

Carnegie Assoc., Ltd. v Crump Life Ins. Servs., Inc.
2014 NY Slip Op 33478(U)
November 17, 2014
Supreme Court, New York County
Docket Number: 151698/2014
Judge: Ellen M. Coin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

CARNEGIE ASSOCIATES, LTD.,

Index No. 151698/2014
VERDICT AND JUDGMENT

Petitioner,

-against-

CRUMP LIFE INSURANCE SERVICES, INC.,

Respondent.

ELLEN M. COIN, J.:

Petitioner Carnegie Associates, Ltd. (Carnegie), judgment creditor of United National Funding, LLC (UNF), brings this proceeding pursuant to CPLR §§ 5225(b) and 5227 against respondent Crump Life Insurance Services, Inc. (Crump). Carnegie seeks, in satisfaction of its judgment of \$725,000 against UNF, the turnover of commissions Crump owes to UNF.

In its First Amended Verified Response to the Verified Petition, Crump denies that it is in possession of commissions due, owing or payable to UNF or Carnegie. It relies upon the indemnification clause in its 2006 Producer Agreement (Respondent's Trial Ex. B)¹ with UNF and UNF representative Georgia M. Merkel, which provides:

Each party to this Agreement shall indemnify and hold harmless the other party against any and all claims, actions, damages, losses and liabilities

¹The Producer Agreement, dated 6/1/06 by Merkel, was between Merkel on behalf of UNF and BISYS Insurance Service, Inc. (BISYS). Crump acquired BISYS in or about 2007.

(including, without limitation, reasonable attorneys' fees) (collectively "Losses") arising from (a) any wrongful, unlawful, or tortious act or omission, or allegedly wrongful, unlawful or tortious act or omission, or (b) any failure to comply with any obligation under this Agreement, in such case on the part of the indemnifying party or any of the indemnifying party's agents or employees....
(¶ 6).

Crump asserts that under Debtor and Creditor Law §151 and pursuant to the indemnification clause, it has the right to set off against commissions owed to UNF (and subject to Carnegie's execution) amounts it has incurred as legal fees in defending against Carnegie's claims against it in the underlying action that resulted in the UNF judgment, as well as in the instant proceeding.

Following the trial of this proceeding, the Court makes the following findings of fact and conclusions of law, noting that petitioner Carnegie bears the burden of proof. (*Payne v Garnett McKeen Lab., Inc.*, 232 AD2d 419, 419-420 [2d Dept 1996]).

FINDINGS OF FACT

Carnegie is in the business of selling sophisticated life insurance programs. It earns first year and renewal commissions on those policies. Carnegie and UNF were co-brokers on five life insurance policies. Pursuant to their agreement, Carnegie would receive 60% and UNF would receive 40% of commissions, payable by the general agent, BISYS. (Testimony of Sherwood Schwarz Sept. 16, 2014 at 9-11).

It is undisputed that the Producer Agreement between Merkel on behalf of UNF and BISYS (Resp's Ex B) contains no reference to Carnegie and makes no provision for payment of UNF commissions, or any portion thereof, to Carnegie.

In or about May of 2008 Carnegie advised Crump that Carnegie was a co-agent of UNF on policies after July 13, 2006 (Testimony of Christie Corado, Sept. 16, 2014 at 84-85; letter of Sherwood M. Schwarz to Christie Corado dated July 13, 2008; Petitioner's Ex. 1). Crump, which concededly had no notice of Carnegie's involvement with UNF until that time, began to seek advice from its counsel, Drinker Biddle & Reath LLP (Drinker Biddle), in or about the Summer of 2008. (Corado testimony, Sept. 16, 2014 at 94). Because of the dispute between Carnegie and UNF, Crump ultimately determined to withhold commissions from UNF, commencing in or about December 2008. (Corado testimony at 105). As of September 14, 2014, the UNF commissions Crump was withholding amounted to \$235,714.58. (Corado testimony at 114).

In 2009 Carnegie sued, *inter alia*, UNF and Crump in a case assigned to the Commercial Division of this Court (Index No. 603113/2009).² Drinker Biddle represented Crump in that litigation. In its original complaint Carnegie asserted causes of action against Crump for breach of contract and for an

² The Commercial Division action was assigned to Justice Barbara Kapnick, formerly of this Court, now Associate Justice of the Appellate Division of the First Judicial Department.

accounting. It then amended its complaint to change its claims against Crump to conversion and fraud, while retaining the breach of contract claim. Next, it served a second amended complaint, alleging claims of racketeering (RICO) and RICO conspiracy, in violation of 18 U.S.C. § 1962, subdivisions (c) and (d), again retaining the breach of contract claim.

Crump is a unit of Branch Banking and Trust Company (BB&T), a provider of financial services, including banking and insurance services. Given BB&T's status as a financial service business company, Carnegie's new claims had serious implications to BB&T's reputation. (Corado testimony, Sept. 30, 2014 at 62). Accordingly, Crump moved to dismiss the second amended complaint. Carnegie cross-moved to further amend its complaint to add a claim of fraud against Crump. Justice Kapnick denied Carnegie's cross-motion to amend and granted Crump's motion dismissing the second amended complaint. Carnegie appealed from the lower court order, but Crump once again prevailed. Thereafter Carnegie moved before Justice Kapnick against (now non-party) Crump for an order of attachment of the UNF commissions Crump had withheld. The motion was denied "as plaintiff has not met its burden of establishing its right to a pre-judgment attachment against non-party Crump, pursuant to CPLR 6201(3)." (Decision and order of Kapnick, J., dated 5/23/13; Def's Ex F).

On January 6, 2014, Carnegie obtained a judgment by consent

against UNF in the Commercial Division action in the sum of \$725,000. On January 29, 2014, Carnegie served Crump with a restraining notice. It caused an execution to be served on Crump on March 7, 2014. On February 26, 2014, Carnegie commenced the instant turnover proceeding against Crump. As noted, Crump contends that it has no property of UNF, based upon assertion of its right of setoff under Debtor & Creditor Law § 151.

Drinker Biddle's legal fees and disbursements for its pre-action counsel to Crump as to Carnegie's claim, its representation of Crump in the Commercial Division action, including upon appeal and as a non-party on the motion for an order of attachment, and in this proceeding for the period from June 2008 through the end of August 2014, after discount, come to \$333,000. (Testimony of Stephen Baker, Sep. 30, 2014 at 204).

Drinker Biddle always accorded Crump a ten percent client loyalty discount on its legal fees. In addition, its arrangement with Crump was that Crump would pay the firm's rate schedule in effect at the time that a matter arose. Since the Commercial Division action commenced in 2009, Baker used the rates in effect at that time in billing Crump throughout the pendency of that action and the instant proceeding. (Baker testimony at 197). Thus, while the total time value Crump incurred was \$444,000, Baker reduced that by about \$111,000, approximately 26%. (Baker testimony at 204-205). Crump paid its fees as billed.

CONCLUSIONS OF LAW

In *Aspen Industries, Inc. v Marine Midland Bank* (52 NY2d 575, 582 [1981]), the Court of Appeals held that the statutory right of setoff under Debtor and Creditor Law §151 "is superior to the rights of intervening judgment creditors and may be exercised even after the judgment creditor has undertaken enforcement of his claim against the judgment debtor."

The court rejects Carnegie's contention that the indemnification provision in the BISYS-UNF agreement creates only a contingent liability. It is well settled that a party asserting a right pursuant to Debtor and Creditor Law §151 does not have to wait for the debt to mature in order to assert its right of set-off. (*Matter of Indus. Commr. of State of New York v Five Corners Tavern, Inc.*, 47 NY2d 639, 646 [1979]; *Carpet Resources, Ltd. v JP Morgan Chase Bank, N.A.*, 83 AD3d 460 [1st Dept 2011] [where judgment debtor defaulted on several construction contracts with garnishee, garnishee entitled to offset although its claims not yet reduced to judgment and were not yet subject of any lawsuits brought by garnishee]). "As mutual matured debts could always be litigated under New York's civil procedure rules, 'it must be that the only purpose of [DCL 151] was to allow debts to be set off even where they had not matured.'" (*Pisane v Feig*, 41 Misc3d 216 [Sup Ct, Kings County 2013] [citing *Fistere v Janapoll*, 241 AD 353, 354 [1st Dept

1934])).

Here, although Crump has not sued UNF, it is clearly a creditor of UNF with respect to Crump's legal fees pursuant to the indemnification clause. Crump has incurred those fees since July 2008, when Carnegie first asserted its claim for a portion of UNF's commissions, and continued to incur fees throughout the Commercial Division litigation, Carnegie's appeal, Carnegie's request for issuance of an order of attachment, and this proceeding. Thus, "there is no uncertainty as to whether [UNF]'s obligations" for legal fees would arise (*Carpet Resources, Ltd. V JP Morgan Chase Bank, N.A.*, 83 AD3d 460). The Court finds that Crump established its right of setoff for payment of its "reasonable attorneys' fees" pursuant to the indemnity provision in the Producer Agreement and Debtor and Creditor Law §151.

The Court finds that the amount of legal fees Crump asserts as an offset is reasonable. Carnegie's argument that Crump engaged in "complete obstructionism," thereby escalating its legal fees, is unsupported by the record. Indeed, the evidence established the opposite: that Crump acted appropriately. Thus, it sought to preserve Carnegie's claim against UNF by withholding UNF's commissions. However, once Carnegie sued Crump, Crump had no choice but to defend the action. Carnegie's assertion of three separate complaints, its attempt to interpose a fourth complaint, and its motion for a pre-judgment order of attachment

were plainly responsible for the amount of legal fees Crump incurred.

Further, Carnegie has failed to show facts to support its assertion that Drinker Biddle's use of attorneys in its Philadelphia branch for the Commercial Division action increased Crump's legal fees. Instead, Drinker Biddle showed that its Philadelphia office has lower rates than those of its New York City branch. (Baker testimony at 198).

"In determining what is reasonable compensation for an attorney, the court may consider a number of factors including the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained." (*Miller Realty Assocs. v Amendola*, 51 AD3d 987, 990 [2d Dept 2008][internal quotation marks and citation omitted]; see also *Matter of Freeman*, 34 NY2d 1, 9 [1974]).

Here the Court finds that the time spent by Crump's lawyers was not excessive. Initially, Crump was consulting its attorneys about handling Carnegie's claim and determining whether to withhold commissions from UNF. Those fees totaled some \$6,000.00. All of the rest of Drinker Biddle's fees were incurred in the Commercial Division litigation and in the instant special proceeding.

Carnegie's commencement and prosecution of the Commercial Division litigation required that Drinker Biddle determine its own strategic responses to Carnegie's frequent shifts in its litigation strategy, including the assertion of three complaints, the cross-motion to interpose a fourth complaint, and the motion for an order of attachment. The bills reflect other motions, including a motion to quash a subpoena and Carnegie's motion for sanctions. Further, the bills reflect time spent reviewing discovery demands from Carnegie. In addition, the bills include fees for multiple settlement negotiations with Carnegie's counsel, both when the case was in the Commercial Division and again when it was on appeal. Indeed, it appears that there were three pre-argument conferences at the Appellate Division before a special master.

In this proceeding Drinker Biddle's bills reflect its formal responses, together with strategic determinations regarding and responses to discovery sought by Carnegie; settlement communications; a motion to amend respondent Crump's answer to the petition; responding to Carnegie's cross-motion for summary judgment; deposition preparations; strategy regarding responses to disciplinary complaints made by Carnegie.

It does not appear that Drinker Biddle "over-lawyered" either the Commercial Division action or this proceeding. The time spent was reasonable in relation to the nature of the cases

and the tactics of Carnegie's counsel. Moreover, the firm's hourly rates were not excessive, ranging from \$121.50 to \$562.50. Accordingly, the Court finds that the legal fees Crump seeks to offset as against UNF's withheld commissions are reasonable, in accordance with the indemnity provision in the Producer's Agreement, and that they substantially exceed the commissions withheld to date.

It is therefore ADJUDGED that the petition for Crump to pay over the funds it is withholding from UNF is denied in all respects, and the petition is dismissed; and it is further

ADJUDGED that respondent Crump Life Insurance Services, Inc. do recover from petitioner Carnegie Associates, Ltd., costs and disbursements in the amount of \$ 2,570.60 as taxed by the Clerk, and that respondent have execution therefor. X

Dated: November 17, 2014

ENTER:

Pet - CARNEGIE ASSOCIATES, LTD.
150 EAST 58TH ST.
NEW YORK, N.Y. 10155

Resp - CRUMP LIFE INSURANCE SERVICES, INC.
105 MAXESS RD, SUITE 301
MELVILLE, N.Y. 11747

EMC
Ellen M. Coin, A.J.S.C.

Milton A. Singler
Clerk

Case Disposed

FILED
MAR - 4 2015
COUNTY CLERK'S OFFICE
NEW YORK