

March 20, 2007

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Re: *Commerce Bank/Delaware NA v. Natasha Brown*
Case No.: 2005-10-490

**Letter Opinion on Attorney's Fees Petition
of the Defendant/Counter-Claimant**

Dear Counsel:

On February 20, 2007 this Court issued a Letter Opinion entering judgment in favor of counter-claimant Natasha J. Brown ("Brown") in the amount of \$1,000.00 plus pre- and post-judgment interest against Commerce Bank/Delaware NA ("Commerce") in the above-captioned matter. Commerce withdrew its case-in-chief trial except an offset for \$500.00. Trial took place on Monday, February 12, 2007 in the Court of Common Pleas New Castle County. Judgment was entered in favor of Brown pursuant to 15 *U.S.C.* §1693(m) against Commerce plus pre- and post-judgment interest and costs. Judgment was offset by \$50.00 as to the liability provisions under the statute, 15 *U.S.C.* §1693(h) against Brown.

Mr. Bernstein, as requested by the Court, filed his Petition and Affidavit in Support of Application for Award of Attorneys' Fees on or about February 26, 2007. Mr. Doughty filed a written response on March 9, 2007 as well. This is the Decision on Mr. Bernstein's Application for Attorneys' Fees after briefing.

THE FACTS

Mr. Bernstein's Application seeks \$5010.00 pursuant to his Affidavit at the rate of \$300.00 per hour plus costs. Briefing has been completed and the Court has carefully reviewed these pleadings by counsel, as well as the attorneys' fees affidavit of Mr. Bernstein. Commerce argues that the award of attorneys' fees must be reasonable in relation to the amount of the underlying claim and services rendered, 10 *Del. C.* §3912. Commerce argues defendant's counter-claim judgment amounted to \$950.00 pursuant to the Court's February 22, 2007 Letter Order and that Commerce seeks a fee award in excess of \$5,000.00, approximately five times the amount of the judgment. Commerce therefore argues this award is excessive in light of the factors to be considered in attorneys' fees awards considering the nature and complexity of the counter-claim. *See Sugarland Industries v. Thomas*, 420 A.2d 142 (Del.Super., 1980).

In Mr. Bernstein's Reply Memorandum, he cites 15 *U.S.C.* §1693(m)(a)(3) for the authority that a violation of the Electronic Funds Transfer Act ("E.F.T.A.") entitles a recovery of reasonable attorneys' fees as determined by the Court. *Id. See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Bernstein argues the "lodestar" fee in *Hensley* is determined by taking the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.

Bernstein further argues that in statutory fee awards the following factors are considered:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill required to perform the legal services properly;
- (4) the preclusion of alternative employment;
- (5) the customary fee for similar work;
- (6) the nature of the fee payment arrangement;
- (7) time limitations imposed by the client or circumstances;
- (8) the amount involved and results obtained;
- (9) the experience, reputation and ability of the attorneys;
- (10) the "undesirability" of the case;
- (11) the nature and length of the attorney-client relationship; and
- (12) fee awards in similar cases.

See, Public Interest Research Group v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995).

Likewise, Bernstein argues that the Court of Common Pleas should take into account the fact that defendant was acting as a “private attorney general” in bringing her claim. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968). The Court agrees.

Finally, Bernstein argues he is also entitled for the time spent and filing and litigating the Attorneys’ Fee Application. *See Planned Parenthood of Central N.J. v. Att’y Gen. of N.J.*, 297 F.3d 253, 268 (3d Cir. 2002) and requests an additional 1.5 hours on his hourly rate of \$300.00.

FINAL OPINION AND ORDER

The Court has carefully reviewed the record in these proceedings. Specifically the Court has considered the twelve (12) factors listed above in the Discussion section of this opinion and the hourly rate and entries by Mr. Bernstein in his Petition. In light of Mr. Bernstein’s experience, the Court finds this hour rate to be entirely reasonable. The Court also notes that the statute set forth in the Court’s Final Opinion limited the Court’s award to \$1,000.00. The Court may well have awarded an excess of \$1,000.00 as a judgment against Commerce for its conduct by not investigating counter-claimant Brown’s request to investigate her lost debit card. Instead, Commerce filed a lawsuit against Brown. However, the Court was statutorily limited to the \$1,000.00 judgment. The Court has recently addressed 10 *Del. C.* §3912 as a limit to attorneys’ fees in the creditor-debtor relationship that applies to this statute. *See Diamond Restoration, Inc. v. Thomas Kreske*, Del. CCP., C.A. No.: 2005-07-373, Welch, J. (October 23, 2006). These facts are similar to the ruling in *Kreske* and the Court finds no creditor-debtor relationship in the instant case. The federal statute cited above controls. Application of 15 *U.S.C.* §1693(m)(a)(3) to these facts and applying the nine factors set forth in *Public Research Group et al.*, cited above, the Court finds Mr. Bernstein’s fee application also to be reasonable. His client was not the party that withdrew its case-in-chief before trial after Brown incurred attorneys’ fees in

defending the civil action as well as asserting her counter-claim, as well as representing Brown at trial on counter-claim on the merits.

The Court also notes the authority cited by Mr. Bernstein, *Washington v. Philadelphia County Court of Common Pleas*, 89F.3d 1031, 1042 (3d Cir. 1996) and Third Circuit ruling “that it is impermissible to reduce a fee award based upon a proportionality analysis between the award of damages awarded and the amount of counsel fees requested.” The applicable statute here limits this Court’s award to \$1,000.00

The Court finds Mr. Bernstein’s fee petition as considered by the applicable case law to be reasonable and therefore Orders the amount of \$5,460.00.

IT IS SO ORDERED this 20th day of March, 2007.

John K. Welch
Judge

/jb

cc: Rebecca A. Dutton, Case Processor
CCP, Civil Division