UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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S.W. et. al,

Plaintiffs,

-against-

CITY OF NEW YORK, a municipal corporation; ADMINISTRATION FOR CHILDREN'S SERVICES; ST. JOSEPH SERVICES FOR CHILDREN, INC f/k/a CATHOLIC CHILD CARE SOCIETY OF THE DIOCESE OF BROOKLYN, INC., a New York corporation; HEARTSHARE HUMAN SERVICES, f/k/a CATHOLIC GUARDIAN SOCIETY OF THE DIOCESE OF BROOKLYN, INC., a New York corporation; SCO FAMILY OF SERVICES, f/k/a ST. CHRISTOPHER-OTTILIE, a New York corporation,

Defendants.

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MEMORANDUM & ORDER

09-cv-1777 (ENV) (MDG)

VITALIANO, D.J.,

Plaintiffs, who were all classified as special needs children, brought this civil rights action, pursuant to 42 U.S.C. § 1983, against the City of New York and one of its municipal units, the Administration for Children's Services (collectively "the City"), as well as several eleemosynary foster care agencies to recover damages for the severe abuse they suffered at the hands of their foster mother, now incarcerated in a Florida state correctional facility. By Memorandum & Order, dated December 18, 2012, the Court approved a settlement between all ten plaintiffs and the City ("2012 Settlement"). (See dkt. # 385.)

Following continued and extensive litigation, the remaining defendants moved for summary judgment. On January 17, 2014, the Court dismissed the claims against the foster agencies brought by L.J. and J.G. but denied the motion as to the claims of all other plaintiffs. On June 13, 2014 the parties reached a settlement through mediation. Plaintiffs now move for court approval of that settlement.

I. Plaintiffs' Awards

Local Civil Rule 83.2(a) provides that any "action by or on behalf of an infant or incompetent shall not be settled or compromised, or voluntarily discontinued, dismissed or terminated, without leave of the court."[1] Moreover, "[t]he proceeding upon an application to settle or compromise such an action shall conform, as nearly as may be, to the New York State statutes and rules, but the Court, for cause shown, may dispense with any New York State requirement." Id. In considering a motion to compromise and settle such a claim, the Court must determine whether the amount of the settlement is fair, whether the distribution of proceeds will protect the interests of each plaintiff, and whether the attorney's fees and costs sought are reasonable. See Allstate Ins. Co. v. Williams, 2006 WL 2711538, at *1 (E.D.N.Y. 2006); Local Civil Rule 83.2(a). The Court may authorize payment of "reasonable attorney's fees . . . after due inquiry as to all charges against the fund." Local Civil Rule 83.2(a).

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[1] **Of the eight remaining plaintiffs, only three (S.W., R.E. and S.B.) are incompetent and have guardians who approved this settlement, which, in turn, requires this Court's approval. See Motion to Approve Settlement, dkt. # 490, at 3; EDNY Local Rule 83.2. None of the plaintiffs are still infants.**

In determining whether a proposed compromise settlement on behalf of an infant or incompetent plaintiff is "fair, reasonable and adequate," the Court compares "the terms of the compromise with the likely rewards of the litigation." Neilson v. Colgate-Palmolive Co., 199 F.3d 642, 654 (2d Cir. 1999) (quotations omitted). A strong presumption exists that a settlement is fair and reasonable where "(i) the settlement is not collusive but was reached after arm's length negotiation; (ii) the proponents have counsel experienced in similar cases; and, (iii) there has been sufficient discovery to enable counsel to act intelligently." Camac v. Lng Beach City School Dist., 2012 WL 3277228, at *4 (E.D.N.Y. 2012). Moreover, "[p]roposed settlements which have been negotiated by the infant's natural guardian carry a presumption that they are fair and in the infant's best interests, and should therefore be afforded some level of deference." De Alvarez v. City of New York, 2012 WL 2087761, at *1 (E.D.N.Y. 2012).

The incompetents do not have natural guardians, but they do have Magistrate Judge Marilyn D. Go. Judge Go has been directly and actively involved in supervising the negotiations that resulted in this settlement, as well as virtually all other aspects of this long and complex litigation. In belt and suspenders fashion, plaintiffs have also sought approval of this settlement from the Florida state court with guardian jurisdiction over the three plaintiffs who remain wards of the state. In that regard, Judge Geiger, of the state Circuit Court for St. Lucie County, Florida has entered orders, dated August 1, 2014 and August 14, 2014, approving these settlements—as he previously did with the 2012 Settlement. The Court stands well-informed by Judge Geiger's determination as to the fairness of the settlement

to those plaintiffs. For these reasons and the safeguards they provide, and to expedite the process for the sake of those plaintiffs who appear to be in financial hardship, the Court finds cause to dispense with any additional requirements that New York law may ordinarily impose as part of a claim compromise proceeding.

The Court has considered the documents submitted in support of the motion and finds that the best interests of the incapacitated plaintiffs will be served by the proposed settlement. As described in Docket # 490, the proposal is fair and reasonable in light of the injuries sustained and the procedural posture of this case. The Court is satisfied, in sum, that the guardians, who have deemed the proposed agreement fair and reasonable, understand the terms of the settlement and have carefully evaluated the risks and benefits of proceeding with litigation. Hence, upon the specified orders below, the proposed settlement is approved.

II. Attorney's Fees and Costs

Judge Geiger also approved payment of requested attorney's fees and costs to plaintiffs' counsel. Under Rule 83.2(a)(2), the Court shall approve "a reasonable attorney's fee and proper disbursements" following "due inquiry after all charges against the fund." Generally, as a matter of public policy, courts "give particular scrutiny to fee arrangements between attorneys and clients." King v. Fox, 7 N.Y.3d 181, 191 (2006) (citation omitted).

Section 474 of the New York Judiciary Law directs that the appropriate amount of attorney's fees to be awarded in an infant or incompetent compromise proceeding is the "'suitable compensation for the attorney for his service therein . . . on behalf of said infant [or incompetent].'" Allstate, at *4 (quoting N.Y. Jud. Law §

474). Thus, any agreement of the guardian is "advisory only" and the amount of the attorney's fees is fixed by order. Id. New York courts have held that attorney's fees amounting to one-third of the total recovery in cases brought on behalf of infants or incompetents constitute "the usual and customary level," while fees in excess of one-third are ordinarily unreasonable. Liss v. McCrory Stores Corp., 7 A.D.2d 738, 738 (2d Dep't 1958). As the forum state, New York's law controls. See Orlandi v. Navistar Leasing Co., 2011 U.S. Dist. LEXIS 99484, at *15-16 (S.D.N.Y. 2011).

Plaintiffs' counsel seeks attorney's fees in the amount of 33 1/3% of the settlement after deduction of costs, in accordance with New York's customary practices. Given that (a) the request mirrors the New York standard, (b) the complexity of this case, (c) the extensive work performed by counsel, and even (d) the request's consistency with the retainer agreement, the Court finds the amount requested appropriate and reasonable. The proposed settlement is, therefore, approved with regard to the attorney's fees requested.

On the matter of costs, however, additional inquiry is required. As part of the 2012 Settlement, plaintiffs requested costs amounting to over 16% of the total settlement. In its December 2012 Order approving that settlement, the Court referred the issue of costs to Magistrate Judge Go. Then, on May 7, 2013 the Court approved disbursement of 75% of the requested costs, with the remainder to continue to be held by plaintiffs' counsel in escrow. (See May 2, 2013 Memorandum & Order, dkt. # 421.)

Further, as part of the 2012 Settlement, the costs allocated to plaintiffs L.J.

and J.G. were far higher[2] than the costs allocated to the other eight plaintiffs because L.J. and J.G. were the only two plaintiffs placed with their foster mother directly by the City, and, accordingly, those two received by far the most money in the 2012 Settlement. As part of the settlement, all plaintiffs agreed that "in the event of a further recovery by plaintiffs in this lawsuit, there should be an accounting of the total costs incurred on behalf of all ten plaintiffs and a reallocation of those costs in an equitable manner proportionate to the pro-rata recovery of each plaintiff." Motion to Approve Settlement, Ex. C, at 3-4. This agreement was intended to ensure that there is "no windfall to any plaintiff based upon the timing of when costs were incurred or when settlement [was] reached." Id. Notably, L.J. and J.G. were the two plaintiffs whose claims against the foster agencies were dismissed by the Court's January 2014 Order, and, therefore, they recovered nothing as part of the instant settlement. Accordingly, L.J. and J.G. appear to be owed money by the other eight plaintiffs as part of the re-allocation of costs related to the 2012 Settlement.[3]

In light of the foregoing, the Court refers the issue of costs and the questions it raises to Magistrate Go for a report and recommendation regarding the reasonableness and propriety of the requested costs, including the possible release of the remaining 25% of the costs component of the 2012 Settlement as well as any

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[2] **Specifically, 62% of the joint costs were allocated to L.J. and J.G., which resulted in their settlement amounts being reduced by $529,342 each, while the other eight plaintiffs had their settlement amounts reduced by just $88,223 each. See Motion to Approve Settlement, Ex. B.**

[3] **Plaintiffs aver that L.J. is owed a refund of $228,873.42 and J.G. is owed a refund of $228,579.10.**

refund that may be due to L.J. and J.G. as non-recovering plaintiffs.

Order

NOW, THEREFORE, upon the foregoing findings, it is hereby

ORDERED, that the guardians are hereby authorized and empowered to settle this action against St. Joseph Services for Children, Inc., Heartshare Human Services and SCO Family of Services in the amounts described in the papers submitted, and to execute a General Release to the defendants conditioned upon the payment of said amount in accordance with this Order and to sign all papers necessary in that connection; and it is further

ORDERED, that the settlement funds be paid in their entirety as set forth herein; and it is further

ORDERED, that the settlement funds, less approved fees and costs, shall be paid to the plaintiffs directly or to the structured settlements funds; and it is further

ORDERED, that the amount of attorney's fees as requested be disbursed to plaintiffs' counsel; and it is further

ORDERED, that the amount of costs sought by plaintiffs' counsel is hereby referred to Magistrate Judge Go for a report and recommendation and that the remaining amount allocated to costs and disbursements shall be held by plaintffs' counsel in escrow pending approval of the amount of costs by the Court; and it is further

ORDERED, that any amount of the costs requested that are disallowed will be distributed two-thirds to plaintiffs *pro rata* in the approved proportion and one-third to plaintiffs' counsel for attorney's fees; and it is further

ORDERED, that the filing of a bond be dispensed with in accordance with N.Y. C.P.L.R. § 1210(c).

SO ORDERED.

Dated: **Brooklyn, New York**
September 11, 2014

s/Eric N. Vitaliano

ERIC N. VITALIANO
United States District Judge