

Mark Fabrics, Inc. v GMAC Commercial Credit LLC

2005 NY Slip Op 30297(U)

December 14, 2005

Supreme Court, New York County

Docket Number: 604631/02

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 49m

Mark Fabrics Inc

INDEX NO. 604631/02

MOTION DATE _____

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

- v -

GMAC Commercial Credit

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

FILED
DEC 16 2005
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

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

Dated: 12/14/05 Alan Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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MARK FABRICS, INC. a corporation
organized under the laws of the
State of California, on behalf of
itself and others similarly situated,

Index No. 604631/02

Plaintiff,

- against -

GMAC COMMERCIAL CREDIT LLC,

Defendant.

-----x

HERMAN CAHN, J.:

This is an application to approve the settlement of the
within class action, and to set the fees of class counsel.

FILED
DEC 16 2005
COUNTY OF NEW YORK

The action was brought as a class action by plaintiff Mark
Fabrics, Inc. on behalf of itself and all others who had their
accounts receivable factored by defendant GMAC Commercial Credit
and/or its predecessors. Plaintiff alleges that GMAC Commercial
Credit and its predecessor improperly calculated the amount of
interest due to it from borrowers. The wrongful calculation was
due to defendant improperly calculating the dates on which the
members of the class should have been credited with the purchase
price of accounts receivable factored by GMAC Commercial Credit
and its predecessor. This caused plaintiff and other members of
the class to incur damages in the form of paying more interest
than should have been paid.

All the claims were dismissed by this court by decision dated December 15, 2003. Despite the dismissal and the fact that the class faces substantial risks of no recovery, counsel have succeeded in securing a settlement for the class, consisting of monetary and non-monetary relief.

The settlement provides for non-monetary relief, including defendant's agreement to complete a system-wide review of its files, including the available files of entities recently merged into GMAC Commercial Credit and an agreement to waive any claim for contractual attorneys' fees against plaintiff and possibly other members of the class. It is argued that the attorneys fees could be substantial given the work put into this case prior to the court's dismissal of plaintiffs' claims.

In addition, the settlement provides for a total cash payment in the amount of \$850,000.00. Plaintiff argues that the total benefits to the class, including cash and the value of GMAC Commercial Credit's system-wide review of its files, equal \$1,275,000.00, plus the value of GMAC Commercial Credit's waiver of its possible claim for attorneys' fees (plaintiff believes GMAC Commercial Credit has incurred attorneys' fees in this action in an amount equal to or greater than the amount of attorneys' fees which class counsel requests as a result of the settlement, i.e. \$425,000.00).

The court granted plaintiff's motion for preliminary

approval of the settlement on December 21, 2004. In its preliminary approval order, the court found "that the proposed settlement contemplated by the Agreement is within the range of fairness and reasonableness and grants preliminary approval to it." (Preliminary Approval Order, page 3, ¶ 4.)

Since the court granted preliminary approval, a class action settlement notice was published in USA Today National Edition and notices were mailed to 975 class members. The notices informed class members of the details of the hearing on the settlement and of their right to appear and object. The notice also informed the members of the class of the terms and provisions of the settlement, the amount of attorneys' fees class counsel will seek, and the procedure for submitting comments regarding approval of, or objection to, the settlement. In response to the notice there have been no objections and no opt-outs.

The court has again reviewed the settlement, and finds it to be fair. This is especially so, in view of the fact that counsel were able to obtain a settlement even after a motion to dismiss was granted.

It is noted, that class counsel are experienced attorneys and have obtained a good result for their clients. It is doubtful if a better result would be obtained if the settlement were not approved. The motion to dismiss has been granted. It is only if an Appellate Court reversed or modified that decision,

which is not at all certain, that any recovery by the class could be had. Thus, the settlement is approved.

Counsel also seeks an award of attorneys' fees, which is certainly warranted. The issue is the amount of attorneys' fees. Counsel seeks an award of \$425,000 (which sum includes "unreimbursed costs" of \$49,633.98). Such an award is less than the lodestar. However, it also equals fifty percent of the total monetary class recovery, since the attorneys' fees and expenses are being paid from the class recovery. In addition, plaintiff seeks an award of \$125,000 for its expenses in connection with the action. This would leave the members of the class with approximately 35% of the monetary recovery - a result which even in these circumstances is not reasonable.

After consideration, the court allows class counsel the sum of \$49,633.98, representing payment of the "unreimbursed costs." In addition, class counsel are awarded the sum of \$240,109.98, representing counsel fees. The court has awarded less than the lodestar amount, because an award measured by the lodestar would be inequitable to the members of the class. The award is approximately 30% of the monetary recovery.

The court has considered the application for an "incentive award" to the named plaintiff. The application is granted, and the named plaintiff is allowed an incentive award of \$25,000.

The balance of the recovery, \$535,256.12, shall be

distributed among the members of the class, as set forth in the settlement agreement.

Order signed.

Dated: December 14, 2005

ENTER: *Hen Cel*
J.S.C.

FILED
DEC 16 2005
COUNTY CLERK'S OFFICE
NEW YORK