STATE OF MAINE
Cumberland, ss

BUSINESSS AND CONSUMER COURT
BCD-CV-17-18

PASSAMAQUODDY WILD BLUEBERRY COMPANY,

Plaintiff

v.

ORDER ON PLAINTIFF'S APPLICATION FOR AWARD OF ATTORNEY'S FEES AND COSTS

CHERRYFIELD FOODS, INC. and OXFORD FROZEN FOODS LIMITED,

Defendants

Before the Court is an Application for Award of Attorney's Fees and Costs brought by Plaintiff. Plaintiff is represented by Attorneys Daniel Mitchell, John Woodcock III and Benjamin Dexter. Defendants Cherryfield Foods, Inc. and Oxford Frozen Foods are represented by Attorneys John Aromando, Sara Murphy, and Eric Wycoff.

The Court has reviewed the substantive orders issued in this litigation, together with the filings made on this Application including the voluminous Exhibits,[1] the last of which was

[1] On November 26, 2019 the Court received from the parties a Notice of Satisfaction and Judgment that was filed after the Court issued its Order denying Defendants' Motion for Remittitur or for New Trial. The Satisfaction of

received on November 14, 2019, and issues the following order awarding attorney's fees and costs as set forth below.

STANDARD OF REVIEW

The contract between the parties as it pertains to the litigation between them reads in pertinent part as follows: "Failure to make timely payments as set forth above shall, in addition to other remedies at law or in equity, subject [Cherryfield] to compound interest of 1% above Prime Rate, accruing daily on the outstanding balance, *plus costs of collection therewith, including reasonable attorney's fees."* Trial Ex. J2 Section 12, emphasis added. The Court will address the issues presented in regards to counsel fees and costs separately.

Award of Attorney's Fees

In *Poussard v. Commercial Credit Plan, Inc.*, 479 A.2d 881 (Me. 1984) the Law Court stated that the factors listed in *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714, 717-719 (5th Cir. 1974) are to be used in determining the reasonableness of counsel fees. Those are: 1) the time and labor required; 2) the novelty and difficulty of the questions presented; 3) the skill required to perform the legal services; 4) the preclusion of other employment by the attorneys due to acceptance of the case; 5) the customary fee in the community; 6) whether the fee is fixed or contingent; 7) the time limitations imposed by client or circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation and ability of the attorneys; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. Before considering if those factors apply to this litigation,

Judgment included payment in full for damages recovered by Plaintiff after the jury verdict, including all pre- and post-judgment interest. This left for decision only the pending Application for Attorney's Fees and Costs.

the Court must decide as an initial matter whether Plaintiff is entitled to an award of counsel fees for work performed by the law firm that initially filed this case on Plaintiff's behalf.

While the attorneys for the parties spend most of their efforts debating what they sometimes refer to as the "Johnson" factors, the Court has to grapple with an issue that is unique in its experience, namely whether the first firm that represented Plaintiff can join in this Application, when almost 20 years ago the firm had obtained conflict of interest waivers from both Plaintiff and Cherryfield. Those waivers enabled it to represent both parties in negotiating the contracts at issue in this case, in exchange for the law firm agreeing not to represent either party if a dispute or disagreement arose between these parties. Based upon the record before the Court it is clear that when Drummond Woodsum (DW) began its representation of the Plaintiff in 2017, its attorneys did so without having actual knowledge of the conflict of interest waiver, [2] and no one is suggesting otherwise. In addition, it is clear to the Court that the work performed by DW attorneys resulted in an excellent result for Plaintiff, and that their representation of Plaintiff in the early stages of this litigation was done in good faith. Again, no one is suggesting otherwise. Nor is anyone suggesting that DW used any confidential information that it may have obtained from Cherryfield when it undertook its legal, joint representation of the parties back in 1997 and 1998 when the contracts were negotiated.

Neither party cites any case law in support of their positions on this issue, and the Court could not find any. The issue for the Court, therefore, becomes whether it should exercise its discretion in awarding counsel fees for the work performed by DW counsel, and the Court has concluded that it should not. Fundamentally, the Court does not think it would be reasonable or

[2] It is also clear from the record that, when this litigation began, counsel for Cherryfield also lacked actual knowledge of the waiver as it took approximately 7 months after the lawsuit was filed for Defendants' counsel to raise the issue. DW withdrew days after this was discovered.

just for the Court to order Cherryfield to pay counsel fees for DW's services under these circumstances. While Plaintiff asserts that the waivers did not constitute a contract between Plaintiff and Cherryfield, the waivers were in part, in the Court's view, a contract between DW and Cherryfield. The Court concludes that Cherryfield was entitled to rely upon that contract insofar as it barred DW from representing Plaintiff in litigation about the contract.

With respect to the services provided by Plaintiff's second law firm, Defendants make a number of arguments, but its central assertion is that Plaintiff's counsel did not exercise proper "billing judgment between the hours actually spent litigating this dispute in its entirety and the amount reasonably spent pursuing the specific contract claims on which it prevailed." [Defendants' Opposition brief, pg. 7]. The Superior Court has stated with respect to "billing judgment" that if fee applicants do not exercise it, "courts are obligated to do it for them, to cut the amount of hours for which payment is sought, pruning out those that are excessive, redundant, or otherwise unnecessary." *Mowles v. Maine Com'n on Governmental Ethics & Election Practices,* 2009 WL 1747859 (Me. Super. Ct. April 10, 2009). Courts are permitted to conduct a line-by-line analysis, or may reduce the number of hours by percentages. *Gates v. Deukmejian,* 987 F. 2d 1392, 1400 (9th Cir. 1992). However, as pointed out by Plaintiff, in statutory fee-shifting cases emphasis is usually placed on awarding fees in "proportion" to the success of the party asking for the award, and *Mowles* was such a case. But when considering bargained-for fee awards, courts focus on whether or not it was "reasonable to do such work in enforcing the agreement." *St. Hilaire v. Industrial Roofing,* 416 F. Supp. 2d, 137, 146 (D. Me. 2006). The Court has concluded that this is the approach that it should take in determining a fair and just fee award.

The Court has reviewed the bills submitted by both law firms that represented the Plaintiff in this litigation. As noted above, the Court declined to award fees to the initial law firm that represented the Plaintiff, but it is clear that both firms billed for services for multiple attorneys, paralegals and legal assistants. Defendants have asserted that billing for multiple professionals was somehow improper, but the Court cannot find on this record that it was. In addition, as pointed out by Plaintiff's counsel, the number of hours spent on the case by attorneys other than Attorneys Mitchell, Woodcock and Dexter were very few, and the Court is not troubled by the fact that other more senior partners weighed in on the matter at certain, limited junctures. Perhaps the best basis for comparison the Court could make as to the reasonableness of the amount of time spent and hourly fees charged would be to consider Defense counsel's charges to their clients, but that is not in the record. Nor have Defendants proffered any independent expert opinion suggesting that the amounts billed or hourly rates were inappropriate. The Court therefore finds unpersuasive Defendants' arguments regarding "billing judgment" and finds that it was reasonable to do the work that was in fact performed in order to enforce the contractual provision. [3]

The Court agrees with counsel for the Plaintiff that this case was "a long and hard-fought action." It was vigorously prosecuted - and defended - by exceptionally able and very experienced counsel. Discovery was extensively conducted by both sides, the case was document-intensive and expert-heavy, and the issues that survived extensive motion practice had

[3] Even if the Court were to strictly apply the "proportion to success" approach most commonly used in statutory fee-shifting awards, the Court would find in this case that the tort claims that were brought and later dismissed were appropriately raised "alternative legal grounds for a desired outcome." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). In addition, the Court would find that the tort claims that were dismissed and the contract claims that went to trial involved a "common core of facts." *Id.* 435.

to be decided by a Maine jury who unanimously found in favor of the Plaintiff on the issue of liability in both Counts.

In sum, with the exception of any fees charged that Plaintiff has conceded were mistakenly double-billed,[4] or that were the result of the "tare" litigation that was settled before trial, the Court will award the fees requested by Plaintiff. This would include work performed by Plaintiff's counsel up to and including the date the Satisfaction of Judgment was filed with the Court. Counsel for Plaintiff is ordered to review the most recent bill submitted, ensure the adjustments ordered hereine have been made, and provide it to counsel for Defendants and to the Court within 14 days of the date of this order, unless further time is requested by either party.

Costs

The Court has reviewed the costs requested by Plaintiff, the costs authorized by Maine law, and has considered the parties' positions regarding the language in the controlling contract that states that "costs of collection" are recoverable. In *Hilaire & Associates v. Harbor Corp.*, 607 A.2d 905 (Me. 1992) the Law Court held that contract provisions imposing the obligation to pay reasonable costs of collection serve to reimburse the creditor for the loss suffered. The test "is one of reasonableness: if such provisions reflect the anticipated or actual loss caused by the default and are not usurious or excessive so as to constitute a penalty, they will be enforced." *Id.* at 907.

[4] These adjustments would also include fees mistakenly billed or duplicatively billed. It is not clear to the Court from the parties' filings if Plaintiff agrees that the entries coded "6" in Attorney Sara Murphy's affidavit were mistakenly billed, and/or if those coded "10" were duplicative of other entries. The Court would request that counsel for the parties confer to see if these issues can be resolved, and to seek court intervention only if necessary to resolve the issue.

The starting point for the Court would be to grant costs allowed by statute, and then to determine if the additional costs requested are "reasonable" and not "excessive."

The award of costs would therefore include all filing fees paid to the Clerk; fees for service of process; attendance fees and travel costs paid to any witness; travel expenses within the State for Plaintiff's three trial counsel for the trial itself; expert witness fees and expenses for Michael LaVert and Eric Purvis as stated in Attorney Mitchell's affidavit; and costs incurred in the taking of depositions in the amount of $11,597.95. All of these costs are provided for by law as "recoverable costs" or "expert costs" under 14 MRS 1502-B or 1502-C.

Other costs which the Court finds to be reasonable would be the costs for electronic discovery analysis and management in the amount of $13,164.81; and costs for the presentation of electronic evidence and expert testimony in the amount of $22,757.69. The Court would also award costs for lodging for Plaintiff's three trial counsel trial, but not for food. The Court declines to award costs for jury consultation in the amount of $2300, costs for Fed Ex, supplies purchased for this trial, or for the cost of the projector.

Finally, the Court will award costs to DW for disbursements made by that firm for filing fees, sheriff's fees, and recording fees at the Registry of Deeds, but declines to award costs for conference call and photocopying charges. The costs awarded would have been incurred by any firm that represented Plaintiff in the early stages of this litigation, as opposed to the award of costs of representation by DW counsel, for reasons explained above.

As the costs awarded require further computation, counsel for the Plaintiff shall have 14 days from the date of this order to provide a new list and computation of those costs to the Court and to opposing counsel.

The entry will be: Application for Award of Attorney's Fees and Costs is granted in part. Counsel for the Plaintiff shall submit new affidavit of counsel fees and new list and computation of costs consistent with this Order, within 14 days from the date of this Order. Any objection by Defendants to the new affidavit of counsel fees and costs shall be made within 10 days after Plaintiff makes its filings.

_December 10, 2019__ _____/s_____

Date M. Michaela Murphy
Justice, Business and Consumer Court