3-9-2021

Ruby Tuesday, Inc. Order on Application for Attorney's Fees Submitted in Accordance with Court's September 10, 2020 Hearing

John J. Goger
Senior Judge, Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

RUBY TUESDAY, INC., Plaintiff, v. CEDE & CO., QUADRE INVESTMENTS, LLP, LAWRENCE N. LEBOW, JONATHAN LEBOW, MIRIAM D. ROTH, POWELL ANDERSON CAPITAL LP, and LELAND WYKOFF, Defendants.	CIVIL ACTION NO. 2018CV304101

ORDER ON APPLICATION FOR ATTORNEY'S FEES SUBMITTED IN ACCORDANCE WITH COURT'S SEPTEMBER 10, 2020 HEARING

This matter comes before the Court on the Application for Attorney's Fees Submitted in Accordance with Court's September 10, 2020 Hearing, filed by Defendant Quadre Investments, LLP (the "Application"). The Application, seeking an award of $112,444.47, concerns a long-running discovery dispute that spanned different motions and supplemental briefs, hearings and court conferences. Having reviewed the record and considered the arguments of counsel during a hearing on March 3, 2021, the Court enters this order.

A. BACKGROUND

1. Underlying Dispute Regarding Dissenters' Rights

On October 15, 2017, the Board of Directors for Ruby Tuesday, Inc. ("Ruby Tuesday") approved a merger agreement between Ruby Tuesday and RTI Merger Sub, LLC. Non-party NRD "indirectly owned the entity that acquired all of the outstanding ownership in Ruby Tuesday

in the merger transaction." (Opp'n. to Mot. for Contempt and Suppl. Brfing., filed Sept. 1, 2020, p. 14.) The merger agreement provided that each outstanding shareholder of Ruby Tuesday would receive $2.40 per share. After approval by the majority of Ruby Tuesday shareholders, Defendants, five former shareholders of Ruby Tuesday, exercised dissenters' rights pursuant O.C.G.A. § 14-2-1302. In April of 2018, after Defendants and Ruby Tuesday could not reach an agreement regarding the fair value of the Defendants' outstanding shares, Ruby Tuesday filed the above-styled Petition for Appraisal, requesting a judicial appraisal of Defendants' shares. See O.C.G.A. § 13-2-1330. Defendant Quadre Investments, L.P. ("Quadre"), the largest shareholder pursuing dissenter's rights, owned 3 million shares and Defendant Powell Anderson Capital LP ("Powell") owned 74,000 shares. (Petition, ¶ 4). [1]

2. Discovery Dispute

Original Discovery Order. On July 12, 2019, a number of Defendants, including Quadre and Powell, filed a Motion to Compel Discovery from Non-Party NRD Partners II, L.P. ("NRD Motion to Compel"). Among other things, these movants sought documents they claim had not been produced in response to the movants' written discovery requests, including valuation models of Ruby Tuesday that NRD was reviewing preceding the merger and NRD communications with its investors regarding Ruby Tuesday. (NRD Motion to Compel, pp. 8-9; 12-13.) As part of their arguments, movants indicated they were seeking to learn about monies that may have been generated by the sale of Ruby Tuesday-held real estate shortly after the merger closed. (Id., pp. 13-14.) Movants sought to recover their fees incurred with regard to the motion pursuant to

[1] Ruby Tuesday/NRD have claimed that these two shareholders, "are professional appraisal arbitragers that purchased their Ruby Tuesday stock only after the merger was announced, on the calculated bet that, at worst, their money would be returned with statutory interest" in a judicial appraisal proceeding and whose plans to profit as dissenters were thwarted by the pandemic which placed the Ruby Tuesday restaurant chain and the entire casual dining business sector under immense financial distress. (Opp'n. to Mot. for Contempt and Suppl. Brfing., filed September 1, 2020, p. 1.)

O.C.G.A. § 9-11-37(a)(4)(A). (Id., p.18.) The NRD Motion to Compel stated, "it is important to note that NRD is represented by the same law firm . . . that represents Ruby Tuesday in this matter. . . Although NRD legally is a non-party in this matter, NRD and its lawyers have an undeniable interest in doing everything possible to aid Ruby Tuesday in this matter and hinder Defendants. The current discovery dispute with NRD must be viewed this this lens." (Id. at p. 2.)

On August 16, 2019, certain Defendants, including Quadre and Powell, filed a parallel Motion to Compel Discovery Responses, and for Sanctions for Total Failure to Respond to Discovery against Ruby Tuesday, Inc. alleging a number of discovery failures "(Ruby Tuesday Motion to Compel"). As NRD's counsel admitted, the discovery issues involved in both motions to compel were "virtually identical." (Aug. 26, 2019 Tr., p. 60.)

The Court conducted a hearing on August 26, 2019. Argument was heard regarding the NRD Motion to Compel, and the parties agreed to work on resolving the Ruby Tuesday Motion to Compel which was not yet ripe. (Id., pp. 59-60.) On September 19, 2019, the Court entered an Order on Defendants' Motion to Compel Discovery from NRD Partners, II, L.P. and Ruby Tuesday, Inc. ("September 19, 2019 Discovery Order"). The September 19, 2019 Discovery Order was, in part, a product of the August 26th hearing and, in part, a consent order. It stated that the NRD Motion to Compel was addressed at the August 26, 2019 hearing and the Court's determinations were reflected in the order.[2] (September 19, 2019 Discovery Order, p. 2.) With regard to the Ruby Tuesday Motion to Compel, the order stated the parties were, "jointly presenting the following order by consent as a proposed resolution of the documents sought and

[2] The September 19, 2019 Discovery Order expressly stated NRD was representing itself an all other the "relevant NRD entities" in this discovery dispute which expressly included not only NRD but NRD Ventures, LLC, NRD Capital Management II, LLC, RTI Holding Company, LLC and RTI Merger Sub, LLC. (September 19, 2019 Discovery Order, p. 1.)

issues raised by that motion . . ." (Id.)[3] The September 19, 2019 Discovery Order was silent on the issue of fees.

Motion for Contempt and February 5, 2020 Hearing. On November 4, 2019, Defendants Quadre and Powell filed a Motion for Contempt against Ruby Tuesday, Inc. and NRD Partners II, L.P. ("Motion for Contempt"). They asserted Ruby Tuesday and NRD had engaged in lengthy and "systemic discovery abuse aimed at delaying this case, running up legal fees, and hindering Defendants from obtaining critical documents and key evidence." (Motion for Contempt, p. 1). Quadre and Powell asked that Ruby Tuesday be sanctioned by limiting its ability to contest the fair valuation of its shares at the time of the merger. (Id. p., 15.) In addition thereto, the movants requested that, pursuant to O.C.G.A. § 9-11-37, "the Court should require [Ruby Tuesday] to pay Defendants all the reasonable expenses, including attorney's fees caused by [Ruby Tuesday] and NRD's contempt . . ." (Id., pp. 15-16.)

The Motion was the subject of a February 5, 2020 hearing. Ruby Tuesday and NRD jointly argued in opposition to the Motion for Contempt. During the hearing, the Court issued various oral orders directing Ruby Tuesday and NRD to supplement its production. The Court held in abeyance the request to sanction or assess fees against Ruby Tuesday or NRD. (Feb. 5, 2020 Tr., p. 10.)

March 18, 2020 Supplemental Brief and the May 28, 2020 Phone Conference. On March 18, 2020, Quadre and Powell filed a Supplemental Brief in Support of Motion for Contempt against Ruby Tuesday, Inc. and NRD Partners II, L.P. (the "March Supplement"), asserting Ruby Tuesday and NRD failed to comply with both the original September 2019 Order and the Court's February

[3] The September 19, 2019 Discovery Order reflects is was prepared by counsel for the movants and counsel for NRD consented only as to its form. (Id., p. 8.) The Court finds NRD's current claim that the NRD Motion to Compel was resolved via a "consent order" is not entirely accurate. (NRD Resp. to Applic., filed Feb. 25, 2021, p. 7.)

5, 2020 oral orders. Among the issues raised in the March Supplement was the late production of certain items and the failure to produce others. Again, Quadre and Powell argued Ruby Tuesday should pay for all expenses caused by its discovery failures and those of NRD. (March Supplement, pp. 15-16.)

The dispute regarding the sufficiency of the Ruby Tuesday/NDR production was addressed during a May 28, 2020 phone conference with the Court. Again, Ruby Tuesday and NRD offered a joint response. Again, the Court held in abeyance issues regarding sanctions and fees, focusing on the discovery that was needed for the Defendants to commence with key depositions. Ruby Tuesday and NRD were ordered to produce certain documents no later than June 12, 2020.

August 14, 2020 Supplemental Brief. On August 14, 2020, Movants filed an update on the discovery dispute via another supplemental brief (the "August Supplement"). It re-hashed old issues, raised new issues and sought a formal ruling on the contempt/sanction questions that had been previously held in abeyance. Movants sought serious sanctions, arguing the dilatory tactics of Ruby Tuesday /NRD delayed the final disposition of the case, prompting the scheduled March 2020 trial to be rescheduled until December 2020. While acknowledging this delay might not be significant under normal circumstances, here the delay coincided with the COVID 19 pandemic that placed Ruby Tuesday under such severe financial distress, it may have lost the financial ability to satisfy Defendants' claims.[4] (August Supplement, pp. 1-2; 15.) At this point, Quadre and Powell asked that the Court to require Ruby Tuesday, NRD and/or their counsel to pay for the litigation expenses related to the discovery failures under O.C.G.A. § 9-11-37(b)(2). (August Supplement, p. 16.)

[4] Ruby Tuesday/NDR rejected the notion that there discovery lapses caused the anticipated trial date to be delayed. (Opp'n. to Mot. to Compel and Suppl. Brfing, filed Sept. 1, 2020, pp. 4-5.)

September 10, 2020 Hearing and the Award of Fees. The Court heard the remaining discovery issues and the request for sanctions during a September 10, 2020 hearing. At the conclusion of the hearing, the Court announced that it was not granting the most drastic sanctions sought by the movants because the information that was produced late was not particularly detrimental to Ruby Tuesday's position in this appraisal proceeding, and there did not appear to be a clear intent for Ruby Tuesday and NRD to hide this information from Movants that would justify severe sanctions. (Application, Ex. A, pp. 28-29; 43-44; 60-61.) However, the Court found Ruby Tuesday and NRD approached their discovery obligations with a measure of sloppiness that caused a lengthy and inexplicable delay in their production. (Application, Ex. A, pp. 29-30; 43-45; 60-63.) It found an award of fees was merited for three specific discovery lapses, outlined below.

Quadre and Powell were directed to provide a copy of their fee request and supporting documentation to opposing counsel and request a hearing if disputes arose regarding the reasonableness of the amount. (Application, Ex. A., pp. 62-63.) The Application indicates the fee request and supporting documentation were presented to Ruby Tuesday/NRD on September 22, 2020. (Application, pp. 2-3.) The parties were in the midst of this conferral process as directed by the Court when Ruby Tuesday filed for bankruptcy protection on October 7, 2020. (Application, p. 2; Suggestion of Bankruptcy, filed October 7, 2020.)

On February 2, 2021, the bankruptcy court issued an order providing limited relief from the automatic stay and allowing Quadre to pursue its efforts to collect the court-ordered sanctions from NRD. (Application, Ex. B.) Apparently, Powell did not seek such relief. Once the stay was lifted, the parties engaged in email communications unsuccessfully attempting to resolve disputes regarding the reasonableness of the fees sought. (Application, Ex. D.) On February 9, 2021,

Quadre filed this Application solely against NRD, supporting the Application with various billing records which were later supplemented in a reply brief, filed March 2, 2021. NRD's response was filed February 25, 2021.[5] During the March 3, 2021 hearing, NRD did not cross examine Quadre's counsel regarding its billing records.

Quadre seeks $112,444.47 for its efforts in pursuing this discovery and enforcing the Court's award of fees. (Quadre Reply, filed March 2, 2021, p. 3; 7.)

B. THREE SUBJECT AREAS THAT LED TO FEE AWARD

1. Investor Communications.

In the NRD Motion to Compel, Quadre and Powell specifically sought NRD's communications with investors regarding the Ruby Tuesday merger. (NDR Motion to Compel, pp. 12-13.) The September 2019 Discovery Order, unambiguously stated before September 23, 2019, RTI and NRD "shall produce to Defendants all . . . marketing materials, presentations or other material distributed, or made available [concerning the RTI merger] since January 1, 2016 to the present, to any of NRD's actual or prospective investors. . . ." (September 2019 Discovery Order, Sec. D). During the February 5, 2020 hearing, NRD counsel affirmatively represented to the Court it had produced all email communications with its investors. (Feb. 5, 2020 Tr., p. 86.) However, on March 6, 2020, NRD subsequently produced several post-merger, quarterly investor letters for 2018 and 2019. Movants claimed the late production was suspicious because it occurred after an NRD investor was noticed for a deposition whereas NRD offered an innocent explanation for its lapse.

NRD argued, and the Court ultimately found, that these communications did not contain damaging information that would have prompted NRD to intentionally shield them from Movants;

[5] The Application was also the subject of a reply, a sur-reply and two post-hearing briefs.

however, the Court also found NRD had failed to offer a satisfactory explanation as to why these communications were not located and produced sooner in response to Quadre's initial discovery requests and the September 19, 2019 Discover Order mandating their production.

2. **Final Valuation Method**

Multiple valuations models were reviewed by NDR prior to the merger. The NDR Motion to Compel specifically sought models used by NRD in assessing the value of Ruby Tuesday's operations and real estate as it contemplated the merger. (NRD Motion to Compel, pp. 8-9). In the September 2019 Discovery Order, the Court generally required Ruby Tuesday/NRD to produce all valuation models through December 21, 2017, the date of the merger. (September 2019 Discovery Order, Sec. C). While the September 2019 Discovery Order did not require the identification of a final valuation model, during the February 5, 2020 hearing, Movants expressed dissatisfaction about the failure of NRD to make such an identification, and counsel for NRD affirmatively and unequivocally represented to the Court that all valuation models had been produced. (February 5, 2020 Tr., p. 83.) The issue was raised again during the May 28, 2020 Conference with Movants claiming a final valuation model still had not been identified. The Court ordered NRD to identify the final valuation model it was relying on at the time of the merger with such identification to occur no later than June 12, 2020. On June 12, 2020, a new valuation model was produced, and NRD identified it as the final model.

This particular discovery problem, again, did not appear to result from the intentional desire to hide the model. Quadre has admitted it had received *similar* models from NRD previously. (Application, Ex. A, p. 32.) However, NRD failed to offer a wholly satisfactory explanation as to why it took so long to locate this final valuation model. Indeed, during the

September 10, 2020 hearing, its counsel acknowledged NRD "fell down" in its efforts to locate and produce the final valuation model. (Application, Ex. A., p. 41.)

3. 43 Real Estate Properties.

During the February 5, 2020 hearing, the parties and the Court discussed, at length, the Ruby Tuesday real estate that NRD or its affiliates received or purchased post-merger. Specifically, Movants argues that at the merger closing, Ruby Tuesday sold 178 properties, and 43 were purchased by an NRD affiliate. (Feb. 5, 2020 Tr., p. 63.) Movants argued shortly after the merger, the NRD affiliate flipped these 43 properties, garnering a quick $13 million profit, and that the value of these properties was not accurately reflected Ruby Tuesday's $2.40 share sale price. (Application, Ex. A, pp. 9-10.) NRD objected to this characterization, claiming the transfer of these 43 properties to an affiliate were not part of a scheme to artificially lower the merger share sale price. (Application, Ex. A, p. 39.) Rather, NRD explained that Ruby Tuesday properties were placed into pools for sale and then leaseback, and the buyers, who were institutional investors, "would examine each pool and kick properties out that they didn't want." (Id.) Ruby Tuesday/NRD claimed these 43 properties were those rejects. (Id.) They also claimed that the $13 million profit figure posited by Movants was grossly inflated and was more properly calculated around $6 million. (Id. at pp. 40-41.)

Much of the confusion regarding this discovery emanated from the number of NRD entities or affiliates that played some role in the merger. During the February 5, 2020 hearing, the parties, together with the Court, worked at length to refine what discovery remained to be produced and/or was needed regarding these 43 properties. (Feb. 5, 2020 Tr., pp. 70-71.) NRD affirmatively agreed that certain information should and would be produced, but no deadline for formally established. (Id., pp. 49-50; 70-71.) Almost four months later, during the May 28, 2020 conference, Movants

informed the Court the information still had not been produced, and NRD responded that it was working on a detailed chart regarding the 43 properties. The Court ordered NRD to finish compiling the information and produce it no later than June 12, 2020 which NRD did.

C. ANALYSIS

1. **Discovery Provisions regarding the Production of Documents and Enforcement Measures Allowing the Imposition of Fees.**

O.C.G.A. § 9-11-34 allows for a party to propound requests for document production. See O.C.G.A. § 9-11-34(a)(1). O.C.G.A. § 9-11-34(c)(1) allows the use of this particular discovery method with non-parties, stating "[**t]his Code section shall also be applicable with respect to discovery against persons, firms, or corporations who are not parties** . . . (Emphasis supplied.)" Should a discovery disagreement or lapse arise, O.C.G.A. § 9-11-34(c)(1) contemplates that the party seeking the discovery may file a motion to compel against a non-party "under subsection (a) of Code Section O.C.G.A. § 9-11-37."

O.C.G.A. § 9-11-37(a) generally addresses motions to compel discovery. Its subsection (a)(4)(A) permits fees to be awarded to a party who has successfully obtained an order compelling discovery. In pertinent part, it provides,

> [i]f the motion [to compel] is granted, the court shall, after opportunity for hearing, require **the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them** to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust (Emphasis supplied).

O.C.G.A. § 9-11-37(b)(2) outlines the sanctions that may be imposed against a person or entity who violates a court's discovery order. It specifies a host of sanctions available to a Court and ends,

> [i]n lieu of any of the foregoing orders, or in addition thereto, the court shall require **the party failing to obey the order or the attorney advising him, or both**, to pay the

> reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust (Emphasis supplied).

The only authority allowing Quadre to recover its fees cited in its underlying motions and briefing was derived from the two portions of O.C.G.A. § 9-11-37, quoted above.

2. **The Liability of Non-party NRD for Attorney's Fees under O.C.G.A. § 9-11-37.**

The Court's fee award announced during the September 10, 2020 hearing did not distinguish between Ruby Tuesday and NRD who had been defending these discovery motions jointly. However, in light of the subsequent bankruptcy of Ruby Tuesday, Quadre is now attempting to seek its fee award solely against non-party NRD. NRD argues the clear and unambiguous language of O.C.G.A. § 9-11-37, quoted above, does not authorize such a fee award against a non-party.

NRD relies on a recent decision of the Georgia Supreme Court, Workman v. RL BB ACQ I-GA CVL, LLC, 303 Ga. 693 (2018), which addressed statutory construction of another Georgia statute where an award of attorney's fees may be assessed. Workman determined an award of fees against a non-party under O.C.G.A. § 9-15-14 was not permitted based on the plain language of the statute which only allowed an award of attorney's fees to be imposed against a party to a civil action or their attorney. Id. at 697. Workman was based on one rule of statutory construction that provides a court must,

> presume that the General Assembly meant what it said and said what it meant. To that end, we must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would. Where statutory text is clear and unambiguous, we attribute to the statute its plain meaning, and

Id. at 695.

Workman espouses one rule of statutory construction, but there is another rule of statutory construction applicable here. "A court should consider one statute in the context of other related statutes, reading all related statutes together so as to ascertain the legislative intent and give effect thereto." (Citation and punctuation omitted.) City of Atlanta v. City of Coll. Park, 311 Ga. App. 62, 70, 7 (2011), aff'd, 292 Ga. 741 (2013). NRD's laser-like focus solely on the language found in O.C.G.A. § 9-11-37(a)(4)(A) and (b)(2) fails to recognize the interlocking nature of the discovery statutes at issue.

O.C.G.A. § 9-11-34 allows for a party to propound requests for document production. See O.C.G.A. § 9-11-34(a)(1). O.C.G.A. § 9-11-34(c)(1) allows the use of this particular discovery method with non-parties. Moreover, O.C.G.A. § 9-11-34(c)(1) clearly contemplates enforcement measures against non-parties may be necessary. It references motions to compel that may be filed against non-parties under O.C.G.A. § 9-11-37 (a) even though the express language of O.C.G.A. § 9-11-37 (a) provides, with regard to O.C.G.A. § 9-11-34, a motion to compel may only be lodged against a party who has failed to comply with their obligation to produce documents.

Construing these two statutes together, the Court finds that by extending the discovery provisions of O.C.G.A. § 9-11-34 to non-parties, the General Assembly intended non-parties to be treated like parties with regard to the enforcement of these discovery obligations under O.C.G.A. § 9-11-37. As noted above, O.C.G.A. § 9-11-34(c) considered enforcement measures might be necessary against an unresponsive or recalcitrant non-party, expressly addressing the standard that should be applied should a motion to compel be filed against a non-party under O.C.G.A. § 9-11-37(a). It is illogical to think that all the provisions of O.C.G.A. § 9-11-37(a) governing motions to compel, including its provision for the award of fees found in O.C.G.A. § 9-11-34(a)(4)(A), would not apply to non-parties who failed in their discovery obligations under O.C.G.A. § 9-11-

34. . Similarly, it is illogical to think that while the General Assembly clearly contemplated a party might need to obtain an order compelling document discovery against a non-party, it would not allow the enforcement measures provided in O.C.G.A. § 9-11-37(b) should the non-party fail to obey that order to compel.

In light of the foregoing, the Court finds it has the statutory authority to impose an award of attorney's fees against NRD pursuant to O.C.G.A. § 9-11-37 for its failure to comply with its discovery obligations.

3. The Reasonableness and Necessity of Quadre's Fees.

As generally summarized by Quadre, it seeks to recovery for work its counsel performed including, "preparing and exchanging discovery dispute letters, briefing a motion to compel, preparing and arguing at a motion to compel hearing, reviewing subsequent deficient discovery production, briefing a motion for contempt, preparing and arguing at a telephone conference, engaging in follow-up dispute communications, briefing a supplemental motion in support of the motion for contempt, and preparing and arguing at a sanctions hearing" as well as the work Quadre's counsel performed in seeking to enforce the fee award. (Reply in Support of Application, filed March 2, 2021, pp. 2-3.)

NRD has raised a host of objections to the reasonableness and necessity of Quadre's fees as well as the sufficiency of its billing record evidence. NRD objects to Quadre's request for $1,134.00 in fees related to Quadre's unsuccessful opposition to Ruby Tuesday / NRD's request for extension of time to respond to the Motion for Contempt, filed December 9, 2019. The Court agrees that fees performed for this work should not be awarded. NDR also objects to $2,810.00 in fees incurred with regard to discovery about the aforementioned 43 Ruby Tuesday properties. The Court finds that it was not established that NRD's failure to provide this information before

June 12, 2020 was in violation of a clear discovery request or discovery order, and, consequently, these fees are not merited.

The Court rejects the remainder of NRD's objections to the necessity of the work performed, the reasonableness of the fees or the sufficiency of Quadre's fee evidence.

D. CONCLUSION

In light of the foregoing, it is hereby ordered that pursuant to O.C.G.A. § 9-11-37(a)(4)(A) and (b)(2), the Application be **GRANTED** and that Defendant Quadre Investments, LLP shall recover a fee award from NRD Partners, II, L.P. in the amount of $108,500.47.

SO ORDERED this 9th day of March, 2021.

/s/ John J. Goger
JOHN J. GOGER, SENIOR JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit

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