

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

**PORTFOLIO RECOVERY
ASSOCIATES, LLC, A LIMITED
LIABILITY COMPANY,**

Plaintiff/Counterclaim Defendant,

Case No. 1216-CV34184

v.

Division 9

GUADALUPE MEJIA

Defendant/Counterclaim Plaintiff.

JUDGMENT/ORDER

Pending before the Court is Counterclaim Plaintiff's Amended Motion For Attorney's Fees. For the following reasons, the Motion is granted in part and denied in part.

Background

On December 21, 2012, Portfolio Recovery Associates, LLC ("Portfolio" or "Defendant")¹ filed a Petition against Guadalupe Mejia ("Plaintiff") seeking to collect credit card debt Portfolio purchased from HSBC Bank Nevada NA/Orchard Bank. On March 12, 2013, Plaintiff filed an Answer denying the Petition allegations, asserting various Affirmative Defenses, and alleging Counterclaims for violation of the Fair Debt Collection Practices Act ("FDCPA") and Malicious Prosecution. On April 10, 2014, Portfolio dismissed its case, without prejudice, but litigation of the Plaintiff's claims against Portfolio proceeded.

After three rounds of sanction motions, on October 31, 2014, this Court struck Portfolio's pleadings and entered Judgment for Plaintiff on her FDCPA and malicious prosecution claims.

¹ To avoid confusion, the parties agreed that during trial, Defendant/Counterclaim Plaintiff would be referred to as "Plaintiff" and Portfolio as "Defendant." The Court will continue to do so here.

The Court ordered that the trial proceed on the issue of damages only, and, on May 11, 2015, a jury awarded Plaintiff damages on both of her claims. Plaintiff now seeks to recover her attorney's fees, and Portfolio argues much of the request should be denied.²

Analysis

The parties agreed attorney's fees are recoverable in malicious prosecution and FDCPA cases, and that the determination and awarding of attorney's fees would be left to the Court subsequent to trial. *See, e.g., Young v. Jack Boring's, Inc.*, 540 S.W.2d 887, 897 (Mo. Ct. App. 1976) (malicious prosecution); *McMillin v. Sears, Roebuck & Co.*, 523 S.W.2d 111, 113 (Mo. Ct. App. 1975) (malicious prosecution); 15 USCS § 1692k(a)(3) (FDCPA) (successful plaintiff entitled to "reasonable attorney's fee as determined by the court").

Recoverability of Attorney's Fees- Malicious Prosecution Claim

Portfolio first argues Plaintiff is not entitled to attorney's fees in this instances because she has not actually incurred any damages in the form of attorney's fees due to her contingency fee agreement with her attorneys. The cases cited in support stand for the general proposition that attorney's fees paid are a compensable element of damages in a suit for malicious prosecution. *See, e.g., Turman v. Schneider Bailey, Inc.*, 768 S.W.2d 108, 113 (Mo. Ct. App. 1988). The cases do not, however, address the specific issue of contingency fee cases, and the Court can find no Missouri cases providing guidance.

As noted by Plaintiff, other jurisdictions specifically addressing this issue have found attorney's fees arising from contingency fee agreements are properly compensable damages. *See, e.g., Hossein Bagher v. Auto-Owners Ins. Co.*, 1:12-cv-00980-REB-KLM, 2015 U.S. Dist. LEXIS 39254 at 12* (D. Colo. 2015) (awarding contingency fee as part of a reasonably attorney

² Portfolio acknowledges Plaintiff is entitled to the award of some attorney's fees and does not dispute the reasonableness of the lodestar calculation or the *Johnson* factors.

fee); *Roehl Transp. v. Liberty Mut. Ins. Co.*, 784 N.W.2d 542, 573 (Wis. 2010) (awarding attorney's fees under contingency fee arrangement in bad faith claim); *Sparks v. Republic Nat. Life Ins. Co.*, 647 P.2d 1127, 1143 (Ariz. 1982) (rejecting argument that a contingency fee agreement does not obligate a party to pay attorney's fees from his own pocket). This view is consistent with Missouri's policy of encouraging attorneys to represent clients in this area of the law and to represent litigants who cannot afford to retain counsel. Thus, Plaintiff's Motion is denied on this point.

Portfolio also argues that even if contingency fees are compensable damages in malicious prosecution cases, Plaintiff's specific contingency fee agreement would exclude them in this case. Portfolio relies on the fee contract language that the attorneys will "represent my entire interest with regard to my claims against Portfolio Recovery Associates," which, Portfolio argues, would not include getting its case against Plaintiff dismissed. Plaintiff's argument in response is well-taken. Her "entire interest" necessarily includes defeating Portfolio's claims against her. Failure to do so would result in no recovery at all. Thus, when the contract states, "I agree to pay my attorney for the services she performs," those services include the Plaintiff's defense. Plaintiff is entitled to attorney's fees in this instance.

Recoverability of Attorney's Fees- FDCPA Claim

The parties agree, in the case of any successful FDCPA action, recoverable damages include "the costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1692k(a)(3). "On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award . . . attorney's fees reasonable in relation to the work expended and costs." *Id.* The Court makes such a finding here.

Portfolio, however, contends Plaintiff's fee request is excessive since many of the time entries reflect efforts to pursue punitive damages, a measure of damages not recoverable in the context of FDCPA claims. "If the plaintiff's claims for relief are based on different facts and legal theories and counsel's work on one claim is unrelated to his work on another claim, the unrelated claims must be treated as if they had been raised in separate lawsuits, and, therefore, no fee may be awarded for services on the . . . unrelated claims." *Williams v. Fin. Plaza*, 78 S.W.3d 175, 185 (Mo. Ct. App. 2002) (internal citation omitted). "Conversely, if the claims for relief have a common core of facts and are based on related legal theories and much of counsel's time is devoted generally to the litigation as a whole making it difficult to divide the hours expended on a claim-by-claim basis, such a lawsuit cannot be viewed as a series of distinct claims." *Id.* (internal citation omitted).

The FDCPA prohibits debt collectors from engaging "in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. The law permits an award of up to \$1,000 in statutory damages under Section 1692k(a)(2), and, in deciding the amount, the fact finder considers "among other relevant factors, the frequency and persistence of noncompliance by the defendant, the nature of such noncompliance, and the extent of which noncompliance was intentional." 2009 U.S. Dist. Ct. Jury Instr. 631428, 12; 15 U.S.C. 1692k(b)(1). With respect to Plaintiff's malicious prosecution punitive damages claims, the jury was asked to determine if Defendant's conduct "was outrageous because of defendant's evil motive or reckless indifference to the rights of others," and was instructed to "consider harm to others in determining whether defendant's conduct was outrageous." MAI 10.01 [2008 Revision].

The Court finds Plaintiff's claims for relief are sufficiently intertwined that they should not be treated as distinct claims for the consideration of attorney's fees. Both claims arise out of the same allegation: Portfolio demanded payment of a debt Plaintiff did not owe. As noted above, the legal theories are related, both allowing consideration of harassing behavior, intent, and harm to others. Both theories required Plaintiff to present evidence to refute Defendant's contention its behavior was not intentional or malicious. Plaintiff was successful on both claims. Therefore, Plaintiff's Motion is granted as to this point.

Next Portfolio asserts Plaintiff is not entitled to attorney's fees for tasks that are administrative in nature such as filing, travel time, and scheduling meetings and for fees expended to prepare AJ Stecklein and Michale Rapp who withdrew prior to trial. The Court agrees. Fees requested in the amount of \$2,980.00 are disallowed.

Recoverable Costs Under FDCPA

Finally, Portfolio requests the Court reduce Plaintiff's request for reimbursement of costs and limit the award to those costs traditionally taxed under Missouri law. But, the Court must look to federal law for guidance on this issue. Federal Courts applying the FDCPA have determined "[a]ttorney's fees awards include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients," but not expenses that are part of ordinary overhead. *Larsen v. JBC Legal Group, P.C.*, 588 F. Supp. 2d 360, 365-66 (E.D.N.Y. 2008) (internal quotations and citations omitted). Federal Courts have determined such out-of-pocket expenses include costs related to photocopies, telephone calls, postage, FedEx costs, court imposed filing fees, process servers, transcripts, and counsel's transportation. *Id.* (internal quotations and citations omitted). A review of the costs requested by Plaintiff include expenses

that are ordinarily charged to clients rather than ordinary overhead. Thus, they are properly recoverable.

Therefore, for the following reasons, it is hereby

ORDERED Counterclaim Plaintiff's Amended Motion For Attorney's Fees is granted in part and denied in part. It is further

ORDERED Counterclaim Plaintiff is awarded attorney's fees and expenses for actual damages in the amount of \$9,995.00. It is further

ORDERED Counterclaim Plaintiff is awarded attorney's fees and expenses under the FDCPA for attorney's fees in the amount of \$276,025.00. It is further

ORDERED Counterclaim Plaintiff is awarded attorney's fees and expenses under the FDCPA for Plaintiff's additional expenses in the amount of \$33,222.97.

20-Jul-2015

DATE



JOEL P. FAHNESTOCK, JUDGE

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered/faxed/mailed and/or sent through the eFiling system to the following on 20th day of July, 2015:

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