

**Gibson v Williams Trading, LLC**

2005 NY Slip Op 30500(U)

May 11, 2005

Sup Ct, NY County

Docket Number: 602644/04

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**PERMAN CASE**

0602644/2004

PART 89

GIBSON, ELODIE FIELDING  
vs  
WILLIAMS TRADING, LLC

SEQ 1

DISCOVERY/PROTECTIVE ORDER

INDEX NO. \_\_\_\_\_  
MOTION DATE 12/7/09  
MOTION SEQ. NO. 001  
MOTION CAL. NO. 8

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

NY SUPREME COURT  
RECEIVED  
MAY 27 2010  
SUPPORT OFFICE

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE

Dated: 5/11/10 105

AK OK

U.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----x  
ELODIE FIELDING GIBSON and LOD  
CONSULTING SERVICES, INC., a Florida  
corporation,

Plaintiffs,

-against-

Index No. 602644/04

WILLIAMS TRADING, LLC and DAVID B.  
WILLIAMS,

Defendants.

-----x  
CAHN, J.

This matter arises out of an employment relationship between plaintiff, as a former employee of the defendant corporation.

Defendants move to disqualify plaintiff's counsel, and for a protective order staying all discovery. Plaintiff cross-moved for summary judgment.

The parties entered into a settlement agreement in 2002 which settled a dispute regarding defendants' alleged mistreatment of plaintiff while she was employed by defendants.

The 2002 settlement agreement required defendants to make installment payments to plaintiff based on a percentage of the corporate defendant's consolidated net income, and other factors, referred to in the complaint as "DNI." It also required defendants to grant plaintiff access to their books and records.

The complaint alleges that defendants failed to grant plaintiff access to their books

and records, and a failed to make the installment payment due July 31, 2004.

On October 29, 2004, defendants made the unpaid installment payment for the second quarter of 2004 by wiring \$191,088 into plaintiff's account, along with an additional \$298,744, as an early payment for the third quarter of 2004. Defendants have also permitted plaintiff to complete her audit.

In going forward with this litigation, plaintiff seeks to recover attorney's fees for the costs of this action, pursuant to paragraph 24 of the 2002 settlement agreement.

Defendants claim that plaintiff's counsel should be disqualified since they "ought" to testify about prior or contemporaneous negotiations. According to defendants, "four partners and numerous associates" at the firm representing plaintiff, Willkie Farr & Gallagher, LLP "drafted, negotiated, and executed" the settlement agreement now sought to be enforced by plaintiff. Because plaintiff has requested disclosure of documents underlying the creation of the agreement, and the definition of "DNI," a key term in the agreement, defendants claim that plaintiff will attempt to go "beyond the four corners of the Settlement Agreement, that events, negotiations, and communications surrounding the Settlement Agreement are relevant to the resolution of this matter," and that Willkie Farr possesses relevant and peculiar information related to the meaning of the term "DNI" as used in the Settlement Agreement.

"[T]he disqualification of an attorney is a matter which rests within the sound discretion of the court." *Matter of Epstein*, 255 AD2d 582, 583-584 (2<sup>d</sup> Dept 1998).

The party seeking disqualification must carry a “heavy burden and meet a high standard of proof” before the lawyer is disqualified.

*Paretti v Cavalier Label Co.*, 722 F Supp 985, 987 (SDNY 1989)(citations omitted).

Applications for disqualification of an adversary’s attorney are subject to close scrutiny, in order to avoid abuse, and to protect a party’s right to freely choose counsel.

*Tekni-plex Inc. v Meyner & Landis*, 89 NY2d 123 (1996); *Crawford v Antonacci*, 297 AD2d 419, 746 NYS 2d 94 (3<sup>d</sup> Dept 2002).

Here, defendants have failed to allege that plaintiff’s trial counsel had any personal prior involvement with the agreement now sought to be enforced. Thus, defendants are seeking to disqualify plaintiff’s counsel on a theory of “vicarious liability,” that all attorneys from the firm should be disqualified if any one of them “ought” to testify on a matter. Defendants do not claim that plaintiff’s counsel will be called to testify on defendants’ behalf, or that counsel will have a conflict of interest should they continue in their representation of plaintiff.

The claim that parol evidence regarding the parties’ negotiations will be needed at trial is based on speculation and conjecture, as is the claimed ambiguity in the meaning of the term “DNI.”

Defendants have failed to show that any particular attorney from the firm representing plaintiff will need to be called as a witness at trial, and certainly not plaintiff’s current trial counsel, who are not alleged to have had any involvement in

drafting the agreement sought to be enforced.

The motion to disqualify is, therefore, denied.

Plaintiff has cross-moved for entry of summary judgment, based on a finding that defendants breached the parties' settlement agreement and that plaintiff is entitled to recover attorney's fees.

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

Defendants apparently attempted to take matters into their own hands, first by withholding the July 31, 2004 payment when they believed plaintiff was not entitled to it, and then by making the payment, during the pendency of this litigation. Defendant has not offered any evidence to support its unpleaded counterclaim of breach by plaintiff. By their own admission, defendants chose "not to continue investigation of the possible improper conduct of Ms. Fielding, and that same day, October 29, 2004" wired funds into plaintiff's account.

Plaintiff has established a prima facie case of entitlement to summary judgment by pleading the existence of the parties' agreement and defendants' breach.

Defendants have not pointed to any provision in the agreement which permitted them to withhold payment pending an investigation into allegedly wrongful conduct.

Defendants have thus failed to raise a triable issue with respect to their own liability for breach of the settlement agreement. Defendants' own admissions of non-payment, and their failure to establish an excuse under the agreement, entitles plaintiff to judgment, as a matter of law. Defendants' subsequent payment of the amounts plaintiff was entitled to under the agreement, cures their wrongful conduct, and clearly limits the damages. By making the payments and permitting the audit, defendants have granted plaintiff the relief she sought in the first and second causes of action. She has thus prevailed in this part of the action, and is the prevailing party. Litigation need not end in a formal decision or judgment for there to be a "prevailing party."

Thus, plaintiff is not now entitled to summary judgment on the first and second causes of action.

Plaintiff's right to attorney's fees turns on the language of paragraph 24 of the parties' agreement:

**24. Prevailing Party.** In the event of a dispute between the parties resulting in litigation or arbitration, the reasonable attorney's fees and costs of the prevailing party shall be paid by the losing party.

Plaintiff has prevailed in this matter by obtaining the relief she sought on both the first and second causes of action, for breach of contract and an accounting, as a result of commencing the action. That defendants have satisfied their contractual obligations after this litigation was commenced does not require this court to redefine the common

meaning of the word "prevail," as defendants urge. Since plaintiff is the prevailing party, she is entitled to recover attorney's fees, pursuant to the plain language of the parties' agreement.

The issue of the amount of attorney's fees that plaintiff is entitled to recover is referred to a referee to hear and report.

In post-motion correspondence to the court, plaintiff claims that defendants have again withheld a quarterly payment, due on January 31, 2005. Defendants claim that they have amended their answer, with the court's permission, to include a counterclaim for breach of the settlement agreement. No such amended answer appears in the court's file. Defendants also offer arguments to bolster their motion to disqualify plaintiff's counsel.

As to alleged breaches by defendants after this action was commenced, plaintiff will have to commence a new action to enforce her rights under the parties' agreement, or may seek to serve an amended complaint.

Accordingly, it is

ORDERED that defendants' motion to disqualify plaintiff's counsel, and for a protective order is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment on the complaint and an award of attorney's fees is granted, to the extent that plaintiff is entitled to attorney's fees in connection with this litigation and otherwise denied; and it is further

ORDERED that the issue of the amount of attorney's fees that plaintiff reasonably

incurred in connection with this action, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion and the entry of judgment is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

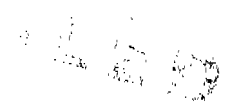
ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee, and it is further

ORDERED that defendants counterclaims are severed from this action.

Dated: May 11, 2005

ENTER

  
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J.S.C.

  
MAY 13 2005  
NEW YORK  
COUNTY CLERK'S OFFICE