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How They Won It: Greenberg Traurig's $50M Counterpunch

By Samuel Howard

Law360, New York (November 17, 2011, 5:43 PM ET) -- When nonprofit investment manager Commonfund sued real estate developer Newport Capital Advisors LLC to kill a contract dispute, it did not foresee a counterattack by litigators from Greenberg Traurig LLP that exposed Commonfund's seamy side and scored a whopping $50 million jury verdict.

The Greenberg litigators, Wayne Gross and Alan Greenberg, had to not only persuade a jury that the nonprofit backer was in fact an avaricious schemer but that a wealthy developer also deserved millions of dollars because it was tossed from a project shortly before the financial crisis hit, putting the properties under water.

"Throughout the trial, we took issues that could have been a weakness and turned them into strengths," Gross said.

Following a four-week trial on Newport's countersuit, a 12-member jury in the Los Angeles Superior Court unanimously ruled in October that Commonfund Realty Investors LLC had breached its fiduciary duties to NCA after ousting the developer from a joint venture to revitalize Hollywood, Calif.

The jury awarded NCA $16.3 million in compensatory damages and $33.98 million in punitive damages — everything Greenberg Traurig had sought for their client.

While the verdict makes the case look like a cakewalk, a closer look at the litigation reveals an uphill battle that showcased Gross and Greenberg's ability to leverage potential weaknesses, whether it be their adversary's nonprofit reputation, the lack of a partnership agreement or the properties' current straits.

The dispute stems from NCA's 2005 joint venture with Commonfund, the nation's largest nonprofit investment manager, to develop four Hollywood properties, including the iconic Hollywood Palladium.

However, in 2007, after the properties gained $35 million in market value, Commonfund tried to jettison NCA, confident that the absence of a finalized partnership agreement skewered NCA's contract claims.

Commonfund initiated the action, suing for declaratory relief that there was no enforceable joint venture. Its case fizzled before trial, leaving Gross and Greenberg to take the reins.

"We had the daunting challenge of taking on a large, reputable nonprofit entity that worked with college endowment funds," Gross said. "We had to show that a nonprofit is nothing more than the executives that run it, and that the executives behind Commonfund were greedy and self-interested and cared nothing about their fiduciary duties to their partners."

Commonfund claimed that the lack of a finished partnership agreement meant that NCA was effectively a service provider working for fees, and not entitled to partnership rights, Gross said.

Rather than bemoan the absence of an authoritative document, Greenberg and Gross used it to support their position, showing that Commonfund put off signing formal documents as a way to maintain leverage over their partner, the attorneys said.

A former federal prosecutor, Gross is accustomed to framing disputes in terms of good vs. evil. The task was made easier because the record showed that Commonfund's unscrupulous executives were bent on undoing the partnership, and even vowed in internal emails to "kick NCA's chief executive in the teeth," Gross said.

Rather than lose jurors to a dry business dispute between two well-heeled opponents, the Greenberg attorneys stressed the aspects that made the fight gripping and identifiable.

"NCA was attempting to build architectural masterpieces for the benefit of the joint venture and the Hollywood community," Gross said. "Commonfund executives, on the other hand, cared only about themselves and were willing to do anything to further their own interests, which included falsely denying that a joint venture ever existed."

After their client took the stand for five days, the litigators drove their point home by playing six hours of deposition footage that helped pull back the nonprofit curtain to expose the Commonfund executives' less laudable exploits.

The footage revealed that the executives of the nonprofit stood to gain seven-figure bonuses in connection with the appreciation of the joint venture properties and had no regard for their partner's interests, Greenberg said.

"The judge was taken aback that we'd show six hours of video, but we were sure the clips offered a compelling and damning view of the defendants," Greenberg said. "We were right, the jurors watched the footage as if it was an action movie."

The Greenberg attorneys knew that if they wielded the footage properly, it would prove a powerful weapon. During closing arguments they played a clip again of one of the executives who reflexively sipped from his coffee cup after particularly tough questions.

Rather than rely on condemnations and exhortations, they played the clip with no sound, focusing the jury on the executive's shaking hand as he raised the cup before answering the question, Gross said.

"The jury watched this 'tell' in silence and was visibly moved by it," Gross said. "We knew, at that moment, that the other side was in deep trouble. Sometimes that most subtle evidence, if used correctly can be the most damning."

Even if they managed to undermine the credibility of Commonfund's executives and prove the existence of the joint venture, Greenberg and Gross still had to nail down a damages amount, no easy feat in a dispute with origins on the other side of the financial crisis.

While the four Hollywood properties held great promise in 2007, the financial crash decimated their value, even sending some into foreclosure, and muddied any attempt to win NCA's rightful share of the assets, Greenberg said. Commonfund maintained that it lost $60 million on the investments, essentially barring any claim for damages.

After mining Commonfund’s documents and emails, however, the Greenberg team not only established that the investor had breached its fiduciary duties to NCA, but pinpointed the date in March 2008 when the developer was effectively ousted, Greenberg said.

Again, it was a question of presenting the dispute in terms that the jury would embrace, framing the fight as a battle between the good and the bad. The litigators found the right metaphor to defeat Commonfund’s claim that it was a no-damages case because the properties’ value cratered after NCA was pushed aside.

“We decided to use the example of a stolen car and told the jury, ‘If someone steals your car and two years later, it crashes and burns, there’s no way the thief can claim you are entitled to nothing.’ And the jurors were absolutely with us,” Gross said.

Greenberg and Gross not only proved the existence of the joint venture and Commonfund's scheme to cut NCA out of a lucrative project, they also demonstrated that Commonfund's abuses were systematic enough to warrant punitive fines.

After a four week trial, the jury needed only half an hour to tack roughly $34 million in punitive damages to the $16 million previously awarded.

--Editing by John Quinn.