

17-3404-cv
Tedesco v. IBEW Local 1249 Insurance Fund

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated Term of the United States Court of Appeals for the Second Circuit, held at the
2 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the
3 6th day of July, two thousand eighteen.

4
5 Present: ROSEMARY S. POOLER,
6 REENA RAGGI,
7 PETER W. HALL,
8 *Circuit Judges.*

9
10 _____
11
12 WENDY A. TEDESCO,

13
14 *Plaintiff-Counter-Defendant-Appellant,*

15
16 v.

17-3404-cv

18 I.B.E.W. LOCAL 1249 INSURANCE FUND,
19 JAMES C. ATKINS, WILLIAM BOIRE,
20 CHARLES BRIGHAM, MICHAEL GILCHRIST,
21 SCOTT LAMONT, AND EDWIN MOREIRA, JR.,
22 AS TRUSTEE OF THE FUND, DANIEL R.
23 DAFOE, AS ADMINISTRATOR OF THE FUND,

24
25 *Defendants-Counter-Claimants-Appellees.*
26 _____

27
28 Appearing for Appellant: Eric S. Weinstein, Ellenoff Grossman & Schole LLP, New York,
29 N.Y.
30

1 Appearing for Appellee: Jules L. Smith, Blitman & King LLP (Daniel R. Brice, *on the*
 2 *brief*), Rochester, N.Y.

3
 4 Appeal from the United States District Court for the Southern District of New York (Forrest, J.).

5
 6 **ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED,**
 7 **AND DECREED** that the orders of said District Court be and it hereby are **AFFIRMED IN**
 8 **PART AND VACATED IN PART.**

9
 10 Appellant Wendy A. Tedesco appeals from an August 21, 2017 order of the United States
 11 District Court for the Southern District of New York (Forrest, J.), dismissing Appellees'
 12 overpayment claim as moot and an October 20, 2017 order denying Tedesco's motion for
 13 attorney's fees. We assume the parties' familiarity with the underlying facts, procedural history,
 14 and specification of issues for review.

15
 16 Tedesco first takes issue with the district court's reading of our previous summary order
 17 in this matter. In that order, issued on December 21, 2016, we vacated the district court's prior
 18 dismissal of Tedesco's denial-of-benefits claim in light of intervening precedent. *Tedesco v.*
 19 *I.B.E.W. Local 1249 Insurance Fund*, 674 F. App'x 6 (2d Cir. 2016) (summary order). We also
 20 found that Tedesco's overpayment claim failed on the merits. *Id.* at 8-9. Thus, we affirmed the
 21 district court's dismissal of Tedesco's overpayment claim. We went on to say: "As the district
 22 court concluded in connection with defendants' counterclaim, the Trustees [of the Fund]...have
 23 the right to recover, through setoff, any benefit overpayments...." *Id.* at 9. We remanded "for the
 24 district court to determine the amount of money the Fund is entitled to recover." *Id.*

25
 26 On remand, the district court concluded that it did not have jurisdiction to determine how
 27 much money the Fund had the right to recover, because Appellees had already voluntarily
 28 withdrawn their claim. *Tedesco v. I.B.E.W. Local 1249 Insurance Fund*, 14-cv-3367, 2017 WL
 29 3608246, at *11 (S.D.N.Y. Aug. 21, 2017). This determination was correct. *See A.B. Dick Co. v.*
 30 *Marr*, 197 F.2d 498, 502 (2d Cir. 1952) ("[V]oluntary dismissal of a suit leaves the situation so
 31 far as procedures therein are concerned the same as though the suit had never been brought, thus
 32 vitiating and annulling all prior proceedings and orders in the case, and terminating jurisdiction
 33 over it for the reason that the case has become moot.") (internal citation omitted); *see also U.S.*
 34 *D.I.D. Corp. v. Windstream Communications, Inc.*, 775 F.3d 128, 134 (2d Cir. 2014) (same).
 35 Tedesco's argument that our remand was not of Appellees' withdrawn claim for overpayment but
 36 of *her* claim that she had not been overpaid is plainly contradicted by the text of our previous
 37 summary order.

38
 39 Tedesco's challenge to the denial of attorney's fees fares better. We review denials of
 40 attorney's fees under 29 U.S.C. § 1132 for abuse of discretion. *See Donachie v. Liberty Life*
 41 *Assurance Co. of Boston*, 745 F.3d 41, 45 (2d Cir. 2014). "A court necessarily abuses its
 42 discretion when it applies an incorrect legal standard. We review questions of law regarding the
 43 appropriate legal standard in granting or denying attorney's fees de novo." *Scarangella v. Group*
 44 *Health, Inc.*, 731 F.3d 146, 151 (2d Cir. 2013) (internal citation omitted).

1 “[W]hether a plaintiff has obtained some degree of success on the merits is the sole factor
 2 that a court *must* consider in exercising its discretion” to award fees under Section 1132.
 3 *Donachie*, 745 F.3d at 46. As the Supreme Court clarified in *Hardt*, attaining “some degree of
 4 success” is not the same as being a “prevailing party,” *Hardt v. Reliance Standard Life Insurance*
 5 *Co.*, 560 U.S. 242, 254-55 (2010), the latter of which requires a “material alteration of the legal
 6 relationship of the parties” by a court, either in the form of an “enforceable judgment[] on the
 7 merits” or a “court-ordered consent decree.” *Buckhannon Bd. & Care Home, Inc. v. W. Virginia*
 8 *Dep’t of Health & Human Resources*, 532 U.S. 598, 604 (2001). “Some degree of success” does
 9 not mean “trivial success” or a “purely procedural victory,” but it also does not require a success
 10 to be “substantial” or even on a “central issue.” *Hardt*, 560 U.S. at 255. In particular, we have
 11 recognized that “in evaluating ERISA fee applications, the catalyst theory remains a viable
 12 means of showing that judicial action in some way spurred one party to provide another party
 13 with relief, potentially amounting to success on the merits.” *Scarangella*, 731 F.3d at 155. Using
 14 a catalyst theory, where “the parties already have received a tentative analysis of their legal
 15 claims within the context of summary judgment, a party may be able to show that the court’s
 16 discussion of the pending claims resulted in the party obtaining relief.” *Id.*; see also *Slupinski v.*
 17 *First Unum Life Insurance Co.*, 554 F.3d 38, 47 (2d Cir. 2009).

18
 19 The district court called into doubt whether Tedesco achieved “some success on the
 20 merits,” pointing to the fact that any success that Tedesco achieved can be attributed to the
 21 change in the relevant legal standard for reviewing denials of benefits under ERISA that we
 22 announced during the pendency of the previous appeal of this matter. See *Halo v. Yale Health*
 23 *Plan, Directors of Benefits & Records Yale Univ.*, 819 F.3d 42 (2d Cir. 2016). To the extent the
 24 district court’s doubt about Tedesco’s success amounted to a legal determination that the parties’
 25 settlement following our remand and the district court’s subsequent denial of summary judgment
 26 to defendants on part of Tedesco’s denial-of-benefits claim was not “some success,” it was an
 27 error of law. If there had been no settlement and Tedesco had won at trial, Tedesco would clearly
 28 have achieved “some success on the merits” and that success would be just as attributable to the
 29 intervening precedent. Or, to look at it from a different angle, had *Halo* not been passed down
 30 during the pendency of Tedesco’s appeal, Tedesco herself could have convinced us to change the
 31 standard of review. It would be strange to make the definition of “some success” depend on the
 32 order in which we hear cases. “Congress intended the fee provisions of ERISA to encourage
 33 beneficiaries to enforce their statutory rights,” not to dole out awards to attorneys for raising a
 34 legal issue for the first time. *Donachie*, 745 F.3d at 45-46 (internal quotation marks omitted).

35
 36 Even if a party has achieved some success on the merits, district courts “retain discretion
 37 to consider five additional factors in deciding whether to award attorney’s fees.” *Id.* at 46
 38 (internal punctuation omitted). Those five factors, which we first articulated in *Chambless v.*
 39 *Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987), are: “(1) the degree of
 40 the offending party’s culpability or bad faith, (2) the ability of the offending party to satisfy an
 41 award of attorney’s fees, (3) whether an award of fees would deter other persons from acting
 42 similarly under like circumstances, (4) the relative merits of the parties’ positions, and (5)
 43 whether the action conferred a common benefit on a group of pension plan participants.” *Id.* If a
 44 district court decides to consider some of these factors rather than simply granting attorney’s
 45 fees, it “cannot selectively consider some factors while ignoring others.” *Donachie*, 745 F.3d at
 46 47.

1
2 The district court in this case briefly discussed the *Chambless* factors, determining that
3 the Fund demonstrated no bad faith, which meant the fees would not deter future bad conduct,
4 and that “no other circumstances—such as the importance of the case for other ERISA plaintiffs
5 or the relative merits of the parties’ positions—[] tilt the balance in favor of plaintiff.” Special
6 App’x at 32. Regarding the first conclusion, we have repeatedly explained that “‘a party need not
7 prove that the offending party acted in bad faith’ in order to be entitled to attorneys’ fees.”
8 *Donachie*, 745 F.3d at 47 (quoting *Slupinski*, 554 F.3d at 48); *see also Paese v. Hartford Life &*
9 *Accident Insurance Co.*, 449 F.3d 435, 450-51 (2d Cir. 2006); *Locher v. Unum Life Insurance*
10 *Co. of America*, 389 F.3d 288, 298-99 (2d Cir. 2004); *Salovaara v. Eckert*, 222 F.3d 19, 27-28
11 (2d Cir. 2000). “[T]he concepts of ‘bad faith’ and ‘culpability’ are distinct, and either one may
12 satisfy the first *Chambless* factor.” *Donachie*, 745 F.3d at 47. The district court failed to consider
13 whether the Fund exhibited at least some degree of culpability in light of its reliance on two
14 psychiatrists who failed to consult with the treating psychiatrist and its failure to comply with
15 ERISA’s requirements for explaining its decisions. *See Halo*, 819 F.3d at 58. On remand, the
16 district court should consider whether this level of culpability, combined with Tedesco’s partial
17 success on the merits and the Fund’s admitted ability to pay weighs in favor of granting
18 attorney’s fees. We conclude only that once one removes the district court’s overreliance on lack
19 of bad faith, its decision does not “reveal[] [any] particular justification for denying [Tedesco’s]
20 request” for those fees. *Donachie*, 745 F.3d at 47 (internal quotation marks omitted).

21
22 Accordingly, the order of the district court hereby is AFFIRMED IN PART and
23 VACATED IN PART. We REMAND to the district court to determine whether Tedesco is
24 entitled to reasonable attorney’s fees and, if so, the amount of those fees. *See, e.g., Scarangella*,
25 731 F.3d at 151 (vacating and remanding where the “district court did not rely entirely on the
26 correct legal standard in evaluating [applicant’s] eligibility for attorney’s fees”).

27
28 FOR THE COURT:
29 Catherine O’Hagan Wolfe, Clerk
30

The block contains a handwritten signature in cursive script that reads "Catherine O'Hagan Wolfe". To the right of the signature is the official seal of the United States Second Circuit Court of Appeals. The seal is circular with a blue border containing the text "UNITED STATES" at the top and "SECOND CIRCUIT COURT OF APPEALS" at the bottom. The center of the seal is white with a blue star.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

Date: July 06, 2018
Docket #: 17-3404cv
Short Title: Tedesco v. I.B.E.W. Local 1249 Insurance

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 14-cv-3367
DC Court: SDNY (NEW YORK
CITY)
DC Judge: Forrest

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
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DC Court: SDNY (NEW YORK
CITY)

DC Judge: Forrest

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature