04/30/80 TANZER v. CAVENHAM LIMITED

1980 | Cited 0 times | Court of Chancery of Delaware | April 30, 1980

GROVER C. BROWN, VICE-CHANCELLOR

UNREPORTED OPINION

This is a class and derivative action brought by Michael Tanzer and Deborah Tanzer, as Trustees of the Tanzer Economic Associates, Inc. Profit Sharing Plan. Michael Tanzer has been deposed by the defendants. During his deposition he was asked various questions which were designed to explore the qualifications of the named plaintiffs to serve as class representatives. He was directed not to answer by counsel, the reason generally given being that the questions were not relevant. Defendants have filed a Rule 37 motion to compel Mr. Tanzer to resubmit to a further deposition and to answer the general areas of inquiry.

The challenged areas of inquiry break down into three categories. First, defendants seek to ask questions relating to plaintiffs' relationship with New York counsel who represented them at the time the suit was filed. Second, defendants seek to inquire into plaintiffs' past experience as plaintiffs in other class and representative actions. Third, defendants seek information concerning any arrangement that plaintiffs may have made for the payment of the costs and expenses of this class action in the event that they should hereafter become liable for them.

This line of questioning was prompted by two things. First, the plaintiffs are relatively well known in the area of corporate litigation for having filed numerous actions wherein they seek relief on behalf of corporations and their shareholders. Second, Deborah Tanzer, the wife of Michael Tanzer, is also the daughter of a member of the New York law firm which filed the complaint on their behalf. Moreover, Michael Tanzer is apparently a professional economist who is said to do consulting work for law firms, one of such firms being the one that filed the complaint on plaintiffs' behalf.

Since the filing of the defendants' opening brief, several things have transpired which have a bearing on the outcome of the present motion. For one thing, a decision was handed down in Tanzer v. Turbodyne Corporation, N.Y. Supr. App. Div., 417 N.Y.S.2d 706 (1979) in which class certification, with the Tanzers, through their trust, acting as class representatives, was reversed because of their relationship with the New York law firm. Presumably as a result of that decision, the New York law firm has since formally withdrawn as associate counsel in this case, leaving the plaintiffs now represented of record solely by Delaware counsel. In addition, while not conceding that they have any obligation to do so, plaintiffs have now agreed to submit to further deposition inquiry concerning their past experience as representative plaintiffs. Finally, Delaware counsel for plaintiffs have filed an

affidavit stating that they have entered into a retainer agreement with plaintiffs pursuant to which Delaware counsel have undertaken to advance all costs incurred by plaintiffs in this litigation based on the understanding that plaintiffs will remain ultimately responsible for the reimbursement of all expenses advanced.

Thus, there will be a further deposition of plaintiffs, and the only remaining issues are (1) whether defendants may inquire into the relationship between plaintiffs and the New York law firm and (2) whether defendants may inquire into the financial status of the profit sharing plan on whose behalf plaintiffs sue as trustees.

As to the first of these, I conclude that the line of inquiry is proper and that the plaintiffs must answer, subject always to the qualification that the scope of inquiry be reasonable and not be used to harass, to embarrass or to acquire information for other purposes.

As to this first point, I am swayed by the decision of the New York court in Tanzer v. Turbodyne Corporation, supra. I stress, however, that this is due to the particular circumstances surrounding Mr. and Mrs. Tanzer. In Turbodyne, the New York court took note of the fact that the Tanzers had brought at least thirteen class action lawsuits and that in virtually all of them they had been represented by counsel from the New York law firm. There was no indication that their stock interests in any of those cases exceeded 25 shares. The court was skeptical of the Tanzers assertion that their only purpose in acquiring such limited holdings was for investment. The court further saw fit to "recognize" that "the real interest of these plaintiffs is that of their lawyers who will advance disbursements and who, if successful, will presumably receive substantial fees." 417 N.Y.S.2d 708. It went on to point out that in a class action the class representative does have an independent role even though, as a practical matter, it is the attorneys who handle the litigation and thus protect the interests of the class. One such function of the class representative is to act as a check on the attorneys so as to provide additional assurance that in any settlement or other Disposition the interests of the class will take precedence over those of the attorneys. The court summed up as follows at 417 N.Y.S.2d 709-710:

"In the present case we have class representatives who are closely related to the lawyers for the class; who as a regular practice make numerous small investments for the purpose of positioning themselves to be able to bring lawsuits through that law firm; whose investments and interest in the lawsuit as stockholders are far smaller even than the average of the class they seek to represent and are substantially outweighed by the possibility of benefit to the law firm to which they are so closely related. Granted that the law firm is well known for its abilities and energy in stockholders' litigation, I think the totality of the circumstances raises so severe a cloud, on at least the appearance of these class representatives being able to protect the interests of the class through these attorneys, that the class should not be certified. If persons who have not affirmatively consented to the lawsuit are to be affected by the lawsuit, the proceedings should be 'without cloud.'"

04/30/80 TANZER v. CAVENHAM LIMITED

1980 | Cited 0 times | Court of Chancery of Delaware | April 30, 1980

In this Court, in addition to this case, plaintiffs have brought similar representative actions in Tanzer v. I.G.I., C.A. 4945 (1975), Tanzer v. Greyhound Computer Corp., C.A. 5524 (1978) and Tanzer v. Warner Co., C.A. 6056 (1979). All of these suits involve attacks on "going private" merger transactions as was the situation in New York. In this suit, plaintiffs own 25 shares. In the I.G.I. and Greyhound Computer suits they owned 50 and 25 shares respectively. If their relationship with counsel was sufficient to deny class certification in Turbodyne, then it would seem under the same rationale, that their relationship with counsel is sufficiently relevant to warrant reasonable discovery in this matter.

Moreover, for the purpose of discovery, the fact that the New York law firm has since withdrawn from the case is not sufficient to foreclose further inquiry as I see it. It may be that this will prove sufficient to remove the impediment to class certification that was found to exist in Turbodyne. But that issue is not before me on the present motion. The issue before me is whether the relationship between the plaintiffs and the New York law firm which they authorized to file this suit is a relevant area for discovery bearing on the question of whether or not a class should be determined and the plaintiffs designated as class representatives. I think that it is under the particular background circumstances that prevail. Moreover, if the plaintiffs truly seek to represent the interests of a class of stockholders, I should think that they would be more than willing to answer reasonable questions so as to remove any "cloud" from the proceedings that might derive from the combination of Turbodyne decision and the fact that the same legal representation which brought about decertification in Turbodyne is responsible for the initiation of the proceedings here.

As to the remaining issue, namely, whether defendants may inquire into the financial condition of the plaintiffs so as to explore their ability to bear the expense attendant to class litigation should they not prevail, my personal inclination would be to permit such discovery in a situation such as the present one wherein the class suit is sought to be maintained in the name of a profit sharing plan created to hold stocks for the sole benefit of one of the plaintiff trustees of the plan. This is particularly true where the "plan" is attempting to carry the banner for several class actions in various jurisdictions and where there is some reason to believe that it rarely owns more than 50 shares of any one company. However, the law appears to be to the contrary.

In Kamens v. Horizon Corp., 81 F.R.D. 444 (S.D.N.Y. 1979) (in which I note that counsel for the plaintiff was the same New York law firm that has since withdrawn from this suit) the court stated as follows at 81 F.R.D. 446:

". . . we conclude that the better rule is that, where counsel for the plaintiff has agreed to advance the costs of the litigation and there is no question raised concerning their ability to do so, and there are no factors present which cast doubt on plaintiff's ability to reimburse counsel (e.g., pending bankruptcy or financial distress), questions concerning plaintiff's finances are irrelevant."

To the same effect, Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974), cert. denied, 421 U.S. 914

(1975); In re Independent Gasoline Antitrust Litigation, 79 F.R.D. 552 (D. Md. 1978); Sayre v. Abraham Lincoln Federal Savings & Loan Ass's, 65 F.R.D. 379 (E.D. Pa. 1974); Bogosian v. Gulf Oil Corporation, 337 F.Supp. 1228 (E.D. Pa. 1971).

The two decisions relied upon by defendants, P.D.Q. Inc. of Miami v. Nissan Motor Corporation in U.S.A., 61 F.R.D. 372 (S.D. Fla. 1973) and Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 472 (W.D. Mo. 1973) involved extremely large classes and, in the one case, an announced inability by the plaintiffs to pay more than a specified amount for costs. There is no indication of these factors here, and thus I feel that those cases are distinguishable.

I conclude, therefore, that upon the redeposition of the plaintiffs they will not be required to answer questions relating to the financial condition of the Tanzer Economic Associates, Inc. Profit Sharing Plan.

Counsel may agree upon and submit a form of order.