

COMMONWEALTH OF MASSACHUSETTS**SUFFOLK, ss.****SUPERIOR COURT
CIVIL ACTION
NO. 2005-3851-BLS1****PAULL HEJINIAN,
Plaintiff****vs.****GENERAL AMERICAN LIFE INSURANCE COMPANY,
Defendant****MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION
FOR ATTORNEYS FEES AND COSTS**

Plaintiff Paull Hejinian seeks attorney's fees and costs following Judge Gants' January 9, 2009 Memorandum of Decision and Order on Cross-Motion for Summary Judgment on a Chapter 176D/93A claim. Plaintiff also contends that he is entitled to treble the interest as well as the \$1 million face value of the underlying insurance policy. Thus, plaintiff seeks judgment in the total amount of \$4,586,666.67, exclusive of attorneys fees.

This Court (Gants, J.) allowed summary judgment on plaintiff's claim for unfair insurance settlement practices and, on January 9, 2009, issued an Order that plaintiff was "entitled to actual damages in the amount of the \$1 million face value of the Policy plus, contractual interest at four percent per annum from July 15, 2004 to September 15, 2004, plus statutory interest [at 12%] from that date until the date of judgment, plus twice actual damages as punitive damages, resulting in treble damages" and the attorney's fees and costs incurred in prosecuting this action.

In the pending motion, plaintiff first contends that, because of his contingency fee agreement, this Court should reject the lodestar method and award fees and costs in the amount of one third of his total recovery. This argument is supported by an affidavit of Daniel J. Gleason, a senior partner at Nutter, McClennan & Fish, LLP. Alternatively, plaintiff argues that he is entitled to an enhancement of the lodestar amount by a factor of two, in light of the amount of time and money spent on the underlying litigation, defendant's conduct, the importance of the result, and the inherent risk of contingency fees. In response, defendant argues that the award of attorney's fees should be limited to the lodestar amount.¹

After a hearing and review of the parties' submissions, I enhance the lodestar amount by a factor of 1.5, but I reject plaintiff's argument that he is entitled to attorneys fees in an amount equal to his contingency fee. For the following reason, I find that plaintiff's counsel is entitled to an award of fees of \$406,683.25 and \$20,360.27 in costs.

¹In his supplemental affidavit, plaintiff's counsel, David Mack, states that the lodestar amount is \$291, 122.50 in fees and \$20,360.27 in costs, for a total of \$311,482.77.

DISCUSSION

The plaintiff concedes that attorneys' fees under a fee shifting statute such as Chapter 93A are generally calculated using the lodestar method. However, because of the contingent fee agreement², plaintiff seeks attorney's fees amounting to one third of his total recovery on the grounds that defendant's breach of the statute occurred before he hired counsel; the case allegedly exposed the defendant's long-standing violation of the law in Massachusetts and, arguably, other states, to the benefit of future claimants; there was a substantial risk of non-payment, and the defendant insurer aggressively resisted plaintiff's claims even after the Court found in favor of plaintiff on the breach of contract claim.

The plaintiff cites no Massachusetts caselaw in support of his position, but he argues that a contingency fee award has not been expressly foreclosed by our appellate courts. The SJC has frequently stated that the fair market rate for time reasonably spent preparing and litigating a case is the basic measure of a reasonable attorney's fee. E.g., Fontaine v. Ebtec Corp., 415 Mass. 309, 326 (1993). In Fontaine, an age discrimination case, the SJC considered whether attorneys' fees, calculated by the lodestar method, "might be enhanced" in recognition of the contingent nature of an attorney's recovery. However, that case cannot be read, in my view, to suggest that the SJC endorses rejecting the lodestar method in a case involving a contingency fee agreement.

²Under the Contingent Fee Agreement, plaintiff is obligated to pay to counsel as a fee 1/3 of the "damages" he recovers. "Damages" is defined in the agreement as any recovery from defendants plus any award of fees and costs awarded by the court.

Rather than award attorneys' fees in the amount of the full contingency fee, I conclude that the lodestar in this case should be enhanced by a 1.5 factor. An enhancement of the lodestar amount is justified in this case by the risk plaintiff's counsel took with their contingency fee agreement, by their efficiency in staffing, and by their relatively low hourly rates.

An award of fees is "largely discretionary." Linthicum v. Archambault, 379 Mass. 381, 388 (1979), and based "not on what the attorney usually charges, but, rather on what his services were objectively worth." Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 629 (1978); Hanner v. Classic Auto Body, Inc., 10 Mass. App. Ct. 121, 123-24 (1980). "The goal is to allow just and fair compensation for the services and efforts of counsel on the case viewed as a whole." Id. at 123. In determining what a lawyer's services "are objectively worth," the Court considers such factors as the difficulty of the legal and factual issues involved and the degree of competence demonstrated by counsel. Also to be considered are the "the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." Linthicum, supra at 388-89.

Since 2007, plaintiff's lead counsel, David Mack and his partner Sean T. Carnathan, have charged generally \$325 - \$330 an hour for their services. Attorney Mack graduated from law school in 1995, and then worked as an associate at Hutchins, Wheeler & Dittmar, which merged into Nixon Peabody LLP in February 2003. Mack stayed at that firm until July 2005, when he became a partner of Quigley, O'Connor & Carnathan. The attorneys representing the plaintiff are experienced, competent and able. Their

hourly rates are low, in light of the prevailing market rates charged by attorneys with similar experience in the Boston area.

My conclusions are buttressed by the affidavit of Attorney Daniel Gleason. I accept his opinion that plaintiff's success was partially a result of the high quality of his counsel. As is clear from their results, plaintiff's counsel had a sound litigation strategy, which they aggressively and thoughtfully pursued. The partners appropriately supervised their associates, and there was little or no overlap in tasks. Aff. at ¶ 25.

Defendant argues that plaintiff's lodestar amount is excessive in two ways: (i) the fees and costs of \$17,963.65 for preparation of the case against two defendants who were ultimately dismissed; and (ii) the fees and costs of \$28,513.50 for preparation of the fee application and the affidavit of Daniel Gleason. The claims against Peter Rodes, the agent who sold the policy, and New England Life Ins. Co., the agency that employed him, were dismissed as moot because plaintiff prevailed in his claim against General American. Therefore, plaintiff is entitled to recovery of those fees. I also conclude that the fees associated with the Gleason affidavit should be allowed. As to compensation for the full amount plaintiff requests for the time spent researching and drafting the contingency fee issue, I reduce the amount requested by \$20,000 because I conclude that the time expended is excessive.

As a final matter, the plaintiff argues that he is entitled to a judgment of treble interest. I am unpersuaded by this argument. The 1989 amendment to c. 93A, § 9(3) provides that "the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction

and occurrence regardless of the existence or nonexistence of insurance coverage available in payment of the claim.”

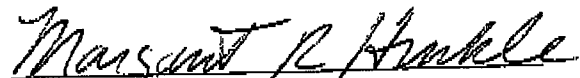
The SJC has stated that this amendment . . . simply cannot be read as requiring prejudgment interest on multiple damages.” McEvoy Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, 718 (1990). See also City Coal Co. v. Noonan, 434 Mass. 709, 715-717 (2001) (citing McEvoy and approving prejudgment interest accruing solely on compensatory component of award, not multiple damages portion). My view on this issue is buttressed by Judge Gants’ detailed reference to interest in his order. Had he intended the interest award to be multiplied, he would have said so. The caselaw relied on by plaintiff on this issue is inapposite; in those cases, interest was part of the underlying judgment.

FINAL JUDGMENT

For the reasons set forth, the Court enters the following final judgment:

1. Plaintiff is entitled to recover from defendant General American Life Insurance Company (“General American”) the amount of \$1,000,000.00 in actual damages under Count I (breach of contract) and Count II (breach of the implied covenant of good faith and fair dealing);
2. Plaintiff is entitled to recover from General American the amount of \$6,666.67 in contractual interest at 4% of \$1,000,000.00 from July 15, 2004 to September 14, 2004;
3. Plaintiff is entitled to recover from General American twice actual damages, or \$2,000,000.00, under G.L. c. 176D/93A;

4. Plaintiff is entitled to recover from General American the amount of \$406,683.75 in attorneys fees and \$20,360.27 in costs under G.L. c. 93A;
5. Plaintiff is entitled to statutory interest at 12 percent on the actual damages of \$1,000,000.00 from September 15, 2004 to the date of this judgment; and
6. Judgment is entered on behalf of defendants New England Life Insurance Company and Peter Rodis on Counts IV-VII of the complaint.


Margaret R. Hinkle
Justice of the Superior Court

DATED: July 3, 2009