

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOSEPH STEVENS,)	
)	
Plaintiff-Appellee)	
)	
v.)	No. 14-1481
)	
SANTANDER HOLDINGS USA)	
)	
)	
Defendants-Appellant)	

PLAINTIFF-APPELLEE'S APPLICATION FOR ATTORNEYS' FEES

The undersigned, attorneys for Plaintiff-Appellee, hereby submit the following application for an award of attorneys' fees and expenses in accordance with L.A.R. Misc. 108.0 and pursuant to 29 U.S.C. § 1132(g) and 28 U.S.C. § 1927:

1. Judgment was entered by the Court of Appeals in this matter on August 24, 2015. That judgment dismissed the appeal for lack of jurisdiction. The judgment and issuance of the mandate occurred on September 15, 2015.

2. The underlying lawsuit was brought pursuant to the civil action provision of the Employee Retirement Income Security Act (ERISA) seeking benefits due under the terms of an employee benefit plan. 29 U.S.C. § 1132(a)(1)(B). The district court ruled in favor of the Plaintiff (Civil Docket No. 54). The court granted the plaintiff's motion for summary judgment and denied the defendant's motion for summary judgment. The court also ruled that the Plaintiff was entitled to the remaining short-term disability benefits he was seeking, but the court remanded Plaintiff's claim for long-term disability benefits to Liberty Life Assurance Company of Boston, the insurer of the group long-term disability

benefits program sponsored by Plaintiff's employer, Santander Holdings, USA. Although Plaintiff sought fees below, the court stayed a decision while the appeal was pending (Civil Docket No. 74); and this motion relates solely to the fees incurred in relation to the appeal, which this Court may decide to remand to the district court to consolidate with the pending fee motion there.

3. Defendants filed a notice of appeal from the district court's ruling (Civil Docket No. 58). Shortly thereafter, the Plaintiff filed a motion to dismiss the appeal for lack of jurisdiction (Appellate Document 003111593219 – filed on April 18, 2014). Although the Court of Appeals later ordered the filing of briefs on the merits and heard oral argument, this Court dismissed the Defendants' appeal for lack of jurisdiction and granted Plaintiff-Appellee costs.

4. The ERISA statute provides for fee-shifting and allows “a reasonable fee and costs of action to either party.” 29 U.S.C. § 1132(g)(1). The Supreme Court ruled in *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255, 130 S.Ct. 2149, 2158 (2010) that the trigger for fees is that “a fees claimant must show ‘some degree of success on the merits’ before a court may award attorney’s fees under § 1132(g)(1).” Although the standard is not satisfied by a “trivial success on the merits” or a “purely procedural victory,” the ruling here was neither trivial nor purely procedural since the court agreed not only with the arguments raised in the Plaintiff's initial motion to dismiss, but also agreed with the arguments regarding appellate jurisdiction that Plaintiff presented in his Brief for Appellee, as well as at oral argument. Moreover, the court issued a published opinion on those issues.

5. However, even if the court ultimately decides the issue is purely procedural, in the alternative to Plaintiff's claim pursuant to 29 U.S.C. § 1132(g)(1), Stevens seeks fees pursuant to 28 U.S.C. § 1927, which provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

6. In addition to the threshold qualification requirements for an ERISA fee award, this Circuit applies *Ursic v. Bethlehem Mines*, 719 F.3d 670 (3d Cir. 1983) in assessing fee requests. *Ursic* requires the court to consider the following factors:

- (1) the offending parties' culpability or bad faith;
- (2) the ability of the offending parties to satisfy an award of attorney's fees;
- (3) the deterrent effect of an award of attorney's fees;
- (4) the benefit conferred upon members of the pension plan as a whole; and
- (5) the relative merits of the parties' positions.

719 F.3d at 673. Although *Hardt* noted factors such as the *Ursic* factors no longer need to be considered, the Supreme Court ruled that such factors may be considered.

7. The standards for fee awards under § 1927 in this Circuit were recently discussed in *Prosser v. Gerber*, 777 F.3d 155, 162 (3d Cir. 2015) to apply to situations where an attorney has “(1) multiplied proceedings; (2) in an unreasonable and vexatious manner; (3) thereby increasing the cost of the proceedings; and (4) doing so in bad faith or by intentional misconduct.” (citation omitted). The “bad faith” standard is comparable to the “culpability” standard under § 1132(g), which was discussed in *Templin v. Independence Blue Cross*, 785 F.3d 861, 868 (3d Cir. 2015), an ERISA fee dispute, to

mean “reprehensible or wrong” but not necessarily involving “malice or a guilty purpose.” *Templin* also discussed the relationship between the culpability factor and the “relative merits” factor under *Ursic*, and deemed the two closely related. 785 F.3d at 868. The court also noted the importance of the deterrence factor.

8. Applying those rulings here, Defendants should be required to pay Plaintiffs’ fees. When Defendants filed their notice of appeal from an order which remanded a substantial portion of the matters at issue to Liberty, this Court had recently ruled in *Papotto v. Hartford Life & Acc. Ins. Co.*, 731 F.3d 265 (3d Cir. 2013) that ERISA remand orders were non-final and therefore non-appealable. Hence, the appeal brought by Defendants, which was completely unsuccessful, was not warranted by applicable law and has delayed Stevens’ receipt of benefits by more than a year and a half. Accordingly, under the standards applicable to both 29 U.S.C. § 1132(g)(1) and 28 U.S.C. § 1927, Defendants are culpable for their actions in filing the appeal and the appeal vexatiously multiplied the legal proceedings unnecessarily. This Court’s ultimate agreement with Plaintiff’s initial motion to dismiss the appeal shows that the relative merits of the positions advanced by the parties favor Plaintiff on the fifth *Ursic* factor. Moreover, a fee award would deter defendants such as the defendants in this case from delaying the payment of benefits by filing needless appeals. Although a fee award is unlikely to benefit other plan participants, the deterrence against unnecessary filings would undoubtedly encourage Defendants to more promptly process disability benefit claims submitted by Santander employees. Finally, with respect to the ability to pay, the amount of past-due short-term disability benefits is only a few thousand dollars, which Santander would presumably be able to pay, while Liberty is a large insurer that reports quarterly revenues in excess of \$10 billion along

with substantial profits that are more than sufficient to satisfy any judgment Stevens would be able to obtain for long-term disability benefits. See, Liberty Mutual Insurance at <http://www.libertymutualgroup.com/omapps/ContentServer?pagename=LGroup/Views/LMG&ft=3&fid=1138356793938> (visited on September 17, 2015). Accordingly, Plaintiff qualifies for an award of fees for the appeal.

9. Attached hereto as Exhibits A and B are the time sheets of counsel for Plaintiff-Appellee. The time listed was all reasonably required to defend the appeal and brief the issues, as well as prepare for and deliver oral argument. The entries listed were recorded at or near the time the services were incurred and were maintained in the regular course of the business of the undersigned. Although this matter was handled on a contingency fee basis, the hourly fees claimed are the rates the undersigned counsel bill and have received from clients who pay by the hour for counsel's services; and are commensurate with prior fee awards. The rates are also deemed reasonable by the affiants whose declarations are attached hereto.

Exhibit A constitutes the time records of Attorney Mark DeBofsky and seeks compensation for 82.2 hours of services at an hourly rate of \$600/hour, for a total sought of \$49,320.00

Exhibit B constitutes the time records of Attorney Bonny G. Rafel, who incurred 33.1 hours of services at an hourly rate of \$500/hour, for a total sought of \$16,550.00.

Attorney Mark D. DeBofsky was admitted to practice in the State of Illinois in 1980; and he has also been a member of the bar of the State of Hawaii since 2005. He also has been admitted to practice by the U.S. Courts of Appeals for the Seventh, Eighth, Ninth, and Eleventh Circuits, as well as this Circuit and numerous district courts around the

country. Mark DeBofsky has litigated hundreds of ERISA cases, has published and taught extensively in the field and devotes the bulk of his practice to such matters. His biography and full curriculum vitae are available at <http://www.debofsky.com/About-Us/Mark-D-Debofsky.shtml>.

Attorney Bonny G. Rafel Was admitted to the practice in the State of New Jersey in 1980. She has been admitted to practice by the United States Supreme Court, the U.S. Court of Appeals for the Third Circuit, The District of New Jersey, the Southern and Eastern Districts of New York and the Eastern District of Tennessee. Her curriculum vitae is available at <http://disabilitycounsel.com>.

10. The declaration of Attorney Tybe Brett is attached hereto as Exhibit C. Also attached as Exhibit D is a declaration prepared by Attorney Michael Quiat that was filed in support of the fees sought by counsel in the district court.

WHEREFORE, the undersigned pray that the Court either grant the request for fees sought in the amounts of \$49,320.00 payable to attorney Mark DeBofsky and \$16, 550.00 payable to attorney Bonny Rafel, or, in the alternative that the Court remand this application of fees to the district court to be taken up with the pending fee request that was previously filed.

Pursuant to 28 U.S.C. § 1746, the undersigned declares under penalty of perjury that the foregoing is true and correct.

Executed on September 18, 2015

/s/ Mark D. DeBofsky

Mark D. DeBofsky

/s/ Bonny G. Rafel

Bonny G. Rafel

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

September 21, 2015

No. 14-1481

JOSEPH STEVENS

v.

SANTANDER HOLDINGS USA INC SELF INSURED SHORT TERM DISABILITY
PLAN;

LIBERTY LIFE ASSURANCE CO OF BOSTON, DBA Liberty Mutual
SANTANDER HOLDINGS USA INC; SANTANDER HOLDINGS USA INC LONG
TERM DISABILITY PLAN,

Appellants

(D.N.J. No. 3-11-cv-07473)

Present: GREENAWAY, JR., KRAUSE and GREENBERG, Circuit Judges

1. Motion by Appellee Joseph Stevens for Attorney Fees or, In the Alternative that the Court Remand this Application of Fees to the District Court;
2. Response by Appellants In Opposition to Motion by Appellee's for Attorney Fees or, In the Alternative that the Court Remand this Application of Fees to the District Court;

Respectfully,
Clerk/pdb

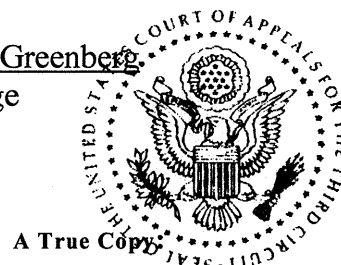
ORDER

The foregoing motion for attorneys' fees is granted as follows: an award of \$46,020.00 for the services of Mark DeBofsky and \$16,550.00 for the services of Bonny Rafel is granted. The award of \$46,020.00 excludes time for DeBofsky's travel to and from Philadelphia for argument. See Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 426 F.3d 694, 710 (3d Cir. 2005).

By the Court,

s/ Morton I. Greenberg
Circuit Judge

Dated: October 21, 2015
PDB/cc: All Counsel of Record



Marcia M. Waldron

Marcia M. Waldron, Clerk