

**Aldrich v Marsh & McLennan Cos., Inc.**

2005 NY Slip Op 30519(U)

July 15, 2005

Sup Ct, NY County

Docket Number: 605336/99

Judge: Herman Cahn

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

PRESENT: CAHN  
*Justice*

PART 4921

GEORGE ALDRICH ET AL

INDEX NO. 605336/99

MOTION DATE 1/27/04

MOTION SEQ. NO. 009

- v -

MARSH & McLELLAN & CO. INC.

MOTION CAL. NO. \_\_\_\_\_

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

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

PAPERS NUMBERED	

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

JUL 18 2005

CLERK OF THE COURT

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7/18/05

Alan Cahn  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION



Plaintiffs were initially represented by Levi, Lubarsky & Feigenbaum, LLP, which was granted leave to withdraw in May 2000. Thereafter, plaintiffs retained Gibson, Dunn & Crutcher, LLP. Gibson Dunn appeared on plaintiff's behalf, filing an amended complaint and, as it asserts, interviewed witnesses, reviewed documents, developed litigation strategy, opposed a motion to dismiss, conducted discovery, represented plaintiffs at evidentiary proceedings, and prepared written submissions. NLC, however, ceased paying the firm's bills as of September 2001. As of the close of 2002, the outstanding balance was \$1,150,000.00 (Gregory Aff. [12/30/02] ¶ 3).

In response to a letter from Gibson Dunn requesting payment of its fees, Luessenhop wrote the firm's executive director on November 22, 2002, stating:

We are deeply grateful for the excellent representation from Fred Gregory<sup>[1]</sup> and everyone at your firm, who worked so successfully to advance our case. We are painfully aware that we have not done our part by not paying your bills as they came due.

(Akkapeddi Aff. Ex. G.) She repeated that acknowledgment in a letter to Gregory, dated December 3, 2002, by stating: "I will be most happy to send money to you as soon as it is received in Washington. You have won everything for us to date." (*Id.*)

Due to continued non-payment of its fees, Gibson Dunn moved for leave to withdraw as plaintiffs' counsel. The court granted that motion by order dated January 28, 2003. The order severed the issue of Gibson Dunn's reasonable attorneys' fees herein, referring it to a Special Referee to hear and report.

A hearing commenced before Special Referee Nicholas Doyle on October 22, 2003. The only parties who appeared were Gibson Dunn, by Fred F. Gregory, Esq., and Richard

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<sup>1</sup> A member of Gibson Dunn.

J. Davis, Esq., and two plaintiffs, Edith Anthoine and Thomas W. Tilsley, through their counsel, Alison Anthoine, Esq. Said counsel informed Referee Doyle that Luessenhop advised her before the hearing that she did not plan to attend. The hearing continued until conclusion.

Almost a full year after Gibson Dunn's withdrawal in January 2003, and three months after the conclusion of the Referee's Hearing in October 2003, NLC presently moves to "intervene" in the hearing; or, more accurately, to reopen it. Along with such relief, NLC seeks an order compelling the production of certain documents preparatory to its participation in a reopened hearing; or, alternatively, staying the hearing, *post facto*, and compelling arbitration of the fee issue.<sup>2</sup>

***Discussion:***

Intervention, even as of right, may only be granted "[u]pon timely motion" (CPLR 1012 [a]). The same is, of course, true with regard to intervention by permission (*id.*, 1013). NLC's failure to move for intervention until the passage of a year from the order of reference and three months from the conclusion of the Referee's Hearing violates the mandate of timeliness, warranting denial of the motion (*id.*; *Oparaji v Weston*, 293 AD2d 592 [2d Dept 2002]; *Krenitsky v Ludlow Motor Co.*, 276 AD 511, *lv denied* 277 AD 800 [3d Dept ], *appeal dismissed* 301 NY 609 [1950]).

Apart from NLC's procedural neglect, its belated objection to Gibson Dunn's fee ignores the express requirement in paragraph 4 of Gibson Dunn's "Terms of Retention" (contained in Akkapeddi Aff. Ex. E), that any and all fee disputes be raised within 30 days from

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<sup>2</sup> The court temporarily stayed the Special Referee from issuing his report pending the outcome of the instant motion.

invoicing. NLC not only breached that condition; it praised Gibson Dunn for its representation of plaintiffs and acknowledged their outstanding indebtedness to the firm (*id.*, Ex. G). NLC's failure to follow the fee dispute mechanism in the Terms of Retention, as well as its candid recognition of the quality of Gibson Dunn's professional services and its own liability on account of same, waives its right to contest the fee (*see, Hadden v Consolidated Edison Co. of N.Y., Inc.*, 45 NY2d 466 [1978]). This is especially so, where NLC did nothing to intervene in the fee proceeding until afterward, and for an inordinate period of time (*Oparaji, supra; Krenitsky, supra*).

Moreover, NLC's November 22, 2002, acknowledgment letter – replete with compliments on the quality of Gibson Dunn's work, and confessionals concerning NLC's non-payment therefor – apparently had the effect of inducing the firm to continue working for plaintiffs, without payment. Such conduct gives rise to estoppel, whereby NLC may not now, belatedly, attack the firm's fee application - (*First Union Natl. Bank v Tecklenburg*, 2 AD3d 575 [2d Dept 2003]).

NLC points to a clause in Gibson Dunn's Engagement Letter, dated May 4, 2001 (contained in Akkapeddi Aff. Ex. E), providing that fee disputes are subject to arbitration. However, that clause must be considered in conjunction with paragraph 4 of the Terms of Retention, attached to and referenced in the Engagement Letter, conditioning any fee disputes on notice of objection within 30 days of invoicing (*id.*; *Muzak Corp. v Taft Hotel Corp.*, 1 NY2d 42, 46 [1956] [“The rules of construction of contracts require us to adopt an interpretation which gives meaning to every provision of a contract . . . .”]). As observed, NLC not only failed to do this; it took measures to let Gibson Dunn know – or think – that all was well between them, and

that it would soon be paid.

Consequently, NLC's motion to intervene in the related attorneys' fee proceeding, and to compel the production of certain documents relevant thereto; or, alternatively, to stay the proceeding and compel arbitration of the fee issues, is denied.


Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the stay of issuance of the Special Referee's report is vacated.

Dated: July 15, 2005

ENTER :

  
\_\_\_\_\_  
J. S. C.

**FILED**  
**JUL 18 2005**  
CLERK  
CLERK'S OFFICE