Gordon v Verizon Communications, Inc.
2015 NY Slip Op 31441(U)
July 31, 2015
Supreme Court, New York County
Docket Number: 653084/13
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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NATALIE GORDON, on behalf of herself and others similarly situated,

Plaintiff,

-against-

VERIZON COMMUNICATIONS, INC., et al.,

Defendant.

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DECISION AND ORDER

Index No. 653084/13

HON. ANIL C. SINGH, J.:

Motion sequence 003, 004 and 005 are consolidated for disposition.

In motion sequence 003, objector Gerald Walpin moves to intervene pursuant to CPLR 1012 and for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff opposes the motion.

In motion sequence 004, plaintiff moves pursuant to CPLR 2221(d) and (e) for leave to renew and reargue the order dated December 19, 2014, denying plaintiff's motion for final court approval of a class action settlement. Objectors Jonathan M. Crist and Gerald Walpin oppose the motion. Objector Gerald Walpin cross-moves for an award of attorneys' fees and sanctions, contending that plaintiff's motion to renew/reargue is frivolous.

In motion sequence 005, Gerald Walpin moves for leave to file a reply memorandum in support of his cross-motion for sanctions.

This is a putative class action centered on an acquisition by Verizon Communications, Inc. (the Company) of a substantial minority interest in a wireless carrier.

On September 2, 2013, Verizon publicly announced that it had entered into a definitive Stock Purchase Agreement with Vodafone Group Plc (Vodafone) to acquire Vodafone subsidiaries holding as their principal assets a 45% interest in Cellco Partnership d/b/a Verizon Wireless (Verizon Wireless) for a purchase price of approximately $130 billion, consisting primarily of cash and Company common stock (Transaction).

On September 5, 2013, plaintiff filed an action (Action) challenging the Transaction. The core of the Action was the allegation that the Company's board of directors breached its fiduciary duty to its shareholders in connection with the Transaction causing the Company to pay an allegedly excessive and dilutive price in the Transaction.

On October 8, 2013, the Company filed with the Securities and Exchange Commission (the SEC) a Preliminary Proxy Statement on Schedule 14A (Preliminary Proxy) detailing the terms and background of the Transaction and

certain analyses performed by JPMorgan Securities LLC (JPMorgan) in connection with the Transaction.

On October 22, 2013, plaintiff filed an Amended Class Action Complaint and asserted additional claims for breaches of fiduciary duty resulting from defendants' failure to disclose material information concerning the Transaction in the Preliminary Proxy.

In November and December 2013, the parties engaged in negotiations in an effort to reach a resolution of the Action. On December 6, 2013, counsel reached an agreement-in-principle to settle the Action wherein defendants would: 1) agree to disseminate to the Company's shareholders certain additional disclosures; and 2) agree for a period of three (3) years thereafter, in the event the Company engages in a transaction involving the sale to a third party purchaser or spin-off of assets of Verizon Wireless having a book value of in excess of $14.4 billion, that the Company shall obtain a fairness opinion from an independent financial advisor (or in the case of a spin-off, financial advice from an independent financial advisor). Plaintiff had decided that the strengths and weaknesses of the claims, balanced against the benefits of the Settlement, favored settlement.

On December 10, 2013, the Company filed a definitive Proxy Statement on Schedule 14A with the SEC (Definitive Proxy) to solicit shareholders to vote in

favor of the Transaction and scheduled a shareholder vote for January 28, 2014. The Definitive Proxy included a number of additional disclosure not contained in the Preliminary Proxy (the Supplemental Disclosures). The Company's shareholders then voted to approve the issuance of shares for the Company to acquire Vodafone's 45% interest in Verizon Wireless on January 28, 2014.

On October 6, 2014, the court issued a Scheduling Order which: 1) preliminarily certified the Action as a class action; 2) preliminarily approved the Settlement; and 3) scheduled a hearing to determine whether the Settlement should receive the final approval of the court as being fair, reasonable, adequate and in the best interest of the class.

A hearing was held before Justice Melvin Schweitzer on December 2, 2014. Two objectors appeared and spoke, as well as Sean Griffith, a professor at Fordham University School of Law, who spoke on behalf of one of the objectors.

By memorandum opinion dated December 19, 2014, the court denied plaintiff's motion for a final approval of Settlement of Class Action.

Objector's Motion for Summary Judgment and to Intervene (Mot. Seq. 003)

In motion sequence 003, objector Gerald Walpin moves to intervene pursuant to CPLR 1012 and for summary judgment dismissing the complaint pursuant to CPLR 3212.

Objector Gerald Walpin is not a named party to this class-action lawsuit. It is clear to the Court that Mr. Walpin, as a nonparty, has no standing whatsoever to make a motion for summary judgment. Accordingly, the Court must determine whether Mr. Walpin has met his burden demonstrating a sufficient basis to intervene in this action.

"It has been consistently held that intervention should be permitted where the proposed intervenor has a real and substantial interest in the outcome of the proceeding" (Vantage Petroleum v. Boad of Assessment Review of the Town of Babylon, 91 A.D.2d 1037, 1037 [2d Dept., 1983]).

Mr. Walpin asserts that there is a non-adversarial relationship between plaintiff and Verizon. He contends that, if the defendant corporation were really adversarial to plaintiff, Verizon would be moving now for summary judgment dismissing the complaint. Mr. Walpin argues, however, that Verizon terminated any adversarial relationship upon agreeing with plaintiff to settle the lawsuit and jointly submit the proposed settlement for court approval. Having signed the settlement agreement, it cannot withdraw the agreement and has instead essentially been, in Walpin's words, "a silent supporter of plaintiff's pressing for settlement approval." Walpin asserts that, unless he is able to protect the shareholder class (including himself) from further litigation expenses and attempts to "circumvent"

the court's prior ruling, the court's ruling could end up a "pyrrhic victory."

After considering the issue carefully, the Court finds that Walpin lacks a real interest in the litigation, nor does he have a direct and substantial interest in the litigation. As plaintiff points out correctly, Verizon's litigation costs associated with this action are being assumed directly by Verizon or its insurance carrier, not the objector. As a single shareholder, Mr. Walpin simply has no "direct and substantial" personal financial interest with respect to Verizon's legal costs.

In light of our decision denying the application to intervene, we conclude that Mr. Walpin has no standing to move for summary judgment.

Motion to Reargue/Renew

Plaintiff moves pursuant to CPLR 2221(d) and (e) for leave to renew and reargue the order dated December 19, 2014, denying plaintiff's motion for final court approval of a class action settlement. Objectors Jonathan M. Crist and Gerald Walpin oppose the motion. Objector Gerald Walpin cross-moves for an award of attorneys' fees and sanctions, contending that plaintiff's motion to renew/reargue is frivolous.

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or

misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion." (Foley v. Roche, 68 A.D.2d 558, 567-568 [1st Dept., 1979]).

This Court has carefully reviewed the memorandum opinion of Judge Schweitzer. In short, plaintiff has not persuaded this Court that Judge Schweitzer overlooked or misapprehended any matters of fact or law. Accordingly, reargument is denied.

We turn next to the motion to renew.

The rule that "a motion for renewal be based upon newly discovered evidence is a flexible one, and a court, in its discretion, may grant renewal even where the additional facts were known to the party seeking renewal at the time of the original motion, provided the moving party offers a reasonable justification for the failure to submit the additional facts on the original motion" (Grantat v. Walbaum's Inc., 289 AD2d 289, 290 [2nd Dept. 2001] (other citations omitted)).

Plaintiff is seeking now to submit an additional expert, Professor Stephen

Lubben, seeking to rebut objector Jonathan Crist's expert affidavit by Professor Sean Griffin.

Rather than waiting, plaintiff should have responded by affirmation/affidavit prior to the date of the hearing. Plaintiff now complains that she had insufficient time. However, instead of asking for more time, plaintiff chose to file a reply memorandum.

It is well settled that the subsequent retention of an expert is not proper grounds for renewal, for an expert's affidavit is not new evidence (Malco Realty Corp. v. Westchester Condos, LLC, 114 A.D.3d 413, 416 [1st Dept., 2014]); Stocklas v. Auto Solutions of Glenville, Inc., 9 A.D.3d 622, 625 [3d Dept., 2004]). Accordingly, renewal is denied

In his cross-motion, objector Walpin asserts that the filing of the motion to reargue/renew constitutes grounds for sanctions against plaintiff.

In short, we disagree with objector Walpin's contention that the motion to reargue/renews is frivolous within the meaning of Rule 130-1.1.

Motion to File a Reply Memorandum (Mot. Seq. 005)

In motion sequence 005, objector Walpin moves for leave to file a reply memorandum in support of his cross-motion for sanctions.

There is no provision in the CPLR granting a right to reply to a cross-

motion.

Accordingly, it is

ORDERED that the motion to intervene and for summary judgment (Mot. Seq. 003) is denied; and it is further

ORDERED that the motion of plaintiff to reargue/renew is denied (Mot. Seq. 004) is denied; and it is further

ORDERED that the motion for leave to file a reply to the cross-motion (Mot. Seq. 005) is denied.

The foregoing constitutes the decision and order of the court.

Date: July 31, 2015
New York, New York

Anil C Singh