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Ruby Tuesday, Inc. v. Cede & Co., et. al., Order on Remand and Defendant's Motion to Reconsider Sanctions

John J. Goger

Superior Court of Fulton County, Metro Atlanta Business Case Division

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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 REMAND AND DEFENDANT QUADRE'S MOTION TO
RECONSIDER SANCTIONS AGAINST NRD PARTNERS II L.P. UNDER
O.C.G.A. § 9-11-37(a)(4)**

The question before the Court involves its ability to issue an attorney's fees sanction against a non-party who has failed to comply with an order compelling them to produce documents. It comes before the Court on remand from the Georgia Court of Appeals in NRD Partners II, L.P. v. Quadre Investments, L.P., 364 Ga. App. 739 (2022) and the post-remittitur Motion to Reconsider Sanctions against NRD Partners II, L.P. ("NRD") under O.C.G.A. § 9-11-37(a)(4) filed by Defendant Quadre

Investments, L.P. (“Quadre”). Having reviewed the record and considered the arguments of counsel, the Court enters this order.

I. FACTUAL BACKGROUND

A. Underlying Discovery Dispute and the Decision to Sanction NRD

This discovery dispute stems from a 2018 dissenters’ rights action brought by Ruby Tuesday, Inc. (“Ruby Tuesday”) against several of its former shareholders including Quadre, Lawrence Lebow, Jonathan Lebow, Miriam Roth, and Powell Anderson Capital LP (“Powell Anderson”) (collectively the “Cede Respondents”). See generally O.C.G.A. § 14-2-1301 *et seq.* (addressing rights of dissenting shareholders). Early in the litigation, all of the Cede Respondents served discovery upon NRD, a non-party closely associated with Ruby Tuesday. As outlined in NRD Partners II,

NRD objected to the scope of the request. In July 2019 Quadre [and all of the other Cede Respondents acting jointly] filed a motion under O.C.G.A. §9-11-37 (a) asking the trial court to compel NRD to produce several categories of documents and asking for the trial court to award attorney fees associated with [their] motion.

After briefing and a hearing on the motion to compel production from NRD, the trial court entered an order on September 19, 2019 that, among other things, required NRD to produce specific documents by September 23, 2019.

Id. at 740.

That order, which partially granted the motion to compel, was prepared by the Cede Respondents with NRD consenting as to its form. (Ord. on Defs.’ Mots. to

Compel Disc. 8.) The order did not address the issue of attorney fees; however, the Cede Respondents specifically noted they were not “waiving any rights under this order.” (Id. 2.) Subsequently, Quadre and Powell Anderson filed a motion for contempt against NRD, asserting that NRD’s production in response to the September 19, 2021 order was untimely and deficient. At a February 5, 2020 hearing on the motion for contempt, the trial court ordered NRD to supplement its production. The discovery dispute stretched for many more months with supplemental briefing and more orders for NRD to search for and produce documents.¹

In making this decision to sanction NRD, the Court found it had “approached [its] discovery obligations with a measure of sloppiness that caused a lengthy and inexplicable delay” for which fees should be imposed. (Ord. on Applic. for Att’y Fees 6.) As the Court would later note, “if ever there was a case where sanctions

¹ As more fully described in NRD Partners II,

Dissatisfied with NRD's supplementation, Quadre [and Powell Anderson] filed another brief in support of [their] motion for contempt, arguing that NRD still had not fully complied with either of the trial court's orders compelling the production of documents. In a May 28, 2020 telephone conference, the trial court ordered NRD to produce certain documents by June 12, 2020. . . .

On August 14, 2020, Quadre [and Powell Anderson] filed yet another supplemental brief. Among other things, Quadre [and Powell Anderson] identified outstanding discovery issues and argued that NRD had engaged in wilful contempt by both failing to fully abide by the trial court's orders to produce documents and by misrepresenting the extent of its compliance. Quadre [and Powell Anderson] asked the trial court to award [them] attorney fees related to NRD's alleged discovery failures under O.C.G.A. § 9-11-37 (b) (2).

The trial court held a hearing on these issues on September 10, 2020, at which [counsel for Quadre and Powell Anderson] stated that [they] had received most of the documents at issue but that NRD had still not produced one category of documents.

Id. at 740-741.

were warranted and a contempt justified, it would certainly be this one.” (Mar. 3, 2021 Hr’g. Tr. 30.) The Court directed Quadre and Powell Anderson to provide NRD with information detailing the amount of their fee request and seek a hearing if the parties could not agree on the amount of the award. (Sept. 10, 2020 Hr’g. Tr. 62-63.)

In the midst of this conferral process, Ruby Tuesday sought bankruptcy protection, giving rise to an automatic litigation stay. Id. at n. 2. The bankruptcy court later provided limited relief from the stay, allowing Quadre to pursue a fee award from NRD. Id. On February 9, 2021, Quadre filed an application for attorney’s fees against NRD. Powell Anderson did not join in the application.

C. The Court’s Original Fee Award

In opposition, NRD asserted O.C.G.A. § 9-11-37(b) did not permit a fee award against non-parties.

O.C.G.A. § 9-11-37 establishes the enforcement scheme for discovery obligations. O.C.G.A. § 9-11-37(a) permits a trial court to enter orders compelling adherence to discovery obligations and to award the movant’s litigation expenses. O.C.G.A. § 9-11-37(b)(2) permits a trial to issue a variety of sanctions against “a party . . . [who] fails to obey” orders compelling discovery including an award of attorney’s fees and other litigation expenses.

O.C.G.A. § 9-11-34(c), the discovery measure at issue here, allows a party to lodge document requests against non-parties and specifically provides that a non-party can be compelled to produce documents under O.C.G.A. § 9-11-37(a), thus invoking the first step of this discovery enforcement scheme. However, it is silent as to what happens if a non-party fails to comply with an order compelling document discovery.

The Court reasoned that, construing these discovery statutes together, if a court had to ability to order a non-party to produce documents under the first step of the statutory enforcement scheme, logically it would also have the power afforded under the second step of that scheme to sanction the non-party that fails to comply with that order. See City of Atlanta v. City of Coll. Park, 311 Ga. App. 62, 70, 7 (2011), aff'd, 292 Ga. 741 (2013)(“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.”)

Based upon its interpretation of this discovery enforcement scheme, the Court determined it had the power to sanction NRD for its failure to comply with the Court’s multiple orders compelling discovery and issued Quadre an award of

attorney's fees in the amount of \$108,500.47, citing both O.C.G.A. § 9-11-34(a)(4) and O.C.G.A. § 9-11-37(b).²

D. Appellate Review

On NRD's appeal, the Court of Appeals disagreed with the Court's reasoning about the interlocking nature of the discovery scheme. It determined that, to the extent it permits an award of attorney's fees, O.C.G.A. § 9-11-37(b) must be strictly construed, and the Court's "construction is inconsistent with the plain language of the statute, which we must follow even if it appears not to serve the purpose we imagine the statute to have. . ." NRD Partners II at 742-743.

Having vacated the award under O.C.G.A. § 9-11-37(b)(2), the Court of Appeals issued a remand directing the Court to reconsider the award under O.C.G.A. § 9-11-37(a)(4) alone. Id. at 744. Once the remittitur was entered, Quadre filed its motion for reconsideration.

² Immediately after ruling on Quadre's Application, the Court granted a certificate of immediate review pursuant to O.C.G.A. § 5-6-34(b), but NRD's application for interlocutory appeal was denied. Quadre then sought to promptly enforce the fee award against NRD whereas NRD argued enforcement proceedings should be stayed pending the final resolution of the case which would enable NRD obtain direct appellate review of the fee award. On June 22, 2021, the Court entered an order refusing to stay enforcement of the fee award but allowing NRD the ability to place the awarded funds into the Court's registry where they would be disbursed once NRD had the opportunity to seek direct appellate review. The Court considered this measure as something akin to a supersedeas bond that would protect the interests of both parties while awaiting appellate review. On Ruby Tuesday's unopposed motion, a Final Order of Dismissal was entered on September 15, 2021. NRD filed a notice appealing the attorney's fee award on October 12, 2021.

3. ANALYSIS

3.1 The Proper Scope of a Fee Award under O.C.G.A. § 9-11-37(a)(4)

Quadre moves the Court to sanction NRD with the same \$108,500.47 fee award it previously entered against NRD for Quadre's successful pursuit of both the motion to compel and the motion for contempt but do so solely under the auspices of O.C.G.A. § 9-11-37(a)(4). (MFR 4.) Without citing any authority, it contends this statute empowers the Court to the award "the fees Quadre incurred in pursuing to completion its successful motion to compel against NRD." (Id. 7.) The Court disagrees.

Because Quadre received only some of the relief it sought in its motion to compel, the applicable portion of the statute is O.C.G.A. § 9-11-37(a)(4)(C). It specifically states, "[i]f *the motion* is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to *the motion* among the parties and persons in a just manner (emphasis supplied)." As noted by the appellate court "[i]nasmuch as attorney fees generally were not recoverable at common law, a statute authorizing the recovery of such fees is strictly construed." NRD Partners II at 741. Strictly construed, "the motion" referenced by O.C.G.A. § 9-11-37(a)(4)(C) is a "motion for order compelling discovery" which is the only subject O.C.G.A. § 9-11-37(a) addresses. Thus, the ability to issue a fee sanction under this statute would not extend to the fees incurred by Quadre attempting to enforce the order

compelling discovery which are governed by O.C.G.A. § 9-11-37(b) and which the appellate court has clearly determined to be inapplicable here.

In its motion for reconsideration, Quadre also makes a straight policy argument that, “it is critical for Georgia courts to be able to punish bad-acing nonparties, such as NRD in this case, otherwise nonparties will be able to openly ignore discovery obligations and Court enforcement.” (MFR 8.) This policy argument was considered and rejected by the appellate court. It specifically noted a trial court is not completely without a remedy and may use its contempt powers to enforce its discovery orders. Id. at 743. Implicitly recognizing this remedy was not entirely satisfactory, the appellate court further observed, “[t]o the extent O.C.G.A. § 9-11-37(b)(2) provides an incomplete remedy to a party, such as Quadre, which is faced with a nonparty that fails to comply with discovery orders, it is for our legislature, rather than this court, to fashion a more complete remedy.” (citations and punctuation omitted.) Id.

Accordingly, the bulk of the fees in the Court’s earlier award may not be properly awarded under O.C.G.A. § 9-11-37(a)(4).

3.2 The Amount of the Fee Award under O.C.G.A. § 9-11-37(a)(4)(C)

The evidence provided by Quadre’s counsel reflects that it incurred \$8,766 in relation to the initial motion to compel which it filed on behalf of all the Cede

Respondents. (Applic. for Atty. Fees Ex. C.) The Court finds these fees were both reasonable and necessarily incurred.

NRD takes issue with the proof submitted by Quadre as to the amount of fees it alone incurred as a result of the Motion to Compel in relation to all the other Cede Respondents.³ (Resp. to MFR 4.) NRD argues Quadre could reap an “unauthorized windfall” recovering fees incurred by its co-movants. (Resp. to MFR n. 1.) The Court finds this concern to be overstated. Quadre was, by far, the largest shareholder among the Cede Respondents, holding approximately 77% of their collective shares in Ruby Tuesday.⁴ O.C.G.A. § 9-11-37(a)(4)(C) expressly allows the Court the discretion to “apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner,” and, based on this authority, the Court awards Quadre 77% of the fees incurred by the Cede Respondents’ counsel in securing the order to compel discovery from NRD or \$6,749.82.

4. CONCLUSION


In light of the foregoing, pursuant to the appellate court’s remand and in the partial grant of Quadre’s Motion to Reconsider Sanctions against NRD Partners II, L.P. under O.C.G.A. § 9-11-37(a)(4), the Court awards Quadre \$6,749.82. The

³ As noted above, all of the other Cede Respondents joined Quadre in the motion to compel against NRD but only Powell Anderson joined with Quadre in seeking to enforce the resulting discovery order. Quadre acknowledged a 2.4% reduction in total fees it initially sought was appropriate to account for fees incurred by Powell Anderson. (Quadre Reply Brf. ISO Applic. for Atty. Fees n. 1.) However, the record does not reveal how counsel allocated its fees between the other Cede Respondents.

⁴ (See generally Petition ¶ 4; Cede Ans. ¶ 4; Quadre Ans. ¶ 4.)

Court will consider the appropriate disbursement of funds currently held in the registry upon the completion of any appellate review of this order.

SO ORDERED this 22 day of December, 2022.


 JOHN J. GOGGER, SENIOR JUDGE
 Superior Court of Fulton County
 Atlanta Judicial Circuit
 Metro Atlanta Business Case Division

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