

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY**

DINA FLORY

Plaintiff,

v.

McCABE, WEISBERG & CONWAY, LLC
AND FIRST ATLANTIC FEDERAL CREDIT
UNION,

Defendants.

CIVIL ACTION NO. 18-15522

**PLAINTIFF'S MEMORANDUM
IN SUPPORT OF AN AWARD OF
ATTORNEYS' FEES AND COSTS**

[NO ORAL ARGUMENT REQUESTED]

I. INTRODUCTION

Plaintiff submits this Memorandum of Law in Support of her application for an award of attorney's fees pursuant to 15 U.S.C. § 1692k(a)(3) and by the agreement of the parties negotiated in an offer of judgment settlement reach on or about November 21, 2018.

II. FACTS

Pursuant to Fed. R. Evid. 201, Plaintiffs respectfully request that the Court take judicial notice of the following facts relevant to this motion:

1. Plaintiff commenced this action by filing a Complaint on October 31, 2018.
2. The 13 page Complaint in this action alleged that the Defendants, McCabe, Weisberg & Conway, LLC (hereinafter "McCabe") violated multiple and numerous provisions of the Fair Debt Collections Practices Act, 15 U.S.C. §1692, et seq. (hereinafter "FDCPA") as

well as claims against First Atlantic Federal Credit Union (hereinafter “First Atlantic”) for failure to properly supervise and direct McCabe in violation of Respondeat Superior.

3. The Summons and Complaint were duly served on Defendants.

4. Plaintiffs are the prevailing party in the present case pursuant to the acceptance of Defendants’ offer of Judgment and are therefore entitled to an award of reasonable attorneys’ fees.

LEGAL SUPPORT FOR AWARD

A. PLAINTIFFS’ FDCPA SUIT WAS SUCCESSFUL AND THEREFORE PLAINTIFF AS THE PREVAILING PARTY IS ENTITLED TO AN AWARD OF ATTORNEYS’ FEES AND COSTS UNDER THE FDCPA.

The FDCPA expressly authorizes the recovery of attorney fees and costs to a successful consumer Plaintiff:

. . .any debt collector who fails to comply with any provision of this subchapter . . . is liable to such person in an amount equal to the sum of - [actual damages] [statutory damages] and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

15 U.S.C. §1692k(a)(3). The purpose of this fee shifting provision is to attract competent counsel. Zagorski v. Midwest Billing Services, Inc., 128 F.3d 1164, 1167 (7th Cir. 1997). In litigation under to the FDCPA, an award of attorney fees is mandatory, not discretionary Graziano v. Harrison, 950 F.2d 107, 113 (3rd Cir. 1991). Piples v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 28 (2d Cir. 1989) (“Because the FDCPA was violated, however, the statute requires the award of costs and reasonable attorney's fee. . .”); Mace v. Van Ru Credit, 109 F.3d 338, 344 N.3 (7th Cir. 1997).

An award of attorney's fees to a successful consumer under the FDCPA is designed to compensate the consumer for his role in privately enforcing the FDCPA. Tolentino v. Friedman, 46 F.3d 645, 651 (7th Cir. 1995); see also, Murphy v. Ford Motor Credit Co., 629 F.2d 556 (8th Cir. 1980) (Truth in Lending case). Congress clearly intended that the prevailing consumer would recover his or her reasonable attorney's fees and costs.

Given the structure of the section, attorney's fees should not be construed as a special or discretionary remedy; rather, the Act **mandates** an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general.

Graziano, 950 F.2d 107, 113 (3d Cir. 1991) (emphasis added). See, also DeJesus v. Banco Popular de Puerto Rico, 918 F.2d 232, 235 (1st Cir. 1990) (awarding attorney fees under the Truth in Lending Act).

Plaintiffs' Complaint alleges numerous violations of the FDCPA, 15 U.S.C. §§ 1692 et seq. for which they very successfully prevailed and therefore Plaintiffs' attorneys fees and costs should be awarded as requested.

B. DEFENDANTS HAVE AGREED TO PAY PLAINTIFF'S COUNSEL'S FEES AND COSTS, AS DETERMINED BY THE COURT, AS PART OF THE ESSENTIAL TERMS OF THEIR SETTLEMENT OF THIS CASE.

In the instant case, Plaintiff is entitled to an award of attorney's fees and costs because they are the prevailing party and Defendants agreed in the Offer of Judgment to pay these fees and costs as determined by the Court. Additionally, the costs incurred in litigating this matter were reasonable and necessary to enforce the defendants' liability under the FDCPA, and reflect good judgment on the part of plaintiffs' attorneys. The FDCPA permits an award of the "costs of the action" in the case of a successful action to enforce liability under its provisions. 15 U.S.C. § 1692k(a)(3). The costs in this case were only those reasonable and necessarily incurred in

litigating this case. In addition, Plaintiff's attorneys did not charge unnecessary amounts for copies, postage, facsimiles, or travel expenses

C. ATTORNEY FEES AWARDS SHALL BE CALCULATED ACCORDING TO THE LODESTAR FORMULA.

In calculating an award of attorney's fees, the Court must first begin with the "lodestar" figure, which is calculated by multiplying the hours reasonably expended times an allowed hourly rate. See Hensley v. Eckerhart, 103 S.Ct. 1933, 1939 (1983) (viewing an award of fees under 42 U.S.C. §1988). The burden is on the applicant to prove that the fee request is reasonable, with a strong presumption that the lodestar amount represents a fair and appropriate fee award. Hensley, 103 S.Ct. at 1941.

Although Hensley was decided in the context of a civil rights case, the lodestar analysis is applicable to all cases involving an attorney fee shifting statute. The Supreme Court has previously noted that, "We have stated in the past that fee shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike." Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989) (quoting Northcross v. Memphis Bd. Of Education, 412 U.S. 427, 428, 93 S.Ct. 2201, 2202, 37 L.Ed.2d 48 (1973).) See also City of Burlington v. Dague, 112 S.Ct. 2638, 2641 (1992) (clean water act case applying lodestar analysis); Simpson v. Sheahan, 104 F.3d 998, (7th Cir. 1997) (civil rights case); DeJesus v. Banco Popular de Puerto Rico, 918 F.2d 232, 234 (1st Cir. 1990) (truth in lending case); Piekarski v. Home Owners Savings Bank, F.S.B., 755 F. Supp. 859, 863 (D. Minn. 1991) (retaliatory discharge case).

The determination of the allowable hours rests with the sound discretion of the trial court. Hensley, 103 S.Ct. at 1941. A determination of the hourly rate by the trial court should

consider a rate “commensurate which [counsel] could obtain by taking other types of cases.” Tolentino, 46 F.3d 645, 652 - 653 (7th Cir. 1995).

1. THE HOURLY RATES FOR PLAINTIFF’S ATTORNEY IS REASONABLE.

Plaintiff’s counsel’s fee rate of \$350.00 per hour is reasonable for the work performed in this case. Counsel has years of experience in litigating FDCPA cases for consumers. By any standards, Counsel is an accomplished member of the New Jersey Bar with an impressive reputation among Judges and colleagues. By focusing a large portion of his law practice in the FDCPA area he has made himself a valuable advocate for otherwise underrepresented consumers in New Jersey. Counsel has managed to build his practice by focusing on foreclosure defense, unfair debt collection and unfair credit reporting, handling large numbers of relatively straightforward FDCPA cases himself, as well as associating with experienced consumer rights counsel on complex FDCPA cases.

2. THE AWARD OF COUNSEL FEES IS NOT PROPORTIONALLY BASED ON THE JUDGMENT AMOUNT.

Plaintiff anticipates that Defendants may argue that the size of Plaintiffs’ confidential settlement recovery should be considered in determining what is a “reasonable” attorney fee award. However, the amount of attorney’s fees awarded pursuant to statute is not required to be proportionate to the amount of damages recovered. To the contrary, a trial court may abuse its discretion if it applies an impermissible “proportionality” standard to the fee award.

The U.S. Supreme Court has previously considered the question of proportionality in attorney fee awards and rightly held:

We reject the proposition that fee awards under section [42 U.S.C.] 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.

City of Riverside v. Rivera, 477 U.S. 561, 574, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986).

The Court went on to state:

A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting section 1988.

Id., 477 U.S. at 578, 106 S.Ct. at 2696.

In the context of a similar Consumer Credit Protection Act statute, the Fair Credit

Reporting Act, ("FCRA"), the Fourth Circuit stated:

Proportionality of attorneys' fees to the amount recovered is not required in every action brought pursuant to the FCRA. Since there will rarely be extensive damages in an FCRA action, requiring that attorney's fees be proportionate to the amount recovered would discourage vigorous enforcement of the Act.

Yoyay v. City of Alexandria Employees Credit Union, Inc. 827 F.2d 967, 974 (4th Cir. 1987).

Under the FDCPA, the Seventh Circuit has noted that the "cumulative effect of petty violations may not be petty" and thus a case involving a small amount of damages is no justification to deny attorney fees. Zagorski, 128 F.3d at 1167 (7th Cir. 1997) (quoting) Hyde v. Small, 123 F.3d 583, 585 (7th Cir. 1997).

Courts have encountered many examples of fee awards disproportionate to damage awards. See City of Riverside v. Rivera, 477 U.S. 561, 106 S. Ct. 2686, 91 L.Ed.2d 466 (1986) (\$245,456.25 in attorney fees, \$33,350.00 in damages); Building Service Local 47, 46 F.3d 1392 (6th Cir. 1995) (ERISA case, \$70,185.95 in attorney fees, \$25,598.71 in damages); Northwest Women's Center v. McMonagh, 889 F.2d 466 (3rd Cir. 1989) (RICO case, over \$60,000.00 in attorney fees, \$2,661.00 damages); Duval v. Midwest Auto City, Inc., 578 F.2d 721, 726 (8th Cir.

1978) (Federal Odometer case, over \$14,000 attorney fees, \$3,000 in damages); Perez v. Perkiss, 742 F. Supp. 883 (D.Del. 1990) (FDCPA case, \$10,110 in attorney fees, \$1,200 damages).

CONCLUSION

For all of the reasons herein, Plaintiffs respectfully request that this Court:

- **GRANT** Plaintiffs' Motion for Attorney's fees in the amount of \$5,425.00 and costs in the amount of \$513.20;
- **ORDER** Defendants to pay Plaintiff's counsel a total of \$5,938.20 or such other amount as the Court may determine, no later than January 31, 2019.

Dated: December 13, 2018

Respectfully submitted,

**IRA J. METRICK, ATTORNEY AT LAW,
LLC**

By: /s/Ira J. Metrick

Ira J. Metrick, Esq.

Attorney I.D.# 010331994

57 West Main Street

Freehold, NJ 07728

Telephone: (732) 863-1660

Facsimile: (732) 863-1949

ira@metrickesq.com

Attorney for Plaintiff

CERTIFICATION

The undersigned does hereby certify that the matter in controversy is not the subject of any other litigation, arbitration or other proceeding, either in existence or presently contemplated, between the parties of which I am aware.

Dated: 12/13/18

/s/ Ira J. Metrick