

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

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Kurt M. Heyman, Esquire
Patricia L. Enerio, Esquire
Proctor Heyman LLP
1116 West Street
Wilmington, DE 19801

Joel Friedlander, Esquire
Bouchard Margules & Friedlander, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, DE 19801

Re: *Susan A. Martinez v. Regions Financial Corporation*,
Civil Action No. 4128-VCP

Dear Counsel:

In an August 6, 2009 Memorandum Opinion in this litigation between Plaintiff, Susan A. Martinez, and Defendant, Regions Financial Corporation (“Regions”), I directed counsel to submit an appropriate form of judgment reflecting the rulings in the Opinion.¹ While agreeing in part, the parties differ on two questions relating to the form of order and, hence, seek this Court’s resolution of those issues. The first question is whether a claim voluntarily withdrawn by Martinez after Regions had moved for summary judgment and filed its opening brief should be dismissed with or without prejudice. The second concerns the procedure to be followed for submission and

¹ *Martinez v. Regions Financial Corp.*, 2009 WL 2413858, at *15 (Del. Ch. Aug. 6, 2009).

payment of the invoices for which Martinez seeks advancement and resolution of any disputes regarding those invoices.

For the reasons set out in this letter, I dismiss Count V of Martinez's Complaint with prejudice and instruct the parties to follow the procedures for submission of advancement claims established in the order entered concurrently herewith.

I. BACKGROUND

The first question deals with voluntary dismissal of one of Martinez's claims following Regions' motion for summary judgment. In the Complaint, Martinez asserted five claims against Regions. Martinez moved for partial summary judgment as to one of the claims shortly thereafter. Less than three months after the Complaint was filed, Regions also moved for summary judgment on all claims asserted in the Complaint. The Memorandum Opinion addressed Regions' summary judgment motion as to the first four claims, but did not discuss the merits of Count V, which accused Regions of breaching a Long Term Incentive Plan, because Martinez voluntarily withdrew that claim in her answering brief.²

The second question addresses the mechanics of settling Martinez's invoices for attorneys' fees and expenses. In the Memorandum Opinion, I ordered Regions to pay

² Pl.'s Answering Br. at 3 n.1; Def.'s Answering Br. at 3. *See also Martinez*, 2009 WL 2413858, at *4 n.12 (noting that "[e]ven if Martinez had not expressly withdrawn Count V, by not addressing the merits of Defendant's motion for summary judgment on Count V, she waived any arguments regarding that count.").

Martinez “the reasonable attorneys’ fees and expenses she incurred in this action to date, with interest” and “any future legal fees and expenses as they are incurred.”³ Though Martinez has not yet submitted requests for fees and expenses to Regions, the parties have not been able to agree on the procedure that will govern those requests and Regions’ payment of them.

II. ANALYSIS

A. Dismissal of Count V

Count V of Martinez’s Complaint alleged that Regions breached its Long Term Incentive Plan. Martinez seeks to have Count V dismissed without prejudice, claiming that the policies underlying Court of Chancery Rule 15(aaa) are not implicated here because she did not “stand on Count V in opposition to Regions’ motion to dismiss,” but instead withdrew the claim.⁴ In support of her position, Martinez points to *Hells Canyon Preservation Council v. U.S. Forest Service*, a Ninth Circuit decision which held that a plaintiff’s unopposed oral withdrawal of a claim at a summary judgment hearing resulted in a dismissal without prejudice.⁵ Martinez argues that because Regions neither opposed

³ *Martinez*, 2009 WL 2413858, at *14. This also included payment of “any fees on fees.” *Id.*

⁴ Court of Chancery Rule 15(aaa) provides that a dismissal by the Court of a complaint that was not timely amended in response to a Rule 12(b)(6) motion to dismiss is a dismissal with prejudice.

⁵ 403 F.3d 683, 690 (9th Cir. 2005).

withdrawal of Count V nor suggested that the withdrawal should result in dismissal with prejudice of that claim, she should not be barred from raising Count V in the future.

In response, Regions argues that Martinez cannot voluntarily withdraw a claim in the face of a motion for summary judgment without consequence. Regions contends that this case is distinguishable from *Hells Canyon* because Regions has at all times sought summary judgment of all claims in the Complaint, including Count V, and never consented to Martinez's withdrawal of the claim or amendment of the Complaint in a way that would allow her to reassert the claim at another time. I find Regions' argument persuasive. Thus, Count V will be dismissed with prejudice.

Generally, dismissal by a plaintiff of an individual claim may be treated as an attempt to amend the complaint.⁶ A party may amend its pleading as a matter of course any time before a responsive pleading is filed.⁷ Once a responsive pleading has been filed, however, such an amendment requires leave of the Court or consent by the adverse party—there is no automatic right to amend after a responsive pleading has been filed.⁸ The court, as a matter of discretion, typically will “freely” grant a motion to amend “if justice so requires,” unless the moving party has been guilty of undue delay, bad faith, or

⁶ *Rhodes v. SilkRoad Equity, LLC*, 2007 WL 441940, at *1 (Del. Ch. Jan. 29, 2007) (citing *Loutfy v. R.R. Donnelley & Sons Co.*, 148 F.R.D. 599, 602 (N.D. Ill. 1993)).

⁷ *See* Ct. Ch. R. 15(a).

⁸ *Id.*

dilatory conduct.⁹ But, even though the court may allow a party to amend its complaint by withdrawing an individual claim without prejudice, it is not required to do so.

The burden of showing that a claim withdrawn in the face of a motion for summary judgment should be dismissed without prejudice rests on the party withdrawing the claim. The withdrawing party can request the consent of the party seeking summary judgment to a withdrawal without prejudice. If that consent is not forthcoming, the withdrawing party must either take appropriate steps to preserve its position or attempt to defeat the summary judgment motion.

Here, Martinez neither sought leave of this Court nor the consent of Regions before summarily withdrawing Count V after Regions moved for summary judgment on all claims. Instead, the claim was withdrawn through a footnote in Martinez's brief opposing summary judgment.¹⁰ Martinez did not explain her reason for withdrawing Count V or show good cause as to why that claim should be dismissed without prejudice. Therefore, the Order accompanying this letter will dismiss Count V of Martinez's Complaint with prejudice.

⁹ See *Rhodes*, 2007 WL 441940, at *1 (citing *Lillis v. AT&T Corp.*, 896 A.2d 871, 877 (Del. Ch. 2005); *Catamaran Acq. Corp. v. Spherion Corp.*, 2001 WL 755387, at *3 (Del. Super. May 31, 2001)).

¹⁰ See Pl.'s Answering Br. at 3 n.1. In whole, the footnote reads: "Martinez will not pursue her claim under Count V of her Complaint. Count V did not arise under the Employment Agreement, and therefore, does not implicate Martinez's advancement claim." *Id.* Martinez never moved to amend her complaint or withdraw her claim and there is no indication in the record that she sought Defendant's consent to the withdrawal of Count V without prejudice.

B. Payment of Attorneys' Fees and Expenses

In the Memorandum Opinion, I ordered counsel to submit a proposed form of order that would, among other things, reflect my ruling that Regions must pay Martinez the reasonable attorneys' fees and expenses she incurred in this action to date, with interest, and advance her future fees and expenses, as incurred. Waiting for resolution of the final form of order, Martinez has not yet submitted requests for her fees and expenses to Regions. At this stage, the parties cannot agree on the procedure that will govern Martinez's submission of advancement claims and Regions' payment of those claims.

The mechanism proposed by Martinez provides that Regions shall advance Martinez's fees within thirty days of submission of her invoices. Under this procedure, the invoices must be paid within that time period even if Regions objects to the reasonableness of those fees. Conversely, Regions' proposed procedure would require Regions to pay only those fees it considers reasonable and advise Martinez of any dispute over the unpaid portion.¹¹

While the Court "does not relish ... the task of playground monitor, refereeing needless and inefficient skirmishes in the sandbox," it is nevertheless clear that good faith cooperation by both sides will be difficult.¹² As the Memorandum Opinion made clear,

¹¹ Regions' proposed procedure does not specify how such disputes are to be resolved and implies that no payments of disputed amounts will be made until after they are resolved.

¹² *Reinhard & Kreinberg v. Dow Chem. Co.*, 2008 WL 868108, at *5 (Del. Ch. 2008) ("Given the context in which advancement often arises (i.e., a dispute

Martinez is entitled to payment of reasonable attorneys' fees and expenses, including fees on fees and future legal fees.¹³ At the same time, I do not see Regions' desire for an opportunity to challenge the reasonableness of Martinez's invoice before payment as an "attempt[] to snatch victory from the jaws of defeat." Indeed, Regions should not be required to pay fees and expenses whose reasonableness cannot be appropriately proven.¹⁴

Consequently, a procedure that allows objections to be made and resolved before payment of *disputed* amounts will both uphold Martinez's ability to receive prompt payment and require Regions to pay only those fees that are "reasonable." Such a mechanism does require, however, that this Court or its designee have an opportunity to decide any disputes. In addition, it is important that both parties proceed in good faith and not waste the time and resources of the Court with needless disputes. Accordingly, I have specified a procedure in the accompanying order to enable a review of any objections to the reasonableness of Martinez's requests for payment and expect that the parties will not abuse that procedure.

between the company and its former directors/officers), good faith cooperation is undoubtedly difficult to muster.").

¹³ *Martinez*, 2009 WL 2413858, at *14.

¹⁴ *See Underbrink v. Warrior Energy Serv. Corp.*, 2009 WL 536904, at *5 (Del. Ch. 2009); *see also Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506-07 (Del. 2005) ("[A] reasonableness inquiry is appropriate even if the indemnification agreement does not expressly condition advancement on the reasonableness of the request.").

III. CONCLUSION

For the foregoing reasons, Count V of Martinez's Complaint is dismissed with prejudice. Furthermore, the parties shall follow the mechanics and procedures for submission of advancement claims established in the revised order being entered today.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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