NORTH CAROLINA

COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
03 CVS 12215

TRADEWINDS AIRLINES, INC., TRADEWINDS HOLDINGS, INC., and COREOLIS HOLDINGS, INC.,

Third-Party Plaintiffs,

v.

C-S AVIATION SERVICES,

Third-Party Defendant.

ORDER ON MOTIONS FOR ATTORNEYS FEES

{1} This matter is before the Court upon the motions of Third-Party Plaintiffs TradeWinds Airlines, Inc. ("TradeWinds"), TradeWinds Holdings, Inc. ("Holdings"), and Coreolis Holdings, Inc. ("Coreolis") (collectively, the "TradeWinds Group"), for an award of attorneys fees. The Court, for the reasons set forth below, declines to award attorneys fees in this case.

Tuggle, Duggins & Meschan, P.A. by J. Nathan Duggins, III for Third-Party Plaintiff TradeWinds Airlines, Inc.

Smith Moore Leatherwood LLP by Larry B. Sitton and Lisa K. Shortt for Third-Party Plaintiffs TradeWinds Holdings, Inc. and Coreolis Holdings, Inc.

Ellis & Winters LLP by Paul K. Sun, Jr. and Curtis J. Shipley for Third-Party Defendant.

Tennille, Judge.

I.

PROCEDURAL BACKGROUND

{2} The procedural history of this case is convoluted at best and, at times, bizarre. Given its complexity, the Court's previous explanation of the default

judgment proceedings, as set forth in its April 29, 2009 Order and Opinion, bears repeating:

> This action was filed in Guilford County on November 14, 2003. Pursuant to Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts, the case was designated complex business and assigned to the undersigned Special Superior Court Judge for Complex Business Cases by order of the Chief Justice of the Supreme Court of North Carolina on January 15, 2004.
>
> In January 2004, Defendants and Third-Party Plaintiffs TradeWinds, Coreolis, and Holdings (collectively "the TradeWinds Group") filed a third-party complaint against Third-Party Defendants P-G Newco LLC, S-C Newco LLC, C-S Aviation, Wells Fargo Bank Northwest, N.A., and Does No. 1−20. The claims against C-S Aviation were for fraudulent inducement, breach of contract, and unfair and deceptive trade practices.
>
> On August 2, 2004, the TradeWinds Group filed a motion, pursuant to Rule 55(a) of the North Carolina Rules of Civil Procedure, for Entry of Default against C-S Aviation. Because C-S Aviation failed to file an Answer or otherwise respond to the Third-Party Complaint, the Court entered a Default against the company on August 19, 2004. At that time, the TradeWinds Group was represented by Larry B. Sitton, Robert R. Marcus, and Heather Howell Wright, of Smith Moore Leatherwood LLP.
>
> Following a settlement agreement between the original Plaintiffs and Defendants, the Court ordered the dismissal of all claims in this dispute, except Plaintiff Deutsche Bank's claims against Defendant David Robb and the TradeWinds Group's third-party claims against C-S Aviation. On December 22, 2006, the Court dismissed the remaining Deutsche Bank claims.
>
> On April 17, 2007, the Court closed its file in this matter.
>
> In the spring of 2008, TradeWinds became aware of the possibility of piercing C-S Aviation's corporate veil to reach the company's owners.
>
> On April 14, 2008, TradeWinds, acting alone and with new counsel, filed a Motion for Default Judgment against C-S Aviation. In support of its motion, TradeWinds provided the affidavit of Jeffrey Conry, Chief Executive Officer and President of TradeWinds since 2000.
>
> The Court held a hearing on the Motion for Default Judgment on June 19, 2008, and C-S Aviation did not appear to challenge it. On June 27, 2008, the Court granted the Default Judgment, finding that C-S Aviation breached its leases with TradeWinds and that its conduct constituted unfair and deceptive trade practices under Chapter 75 of the North Carolina General Statutes. The Court awarded TradeWinds $16,326,528.94 as a direct result C-S Aviation's breach. Adding

treble damages and prejudgment interest, the Court ruled that TradeWinds was entitled to recover $54,867,872.49 from C-S Aviation.

The next business day, on June 20, 2008, TradeWinds filed an action in the United States District Court for the Southern District of New York (TradeWinds Airlines, Inc. v. Soros, No. 08 Civ. 5901 (S.D.N.Y)) (the "Soros suit") seeking to recover the Default Judgment by piercing C-S Aviation's corporate veil.

On July 25, 2008, TradeWinds filed a voluntary petition in the United States Bankruptcy Court in the Southern District of Florida seeking relief under Chapter 11 of the Bankruptcy Code. The case was converted to a Chapter 7 proceeding by Order dated October 29, 2008.

On July 31, 2008, the Court again closed its file in this matter without knowledge of the Soros suit or the bankruptcy.

Then, on August 27, 2008, C-S Aviation filed a Motion to Set Aside Entry of Default and Default Judgment under Rules 55(d) and 60(b)(1), (3), (4), (5), and (6) of the North Carolina Rules of Civil Procedure.

On November 13, 2008, Coreolis and Holdings filed a Motion to Revise the Default Judgment so that they could be added as beneficiaries of the judgment. The Court heard oral arguments on both the Motion to Set Aside the Entry of Default and Default Judgment and the Motion to Revise the Default Judgment on January 27, 2009.

On February 10, 2009, the United States Bankruptcy Court for the Southern District of Florida issued a stay of litigation against Coreolis and Holdings to prevent the former parent companies of TradeWinds from altering the Default Judgment issued by this Court.

Pursuant to that court's ruling, Coreolis and Holdings withdrew their Motion to Revise the Default Judgment.

Coreolis and Holdings filed their own Motion for Default Judgment on March 6, 2009.

Deutsche Bank Trust Co. Am. v. TradeWinds, No. 03-CVS-12215 (N.C. Super. Ct. Apr. 29, 2009), *available at* http://www.ncbusinesscourt.net/TCDDotNetPublic/default.aspx?CID=3&caseNumber=03CVS12215 (footnote omitted).

{3} On September 17, 2009, the Court entered an Order on various motions, including the motion of C-S Aviation to set aside the entry of default and default judgment entered in favor of TradeWinds. The Court, in its discretion, denied the

motion with respect to the entry of default, but granted the motion with respect to the default judgment. The Court then allowed the parties 140 days to conduct fact discovery on damages.

{4} In May 2010, a six-day hearing on damages was held at the North Carolina Business Court. The Court entered a final judgment on damages contemporaneously with this Order.

II.

DISCUSSION

{5} Section 75-16.1 of the North Carolina General Statutes makes it clear that the award of attorneys fees is in the discretion of the presiding judge. Specifically, it reads as follows:

> In any suit instituted by a person who alleges that the defendant violated G.S. § 75-1.1, the presiding judge may, *in his discretion*, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as part of the court costs and payable by the losing party, upon a finding by the presiding judge that . . . [t]he party charged with the violation has willfully engaged in the act or practice, and *there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit*.

N.C. Gen. Stat. § 75-16.1 (2009) (emphasis added). The statute does not require every party found to have committed an unfair or deceptive trade practice to pay what its opponent demands.

{6} Before a court may exercise its discretion under the statute, the presiding judge must make two findings. The first finding—that the party charged with the violation willfully engaged in the act or practice—is established by the entry of default. By virtue of the default, the factual allegations in the Amended Third-Party Complaint are deemed admitted. C-S Aviation does not dispute that the allegations in the Amended Third-Party Complaint (e.g., knowingly making false misrepresentations) satisfy the first finding. The second finding—that there was an unwarranted refusal to resolve the matter by such party which constitutes the basis of the suit—is hotly contested and warrants further discussion.

{7} One goal of North Carolina's Unfair and Deceptive Trade Practices Act is to encourage businesses to revise business practices that a court finds to be unfair or deceptive. In this case, C-S Aviation was already out of business when the case commenced and had no business practices to alter. The only available resolution was a financial settlement, and even that was not within C-S Aviation's ability, as the corporate entity had no assets with which to resolve the claims against it.

{8} TradeWinds, which was on the verge of bankruptcy, did not pursue a default judgment in this matter until after the United States District Court for the Southern District of New York entered an order in an unrelated case that sought to pierce C-S Aviation's corporate veil and enforce a judgment against its owners.[1] At that point, the "resolution" of the pending case turned on whether the TradeWinds Group could pierce C-S Aviation's corporate veil and hold its owners, George Soros and Purnendu Chatterjee, personally liable for C-S Aviation's actions with respect to the TradeWinds leases.[2] That issue is not present in this case and was not pursued in connection with the default judgment. Resolution of that issue is pending in the federal action in New York.

{9} All of the settlement discussions in this case have taken place with counsel representing Soros and Chatterjee and have involved what they would pay to resolve the claims pending in the New York action. Subsumed in those negotiations was the question of the amount of the default judgment that might ultimately be entered in this case. However, resolution of the default judgment amount was particularly meaningless without the agreement of Soros and Chatterjee to pay the amount agreed upon. Thus, the resolution of the New York action and this action were inextricably intertwined. For that reason, the Court ordered the parties, including Soros and Chatterjee, to participate in a mediation in New York to achieve a global settlement. The mediation ended in an impasse. Therefore, on one level, *this* case was not, in and of itself, susceptible to resolution.

---

[1] *TradesWinds Airlines, Inc. v. Soros*, No. 08-CV-5901 (S.D.N.Y. Feb. 23, 2009).

[2] The Court will take judicial notice that both Soros and Chatterjee are men of uncommon wealth.

{10} The Court, in addition, has looked at resolution on a second level. Was there a resolution of the default judgment amount that could have been agreed upon by the parties and submitted to this Court and that could have then fixed the liability over which the TradeWinds Group, Soros, and Chatterjee could litigate in New York? On that level, the Court had an additional reservation that would lead it to deny the request for attorneys fees. This was not a case where damages were clear and uncontested. It involved extensive expert testimony. Determining the damages for engine repair, replacement, and loss of use and flight time were not without complications and conflicting evidence. The claims brought by Coreolis and Holdings were not common, run-of-the-mill damage claims. If those damage claims did not cross the border of speculation, they reached the very edge of the line.

{11} Individually, the TradeWinds Group were not united in their original positions. They could not agree on who was entitled to what part of the potential Soros-Chatterjee pie. In addition, management and the owners of Coreolis and Holdings did not part on good terms when Deutsche Bank foreclosed on the Coreolis and Holdings stock after the first settlement with Deutsche Bank.[3] The facts that TradeWinds (1) pursued the default judgment in its own name without notice or participation by Holdings or Coreolis and (2) filed bankruptcy immediately after getting the default judgment did not improve the already strained relationship.

{12} In hindsight, the TradeWinds Group might have been better served if they had agreed to a division of the amount, if any, received in the New York action as a result of the entry of the first default judgment in this action. Instead, their failed attempts at agreement contributed to the decision of this Court to set aside the default judgment. Once set aside, C-S Aviation faced conflicting claims to default damages among the TradeWinds Group. However, the TradeWinds Group ultimately reached agreement on which damages each of them could pursue without

[3] For clarification, in all the transactions involving Deutsche Bank, the stock of the airline companies was pledged as collateral and, thus, was the subject of foreclosure threats and actions. The use of stock as collateral facilitated the transfer of assets without having to go through costly and time-consuming approvals and relicensing from the FAA. It also facilitated use of TradeWinds's losses for tax purposes.

overlapping and presented their claims separately at the May 2010 damages hearing.

{13} The damages issue also posed an obstacle to resolution. The amounts claimed were not insignificant sums—even for uncommonly wealthy individuals. The parties included sophisticated investors ready to engage sophisticated legal talent to do battle.

{14} For its part, TradeWinds stuck to the same types of damages that it had originally pursued and heeded the Court's admonition against pursuing outsized damage claims. In addition to sticking to the same types of claims it had pursued on the first motion for default judgment, TradeWinds ceded $11 million of its claim to Coreolis and Holdings. Nonetheless, the amount of its damage claims gave rise to a legitimate dispute, and the Court did not award all the damages sought by TradeWinds.

{15} Coreolis and Holdings, on the other hand, opted to up the ante considerably. It sought to value its lost equity at more than ten times the amount it originally invested in TradeWinds and then to have that amount trebled. The Court, however, declined to award Coreolis and Holdings the full amount of damages it sought. The new amount claimed by Coreolis and Holdings sharpened the divide between the parties' positions and makes it difficult to conclude that C-S Aviation's refusal to resolve the claims was unwarranted.

{16} The Court has not considered, and will not delve into, the mediation and settlement numbers. To do so would violate mediation confidentiality rules and have a chilling effect on settlement negotiations in other cases. It is clear to the Court that, successful or not, there were non-frivolous settlement negotiations. The Court may not have agreed with many of C-S Aviation's legal positions. Even so, its legal positions were not frivolous, and an appellate court may yet find them to have some merit. Accordingly, this Court does not find C-S Aviation's refusal to

resolve this case to be unwarranted and will deny the motions for attorneys fees and expenses for that reason.[4]

{17} So that the appellate courts will have a full record and decision to review, the Court will make an additional finding and conclusion: Even if it had determined that C-S Aviation's failure to resolve this matter was unwarranted, the Court, in the exercise of its discretion, still would have declined to award attorneys fees.

{18} The TradeWinds Group collectively has an award in excess of $80 million. TradeWinds was in distress when it was purchased by Holdings and Coreolis, when it was sued by Deutsche Bank, and when it went into bankruptcy under its new owners after the settlement. C-S Aviation was defunct when the suit was brought. It had no assets. No party sought to pierce the corporate veil in this case. No party even sought a default judgment until a party in another case in another jurisdiction was successful in piercing C-S Aviation's corporate veil, exposing the deep pockets of Soros and Chatterjee. If the TradeWinds Group individually and collectively prevail in piercing the corporate veil in their other litigation and collect on the default judgment in this case, then they will have been more than adequately compensated for any damages.

{19} Based on the foregoing, the motions filed by TradeWinds, Holdings, and Coreolis for attorneys fees are, in the Court's discretion, DENIED.

SO ORDERED, this the 26th day of July, 2010.

/s/ Ben F. Tennille
The Honorable Ben F. Tennille
Chief Special Superior Court Judge
for Complex Business Cases

[4] Were this decision to be reversed and the Court directed to award attorney fees, it would be necessary for counsel for the TradeWinds Group to produce copies of their time records and expenses, redacted for attorney-client information. Only under those circumstances would C-S Aviation know the basis of the claimed fees and expenses and be able to respond.