United States District Court, S.D. New York.

RETIREMENT FUND OF the FUR MANUFACTURING INDUSTRY, by its Trustees, Theofanis Dardaganis, Jerry Kay, Arthur Kotoros, Cheryl Lamm, William Molina, Paul Raphael, and Sidney Reiss, Plaintiffs,
v.
GETTO & GETTO, INC., Irving Getto and Harold Getto, Defendants.

No. 88 CIV. 3121 (MBM).

Aug. 7, 1989.

Ronald L. Castle, V. Daniel Palumbo, Fred S. Sommer, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., Christopher E. O'Brien, Gaston & Snow, New York City, for plaintiffs.

Solaman G. Lippman, Richard H. Semsker, Lippman & Associates, Washington, D.C., Michael M. Premisler, Carle Place, N.Y., for defendants.

AMENDED OPINION AND ORDER

MUKASEY, District Judge.

***1** Plaintiffs Retirement Fund of the Fur Manufacturing Industry ("Fund") and its trustees filed this lawsuit to collect withdrawal liability from defendant Getto & Getto, Inc. and its sole shareholders, Irving and Harold Getto, under the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended by* the Multi-employer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1001 *et. seq.* (1982 & Supp. IV 1986). In an opinion and order dated June 1, 1989, familiarity with which is assumed, I granted summary judgment for plaintiffs, finding the defendant corporation liable to pay interim withdrawal payments of $27,799.63, and the individual defendants personally liable for any payments Getto & Getto failed to make up to an aggregate amount of $69,932.96, representing the amount the individual defendants received from the corporation's undistributed income.

In that opinion, I noted that reasonable attorney's fees and costs might be mandatory as the Fund had prevailed. 29 U.S.C. §§ 1132(g)(2)(D); *United Retail & Wholesale Employees, Teamsters Union v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 134-35 (3d Cir.1986) (holding that attorney's fees are mandatory under § 1132(g)(2)(D); *but see Local 445 Welfare Fund v. Wein*, 855 F.2d 62, 65 n. 2 (2d Cir.1988) (*per curiam*) (noting that other circuits had found § 1132(g)(2)(D) attorney's fees mandatory, but expressly leaving this question open in this Circuit). [FN1] Section 1132(g)(2) provides that:

[i]n any action under this title by a fiduciary for or on behalf of a plan to enforce Section 515 [29 U.S.C. § 1145] in which a judgment in favor of the plan is awarded, the Court shall award the plan ...

(C) an amount equal to the greater of ...

(ii) liquidated damages ...

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant ...

For purposes of this section, the failure to make withdrawal liability payments is treated as a delinquent contribution within the meaning of § 1145. 29 U.S.C. § 1451(b). Accordingly, § 1132(g)(2)(D), not § 1451(e) of the MPPAA, governs the application for attorney's fees here. *Connors v. Brady-Cline Coal Co.*, 668 F.Supp. 5, 10 (D.D.C.1987).

Plaintiffs have provided an affidavit requesting overdue payments of $10,465.68, plus $867.27 in interest and a like amount in liquidated damages. 29 U.S.C. § 1132(g)(2)(C)(i). Plaintiffs' request that defendants pay this sum--a total of $12,200.22--is granted as reasonable. Of course, as detailed in the June 1 opinion, this sum should first be taken from the defendant corporation's escrow account; the individual defendants will pay for any excess.

Plaintiffs request $21,614.00 for attorney's fees and $1,701.29 for costs and expenses. I need not reach the question whether attorney's fees would be mandatory under § 1132(G)(2)(D) as I find that, even under a discretionary standard, attorney's fees are warranted here. Courts have developed five factors to determine whether an award of attorney's fees is warranted under both discretionary MPPAA and ERISA attorney's fees statutes. *See Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund*, 827 F.2d 491, 500 (9th Cir.1987) (MPPAA action construing discretionary § 1451(e)), *cert. denied*, 99 L.Ed 2d 703 (1988); *Central States Southeast & Southwest Areas Pension Fund v. 888 Corp.*, 813 F.2d 760, 767 (6th Cir.1987) (same); *Miles v. New York State Teamsters Conference*, 698 F.2d 593, 602 n. 9 (2d Cir.) (ERISA action construing discretionary § 1132(g)(1), *cert. denied*, 464 U.S. 829 (1983). These factors are:

***2** (1) The degree of the opposing party's culpability or bad faith;

(2) The ability of the opposing party to satisfy an award of attorney's fees;

(3) Whether an award of fees against the opposing party would deter others from acting in similar circumstances;

(4) Whether the party requesting fees sought to benefit all participants and beneficiaries of a multiemployer plan or to resolve a significant legal question; and

(5) The relative merits of the parties' position.

888 Corp., 813 F.2d at 767.

I find some indications that defendants acted in bad faith here. Defendants argued that they had a defense to payment of withdrawal liability: to wit, that they had withdrawn in 1983 rather than 1984, the year of the "mass" withdrawal. *See* June 1, 1989 slip op. at 3-4. If defendants withdrew in 1983, they would escape liability because of the MPPAA's *de minimis* rule reducing withdrawal liability by $50,000. 29 U.S.C. § 1389(a). The *de minimis* rule is inapplicable if withdrawal occurs in a year when "substantially all employers" withdraw from a plan. 29 U.S.C. § 1389(c)(1). While this defense ultimately may prove successful in arbitration, defendants were essentially asking this court to intervene in an arbitration which they themselves had initiated, in order to relieve them from liability to pay interim withdrawal payments. *See* June 1, 1989, slip op. at 4 ("It is not often that a party which requests arbitration turns around and seeks judicial intervention, but that is precisely what defendants request here."). While this Circuit's doctrine requiring exhaustion of administration remedies in MPPAA cases was not a *per se* bar to such a defense, there was little chance that this court would intervene in an ongoing arbitration to decide a question which revolved around purely factual issues, as opposed to statutory ones. June 1, 1989, slip op. at 6-8. Defendants were essentially seeking to undermine clear statutory language and circuit precedent requiring that they pay withdrawal liability pending arbitration and review. Slip op. at 3. Moreover, the individual defendants' argument against personal liability was also weak: one of them had conceded at a deposition that they had taken undistributed income from the corporation, slip op. at 10, and state law holding them liable was fairly settled. Although defendants' conduct here does not amount to gross bad faith, neither does it demonstrate good faith. Accordingly, I find that this factor slightly favors imposition of attorney's fees.

The second factor--defendants' ability to satisfy an award of attorney's fees--also slightly supports imposition of attorney's fees. Although I understand that defendants have limited assets, they have conceded that they withdrew $69,932.96 in undistributed income from the corporation. Moreover, the corporation still has an escrow account of $11,000. Thus, defendants will be able to pay any award of attorney's fees.

***3** Moreover, the third, fourth, and fifth factors strongly favor plaintiffs. Certainly, an award of attorney's fees will dissuade others in defendants' position from refusing to make interim payments of withdrawal liability pending review and arbitration. And it is beyond doubt that the Fund was acting in the best interests of pension beneficiaries by instituting this action in order to ensure funding for vested benefits. Finally, plaintiffs' position on the merits was clearly stronger than defendants'.

The first and second factors slightly favor imposition of attorney's fees, while the third, fourth and fifth factors strongly favor an award. Balancing these factors, I find that they tip decidedly in favor of awarding fees and costs here.

Plaintiffs request a total of $23,315.29 in attorney's fees and costs for their successful prosecution of this action. Defendants do not challenge the reasonableness of the hourly rates charged by plaintiffs, not do they challenge the reasonableness of any of the time spent on the litigation. Rather, they contend that the fee request is wholly out of proportion to both the amount involved and the complexity of this case.

That attorney's fees are proper does not mean that this court must rubber stamp plaintiffs' fee request. Whether plaintiffs' fee is reasonable, under both discretionary and mandatory schemes, is a matter committed to the sound discretion of the court. *McCann v. Coughlin*, 698 F.2d 112, 129 n. 16 (2d Cir.1983). The lodestar amount, calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate, is the starting point in this analysis. To determine whether a reduction in the basic lodestar fee is necessary, the Supreme Court has listed twelve factors which the court should consider: (1) time and labor required; (2) novelty and difficulty of the questions; (3) skill required to perform the legal services properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Hensley v. Eckerhart*, 461 U.S. 424, 430 n. 3 (1983).

Although plaintiffs were successful in this litigation, a factor which is "critical," *Hensley*, 461 U.S. at 436, I find plaintiffs' attorney's fee completely disproportionate to the magnitude and complexity of this matter. It is astounding that plaintiffs expended $21,614.00 in attorney's fees and $1,701.29 in costs and expenses for a complaint which, at most, sought recovery of $27,799.63. Indeed, the fee request becomes all the more excessive when one considers that only $10,465.68 of the total withdrawal liability is now overdue. Instructive in this regard is Judge Pollack's comment on the need to mitigate costs in the analogous area

of Rule 11 sanctions: "[W]hile a client and his attorney may surely select the grand style for their representation, the sanction will be less than the attorney's fee when, in a 'comparatively simple matter there was an excess of professional services.' " *Nassau- Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.*, 114 F.R.D. 684, 692 (S.D.N.Y.1987) (quoting *Marine Midland Bank v. Goyak*, 84 Civ. 1204 (EW) (S.D.N.Y. July 12, 1984)). That principle applies with equal force to the fee request here.

***4** Plaintiffs had two senior associates, three mid-level associates, one junior associate and three paralegals working on this matter. Although defendants sought to cross move for summary judgment, a motion which may have required some brief research, plaintiffs' claim involved settled statutory requirements which the Second Circuit has clearly interpreted as requiring defendants to pay withdrawal liability pending review and arbitration. Indeed, as defendants had sought arbitration in the first place, the chance that defendants' cross-motion would succeed was practically nil. *See* June 1, 1989, slip op. at 4 ("It is not often that a party which requests arbitration turns around and seeks judicial intervention, but that is precisely what defendants request here.") Furthermore, although Second Circuit precedent on the exhaustion-of-administrative-remedies requirement in MPPAA actions was somewhat complex, *see* June 1, 1989, slip op. at 5-8, the issue was relatively straightforward; defendants' claims clearly fell outside the reach of cases where the Circuit had waived the exhaustion requirement. Likewise, plaintiffs' claim holding the individual defendants personally liable involved uncomplicated principles of state law.

Moreover, the litigation here was not extensive; to the contrary, the matter was active only a few months. Plaintiffs sought once at a status conference and were granted permission to amend their complaint. No formal motion was necessary. One deposition was taken at which one of the individual defendants flatly conceded that they had taken undistributed income from the corporation and thus that they were personally liable for the payments. *See* June 1, 1989, slip op. at 10. Plaintiffs then moved for summary judgment, which this court granted without oral argument.

Given the simplicity of the issues involved, the absence of any serious defense, the small amount at stake, and the brief duration of the litigation, I find that the staffing and the hours expended in this case were grossly out of proportion. This matter could have been handled comfortably by one senior associate, one junior associate and a paralegal. That plaintiffs chose to prosecute this case in the "grand style" does not make their fee request reasonable. As I find that plaintiffs generally used approximately three times the staff and time necessary for such a case, I find that a reduction of the lodestar figure by two thirds is appropriate here. The same is true of plaintiffs' request for costs. However, the amount sought for briefing this fee petition, $950 (Castle Aff. at ¶ 17), will not be reduced by this percentage as the affidavit was requested by this court and there is no suggestion that plaintiffs used excessive energy on this motion. Accordingly, plaintiffs will recover attorney's fees of $7,838 ($6,888 plus $950) and $567.10 in costs and expenses for a total of $8,405.10.

In sum, I find that defendants are liable for overdue payments, interest and liquidated damages totally $12,200.22 and attorney's fees, costs and expenses totalling $8,405.10. Of course, as stated in the June 1 opinion, slip op. at 14, these amounts should first be taken from the defendant corporation's escrow account; the individual defendants are jointly and severally obligated to pay the excess. Plaintiffs should submit a final judgment within four days reflecting the amounts defendants must pay as detailed in this decision and the future payments of withdrawal liability defendants must make as set forth in this court's June 1 opinion.

***5** SO ORDERED:

> FN1. Plaintiffs cite *O'Hare v. General Marine Transp. Corp.*, 740 F.2d 160, 171 (2d Cir.1984), *cert. denied*, 469 U.S. 1212 (1985), as demonstrating that the Second Circuit has held that attorney's fees to recoup delinquent payments are mandatory. On close reading, the *O'Hare* panel's reference to § 1132(g)(2)(D) "mandat[ing]" attorney's fees meant only that that section *provides* for attorney's fees, not that such fees are required. There is no evidence in the *O'Hare* opinion that the Court fully considered whether attorney's fees should be mandatory under this section. Indeed, the *Wein* panel expressly left this question open, although it was well aware of the *O'Hare* opinion. *See* 855 F.2d at 64. To the extent that this court's prior opinion may have suggested otherwise, *see* June 1, 1989, slip op. at 11, that opinion is hereby amended. It should be noted, however, that the statute's use of the phrase "shall award" strongly suggests that Congress did intend to make attorney's fees mandatory when a pension plan successfully sues to recoup delinquent contributions. However, as I find that attorney's fees would be appropriate under a discretionary standard, *see infra*, I do not reach this question.

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