

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

DANIEL ROSEBUD,

Plaintiff,

v.

KHALIA, INC.,

Defendant.

CIVIL ACTION FILE
NO. 16EV001052

JUDGE BESSEN

ORDER ON MOTION FOR ATTORNEY'S FEES PURSUANT TO OCGA § 9-11-68

Before the Court is Plaintiff Daniel Rosebud's motion for attorney's fees pursuant to OCGA § 9-11-68. The highest offer from Defendant prior to trial was \$50,000, while the judgment after a jury trial was \$1,134,122.52 for Plaintiff. After consideration the Court awards reasonable attorney's fees as set out herein.

Statement of Facts

Plaintiff Daniel Rosebud was shot while sitting in a car parked at a shopping center in which Khalia, Inc. had its business. Plaintiff sued Khalia and one other party¹ to recover damages resulting from the shooting. Rosebud had a contingency fee agreement with his attorney which provided for attorney's fees of 40 percent of the recovery if the case settled prior to going to trial, and 45 percent of the recovery if the case went to trial.

In the midst of litigation, on June 20, 2017, Khalia forwarded to Rosebud an offer of settlement in the amount of \$50,000.00. Rosebud rejected the offer, counter-demanding for \$125,000.00. Khalia did not respond and two days later Rosebud sent a second demand of

¹ The other defendant was dismissed by consent leaving Khalia as the sole remaining defendant.

\$150,000.00, to which Khalia again did not respond. This second demand of \$150,000.00 was Rosebud's final and highest demand.

The jury returned a verdict of \$1,718,367.46. Of that amount, 66 percent of the liability was apportioned to Khalia and so judgment was entered against Khalia on October 12, 2017 in the amount of \$1,134,122.52.

OCGA § 9–11–68, commonly called the “offer of settlement” statute, was written to encourage litigants to make and accept good faith settlement proposals in order to avoid unnecessary litigation. Subsection (2) of the statute is applicable under the facts in this case as the final judgment was greater than 125 percent of the last offer of settlement and as such plaintiff “...shall be entitled to recover reasonable attorney’s fees and expenses of litigation incurred by the plaintiff or on the plaintiff’s behalf from the date of the rejection of the offer of settlement through the entry of judgment.” OCGA § 9–11–68(b)(2).

The parties are not arguing over whether the situation at hand warrants an award of attorney’s fees under the terms of this statute, but rather as to how those fees should be calculated.

Khalia states categorically that contingency fee calculations in awarding attorney’s fees pursuant to OCGA § 9-11-68 were “explicitly rejected” in *Georgia Dep’t of Corr. v. Couch*, 295 Ga. 469, 470–72 (2014). This is not the case. The Supreme Court in *Couch* actually stated only that “[w]hile certainly a guidepost to the reasonable value of the services the lawyer performed, the contingency fee agreement is not conclusive, and it cannot bind the court in determining that reasonable value, nor should it bind the opposing party required to pay the attorney fees, who had no role in negotiating the agreement.” *Id.* at 484. *Couch* reminds the Court that a contingency fee is evidence of what the parties to the fee contract believe is reasonable, but that

this belief must be tested by reference to “evidence of hours, rates, or other indications regarding the value of the attorneys’ professional services actually rendered.” *Id.* Therefore, a court can award attorney’s fees with reference to the contingency agreement, but must do so in conjunction with the other factors mentioned in *Couch*.

Rosebud has provided the Court with three options for calculating its fee, specifically a calculation of value added over the highest offer, and two different calculations of value added over Rosebud’s offer of judgment.

(1) Value added over the highest offer. This method compares the fee that would have been earned on Khalia’s offer (\$22,500) to what was actually earned on the judgment (\$510,355.13) and awards the difference (\$487,855.13).

The Court finds that this method of calculation is improper because it backs the calculation date of the fees not to the rejection of Rosebud’s \$150,000 demand, but to Khalia’s \$50,000 offer. However, under OCGA § 9-11-68, a plaintiff is entitled to recover fees only from the rejection date of his offer of settlement. *Couch*, 295 Ga. at 485. The Court therefore REJECTS this calculation.

(2) Value added over Rosebud’s offer of judgment. Alternatively, you may choose to award a “pro-rata portion of the work performed after expiration of the offer.” This would be, quite simply, 80 percent of the full amount of fees (\$510,355.13), or \$408,264.13, since approximately 80 percent of the work was performed after the highest offer expired.

The Court finds that this method mathematically handles the requirement that the Court award only those fees incurred after the expiration of the highest demand. However, it does not take into account the agreement entered into between Rosebud and his attorney. It therefore does not advance as effectively the purpose of the statute, to “encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation, thereby

advancing this State's strong public policy of encouraging negotiations and settlements." *Couch*, supra.

(3) (also titled) Value added over Rosebud's offer of judgment. This is a value-added approach. The Court would look to the fee that would have been earned from Rosebud's highest demand (\$67,500), compare it to the fee that was actually earned on the judgment (\$510,355.13), and award the difference (\$442,855.13).

According to Rosebud, "This analysis is reasonable and logical because the work by Plaintiff's Counsel after Khalia rejected the Offer substantially increased Plaintiff's recovery." It also satisfies the requirement that the Court only award fees incurred after rejection of the highest offer by subtracting any fees that would have been earned at the point of rejection of the highest offer.

The Court finds that this approach comports with the spirit of a contingency fee agreement, where risks are taken in the hope, but not expectation, of fees at the end. Because the math is based on the contingency fee, it comes closest to effectuating the purpose of the statute as set out in *Couch*.

The final consideration is whether this fee amount, \$442,855.13, is reasonable under the circumstances of this case, given all the other factors. "While certainly a guidepost to the reasonable value of the services the lawyer performed, the contingency fee agreement is not conclusive, and it cannot bind the court in determining that reasonable value, nor should it bind the opposing party required to pay the attorney fees, who had no role in negotiating the agreement." *Couch*, 295 Ga. at 484.

Khalia submitted expert testimony from a practicing attorney that handles similar cases and he felt this was a relatively straightforward case, and did not warrant the hundreds of hours put into it by Rosebud's counsel. Rosebud's attorneys, on the other hand, also submitted testimony and evidence from the lead counsel that they were the sixth law firm to review this

case, and the only one to see any worth in it. Additionally, there was testimony that there were many difficult pre-trial matters and legal issues, and it was a very hard fought trial.

The Court finds the truth to rest somewhere in the middle. The Court does not believe that \$442,855.13 is a reasonable amount to recover in this case, and that some of the fees evidenced by Rosebud's attorneys were unnecessary. There is also some question regarding the memorializing of the time spent, as Rosebud's counsel did not contemporaneously keep track of his time. On the other hand, the Court does not agree that this was a simple, straightforward case such that the fees should be much closer to those awarded simply on an hourly basis.² The trial of this case revealed a number of difficult issues, requiring a high degree of skill and knowledge to navigate. This is further evidenced by the fact that several other law firms refused to take this case, and Rosebud's counsel apparently did a very good job preparing and litigating this matter.

Considering all of the circumstances of the trial, the contingency agreement, and the evidence presented, the Court hereby AWARDS Rosebud \$140,951.17 as "reasonable attorney's fees and expenses of litigation incurred by plaintiff." OCGA § 9-11-68(b)(2).

As a final note, Khalia argues that, "Under OCGA § 9-11-68(d)(1), a trial court has no authority to award attorney's fees until after remittitur if there is an appeal of the judgment." Khalia contends that an award at this point would "offend the legislative intent underlying the statute," and "would be an imprudent waste of judicial resources."

This is incorrect. OCGA § 9-11-68(d) provides, "if an appeal is taken from such judgment, the court shall order *payment* of such attorney's fees and expenses of litigation only upon remittitur affirming such judgment." (Emphasis supplied.) Conservation of judicial

² Defense expert Jason Graham, Esq. testified that 200 hours should have been more than enough to adequately handle this matter through trial. He stated that at a generous hourly rate of \$250 an hour, fees of \$50,000 are more than sufficient. Rosebud's contingency agreement provided that in the event of termination, fees would be billed at \$350 an hour. That would mean an award of \$70,000.

resources is preserved by ruling now, prior to appeal. However, payment of this award shall not be made unless and until the appeal of this case has terminated in Rosebud's favor.

This 8th day of November, 2018.

A handwritten signature in black ink, appearing to read "Bessen", written in a cursive style.

Judge Diane E. Bessen
State Court of Fulton County

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