

**Venturetek, L.P. v Rand Publ. Co., Inc.**

2007 NY Slip Op 31167(U)

May 8, 2007

Supreme Court, New York County

Docket Number: 0605046/1998

Judge: Herman Cahn

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

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VENTURETEK, L.P., RICHARD ELKIN, ANTOINE  
BERNHEIM, STACY BERNHEIM, and GENSTAR,  
LTD., individually and as shareholders  
of Rand Publishing Co., Inc.,

Plaintiffs,

-against-

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RAND PUBLISHING CO., INC., MASON P.  
SLAINE, MICHAEL E. DANZIGER,  
WARBURG PINCUS VENTURES, L.P. and  
E.M. WARBURG, PINCUS & CO., L.L.C.,

Defendants.

**FILED**

MAY 10 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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**CAHN, J.**

Motions sequence number 029 and 030 are consolidated for  
decision.

In motion sequence number 029, plaintiffs' counsel moves  
for an order (1) vacating the report of the Special Referee  
entered on November 30, 2006, insofar as it limited its  
attorneys' fees to \$175,000.00, and expenses to \$2,500, CPLR  
4403; (2) awarding plaintiffs' counsel attorneys' fees in the  
amount of \$225,000.00, representing 30% of the \$750,000  
settlement obtained from defendants Warburg Pincus Ventures, L.P.  
and E.M. Warburg, Pincus & Co., LLC (Warburg), and expenses in  
the amount of \$10,805.55; and (3) directing that plaintiffs'  
counsel be entitled to a pro rata share of the interest earned on  
the settlement, currently being held in escrow by Willkie Farr &  
Gallagher LLP.

In motion sequence number 030, defendants Rand Publishing Co., Inc., Mason P. Slaine and Michael E. Danziger move for an order (1) confirming the report of the Special Referee, insofar as it found that plaintiffs' counsel failed to meet its burden of proof on its application for attorneys' fees, and that certain testimony of David Jaroslawicz, Esq. was not credible, CPLR 4403; (2) rejecting the Referee's report, insofar as it concluded that plaintiffs' counsel was entitled to recover attorneys' fees in the amount of \$175,000.00, and expenses in the amount of \$2,500.00; and (3) directing Willkie Farr & Gallagher LLP to release to Rand all settlement funds held in escrow or, alternatively, all settlement funds over and above the \$177,500.000 awarded to plaintiffs' counsel by the Referee, and to retain the remainder of the funds in escrow pending final adjudication of this case.

#### **BACKGROUND**

The facts of this case have been detailed in numerous prior decisions of this court, familiarity with which is presumed.

Briefly, in October 1998, plaintiff shareholders, owning 50% of Rand Publishing Co., Inc., brought the instant derivative suit against (1) Slaine and Danziger, two of Rand's three directors and the remaining 50% shareholders of Rand, for, inter alia, usurpation of corporate opportunities, breach of fiduciary duty, and the imposition of a constructive trust, and (2) Warburg, for

tortious interference with contract and aiding and abetting a breach of fiduciary duty. In March 2005, all parties moved for summary judgment.

On April 6, 2005, while these motions were still pending, Warburg agreed to settle the claims asserted against it for \$750,000.00; a "So Ordered" stipulation of settlement was signed by this court on April 11, 2005 (see Brodie Aff., Exh. F). Pursuant to the stipulation, the settlement funds were placed in an interest-bearing escrow account, held by Warburg's counsel, Willkie Farr & Gallagher LLP (id.). The action continued against the other defendants.

Thereafter, plaintiffs' counsel moved for an award of attorneys' fees in the amount of 30% of the settlement, and additional expenses in the amount of \$10,805.55. Rand opposed the motion, noting, *inter alia*, that plaintiffs' counsel had failed to submit detailed time records from which it could be determined how much of the time spent by plaintiffs' counsel went to litigating the Warburg claims. This court was unable to determine, solely from the submissions on the motion, the reasonableness and value of the time expended by plaintiffs' counsel. Therefore, by Order dated March 8, 2006, the issues as to the reasonableness and fairness of plaintiffs' counsel request were referred to a Special Referee to hear and report (id., Exh.

A).<sup>1</sup>

The matter was heard by Special Referee Hewitt on April 26 and 27, 2006 (id., Exh. B). The Referee issued his report, which was entered on November 30, 2006 (id., Exh. C). In his report, the Referee reported that the plaintiffs' counsel had failed to establish, by a fair preponderance of the evidence, that it was entitled to an award of attorneys' fees representing 30% of the settlement, plus \$10,805.55 in expenses and disbursements. The Referee based his findings on his assessment of the witness testimony and evidence presented at the hearing.

Specifically, the Referee reported that plaintiffs' counsel failed to provide sufficient documentation to establish the time spent working on this case. In particular, he found that the direct testimony of attorney Jaroslawicz, regarding his estimates of such amounts, was unreliable and "virtually incredible," given his various admissions on cross-examination, the failure to provide documentation sufficient to support such testimony, and the amount of time that had elapsed since the matter was litigated and settled.

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<sup>1</sup> By separate Order, also dated March 8, 2006, the court granted the remaining defendants' motions for summary judgment and dismissed this action against them (see Brodie Aff., Exh. D). That decision has since been affirmed by the Appellate Division, First Department (see Venturetek L.P. v Rand Publishing Co., Inc., \_\_\_ AD3d \_\_\_, NY Slip Op. 03079 [1<sup>st</sup> Dept, April 12 2007]).

However, the Referee further found that it was undeniable that significant amounts of time had been spent working on this case, and that certain expenses had been incurred. The Referee reported that the record supported an award of attorneys' fees in the total amount of \$175,000.00, and expenses and disbursements in the total amount of \$2,500.00.

Plaintiffs' counsel now moves to reject those portions of the Referee's report which recommended that the award of attorneys' fees be limited to \$175,000.00, and that the award of expenses be limited to \$2,500.00. Plaintiffs' counsel argues that the Referee's failure to award him the attorneys' fees he sought was totally arbitrary, as the Referee failed to articulate any basis for an award of \$175,000.00, rather than the 30% (\$225,000.00) that was sought. He further argues that, in view of the contested nature of this complex derivative action and the amount of time that clearly was spent on hearings, depositions and appeals, this lesser amount is inadequate for the amount of work performed. Finally, plaintiffs' counsel argues that the Referee's limitation on the amounts requested to cover expenses and disbursements had no rational basis, as all of the expenses had been carefully detailed.

Defendants argue that the Referee's report, that plaintiffs' counsel failed to meet its burden of establishing its entitlement to attorneys fees in the amount 30% of the settlement proceeds,

and expenses as sought, is adequately supported by the record and should be confirmed. Defendants additionally argue that this court should reject the Referee's report, insofar as it found and concluded that counsel was entitled to recover fees of \$175,000.00 and expenses of \$2,500.00, given the absence of either contemporaneous time records or credible testimony to substantiate plaintiffs' counsel request. Rather, defendants argue, the court should enter an award of \$0.

### **DISCUSSION**

Where questions of fact are submitted to a Referee, it is the function of the Referee to determine the issues presented, and to resolve conflicting testimony and matters of credibility (Kardanis v Velis, 90 AD2d 727, 727 [1<sup>st</sup> Dept 1982]). The courts generally look favorably upon the report of a Referee because, as the trier of fact, the Referee is in the best position to determine the issues presented (Namer v 152-54-56 West 15<sup>th</sup> Street Realty Corp., 108 AD2d 705, 706 [1<sup>st</sup> Dept 1985]). Generally, the Referee's report should be confirmed if the findings contained therein are supported by the record (id., at 705).

As an initial matter, the court notes that the issue of whether or not plaintiffs' counsel is entitled to any fees from the settlement funds, was previously decided by the court in the affirmative in the March 8, 2006 Order, which referred only the

issue of the reasonableness of plaintiffs' counsel's request to the Referee. As noted in that decision, both New York and Delaware law permit an attorney for a derivative plaintiff to recover attorneys' fees out of the corporation's recovery, whether obtained by judgment, compromise or settlement (see, Business Corporation Law § 626(e); Glenn v Hoteltron Sys., Inc., 138 AD2d 568 [2<sup>nd</sup> Dept 1988], affd 74 NY2d 386 [1989]; Lewis v S. L. & E., Inc., 629 F2d 764 [2d Cir 1980]; see also Tandycrafts, Inc. v Inition Partners, 562 AD2d 1162 [Del Sup 1989]; Allied Artists Pictures Corp. v Baron, 413 AD2d 876 [Del Sup 1980]). It is undisputed that Rand's recovery from Warburg was the result of plaintiffs' counsel's prosecution of this case. Thus, as was emphasized by the Referee during the hearing, the only issues referred pertained to the value and reasonableness of such fees.

The Referee's report that plaintiffs' counsel failed to establish, by a fair preponderance of the credible evidence, that it was entitled to an award representing 30% of the settlement proceeds, and \$10,805.55, is confirmed. Although the Referee found that Jaroslawicz testified credibly about his education, legal experience and usual billing rate, and that this case involved a complex, derivative matter, the Referee did not accept his testimony regarding the number of court appearances, the amount of time spent deposing witnesses and traveling. The Referee based his findings both on the lack of sufficient

supporting documentation, as well as on numerous admissions made during cross-examination. After reviewing the hearing transcript and the evidence presented to the Referee, the court finds that the Referees' report in this regard is amply supported by the record.

Nonetheless, although plaintiffs' counsel was unable to produce contemporaneous time records to document either the expenses incurred or the amount of time spent on this case, the Referee found that it was undeniable that plaintiffs' counsel spent significant amounts of time and incurred expenses in prosecuting this case. Based upon the court's review of the hearing transcript and the credible evidence that was presented to the Referee, as well as on the substantial submissions contained in the court's file, the court finds that the recommended award of attorneys' fees in the total amount of \$175,000.00, and expenses and disbursements in the total amount of \$2,500.00, is reasonable and sufficiently supported by the record. Accordingly, the Referees' findings in this regard are confirmed, and defendants' motion to reject these findings, and enter an award of \$0, is denied.

Plaintiffs' counsel protests, nevertheless, that in view of the obvious amounts of time that were spent on this case, such an award is inadequate and should be increased. However, given the lack of contemporaneous time records, supporting documentation or

credible testimony in this regard, the court finds that there is insufficient evidence in the record to support any larger amount. Accordingly, plaintiffs' counsel motion, insofar as it seeks to increase the amount allowed to 30% of the \$750,000.00 settlement, plus \$10,805.55 in expenses, is denied.

Additionally, insofar as plaintiffs' counsel now seeks a pro rata share of the earned interest on the settlement proceeds, the motion is denied. The court notes that plaintiffs' counsel made no such request either on the prior motion, or during the hearing before the Referee. In any event, the court can find no basis to support adding to the award any share of the interest that has been earned on the settlement (cf. Ripley v International Rys. of Cent. Am., 16 AD2d 260, 264 [1<sup>st</sup> Dept], affd 12 NY2d 814 [1962]).

Finally, that part of the defendants' motion, which seeks the release of the Warburg settlement funds to Rand, is granted as to those amounts over and above the \$177,500.00 that is herein awarded to plaintiffs' counsel as attorneys' fees and expenses.

Accordingly it is

ORDERED that the motion by plaintiffs' counsel (motion sequence number 029), is denied to the extent that it seeks an order (1) vacating the report of the Referee entered on November 30, 2006, insofar as it limited plaintiffs' counsel's fee to \$175,000.00 and expenses to \$2,500.00; (2) awarding plaintiffs' counsel 30% of the settlement funds obtained from defendants

Warburg Pincus Ventures, L.P. and E.M. Warburg, Pincus & Co., LLC, as attorneys' fees, plus \$10,805.55 in expenses; and (3) directing that plaintiffs' counsel be entitled to a pro rata share of the interest earned on the funds currently held in escrow by Willkie Farr & Gallagher LLP; and it is further

ORDERED that the Report of the Special Referee, recommending an award of attorneys' fees in the total sum of \$175,000.00, and expenses and disbursements totaling \$2,500.00, is hereby confirmed; and it is further

ORDERED that plaintiffs' counsel is entitled to be paid attorney's fees and expenses of \$177,500.00, to be paid by Willkie Farr & Gallagher LLP, from the settlement funds paid by defendants Warburg Pincus Ventures, L.P. and E.M. Warburg, Pincus & Co., LLC, and currently held in escrow by said firm; and it is further

ORDERED that the motion by defendants Rand Publishing Co., Inc., Mason P. Slaine and Michael E. Danziger (motion sequence number 030), is granted to the extent it seeks an order directing Willkie Farr & Gallagher LLP to release to Rand all settlement funds held in escrow over and above the \$177,500.00 herein awarded to plaintiffs' counsel, and the motion is otherwise denied; and it is further

ORDERED that the payments herein ordered are to be made by Willkie Farr & Gallagher LLP from the funds held by it in escrow,

