

**Madison Liquidity Invs. 119, LLC v Griffith**

2007 NY Slip Op 30985(U)

April 23, 2007

Supreme Court, New York County

Docket Number: 0602099/2004

Judge: Carol R. Edmead

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**CAROL EDMEAD**  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 35

MADISON Liquidity Investors

INDEX NO. 602099/04

MOTION DATE 3/1/07

MOTION SEQ. NO. 003

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

- v -

Griffith, Patricia Hope

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

Upon the foregoing papers, it is ordered that this motion

**FILED**  
APR 30 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

The within motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that, defendant's motion for summary judgment dismissing the complaint is hereby granted, and plaintiff's cross motion for summary judgment on the complaint is hereby denied, and the Clerk of the Court is hereby directed to enter judgment accordingly; it is further

ORDERED that, with respect to defendant's counterclaim against plaintiff, summary judgment is granted in favor of defendant on the issue of liability. The balance of this action shall continue; it is further

ORDERED that counsel for defendant shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: 4/23/07



**CAROL EDMEAD** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK; PART 35

-----x  
MADISON LIQUIDITY INVESTORS 119, LLC,

Plaintiff,

-against-

Index No.: 602099/2004

PATRICIA HOPE GRIFFITH,

DECISION AND ORDER

Defendant.

-----x

EDMEAD, J.:

MEMORANDUM DECISION

**FILED**  
APR 30 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

This action involves a breach of contract claim plaintiff Madison Liquidity Investors 119, LLC against defendant Patricia Hope Griffith, arising out of a certain Transfer of Claim Agreement (the Agreement) between Madison Liquidity Investors, LLC (MLI) and defendant. Pursuant to the Agreement, MLI, an affiliate of plaintiff engaged in the business of trading in bankruptcy claims, purchased defendant's employee compensation claim filed in the chapter 11 case of her former employer Inacom Corp. (Inacom), which sought bankruptcy protection in June 2000.

The complaint alleges that MLI assigned all of its rights under the Agreement to plaintiff, entitling plaintiff to commence the instant action against defendant. The complaint also alleges that defendant breached the Agreement, by refusing to reimburse or otherwise transfer to plaintiff those distributions that were made under Inacom's plan of liquidation (the Inacom Plan) for the benefit of defendant's possible tax withholding obligations.

In response to the complaint, defendant denies plaintiff's allegations and asserts a counterclaim. The counterclaim alleges that plaintiff breached the Agreement by refusing to share with defendant the financial information and proceeds of distributions received by plaintiff under the Inacom Plan. The counterclaim seeks recovery of certain additional distributions that defendant is allegedly entitled to receive pursuant to the Agreement, as well as attorneys' fees and costs incurred by defendant in the event defendant is the prevailing party in this action.

After defendant filed her answer, the parties engaged in rather protracted and acrimonious discovery. Defendant filed a motion seeking, among other things, an order striking plaintiff's interrogatory responses and, alternatively, summary judgment dismissing the complaint. Plaintiff filed a motion to compel the production of documents by defendant, and also a cross motion for summary judgment on its complaint. On March 1, 2007, based on the parties' submissions and an in-court conference with counsel, this court entered an order (the Interim Order) adjudicating and resolving the discovery disputes, and instructed the parties to comply with the directives set forth in the Interim Order.

This decision addresses defendant's motion for summary judgment dismissing the complaint and granting her counterclaim, as well as plaintiff's cross motion for summary judgment on the complaint. They are consolidated for disposition.

### Background

Defendant was a senior executive of Inacom. After Inacom and its affiliates filed for bankruptcy relief in June 2000, defendant filed a proof of claim in their chapter 11 cases that reflected unpaid compensation pursuant to her employment contract with Inacom. On November 8, 2002, defendant and Inacom entered into a stipulation, which fixed defendant's wage claim at the amount of \$839,494.13 (the Claim). On or about November 11, 2002, MLI and defendant entered into an agreement for the sale of the Claim, but such agreement was subsequently superseded by the Agreement, with an "effective date" of June 18, 2003. A copy of the Agreement is annexed as an exhibit to the complaint.

Pursuant to the terms of the Agreement, MLI agreed to purchase the Claim from defendant at 15.5% of its fixed amount (i.e. at \$130,121.59). MLI also agreed to pay defendant 50% of any and all distributions that MLI actually received in respect of the Claim which exceed 28% of its fixed amount (i.e. at \$235,058.35). It is undisputed that defendant has received from MLI, in the aggregate, \$130,121.59 for the sale of her Claim.

Pursuant to the Inacom Plan, which was approved by the bankruptcy court on May 23, 2003, MLI or plaintiff has received at least two interim distributions on account of the Claim. Plaintiff's Brief, page 7, footnote 4. The administrator for the Inacom Plan withheld from such distributions federal and state

taxes that were attributable to the tax withholding obligations of defendant, as an Inacom employee. Plaintiff took exceptions to these withholdings, and demanded that defendant reimburse plaintiff the withheld amounts. Plaintiff takes the position that the amounts were improperly withheld for the benefit of defendant, and should have been paid to plaintiff as part of the distributions on account of the Claim. When defendant refused to comply with the demand, plaintiff commenced the instant action, alleging that defendant breached her contractual obligations by failing to "transfer to Madison the entirety of the distributions received or payable on account of the [C]laim." Complaint, ¶ 11.

In her motion for summary judgment dismissing the complaint, defendant argues that the withheld taxes were legally mandated, and that the Agreement does not require her to reimburse plaintiff for the amounts withheld from distributions. Defendant also seeks summary judgment on her counterclaim, alleging that plaintiff breached the Agreement, by failing to pay her the additional distributions she is entitled to receive under the Agreement and the Inacom Plan. Plaintiff opposes defendant's motion, and cross moves for summary judgment on the complaint.

For the reasons stated below, defendant's motion for summary judgment dismissing the complaint is granted, and plaintiff's cross motion is denied. As to the counterclaim, summary judgment is granted in favor of defendant on the issue of liability.

### Discussion

In considering a motion for summary judgment pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), that:

[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted.]

Following the Court of Appeals' guidance, the lower courts uniformly scrutinize summary judgment motions, as well as the facts and circumstances of each case to determine whether relief should be granted. *Martin v Briggs*, 235 AD2d 192, 196 (1<sup>st</sup> Dept 1997) ("[i]n considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion"). Summary judgment is generally granted in favor of the movant if there are no material and triable issues of fact. *Francis v Basic Metal, Inc.*, 144 AD2d 634 (2<sup>nd</sup> Dept 1988). Moreover, general allegations of a conclusory nature that are unsupported by competent evidence are insufficient to defeat a motion for summary judgment. *Alvarez*, 68 NY2d at 324-325.

The Complaint Should Be Dismissed

Plaintiff argues that defendant breached the Agreement by failing to transfer to plaintiff the distributions she received on the Claim. Plaintiff also argues that the amounts withheld from distributions for defendant's tax obligations were purchased by it and belong to it. Specifically, plaintiff argues that it is entitled to the "universe of sums paid or payable on account of the [C]laim, and the Agreement was certainly not required to list every theoretical possible way in which such payments could improperly be diverted" to pay for the tax withholdings for the benefit of defendant. Plaintiff's Brief, page 13.

These arguments are unpersuasive. First, plaintiff does not dispute that the distributions in respect of the Claim were made directly to it, rather than to defendant, by the Inacom Plan administrator. Thus, defendant cannot transfer to plaintiff distributions that she never received. Further, the Agreement does not address tax withholding or defendant's obligation to reimburse plaintiff in the event that amounts are withheld from distributions. The absence of such provisions in the Agreement is significant, particularly where the Inacom Plan contained a provision stating: "[t]o the extent applicable, the Plan Administrator will comply with all tax withholding and reporting requirements imposed on it by any governmental unit, and all distributions pursuant to this Plan will be subject to such

withholding and reporting requirements." See Excerpt of Inacom Plan attached as Exhibit "I" to Affirmation of Jeffrey Duban in support of defendant's motion. Because defendant was an employee of Inacom, distributions on account of the Claim pursuant to the Inacom Plan constituted wages or compensation paid to defendant, and taxes were required to be withheld by Inacom or the Plan designee, as employer, from such distributions. See 26 U.S.C. § 3401 (a) (definition of "wages") and § 3402 (a) (requirement of tax withholding from employee wages by employer).

Notably, the Inacom Plan was dated March 24, 2003, and was approved by the bankruptcy court on May 23, 2003. Plaintiff's Cross Motion, Exhibits "J" and "K." Yet, the Agreement was executed by the parties in June 2003, after filing of the Inacom Plan and its approval by the court. Thus, plaintiff's contention that "[a]t the time the [A]greement was signed ... the Plan of Liquidation had not even been approved" is factually incorrect. Plaintiff's Brief, page 15. In this regard, plaintiff's argument that defendant never had constructive receipt of (or control over) the distributions and was not required to pay or withhold taxes on such distributions is unpersuasive, in light of the fact that applicable tax law provides that where an assignment of income is made after it is earned, the income is constructively received by the assignor when it is received by the assignee. 26 U.S.C. § 451 (general rules for taxable year of inclusion of

income). Here, income was earned by defendant and calculated pursuant to the terms of her employment contract with Inacom, and when the income (i.e. the Claim with respect to such income) was assigned by defendant to plaintiff, distributions in respect of the Claim under the Inacom Plan were deemed to have been constructively received by defendant (even though they were paid directly to plaintiff), and taxes should be withheld from these distributions. Further, plaintiff's argument that taxes were "improperly withheld" from the distributions is flawed as a matter of law in light of applicable tax law, as well as the fact that, as the ultimate assignee of the Claim pursuant to the Agreement, plaintiff stepped into the shoes of defendant, the assignor of the Claim. *In Re Stralem*, 303 AD2d 120, 123 (2d Dept 2003) ("[w]hen a valid assignment is made, the assignee steps into the assignor's shoes and acquires whatever rights [and obligations] the latter had").

Despite the lack of specific provisions in the Agreement addressing tax withholding issues, plaintiff alleges that defendant, "through her husband, repeatedly promised to pay [the withheld] amounts, but never did." Plaintiff's Brief, page 7. The purported oral promise made by defendant's husband, a nonparty to this action, is hearsay and cannot be admitted as evidence. *W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157, 162 (1990) ("[e]vidence outside the four corners of the document

as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing"). Even assuming, *arguendo*, that the parties might have orally agreed to modify the Agreement, the lack of any writing and consideration in support of such modification would render the purported modification ineffective. *Ralco, Inc. v Citibank*, 32 AD3d 301 (1<sup>st</sup> Dept 2006) (alleged oral consent to contract modification not supported by separate consideration was unenforceable). Moreover, because plaintiff is in the business of purchasing bankruptcy claims and should have exercised due diligence in reviewing bankruptcy plans, the absence of any provision in the Agreement addressing tax withholding issues with respect to defendant's wage Claim should be construed against plaintiff, as the drafter of the Agreement. *Matter of Cowen & Co. v Anderon*, 76 NY2d 318, 323 (1990) (deficiency or ambiguity in the contract should be construed against its drafter).

Based on the foregoing, plaintiff has failed to provide any legal or factual support for its allegation that defendant has breached the Agreement. Hence, defendant's motion for summary judgment dismissing the complaint should be granted, and plaintiff's cross motion for summary judgment should be denied.<sup>1</sup>

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<sup>1</sup> Plaintiff's further allegations that defendant might have improperly filed her tax returns or received tax refunds, or that the Inacom Plan administrator might have improperly withheld taxes from the distributions to plaintiff, should be addressed to the relevant tax authorities rather than to this court.

Defendant's Counterclaim

Defendant's counterclaim against plaintiff is two-folded:

(1) defendant's right to share with plaintiff all additional distributions under the Inacom Plan that exceed 28% of the Claim (i.e \$235,058.35); and (2) defendant's right to recover against plaintiff all attorneys' fees and costs if defendant prevails in this litigation. Both elements of the counterclaim are based on the explicit terms of the Agreement, which are undisputed by plaintiff. In response to the counterclaim, plaintiff contends that it "has not received [an amount exceeding \$235,058.35] and does not expect to do so", and that defendant's purported "breach of the Agreement precludes any recovery by her under that Agreement." Plaintiff's Brief, page 17, footnote 7.

With respect to any and all additional distributions under the Inacom Plan, the Interim Order directed plaintiff to produce to defendant all checks and documents received by it from Inacom, because plaintiff had covenanted to do so in the Agreement. As of the date hereof, this court has not been informed by the parties as to whether plaintiff has complied with the Interim Order. Thus, while plaintiff is liable to pay defendant for any distribution that exceeds the stipulated sum under the Agreement, the amount of payment damages (if any) that defendant may recover against plaintiff cannot be determined at this time, until the parties have submitted relevant documentation establishing same.

With respect to defendant's counterclaim for attorneys' fees and costs, paragraph 10 of the Agreement provides, in relevant part, that "[i]f any dispute regarding the subject matter of this Agreement results in litigation, the prevailing party shall be entitled to the recovery of attorneys' fees and costs." Because the court has decided defendant's motion for summary judgment in her favor, for the reasons discussed above, defendant is the prevailing party, and is therefore entitled to recover against plaintiff all actual, necessary and reasonable attorneys' fees and costs incurred in connection with this litigation.

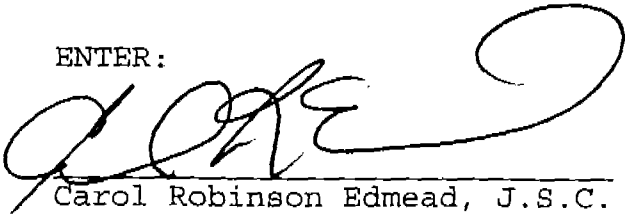
Accordingly, it is

ORDERED that, defendant's motion for summary judgment dismissing the complaint is hereby granted, and plaintiff's cross motion for summary judgment on the complaint is hereby denied, and the Clerk of the Court is hereby directed to enter judgment accordingly; it is further

ORDERED that, with respect to defendant's counterclaim against plaintiff, summary judgment is granted in favor of defendant on the issue of liability. The balance of this action shall continue.

Dated: April 23, 2007

ENTER:

  
Carol Robinson Edmead, J.S.C.

CAROL EDMEAD  
J.S.C.

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