

**Richbell Information Services, Inc. v Jupiter
Partners L.P.**

2006 NY Slip Op 30416(U)

January 30, 2006

Supreme Court, New York County

Docket Number: 605979/1997

Judge: Karla Moskowitz

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
RICHBELL INFORMATION SERVICES, INC. and THE
RICHBELL GROUP LIMITED,

Plaintiffs,

-against-

JUPITER PARTNERS L.P., GANYMEDE L.P., EUROPA L.P.,
JOHN A. SPRAGUE, TERRY J. BLUMER, RIT CAPITAL
PARTNERS PLC, and ERNEST SAUNDERS,

Defendants.
-----X

INDEX NO. 605979/1997

MOTION DATE _____

MOTION SEQ. NO. 020

MOTION CAL. NO. _____

\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 is decided in accordance with the accompanying
Decision and Order.

Dated: January 30, 2006

FILED

FEB 01 2006

COUNTY CLERK'S OFFICE
NEW YORK



KARLA MOSKOWITZ

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

-----X
RICHBELL INFORMATION SERVICES, INC. and
THE RICHBELL GROUP LIMITED,

Index No. 605979/1997

Plaintiffs,

-against-

DECISION AND ORDER

JUPITER PARTNERS L.P., GANYMEDE L.P.,
EUROPA L.P., JOHN A. SPRAGUE, TERRY J.
BLUMER, RIT CAPITAL PARTNERS PLC, and
ERNEST SAUNDERS,

Defendants.

-----X
KARLA MOSKOWITZ, J.:

Defendants move to dismiss the Amended Complaint on the ground that a key fact witness, David Elias ("Elias"), is a party to an agreement to receive a substantial contingent fee dependent on the outcome of this case. Alternatively, defendants seek curative sanctions including the preclusion of Elias' testimony, the invalidation of the fee agreement and the disqualification of counsel. Plaintiffs cross-move to dismiss the champerty-related affirmative defenses based upon section 489 of the Judiciary Law.

This is an action for, inter alia, breach of fiduciary duty in connection with a joint venture. The facts underlying the complaint have been discussed at length in prior decisions of this court and the Appellate Division, First Department. This court presumes familiarity with them. For the following reasons, defendants' motion is granted to the limited extent of declaring the contingent fee agreement with Elias invalid. Plaintiffs' cross-motion is denied.

Defendants' Motion to Dismiss

As is relevant here, David Elias is the 100% owner of plaintiff the Richbell Group Limited ("RGL"), that in turn indirectly owned and controlled plaintiff Richbell Information

Services (“RIS”). In 1997, together with RGL and RIS, Elias commenced this action alleging that defendants had misappropriated plaintiffs’ stock in H-G Holdings, Inc. (“H-G”). In 1998, some of the investors in RIS formed Richbell 1998 Limited (“Richbell 1998”) to provide funding for the continuation of the lawsuit.

In the Spring of 1998, liquidation proceedings commenced against RGL and RIS in the English courts. Elias assigned his claims in this action to Richbell 1998 in June 1998. In December 1998, Elias entered into a series of agreements with Richbell 1998 (the “1998 Agreements”) entitling him to a share of any litigation proceeds remaining after satisfaction of RIS’ and its creditors’ claims. In exchange, Elias agreed to give assistance to “enable the Litigation to be conducted and pursued to a successful conclusion,” including statements, depositions and court appearances. (See affidavit of Allan J. Arffa, sworn to March 21, 2005 Ex. F at § 7.4 [b]).

By order entered March 15, 2002, this court dismissed the complaint in its entirety. The Appellate Division, First Department reinstated three of the thirty-three causes of action by order dated September 23, 2003 (see, Richbell Information Svcs., Inc. v Jupiter Partners, LP, 309 AD2d 288 [1st Dept 2003]). However, the Appellate Division, First Department did not restore any claims Elias asserted in his individual capacity.

In April 2004, Elias entered into a Supplemental Agreement (the “2004 Supplemental Agreement”) that revised the formula for the allocation of recovery from the litigation. Elias’ recovery remained contingent upon the outcome of the case, and he agreed that he would “give his wholehearted support to the Litigation” by way of testimony. (Arffa Aff. Ex. I).

There is no dispute that by virtue of the 1998 Richbell Agreements and the 2004 Supplemental Agreement (collectively, the "Fee Agreements"), Elias has entered into an arrangement making his fee contingent upon the outcome of this case. Accordingly, Disciplinary Rule 7-109, 22 NYCRR § 1200.40 of the Code of Professional Responsibility governs the propriety of the Fee Agreements. That rule provides in pertinent part:

Contact with Witnesses

* * *

C. A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

1. Expenses reasonably incurred by a witness in attending or testifying.
2. Reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel.
3. A reasonable fee for the professional services of an expert witness.

The policy underlying this rule is set forth in Ethical

Consideration 7-28 that states:

Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness.

(See also Creswell v Sullivan & Cromwell, 704 F Supp 392, 404 [SDNY 1989] vacated in part, aff'd in relevant part, 922 F2d 60 [2d Cir 1990] ["[c]ase law confirms that witnesses should not

be paid on a contingency basis . . . Rule 7-109(c) has been incorporated into the laws of New York and reflects a legislative judgment of the need for discouragement of contingent fee arrangements”][internal citations and quotations omitted]).

Elias is a fact witness rather than an expert witness, and, as noted, his compensation is contingent upon the outcome of the case rather than merely upon the expenses of testifying. The agreements are thus in “direct conflict” with DR 7-109(c) (see Creswell, supra at 401). Nevertheless, plaintiffs and Elias argue that under Wellington v Kelly, 84 NY 543 [1881]), Elias’ status as a shareholder in the plaintiff entities places the agreement under an “antecedent interest exception.” Further, plaintiffs and Elias argue that CPLR § 4512 specifically authorizes testimony from interested witnesses.

For the reasons discussed in Creswell, supra, neither of these arguments save the Fee Agreements. First, Wellington is an “antique” case that predates the enactment of DR § 7-109 (see Creswell, supra at 402). Second, certified copies of documents were at issue in Wellington rather than witness testimony (Id.). Although Elias’ status as a shareholder and former party may explain his motives for entering into the agreements, it does not justify the application of a questionable, dated exception that the rule never codified.

Plaintiffs’ reliance on CPLR 4512 fails under the plain language of that section. The statute provides that “[e]xcept as otherwise expressly prescribed, a person shall not be excluded or excused from being a witness, by reason of his interest in the event or because he is a party.” DR § 7-109[c] does “expressly prescribe” the testimony of a person whose interest derives from a contingent fee arrangement (Creswell, supra at 404). Insofar as the agreements guarantee Elias,

a non-party, a direct financial benefit in exchange for testimony leading to a “successful conclusion,” it is unnecessary to resolve the parties’ dispute over whether and under what circumstances Elias’ indirect recovery would be greater or lesser in the absence of the agreements.

Plaintiffs’ arguments are not without force, however, with respect to the appropriate remedy. Dismissal is not a preferred remedy for the violation of the disciplinary rule at issue (see, e.g., Cosgrove v Sear Roebuck & Co., 1987 WL 33595 [SDNY 1987]; Creswell, supra; Wagner v Lehman Bros. Kuhn Loeb, Inc., 646 F Supp 643 [ND Ill 1986]), especially given that Elias was a party at the time the complaint incorporated key factual allegations. Nor would the exclusion of Elias’ testimony serve “substantial justice” in view of its centrality and the importance to the case of that testimony (see Creswell, supra at 404) and that defendant may explore his credibility (and indirect interest in the outcome) on cross-examination. Disqualification of plaintiffs’ counsel is also unnecessary. No one will call plaintiffs’ counsel as fact witnesses at trial (compare, Creswell, supra), and there was no impropriety in their alleged “acquiescence” to the agreement given the novelty of the issues and their good faith arguments in its defense.

The remaining option — invalidation of the agreements to the extent they guarantee Elias a contingent fee — is sufficient to cure the violation of DR § 7-109(c) (see Creswell, 404-05). The agreement itself anticipates this remedy in section 6.2 of the Supplemental Agreement, that states that Elias shall receive compensation only “provided any such payment is permitted by law.” (Arffa Aff. Ex. G). Accordingly, the court hereby holds that Elias is not permitted to receive contingent payments under the Richbell Agreements and that his recovery is limited to

whatever he would be entitled to as a shareholder in the absence of the relevant provisions of the Richbell Agreements.

Plaintiffs' Cross-Motion to Dismiss the Defense of Champerty

Plaintiffs argue that the court should dismiss the affirmative defense of champerty because the claims of Elias and RIS fall within the exception to Judiciary Law § 489 for assignments made in bankruptcy. Specifically, plaintiffs' rely upon an August 6, 1999 order of Justice Cozier (the "August 1999 Order"), that found that RGL's Liquidators' assignment was subject to the exception. Plaintiffs assert that the Liquidators for Elias and RIS' execution of Deeds of Adherence (the "Deeds") similarly cured the champerty problem.

The motion is denied. Plaintiffs unsuccessfully sought the same relief in prior applications to this court and the Appellate Division, First Department. By order dated April 10, 2000 (the "April 2000 Order"), Justice Cozier denied a motion to renew based upon the Deeds, holding that the court could not consider events transpiring after the original motion. The court also dismissed the action, holding that plaintiffs had failed to comply with a directive in the August 2000 Order to replead only causes of action pre-dating the assignments to Richbell in 1998. By order dated May 18, 2000, Justice Cozier also denied plaintiffs' motion to supplement the record with an executed copy of one of the Deeds and a copy of an English High Court order approving the RIS funding arrangement.

Plaintiffs appealed from each of the three orders. In connection with the champerty issue, plaintiffs' briefs set forth arguments identical to those interposed on this motion. The resulting Appellate Division decision (see, Richbell Information Svcs., Inc. v Jupiter Partners, LP, 280

AD2d 208 [1st Dept 2001] considered and recited the facts relevant to the alleged bankruptcy exception, making specific reference to plaintiffs' efforts to supplement the record with the Deeds and the High Court order (Richbell, supra at 214). The court concluded that it could not resolve the champerty issue on the record before it:

Under the circumstances, questions of fact exist as to whether Richbell 1998 is a stranger and whether the funding agreements were designed to preserve investments in the Richbell Group companies that would be wiped out if the suit were not successful and the Elias pyramid collapsed. We therefore cannot find as a matter of law that the sole purpose of the assignments was to prosecute the suit or that the funding agreements conflict with the purpose of § 489.

Richbell, supra at 219.

In short, the Appellate Division rejected plaintiffs' request to resolve the champerty issue as a matter of law. This court cannot, on an identical record, accord that relief. To the extent plaintiffs imply that the Appellate Division erred in failing to resolve or remand the issue, this court is not the appropriate forum to raise that argument. "If [a] remittitur is erroneous in any respect, or if there is any uncertainty as to the effect of the language employed, the remedy is by an application to the appellate court to amend it" (City of New York v Scott, 178 Misc2d 836, 843 [Civ Ct NY City 1999]; see, Wiener v Wiener, 10 AD3d 362 [2d Dept 2004]; Brown v Brown; 169 AD2d 487, 487 [1st Dept 1991][“(t)he IAS court was without authority to grant the relief requested by appellant, which was previously denied by an order of this Court”]).

Accordingly, it is

ORDERED that defendants' motion is granted to the extent of declaring that the provisions of any agreement between David Elias and 1988 Richbell Limited purporting to


entitle Elias to a fee contingent upon the outcome of this case are invalid and unenforceable, and it is further

ORDERED, that defendants' motion is otherwise denied, and it is further

ORDERED, that plaintiffs' motion to dismiss defendants' champerty-related affirmative defenses is denied.

Dated: January 30, 2006

ENTER:



J.S.C.

FILED
FEB 01 2006
COURT CLERK'S OFFICE
NEW YORK