Similarly, while the case's level of difficulty is encompassed in the lodestar as reflected by higher hourly rates and additional attorney hours, the protracted nature of the litigation also meant that it was less likely that Lopez would eventually succeed at

trial. Put another way, because Lopez's counsel bore a higher risk of not being paid *anything* after providing four years of unpaid legal services, the court did not err in awarding a multiplier based on the difficulty factor. (See *Graham*, *supra*, 34 Cal.4th at p. 580 [implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans]; *Kern River Public Access Com. v. City of Bakersfield* (1985) 170 Cal.App.3d 1205, 1228-1229 ["This is a relatively complex matter where success was not assured and where the appellants fought the case at every turn. We cannot reverse the award as an 'abuse of discretion' in this context."].) The court's decision to limit the multiplier to work done *before* the jury's verdict also shows that this factor was used to adjust the lodestar due to the increased risk that counsel would not be paid at all.

Even if the court's reasoning may be internally inconsistent and legally flawed, a matter open to debate, it is not the end of our inquiry because under the abuse of discretion standard reversal is required only if " 'it appears that there has been a miscarriage of justice.' [Citation.]" (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 80.) In other words, if the court reaches the correct result, we will not disturb its decision on appeal merely because the court gave the wrong reasons for its ruling. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18–19.) As reflected in the court's 20-page ruling, the court was well aware of the *Ketchum* factors, and weighed them, before it decided to enhance the lodestar. The court applied a multiplier of 2.0 only after "considering *all* of the circumstances of this case" (emphasis added), and only after

determining that "at least three of the four criteria listed in *Ketchum* for the application of a multiplier exist in the present case." On this record, and given our deferential standard of review, we see no basis for overturning the court's order even if it misapplied one of the *Ketchum* factors.

DISPOSITION

The order is affirmed. Lopez shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

STONE, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.