

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

ORIGINAL

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

EAST RAMAPO CENTRAL SCHOOL
DISTRICT,

Plaintiff,

INDEX No. 600963/13

MOTION DATE: May 22, 2015
Motion Sequence # 011

-against-

NEW YORK SCHOOLS INSURANCE
RECIPROCAL,

Defendant.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation/Affidavit in Support..... XXXX
- Affirmation in Opposition..... XX
- Memorandum of Law..... X
- Reply Memorandum of Law..... X

Motion by plaintiff East Ramapo Central School District for partial summary judgment is **granted** only to the extent indicated below.

This is an action to recoup legal expenses allegedly required to be reimbursed pursuant to a school board legal liability policy. Defendant New York Schools Insurance Reciprocal issued the policy to plaintiff East Ramapo Central School District, covering liability and defense costs arising from “wrongful acts(s) by the insured in the performance of [their] duties.” The policy was for the period July 1, 2012 to July 1, 2013. The policy contains an aggregate limit of liability of \$1 million. Among other exclusions, the policy has an exclusion for claims arising out of “any fraudulent, dishonest, malicious, criminal or intentional wrongful act or omission by an insured.”

On August 8, 2012, parents of non-white, non-Hasidic students who attended school in the District commenced a civil rights class action against the school board members in the United States District Court for the Southern District of New York, Rebecca Montesa, et al v Daniel Schwartz, et al, 12-cv-06057. In their amended complaint, the plaintiffs in Montesa asserted claims under the Establishment Clause of the First Amendment, the Equal Protection clause, the New York State Constitution, breach of fiduciary duty, and other state law claims. Plaintiffs alleged that the District entered into contracts with private schools to provide remedial services for children in the district, resulting in the district's funds being expended for religious education. The plaintiffs further alleged that the District engaged in collusive settlements with parents of special needs Hasidic children. More specifically, after the parents challenged the district's placement of their children under the Individuals with Disabilities Education Act ("IDEA"), the Board allegedly agreed to place the children in private religious schools, paying both tuition and the parents' attorneys' fees. The plaintiffs alleged that District funds were used to purchase textbooks of a religious nature. Additionally, plaintiffs alleged that the school board members had approved a sale of the Hillcrest Elementary School to a religious congregation for \$3.1 million when the fair market value of the property was between \$11 million and \$13.9 million. The plaintiffs alleged that the Board leased the Colton Elementary School to a religious congregation under a five year lease and failed to collect \$85,000 rent which was in arrears. Finally, the plaintiffs alleged that the Board had attempted to sell Colton Elementary to the congregation at a below market price, but the sale was challenged by a taxpayer.

On September 13, 2012, New York Schools Insurance Reciprocal disclaimed coverage with regard to the Montesa action. In disclaiming coverage, the insurer relied in part upon the exclusion for fraudulent, dishonest, malicious, criminal, and intentional acts. On the same date that the insurer disclaimed coverage, the board members held a special meeting and adopted a resolution to retain counsel to defend the individual board members in the Montesa action.

The present action was commenced on April 17, 2013. In its first cause of action, the District seeks damages for breach of contract, that is the cost to the District of defending the Montesa action. The second cause of action is for breach of the implied covenant of good faith and fair dealing by disclaiming coverage. In the third cause of action, plaintiff sought a declaratory judgment that New York Schools is under a duty to defend the school district in the Montesa action and indemnify the District up to the limit of the policy.

By order dated October 17, 2013, this court granted East Ramapo's motion for summary judgment to the extent of declaring that New York Schools Insurance Reciprocal was obligated to defend the District and its board members in the Montesa action. The court noted that an insurer's duty to defend is broader than the duty to indemnify (Barkan v New York Schools Insurance Reciprocal, 65 AD3d 1061, 1063 [2d Dept 2009]). The court

reasoned that the amended complaint in *Montesa* alleged reckless and negligent, in addition to intentional, conduct, and neither recklessness nor negligence fell within the exclusion for fraudulent, dishonest, malicious, criminal, or intentional acts. The court made no determination with regard to the insurer's duty to indemnify.

Meanwhile, on September 30, 2013 Judge Seibel in the U.S. District Court issued an order dismissing certain of the *Montesa* plaintiffs' claims against certain of the defendants. Nevertheless, Judge Seibel allowed plaintiffs' Establishment Clause claims based upon IDEA settlements to continue against all defendants. Plaintiffs' Establishment Clause claims based upon textbook purchases were allowed to continue against all defendants, except defendant D'Agostino, an attorney for the District, and defendant Rothschild, a board member. Plaintiffs' Establishment Clause claims based upon fraudulent real estate transactions were allowed to continue against all defendants, except defendant D'Agostino. Plaintiffs' claims under the New York State Constitution based upon IDEA settlements were allowed to continue as to all defendants. Plaintiffs' claims under the anti-gift provision of the New York State Constitution based upon textbook purchases and lease transactions were allowed to continue as to all defendants, except D'Agostino and Rothschild. The plaintiffs in the *Montesa* action filed a second amended complaint on November 4, 2013, and a third amended complaint on December 11, 2013, in an effort to conform their pleading to Judge Seibel's order.

By order dated January 30, 2014, this court granted defendant New York Schools Insurance Reciprocal's motion for leave to renew its motion for summary judgment based upon Judge Seibel's order. Upon renewal, the court determined, as a matter of law, that the school board action alleged in support of the remaining Establishment Clause and state constitutional claims; purchasing religious textbooks, paying religious school tuition, and transferring district facilities to religious schools at less than fair value; fell within the exclusion for intentional, wrongful conduct and could not potentially give rise to a covered claim (*Barkan v New York Schools Ins. Reciprocal*, 65 AD3d 1061, 1063 [2d Dept 2009]). Thus, defendant New York School's motion for summary judgment was granted to the extent of declaring that defendant had no duty to indemnify the District for the activity alleged in the *Montesa* action and no duty to defend the District after September 30, 2013, the date of Judge Seibel's order.

By order dated March 27, 2014, the court granted the District's motion for leave to renew defendant's motion for summary judgment based upon a subsequent decision of Judge Seibel issued on March 12, 2014. In the March 12 order, Judge Seibel dismissed the *Montesa* plaintiffs' state constitutional claims on the ground that taxpayers lacked standing to maintain such claims against a school district. Upon renewal, the court granted New York Schools Insurance Reciprocal's motion for summary judgment to the extent of declaring that the insurer had no duty to defend the District after March 12, 2014, the date of Judge Seibel's subsequent order.

The District moves for partial summary judgment, requesting a judgment for its attorney's fees defending the Montesa action through March 12, 2014, in the amount \$2,233,485.50. The legal services include attending ten conferences in the federal court including pre-motion conferences and discovery, correspondence with the court, and briefing eight motions. These motions included a motion to dismiss the amended complaint, a motion for reconsideration, a motion to intervene and to strike, a motion for a protective order, and a motion by the Montesa plaintiffs to disqualify defendant's counsel. Additionally, there was extensive document discovery. Board members Yehuda Weissmandl, Moses Friedman, Moshe Hopstein, Eliya Solomon, Daniel Schwartz, Aron Wieder, Richard Stone, and Morris Kohn, Superintendent Joel Klein, and Assistant Superintendent Eliezer Wizman were represented by Bingham McCutchen LLP. Former board member Nathan Rothschild was represented by Proskauer Rose LLP.

Bingham's hourly rates are \$695-\$1,230 for partner time and \$420-\$795 for associate time. Proskauer's hourly rates are \$800-\$1,325 for partner time and \$395-\$850 for associate time. Bingham's total fees were \$1,502,619 and expenses of \$75,907. Proskauer's total fees were \$533,460 and expenses of \$44,603.

In opposition, New York Schools argues that the hourly rates were excessive and that reasonable rates in the Southern District of New York are \$400/hour for partner and \$300/hour for associate time. Defendant argues that the number of hours was unreasonable as Bingham had eleven different lawyers working on the Montesa action and much of the work was duplicative. Additionally, defendant argues that there was no need for Rothschild to be represented by separate counsel. Thus, defendant argues that, disallowing the excessive and duplicative entries, a reasonable fee is \$178,140.

The factors to be considered in determining whether a legal fee is reasonable may include the time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the legal service properly; the likelihood that other employment will be precluded; the fee customarily charged in the locality; the amount involved and the results obtained; time limitations imposed by the client or the circumstances; the nature and length of the professional relationship; the experience, reputation, and ability of the lawyer; and whether the fee is fixed or contingent (Professional Conduct Rule 1.5).

The District retained highly capable counsel of excellent reputation. However, the questions raised in the Montesa action were not particularly novel. Under the Establishment Clause, a school district may not favor one religion over another (Bd of Education v Grumet, 512 U.S. 687 [1994]). Violations of the Establishment Clause may be addressed in a civil rights action under 42 U.S.C. § 1983 (Warnoch v Archer, 380 F.3d 1076 [8th Cir 2004]). The members of a school board are under a fiduciary duty to the taxpayers of the school district (Roslyn School Board v Barkan, 16 NY3d 643 [2001]).

Moreover, the overall results obtained by the district's counsel were not favorable. While dismissing a few ancillary claims, Judge Seibel sustained the core Establishment Clause and breach of fiduciary duty claims. Thus, the court concludes that the time expended and the rates charged were excessive, considering the lack of novelty of the questions presented and the results achieved. A reasonable fee for the legal services provided is \$187,500, based upon 500 hours and an average hourly rate of \$375, including all expenses. Plaintiff's motion for partial summary judgment is **granted** to the extent of \$187,500, plus interest from September 13, 2012 to March 12, 2014.

Settle judgment on notice to defendant.

So ordered.

Dated

11 June 2015

Stephen A. Bucaria
J.S.C.

ENTERED

JUN 15 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE