

Kilgour Williams Group Inc. v Ben-Artzi

2020 NY Slip Op 32891(U)

September 2, 2020

Supreme Court, New York County

Docket Number: 654091/2018

Judge: Barry Ostrager

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

PRESENT: HON. BARRY R. OSTRAGER. PART IAS MOTION 61EFM
Justice

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		INDEX NO.	654091/2018
Kilgour Williams Group Incorporated, Daniel Williams, and Colin Kilgour, Plaintiffs,		MOTION NO.	009
	- v -		
Eric Ben-Artzi, and Model Risk LLC, Defendants		DECISION & ORDER ON MOTION	

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OSTRAGER, J.

Before the Court is Motion Sequence 009 by plaintiffs Kilgour Williams Group Incorporated, Daniel Williams and Colin Kilgour for summary judgment. In accordance with the ruling on the record on September 2, 2020, plaintiffs’ motion for summary judgment is granted. The following is a recitation of the undisputed facts in this action:

Plaintiffs Daniel Williams and Coilin Kilgour are expert consultants and officers of plaintiff Kilgour Williams Group Incorporated (“Kilgour Williams Group”). Defendant Dr. Eric Ben-Artzi (“Ben-Artzi”) is a former risk officer at Deutsche Bank, who became a Securities and Exchange Commission (“SEC”) whistleblower. Defendant Model Risk LLC is Ben-Artzi’s company.

From June 1, 2010 to November 14, 2011 Ben-Artzi worked at Deutsche Bank and sometime therein discovered accounting irregularities. Ben-Artzi reported his findings internally

and then in March 2011 to the SEC. In August 2011, Ben-Artzi retained the law firm of Labaton Sucharow LLP ("Labaton") to investigate, prepare, and file whistleblower submissions with the SEC. In November 2011, Ben-Artzi terminated from Deutsche Bank.

On November 4, 2011, Labaton, as attorneys for Ben-Artzi, commenced a proceeding for a whistleblower award before the SEC by filing a Form TCR on Ben-Artzi's behalf. At some point thereafter, Labaton suggested that Ben-Artzi needed experts to support his SEC claim, which led to Ben-Artzi's meeting and hiring the Kilgour Williams Group – and specifically plaintiffs Colin Kilgour and Daniel Williams.

On April 24, 2013, Ben-Artzi's company - defendant Model Risk LLC, entered into an agreement with Kilgour Williams Group concerning the Whistleblower Claim (the "Expert Agreement"). Pursuant to the Expert Agreement, among other things, Kilgour Williams Group agreed to render expert consulting services in support of the Whistleblower Claim in exchange for specified consideration, in the form of a professional fee in an amount equal to Three Percent (3%) of the gross value of any whistleblower award rendered, by the SEC, upon the Whistleblower Claim. *See* NYSCEF Doc. No. 294.

On June 21, 2013, Labaton, acting on behalf of Ben-Artzi, submitted to the SEC the expert report of Kilgour Williams Group authored by Williams and Kilgour. On July 2, 2013, Kilgour and Williams traveled to Washington and gave a presentation to the SEC, which the Initial Declaration by the SEC described as lengthy and detailed and which included a slide presentation.

In December 2013, Ben-Artzi, Kilgour and Williams began discussing modifying the Expert Agreement to compensate plaintiffs for providing additional expert consulting services in

support of the Whistleblower Claim. By this time, Ben-Artzi's wife had commenced proceedings for a divorce in the State of Washington. As negotiations over the additional compensation progressed, developments in the divorce proceedings threatened to delay payment of the fees that Kilgour Williams Group had earned under the Expert Agreement.

On May 21, 2014, the Whatcom, Washington County Court issued its divorce decree concerning the marriage of Ben-Artzi and his now former wife, Gillian Hopson ("Hopson"). The divorce decree awarded Hopson 50% of the "net proceeds" of the SEC whistleblower matter, as defined in its Findings of Fact and Conclusions of Law. The Whatcom County Court's Findings of Fact and Conclusions of Law, dated May 21, 2014, defined the net proceeds as the gross amount of the award in the SEC proceedings, less attorneys' fees for Thad Guyer and Jordan Thomas; fees of experts; court reporter expenses and any other expenses directly related to the litigation. *See* NYSCEF Doc. No. 296.

On August 1, 2014, Ben Artzi, acting through his company, defendant Model Risk, entered into a written "Tri-Party Agreement" with Kilgour, Williams and Kilgour Williams Group. The Tri-Party Agreement modified the Expert Agreement to provide for additional compensation by: (a) increasing Kilgour Williams Group's fee to five percent (5%) of any Whistleblower award that the SEC's Office of the Whistleblower pays to Ben-Artzi; and (b) transferring to Kilgour Williams Group, Kilgour and Williams the intellectual property that Kilgour Williams Group developed in the work product it provided under the Expert Agreement. As consideration for the transfer of the intellectual property, Kilgour Williams Group, Kilgour and Williams agreed to submit their own Whistleblower Claim to the SEC using the intellectual property (the "KWG Whistleblower Claim"), and to pay to Model Risk 60% of any award that they received from the KWG Whistleblower Claim. *See* NYSCEF Doc. No. 299.

Pursuant to the Tri-Party Agreement, on August 11, 2014, Kilgour Williams Group, Kilgour and Williams submitted their TCR form to the SEC as a first step in obtaining a Whistleblower award.

On or about August 12, 2014, Ben-Artzi's counsel, Jordan Thomas of Labaton, credited Kilgour and Williams in a letter to the SEC, in which he stated that Kilgour and Williams had provided extensive factual research and expert analysis with respect to Labaton's submissions dated June 21, 2013, August 16, 2013 and December 4, 2013.

On May 26, 2015 the SEC reached its settlement with Deutsche Bank. On June 30, 2015, the SEC issued a Notice of Covered Action No. 2015-61 in the proceeding captioned In the Matter of Deutsche Bank, AG, Administrative Proceeding File No. 3-16557 (the "Notice of Covered Action"). The Notice of Action announced an order imposing civil penalties on Deutsche Bank of \$55 million for violations of the Securities and Exchange Act. The publication of the Notice of Covered Action triggered a 90-day deadline to claim a whistleblower award by submitting to the SEC a form WB-APP. Both Ben-Artzi and Kilgour Williams Group timely applied for awards.

On August 10, 2015, the Court of Appeals for the State of Washington affirmed the Whatcom County Court's rulings regarding the divorce decree in their entirety. *See* NYSCEF Doc. No. 297.

On July 27, 2016, Amy Friedman, an Assistant Director in the Division of Enforcement of the SEC, and one of the primary Enforcement attorneys responsible for the investigation of Deutsche Bank, submitted her First Declaration to the SEC's Claims Review Staff to assist the Staff in making its preliminary and final determinations of awards to whistleblowers. Ms.

Friedman noted that the report submitted by plaintiffs in aid of Ben-Artzi's claim was voluminous and contained many exhibits.

On July 27, 2016, the SEC issued its Preliminary Determination of the whistleblower award claims in the Notice of Covered Action. The Preliminary Determination awarded Ben-Artzi 15% of the monetary sanctions collected or to be collected in the Deutsche Bank action, which amounted to \$8.25 million. The Preliminary Determination denied the request of plaintiffs for a whistleblower award. The Preliminary Determination took judicial notice that the Whatcom County divorce decree directed Ben-Artzi to pay the expert fees of plaintiffs, and expressly recognized that plaintiffs may wish to pursue a claim to a portion of any award paid to Ben-Artzi. Plaintiffs timely contested the Preliminary Determination.

On August 17, 2016 Ben-Artzi wrote to Jane A. Norberg, Deputy Chief, Office of the Whistleblower, and informed the SEC of his decision not to accept the whistleblower award described in the Preliminary Determination.

On August 18, 2016, Ben-Artzi published an editorial in the *Financial Times*, in which he stated he would not accept his whistleblower award because the SEC did not fine the executives at Deutsche Bank who were responsible for the wrongdoing. He said that by fining Deutsche Bank, the SEC was punishing the victims, which were the bank's shareholders and rank and file employees. He stated in the article that his lawyers and ex-wife had a claim on a portion of his award, which he was not at liberty to reject. He requested that his share of the funds awarded to him be distributed to the injured shareholders. *See* NYSCEF Doc. No. 301.

On August 24, 2016, Kilgour, Williams and Ben-Artzi executed a written Letter Agreement. In the Letter Agreement, Ben-Artzi agreed to request that the SEC Office of the

Whistleblower direct payments as follows: (a) \$247,500 to Kilgour Williams Group under the Expert Agreement; (b) \$1,250,000 to Colin Kilgour; and (c) \$1,250,000 to Daniel Williams. *See* NYSCEF Doc. No. 289.

On October 28, 2016, Ben-Artzi submitted a letter to the SEC supporting the request of plaintiffs to the SEC for reconsideration of the Preliminary Determination denying their claim for a whistleblower award.

On July 11, 2017 Amy Friedman (SEC) submitted her Second Declaration in which she described plaintiff's expert report as "absolutely critical to our investigation" and stated that the report "played a key role in the investigation." (Second Declaration at p. 9.) She described how the SEC "used that expert report in connection with our proffer sessions with Deutsche Bank and ensuing settlement negotiations with the Company." (Second Declaration at pp. 9-10.)

On November 30, 2017, the SEC issued its Final Determination. The Final Determination awarded Dr. Ben-Artzi 15% of the \$55 million settlement with Deutsche Bank, which amounts to \$8.25 million. However, it denied the claim that Kilgour Williams Group submitted as whistleblowers. Plaintiffs timely appealed the Final Determination to the United States Court of Appeals for the District of Columbia Circuit.

On December 14, 2017, two weeks after the SEC issued its final determination in the whistleblower proceedings, Ben-Artzi's ex-wife, Hopson, submitted a motion to the Whatcom County Superior Court for an order to direct the SEC to deposit funds into the Divorce Court's registry and to order an allocation of funds.

On December 26, 2017, Ben-Artzi submitted his own declaration in opposition, proposing to transfer the entire SEC award to the registry of the Whatcom County Superior

Court and proposing an allocation of the entirety of the award to Hopson and himself. Ben-Artzi's proposal was explicit that nothing be distributed to the Labaton firm and proposed no payment to Kilgour Williams Group, Colin Kilgour or Daniel Williams. *See* NYSCEF Doc. No. 309.

On December 28, 2017, plaintiffs moved to intervene in the above action. On December 29, 2017, the Court granted plaintiffs' motion to intervene and the motion of the Labaton firm to intervene.

On January 3, 2018 the Divorce Court granted Hopson's motion (the "January 2018 Order"). The January 2018 Order directed the SEC to deposit in the Divorce Court's registry Ben-Artzi's entire whistleblower award, less the 18% fee to Labaton. The order provided for the parties, including the intervenors, to petition the Divorce Court "for release or disbursement of the funds consistent with the allocations previously ordered by this Court." *See* NYSCEF Doc. No. 304.

On January 8, 2018, the SEC's Office of the General Counsel responded to the Divorce Court's order by letter stating that the SEC could not transfer the funds to the Divorce Court's registry because, under Federal Regulations, the SEC could not make awards until the resolution of pending appeals of the SEC's Final Determination.

On January 12, 2018, Hopson submitted a motion seeking an order from the Divorce Court disbursing the whistleblower award as follows: (1) directing \$4,335,185.60 to Hopson and \$2,429,814.40 to Ben-Artzi; and (2) creating a trust for the support and education of the children of the marriage with \$928,187 from Ben-Artzi's share of the whistleblower award. Hopson's motion made no provision for payment of expert fees to Kilgour Williams Group and would

have left Ben-Artzi without sufficient funds from the whistleblower award to pay the full amount of the fees he had agreed to pay under the Letter Agreement.

On August 24, 2018, the Divorce Court issued its Findings/Order on Hopson's motion (the "August 2018 Order"). The August 2018 Order clarified the Divorce Court's definition of Net Proceeds as the gross award from the SEC, less the 18% fee to Labaton and the 3% fee to Kilgour Williams Group. The Divorce Court expressly declined to assert jurisdiction over whether plaintiffs had additional rights against Ben- Artzi under the Letter Agreement and Tri-Party Agreement.

On August 16, 2018 the present action was filed in the New York State Supreme Court.

One year later, on August 14, 2019, Ben-Artzi sent an email to the SEC that requested payment of the amounts due under the Letter Agreement, but imposed the additional conditions that those payments not take precedence over his tax liabilities and his "other lawful obligations". *See* NYSCEF Doc. No. 307.

On November 8, 2019, the Second Circuit affirmed the denial of plaintiffs' claims as whistleblowers.

On December 3, 2019, Ben-Artzi sent contradictory instructions by email to the SEC. In that email he instructed the SEC to pay the sums he owes to his wife under the Divorce Decree, and to hold everything else pending resolution of this action and the appeal that was at that time pending in Washington State and which is now resolved. That email further stated, "The SEC is not to distribute any portion of my award to anyone without first obtaining my consent." *See* NYSCEF Doc. No. 308.

On December 16, 2019, plaintiffs made a motion in this action for provisional remedies, which sought to prevent Ben-Artzi from transferring or receiving \$1,807,726.37, and which sought the appointment of a receiver to hold that sum pending this Court's further order or judgment directing payment of those funds.

On January 15, 2020, this Court granted the motion in part by requiring Ben-Artzi's attorney at the time, to hold up to \$1,807,726.37 in its attorney escrow account. On February 3, 2020 this Court entered a Stipulation and Order (modifying Jan. 15 order) which directed Ben-Artzi's counsel to give instructions to the SEC to pay to the escrow account of Ben-Artzi's counsel, \$1,807,726.37 from the whistleblower award, to be held pursuant to the Court's order of January 15, 2020.

On February 11, 2020, plaintiffs' attorney Anthony Harwood, submitted a joint letter to the SEC with counsel for Hopson and Labaton authorizing the SEC to distribute the whistleblower award pursuant to the orders of this Court and the Divorce Court. In a separate email to counsel for Hopson and Labaton, Mr. Harwood confirmed his express reservation of rights on plaintiffs' behalf with respect to the distribution of funds to Hopson and the trust. That email stated, "the joint letter is without prejudice to the rights of my clients, Colin Kilgour, Dan Williams and Kilgour Williams Group Incorporated, including their rights to seek to recover from Eric Ben-Artzi, Gillian Hopson individually and as trustee the full amounts due to my clients under their agreements with Dr. Ben-Artzi. That reservation of rights applies to any amounts that the SEC distributes pursuant to this letter and/or the orders of the Washington State Courts."

Thereafter Ben-Artzi's prior counsel gave the instructions to the SEC to pay funds to counsel's escrow account pursuant to this Court's order. On February 24, 2020, Ben-Artzi dismissed his counsel in this action.

On June 4, 2020, after Ben-Artzi retained new counsel, the Court issued another Stipulation and Order, directing Ben-Artzi's new counsel to instruct the SEC, on behalf of Ben-Artzi, to pay the \$1,807,726.37 to the escrow account of plaintiffs' attorney, Harwood Law PLLC, to be held pursuant to the Court's Order of January 15, 2020. On July 22, 2020 the SEC paid the funds to Harwood Law's escrow account.

On August 3, 2020, plaintiffs' counsel filed this motion by Order to Show Cause. The Court heard oral argument and rendered a decision on the record of September 2, 2020, granting plaintiffs' motion for summary judgment based on Ben-Artzi's anticipatory breach of the Letter Agreement by his statements to the divorce court making no provision for payment to plaintiffs, by sending the request to the SEC with extra-contractual terms, and by subsequently sending contradictory instructions to the SEC which indicated the SEC should not pay plaintiffs as agreed.

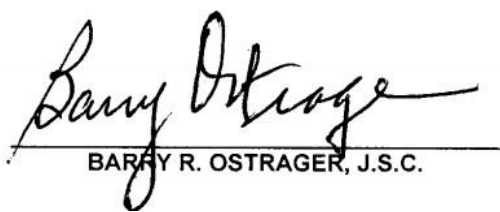
Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is granted; and the Clerk is directed to enter judgment: (1) in favor of plaintiff Kilgour Williams Group Incorporated and against defendants Eric Ben-Artzi and Model Risk LLC, jointly and severally, in the amount of \$247,500.00 with prejudgment interest at the statutory rate of 9% per annum from December 31, 2018, as calculated by the Clerk of the Court; and (2) in favor of plaintiff Daniel Williams and against defendants Eric Ben-Artzi and Model Risk LLC, jointly and severally, in the amount of

\$1,250,000.00 with prejudgment interest at the statutory rate of 9% per annum from December 31, 2018; and (3) in favor of plaintiff Colin Kilgour against defendants Eric Ben-Artzi and Model Risk LLC, jointly and severally, in the amount of \$1,250,000.00 with prejudgment interest at the statutory rate of 9% per annum from December 31, 2018, upon plaintiffs' e-filing of a Proposed Judgment directed to the County Clerk; and it is further

ORDERED that plaintiffs are entitled to attorney's fees pursuant to a written agreement between the parties. Plaintiffs shall move by notice of motion returnable in the Submissions Part by October 5, 2020, setting forth the amounts allegedly owed (including by providing attorney credentials and invoices for services rendered).

Date: September 2, 2020


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE