UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MASON TENDERS DISTRICT COUNCIL OF GREATER NEW YORK, MASON TENDERS DISTRICT COUNCIL WELFARE FUND, PENSION FUND, ANNUITY FUND, and TRAINING FUND, and JOHN J. VIRGA, in his fiduciary capacity as FUNDS Director,

Plaintiffs,

-against-

CONCORE EQUIPMENT, INC. and PATRICIA RICE a/k/a PAT RICE,

Defendants.

10 Civ. 4227
OPINION

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A P P E A R A N C E S:

Attorneys for Plaintiffs

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Sweet, D.J.

This ERISA action has been convoluted and difficult as demonstrated in the opinions filed on November 10, 2011 and September 20, 2013. Ultimately, the defendants Concore Equipment, Inc. ("Concore") and Patricia Rice ("Rice"), Concore's owner, have been held liable for the $288,000 settlement of the initial ERISA claim.

Concore is defunct and Rice is without resources and is contemplating bankruptcy. The plaintiffs Mason Tenders District Council of Greater New York, the Mason Tenders District Council Welfare Fund, Pension Fund, Annuity Fund and Training Fund and John J. Virga, as Funds Director ("Mason Tenders" or collectively, the "Plaintiffs") now seek attorneys' fees of $108,814 as prevailing parties under ERISA § 502(g)(2)(D).

The settlement did not provide for attorneys' fees and did not constitute an ERISA determination. The summary judgment requiring an audit has not resulted in an ERISA judgment. However, in any ERISA action, the Court also has the discretion to award reasonable attorneys' fees and costs of action to either party. *Hardt v. Reliance Stand. Life Ins. Co.*, 560 U.S.

242, 130 S. Ct. 2149, 2159 (2010); *Levitian v. Sun Life and Health Ins. Co.*; 90 Civ. 2965; 2013 U.S. Dist. LEXIS 11567 (S.D.N.Y. Aug. 14, 2013). That standard provides that attorney's fees may be awarded by the court when a party has achieved "some degree of success on the merits." *Id.* At 2159.

The November 1, 2006 settlement document is not a collective bargaining agreement and its enforcement does not trigger the attorney fee provisions of 29 U.S.C. § 1132.

Plaintiffs also do not meet the five factor test established by the Second Circuit for a discretionary award of attorneys' fees:

> (1) the degree of the offending party's culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney's fees, (3) whether an award of fees would deter other persons from acting similarly under like circumstances, (4) the relative merits of the parties' positions, and (5) whether the action conferred a common benefit on a group of pension plan participants.

Jones v. UNUM Life Ins. Co. of Am., 223 F.3d 130, 138 (2d Cir. 2000) (quoting *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987), *cert.*

denied, 496 U.S. 905, 110 S.Ct. 2587, 110 L.Ed.2d 268 (1990)). Bad faith has not been established, the ability of the Defendants to satisfy an award is problematic, and the unique circumstances presented diminish any deterrent effect. The merits favor the Plaintiffs, but practicality favor the Defendants, and the benefits to granting the motion is limited.

Conclusion

As an exercise of discretion, the motion for attorneys' fees is denied.

It is so ordered.

New York, NY
May 15, 2014

ROBERT W. SWEET