Sina Drug Corp. v Mohyuddin
2016 NY Slip Op 32392(U)
December 5, 2016
Supreme Court, New York County
Docket Number: 651710/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SINA DRUG CORP. d/b/a ONCOMED PHARMACEUTICAL SERVICES and KAVESH ASKARI,

Index No: 651710/2013

DECISION & ORDER

Plaintiffs,

-against-

MOHAMMAD ALI MOHYUDDIN and SORKIN'S RX LTD.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiffs Sina Drug Corp. (Oncomed) and Kavesh Askari move, pursuant to CPLR 4403, to confirm the report of Special Referee Joseph P. Burke (the Referee) dated August 10, 2016 (the Report) (Dkt. 100).[1] Defendants Mohammed Ali Mohyuddin and Sorkin's RX Ltd. oppose the motion and cross-move to modify the Report. Plaintiffs oppose the cross-motion. For the reasons that follow, the motion and cross-motion are granted in part and denied in part.

This action, commenced on May 10, 2013, is the culmination of the parties' lengthy, multi-forum litigation (in New York and Nassau County Supreme Court, the Appellate Division, and federal court in the Eastern District of New York) regarding Mohyuddin's equity stake in Oncomed, the settlement of that dispute, and the resulting tax implications. This case involves the reasonable counsel fees owed to plaintiffs as a result of litigation arising from the parties' settlement agreement.

As the court explained in its November 25, 2013 summary judgment decision (Dkt. 62):

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

> Between 2006 and 2011, the parties litigated in Nassau County Supreme Court. Mohyuddin, a former employee of Oncomed, alleged he was to receive equity in the company as part of his compensation but was never granted it. In an order dated February 11, 2010, the court granted summary judgment to Mohyuddin, holding that he owned 18% of Oncomed. The Oncomed Parties appealed. In May 2011, while the appeal was pending, the parties entered into a settlement agreement, in which Mohyuddin relinquished his equity in Oncomed in exchange for $3.8 million. Mohyuddin paid $567,075 in federal capital gains taxes on the settlement. The parties also exchanged mutual releases for all disputes arising from that litigation. Moreover, and at issue in the instant case, the parties agreed not to sue each other for any claims that they "ever had" relating to their dispute in that litigation. **The settlement agreement further provides that if any party sues another in violation of this promise, such party shall pay the other's attorneys' fees**. The subject provision provides:
>
> > the Mohyuddin Parties shall indemnify and hold harmless each of the Oncomed Parties from and against all [losses arising from or relating to the claims in the lawsuit being settled, including reasonable attorneys' fees.]
>
> Shortly after Mohyuddin received his settlement money, on July 15, 2011, Oncomed amended its tax returns for the years between 2007 and 2010. Oncomed also issued K-1 Statements to Mohyuddin, which claimed that Mohyuddin received "ordinary income" for such years, totaling approximately $1.27 million. Mohyuddin never received such money. In order to challenge Oncomed's new tax filings, Mohyuddin commenced a new action in Nassau County Supreme Court on October 22, 2012. The Oncomed Parties removed the case to federal court in the Eastern District of New York, purportedly based on federal subject matter jurisdiction. However, the federal court, sua sponte, held that **federal question jurisdiction was lacking because the case was really about the interpretation of the parties' settlement agreement; the mere relevance of federal tax law did not create federal jurisdiction**.

Sina Drug Corp. v Mohyuddin, 2013 WL 6162518, at *1 (Sup Ct, NY County 2013) (emphasis added). This court granted summary judgment to defendants on the applicability of the settlement agreement's indemnity clause and dismissed the case. *See id.* at *2. By order dated November 13, 2014, the Appellate Division modified this court's summary judgment decision, holding that the indemnity provision applies, but that the $1 million liquidated damages clause is an unenforceable penalty. *See Sina Drug Corp. v Mohyuddin*, 122 AD3d 444 (1st Dept 2014).

The Appellate Division further held that, by virtue of the indemnity provision's applicability, plaintiffs "are entitled to attorneys' fees they incurred in defending the action commenced by Mohyuddin since the indemnification provision in the parties' settlement agreement unambiguously reflects defendants' expressed intent to indemnify and hold plaintiffs harmless from and against **all claims or expenses in connection with any claims brought by defendants**." *See id.* at 445 (emphasis added).

Approximately six months later, on May 15, 2015, plaintiffs moved for an order appointing a special referee to hear and determine the amount of plaintiffs' reasonable attorneys' fees and for entry of a confidentiality order to protect their legal billing records. This motion was unnecessary since, as explained to the parties, a formal motion to appoint a referee was not needed (a simple call to the court would have sufficed); the court does not order a "hear and determine" reference without the consent of the parties; and there was no good faith basis to refuse to consent to deeming the billing records confidential. By orders respectively dated June 26 (Dkt. 82) and July 8, 2015 (Dkt. 86), the court referred the matter to a special referee to hear and report and so-ordered the parties' confidentiality stipulation.

The Referee conducted a hearing on September 16, **2015**, at which only **one** witness testified:[2] James W. Perkins, a partner at Greenberg Traurig, LLP (Greenberg Traurig), who represented plaintiffs in the subject litigation. *See* Dkt. 95 (9/16/15 Tr.). Nearly one year later, on August 16, 2016, the Referee entered his 12-page Report. *See* Dkt. 100. On August 31, 2016, plaintiffs filed the instant motion to confirm the Report, and defendants cross-moved to

[2] The Referee refused to permit defendants to call another attorney (Y. David Scharf of Morrison Cohen LLP) as an expert witness, a ruling with which this court agrees. The court does not need expert testimony to assess the reasonableness of counsel's billings. Such testimony is not useful and, thus, was properly excluded.

modify the Report on September 9, 2016. The parties dispute the reasonableness of certain categories of fees, the alleged excessive amount of time spent and billed by plaintiffs' counsel on various tasks, and whether the settlement agreement permits the recovery of so-called "fees on fees", i.e., the amount spent on the hearing before the Referee and the instant motion.

It is well settled that "the fixation of lawyers' fees [is] to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved." *In re Freeman's Estate*, 34 NY2d 1, 9 (1974); *see Bd. of Managers of Cent. Park Place Condo. v Potoschnig,* 136 AD3d 441 (1st Dept 2016). This court will generally confirm the findings of a special referee on an attorneys' fees reference where there is "ample evidence supporting the reasonableness of the fees charged." *See Atlantic Aviation Inv. LLC v Varig Logistica, S.A.*, 73 AD3d 467, 468 (1st Dept 2010). The court, moreover, will usually give deference to the referee's credibility determinations because, "as the trier of fact, [the referee] has the opportunity to see and hear the witnesses and to observe their demeanor." *Last Time Beverage Corp. v F & V Distribution Co.*, 98 AD3d 947, 950 (2d Dept 2012). Here, however, the court finds a number of the Referee's findings unsupportable and, therefore, modifies the award.

As an initial matter, the court agrees with the Referee that the hourly rates charged by plaintiffs' attorneys at Greenberg Traurig, which topped out at $790 per hour for Perkins (it was $695 per hour when he began representing plaintiffs, and more junior attorneys billed at a lower rate), are reasonable. *See* Report at 5. Much of the work in this commercial action involving tax

matters was complex, and New York courts have awarded even higher rates than the amount billed here. *See id.* That being said, the quantum of work performed and, more particularly, the amount of billable hours expended on certain tasks, is well in excess of what this court finds to be reasonable. Before the Referee, plaintiffs sought $606,949.50 in outstanding legal fees and expenses. *See* Report at 6. Defendants contended that the legal fee award should be reduced to $145,625. *See id.* at 8. The only reduction made by the Referee was a 15% "across the board" deduction "because, although not entirely excessive, unnecessary or redundant, there is enough 'surplusage' to justify the reduction." *See id.* at 10-11. The Referee did not explain why he used a 15% reduction nor did he meaningfully address the merits of the parties' arguments regarding the necessity and excess of Greenberg Traurig's billings. At this juncture, plaintiffs seek confirmation of the $536,604.25 awarded by the Referee plus an additional award of $72,019.95 for the amount spent on the hearing, for a total of $608,624.20; defendants oppose and seek a further reduction of the award.

To begin, the court finds the amount ultimately billed by Greenberg Traurig for the appeal to the First Department excessive and caps it at $80,000 (subject to further reduction, discussed below). As plaintiffs admit, they and Greenberg Traurig originally agreed that Greenberg Traurig's fee for the appeal would be capped at $80,000. *See* Dkt. 117 at 11. Shortly before the appeal was decided and **after** oral argument, plaintiffs claim they *orally* agreed with Greenberg Traurig that, for no additional consideration, if Greenberg Traurig was successful on appeal, Greenberg Traurig would be entitled to the full amount billed (which totaled $176,753.54). *See id.* As plaintiffs further admit, they did not respond in writing confirming this

contingency agreement until **after** the Appellate Division partially[3] decided the appeal in their favor.[4] *See id.* at 11-12. The Referee, without addressing these questionable circumstances, found that the agreement to pay the contingency amount of $96,753.54 ($176,753.54 - $80,000) was enforceable and should be paid for by defendants (subject to the 15% reduction, noted earlier). The court disagrees.

To say that the contingency agreement is suspect is an understatement. Plaintiffs agreed to it after all of the appellate work had been performed. There simply was no bona fide consideration for the contingency portion of the agreement. More telling, it was proposed after oral argument, when there was indication of how the Court would rule, and agreed to after the Court did rule. The only reasonable inference that may be drawn from these circumstances and Perkins' testimony[5] is that plaintiffs were gratuitously providing Greenberg Traurig the opportunity to collect more money **from defendants** when they prevailed, since the agreement was signed only after it was clear that defendants, not plaintiffs, would be responsible for the firm's fees. In this court's view, no reasonable finder of fact could conclude that the contingency portion of the retainer was anything other than a scheme to inflate Greenberg Traurig's bill for

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[3] As noted, the $1 million penalty was disallowed. Thus, the appeal was not a complete victory for plaintiffs.

[4] Perkins emailed Askari about the contingency arrangement on November 11, 2014. The appeal was decided two days later, on November 13, 2014. The First Department issues decisions at approximately 11:00 am. Approximately one hour after the Appellate Division issued its decision, at 12:09 pm on November 13, Perkins instructed Askari to respond to his November 11 email, which he did a few minutes later.

[5] To the extent the Referee found Perkins' testimony on this subject to be credible (an issue not explained in the Report), the court rejects that finding due to the highly suspect circumstances of the contingency fee. It should be noted, however, that the court agrees with the Referee that Perkins' interest in this case by virtue of the fees owed to Greenberg Traurig is not, on its own, a basis to completely disbelieve Perkins' testimony.

the purpose of having it paid for by defendants because there was no plausible circumstance in which plaintiffs would have had to foot that bill.[6] Without opining on the ethics of this arrangement, the contingency fee cannot be said to be reasonable. The work on appeal by Greenberg Traurig is capped at $80,000.

Next, the court takes issue with the manner in which the Referee addressed the "surplusage" in Greenberg Traurig's bills. *See* Report at 11. The Referee, again without meaningful analysis, reduced the amount billed by 15%. That, in this court's view, is not nearly enough. Employing a percentage deduction in this manner would have been permissible if the issue was merely block billing. *See J. Remora Maint. LLC v Efromovich*, 103 AD3d 501, 503 (1st Dept 2013). Here, however, the issue is not Greenberg Traurig's failure to document the work performed (indeed, they did so satisfactorily). Instead, the issue is that many of the tasks performed were strategically questionable and, in many instances, immoderate. These issues were raised by defendants and not substantively addressed by the Referee. The 15% reduction recommendation, thus, is vacated.

The court first addresses the two categories of work for which plaintiffs may not recover at all: (1) plaintiffs' removal of the second Nassau County Supreme Court action to federal court; and (2) the motion seeking a hear and determine reference and confidentiality order (Motion Seq. 002 in this action). As an initial matter, the court rejects plaintiffs' contention that the legal issues regarding removal were complex. On the contrary, federal courts consistently hold that subject matter jurisdiction based on the existence of a "federal question" does not exist merely

[6] The only situation in which plaintiffs might hypothetically be on the hook is if, as here, the court refuses to compel defendants to pay the contingency fee. That eventuality, which is somewhat ironic, does not impel the court to force defendants to pay the contingency fee. The court expresses no opinion on the enforceability of the contingency fee against plaintiffs.

because the parties' dispute involves a nominally "federal" issue. For these reasons, the federal magistrate judge (unsurprisingly) found there to be a lack of federal subject matter jurisdiction. He explained:

> **The pass-through aspect of a subchapter S corporation, while relevant, is a relatively simple concept that does not warrant removal on the facts presented here.** As plaintiff points out in his letter brief, the crux of this action concerns whether plaintiff was indeed a shareholder of [Oncomed] during the years 2007 through 2010, the years for which [Oncomed] amended its K-1 statements and tax returns. Such a determination requires the Court to construe the settlement agreement and releases entered into by the parties in 2011, as well as the prior state court decision rendered on February 11, 2010, which defendants assert found plaintiff to be an eighteen percent shareholder in [Oncomed]. **This analysis by the Court does not involve issues of federal law, but rather simple contract and decisional interpretation, which is more properly the province of the state court.**

Mohyuddin v Sina Drug Corp., No. 12-cv-6043, Dkt. 26 at 5-6 (EDNY June 5, 2013) (citations omitted). While the district judge dismissed the action on other grounds [*see id.*, Dkt. 33 & 36], what is clear is that the case never should have been removed to federal court. Indeed, removal cost an extraordinary amount of money. Greenberg Traurig billed approximately $280,000[7] for removing the case and litigating the issue of whether the case should stay in federal court.[8] In this relatively minor commercial dispute, that is an ungodly sum of money to devote to an unwarranted procedural issue. Were this court to permit the removal attorneys' fees to be recovered (which it does not), it would have, as defendants suggest, reduced that amount by 75% (i.e., to approximately $70,000). However, the fact that the case clearly did not belong in federal

[7] The Referee wrote that the federal action "cost [plaintiffs] in excess of $100,000." *See* Report at 3-4. In truth, as noted above, the amount was almost three times that sum.

[8] In this court's experience, borderline (if not actually) frivolous removal is a common procedural tactic, both for forum shopping and delay purposes, not to mention the costs of litigating the removal issue, particularly where one party has deeper pockets or insurance or corporate coverage.

court along with the attendant churning,[9] lead this court to conclude that any recovery for the federal action would be unreasonable.

Next, and perhaps even more remarkably, Greenberg Traurig billed approximately 120 hours in connection with the motion (Seq. 002) to compel a hear and determine the reference, and ran up a bill of almost $100,000 after the Appellate Division issued its decision. To be sure, some of that was due to defendants' unjustifiable obstruction with respect to the confidentially stipulation, an issue which could easily have been resolved by a telephone call to the court. Nonetheless, the bulk of that time was spent disputing the type of reference that would be ordered. In any event, there is no valid basis to inefficiently combat opposing counsel's obstructionist behavior, especially where, as here, there was a method of resolving the issues – directly contacting the court – that would have been immensely cheaper than filing a formal motion.[10] In fact, on June 24, 2015, the issues raised on the motion were resolved in minutes on a call with the court. The court finds that the motion was unnecessary, profligate and not recoverable as a reasonable counsel fee.

Finally, the court concurs with the Referee that Greenberg Traurig's billings were unreasonably excessive, as exemplified in the preceding paragraph and in defendants' brief. Upon review of the billing records, the court finds that a 30% reduction, rather than the 15% reduction recommended by the Referee, is appropriate under these circumstances. The court

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[9] Of course, the knowledge that defendants have to foot the bill is not a legitimate reason to over-litigate.

[10] As this part's rules provide (in this 2013 action, the parties should be familiar with them), minor issues are to be resolved by calling the court with all counsel on the line. The court provides this option to counsel precisely so they do not waste their client's money on costly motion practice.

does not actually take issue with the quality of Greenberg Traurig's work or the outcome achieved, which surely is a positive one for plaintiffs. However, the court finds that the prospect of defendants paying their bill incentivized particularly aggressive litigation with no regard to efficiency.[11] Contrary to defendants' protestations, the court finds that some of the obstructionist behavior that the Referee found to have occurred on the part of defendants is troubling and warrants some of the fees. Nonetheless, taking that into account, a review of Greenberg Traurig's records makes clear that excessive billing cannot be predominantly explained by the behavior of defendants' counsel.

To ensure the accuracy of the final amount awarded, as directed below, plaintiffs shall submit a proposed order setting forth the amount of Greenberg Traurig's billable hours on tasks not excluded by this decision (i.e., tasks other than litigation in the Eastern District, motion seq. 002, and billings in excess of $80,000 on the First Department appeal) and then compute the fees at the rates approved by the Referee, which should then be discounted by 30%. Included in that total shall be the billable hours attributable to the hearing before the Referee and the instant motion. These "fees on fees" are recoverable in this instance.

The First Department generally prohibits recovery of fees on fees when they are not expressly provided for by contract or statute. *See Gottlieb v Gottlieb*, 138 AD3d 575, 577 (1st Dept 2016), citing *Sage Realty Corp. v Proskauer Rose LLP*, 288 AD2d 14, 15 (1st Dept 2001) ("It has been established that an award of fees on fees must be based on a statute or on an agreement.") (emphasis added); *see also Batsidis v Wallack Mgmt. Co.*, 126 AD3d 551, 553 (1st

[11] The court understands that even the best intentioned lawyers, when zealously advocating for their clients (as Greenberg Traurig has ably done in this case), are not immune from this incentive.

Dept 2015) ("The [contract] does not contain unambiguous language providing for the recovery of fees on fees. Because it is not 'unmistakably clear' from the parties' agreement that fees on fees were contemplated, such an award is not allowed."). However, as Justice Ramos has observed, the First Department, in dicta, indicated that a contract with indemnity language substantially similar to that of the settlement agreement in this action warrants the award of fees on fees. *See Square Mile Structured Debt (One) LLC v Swig*, 2013 WL 3989037, at *5-8 (Sup Ct, NY County 2013), citing *546-552 W. 146th St. LLC v Arfa*, 99 AD3d 117, 123 (1st Dept 2012). This court agrees with Justice Ramos and the arguments made by plaintiffs that, under the indemnity provision in the contract at issue (and the way it was described by the First Department), fees on fees should be awarded.

The court has considered the parties' remaining arguments and finds them unavailing. Accordingly, it is

ORDERED that the parties' cross-motions are granted to the following extent: plaintiffs shall not recover their attorneys' fees related to removal and litigation in the Eastern District, the fees on motion seq. 002 in this action, and billings in excess of $80,000 on the First Department appeal, and the total percentage reduction on the recoverable fees shall be 30%, and the Report is otherwise confirmed; and it is further

ORDERED that plaintiffs shall recover their "fees on fees" to the extent set forth herein, which also shall be subject to the 30% reduction; and it is further

ORDERED that within 7 days of entry of this order on the NYSCEF system, plaintiffs shall submit (by e-filing and faxing to Chambers) a proposed order in accordance with this decision directing the entry of judgment for the amount of fees awarded herein along with a brief letter explaining how such fees were computed; within 7 days thereafter, defendants may file a

counter-proposed judgment (with a redline) along with a brief letter explaining any proposed differences; and between 4:00 and 5:30 pm on either January 4 or 5, 2017, the parties shall jointly call the court to resolve any disputes over the proposed orders or, if they are in agreement as to the form of the judgment, they shall file a joint letter to that effect.

Dated: December 5, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C