

First California Bank v. Nester, CV11-0684

Hearing: Motion to Tax Costs

Date: November 8, 2017

On April 11, 2012, First California Bank (“First California”) had judgment entered against Defendant Greg Nester (“Nester”) in the amount of \$230,619.10, for breach of written personal guarantees of two construction loans (“Judgment”). The Judgment included an award of attorney’s fees. As of September 2017, the amount of the Judgment plus accrued interest totaled approximately \$351,500.

In June 2017, First California levied on Nester’s home to enforce the Judgment. Nester opposed the levy on the grounds that First California had received payments from the FDIC that should be credited against the Judgment, filing a motion for an order compelling entry of acknowledgment of partial satisfaction of judgment. He propounded discovery on First California regarding the payments, which First California challenged, and this Court found after a discovery conference that as the judgment debtor Nester was not entitled to such discovery. Nester then served trial subpoenas requesting documents regarding the payments, to which First California filed a motion to quash and a motion for sanctions. On September 6, 2017, this Court ruled against Nester in regard to the payments, finding that he was not entitled to partial satisfaction of judgment. The Court further sustained First California’s motion to quash, finding that because he was not entitled to the credits, the subpoenas he served were irrelevant, and denying First California’s motion for contempt.

On September 12, 2017, pursuant to Code of Civil Procedure §§685.040 and 685.070, First California filed and served by mail its memorandum of costs seeking attorney’s fees and costs in enforcing the Judgment (“Memorandum”). On September 22, 2017, Nester paid the Judgment, both principal and accrued interest, in full.¹ On September 27, 2017, Nester timely filed his Motion to Tax Post Judgment Costs (“Motion”) pursuant to Code of Civil Procedure §685.070(c), on the grounds that First California’s fees were not reasonable and necessary costs of enforcing the judgment under the circumstances of the case. First California opposes the Motion.

First California’s Memorandum seeks attorney’s fees in the amount of \$58,898.25, and costs incurred regarding pursuing sale of Nester’s dwelling in the amount of \$2,482.00.

¹ Nester’s Motion states that the Judgment was paid on September 22, 2017. First California also admits in its papers that Nester has now paid the Judgment in full.

First California's Opposition seeks additional fees for opposing the Motion in the amount of \$7,790.85.

Section 685.040 provides that "reasonable and necessary" costs may be claimed by a judgment creditor enforcing its judgment, and that attorney's fees incurred in enforcing a judgment are recoverable as costs if the underlying judgment included an award of attorney's fees to the judgment creditor. Here, as stated above, the underlying Judgment included an award of attorney's fees to First California. Nester does not challenge First California's entitlement to fees or its claimed costs and accrued interest.

Nester challenges the amount of the attorney's fees as unreasonable and unnecessary. Section 685.070(c) provides that in ruling on the Motion, the court shall make an order allowing or disallowing the costs to the extent justified under the circumstances of the case.

Nester argues that the fees are unreasonable because Local Rule 25.02 should serve as a guideline; however, Local Rule 25.02 clearly deals with defaults, not with contested matters such as this. Nester next argues that the rates charged by First California's attorneys are higher than the prevailing rate in San Luis Obispo County, and higher than the \$250/hour Mr. Lewi charged his client. First California billed its attorneys in a range of \$337.50-\$396.00/hour, and its paralegals at \$175.50/hour, after a 10% discount offered to First California.² Per Mr. Goldflam's declaration, First California's attorneys on this matter all have over 20 years of experience, and paralegals were utilized for more routine tasks. Further, as Nester himself argues, his claims regarding the FDIC payments are an "emerging issue" without cases directly on point, eliding the argument that this case was routine. First California was entitled to defend those claims as vigorously as Nester pursued them and the Court finds these rates reasonable given the circumstances.

Nester further objects to travel time by First California's attorneys and to the personal appearance by First California's Los Angeles attorney. However, First California points out that its attorneys only billed 50% of their travel time, that it is entitled to counsel of its choice, and that personal appearance (rather than CourtCall) at the pretrial discovery conference was mandatory.

² First California asks the Court to take judicial notice of a declaration filed by Paul F. Ready, Esq., (co-counsel to Mr. Lewi) in the Bankruptcy Court for the Central District of California, wherein Mr. Ready asserts that his regular billing rate is \$375. While the Court may take judicial notice of the existence of the declaration, it is not proper in this case to take notice of the truth of the matter asserted therein. (*See, Bach v. McNelis* (1989) 207 Cal. App. 3d 852, 865.) However, the denial of this Request does not change the Court's ruling.

Nester next objects to specific invoices and time entries billed by First California, including having multiple attorneys working on the case, the amount of time billed at certain hearings and on certain briefs, travel time, and time spent by First California's attorneys considering whether to seek to disqualify co-counsel Paul Ready, Esq. for his prior representation of a predecessor in interest to First California. Nester further seems to want to relitigate the payments issue that was already decided by this Court, arguing that the fees are particularly "inequitable" because of First California's "extortionate double-recovery." (Motion, 12:9-11.) Nester also argues that First California's claim for \$7,790.85 is excessive, as it amounts to 22 hours of time to respond to a basic motion where the only exhibit is First California's billings.

First California points out that the fees were accrued due to Nester's failure to pay the Judgment, and his ultimately unsuccessful post-Judgment litigation seeking credits towards the Judgment. First California explains and supports the time entries challenged by Nester.

Nester objects to First California's "hammer and tongs" defense in this case, however, Nester vigorously litigated his matter and First California was entitled to defend such efforts. Further, Nester's arguments alleging a "double recovery" by First California have already been fully considered and rejected by this Court. As to First California's request for fees for responding to the Motion, First California is entitled to recover such fees. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141.) However, the Court agrees with Nester that the fees requested for opposing the Motion are somewhat excessive.

The Court finds that rates charged by First California's attorneys are reasonable. The Court further finds that while First California's research and strategizing regarding the potential disqualification may have been a reasonable strategy decision, it was not necessary to enforcement of the Judgment and it is not reasonable under the facts of this case to require Nester to pay for that time. The Court disallows fees in the amount of \$949 associated with First California's research into the disqualification of attorney Paul Ready. The Court further reduces First California's claim for fees in defending this motion by \$1,012.50, representing a reduction of three hours of time billed by Mr. Brad Becker, Esq.

The Court allows First California to recover its fees and costs in the amount of \$67,349.60, representing the full amount of First California's request minus \$1,961.50.