

State of New York v Morris

2004 NY Slip Op 30154(U)

September 24, 2004

Supreme Court, New York County

Docket Number: 0400361/1997

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAMOS
Justice

PART 53

STATE OF NEW YORK

INDEX NO. 400361/97

MOTION DATE _____

- v -
PHILIP MORRIS INC., ET AL

MOTION SEQ. NO. 32

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with
accompanying memorandum decision and order.

FILED

SEP 29 2004

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/24/04

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
CHARLES E. RAMOS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
THE STATE OF NEW YORK and ELIOT SPITZER,
Attorney General of the State of New York,
for an on behalf of the PEOPLE OF THE
STATE OF NEW YORK,

Plaintiffs,

-against-

Index No. 400361/97

PHILIP MORRIS INCORPORATED; PHILIP
MORRIS COMPANIES, INC.; RJR NABISCO,
INC.; RJR NABISCO HOLDINGS CORP.;
RJ REYNOLDS TOBACCO CO.; THE AMERICAN
TOBACCO CO., INC.; AMERICAN BRANDS,
INC.; BROWN & WILLIAMSON TOBACCO CORP.;
LORILLARD TOBACCO COMPANY; LORILLARD
INCORPORATED; LOEWS CORPORATION; UNITED
STATES TOBACCO COMPANY; U.S.T., INC.;
B.A.T. INDUSTRIES, P.L.C.; BRITISH
AMERICAN TOBACCO COMPANY, LTD.; BATUS
HOLDINGS, INC.; THE COUNCIL FOR TOBACCO
RESEARCH-USA, INC.; and TOBACCO INSTITUTE,
INC.,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

*In accepting the honor and responsibility of
life in the profession of law-*

*I will strive, as best I can and with a whole
heart and with good faith to weigh my
conflicting loyalties-*

*And guide my work with an eye to what is
good, acting less for myself than for justice
and the people-*

*And to be at all times, even at personal
sacrifice, a champion of fairness and due
process, in court or not-*

*For all persons, whether the powerful or
envied, or my neighbors-*

Or the helpless, hated, or the oppressed.

Karl N. Llewellyn The Lawyer's Pledge, New
York Law Journal, August 27, 2004.

Mindful of these principles, this Court requested Harvey Fishbein and Jack S. Hoffinger to act as "Independent Counsel" to represent the people of this State in this Court's attempt to determine the fairness of a legal fee awarded to "Outside Counsel." Independent Counsel now move for an order removing a docketed judgment in the amount of \$4,572.34 against them personally and vacating said judgment.¹ The law firm Sullivan Papain Block McGrath & Cannavo, P.C. ("Sullivan") cross moves for my recusal.

The background of this action is set forth in this Court's October 22, 2002 decision and will not be repeated here except to say that the tobacco companies agreed, pursuant to the terms of the Master Settlement Agreement ("MSA"), to certain non-monetary restrictions and to pay New York State a sum of money in settlement of this action. As a result of one cause of action in the complaint, the counties of this State receive almost 50% of the monetary component of the settlement. That single cause of action was brought as a class action under CPLR Article 9. In its October 22, 2002 decision, this Court held that under the courts' inherent powers and pursuant to CPLR Article 9 it had the authority to inquire into the grant of attorneys' fees in the amount of \$625 million to six law firms (also referred to herein as Outside Counsel) hired by the then Attorney General to represent New York State in this litigation against the tobacco

¹A temporary restraining order dated February 13, 2004 issued restraining Sullivan Papain from enforcing the judgment.

companies. The motion seeking this Court's recusal asserts that any argument that Independent Counsel's role was to ensure the "'judicial process' or some such nonsense is pure dross." (Shoot affidavit ¶ 14). Instead of setting a basis for recusal, Outside Counsel seek to question this Court's motives when it acted on its own initiative to question the fees were reasonable.

At the heart of this Court's discomfort at the \$625 Million legal fee in this case was the absence of any judicial review of its reasonableness. It should also be understood that this case was virtually unknown to this Court. This matter had been referred to this Court long after its settlement. The Justice who presided over this entire case through settlement (and beyond) had been subsequently appointed to the Appellate Division and was therefore no longer presiding over this case at the time the arbitrators made their fee award. Therefore, no Justice was available that was familiar with this action or of Outside Counsel's efforts.

Notwithstanding the fact that this Court was assigned all responsibility over the conduct of this case and any future enforcement of the MSA, we were not notified that a fee application had been made, that an arbitration was in fact conducted and that an award of \$625 Million in legal fees to be paid to Outside Counsel had been rendered by the arbitrators.

Under the MSA and the New York Fee Payment Agreement (NYFPA) the arbitrators' task was to set a fee in accordance with the American Bar Association's Code of Professional Responsibility (a

highly refined and technical document which is widely accepted as the national lawyers' code of ethics which is referred to herein as the "ABA Code"). The fee that was awarded by the arbitrators pursuant to that code was to be "reasonable." It should be noted that this Court was, and still is, deeply concerned that the three member arbitration panel was not unanimous in its determination. Of the two arbitrators voting in favor of the award, only one was an attorney. Additionally, the third (dissenting) arbitrator on the panel was a retired Federal judge who strongly objected to the amount of the fee awarded.

At the time this Court was considering this issue, this Court was not aware of any provision of the MSA or the order of our predecessor court approving it, that divested the courts of this State of their statutory duty under Article 9 to insure that legal fees awarded in class actions were reasonable.

It was this Court's opinion that it had an obligation to evaluate this fee, as the fee in any case involving a class action or the public, in the context of the benefit to the client, the skill of counsel, the risk of no compensation and the effort expended. It should be noted that this task was complicated by the fact that this settlement had both monetary and non-monetary components.

This Court's analysis of the terms of the settlement as set forth in the MSA raised questions regarding the true magnitude of the monetary benefit of the settlement to the people of New York State. Briefly, this Court was concerned (a) that the real

monetary benefit was far less than the headline figure of \$25 Billion which has been repeatedly used to justify the fee award of \$625 Million and (b) that the consumer, *i.e.*, the public, rather than the tobacco manufacturers, was actually funding the settlement by being required to pay higher prices for tobacco products. It seemed, frankly, that the settling defendants were not using their own money to fund the settlement.

Of course, this Court is well aware of the non-monetary benefits of the MSA and does not in any way seek to diminish their importance. However, when dealing with class actions and with actions involving the State, special care should be given to the concept of fairness, particularly with regard to what here is virtually an unopposed fee.²

This does not mean that Outside Counsel, who were appointed by then Attorney General Dennis Vacco, do not have a right to be fairly compensated for their efforts. In fact it is this Court's opinion that Counsel should always be rewarded for the risks they take, especially when they accept a litigated matter on a contingent fee basis. However, it should be noted here that this fee was not contingent upon success. It was agreed that it would be fixed pursuant to the ABA Code which is a "Loadstar" determination based on skill, experience, risk, difficulty and hours expended.

This Court also notes that it does not hold Outside Counsel

²The tobacco manufacturers, the defendants herein, never objected to the amount of this fee.

responsible for any possible deficiency in the terms of this settlement. They did not negotiate its terms, Mr. Vacco did in his final month as New York's Attorney General.

This Court intended to inquire into these and other issues in order to assure that the fee was reasonable under all of the circumstances. The fair adjudication of these issues, given the staunch and ultimately successful resistance of the parties, required that someone oppose Outside Counsel with regard to the amount of their fee. Without an adversary (in this case Independent Counsel), there can be no adversarial system. It was never this Court's intention to impoverish counsel or to deny them a generous reward for taking on what was at the time, a questionable venture. However, their effort to saddle Independent Counsel with costs of \$4,572.34 after succeeding in protecting their \$625 Million fee is unwarranted and was not what the Court of Appeals directed.

This Court had stayed payment of the \$625 Million legal fee to Outside Counsel pending a hearing on whether the fee was reasonable under the ABA Code and the rules governing the settlement of class actions (CPLR Article 9) and ordered payments to be made to the Attorney General in escrow for the People of the State of New York.³ The six law firms and the NYS Attorney

³Contrary to Sullivan's cross moving papers, this Court did not vacate the arbitration award. p. 7 ¶13. Indeed, in the October 22, 2002 order, the Court specifically stated "that the Court's motion is withdrawn with regard to vacating the arbitration award, vacating the MSA and vacating any prior orders." The Appellate Division's decision reveals that it may have been misled when it adopted Sullivan's argument that this

General appealed the October decision. This Court appointed Mr. Hoffinger and Mr. Fishbein to represent plaintiffs-class members pursuant to the Rules of the Justices of the Commercial Division, Supreme Court, New York County, Appendix C, paragraph 6,⁴ on January 17, 2003. The Attorney General moved to appeal the January 17, 2003 order appointing Independent Counsel.

The MSA provides that Tobacco shall pay "reasonable attorneys' fees" to plaintiffs' attorneys who agreed to execute a model fee agreement pursuant to which attorneys' fees were to be determined through arbitration. The New York Fee Payment

Court "lacked the authority to sua sponte reopen the M.S.A. in order to inquire into the setting of Outside Counsel's attorneys' fees." 308 AD2d 57, 69. This Court never opened the MSA. Indeed, the October decision specifically states "the Court's motion is withdrawn with regard to vacating . . . the MSA and any other prior orders."

This Court does not recite the above as any criticism of the Appellate Division. That Honorable Court can deal only with those facts brought before it. These are problems that arise when courts seek to protect class members who can no longer be represented by prior counsel who are the ones most familiar with the facts in their case, because of a conflict regarding reasonable fees.

⁴The Rule provides:

6. The Court may appoint independent counsel to represent the proposed class members on the question of class certification, fees to be awarded class counsel or any other issue where the Court is unable to determine the relative strengths of the parties' positions, or if the settlement raises questions about collusion or the ability of plaintiffs' counsel to represent the interests of the class.

Contrary to Sullivan's suggestion to the Appellate Division that this rule was drafted to fit this case, that rule was adopted in the year 2000, well before this case was assigned to this Court and long before this issue arose.

Agreement (NYFPA)⁵ provides in section 2 that the award would be in accordance with the ABA Code which also requires fees to be reasonable and sets forth the criteria to be used in determining the fee.

While the appeal of our October decision was pending, this Court received a copy of a letter dated February 24, 2003 from a Stephen J. Acquario, general counsel of a private organization allegedly representing the interests of county officials and administrators, calling itself the New York State Association of Counties.

Although he had never appeared in this action, in his letter Mr. Acquario remarkably claimed that he in fact represented the county class members and took upon himself the authority to instruct Independent Counsel not to oppose the \$625 Million fee. This Court invited Mr. Acquario and all counsel to a conference to be held on February 25, 2003 to determine if he indeed represented the class members and if that would finally end this inquiry of the appropriateness of the \$625 Million fee (without the need for the appeals which have resulted in this present dispute). The Attorney General successfully sought from the Appellate Division a stay of that conference. Summary Statement on Application for Expedited Service and/or Interim Relief, Feb. 24, 2003. Thus, this Court was barred from inquiring whether

⁵Since the NYFPA, not the original retainer agreement, was operational, the Appellate Division's comparison to the award under the retainer agreement to justify the \$625 million attorneys' fees award may be yet another instance of confusion. 308 AD2d 20 at 57 and 71.

members of the class did not wish to be represented by Independent Counsel and oppose the legal fee, as Mr. Acquario had contended, and if there was any need at all to continue this inquiry.

On February 20, 2003, the First Department granted the Attorney General's motion for leave to appeal and allowed Independent Counsel to file briefs on both appeals, designating them "Non party respondents."

In its July 31, 2003 decision, the First Department reversed our October decision, dismissed the *sua sponte* proceeding, reversed the January 17, 2003 appointment of Fishbein and Hoffinger and vacated the order, all without costs. The Appellate Division held that this Court did not have the authority to *sua sponte*⁶ inquire into the payment of attorneys' fees in a class action. It also held that this Court did not have the authority to review attorneys' fees to determine if they were reasonably consistent with the ABA Code, as required by the NYFPA. In yet another indication of the confusion plaguing this case, in its decision, the Appellate Division adopted the Acquario letter and his self-serving statement that he represented the City of New York and the county plaintiffs, when it stated that "[t]he counties clearly do not want the lawyers

⁶Even if a party such as Tobacco had challenged the award of attorneys' fees under the MSA, the Appellate Division's conclusion would be the same. Indeed, the First Department held in *In re Application of Brown & Williamson*, "we nevertheless observe that the award is neither irrational nor violative of public policy." even though there was never a fairness hearing under CPLR Article 9. NYLJ May 19, 2004, p 1.

appointed by Justice Ramos; they have told the nonparty respondents to stop acting on their behalf." 308 AD2d 57. Without any citation or reference to Mr. Acquario's letter, the Appellate Division quotes from it even though it was not in the record; "they [the counties] 'agree with the position taken by the New York State Attorney General's Office... in this action.'" 308 AD2d 57.

Mr. Fishbein and Mr. Hoffinger moved for leave to appeal to the Court of Appeals. On November 24, 2003, the Court of Appeals stated "Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements." On December 4, 2003, Sullivan, one of the six firms being paid a total of \$625 Million, sent Hoffinger and Fishbein a copy of a printer's bill seeking reimbursement for the sum of \$4,687.66.⁷ On February 5, 2004, Sullivan had the Court of Appeals order docketed as a judgment pursuant to CPLR 2222⁸ in the amount of \$4,572.34 against Fishbein and Hoffinger, individually. Sullivan sent a letter dated February 9, 2004 to Fishbein and Hoffinger containing a copy of the judgment.

⁷The Damashek and Thuillez firms sent Hoffinger a letter dated December 11, 2003 seeking reimbursement of an additional \$2,490 in reproduction costs.

⁸CPLR 2222, Docketing order as judgment provides:

At the request of any party the clerk shall docket as a judgment an order directing the payment of money, including motion costs, or affecting the title to, or the possession, use or enjoyment of, real property, provided, however, that where the clerk maintains a section and block index, an order affecting the title to, or the possession, use or enjoyment of, real property may be entered in such index in lieu thereof.

Based on CPLR Articles 81 to 84, Hoffinger and Fishbein argue that costs and disbursements can only be assessed against parties not against lawyers, especially if the lawyers were appointed by the Court and confirmed with a name change by the Appellate Division. They also dispute the amount as excessive. Finally, Independent Counsel argue that the very docketing of such a judgment may be harmful to their reputations if it is disclosed, for example, to creditors or potential lenders.

CPLR Article 81 "Costs Generally" repeatedly uses the term "party," "plaintiff" or "defendant". Accordingly, resolution of this motion turns on whether Independent Counsel can be categorized as a party.

Sullivan relies on *Matter of Greater New York Health Care Facilities Association v DeBuono*, 91 NY2d 716, 720 (1998) for the proposition that Independent Counsel are liable for costs as intervenors. In that case, the Court explained that even though "a successful intervenor [under CPLR 7802(d) or 1013] becomes a party for all purposes and the intervenor's claim will be deemed to have been interposed as of the filing date of the petition, . . . intervention cannot be used as a means to revive stale claims." That case is inapplicable here since Independent Counsel never moved to intervene. The Court rejects Sullivan's reliance on *New York Central Railroad Company v Lefkowitz*, 19 AD2d 548 (2d Dept 1963) for the same reason.

Next, we turn to the First Department's designation of Independent Counsel as "nonparty respondents." A review of the

almost 500 New York cases wherein the term "Nonparty Respondent" appears, yields the conclusion that it is used as a catchall term to describe anyone who is not a party, but who has an interest in the proceeding. See e.g. *Ellis v Griffin*, 2 NY 3rd 704 (2004) (law guardian for child); *Brady v Ottaway Newspapers, Inc.*, 63 NY2d 1031 (1984) (in a libel action, nonparty respondent, the NYS Police Department, created confidential investigative police reports on police corruption sought by both plaintiff and defendant newspaper); *Walker v Mount Vernon Hosp.*, 5 AD 3rd 590 (2d Dept 2004) (nonparty respondent was attorney moving to withdraw as counsel); *Villano v Beeson*, 3 AD3d 344 (1st Dept 2004) (nonparty appellant and nonparty respondent, both law firms fighting over contingency fees); *United Airlines, Inc. v Ogden N.Y. Servs.*, 305 AD2d 239 (1st Dept 2003) (documents sought from nonparty respondent). Therefore, the Court cannot conclude that Independent Counsel are parties based on the fact that the First Department used the designation "nonparty respondent."

Independent Counsel were appointed under this Court's rule to represent the class members. However, on appeal, Independent Counsel were also advocating for affirmance of this Court's October decision. Indeed, this is true whenever one party is successful at the trial level and the unsuccessful party appeals. Without a respondent defending the underlying decision, there would be silence. Typically, the successful party will argue that the lower court was correct.

The situation here is not unlike cases where a judge imposes

sanctions or finds contempt. *Sholes v Meagher*, 100 NY2d 333 (2003). When the order is appealed and the action was taken by the judge *sua sponte* or the adversary has no interest in defending the judge's action, there is no opposition to the appeal. To remedy this situation, the Office of Court Administration and the Attorney General have executed a Memorandum of Understanding dated October 24, 2003, pursuant to which a Judge may request the Attorney General to participate. Likewise, here, this Court inquired whether the Attorney General would defend the decision on behalf of the class. Not only did the Attorney General choose not to, he joined the appeal.

At no point did Independent Counsel's status change from advocate to party. Rather, Independent Counsel's appointment in this case is similar to the appointment of the Attorney General as counsel when a judge or state employee is sued in an official capacity. Public Officers Law §17 provides authority for the Attorney General to defend the Judge or employee. Here, the October 22, 2002 decision invited the Attorney General to represent the class members since Outside Counsel who were seeking fees were hopelessly conflicted. When the Attorney General joined Outside Counsel's appeal, there was no one left to represent the class members. Under Public Officer's Law §17(b), when such a conflict arises with the Attorney General, a New York State employee is entitled to choose private counsel. Likewise, here, when a conflict arose in this case, this Court appointed

private counsel.⁹

Independent Counsel are not parties to this action and thus are not liable for the costs awarded by the Court of Appeals. When an entity, not a party, "assist[s] the Court in coming to a correct determination of the question presented, it is not liable for costs." *Jackson v Smith*, 154 AD 883 (1st Dept 1912) (where the City of New York was not a party to the action, but simply assisted the Court in coming to a correct determination of the question presented, it could not be liable for costs), *affirmed*, 213 NY 630 (1914). Indeed, the Court of Appeals did not specify that either Independent Counsel or nonparty respondents were to pay the costs. When a Court wishes to take the unusual step of awarding costs to or to be paid by a nonparty respondent, it knows how to say so. See e.g. *Broadway Equities v Metro. Elec. Mfg. Co.*, 306 AD2d 426 (2d Dept 2003); *Key Corporate Capital, Inc. v Lindo*, 304 AD2d 620 (2d Dept 2002); *Nam Jin Chung v M & S Deli*, 293 A.D.2d 725 (2d Dept 2000); *Coronet Capital Co. v Spodek*, 279 AD2d 602 (2d Dept 2001). Indeed, it is required to so specify. CPLR 8110 provides:

Where costs are awarded against a fiduciary, they shall be chargeable upon the estate, fund or person he represents, unless the Court directs them to be paid personally for mismanagement or bad faith in the prosecution or defense of the action.

If the Court of Appeals intended to use costs to sanction

⁹Although no application for payment has yet been made, the Court sees no reason why Independent Counsel would not be entitled to compensation under Public Law §17.

Independent Counsel, as Sullivan contends, then that too must be stated clearly. CPLR 8303-a and 22 NYCRR 130.

Rather, it appears to this Court that under CPLR 8109, payment of defendants' costs must be made by the state. CPLR 8109(b) provides:

Payment of defendant's costs against the state. Where costs are awarded to the defendant and against the state in an action brought by a public officer, and the proceedings have not been stayed, the comptroller shall draw his warrant upon the treasurer for the payment of the costs out of any money in the treasury appropriated for that purpose, upon the production to him of an exemplified copy of the judgment or order awarding the costs, a copy of a taxed bill of costs and a certificate of the attorney-general to the effect that the action was brought pursuant to law. The fees of the clerk for the exemplified copy shall be certified thereupon by him and included in the warrant.

The Court also finds that Sullivan's fees may be excessive. In response to a motion for leave to appeal, section 500.11(d)(2) of the Rules of the Court of Appeals limits opposing respondents to "a single document [or] the filing of one copy of respondent's Appellate Division brief" in lieu of opposing papers. Sullivan's opposition was over 650 pages, including many items which had already been submitted with the motion for leave. And, it made 31 copies. Indeed, the request by Damashek and Thuillez firms for \$2,490 supports the conclusion that Sullivan's request for \$4,572.34 is overstated. Moreover, CPLR 8105 limits costs in multiple party actions to the same amount as if there had been a single party.

With regard to recusal, the rules provide that this Court grant such a motion only when a judge's impartiality might

reasonably be questioned. Rules of the Chief Administrator, 22 NYCRR 100.4(E). The fact that this Court at one time sought to hold a hearing to inquire into the reasonableness of the fee awarded by the arbitrators is not a ground for recusal. That issue has already been ruled upon by the appellate courts of this State. The cross-movant fails to set forth any basis for disqualification. This Court has not pre-judged the issue now before it, nor does it have any interest in the outcome. This Court has continued to rule on matters involving the MSA and has been affirmed by the Appellate Division. Given the finality of the appellate determinations, the discomfort, if any, Outside Counsel have in further appearances in this matter is not a basis for disqualification. In addition, the appellate courts regularly disqualify any court when it appears that the interests of justice require such action. They did not do so in any of the appeals in this case.

Accordingly, it is

ORDERED, that the motion for an order removing from the judgment roll a docketed judgment in the amount of \$4,572.34 against Mr. Fishbein and Mr. Hoffinger personally and vacating the judgment against them is granted. The cross motion by Sullivan for my recusal is denied.

Dated: September 24, 2004

FILED
 SEP 29 2004
 J.S. COURT
CHARLES E. RAMOS