

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SCAN

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ANTHONY LICATESI,

Plaintiff,

-against-

MICHELE M. WOODARD
J.S.C.

TRIAL/IAS Part 12

Index No.:9080/08

Motion Seq. No.: 04

MASERATI NORTH AMERICA, INC. and
FERRARI-MASERATI OF LONG ISLAND, Jointly
and Severally,

Defendants.

DECISION AND ORDER

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Papers Read on this Motion:

Plaintiff's Notice of Motion	04
Defendants' Affirmation of Paul Daly in Opposition	xx
Plaintiff's Reply	xx
Affidavit of Anthony Licatesi	xx

Relief Requested:

The plaintiff, Anthony Licatesi, moves for an award of costs and counsel fees in accordance with the stipulated settlement previously obtained herein.

Factual and Procedural Background:

The plaintiff had purchased a new 2006 Maserati automobile from the defendants (*see* Schwartz Affirmation in Support at ¶5). Shortly thereafter, the plaintiff began experiencing a series of mechanical difficulties and as a result thereof, on March 25, 2008, sent a written notice to the defendants demanding that they repurchase the vehicle, in accordance with General Business Law §198-a [the Lemon Law] (*id.* at ¶6). By letter dated April 7, 2008, the defendants refused said demand and denied any liability under the statute (*id.*; *see also* Exh. B). The within action was commenced on or about April 15, 2008 (*see* Daly Affirmation in Opposition at ¶3). Subsequent thereto, in or around June or

July 2009, plaintiff's counsel was retained and thereafter contacted counsel for the defendants in an attempt to settle the matter (*see* Schwartz Affirmation at ¶7). Notwithstanding said attempts, settlement negotiations were unsuccessful (*id.*).

Approximately one week prior to the scheduled trial date, defense counsel indicated an interest in possibly settling the matter and on the May 18, 2010, the defendants purportedly made an offer of \$5,000 to cover the "plaintiff's claims for damages, costs and attorney's fees combined" (*id.* at ¶8, 9, 10). Said offer was rejected by the plaintiff and no additional progress *vis a vis* a settlement was accomplished (*id.*). Ultimately, on May 20, 2010, the parties entered into a stipulation of settlement, the substance of which included the repurchase by the defendants of the plaintiff's automobile (*id.* at ¶12). The terms of said settlement were placed on the record before this Court and also included the following: "the defendant shall pay plaintiff Anthony Licatesi \$65,000 under the Magnuson-Moss Warranty Act [hereinafter MMWA]¹, which is breach of implied and express warranty claims, as well as the New York Lemon Law claim" (*id.*; *see also* Exh. A). The on-the-record stipulation further provided that the plaintiff "shall be deemed a prevailing consumer for all purposes in this case under the MMWA, the New York Lemon Law, and all other accounts relating to this claim" (*id.*). Finally, the stipulation provided that "the defendants shall pay plaintiff, plaintiff's counsel, reasonable legal fees based upon actual time expended in litigation costs in an amount to be determined by the Court" (*id.*).

Thus, in accordance with the terms of the stipulation, the plaintiff has interposed the instant application for an award of counsel fees (*id.* at ¶¶14, 15). In support thereof, counsel argues that while the plaintiff repeatedly attempted to settle the within action, the defendants failed to negotiate which resulted in the plaintiff having to incur escalating costs and counsel fees, the total of which now stands

¹ 15 USC §2310

at \$95,568.14 (*id.* at ¶¶ 19, 20, 38, 47, 52). Counsel asserts that in accordance with the MMWA, the Lemon Law, as well as the heretofore referenced on-the-record stipulation, the plaintiff herein is entitled to an award of “reasonable” attorney’s fees which are based upon the “actual time expended” in the sum of \$95,568.14 (*id.* at ¶¶21-26; 50-52). Counsel provides a trio of affidavits from attorneys, Christopher Winkler, Daniel Goldsmith Ruggiero and Carl Schwartz, each of whom aver that they have reviewed the time sheets reciting their respective work on the within matter and attest to the accuracy thereof (*id.* at ¶51; *see also* Exh. D). Counsel further provides the affidavit of Anthony Licatesi, the plaintiff herein, who is also an attorney practicing law in Nassau County (*id.* at Exh. E). Mr. Licatesi states that based upon his “22 years” of practicing law, the rates charged by his attorneys in prosecuting the within matter are “reasonable * * * for practitioners of this area of law” within the county (*id.*).

The defendants oppose the within application and strenuously contest the amount demanded by the plaintiff. Initially, counsel contends that notwithstanding the assertions of plaintiff’s counsel, the defendants were receptive to resolving the within matter and rather it was the plaintiff who remained recalcitrant and refused to engage in good faith negotiations (*see* Daly Affirmation in Opposition at ¶¶5,6,7). Counsel for the defendants further contends that due to the lack of experience of the attorneys who provided legal services to the plaintiff, the fees and expenses charged were unreasonable and thus should be reduced to an amount equaling \$24,675.00 for legal fees and \$2,803.96 for expenses (*id.* at ¶¶11,14 - 21,23). In so arguing, counsel posits that the amount demanded by the plaintiff must be reduced as many of the legal fees incurred were due to excessive travel time, duplicative tasks, unsubstantiated expert fees, as well as clerical and paralegal services (*id.* at ¶¶22,23; *see also* Exhs. A, D). In addition to the foregoing, counsel argues that the plaintiff has failed to set forth competent evidence with respect to the prevailing rate in Nassau County for the legal services provided (*id.* at

¶21). Particularly, counsel contends that the only evidence provided with respect thereto is the affidavit of the plaintiff himself and that same is not dispositive as to this issue (*id.*).

When calculating an award of counsel fees to which a plaintiff is entitled under the Lemon Law, the courts of this state require the employment of lodestar calculation (*Rahmey v Blum*, 95 AD2d2294 [2d Dept 1983]). Such a calculation “requires that the number of hours reasonably expended in prosecuting the matter be multiplied by a reasonable hourly rate and then the cost of reasonable expenses is added to that number” (*Daimler Chrysler Corp. v Karman*, 5 Misc 3d 567 [Sup Ct, Albany County 2004]; *Rahmey v Blum*, 95 AD2d 294 [2d Dept 1983], *supra*). As a general proposition, “the reasonable hourly rate is based upon the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented” (*Daimler Chrysler Corp. v Karman*, 5 Misc 3d 567 [Sup Ct, Albany County 2004], *supra*). The party seeking an award of counsel fees bears the burden of demonstrating the hours reasonably undertaken by counsel, as well as the prevailing hourly rate for the services rendered (*id.*). When calculating an award, the Court is empowered to adjust the “basic lodestar amount”, based upon the circumstances attendant to a specific case (*id.*).

Having reviewed the within matter and given the sharply contested versions as to the nature of the settlement negotiations and the propriety of the fees incurred, particularly with respect to the issue of prevailing rates, the Court hereby refers this matter to the Calendar Control Part (CCP) for an Inquest as to counsel fees to be held on January 18, 2011.

The plaintiff shall file and serve a note of issue, together with a copy of this Order on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of the Court within twenty (20) days of the date of this Order.

The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **Denied**.

DATED: December 16, 2010
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

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ENTERED
DEC 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE