West Palm Beach Police Pension Fund v Gottdiener
2014 NY Slip Op 32777(U)
October 22, 2014
Supreme Court, New York County
Docket Number: 650144/2013
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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WEST PALM BEACH POLICE PENSION FUND,
on behalf of himself and those similarly situated,

Plaintiff,

- against –

NOAH GOTTDIENER, ROBERT M. BELKE, PETER W. CALAMARI, WILLIAM R. CARAPEZZI, JOHN A. KRITZMACHER, HARVEY M. KRUEGER, SANDER MORTON LEVY, JEFFREY D. LOVELL, NORMAN S. MATTHEWS, GORDON A. PARIS, DUFF & PHELPS CORPORATION, DUFF & PHELPS ACQUISITIONS, LLC, DAKOTA HOLDING CORPORATION, DAKOTA ACQUISITION I, INC., and DAKOTA ACQUISITION II, LLC,

Defendants.

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Index No.: 650144/2013

DECISION

In this class action challenging a merger, plaintiff West Palm Beach Police Pension Fund moves for certification of the class for purposes of settlement only, final approval of the settlement, and the award of plaintiff's counsel attorney's fees and expenses in the sum of $500,000.00. Defendants do not oppose this motion. No putative class member has filed objections to the settlement or the request for attorney's fees. A fairness hearing was heard on April 23, 2014. The court reserved decision on the motion pending supplemental briefing.

Background

The following facts are taken from the Stipulation and Agreement of Compromise and Settlement (Stipulation). (Affirmation of Jonathan M. Stein [Plaintiff's Counsel] [Stein Aff.], Ex. B.) On December 30, 2012, Duff & Phelps Corporation, a financial advisory and investment

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banking firm, announced that it had entered into a definitive merger agreement pursuant to which it would be acquired by a private equity consortium for $15.55 per share in cash. (Stipulation at 1-2.) The transaction was valued at $665.5 million. (Id. at 2.) Two class-action lawsuits challenging the merger were subsequently filed; the first was filed on January 15, 2013 in this court, and the second was filed on January 17, 2013 in Delaware. (Id.) The amended complaints filed in the actions allege that the "Duff & Phelps board of directors breached its fiduciary duties in connection with its consideration and approval of the Merger Agreement and in connection with certain alleged material misstatements or omissions in the Preliminary Proxy Statement." (Id.)

Prior to entry into a Memorandum of Understanding with defendants on April 5, 2013, plaintiff sought and obtained discovery from Duff & Phelps' financial advisor, reviewed document discovery including board minutes, financial presentations and emails concerning the merger, delivered a letter to defendants' counsel outlining additional items of material information it believed should have been included in the preliminary proxy statement, deposed a representative of Duff & Phelps' financial advisor and a board member of Duff & Phelps, and engaged in "extensive arm's-length negotiations concerning Plaintiffs' demands and a possible settlement." (Id. at 2-4.) As a result of these negotiations, defendants agreed to make additional disclosures in connection with the merger.

Class Certification

CPLR 901(a) sets forth the prerequisites to class certification. (See CPLR § 901.) These five prerequisites are:

"1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> 4. the representative parties will fairly and adequately protect the interests of the class; and
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

(Id.) "These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority." (City of New York v Maul, 14 NY3d 499, 508 [2010].) The question "of whether a lawsuit qualifies as a class action under the statutory criteria 'ordinarily rests within the sound discretion of the trial court.'" (Id. at 509, citing Small v Lorillard Tobacco Co., 94 NY2d 43, 52 [1999].)

Plaintiff seeks certification of a class, for purposes of settlement only, defined as "all persons or entities that were record and/or beneficial holders of Duff & Phelps common stock at any time from December 30, 2012 through the date of consummation of the Merger, May 3, 2013." (Stipulation at 6.) Class members are entitled to opt-out for damages claims only and not for any claims seeking injunctive relief. (Id.)

The court finds that the statutory criteria for class certification have been demonstrated. As evidenced by the notice program, the class consists of over 7,500 class members, satisfying the required element of numerosity. (Stein Aff., ¶ 22.) The remaining elements for class certification are satisfied, as it appears, in the absence of any objection, that all class members are identically situated with respect to questions of law and fact surrounding the merger and the disclosures, and that all of the class members' claims are based on the same legal theories and operative facts as the claims asserted by the proposed representative. The adequacy of representation is established in the absence of any conflict of interest between the representative and the class. Furthermore, counsel in this matter have established on this record, through submission of numerous court orders awarding counsel fees in similarly situated actions, that

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they are experienced and adept in shareholder class action litigation. (See Affirmation of Evan Smith In Further Support [Counsel for Plaintiff] [Smith Aff.], Exs. B-G; Stein Aff. In Further Support, Exs. D-H.)

Settlement

In deciding whether any proposed settlement is appropriate, the court considers whether the settlement was "fair, adequate and in the best interests of the class. . . ." (Rosenfeld v Bear Stearns & Co., Inc., 237 AD2d 199, 199 [1st Dept 1997], appeal dismissed 90 NY2d 888, lv denied 90 NY2d 81; Klein v. Robert's American Gourmet Food, Inc., 28 AD3d 63, 70 [2d Dept 2006].) Upon review of the record in this matter, the court holds that the proposed settlement is fair, adequate and in the best interests of the class. The shareholders obtained a number of additional disclosures as reflected in the supplemental proxy statements. These disclosures provided shareholders with additional information including information regarding Duff & Phelps' Discounted Cash Flow Analysis – in particular, the range of discount rates used in determining the illustrative range of implied value per share, and the treatment of stock-based compensation as a non-cash expense; information as to the basis for Duff & Phelps' financial advisor's calculation of EBITDA; and factors considered by the financial advisor in including or excluding companies in the Selected Companies Analysis.

There is New York authority approving class action settlements based on disclosures. (See Rosenfeld, 237 AD2d at 200; Schumacher v Neostem, Inc., Sup Ct, NY County June 13, 2014, Index No. 653285/12 [Ramos, J.] [approving class action settlement in merger context based on disclosures and implementation of additional corporate governance measures regarding approval of executive compensation]; Brody v Catell, 16 Misc 3d 1105(A) [Kings Co. June 27, 2007] [approving class action settlement in merger context based on disclosures and independent

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vetting of the proposed merger].) As the parties do not cite New York appellate authority on approval of class action settlements in the merger context based on disclosures, Delaware law, although not applicable to this case, provides useful guidance. Under Delaware law, disclosures need not be "material" in order to support a class action settlement involving a merger, but must provide "benefit" to the shareholders (see Bhat v Global Defense Tech. & Sys., Inc., No. 6269-CS, at 12 [Del Ch Sept 8, 2011] [Strine, Chancellor] [approving settlement where disclosures were made of free cash flows and information regarding the precedent transaction analysis]) or "information that an investor could find useful." (Minard v Warburg Pincus Private Equity IX, LP, No. 4894-VCS, at 18-22 [Del Ch May 26, 2010] [Strine, Vice Chancellor] [approving settlement based on disclosures regarding "valuation"]; see also Maric Capital Master Fund, Ltd. v Plato Learning, Inc., 11 A3d 1175, 1176 [Del Ch 2010] [enjoining merger until corrective disclosures were made regarding, among others, how investment bank came to its discount rate for its discounted cash flow valuation, and providing shareholders with information regarding future cash flow]; Laborers Local 235 Benefit Funds v Starent Networks, Corp., 2009 WL 4725866, *1 [Del Ch 2009] [granting motion to expedite on a "colorable" disclosure claim where proxy statement failed to disclose or explain varying treatment of stock-based compensation as a cash or non-cash expense, under different valuation methodologies]; Matter of Netsmart Techs., Inc. Shareholders Litigation, 924 A2d 171, 203-204 [Del Ch 2007] ["when a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the key inputs and ranges of ultimate values generated by those analyses must also be fairly disclosed"].)

In determining whether to approve the settlement, the court should weigh the likelihood of success at trial against the settlement offered. (See Matter of Colt Industries Shareholder

Litigation, 155 AD2d 154, 160 [1st Dept 1990], mod on other grounds 77 NY2d 185 [1991].) Other factors to be considered include the support of the class members, the opinion of counsel, and the good faith with which the negotiations were conducted. (See Rosenfeld, 237 AD2d at 199-200.)

It is undisputed that plaintiff does not have a strong likelihood of success on the merits of its claim for money damages. In fact, plaintiff represents that it had "no compelling evidence to suggest it could have overcome the presumptions of the Business Judgment Rule, or could have otherwise demonstrated at trial that a different sales process would have resulted in additional consideration." (P.'s Memo In Support at 17.) As discussed above, however, the supplemental disclosures provide benefit to the shareholders. The court further notes that it has received no objections to the settlement, and that the settlement negotiations between plaintiff and defendants were conducted at arm's length. Under these circumstances, the court concludes that the disclosures are sufficient to support the settlement.

Attorney's Fees

Pursuant to CPLR 909 "[i]f a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class . . . based on the reasonable value of legal services rendered. . . ." The proper method to determine the reasonable value of legal services rendered in this case is the lodestar method. (See Matakov v Kel-Tech Constr. Inc., 84 AD3d 677, 678 [1st Dept 2011] ["court properly applied the lodestar method to calculate plaintiffs' class counsel's fee rather than the percentage method"]; Nager v Teachers' Retirement Sys. of City of New York, 57 AD3d 389, 390 [1st Dept 2008], lv denied 13 NY3d 702 [2009] ["Supreme Court properly used the lodestar method in determining the reasonable value of plaintiffs' attorneys' services in

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instituting and settling this class action, rather than applying a percentage of the value of the settlement, in view of the enormous disparity in result between the two methods"].) "Under the lodestar method, the court determines the reasonable hourly rate and multiplies it by the reasonable number of hours expended, then adjusts the fee based upon certain subjective criteria." (Flemming v Barnwell Nursing Home and Health Facilities, Inc., 56 AD3d 162, 165 [3d Dept 2008], affd on other grounds 15 NY3d 375 [2010].) The court may also consider whether to apply a multiplier to enhance the lodestar amount. (See Nager, 57 AD3d at 390, citing Goldberger v Integrated Resources, Inc., 209 F3d 43, 50 [2d Cir 2000].)

Plaintiff's counsel must demonstrate, by submitting evidence in the record, that the number of hours claimed were reasonably expended based on contemporaneous time sheets. Hours that reflect duplication of services, inefficiency or padding are not reasonably expended and should be disallowed. (See Matter of Rahmey v. Blum, 95 AD2d 294, 300-301 [2d Dept 1983].) Counsel must further demonstrate that its fees "were consistent with 'customary fee[s] charged for similar services by lawyers in the community with like experience and of comparable reputation,' or were reasonable." (Matakov, 84 AD3d at 678, citing Friedman v Miale, 69 AD3d 789, 791-792 [2010], lv denied 16 NY3d 706 [2011].)

Plaintiff's counsel claim that they spent over 727 hours litigating this action. (P.'s Supplemental Memo In Further Support at 15.) The time sheets of Brodsky & Smith reflect that it billed 253.25 hours (Smith Aff., ¶ 3), and the time sheets of Saxena White reflect that it billed 473.75 hours (Stein Aff. In Further Support, ¶ 3). Multiplying Brodsky & Smith's hours expended by its blended hourly rate of $615.35 yields a lodestar sum of $155,837.50. Multiplying Saxena White's hours expended by its blended hourly rate of $473.02 yields a lodestar sum of $224,095.00. The collective lodestar sum is $379,566.50. Plaintiff incurred an

additional $36,637.65 of unreimbursed expenses (Stein Aff. In Further Support, ¶ 7), which produces the total of $416,204.15 for hours billed and expenses incurred. Plaintiff seeks an award of $500,000.00, which represents a multiplier of 1.2 when expenses are subtracted from the requested award.

Plaintiff's counsel have demonstrated that they expended the hours claimed, that the rates billed are customary, and that they are experienced and adept at shareholder litigation. Although the number of hours is high, defendants, who are sophisticated parties represented by sophisticated counsel, have not objected to the number of hours, or claimed that the two plaintiffs' firms unnecessarily duplicated efforts.

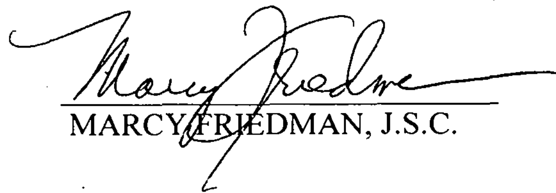
It is noted that defendants agreed to a cap of fees at $500,000.00. (Stein Aff., ¶ 17.) While the "presence of an arms' length negotiated [fee] agreement among the parties weighs strongly in favor of approval, [] such an agreement is not binding on the court . . . [I]f the court finds good reason to do so, it may reject an agreement as to attorneys' fees just as it may reject an agreement as to the substantive claims." (Jones v Amalgamated Warbasse Houses, Inc., 721 F2d 881, 884 [2d Cir 1983], cert denied 466 US 944 [1984].) In this case, the contingency risk that plaintiff faced was insubstantial, given the ubiquity of settlements in shareholder derivative actions challenging mergers based on insufficient disclosures. (See Goldberger, 209 F3d at 54 ["We have historically labeled the risk of success as perhaps the foremost factor to be considered in determining whether to award an enhancement"] [internal quotation marks and citation omitted]; see also Minard v Warburg Pincus Private Equity IX, LP, supra, at 17 [approving fee where settlement did not produce economic benefit to shareholders and was based on disclosures, but noting that "if you continue to have suit after suit after suit where there is no

material change in the economic terms of deals and simply some additional disclosures, it really will be a drag on investors' return"].)

The court accordingly holds that plaintiff is entitled to an award of attorneys' fees in the amount of $416,204.15, which amount reflects the lodestar sum and expenses incurred, but does not include a multiplier.

This constitutes the decision of the court. A separate order will be signed.

Dated: New York, New York
October 22, 2014



MARCY FRIEDMAN, J.S.C.