

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CV-13-82 ✓

JOHN E. MCDONALD, JR.)

Plaintiff,)

v.)

CETIS, INC.)

Defendant.)

**ORDER ON MOTION FOR
ALLOWANCE OF ATTORNEY'S FEES**

Before the court is Plaintiff's Motion for Allowance of Attorney's Fees, along with Defendant's Opposition. The court has reviewed the parties' written submissions, the last of which was received by the court on December 24, 2014, and issues the following order granting the motion in part.

As noted by the parties, the court previously found that Plaintiff is entitled to an award of counsel fees from the date of the Law Court decision in McDonald I, up to the date the commissions clearly owed under that decision were paid by the Defendant. The court finds that amount to be \$3,976.¹

As the parties know, this case came forward on a two-count complaint. Count I alleged breach of contract. Count II alleged violation of the Illinois Sales Representative Act ("ISRA") and asked the court to award payment of counsel fees and exemplary damages. Defendant essentially argues in its opposition to the motion before the court that Plaintiff has prevailed only on Count I and that he did not prevail on his ISRA

¹ The Plaintiff also submitted a Bill of Costs, which the court hereby approves in the amount of \$968.75.

claims. The court disagrees with that proposition. Defendant did more than violate a common law contract. Defendant also violated ISRA in that he breached his obligation under that statute to pay commissions owed within 13 days of the date on which commission become due after a contract is terminated, as it was here.

The court further agrees with Plaintiff's statement on page 4 of its Motion that "Cetis' failure to pay created the risk that ISRA would be found to apply." This is a fair and accurate description of the conflict between the parties, certainly up to September 20, 2013, which is when Justice Nivison found that ISRA applied. In addition, the Court finds this to be the case as well up to the date in January of 2014 when Justice Nivison articulated what legal standard would control Defendant's liability for payment of exemplary damages in that case. Justice Nivison at that time characterized the parties' dispute as being a legitimate one that required judicial intervention and determination. The parties disagreed in good faith as to what that standard would be, and the court ruled. Therefore, the court finds that Plaintiff is also entitled to an award of counsel fees up to the date of Justice Nivison's decision, namely January 7, 2014.

Defendant cites no authority to support its position that counsel fees under ISRA can be awarded only if a plaintiff prevails in a claim for exemplary damages. Indeed, as Plaintiff points out, it appears to the Court that Justice Nivison awarded counsel fees in McDonald I despite the fact that ultimately Plaintiff did not prevail on the issue of exemplary damages.² The award included charges incurred in making the ultimately unsuccessful argument that exemplary damages should have been awarded. *McDonald v.*

² Justice Nivison, however, did reduce the amount sought when he found certain charges unreasonable. He also did not award fees for certain work performed pursuing arguments or "claims that were dismissed prior to trial or that were unrelated to his entitlement to commission payments." *McDonald v. Scitec, Inc.*, BCD-CV-10-37 (Bus. & Consumer Ct. Jan. 7, 2014, Nivison, J.).

Scitec, Inc., BCD-CV-10-37 (Bus. & Consumer Ct. Jan. 7, 2014, *Nivison, J.*) at 12-13; *see also Maher and Assocs. Inc. v. Quality Cabinets*, 640 N.E. 2d 1000 (Ill. App. Ct. App. 1994) (noting “no showing of culpability is necessary for the imposition of reasonable attorney fees and court costs under the Sales Act because these damages are compensatory and not punitive and because the plain language of the section 3 of the Sales Act provides that attorney fees and costs ‘shall’ be imposed for a violation of section 2 of the Sales Act”).

In addition, it is not lost on the court that Cetis' position in this litigation has been that its obligation to pay did not become due until, at the earliest, when McDonald I became final, namely in late January of 2014. Given this position, it was not at all unreasonable for Plaintiff to continue pursuing this matter to Judgment, which did not occur until after trial.

At the same time, Plaintiff would have to agree that most of his counsel's efforts were expended trying to obtain exemplary damages. Plaintiff does not proffer a percentage, but simply states that he should be awarded all claimed fees. Defendant does not challenge the reasonableness of the charges, but simply argues that Plaintiff should get no fees, or perhaps only the amount of \$3,976 which reflects cost of fees incurred up to the date the commissions due were paid.

The court rejects both approaches. As noted above, the court will award all fees claimed up to January 7, 2014. The court has gone over the Affidavit of Attorney Donlan and orders that he supplement the affidavit to indicate what the fees were as of that date. After that date, the court finds that a reasonable fee in this case to be that of 40% of the time expended. The court believes this is a fair percentage given the time that was

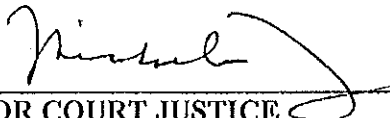
clearly spent by counsel unsuccessfully pursuing exemplary damages, while at the same time recognizing that it is impossible to disentangle with mathematical certainty the efforts to get a case to Judgment from efforts to obtain a certain category of damages. See *Gary Brown & Associates, Inc. v. Ashdon, Inc.* 268 F. App'x 837, 845-46 (11th Cir. 2008). Discovery had to be conducted for both aspects of the case, pre-trial court sessions had to be attended, trial preparations had to be completed, trial had to be conducted, and written arguments had to be filed. In addition, it is worth noting that the court spent considerable effort, with Plaintiff's cooperation and effort, in accommodating the needs of Defendant's witnesses that enabled them to testify from remote locations.

The entry will be: Plaintiff's counsel has 14 days from the date of this Order to file a supplemental affidavit with the court setting forth all fees incurred by Plaintiff up to January 7, 2014. The affidavit should also indicate the amount of fees incurred after that date, and the court will then apply the percentage reduction found to be reasonable in this matter.

Plaintiff is awarded costs in the amount of \$968.74.

Defendant has waived any argument as to the reasonableness of fees claimed.

1/27/15
DATE



SUPERIOR COURT JUSTICE
BUSINESS AND CONSUMER COURT