

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CH PROPERTIES, INC.,

Plaintiff,

v.

Civil No. 13-1354 (FAB)

FIRST AMERICAN TITLE INSURANCE
COMPANY,

Defendant.

MEMORANDUM AND ORDER

BESOSA, District Judge.

Before the Court are plaintiff CH Properties, Inc. ("CH Properties")'s and defendant First American Title Insurance Company ("FATIC")'s briefs and replies on the issues of the reasonableness of the fees paid to the Andreu & Sagardia Law Firm and the appropriateness of CH Properties' hiring of Attorney Pedro Rosario-Urdaz. (Docket Nos. 105-106, 117-118.) For the following reasons, the Court holds that CH Properties is entitled to reimbursement in the amount of \$207,258.78 for the fees and costs paid to Andreu & Sagardia but that it is not entitled to reimbursement for the fees paid to Attorney Rosario-Urdaz.

I. Background

Plaintiff CH Properties acquired title over the leasehold in a tract of land located in Isla Verde, Puerto Rico ("the Property") in 2002. As part of the financing for this acquisition, defendant

Civil No. 13-1354 (FAB)

2

FATIC issued a title insurance policy in favor of CH Properties as the insured ("the Owner's Policy").

In 2005, various parties brought three lawsuits in Puerto Rico Commonwealth Court against CH Properties challenging its acquisition of the Property and its permitting process to develop the Property (collectively, "the State Court Actions"). CH Properties retained the Andreu & Sagardia Law Firm to defend it in the State Court Actions and paid legal fees to the firm over the next four years.

In March 2009, CH Properties gave notice to FATIC of a claim pursuant to the Owner's Policy. CH Properties requested, *inter alia*, reimbursement for the legal fees that it had paid to Andreu & Sagardia in the State Court Actions as well as prospective legal defense in those cases. FATIC denied CH Properties' request for reimbursement but agreed to tender prospective legal defense in the State Court Actions.

In its agreement to tender prospective legal defense, FATIC approved the engagement of attorneys Jose Andreu-Fuentes, Jose Andreu-Garcia, Miguel Sagardia, and Pedro Lopez, all members of Andreu & Sagardia. The retainer agreement became effective on July 31, 2009. From then on, FATIC paid all legal fees and costs incurred by Andreu & Sagardia in its defense of CH Properties in the State Court Actions.

Civil No. 13-1354 (FAB)

3

In November 2009, CH Properties retained Attorney Pedro Rosario-Urdaz to assist in CH Properties' defense in the State Court Actions. Attorney Rosario-Urdaz is not a member of Andreu & Sagardia. Between November 2009 and April 2012, Attorney Rosario-Urdaz invoiced CH Properties directly for his legal services, and CH Properties paid the invoices.

CH Properties brought this suit against FATIC claiming, *inter alia*, that FATIC breached the Owner's Policy when it denied reimbursement of legal fees incurred by CH Properties in the State Court Actions. (Docket No. 1-1 at pp. 5-6.) CH Properties and FATIC both moved for summary judgment. (Docket Nos. 54, 58.) The Court found in favor of CH Properties on this claim, holding that FATIC was liable to CH Properties for reimbursement of defense costs incurred in the State Court Actions before FATIC assumed those costs on July 31, 2009 (*i.e.*, during the "the pre-tender period"). (Docket No. 92 at p. 31.) The Court reserved judgment on the amount of reimbursement, however, because genuine issues of fact remained regarding the reasonableness of the fees paid to Andreu & Sagardia and the appropriateness of CH Properties' hiring of Attorney Rosario-Urdaz. Id. at p. 31 n.19. The Court held a hearing and ordered the parties to submit simultaneous briefs on those issues. (Docket No. 96.)

II. Waiver

CH Properties argues that FATIC waived its objections to the reasonableness of Andreu & Sagardia's fees and the appropriateness of Attorney Rosario-Urdaz's hiring by not raising the issues in FATIC's motion for summary judgment or in its opposition to CH Properties' motion for summary judgment. (Docket No. 106 at pp. 2-3.) CH Properties' argument, however, is untethered from waiver law and the facts of this case.

"A party waives a right only if he intentionally relinquishes or abandons it; he forfeits a right by failing to assert it in a timely manner." Davila v. Corporacion de P.R. para la Difusion Publica, 498 F.3d 9, 14 n.2 (1st Cir. 2007); see also Warren Freeddenfeld Assocs., Inc. v. McTigue, 531 F.3d 38, 48 (1st Cir. 2008) ("[A]bsent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal." (quoting Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 1992))). In the summary judgment context, a party who fails to oppose a motion for summary judgment "waive[s] the right to object to the material facts set forth by the movant." Ocasio v. Hogar Geobel Inc., 693 F. Supp. 2d 167, 171 (D.P.R. 2008) (Dominguez, J.) (internal quotation marks and citation omitted).

Here, defendant FATIC timely raised objections to the reasonableness and appropriateness of CH Properties' reimbursement request. In its opposition to CH Properties' statement of uncontested facts, FATIC indicated that CH Properties had not proven the accuracy of the attorneys' fees and costs for which it sought reimbursement because CH Properties failed to submit invoices. (Docket No. 67 at p. 14.) In its opposition to CH Properties' motion for summary judgment, FATIC argued that it was under no obligation to reimburse CH Properties for fees paid to Attorney Rosario-Urdaz because (1) FATIC did not retain Rosario-Urdaz, (2) Rosario-Urdaz was not a member of the law firm approved by FATIC, and (3) CH Properties did not submit a written request or proposal for Rosario-Urdaz's engagement. (Docket No. 66 at p. 5 n.4; see Docket No. 67 at p. 14.) FATIC reiterated these objections in its reply to CH Properties' opposition to FATIC's motion for summary judgment. (Docket No. 84 at pp. 7-8.)

FATIC neither failed to oppose plaintiff's motion for summary judgment nor failed to assert its objections in a timely manner. FATIC thus did not waive its right to contest the amount of legal fees sought by CH Properties.

III. Pre-Tender Fees and Costs Paid to Andreu & Sagardia

At summary judgment, the Court held that FATIC is liable to CH Properties for the pre-tender defense costs incurred in the State Court Actions but that genuine issues of fact remain regarding the

Civil No. 13-1354 (FAB)

6

reasonableness of the fees paid to Andreu & Sagardia. (Docket No. 92 at p. 31.)

When an insured seeks reimbursement from its insurer for attorneys' fees and costs incurred in the defense of an action, only reasonable fees and costs are recoverable. Liberty Mut. Ins. Co. v. Cont'l Cas. Co., 771 F.2d 579, 582 (1st Cir. 1985) (citing 7C J. Appleman, Insurance Law and Practice § 4691, at 261 (1979) ("[A]ttorneys' fees incurred by the insured in the defense of an action must be shown to be reasonable to allow a recovery thereof from the insurer.")). "To apply a lesser standard would be to invite excessive, duplicative, or outrageous charges - charges which were not originally contemplated by the parties to the policy and which, if allowed, might ultimately lead to increased premiums for many purchasers of insurance." Id. The party seeking attorneys' fees and costs "has the burden of proving them, including the burden of proving whether the fees were in fact reasonable." Id. (citing cases).

A. Amount

As evidentiary support for its request for reimbursement of attorneys' fees and costs paid to Andreu & Sagardia, CH Properties provides a report that summarizes its legal expenses from April 2005 through February 2012. (Docket No. 58-1 at pp. 305-06.) The report lists the dates, invoice numbers, descriptions, and amounts for eighteen invoices from Andreu & Sagardia between May 31, 2005,

Civil No. 13-1354 (FAB)

7

and July 31, 2009. Id. at p. 305. CH Properties admits that one of these invoices was for a different case and "was mistakenly included" in its reimbursement request.¹ (Docket No. 118 at p. 4.) The seventeen other invoices from Andreu & Sagardia total \$207,258.78.² (Docket No. 58-1 at p. 305.) The report lists dates, check numbers, and amounts for checks paid to Andreu & Sagardia that cover this entire invoiced amount.³ Id.

¹ The invoice that CH Properties "mistakenly included" in its reimbursement request is dated December 2, 2005, and is for \$27,962.50. See Docket Nos. 58-1 at p. 305; 118 at p. 4.

² The dates and amounts of the seventeen invoices which total \$207,258.78 are:

Date	Amount	Date	Amount	Date	Amount
05/31/05	\$49,586.60	06/02/06	\$1,669.50	03/31/08	\$18,875.00
07/13/05	\$15,290.00	06/02/06	\$58.50	08/29/08	\$20,575.00
11/01/05	\$7,395.00	09/30/06	\$9,677.00	01/30/09	\$20,337.50
06/30/06	\$28,247.50	01/31/07	\$12,432.50	02/06/09	\$698.18
03/13/06	\$2,563.50	06/05/07	\$9,262.50	07/31/09	\$4,987.50
03/14/06	\$90.50	07/31/07	\$5,512.50		

³ The checks paid to Andreu & Sagardia total \$223,883.58. See Docket No. 58-1 at p. 305. This includes a partial payment for the \$27,962.50 invoice that CH Properties "mistakenly included" in the report. See id.; Docket No. 118 at p. 4. The dates and amounts of the checks which total \$223,883.58 are:

Date	Amount	Date	Amount	Date	Amount
04/08/05	\$50,000.00	03/08/07	\$12,432.50	04/07/09	\$20,337.50
09/23/05	\$14,876.40	09/12/07	\$9,262.50	07/01/09	\$698.18
03/21/06	\$24,020.00	03/14/08	\$5,512.50	09/17/09	\$4,987.50
07/14/06	\$32,629.50	05/09/08	\$18,875.00		
03/28/07	\$9,677.00	11/24/08	\$20,575.00		

Eduardo Ferrer-Ramirez de Arellano ("Ferrer-Ramirez"), who is the Corporate Director and Secretary of the Board of CH Properties, states under penalty of perjury that the tasks described in the invoices submitted by Andreu & Sagardia were necessary to defend CH Properties' rights in the State Court Actions and that CH Properties paid all of the invoices submitted by Andreu & Sagardia during the pre-tender period. (Docket No. 106-1 at pp. 1, 3.)

FATIC challenges CH Properties' proof that CH Properties paid the total invoiced amount. (Docket No. 105 at p. 9.) FATIC argues that pursuant to Federal Rule of Evidence 1002, CH Properties must produce checks, wire transfers, or money orders to prove payment. Id. Rule 1002 provides that "[a]n original writing, recording, or photograph is required in order to prove its content," unless an exception applies. Fed. R. Evid. 1002. CH Properties is not attempting to prove the "content" of a writing; rather, it is attempting to prove that it made a series of payments. No evidentiary rule requires parties to produce checks, wire transfers, or money orders to prove that payments were made. See R & R Assocs., Inc. v. Visual Scene, Inc., 726 F.2d 36, 38 (1st Cir. 1984) ("No evidentiary rule . . . prohibits a witness from testifying to a fact simply because the fact can be supported by written documentation."). FATIC's reliance on Rule 1002 is therefore misplaced. FATIC provides no other argument or evidence to contest the amount that CH Properties paid to Andreu & Sagardia.

Accordingly, the Court finds that CH Properties paid \$207,258.78 in attorneys' fees and costs to Andreu & Sagardia for its defense in the State Court Actions during the pre-tender period.

B. Reasonableness

In determining the reasonableness of attorneys' fees sought by an insured from its insurer, courts consider "the character and complexity of the litigation, the attorney[s'] experience and other qualifications, and the locale of the legal services." 14 Couch on Insurance § 205:76 (3d ed. 2014).

CH Properties' Corporate Director and Board Secretary Ferrer-Ramirez states under penalty of perjury that CH Properties retained Andreu & Sagardia to defend it in the State Court Actions because the attorneys at the firm are "highly competent, vigorous litigators, with in-depth knowledge of [c]ivil and [c]ommercial [l]aw" who collectively have "over 70 years [of experience] handling complex civil cases." (Docket No. 106-1 at pp. 1-2.) Specifically, Attorney Jose Andreu-Garcia is a former district attorney, municipal judge, and associate and chief justice of the Puerto Rico Supreme Court. Id. at p. 1. Attorney Jose Andreu-Fuentes obtained an LL.M. in civil and criminal litigation from Emory University School of Law in 1990 and has litigated several leading cases before the Puerto Rico District Court since 1998. Id. at pp. 1-2. Ferrer-Ramirez considers Andreu & Sagardia's

Civil No. 13-1354 (FAB)

10

hourly rate of \$250 "reasonable in light of the firm's extensive experience and high professional standard, the nature of the case and the complexity of the issues presented therein." Id. at p. 2.

Defendant FATIC objects to the \$250 hourly rate charged by Andreu & Sagardia, asserting that the \$185 hourly rate approved in the post-tender retainer agreement should apply to the four-year pre-tender period. (Docket No. 105 at p. 8.) FATIC does not develop an argument explaining why the \$185 hourly rate should apply or why the \$250 hourly rate is unreasonable. FATIC actually concedes that reasonable hourly rates for Puerto Rico attorneys are in the range of \$225-\$250. Id. at p. 4.

The Court finds that the \$250 hourly rate charged by Andreu & Sagardia is reasonable because the legal issues presented in the State Court Actions were highly complex, the attorneys had extensive experience, and similar rates have been found reasonable in this district. See, e.g., Gonzalez-Nieves v. Mun. of Aguadilla, No. 3:13-CV-01132 (JAF), 2016 WL 297432, at *2 (D.P.R. Jan. 22, 2016) (Fuste, J.) (finding hourly rates of \$250-\$280 reasonable for experienced attorneys in employment discrimination case); Rosario-Urdaz v. Rivera-Hernandez, 451 F. Supp. 2d 305, 310 (D.P.R. 2006) (Casellas, J.) (finding hourly rates of \$200-\$250 reasonable for experienced attorneys in a "run-of-the-mill political discrimination case").

Civil No. 13-1354 (FAB)

11

During discovery, CH Properties produced time records detailing the fees charged by Andreu & Sagardia during the pre-tender period. (Docket No. 105 at p. 6; see Docket No. 115-1.) Ferrer-Ramirez states under penalty of perjury that he "meticulously examined and reviewed each of the invoices submitted by Andreu & Sagardia" and determined that "[a]ll the tasks described in the [] invoices were necessary to defend CH Properties' rights under the Lease Agreement[] and were exceptionally performed by Andreu & Sagardia." (Docket No. 106-1 at p. 3.) He also determined that "the time charged for the performance of those tasks was adequate and reasonable." Id.

Defendant FATIC raises three objections to the reasonableness of the hours billed by Andreu & Sagardia during the pre-tender period. First, FATIC argues that twenty-seven hours should be deducted because they are in excess of eight hours per day. (Docket No. 105 at p. 8.) The invoices from Andreu & Sagardia reflect that the maximum hours billed per day by a single attorney was ten hours. See Docket No. 115-1 at pp. 2-5. The Owner's Policy does not limit billable hours to eight hours per day, see Docket No. 55-11, nor does FATIC cite to any authority suggesting that it is unreasonable for an attorney to bill more than eight hours per day. The Court accordingly finds FATIC's first objection meritless.

Second, FATIC argues that ten hours should be deducted because they correspond to expenses unrelated to litigation. (Docket No. 105 at p. 8.) Specifically, FATIC objects to two hours billed for a meeting "with Mr. Ferrer and Mr. Andrew . . . to attend to journalists from Caribbean Business and the Vallori people," two hours billed for a meeting at Empresas Ferrer and a meeting at the Development Bank, and three hours billed for a meeting with the Puerto Rico Governor to discuss a possible settlement.⁴ (Docket No. 105 at p. 7; see Docket No. 115-1 at pp. 16, 21, 25.) The Owner's Policy does not limit legal services covered by the policy only to litigation services, see Docket No. 55-11, and CH Properties asserts that options for defending its leasehold interest were discussed at these meetings, (Docket No. 118 at p. 5). The Court finds that these tasks were reasonably related to defending CH Properties' leasehold interest and therefore are covered by the Owner's Policy.

Third, FATIC argues that 38.75 hours should be deducted because they correspond to services rendered in the federal court action, not the State Court Actions. (Docket No. 105 at p. 8.) Andreu & Sagardia did not defend CH Properties in the federal court

⁴ Although FATIC objects to ten hours of non-litigation expenses, the tasks that it identifies correspond to seven hours total.

Civil No. 13-1354 (FAB)

13

action; CH Properties hired separate legal counsel for that case.⁵ (Docket No. 58-1 at p. 13.) CH Properties explains that the tasks performed and billed by Andreu & Sagardia were necessary to "protect CH Properties' leasehold interest before the Bankruptcy Court in light of the initial Judgment that annulled the Lease Agreement" and to "protect and preserve CH Properties' right to be compensated for warranty of title . . . by its seller . . . in case the Lease Agreement was permanently annulled." (Docket No. 118 at p. 4.) The Court has reviewed the tasks described in Andreu & Sagardia's invoices, see Docket No. 115-1, and finds that they were not for defense in the federal court action but rather were related to litigating the complex issues presented in the State Court Actions.

Accordingly, the Court finds that CH Properties paid \$207,258.78 in reasonable attorneys' fees and costs to Andreu & Sagardia for defense in the State Court Actions during the pre-tender period.

IV. Post-Tender Fees Paid to Attorney Rosario-Urdaz

At summary judgment, the Court found that genuine issues of fact remain regarding the appropriateness of CH Properties' hiring of Attorney Rosario-Urdaz. (Docket No. 92 at p. 31.) CH Properties seeks \$115,000 for fees that it paid to Attorney

⁵ The Court denied CH Properties' request for reimbursement of fees paid to the attorney defending it in the federal court action because the claims alleged in the federal court action were not covered by the Owner's Policy. (Docket No. 92 at pp. 37-38.)

Civil No. 13-1354 (FAB)

14

Rosario-Urdaz between November 2009 and April 2012. See Docket No. 106 at p. 7; 58-1 at p. 306. Defendant FATIC argues that it is not liable to reimburse CH Properties for these fees because Attorney Rosario-Urdaz provided legal services during the post-tender period and FATIC did not retain him. (Docket No. 105 at p. 8.) The Court agrees with FATIC.

Section 4(a) of the Conditions and Stipulations in the Owner's Policy provides that FATIC has "the right to select counsel of its choice" to represent CH Properties and that it will "not be liable for and will not pay the fees of any other counsel." (Docket No. 55-11 at p. 3.) On July 31, 2009, FATIC prospectively assumed CH Properties' legal fees and costs in the State Court Actions and retained attorneys Jose Andreu-Fuentes, Jose Andreu-Garcia, Miguel Sagardia, and Pedro Lopez-Bergollo in a written agreement. (Docket No. 55-29 at pp. 20-26.) The retainer agreement does not mention Attorney Rosario-Urdaz, see id. at pp. 20-24, nor is he a member of the Andreu & Sagardia Law Firm, (Docket No. 67-1 at p. 2).

Although CH Properties asserts that FATIC's representative orally consented to CH Properties' hiring of Attorney Rosario-Urdaz, see Docket No. 106-1 at p. 5, CH Properties presents no evidence to prove that FATIC retained Attorney Rosario-Urdaz or agreed to pay his fees.

Thus, it remains uncontested that when FATIC assumed CH Properties' legal fees and costs in the State Court Actions, it

Civil No. 13-1354 (FAB)

15

retained only attorneys at the Andreu & Sagardia Law Firm to represent CH Properties in those actions. Pursuant to the Owner's Policy, FATIC is not liable for the fees of any additional counsel that CH Properties chose to engage, including Attorney Rosario-Urdaz.

Accordingly, the Court finds that CH Properties is not entitled to reimbursement from FATIC for fees paid to Attorney Rosario-Urdaz.

V. Conclusion

For the reasons discussed above, CH Properties is entitled to reimbursement from FATIC in the amount of \$207,258.78 for attorneys' fees and costs incurred in the State Court Actions.

Judgment shall be entered in accordance with this Memorandum and Order and with the Opinion and Order at Docket No. 92.

IT IS SO ORDERED.

San Juan, Puerto Rico, September 2, 2016.

s/ Francisco A. Besosa
FRANCISCO A. BESOSA
United States District Judge