Penn v. Tenet Healthcare Corp.

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Appellants North Border Investments, Louisiana School Employees' Retirement System, and their attorneys appeal from a Santa Barbara Superior Court order denying their motion to intervene and petition for $10 million attorney fees and expenses in a shareholder derivative action against nominal defendant Tenet Healthcare Corporation (Tenet). The trial court denied relief and approved a $51.5 million global settlement, awarding plaintiffs' counsel $5 million attorney fees and expenses. We affirm.

Procedural History - The State Derivative Action

On November 12, 2002, the first of 10 derivative actions was filed in the Santa Barbara County Superior Court against Tenet's directors and officers. (Penn et al. v. Barbakow et al., Santa Barbara County Sup. Ct., Case No. 0109890.) The operative complaint alleged violations of the Corporations Code, breach of fiduciary duty, gross mismanagement, waste of corporate assets, abuse of control, and unjust enrichment. The trial court consolidated the actions (In re Tenet Healthcare Corporation Derivative Litigation, Case No. 01098905) and appointed the law firms Robbins Umeda & Fink, LLP and Faruqi & Faruqi, LLP as lead counsel.

Two state court derivative actions were filed by appellants. (Santa Barbara County Sup. Ct., Case Nos. 0110372 and 0111879.) They dismissed their complaints after the trial court denied their motion to appoint appellants' counsel as lead counsel.

The Federal Derivative Action

Appellants then filed parallel derivative actions in federal court which were consolidated and captioned In re Tenet Healthcare Corporation Derivative Litigation, No. CV-03-11 RSWL (C.D. Cal.). The federal district court appointed appellants' counsel as lead counsel.[1] A separate group of investors, represented by different counsel, had already filed a class action for violation of federal securities law. (In re Tenet Healthcare Corp. Securities Litigation, United States District Court, California Central District, Case No. CV-02-8462-RSWL (Rzx).)

Because of the duplicative nature of the federal derivative action, the Santa Barbara County Superior Court granted Tenet's motion to stay the state derivative action on June 19, 2003. The lawsuits, a pending Security Exchange Commission investigation, and news of Tenet's financial problems had a huge impact in the investment community. On June 23, 2003, four days after the hearing on the stay request, Tenet suffered a $2.8 billion loss in market capitalization.

Lead counsel in the state derivative action brought several motions to vacate the stay but the motions were denied. The trial court did, however, authorize counsel to conduct limited discovery and attend depositions in the federal derivative action and the federal securities action.

Tenet's Deputy General Counsel, Gary W. Robinson, negotiated with Tenet insurers to fund a global settlement and attempted to settle the federal derivative action at a November 17, 2005 mediation conference. Settlement negotiations commenced but were not fruitful. On January 4, 2006, appellants gave Tenet an eleventh hour ultimatum and terminated settlement negotiations.

Global Settlement of State Derivative Action

Tenet thereafter negotiated a settlement in the state derivative action in which Tenet's insurers contributed $50 million and two Tenet officers (Board Chairman and Chief Executive Officer Jeffrey Barbakow and Chief Operation Officer Thomas Mackey) contributed $1.5 million. The settlement agreement provided that lead counsel's fees and expenses would be paid from the $51.5 million settlement fund and not exceed $5 million. The settlement agreement required that Tenet implement 26 corporate governance changes and included a "Fair Fund" to credit Tenet for payments made to the Securities Exchange Commission.

Although Tenet had more than 100,000 shareholders, appellants and their clients, who owned 100 shares of Tenet's stock, were the only shareholders to object to the settlement. Appellants claimed, on grounds of judicial comity, that the settlement should be approved by the federal court. Appellants also sought leave to intervene based on the theory that their attorneys should be paid $10 million on a common fund theory for fees (about $775 per hour) and expenses.

The trial court overruled appellants' objections. It denied the motion to intervene and petition for fees and expenses. On May 4, 2006, the trial court approved the settlement as "fair, just, reasonable and adequate in all respects as to each of the Settling Parties, including the nominal defendant Tenet and its shareholders." The state derivative action settlement was part of a global settlement which funded a partial settlement of the federal securities action, approved by the federal district court on May 26, 2006. (In re Tenet Healthcare Corp. Securities Litigation, U.S. Dist. Court, Cal. Central District, Case No. CV-02-8462-RSWL (Rsx).)

Appellants appealed from the state court settlement judgment and orders denying their requests. While this appeal was pending, appellants brought a motion in the federal derivative action for fees

and costs. On April 5, 2007, the federal district court denied the motion, finding no factual or legal basis to award fees and expenses on a common fund or substantial benefit theory.[2] (In re Tenet Healthcare Corporation Corporate Derivative Litigation, U.S. Dist. Court, Cal. Central District, Case No. CV 03-11 RSWL (RZx).) (Tenet's Req for Judicial Notice)

Stay of State Derivative Action

Appellants argue that the trial court erred in lifting the stay. The stay was imposed so that Tenet would not suffer the enormous cost of defending against duplicative parallel actions in different forums. After appellants gave Tenet an ultimatum and terminated settlement discussions in the federal derivative action, the trial court lifted the stay so that Tenet could finalize a global settlement. The trial court reasonably concluded that the stay had served its purpose and, in lifting the stay, was vested with the discretion to consider any factor bearing on the suitability or convenience of settling the matter in other forums. (Archibald v. Cinerama Hotels (1976) 15 Cal.3d 853, 860.)

On appeal, appellants simultaneously argue inconsistent positions. They say that the trial court lacked the authority to lift the stay and at the same time erred in not awarding them attorney's fees and expenses. Appellants cannot have it both ways. They are estopped by their motion to intervene from saying that the trial court had no power to deny their petition for fees. The doctrine of judicial estoppel protects against a litigant playing "'fast and loose'" with the courts by asserting inconsistent positions. (Thomas v. Gordon (2000) 85 Cal.App.4th 113, 119.)[3]

Intervention

The argument that the trial court abused its discretion in denying appellants leave to intervene is without merit. Appellants sought intervention for the sole purpose of requesting fees and expenses in a settlement they did not negotiate to successful conclusion. Appellants failed to show that their attorneys had a direct interest in the settlement, that intervention would not enlarge the settlement issues, or that the reasons for intervention outweighed the interests of the parties in the state derivative action. (Code Civ. Proc., § 387, subd. (a); US Ecology, Inc. v. State of California (2001) 92 Cal.App.4th 113, 139.) "The permissive intervention statute balances the interests of others who will be affected by the judgment against the interests of the original parties in pursuing their litigation unburdened by others. [Citation.]" (City and County of San Francisco v. State of California (2005) 128 Cal.App.4th 1030, 1036.) The order denying leave to intervene was not an abuse of discretion and there was no miscarriage of justice. (Ibid.)

The trial court reasonably concluded that intervention was improper to recover fees and expenses for legal services in another action. (See e.g., (Meadow v. Superior Court (1963) 59 Cal.2d 610, 615 [attorney may not intervene to assert a claim for services rendered].) Appellants abandoned their state derivative action and filed a parallel action in federal court that never settled. Having dismissed the state derivative action, appellants could not successfully move to intervene and assert a claim for fees

and expenses that would jeopardize the settlement of the state derivative action ($51.5 million) and the settlement of the federal securities action ($216.5 million).[4]

Attorney Fees

In ruling on appellants' petition for fees and expenses, the trial court had to decide what was best for Tenet and its shareholders. (Robbins v. Alibrandi (2005) 127 Cal.App.4th 438, 448.) "[C]courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class of plaintiffs. [Citations.]" (In re Washington Pub. Power Supply Sys. Lit. (9th Cir. 1994) 19 F.3d 1291, 1302.)

Here an award of $10 million fees and expenses would violate the terms of the settlement agreement which provided for a $5 million cap on fees and costs. The trial court, in approving the settlement agreement, lacked the authority to award fees and expenses in excess of the amount agreed upon. (See e.g., Burbank Studios v. Workers' Comp. Appeals Bd. (1982) 134 Cal.App.3d 929, 937; Hanlon v. Chrysler Corporation (9th Cir, 1998) 150 F.3d 1011, 1026.) Because the trial court could not rewrite the settlement agreement, the settlement had to stand or fall in its entirety. (Ibid.)

To recover on a common fund theory, counsel for appellants had to represent a successful plaintiff. "We know of no authority which mandates an award of fees to attorneys not formally representing the class, whose activities in representing others incidentally benefit the class." (Class Plaintiffs v. Jaffe & Schlesinger, P.A. (9th Cir. 1994) 19 F.3d 1306, 1309.) Appellants have not demonstrated, as a matter of law that they caused the defendants to bring money to the settlement table. (See ante, pp. 3,7.) The $50 million contribution from Tenet's insurers was negotiated by Tenet's deputy general counsel months before the mediation of the federal derivative action. Two Tenet officers agreed to contribute $1.5 million, but the settlement was negotiated by counsel in the federal securities action without the help of appellants or their attorneys. "Having not [successfully] negotiated a separate fund, Derivative Counsel can not claim its negotiations yielded a substantial, monetary benefit for the Company." (In re Lucent Technologies, Inc., Securities Lit. (D.N.J. 2004) 327 F.Supp.2d 426, 461.) Appellants nevertheless claim that their actions in federal court postured, caused, and created the state derivative action settlement. This claim is speculative. Appellants made unreasonable demands, gave Tenet an ultimatum, and cut off settlement negotiations. They acted as if this were high stakes poker. Tenet would not be intimidated and turned to negotiate a settlement with lead counsel in the state derivative action. They had the power and the right to do so. In the words of the trial court, it was "a race to the courthouse. And it's a gamble. And at the very beginning of our time together it fell to me to designate lead counsel. And when I did so, those who were not chosen as lead counsel went to the Federal Court, as they can do. And so we had two parallel universes, if you will."

Having played their hand and lost in federal court, appellants had no right to return to state court and ask for a new deck and a new deal. A duplicative action that contributes nothing to the settlement does not justify an award of attorney's fees, (Gerena-Valentin v. Koch (1984) 739 F.2d 755,

759; In re Vitamin Cases (2003) 110 Cal.App.4th 1041, 1055.) If the rule was otherwise, it would encourage latecomers and tag-alongs to bring superfluous litigation solely for attorney fees. (Thayer v. Wells Fargo Bank (2001) 92 Cal.App.4th 819, 841.)

Appellants claim they are entitled to $10 million fees because they negotiated 16 of the 26 corporate governance changes. The record indicates that Tenet implemented most of the changes due to the Securities Exchange Commission investigation and changes in federal securities law. (See e.g., In re Lucent Technologies, Inc. Securities Lit., supra, 327 F.Supp. at p. 462 [derivative plaintiffs' counsel not awarded fees where corporate governance changes largely due to SEC consent decree].) The evidence supports the finding that appellants' counsel did not materially contribute to the global settlement. (See, Petrovic v. Amoco Oil Co. (8th Cir. 1999) 200 F.3d 1140, 1156 [denying fees in parallel cases that did not meaningfully or materially contribute to settlement]; Middle Mountain Land and Produce v. Sound Commod. (9th Cir. 2002) 307 F.3d 1220, 1225 [no fees if litigation did not create fund].)

Nor are appellants entitled fees based on the substantial benefit doctrine.[5] The doctrine applies where "(1) the litigant's efforts have created a substantial, actual and concrete pecuniary or non-pecuniary benefit; (2) such benefit redounds to members of an ascertainable class; and (3) the court's jurisdiction over the subject matter makes possible an award which spreads the cost proportionately among the members of the benefited class. The doctrine rests on concepts of unjust enrichment: those enriched by an economic windfall should bear their fair share of the costs expended to create the benefits obtained. [Citation.]" (Ciani v. San Diego Trust & Savings Bank (1994) 25 Cal.App.4th 563, 578.)

Appellants argue that, by filing the federal derivative action and objecting to the global settlement, they provided an adversarial edge that protected absent class members from an unfair settlement. "[A]dversarial context, by itself, is not enough to justify an award of fees: The principles of restitution underlying equitable fee awards 'require, however, that the objectors produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class.' [Citation.] In other words, providing assistance to the court in its effort to protect class members from unfair settlements, while laudable, alone is not a sufficient basis for recovery of attorney fees. The objector's efforts must also produce significant benefit to the class of passive beneficiaries from whom it seeks payment of its fees." (Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal.App.4th 387, 400.)

Reverse Auction

Finally appellants argue that the settlement was a "reverse auction" in which Tenet induced counsel in the state derivative action to sell out their clients in return for generous fees. (See Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America (2006) 141 Cal.App.4th 46, 50, fn 2; citing Reynolds v. Beneficial Nat. Bank (7th Cir. 2002) 288 F.3d 277, 282.) It was hardly a collusive

settlement. The global settlement was for more money, less fees, and more corporate governance changes. Had Tenet accepted appellants' settlement terms, the settlement fund would have been $5 million less, the attorney fees would exceed the settlement cap, and Tenet would have to implement 16 rather than 26 corporate governance changes.

The global settlement was approved by the trial court and by the federal district court in the federal securities action. The judge in the federal securities action was the same judge who, in the federal derivative action, determined that appellants' counsel was not entitled to fees on a common fund or substantial benefit theory. To conclude de novo that two different trial judges, in reviewing and approving the global settlement, abused their discretion as a matter of law would entail a gross reweighing of the facts and circumstances. This is not appropriate. (E.G., Estate of Gilkinson (1998) 65 Cal.App.4th 1443, 1449.) Such a determination would undo the settlements and create more litigation. This would be against the strong public policy in favor of settlement. (Osumi v. Sutton (2007) 151 Cal.App.4th 1355, 135;7-1359.) Appellants' remaining arguments merit no further discussion. The record shows that the award of $5 million to lead counsel for fees and expenses in the state derivative action was fair and reasonable.[6]

The judgment (orders under review) are affirmed. Respondents are awarded costs on appeal.

We concur: GILBERT, P.J., COFFEE, J.

1. Appellant North Border Investments was represented by Attorney Jeffrey Abraham of Abraham, Fruchter & Twersky, LLP, and Attorney Richard B. Brualdi of the Brualdi Law Firm. Attorney Eric Burkhardt of the law firm of Beall & Burkhart was local liaison counsel. Appellant Louisiana School Employees' Retirement System was represented by Marcus Bozeman of the law firm Cauley Geller Bowman Coates & Rudman, PLLC.

2. We have taken judicial notice of Federal District Court Judge S.W. Lew's May 26, 2006 and April 5, 2007 orders in the federal securities action and the federal derivative action.

3. Appellants are further estopped from arguing that the federal derivative action is not a duplicative parallel action. After the trial court approved the global settlement, appellants stipulated to a stay of the federal derivative action because of the potential res judicata effect of the settlement. The stay stipulation was approved by the federal court on July 6, 2006. We have taken judicial notice of the order.

4. The settlements are interconnected. The $51.5 million settlement of the state derivative action was earmarked to fund a portion of the $216.5 million settlement in the federal securities action.

5. "[T]o the extent that the substantial- benefit rule affirmatively encourages stockholders to exercise their right to seek redress for corporate mismanagement, it serves important considerations of public policy. [Citation.] The encouragement of nuisance- value derivative actions ('strike suits') is avoided or minimized by the requirement that only 'substantial' benefits will entitle the successful stockholder to attorneys' fees. [Citations.]" (Fletcher v. A. J. Industries, Inc. (1968) 266

Cal.App.2d 313, 324.)

6. The attorneys in the state derivative action collectively spent 4,320 hours over a 3.5 year period drafting pleadings, opposing demurrers, litigating the stay, conducting discovery, accessing Securities Exchange Commission files, reviewing three million pages of discovery documents, investigating claims against Tenet officers, and in settlement negotiations. Counsel requested a $1.836 million lodestar amount based on an hourly fee that was commensurate with the prevailing market rate, counsel's expertise, the risk and complexity of the case, and the results obtained. (See Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132.) Applying a 2.57 multiplier, the trial court awarded $4,720.055.22 fees plus $279,944.79 costs and expenses. Appellants make no showing that the trial court abused its discretion. (See Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 255 ["Multipliers can range from 2 to 4 or even higher"]; Flannery v. California Highway Patrol (1998) 61 Cal.App.4th 629, 639.)