

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

PAMELA E. SMITH individually,

Plaintiff,

-vs-

Case No. 2:09-cv-512-FtM-29SPC

ARROW FINANCIAL SERVICES, LLC a foreign
limited liability company; THE LAW OFFICES OF
ERSKINE & FLEISHER a Florida partnership,

Defendants.

ORDER

This matter comes before the Court on Motion by Defendant The Law Offices of Erskine & Fleisher for Sanctions and Order to Show Cause (Doc. #47) filed on September 11, 2010. Plaintiff filed a Response in Opposition (Doc. #55) on September 22, 2010. On September 21, 2010, Attorney James Giardina filed a Notice of Appearance on behalf of non-party Tiffany Smith (Doc. #53). Tiffany Smith's Response to Defendant's Motion for Sanctions and Order to Show Cause (Doc. #54) was filed on September 21, 2010. Thus, the Motion is now ripe for review.

On August 17, 2010, the Court granted a short extension of the discovery deadline up to and including August 31, 2010 so that the deposition of Tiffany Smith - Plaintiff's daughter and a purported witness in this case - could be taken. Tiffany Smith was served with a subpoena and Notice of Deposition on August 19, 2010 by the Defendant. No objections were posed by either Tiffany Smith or Plaintiff's counsel. Plaintiff's and Defendant's counsel engaged in correspondence leading up to the deposition date, in which Plaintiff's counsel informed opposing counsel that he did not represent Tiffany Smith, who is a non-party. It appears that Tiffany Smith obtained counsel once

she was served with the subpoena. Her counsel informed her that she was not required to attend the deposition because the subpoena did not include a witness fee check as required by Federal Rule 45. Thus, neither Tiffany Smith, her counsel, nor Plaintiff's counsel attended the deposition. Defense counsel traveled to Fort Myers on August 27, 2010 for the deposition, which did not take place.

Defendant has filed the instant Motion requesting that the Court enter an Order imposing an award of attorneys' fees and costs against Plaintiff and her counsel; dismissing with prejudice Count II of the Amended Complaint; and barring Plaintiff from putting on testimony of Tiffany Smith. Defendant also requests that this Court enter a show cause order requiring Tiffany Smith to show cause why she should not be held in contempt for her failure to attend her deposition.

The Court has already found that the deposition of Tiffany Smith should go forward and directed the Parties that the deposition was to take place prior to August 31, 2010. Both Parties are in clear contravention of this Order and the briefing makes clear that they have failed to work together for the deposition to occur within the Court-imposed deadline. Thus, the Parties, Tiffany Smith, and her counsel are to confer in good faith and come to a mutually agreeable time and date within the next two weeks for Tiffany Smith's deposition to take place. Defendant shall inform the Court by next **Tuesday, October 5, 2010** as to the date and time of the deposition. If the Parties are unable to reach a mutually agreeable date and time when the deposition can take place in the next two weeks, the Court will set the date and time and the deposition will take place in the Federal Courthouse in Fort Myers. In any event, the deposition will take place on or before **October 15, 2010**. Once the date and time are set, Defendant can serve a proper subpoena on Tiffany Smith through her attorney of record, which includes the witness fee as required by Federal Rule 45.

Accordingly, it is now

ORDERED:

Motion by Defendant The Law Offices of Erskine & Fleisher for Sanctions and Order to Show Cause (Doc. #47) is **DENIED**. Defendant shall inform the Court by next Tuesday, **October 5, 2010** as to the date and time of Tiffany Smith's deposition. The deposition shall take place on or before **October 15, 2010**.

Tiffany Smith's request for an award of \$2,500 in attorney's fees in her Response to Defendant's Motion for Sanctions and Order to Show Cause (Doc. #54) is **DENIED**.

DONE AND ORDERED at Fort Myers, Florida, this 1st day of October, 2010.


SHERI POLSTER CHAPPELL
UNITED STATES MAGISTRATE JUDGE

Copies: All Parties of Record