

Carroll v Weill

2008 NY Slip Op 32512(U)

September 9, 2008

Supreme Court, New York County

Docket Number: 0600645/2006

Judge: Charles E. Ramos

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

PRESENT: CHARLES E. RAMOS
Justice

PART 53

Carrol, Sharon

- v -

Weill, Sanford

INDEX NO.

600645/06

MOTION DATE

MOTION SEQ. NO.

011

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Motion is decided in accordance with
accompanying Memorandum Decision.

FILED

SEP 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/9/08

[Signature]
HON. CHARLES E. RAMOS

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

-----X
SHARON CARROLL, derivatively on behalf
of nominal defendant CITIGROUP INC.

Plaintiff,

Index No. 600645/06

-against-

SANFORD I. WEILL, C. MICHAEL ARMSTRONG,
ALAIN J.P. BELDA, GEORGE DAVID,
KENNETH T. DERR, JOHN M. DEUTSCH,
ROBERTO HERNANDEZ RAMIREZ,
ANN DIBBLE JORDAN, DUDLEY C. MECUM,
RICHARD D. PARSONS, ROBERT E. RUBIN,
FRANKLIN A. THOMAS, STANLEY FISCHER,
REUBEN MARK, ALFREDO HARP HELU,
MICHAEL TERRY MASIN, ANDRANIL E. PEARSON,

Defendants,

and

CITIGROUP INC.,

Nominal Defendant.

-----X

FILED
SEP 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Charles Edward Ramos, J.S.C.:

Citigroup Inc. (Citigroup) shareholder, Leonard Mann, moves for an award of \$330,000 in attorney's fees and \$1,493.48 in expenses for his counsel, Lawrence Schonbrun, Esq., for legal services performed in connection with Mann's objection to the proposed settlement (Settlement) in this action.

Background

On February 24, 2006, plaintiff Sharon Carroll (Plaintiff) filed a shareholder derivative suit alleging that members of Citigroup's board (the Board) breached its fiduciary duty, grossly mismanaged the company, and wasted corporate assets by failing to implement adequate internal controls, which in turn led to a series of improper financial arrangements with publicly

traded companies. Facing serious obstacles to litigation, Plaintiff's counsel sought to settle the action.

The proposed Settlement contained a general release of all claims against the Board. Additionally, Citigroup agreed to adopt certain internal corporate governance measures, and to pay Plaintiff's attorneys \$3.3 million in legal fees (Settlement, 7).

On February 28 and March 1, 2007, this Court held a hearing to determine the fairness of the Settlement. Two shareholders, Stephen Hochman and Leonard Mann (Objector), objected to the Settlement. After consideration of all of the submissions and arguments, this Court rejected the Settlement, finding that it was "neither fair nor reasonable to Citigroup and its shareholders" (Decision, 2). Further, the Court determined that the Settlement permitted Plaintiff's counsel and the Board to take the "lion's share of the benefits (release from the action and attorneys' fees)," while leaving the corporation with the bill for litigation (*id.* at 31).

The Objector now seeks attorney's fees for his counsel, Lawrence Schonbrun, Esq., on the ground that Citigroup benefitted from Mr. Schonbrun's efforts in opposing the proposed Settlement, insofar as it ultimately did not have to pay \$3.3 million in attorneys' fees for Plaintiff's counsel.

Discussion

A. Entitlement to Attorney's Fees

Business Corporation Law § 626 (d) provides that a shareholder derivative action "shall not be discontinued,

compromised or settled, without the approval of the court having jurisdiction of the action." This section seeks to protect the interests of the corporation and its shareholders by discouraging "the private settlement of a derivative claim under which a shareholder-plaintiff and his attorney personally profit to the exclusion of the corporation and the other shareholders"

(*Mokhiber on Behalf of Ford Motor Co. v Cohn*, 783 F 2d 26, 27 [2d Cir 1986]). For this reason, courts are required to review the settlement and determine whether it is fair and reasonable (*id.*).

Objectors have a valuable and important role to perform in preventing collusive or otherwise unfavorable settlements (*White v Auerbach*, 500 F 2d 822, 828 [2d Cir 1974]). Thus, objectors are entitled to compensation for attorney's fees and expenses where a proper showing is made that the settlement was improved as a result of their efforts (*id.*; *Wal-mart Stores v Buholzer*, 156 Fed Appx 346 [2d Cir 2005]).

Moreover, a trial judge has "broad discretion in deciding whether, and in what amount, attorneys' fees should be awarded," because he is in the best position to determine whether the participation of objectors assisted the court and enhanced the recovery (*White*, 500 F 2d at 828). Therefore, this Court must determine whether, and to what extent, the Objector contributed to the rejection of the Settlement.

It is evident from the record that the Objector, by his counsel Mr. Schonbrun, played a significant role in this Court's decision to reject the Settlement, and the finding that the it

was unfair and unreasonable. For instance, the Court noted three significant issues that the Objector demonstrated,

To demonstrate "mutual back scratching", Mann [Objector] first points to the underlying claims of Action II, and argues that the complaint only calls for relief in the form of monetary compensation for damages suffered by the corporation and that corporate governance changes were never contemplated as a form of relief. Furthermore, the changes that persons associated with the settlement assert were caused by the plaintiff's complaint and demand letter were, in fact, already occurring and therefore cannot be properly attributed to plaintiff and her counsel. Lastly, Mann points to both plaintiff's counsel and defense counsel agreeing that there was no evidence supporting any of the accusations of director misconduct, but yet no explanation is proffered as to why Action II would not be dismissed on motion, just like the other lawsuits (Decision, 14-15).

Additionally, the Objector's efforts resulted in substantial benefits for Citigroup shareholders, insofar as Citigroup was not required to pay \$3.3 million in attorney's fees for Plaintiff's counsel.

B. Calculation of Attorney's Fees

In addition to attorney's fees, Mr. Schonbrun is entitled to a "multiplier." Generally, the "Lodestar" method is employed to calculate reasonable attorney's fees (*Friar v Vanguard Holding Corp.*, 125 AD2d 444, 447 [2d Dept 1986]). The Lodestar figure is calculated by multiplying the reasonable hours expended on the action by a reasonable hourly rate (*id.*). The fee is then adjusted based upon a number of factors, including the riskiness of the litigation, the novelty and complexity of the action, and the success achieved based upon (*Sheridan v Police Pension Fund*, 76 AD2d 800, 801 [1st Dept 1980]).

In the event that the court finds that an attorney spent

excessive or unreasonable hours, it may exclude that amount from the calculation (*In re Independent Energy Holding PLC Sec. Litig.*, 2003 US Dist LEXIS 21322, *5 [SDNY 2003]). Further, a "multiplier" should be employed where the Lodestar method does not adequately compensate the applicants for the risk of litigation, the complexity of the issues, and the benefit secured (see e.g. *Seigal v Merrick*, 1980 WL 1411, *3 [SDNY 1980]).

Mr. Schonbrun submitted a detailed billing summary of the work he performed in this case (Schonbrun Declaration). Multiplier aside, Mr. Schonbrun seeks a Lodestar fee amount of 105.3 or 138.5, representing the additional 33.2 hours for the amount of time he spent litigating attorney fees. Multiplying the number of hours by an hourly rate of \$500, Mr. Schonbrun arrives at the Lodestar figure of \$52,666.67 and \$69,250 (*id.*). Mr. Schonbrun additionally seeks a multiplier of 6.27 for the Lodestar amount, *excluding* the time he spent litigating the attorney's fees issues, and 4.77 for the Lodestar amount *including* the time he spent on attorney's fees issues, totaling \$330,000. Finally, Mr. Schonburn seeks reimbursement of \$ 5,346.21 in expenses (*id.*).

The court determines that the Lodestar figure alone does not adequately compensation Mr. Schonbrun, entitling him to a multiplier. Mr. Schonbrun significantly contributed to this Court's finding that the Settlement was unfair, and has sufficiently demonstrated that the legal issues presented were complex. Additionally, the risk of objecting to a proposed

settlement in a derivative lawsuit is high. Finally, Mr. Schonbrun's work secured a substantial benefit to Citigroup, namely saving it \$3.3 million, justifying the award of a multiplier (accord *Seigal*, 1980 WL 1411 at *3).

Declining to reward Mr. Schonbrun for his efforts may unjustly enrich those shareholders not directly represented by him who will enjoy the benefit of his work without contributing any to his compensation (*Washington Fed. Sav. and Loan Assoc.*, 90 Misc 2d at 227). Moreover, an attorney who represents objectors in a shareholder derivative suit is a vindicator of public policy (*id.*).

Nonetheless, the court believes that a multiplier of 2 for the Lodestar amount, rather than 6.27 as requested, reasonably and fairly compensates Mr. Schonbrun for his services, in light of the factors discussed.

Defendants seek to reduce the Lodestar amount on the grounds that the hours spent by Mr. Schonbrun are excessive, and that the objections that he presented were straightforward. However, Defendants fail to demonstrate that the time spent by Mr. Schonbrun was excessive or unreasonable.

However, Mr. Schonbrun is not entitled to fees spent on this application for attorney's fees, insofar as that would result in the diminution in corporate assets. An attorney's work on a fee application is not to be counted in setting attorney fees, when the fee will result in the diminution of corporate assets (*Seigal v Merrick*, 619 F 2d 160, 165 [2d Cir 1980]).

Furthermore, Mr. Schonbrun has not demonstrated that an hourly fee of \$500 is justified. Mr. Schonbrun does not bill clients for his services, and therefore, has no hourly billing rate. To determine the reasonable hourly billing rate, the "prevailing market rate" or the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation" applies (*Blum v Stenson*, 465 US 886, 896 [1984]); *Harbotko v Clinton County*, 433 F 3d 204 [2d Cir 2005]). Mr. Schonbrun submitted uncontroverted evidence that the current market rate for attorneys with 20+ years of experience is \$462 (see *In re Chiron Corp. Sec. Litig.*, 2007 WL 4249902 [ND Cal 2007] [court adjusted average hourly rate from \$440 to \$462 for attorneys with 20+ years of experience to account for the difference in cost of living between the District of Columbia and New York]).

Furthermore, Mr. Schonbrun is not entitled to full recovery of expenses because he failed to differentiate between expenses related to the original action, and those expended on the attorney's fee application. Nonetheless, Mr. Schonbrun is entitled to travel expenses related to the fairness hearing, amounting to \$1,396.40. As per other expenses, including photocopies, filing fees, reporter's transcripts and mailing, Mr. Schonbrun is entitled to an equitable amount equivalent to 2/3 of the total requested amount of \$1,622.70.

For these reasons, Mr. Schonbrun is entitled to \$97,297.20 in attorney's fees, reflecting 105.3 hours, at an hourly rate of

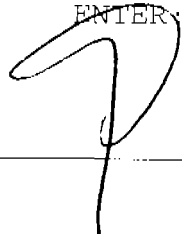
*9]
\$462 with a multiplier of 2, and \$3,019.19 in expenses.

Accordingly, it is

ORDERED that Objector Leonard Mann's motion for an award of attorney's fees and expenses is granted; and it is further

ORDERED that attorney's fees and expenses due to Lawrence Schonbrun, Esq. is assessed in the amount of \$97,297.20 in attorney's fees, and \$3019.19 in expenses.

Dated: September 9, 2008

ENTERED


HON. CHARLES E. RAMOS

J.S.C.

FILED
SEP 16 2008
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NEW YORK