

FILED
APR 22 2019
HON. ALAN G. LESNEWICH, J.S.C.

ORDER PREPARED BY THE COURT

MIST PHARMACEUTICALS, LLC,

Plaintiff,

vs.

BERKLEY INSURANCE COMPANY,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY

DOCKET NO.: UNN-L-3329-17

CIVIL ACTION

**ORDER GRANTING MIST'S MOTION
FOR ATTORNEYS' FEES AND
EXPENSES UNDER RULE 4:42-9(a)(6)**

THIS MATTER having come before the court by way of a motion for recovery of attorneys' fees and expenses filed by Lowenstein Sandler LLP, attorneys for Plaintiff, Mist Pharmaceuticals, LLC ("Mist"); and opposition having been filed by Coughlin Duffy LLP, attorneys for Defendant, Berkley Insurance Company ("Berkley"); and the court having considered the submissions of counsel; and for both counsel having represented to the court that the motion can be resolved on the papers without oral argument; and for the reasons set forth in the attached Statement of Reasons; and for good cause shown;

IT IS on this 22nd day of April, 2019,

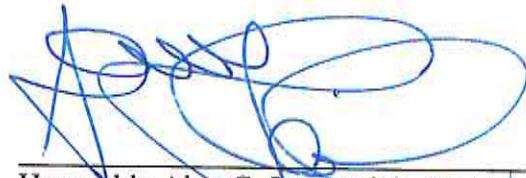
ORDERED as follows:

1. Mist's motion for attorneys' fees and expenses under Rule 4:42-9(a)(6) is **GRANTED**.

2. The Court finds that (i) the attorneys' fees and expenses that Mist incurred in this lawsuit in the amount of \$172,681.31 were incurred by necessity and are reasonable based on the work performed;

3. Within ten (10) business days of the entry of this Order, Berkley shall pay to Mist the sum of \$172,681.31, representing Mist's reasonable attorneys' fees and expenses incurred in this lawsuit. This payment shall be made to the attorney trust account of Lowenstein Sandler LLP; and

A copy of this Order shall be considered served upon all parties by the uploading of the within Order by this Court to eCourts.



Honorable Alan G. Lesnewich, J.S.C.

(X) Opposed

STATEMENT OF REASONS

Mist Pharmaceuticals, LLC v. Berkley Insurance Company

Docket No.: L-3329-17

**Attorney for Plaintiff, Mist Pharmaceuticals, LLC,
Linda A. Bennett, Esq., Eric Jesse, Esq., and Michael A. Barrese, Esq.,
Lowenstein Sandler LLP

**Attorney for Defendant, Berkley Insurance Company
Adam M. Smith, Esq., and Michael E. Hrinewski, Esq.,
Coughlin Duffy LLP

Brief Procedural History

Mist Pharmaceuticals, LLC (“Mist”) filed its Complaint in this action on September 18, 2017. Berkley Insurance Company (“Berkley”) filed its Answer on November 27, 2017. It served interrogatories, document demands, and a notice of deposition on Mist on March 14, 2018. Two days later, Mist served its summary judgment motion, without having first responded to Berkley’s discovery demands.

Following the first round of oral argument that took place on May 11, 2018, the court entered an order that permitted the parties to engage in limited discovery related to the legal issues presented, and set the matter down for supplemental oral argument. According to the parties’ submissions, during that limited discovery, somewhere in the neighborhood of twelve thousand (12,000) documents were provided by Mist to Berkley. Briefs and supplemental briefs were then filed with permission of the court. Counsel returned to court on September 14, 2018, to present supplemental oral argument.

Thereafter, the court poured through the motion submissions and, eventually, on December 5, 2018, entered two orders: The first granted Mist’s Motion for Partial Summary Judgment. The

second denied Berkley's Cross Motion for Summary Judgment. The court's rationale for both orders was set forth in a twenty-eight page Statement of Reasons.

On December 26, 2018, Berkley filed a motion seeking reconsideration. The court reviewed the written submissions and by Order dated January 9, 2019, denied Berkley's motion. The court's rationale for both orders was set forth in a twenty-eight page Statement of Reasons.

On February 27, 2019, Mist filed a motion pursuant to Court Rule 4:42-9(a)(6) seeking attorneys' fees and expenses. Berkley filed opposition submissions. Mist filed a reply letter brief. Counsel have represented to the court that the motion can be resolved on the papers without oral argument.

Statement of Facts

The facts underlying the dispute leading to Mist's fee application need not be addressed here as they are articulated in detail in the court's December 5, 2018 Statement of Reasons.

According to Mist's moving submissions, the hours spent on the tasks and activities, and the associated fees, in this case as of the filing date were as follows:

Task/Event	Partner Hours	Counsel/ Associate Hours	Paraprof. Hours	Total Amount
Draft/Responding to Pleadings	7	22.3	-	\$16,800.00
Summary judgment briefing	8.6	54.7	-	\$35,052.50
First oral argument preparation, appearance	6.5	2	-	\$5,715.00
Document discovery, sought by Berkley at the first oral argument	5.6	16.4	3.5	\$13,731.00
Supplemental motion practice following document discovery	3.2	22.4	-	\$13,818.00

Second oral argument preparation, appearance	12.2	4.1	-	\$10,917.00
Court's Dec. 5 Order & compliance with same	6	5.6	1.6	\$5,640.50
Motion for reconsideration	2.3	7.2	-	\$5,710.00
Fee application (time through 2/25/19)	1.2	22.7	-	\$13,940.50
Opposing Berkley's motion for interlocutory appeal	7.2	21.5	0.7	\$17,890.00
Miscellaneous matters (e.g., status updates re: Underlying Action; Berkley's proposed appeal bond; discovery extensions)	7.5	3.2	0.4	\$7,216.00
Disbursements	-	-	-	\$4,655.60
TOTALS	64	182.4	6.2	\$151,086.10

Putting aside Berkley's argument that Mist should not be awarded any fees because Mist created the attorneys' fees mess and, therefore, should not be rewarded for its bad behavior, Berkley concedes that \$98,214.36 of the original fees sought are reasonable and should be paid.¹ The court agrees and that amount will be the basement floor of the court's fee award.

Legal Analysis

The court has come to two critical conclusions with regard to the current motion. First, there is absolutely no denying that Mist is a "successful claimant" under Court Rule 4:42-9(a)(6). This court has already concluded that Berkley, without new developments or information in the Celestial Action and without a Claim being asserted before the Policy incepted, improperly withdrew from the defense of the Underlying Action. As a result, the court concluded without

¹ Berkley has not addressed the additional \$21,595.21 fees incurred by Mist since February 26, 2019, in attending to the current motion.

hesitation that Berkley had a duty to defend Mist and ordered it to pay past and future defense costs. Although the court is mindful that fees are not to be awarded in every case and that any decision to award counsel fees rests in the sound discretion of a trial court, it is also aware of the fact that the Supreme Court of New Jersey has made it clear that a policyholder like Mist, which establishes an insurer's duty to defend, is a "successful claimant" under the aforementioned Court Rule. "[A] party to a declaratory judgment action qualifies as a successful claimant when the insurance carrier's duty to defend is proven." Occhifinto v. Olivia Constr. Co., LLC, 221 N.J. 443, 453 (2015) (emphasis added).

Second, this court has concluded that Court Rule 4:42-9(a)(6) was, at least in part, specifically designed with insureds like Mist in mind. Therefore, under the Rule, "a successful insured is presumptively entitled to attorneys' fees and need not establish that the insurer acted in bad faith or arbitrarily in declining a claim." Allstate Ins. Co. v. Sabato, 380 N.J. Super. 463, 473 (App. Div. 2005). As the court has already ruled, it was Berkley's unjustified refusal to honor its "clear" duty to defend, which left Mist no choice but to incur \$151,086.10 in attorneys' fees and expenses to reestablish it, which diminishes the coverage benefits under the Policy (absent a fee award). "The theory is that one covered by a policy is entitled to the full protection provided by the coverage, and that benefit should not be diluted by the insured's need to pay counsel fees in order to secure its rights under the policy." Myron Corp. v. Atl. Mutual Ins. Corp., 407 N.J. Super. 302, 310 (App. Div. 2009).² Simply put, in this case, the court has concluded that Mist had to unnecessarily litigate to simply get the benefit of its contractual bargain.

² Thus Court Rule 4:42-9(a)(6), exists "both to discourage groundless disclaimers and to provide more equitably to the insured the benefits of the insurance contract without the necessity of obtaining a judicial determination that the insured, in fact, is entitled to such protection." Guarantee Ins. Co. v. Saltman, 217 N.J. Super. 604, 609 (App. Div. 1987); see also Sears v. Mortgage Co. v. Rose, 134 N.J. 326, 356 (1993) (the rule allows an insured to obtain a policy's "protection" without the necessity of incurring the costs to obtain a judicial determination); Tooker v. Hartford Accident & Indem. Co., 136 N.J. Super. 572, 576 (App. Div. 1975) (the rule is designed to "discourage groundless disclaimers by carriers by assessing against them the expenses incurred in enforcing coverage.").

In the court's opinion, Berkley has failed to rebut Mist's presumptive entitlement to a fee award and also that it would be an abuse of discretion to not award fees based upon the underlying circumstances. It is, in the court's opinion, not a close call. Here, Berkley's denial of its defense obligation was, for lack of a better term, "groundless." That much this court has already determined in its previous Statements of Reasons. As such, the court is constrained to respectfully disagree with Berkley's argument on this issue. No more need be written on this point.

Moving on to the issue of reasonableness, after a thorough review of all of the written submissions, the court will also grant Mist's fee application in its entirety because under the circumstances presented, the fees and expenses sought are all reasonable and were necessary. "The appropriate starting point ... for establishing a reasonable fee is to determine the lodestar, 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.'" Rendine v. Pantzer, 141 N.J. 292, 333 (1995) (quoting Hensley v. Eckerhart, 461 U.S. 424, 499 (1983)). The "lodestar" for litigation of this action through February 25, 2019 involved a total of 246.4 hours of attorney time at a blended rate of \$588.31 per hour, amounting to attorneys' fees of \$144,960.00. Mist also incurred \$1,470.50 in paraprofessional expenses and \$4,655.60 in disbursements. Mist also seeks an additional \$21,595.21 in fees incurred since February 26, 2019, in attending to the current motion.

To challenge \$52,871.74 as "unreasonable," Berkley has presented the Certification of John S. Pierce, Esq., a Partner with the law firm of Hinshaw & Culbertson, LLP, which is located in San Francisco, California. Rather than explore the efficacy of the relevant rate information provided in the certifications of Sherilyn Pator, Esq. and Robert D. Chesler, Esq., both of whom provided meaningful guidance to the court, Mr. Pierce relies predominantly upon his market study of rates in (southern) New Jersey. It is axiomatic that in a bench proceeding, the judge is free to

disregard expert testimony where he or she finds that it will not aid in making a determination. See N.J. Div. of Youth & Fam. Servs. v. Z.P.R., 351 N.J. Super. 427, 439-40 (App. Div. 2002). This is especially true when the proffered expert's opinion is to guide the law in interpreting case law, something which judges do every day as a matter of course without the aid of experts. "It is well-established that '[e]xpert witnesses simply may not render opinions on matters which involve a question of the law.'" Boddy v. Cigna Prop. & Cas. Cos., 334 N.J. Super. 649, 659 (App. Div. 2000); N.J.R.E. 702, cmt. 1 ("Questions of law ... are for the court alone and are not appropriate objects of expert testimony.").

Again, awarding attorneys' fees is "a matter which rests in the sound discretion of the trial court." In re Probate of the Alleged Will of Landsman, 319 N.J. Super. 252, 271 (App. Div. 1999). Although certainly a well-credentialed and incredibly experienced attorney, ultimately, as an attorney who practices in California with no connection to this case or the New Jersey legal community apart from being retained to write a report on fees, Mr. Pierce lacks any "peculiar knowledge or experience" that renders his opinions regarding reasonable legal fees an "aid to the court." See Berry, 140 N.J. at 291. Even the most cursory review of Mr. Pierce's tome shows that it is a legal brief in everything but title. His certification is replete with argument and, in fact, as pointed out by Mist's counsel, cites even more cases³ than Berkley's and Mist's briefs combined. It is not consistent with Court Rule 1:6-6, which makes it clear that it should only set forth facts based upon personal knowledge.

According to Mist's reply brief and cited cases, courts have routinely rejected Mr. Pierce's "reasonableness" assessment for a host of reasons. Those cases need not be discussed by this court in order to reach its conclusion in this case. The Achilles' heel of the Pierce Certification is that it

³ Mostly from California courts

simply does not address the factors of Rule of Professional Conduct 1.5(a), which, according to the Supreme Court of New Jersey, “must inform the calculation of the reasonableness of a fee award in this and every case.” Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22 (2004). For instance, one of those factors is “the amount involved and the results obtained.” Id. Because that factor would not depress Lowenstein’s rates, Mr. Pierce ignores that Mist only incurred \$151,000 in coverage counsel fees to obtain access to a \$2,000,000.00 policy. Another factor is the “novelty of the question,” ignored by Mr. Pierce. See id.

In addition, according to New Jersey law, attorneys’ hourly rates should be “compar[ed] to rates for similar services by lawyers of comparable skill, experience, and reputation in the community.” Id. The Lowenstein lawyers for whom fees are being sought in this matter are insurance coverage specialists who practice in Roseland, New Jersey, which is located in Northern New Jersey. Mr. Pierce’s idea of “similar services” and “community” are commercial litigators from Trenton, New Jersey, which is located in Southern New Jersey. The court is mindful that hourly rate differences, likewise, extend to the geographic breakdown of the legal community. As such, the court agrees with Mist’s observation that a more logical/helpful comparison for Roseland attorneys’ hourly rates is to the rates of attorneys in the closer geographic venues like Newark or New York City, rather than Trenton. Very different area codes and very different costs for professional legal services. That type of data is noticeably absent from Mr. Pierce’s rate table submitted to the Court.

The court has reviewed the certifications and has concluded that hourly rates of each of the Lowenstein Sandler attorneys that worked on this matter are reasonable, given the attorneys’ skill and experience. The court has concluded the hourly rates charged by Lowenstein Sandler attorneys are reasonable when compared to the hourly rates charged by other attorneys who also specialize

in insurance recovery and who practice in the relevant New Jersey market. Mist provided in support of its application the certifications of two experienced attorneys who specialize in representing corporate policyholders in insurance coverage litigation. The attorneys have both credibly attested that the rates charged by Lowenstein Sandler to Mist are within the prevailing market rate that is customarily charged in northern New Jersey for representation of corporate policyholders in insurance coverage litigation. Their certifications – and the reasonableness of Lowenstein’s rates – are also confirmed by the Peer Monitor’s survey of the range of hourly rates charged by insurance coverage litigators at national law firms, including Lowenstein Sandler. The hourly rates charged in this case for Ms. Bennett and the associates are clearly comparable to the rates identified in the survey.⁴

The court has also concluded that the tasks performed by Lowenstein Sandler to pursue this action, are reasonable. Only a single partner worked on the matter and was assisted by only one counsel; on limited occasions an associate performed discrete research. The tasks performed were tailored to securing Berkley’s duty to defend. This effort was professional and focused: filing a complaint and then filing an early motion for partial summary judgment. The subsequent efforts that Mist had to undertake (e.g., document discovery, supplemental briefing, opposing reconsideration motion, opposing interlocutory review, and filing this motion), were necessitated, in the court’s opinion, entirely by Berkley’s commitment to its coverage denial. All of the Lowenstein Sandler submissions were based upon solid research, were extremely well written and to the point. The court is not going to take a microscopic view of well-documented fee application amounts and hours, professional, paraprofessional or administrative, in order to carve out any

⁴ The “inflationary block-billing” argument raised by Mr. Pierce is not logical nor consistent with this court’s understanding of the law or anecdotal evidence gleaned during twenty-eight years in the practice of law and six years on the bench. Block-billing is not an absolute bar to fee recovery. The proper barometer is reasonable fees, which are contingent on the reasonableness of the time entries. The Mist attorneys’ filed records pass that test.

amounts that have been easily demonstrated to be overall very fair and reasonable. Such an approach is not warranted, nor would it be fruitful.⁵

Conclusion

For the reasons set forth in detail above, Mist is a successful claimant entitled to a fee award under Court Rule 4:42-9(a)(6) and the fees/rates incurred were reasonable. Accordingly, Mist's motion to be awarded attorneys' fees and costs in the amount of \$172,681.31 is GRANTED.

⁵ The court would note that the Coughlin Duffy submissions were also well written. The court was not informed as to the legal costs associated with Coughlin Duffy zealously advocating on behalf of Berkley, but the court would imagine that the fees and costs were fair and reasonable as well.