

**Gibson v Williams Trading, LLC**

2006 NY Slip Op 30668(U)

March 27, 2006

Supreme Court, New York County

Docket Number: 602644/04

Judge: Herman Cahn

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

PRESENT: HERMAN CAHN

PART 49

Index Number : 602644/2004

GIBSON, ELODIE FIELDING

INDEX NO. \_\_\_\_\_

vs

WILLIAMS TRADING, LLC

MOTION DATE 1/24/05

Sequence Number : 007

MOTION SEQ. NO. 007

DISMISS

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

Upon the foregoing papers, it is ordered that this motion

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

Dated: 31 27 06

[Signature]  
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: IAS PART 49

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

Plaintiffs,

-against-

Index No. 602644/04  
Motion Seq. 007

WILLIAMS TRADING, LLC and DAVID B.  
WILLIAMS,

Defendants.

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

Plaintiffs,

-against-

Index No. 602828/05  
Motion Seq. 001

WILLIAMS TRADING, LLC and DAVID B.  
WILLIAMS,

Defendants.

-----X  
**CAHN, J.**

Motion sequence 001 in the action bearing Index No. 602828/2005 and motion sequence number 007 in the action bearing Index No. 602644/2004 are consolidated for decision.

Plaintiffs move for summary judgment and a declaration that they are the prevailing party in both actions, and therefore are entitled to attorney's fees in both actions. Further, Plaintiffs seek summary judgment that Defendant David B. Williams individually breached his fiduciary duty pursuant to the Settlement Agreement. Plaintiffs also seek sanctions and legal fees, pursuant to Administrative Rule 130, as a result of Defendants' claimed frivolous conduct.

Additionally, Defendants move to discontinue the counterclaims, CPLR 3217. Plaintiffs

oppose the discontinuance until the legal fees are paid.

## **Background**

Plaintiff Elodie Fielding Gibson was employed as Chief Financial Officer of Defendant Williams Trading, L.L.C. (“Williams Trading”) a securities brokerage firm. After leaving her employment, she formed a consulting company, Plaintiff LOD Consulting Services, Inc. of which she served as president. LOD and Williams Trading entered into a consulting arrangement.

Defendant David Williams is the managing member of Williams Trading.

Plaintiff's made claims regarding Williams' treatment of Gibson during her tenure with Williams Trading. Those claims were settled in a Settlement Agreement dated May 16, 2002.

This action arises out of alleged breaches of the Settlement Agreement. In the agreement, defendants agreed that Williams Trading would make quarterly payments to Gibson, commencing on July 31, 2002, through January 31, 2007. Further, Paragraph 24 of the Agreement provides that “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.”

Paragraph 11 of the Agreement states that David Williams “shall cause the company [Williams Trading] to comply with the terms of [the agreement]...” Williams Trading made the payments until July 31, 2004, when it refused to make the payment due on that date, stating that it was investigating “wrongful” conduct by Gibson.

**Action # 1, the 2004 action:** After demanding payment, Gibson commenced this action (Action #1), in order to collect the July 31, 2004 payment, together with attorney fees. On October 29, 2004, Williams Trading made the payment due on July 31, 2004, but refused to pay

the legal fees associated with the litigation.

Therefore, Gibson continued the litigation. On February 15, 2005, Williams Trading pleaded two counterclaims. The first sought a declaratory judgment for the proper calculation of the payments, pursuant to the Settlement Agreement. The second alleged breach of contract, asserting that Gibson disclosed certain confidential information in breach of the settlement agreement.

On May 11, 2005, this court decided that Gibson was the prevailing party because Williams Trading conceded that it owed the payment sued for, and that, therefore, Williams Trading was required to pay reasonable attorney fees. This court referred the amount of attorney fees to a Special Referee to hear and report. This court also denied Williams Trading's motions for a protective order and to disqualify Gibson's counsel, and severed Williams Trading's counterclaims. Subsequently, this court again rejected Williams Trading's arguments on reargument.

*Action # 2, the 2005 action:* Williams Trading also did not timely make the payments due January 30, 2005, April 30, 2005, and July 31, 2005. Therefore, Gibson commenced the second action to collect those payments, as well as attorney fees. On September 14, 2005 Williams Trading made the demanded payments but again refused to pay attorneys fees. The motions were thereupon made.

## **Discussion**

### **Declaration that Plaintiffs are the prevailing party in Action 1 and Action 2 and the resulting attorney fees:**

#### *Action 1*

Gibson argues that it is the prevailing party in the remainder of Action 1, Williams'

counterclaims, because Williams Trading seeks to discontinue its counterclaims. Therefore, Gibson argues that, pursuant to the Settlement Agreement, Gibson is entitled to an order that Williams Trading must pay all attorney fees related to the counterclaims.

Williams Trading counters that Gibson is not the prevailing party with regard to the counterclaims. It argues that this court granted leave to assert the two counterclaims. Therefore, in connection with attorney preparation towards the leave to amend, Williams Trading argues that it is the prevailing party and that it, therefore, is entitled to attorney fees. Next, in regards to its motion to discontinue its counterclaims, Williams Trading argues that Gibson is not the prevailing party because a voluntary dismissal of a claim is a “voluntary act” and the adversary cannot be the “prevailing party” thereon. It is noted that this argument is very similar to Williams Trading’s earlier argument that was rejected by this court’s May 11, 2005 decision. There, the court rejected Williams Trading’s argument that Gibson was not the prevailing party because it voluntarily conceded and made the demanded payments.

### *Action 2*

Gibson argues that she is the prevailing party in Action 2 for the same reasons that this court held she was the prevailing party in Action 1: “by making the payments . . . defendants have granted plaintiff the relief she sought. . .” Just as in Action 1, in Action 2 Williams Trading eventually did make the payments. Gibson argues that, therefore, as the prevailing party she is entitled to reasonable attorneys’ fees.

Williams Trading effectively makes the same arguments as in Action No. 1. It argues that it voluntarily altered its conduct by making the payments. Williams Trading also argues that Gibson is precluded from claiming prevailing party status, because she materially breached the

Settlement Agreement, by disclosing Williams Trading's confidential financial statements.<sup>1</sup>

Williams Trading argues that due to Gibson's alleged breach it had the right to withhold the quarterly payments. Therefore, Williams Trading argues, while it later made the payments, Gibson cannot be deemed the prevailing party.

It is clear that in both actions Williams Trading conceded that Gibson was entitled to the payments that it withheld, and indeed made those payments. Further, it voluntarily discontinued counterclaims it had interposed.

Common sense dictates that Gibson, having won her claims is the prevailing party. Pursuant to the agreement, she is therefore entitled to recover her counsel fees.

Plaintiffs' motions are granted.

Defendants' motion to discontinue the counterclaim is also granted. The application for sanctions is also denied.

Settle order.

Dated: March 27, 2006

ENTER:

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

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<sup>1</sup>This claimed breach is the same claim that Williams Trading is now moving to discontinue.