

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KRISTY MOYER : CIVIL ACTION
 :
 v. : NO. 05-1053
 :
 TURNBROOK ASSOCIATES, INC. :

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

October 17, 2005

Kristy Moyer asks this Court to award attorney fees after an arbitration award of \$1,000 for violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, and related state law claims. Turnbrook Associates, the defendant, argues prevailing on a single count should not entitle Moyer to attorney fees. Because the statute and Third Circuit law compels an award of attorney fees, I will grant Moyer's motion.

FACTS

Moyer filed suit in district court complaining that an employee of Turnbrook Associates violated the FDCPA in several instances in an effort to collect a debt. Moyer received an arbitration award of \$1,000 on July 21, 2005. Judgment was entered on August 25, 2005, and Moyer filed for attorney fees on August 31, 2005, well within the required 14 days. Fed. R. Civ. P. 54(d)(2)(b). At the October 3, 2005 hearing on attorney fees, counsel for Turnbrook suggested Moyer had sued the wrong party and the judgment would be unenforceable.

DISCUSSION

The FDCPA imposes liability for actual damages, statutory damages and a reasonable attorney's fee as determined by the court. The Third Circuit holds an award of attorney fees is mandatory under Section 1692k(a). *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991).¹ The ability of a losing party to pay the attorney's fee is not a relevant consideration. *Id.* at 114.

Turnbrook argues the size of Moyer's award, \$1,000, suggests she is not the prevailing party. The statute requires only that a debt collector "fail[] to comply with any provision of this subchapter" to incur liability. 15 U.S.C. § 1692k(a). Judgment was entered in favor of Moyer in the statutory maximum of \$1,000. 15 U.S.C. § 1692k(a)(2)(A); *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004). When the facts do not support an award of statutory damages, courts do not impose them. *See Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989) (determining that the nature of defendant's noncompliance did not warrant statutory damages); *Fasten v. Zager*, 49 F. Supp. 2d 144, 150 (E.D.N.Y. 1999) (holding the defendant's noncompliance was minor). In this case the Complaint alleged several acts of non-compliance and the arbitrators awarded statutory damages, suggesting a significant level of non-compliance. Attorney fees are then mandatory under *Graziano*.

Turnbrook's second argument is that Moyer should have made her claim for attorney's fees during arbitration. The Rules of Civil Procedures provide a motion for attorney's fees must be filed no later than fourteen days after the entry of judgment. Fed. R. Civ. P. 54(d)(2)(b). Nothing in the FDCPA provides otherwise. 15 U.S.C. § 1692k(a)(3). Moyer timely filed. Only if a settlement

¹ The Third Circuit noted with approval cases in which courts imposed attorney's fees even where violations did not warrant statutory damages. *See Pipiles v. Credit Bureau of Lockport*, 886 F.2d 22, 28 (2d Cir.1989); *Emanuel v. American Credit Exchange*, 870 F.2d 805, 809 (2d Cir.1989).

agreement “clearly waived the statutory right to attorneys fees,” will this Court deny a motion for attorney fees. *El Club Del Barrio, Inc. v. United Community Corporations, Inc.*, 735 F.2d 98, 99 (3d Cir. 1984) (holding effective waiver of attorney fees in a settlement agreement must be written). *But see Evans v. Jeff D.*, 475 U.S. 717, 743 (1986) (upholding a fee waiver which secured broad injunctive relief). Moyer complied with Rule 54 and nothing in the settlement agreement explicitly waived the attorney fees to which Moyer is entitled by statute.

To calculate reasonable attorney fees this Court multiplies the reasonable number of hours worked by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Moyer’s attorney, Jason M. Rapa, Esq., offered evidence that he charged Moyer \$225 an hour for twenty-seven hours work. Rapa presented credible evidence his hourly rate was substantially less than the \$290 an hour approved by this Court in another case, he is well-qualified to handle consumer law questions and he has brought more than 300 such cases. The twenty-seven hours work, some of which were individually challenged by Turnbrook, include time with Moyer, research, drafting and time in arbitration. The total of fees and costs is \$6,461.87, which I find reasonable.

The second issue which Turnbrook raises is whether a judgment entered against Turnbrook Associates, Inc. is enforceable against the unincorporated Turnbrook Associates. A Complaint which names the wrong party as defendant will not generally survive a motion for summary judgment. *See Rao v. Hillman Barge & Constr. Co.*, 467 F.2d 1276, 1277 (3d Cir. 1972). To avoid having judgment entered against a non-existent party, Moyer must petition this Court for leave to amend her pleading under Rule 15.² The Third Circuit interprets Rule 15 liberally. *Lundy v. Adamar*

²Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive

of New Jersey, Inc. 34 F.3d 1173, 1193 (3d Cir. 1994). A court may allow amendment after judgment is entered. 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1488 (2000). Prejudice to the non-moving party is “the touchstone for the denial of an amendment.” *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989) (internal citations and quotations omitted). A court may “permit amendments to conform to the evidence only if an issue has been tried with the

pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

- (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
- (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
- (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

express or implied consent of the parties and the opposing party will not thereby be prejudiced.” *Evans Prods. Co. v. W. Am. Ins. Co.*, 736 F.2d 920, 924 (3d Cir. 1984). “If the issue ... has not been tried with the consent of the parties, then an amendment to conform to the pleadings will not be permitted no matter when made.” *Douglas v. Owens*, 50 F.3d 1226, 1236 (3d Cir. 1995).³

Were this Court to deny amendment, Moyer would be unable to re-institute her action within the statute’s one-year limitation. 15 U.S.C. § 1692k(d). A defendant, whose representations or other conduct has caused a plaintiff to delay filing suit until after the running of the statutory period, may not assert the statute of limitations as a bar to the action. *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946 (3d Cir. 1971) (holding a plaintiff must show he was misled into delay by the defendant). This Court may invoke equitable estoppel to prevent the running of the statute when “the defendant has actively misled the plaintiff respecting the plaintiff’s cause of action.” *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994). The doctrine of equitable estoppel allows “no man to take advantage of his own wrong.” *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232 (1959). The doctrine of equitable tolling should be applied sparingly. *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748, 753 (3d Cir. 1983).

³Prior to the 1991 amendment to Rule 15(c), a plaintiff could not relate back the amendment of a defendant’s name on the complaint unless the new defendant had notice of the suit prior to the expiration of the statute of limitations. *Schiavone v. Fortune*, 477 U.S. 21, 30-31 (1986). The 1991 amendment to Rule 15(c) changed the result in *Schiavone* and provided that an amendment would relate back as long as the intended defendant received notice of the action within the period allowed for service of the summons and complaint as set forth in Fed. R. Civ. P. 4(m), or 120 days, whether or not the statute of limitations had expired in the interim. Rule 15(c) does not require that a plaintiff actually amend his complaint within the Rule 4(m) period; it speaks only of notice, lack of prejudice, and reason to know of a mistake within that time. *Urrutia v. Harrisburg County Police Dep’t* 91 F.3d 451, 458 (3d Cir. 1996) (suspending the running of the statute of limitations during the pendency of an *in forma pauperis* motion.) In this case, Turnbrook Associates undeniably had notice of the suit, which it defended, and so no prejudice will flow from allowing an amendment to relate back.

In this case Turnbrook actively misled Moyer when it admitted it was a New Jersey corporate entity. Because Turnbrook actively misled Moyer, Turnbrook loses the protection which a mistaken pleading would ordinarily provide. Turnbrook has not and can not suggest it was in any way prejudiced by Moyer's belief it was corporation. Turnbrook is equitably estopped from objecting to Moyer's Motion for Leave to Amend under Rule 15, which this Court will entertain when filed. I will enter an appropriate order.

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ORDER

And now this 17th day of October, Plaintiff's Motion for Attorney's Fees (document 9) is GRANTED. Judgment is entered in favor of Plaintiff and against Defendant in the amount of \$6,461.87 (six thousand four hundred sixty-one dollars and eighty-seven cents). It is further ORDERED this Court will entertain a Motion for Leave to Amend pursuant to Fed. R. Civ. P. 15(b) and (c)(3) to conform the pleading to Defendant's Answer and evidence presented and for the entry of judgment against Turnbrook Associates.

BY THE COURT:

Juan R. Sánchez, J.