

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
INDOTRONIX INTERNATIONAL CORP.,

Plaintff,

- against -

TWIN CITY FIRE INSURANCE COMPANY,

Defendant.

-----x
Brieant, J.

06 Civ. 2688 (CLB)

Memorandum and Order

By a Memorandum and Order dated October 27, 2006 in this action, the Court granted Plaintiff's Motion for Summary Judgment in part to the extent of awarding the Plaintiff its reasonable and actual legal fees and expenses in defending two lawsuits and the Court thereafter, on December 19, 2006, held an Inquest to determine the amount of damages in order that final judgment could be entered in the case.

The legal services were rendered by the distinguished New York law firm of Moses & Singer, LLP between April 1, 2004 and May 31, 2006 in a lawsuit in the Southern District of New York (*Cardinal Holdings, Ltd., Plaintiff v. Indotronix International Corporation, Chocovision Corp. and Babu Mandava, Defendants*, Docket No. 04 Cv. 01138 (LAP)) and an Adversary Proceeding in the Bankruptcy Court in this District entitled *Michael O'Leary, Trustee for Chandre Corporation, Plaintiff v. Indotronix International Corporation, Chocovision Corp. and Babu Mandava, Defendants*. Adversary Proceeding No. 05-9009 (CGM) filed in connection with a Chapter 7 case involving *Chandre Corporation, Debtor*, Case No. 03-35669 (CGM).

The history of these lawsuits is set forth in full in this Court's October 27, 2006 decision and familiarity therewith is assumed on the part of the reader. This Court held that Plaintiff is entitled to recover from Defendant its reasonable and actual legal fees and expenses in defending the aforementioned two cases. With respect to a covered claim, the policy in Paragraph IV defines claims expenses as "reasonable and necessary fees (including attorneys fees and experts fees) and expenses incurred in the defense or appeal of a claim..." As previously noted, Indotronix, Chocovision and its principal officer, Mr. Babu Mandava as well as Chandre Corporation, are all named insureds under the policy together with their officers and agents.

In the first action before Judge Preska, Cardinal, a judgment creditor of Chandre, pursuant to a claim made prior to the issuance of the insurance policy by Twin City and adjudicated in the Courts of the United Kingdom, alleged that the insureds "fraudulently transferred Chandre's assets to Chocovision so as to put them out of the reach of the Plaintiff," The first action in New York before Judge Preska, contained claims on the judgment, as well as for violations of the New York Debtor and Creditor Law, to pierce the corporate veil of Chandre, and "civil conspiracy". The claims asserted compensatory damages of \$4,467,628.00, plus punitive damages of \$15 million. The action before Judge Preska was filed on February 11, 2004 and was dismissed without prejudice by an Order issued July 23, 2004.

This dismissal was not on the merits. Judge Preska held that the plaintiff Cardinal lacked standing to maintain the action because the proper party to assert claims of fraudulent conveyance was the Chapter 7 Trustee under Chandre's Bankruptcy proceedings, then pending

in this District before Bankruptcy Judge Morris.

The only issue litigated before the District Court in the first action was a Motion to Dismiss for Lack of Standing, which did not reach the merits of the underlying fraud claims. The insured prevailed on what were two pure issues of law, or pleading: lack of standing, and that there is no such thing as an actionable civil conspiracy under New York law, which was held to apply to the case.

Thereafter, Chandre's Bankruptcy Trustee, represented by the same lawyer who had represented Cardinal before Judge Preska, brought the second lawsuit, an Adversary Proceeding in the Bankruptcy Court. The Complaint there was essentially identical to the one which had been dismissed by Judge Preska. By decision dated October 23, 2005, Judge Morris dismissed the first Complaint in the Adversary Proceeding, without reaching the merits. She held that the Trustee "does not have standing to bring an action on a judgment obtained by creditor Cardinal Holdings, Ltd. As Plaintiff's claim to pierce the corporate veil [of Chandre] is dependent upon the action seeking to enforce Cardinal's judgment, it does not survive dismissal of Count I." She also dismissed the Civil Conspiracy Claim as precluded because of the ruling of Judge Preska in the first action. Count III was dismissed with leave to replead and Counts II and IV were regarded as sufficiently pled but the Court pointed out that "any damages over the value of the transferred assets would be stricken as no authority was provided for the proposition that punitive or compensatory damages are available on a fraudulent conveyance claim." By Order dated

January 20, 2006, Judge Morris dismissed the Amended Complaint in the Adversary Proceeding, with prejudice.

Thereafter, the same attorney who had represented Chandre's trustee Michael O'Leary before the Bankruptcy Court, and Cardinal before Judge Preska, applied on notice for and received from the Bankruptcy Court permission to file the English Cardinal judgments in the Supreme Court of New York, County of Dutchess, an act which, as it turned out, had already been accomplished. That lawyer, again acting for Cardinal, filed a motion dated May 1, 2006. In the Bankruptcy Court, for relief from the automatic stay with respect to the First Claim pleaded in the Adversary Proceeding, and represented to the Indotronix defendants an intention or purpose to have the Trustee abandon the remaining claims, in order that Cardinal could thereafter reopen and prosecute all the fraudulent conveyance claims before Judge Preska which she had previously dismissed without prejudice.

Before this could be accomplished, Plaintiff in this case terminated its retainer of Moses & Singer, in late June or early July 2006, and retained the Poughkeepsie law firm of Vandewater & Vandewater, which, on August 29, 2006 entered into what is described as a "global settlement" with Michael O'Leary as Chandre's Bankruptcy Trustee. This stipulation (Exhibits 9 and 10) was later authorized and approved by the Bankruptcy Court after a hearing.

Familiarity therewith on the part of the reader is assumed. Plaintiffs in this case agreed to and did pay \$30,000.00 to the Trustee for Chandre "notwithstanding dismissal" of the

Adversary Proceeding, as to which time to appeal had expired, “to settle the matter,” and also consented that IIC Properties, Inc., a related party and the landlord of Chandre, expunge and withdraw an unsecured claim against the Debtor in the amount of \$203,970.00. In addition, Indotronix consented to withdraw a secured claim against Chandre in the amount of \$173,616.47. This brought all the litigation with Cardinal and Chandre’s trustee to a close. At the time of this Court’s Inquest on December 19, 2006, the Chandre Chapter 7 Proceeding remained open, and the monetary value of the withdrawn claims was unable to be determined from the public record in the Bankruptcy Court.

The Legal Services:

On March 9, 2004, Indotronix, Chocovision and Mr. Mandava retained Moses and Singer, LLP pursuant to a retainer letter signed by partner, Joel David Sharrow, who rendered most of the services in this case. Indotronix at all relevant times had a general counsel or house attorney, Lynn Hanig, Esq. who testified at the Inquest. The relevant terms of the retainer were stated as ranging from \$180.00 to \$650.00 per hour for lawyers, and contemplated partners Sharrow at \$395.00 per hour and Perry at \$525.00 per hour and Associates Silverfein at \$250.00 per hour and Mayer at \$220.00 per hour and Caruso at \$330.00 per hour, with the firm reserving the right to assign other partners or associates as it deemed appropriate, together with disbursements and the cost of additional services such as computerized legal research and database usage, telephones, messages, facsimiles, duplicating and secretary overtime. It was understood that the bills would be rendered monthly and due within thirty days of receipt.

Attorney Joel David Sharrow was the first witness for Plaintiff at the Inquest before this Court. An experienced lawyer who had been practicing with Moses & Singer for twenty-nine years, Mr. Sharrow said that the major areas of his practice had been civil commercial litigation.

Although it was obvious to Mr. Sharrow that ultimately the Court would have to dismiss the case before Judge Preska for lack of standing, he took the position that it was important “to know everything that there is about a case, good and bad, for my client from Day 1.” *Tr. at 19*. The Court understands and appreciates the virtue of this approach. Litigation is wasteful, and legal work rendered in good faith does not always turn out, in hindsight, to have been necessary. Courts do not always function perfectly, and there is always the possibility that a Court might fail to see the point, and deny a pre-answer procedural motion to dismiss. Such a foreseeable result in the first case would not have led to an appealable order, so there was a possibility that the assigned Judge might call the case in for trial on the merits shortly following a decision on the motion. A lawyer and his client who failed to look down the road, and make at least some reasonable early investigation into the serious charges being made here of violation of the New York Debtor and Creditor Law, would have been caught flatfooted. Such a lawyer would be professionally embarrassed to the detriment of his client for not anticipating such an eventuality.

A rational client would expect to pay at least something for such services directed to defending the merits, in advance of actual need. Indeed, Plaintiff, a sophisticated business organization with a competent in-house lawyer, willingly paid for all the legal services for which reimbursement is sought, and did so without any assurance of reimbursement, because the

Defendant in this case was contesting coverage. However, on numerous occasions when nothing was happening in the Court and all papers due had been filed, counsel was actively engaged in “spending an awful lot of time looking at documents” *Tr. at 70* and “days on end sitting at Indotronix.” *Tr. at 26*. Far too much work was done at too great a cost to be visited upon the insurer simply in the name of being prepared for an unexpected denial of the motions. Much such work could have been done at lesser cost using a forensic accountant. Most of the work done after the motions consisted of:

Days on end of sitting at Indotronix, going through their files, which were voluminous, to say the least, deciding what I felt needed to be copied and why, discussing things with Miss Hanig, General Counsel, discussing things with Babu Mandava, discussing things with two former employees of Chocovision who had been affiliated before that with the debtor Chandre Corporation, a gentlemen by the name of Jeffrey Carano and Jeffrey Babicz, these were gentlemen who knew the financial aspects of the Debtor which was important to me, vis-a-vis the fraudulence conveyance claims.

Indotronix incurred and paid for legal services through May 2, 2006 amounting to \$ 443,496.09, plus disbursements of \$ 75,772.39. This amount is facially excessive. Some hourly records are missing from the record and some services involved attending at proceedings, hearings and examinations in the Bankruptcy Court not directly related to the Adversary Proceeding.

The insurance policy leaves to the insured the right to select and contract with the lawyers to defend a covered claim but contemplates that the fee would be that of the “reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively.” *Arbor Hill Concerned Citizens v. County of Albany*, Dkt. 06-6086, 2d Cir. April 24 2007.

Throughout the matter, Moses & Singer billed legal services at a blended rate of \$357.69 per hour. See letter dated December 27, 2006 filed herein. This rate, while perhaps reasonable in Manhattan, is in excess of the rates reasonably charged for similar work in the Poughkeepsie or in the White Plains legal market. Poughkeepsie is where the Bankruptcy Court was located, and the case decided in Foley Square should have been transferred to and heard at White Plains, if requested. Indeed, before selecting Moses & Singer, Indotronix consulted several Poughkeepsie firms and rejected them for reasons not related to professional ability.¹

Of course, the insured may choose the lawyer, and may choose to pay metropolitan prices for work in the suburbs, but the Defendant in this case is only required under the policy to pay for reasonably necessary services. This Court takes judicial notice that \$300.00 per hour is a reasonable blended rate in the New York Ninth Judicial District for qualified counsel (and paralegal services) in corporate and bankruptcy civil litigation of the sort rendered here.

Following Judge Preska's decision in June 2004, no further litigation services were needed until the Adversary Proceeding in the Bankruptcy Court began on March 23, 2005. During this lull in the litigation, counsel continued to bill substantial time. When the case resumed, the issues presented were much the same as litigated before Judge Preska and should have been less costly.

¹One local firm was rejected because the spouse of a partner was employed at Indotronix and another declined because of a conflict.

Cardinal's initial claim that the corporate veil of Chandre may be pierced depends on whether Chandre had a genuine existence in a corporation and maintained all of the corporate formalities necessary to confirm its independent existence. Whether or not it did so is easily researched, especially by an attorney having access to management, and should not have required a great investment of time. The next claim pleaded was asserted under § 273(a) of the New York

Debtor and Creditor Law and accuses Chandre's management of having made conveyances without fair consideration during the Cardinal litigation. Such conveyances, if any, must appear either on the books and records of Chandre or in its checkbook or its property inventory, and will be a matter of public record in situations where a UCC Form 1 was filed.

Chandre was during much of the period an active business, and it should not take a great deal of documentary examination to determine whether its property or cash passed out its control for less than a fair consideration. To the extent that § 273(a) treats as fraudulent any conveyance made or obligation incurred by a person who is or will be thereby rendered insolvent, fraudulent without regard to actual intent, such transfers are also readily ascertainable from the records of a going concern, its property inventory, its checkbook, its shipping documents and the other means by way of which assets can be diverted or stolen. The same is true of so much of the Complaint as was based on a violation of § 276 of the statute which has to do with actual intent. Much of this information could have been obtained rapidly, by simply interviewing the corporate officers and high placed employees. In short, the number of hours spent looking at documents appears to this Court to be highly excessive when sought to be passed off on the Insurer as reasonable and

necessary for the defense of either lawsuit. The test is not whether Indotronix thought this way of preparing for trial and investigating the risks of loss of the case were worthwhile, but whether a reasonable person acting in good faith with the insurance company would have incurred such a large expenditure.

The Court concludes from its examination of all of the evidence in the case that 470.51 hours were actually, reasonably and necessarily expended for purposes of the defense of both cases through the conclusion of the representation of Indotronix by Moses & Singer. Multiplied by a hypothetical blended hourly rate of \$300.00, this leads to a reasonable fee award of \$141,153.00 together with \$75,772.39 in actual expenses incurred and paid, making a total of \$216,925.39, less than Retention discussed below. No claim is made in this present action for the subsequent legal representation by the Vandewater firm, nor for the payment of the \$30,000.00 or the value of the released claims in connection with the final settlement.

Deductible Retention:

Item D of the Declarations in the insurance policy calls for a \$100,000.00 “Retention” for each relevant claim. Section VI© of the Policy, entitled “Limits of Liability and Retention,” reads in relevant part:

If in a Claim all defendants insureds obtain by reason of a motion to dismiss, motion for summary judgment or trial, a final non-appealable judgment of no liability in their favor, there should be no Retention applicable to any Claims Expense resulting from such Claim.

This Court concludes that there is a required Retention, because the orders and judgments

obtained in the District Court before Judge Preska and in the Bankruptcy Court at Poughkeepsie, did not and could not result in a final non-appealable judgment of no liability in the Insured's favor, with respect to the Claim. True, the Orders themselves had in each case become non-appealable. The decisions however were not on the merits. The attorney for Cardinal, also representing the Bankruptcy trustee, had prepared and filed an application to the Bankruptcy Court for Cardinal to be relieved from the Bankruptcy Stay. Upon relief from the Stay, at least the First Claim in the Complaint in Judge Preska's case could be reactivated and presumably to be brought to trial on the merits. Also, Cardinal's counsel expressed an intention to have the Bankruptcy Trustee abandon the claims of fraudulent transfer, so as to be able to sue on these also.

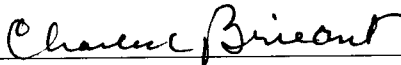
It was to avoid this threat that the Insureds entered into Exhibits 9 and 10 which created a settlement under which \$30,000.00 in cash and the expungement of two substantial claims against Chandre, one of which was a Secured Claim, were offered to and received by the Bankruptcy Trustee for a full release of the Cardinal "matter." These facts clearly implicate the Retention Provision of the Policy.

Conclusion

The Plaintiffs in this litigation are entitled to judgment in the net amount of \$ 116,925.39 together with New York pre-judgment interest from April 6, 2006 and costs to be taxed. The Clerk shall file a final judgment.

SO ORDERED.

Dated: White Plains, New York
April 30, 2007



Charles L. Bricant, U.S.D.J.