UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERTA CAMPBELL, : 09 Civ. 9644 (WHP)

Plaintiff, :

v.

MARK HOTEL SPONSOR, LLC, :

Defendant. :

----------X

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S ATTORNEY'S FEE APPLICATION

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This Memorandum of Law is submitted on behalf of plaintiff, Roberta Campbell, in opposition to the exorbitant fee request of defendant, Mark Hotel Sponsor, LLC, for some $3,346,145.72 in fees and disbursements, constituting the equivalent of some 68.6% of the res sued for, including interest.

The relevant facts are set forth in the accompanying Declaration of Amos Alter, dated August 31, 2012. This Memorandum is limited to establishing the relevant principles of law referred to in that Declaration.

ARGUMENT

THE FEE APPLICATION HERE IS GROSSLY EXCESSIVE UNDER NEW YORK LAW

This being a diversity case, and the obligation to pay attorney's fees arising from contract rather than Federal statute, the applicable law as to attorney's fees is to be found in New York, rather than Federal, jurisprudence. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259, 95 S.Ct. 1612, 1623, 44 L.Ed.2d 141, 154

(1975). Federal cases wherein the right to attorney's fees is governed by Federal law are therefore not controlling. Similarly, the obligation to pay attorney's fees arises here from a contract, in an action seeking to recover money under that contract, rather than in action seeking equitable relief, where a statutory right is being vindicated, or where the right to attorney's fees arises from statute. Accordingly, cases where the right to attorney's fees, even if under State law, is not contractual, are also not controlling. All the cases (Federal or State) cited herein by plaintiff on the merits, as opposed to the citing of defendant's cases for purposes of distinguishing them, are New York law cases seeking recovery of money under a contract, with the right to an attorney's fee being governed by the contract. By contrast, many of defendant's cases are based on Federal law, or arise otherwise than from contract, and hence there may have been policy reasons to award large attorney's fees not present here.

"It is clear that the determination of reasonable counsel fees is a matter within the sound discretion of the trial court." Ogletree, Deakins, Nash, Smoak & Stewart v. Albany Steel, 243 A.D.2d 877, 878-79, 663 N.Y.S.2d 313, 315 (3d Dept. 1997) (internal citation and quotation marks omitted); Curtis v. Nutmeg Ins. Co., 256 A.D.2d 758, 758, 681 N.Y.S.2d 620, 620 (3d Dept. 1998); Orlikowski v. Cornerstone Community Federal Credit Union, 55 A.D.3d 1245, 1249, 865 N.Y.S.2d 429, 432 (4th Dept. 2008).

The most fundamental principle in determining counsel fees is reasonableness. "As a general matter of New York law, ... when a contract provides that in the event of litigation the losing party will pay the attorney's fees of the prevailing party, the court will order the losing party to pay whatever amounts have been expended

by the prevailing party, so long as those amounts are not unreasonable." F. H. Krear v. Nineteen Named Trustees, 810 F.2d 1250, 1263 (2d Cir. 1987). "[I]t may be necessary to look beyond the actual fee arrangement between [the prevailing party] and counsel to determine whether that arrangement was reasonable." Equitable Lumber Corp. v. IPA Land Development Corp., 38 N.Y.2d 516, 521, 381 N.Y.S.2d 459, 463, 344 N.E.2d 391, 395 (1976).

The amount involved in the lawsuit is a matter which bears strongly on the reasonableness of the attorney's fees. F. H. Krear, id.; Regan v. Conway, 768 F.Supp.2d 412, 417 (E.D.N.Y. 2011); Antidote Int'l. Films v. Bloomsbury Publishing, 496 F.Supp.2d 362, 394-5 (S.D.N.Y. 2007); Norwest Financial v. Fernandez, 121 F.Supp.2d 258, 262 (S.D.N.Y. 2000); Hovanec Builders & Dev. Corp. v. Hines, 173 A.D.2d 951,951-52, 569 N.Y.S.2d 813, 814 (3d Dept. 1991). Thus, in Hovanec, supra, the Appellate Division affirmed the trial court's reduction of the successful plaintiff's attorney fee award to 33 1/3% of the amount of the jury award plus interest.

If the Court finds the attorney's fees sought by the prevailing party to be excessive, it has a number of tools available to it in order to set a reasonable fee. First: As was done or sanctioned by the Second Circuit in F. H. Krear, supra, and by the Appellate Division in Hovanec, supra, the Court can set the fee itself, as a percentage of the amount recovered (in both those cases, one-third). Second: It may impose an across-the-board percentage reduction in the amount of fees sought. See, e.g., Norwest Financial v. Fernandez, 121 F.Supp.2d 258, 261 (S.D.N.Y. 2000). Third: It may reduce counsel's hourly billing rate. Nutmeg Ins. Co. v. Rosen, 256 A.D.2d 759, 760, 683 N.Y.S.2d 593, 594 (3d Dept. 1998).

The cases cited by defendant do not contradict any of the above principles. Thus, defendant relies heavily on what it terms "the twelve Johnson factors" for determining the reasonableness of attorney's fees, citing to a Fifth Circuit case, Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). That Court, however, was interpreting Federal law, not New York law, the latter giving far greater weight, at least in contract actions seeking solely money, to the amount in controversy. In any event, the Supreme Court has criticized the Johnson 12-factor list, Perdue v. Kenny A., ___ U.S. ___, 130 S.Ct. 1662, 1671-2, 176 L.Ed.2d 494, 504 (2010), and it cannot be considered good law even in Federal-law cases.

The cases cited by defendant for its proposition (Br. 8) that the fees sought do "not warrant a reduction ... in light of their size in relation to the amount recovered" are similarly inapposite. United States ex rel. Feldman v. Van Gorp, 2011 U.S.Dist.LEXIS 14914 (S.D.N.Y. 2/9/2011) (Pauley, D.J.), was a Federal qui tam case, where the right to an attorney's fee was statutory, in support of a public policy of encouraging qui tam relators to bring suits. Lunday v. City of Albany, 42 F.3d 131, 135 (2d Cir. 1994), was also a Federal statutory action, with the right to an attorney's fee provided by statute, in furtherance of an important public interest (in that case, the Federal civil rights statute). Krumme v. Westpoint Stevens, 79 F.Supp.2d 297 (S.D.N.Y. 1999), rev'd, 238 F.3d 133 (2d Cir. 2000), did involve a contractual fee, but it is hardly comparable to the case at bar. The case involved Westpoint paying a fee under a contractual provision in its own deferred compensation plan, which provided for fee reimbursement regardless of the outcome. The Court noted (at 306) that Westpoint was "a sophisticated corporation with experience in drafting and entering into contracts", and

that it knowingly offered plan participants an extremely broad fee reimbursement provision. Furthermore, the Court there also found an exception to the amount-in-controversy limit in part because the result in the case before it far exceeded the dollars in controversy there. The decision had collateral estoppel effect on a companion State case, for which the Federal case was a test case – the State plaintiffs having been unable to join the Federal case because of diversity or amount-in-controversy concerns. See discussion at 308-309. It also must be stated that defendant in our case has failed to note that Krumme was reversed on appeal, and the attorney's fee award vacated.

The amount in controversy is thus of critical significance in determining the amount of the award. Unlike statutory claims, where the significance of the result frequently far transcends the money at stake for the individual claimants, this case is a simple contract action, without consequences extending beyond the parties.

As defendant has expressly not sought to collect attorney's fees for this application for attorney's fees (albeit reserving "rights" in that regard), it requires only passing mention that New York's rule is that a party is not entitled to attorney's fees for an application for attorney's fees. F. H. Krear v. Nineteen Named Trustees, 810 F.2d 1250, 1266 (2d Cir. 1987); Regan v. Conway, 768 F.Supp.2d 412, 417 (E.D.N.Y 2011).

Conclusion

For the reasons stated, defendant's exorbitant fee award cannot be granted. It should be reduced as indicated above.

Respectfully submitted,

/s/

Amos Alter, Esq.
Attorney for Plaintiff

Of Counsel:

Cohen & Coleman, LLP
John A. Coleman, Jr., Esq.
Joshua Cohen, Esq.

August 31, 2012