

[Doc. Nos. 67, 81]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE

SANTOS ANDUJAR,

Plaintiff,

v.

Civil No. 14-7696 (JS)

GENERAL NUTRITION CORPORATION,

Defendants.

**MEMORANDUM OPINION AND ORDER**

This matter is before the Court on plaintiff's "Motion for Attorney's Fees, Costs, [Prejudgment Interest] and Negative Tax Consequences" [Doc. No. 67]. Also before the Court is defendant's Motion to Strike the Amended Reply Affidavit of Plaintiff's Counsel" [Doc. No. 81]. The Court received the parties' extensive opposition and supplemental submissions [Doc. Nos. 68, 75, 76, 78, 83, 84, 88, 89, 90, 92, 107 and 108] and held oral argument. For the reasons to be discussed, plaintiff's motion is granted in part and denied in part and defendant's motion is denied. The Court grants a statutory attorney fee of \$127,215.00 (lodestar) plus an enhancement of 25% or \$31,803.75, for a total attorney fee award of \$159,018.75. The Court also awards costs in the amount of \$1,823.80, prejudgment interest in the amount of \$1,207.64, and negative tax consequences in an amount to be determined. The enforcement of this award is stayed

at least until the Third Circuit rules on defendant's pending appeal.

### Background

The parties are familiar with the background of this matter so there is no need to set out a detailed summary. The Court incorporates by reference the background set forth in its February 28, 2018 Opinion denying defendant's motion for a new trial or in the alternative amending the judgment. 2018 WL 1087494 (D.N.J. Feb. 28, 2018). Briefly, plaintiff alleged he was terminated from his job as the Manager of a General Nutrition store on account of his age. On October 26, 2017, the jury returned a verdict in plaintiff's favor finding defendant violated the New Jersey Law Against Discrimination ("NJLAD"). Plaintiff was awarded \$123,926 in back pay, \$75,000 in emotional distress damages and \$60,000 in front pay damages, for a total damage award of \$258,926. Judgment in this amount was entered on October 30, 2017. [Doc. No. 66]. On February 28, 2018, defendant's motion for a new trial or to amend the judgment was denied. [Doc. Nos. 85, 86]. Defendant appealed the decision to the Third Circuit where the appeal is pending.<sup>1</sup>

Plaintiff seeks an award of attorney's fees, costs and prejudgment interest. Plaintiff also seeks an award for the

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<sup>1</sup> Despite the fact the case is on appeal to the Third Circuit, the Court still has discretion to decide this motion. West v. Keve, 721 F.2d 91, 95 n. 5 (3d Cir. 1983).

negative tax consequences resulting from the judgment. Plaintiff requests a lodestar of \$130,500 in fees, plus an enhancement of 50%. Plaintiff also requests \$1,823.90 in costs, \$2,481.42 in prejudgment interest and \$69,443.00 for negative tax consequences. Defendant asserts various objections to plaintiff's requests which will be discussed herein.

For present purposes it is important to discuss how plaintiff's counsel proposes to compute his final fee. Plaintiff's retainer agreement provides he is to be paid a contingency fee of 45% of the net recovery. At first plaintiff contended he was entitled to the full amount of his Court awarded fee plus his contingency fee. In other words, a dual fee recovery.<sup>2</sup> Plaintiff proposed to pay a 1/3 referral fee of his 45% net recovery to his referring attorney. In addition, plaintiff proposed to pay a 1/3 referral fee of the Court's fee award to the referring attorney.<sup>3</sup> Defendant did not object to

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<sup>2</sup> Based on the jury's verdict, the computation of net recovery is \$258,926.00 - \$1,823.80 = \$257,102.20. Counsel's 45% share is \$115,695.99. If the proposed lodestar (\$130,500) is added to this amount, counsel's fee totals \$246,195.99. This total does not include counsel's proposed enhancement. Under this proposal plaintiff would only receive \$141,406.21.

<sup>3</sup> To the extent defense counsel argues counsel's affidavits are inconsistent with representations made at oral argument, the Court accepts plaintiff's representations made on the record. Further, to be frank, the record is not entirely clear as to the referral fee to be paid. At oral argument the Court first understood the fee would be 1/3 of counsel's 45% contingency fee. See March 23, 2018 Oral Argument Transcript ("Tr.") at 6:4-11. However, later on counsel indicated he pays a referral fee of 1/3 of 33%. Id. at 14:10 to 25:25. The Court reads the

counsel's proposed dual recovery but argued this should be taken into account when determining whether a lodestar enhancement should be awarded and the percentage.<sup>4</sup>

After the Court questioned counsel's proposed dual recovery and asked for supplemental briefs on the issue, counsel

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transcript to mean in personal injury cases the referral fee is 1/3 of 33%. Whether plaintiff's referral fee is 1/3 of 33% or 45% is immaterial to the Court's decision.

<sup>4</sup> The Court disagrees with plaintiff's counsel's recent statement that "there is a fundamental misunderstanding" as to how plaintiff initially proposed to calculate his attorney fee. See July 5, 2018 Letter Brief ("LB") at 1, Doc. No. 107. At oral argument the Court inquired how counsel intended to calculate his fee. Counsel unequivocally indicated he would receive 45% of the net jury award after costs were paid, plus 100% of the Court awarded fee.

THE COURT: ... It's correct that Mr. Andujar is not going to see a penny of whatever the Court awards in attorney's fees, right?

MR. PESCATORE: True.

Tr. at 26: 12-14, Doc. No. 106; see also id. at 4:6-12:

THE COURT: [I]f you'll indulge me, I'll hear your argument, but I just had a couple of questions that I wanted to get clarified first.

Plaintiff, defendant I believe argues that under the retainer agreement you're going to get paid 45 percent of the net recovery of the verdict, plus whatever award this Court grants for the successful outcome in the case.

Is that in fact correct?

MR. PESCATORE: It is correct under the agreement as it's written.

submitted a new proposal to calculate his attorney fee. See Plaintiff's July 5, 2018 LB. Counsel now proposes that he is entitled to 45% of the jury award plus 45% of the attorney fee award. According to counsel, plaintiff will not only receive 55% of the jury award, but also "fifty-five cents (55¢) on every dollar awarded, including any award of attorney's fees and costs." Id. at 1.<sup>5</sup> Defendant opposes plaintiff's new computation as excessive. See July 17, 2018 LB, Doc. No. 108.

### Discussion

The parties do not dispute that a party that prevails on a NJLAD claim is entitled to a reasonable attorney's fee award. N.J.S.A. 10:5-27.1. There also is no dispute that plaintiff is a prevailing party since plaintiff succeeded on a "significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit." P.N. v. Clementon Board of Education, 442 F.3d 848, 855 (3d Cir. 2006) (citation and quotation omitted). In addition, the parties do not dispute the starting point in the attorney's fee analysis is to determine the lodestar amount. Lanni v. New Jersey, 259 F.3d 146, 149 (3d Cir 2001). The lodestar is computed by multiplying the reasonable hourly rate by the reasonable number of hours expended. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The

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<sup>5</sup> Under this proposal, 45% of the jury verdict (\$116,516.70) plus 45% of the proposed lodestar (\$58,725.00) totals \$175,241.70. Counsel proposes to add to this amount his 50% enhancement.

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