

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X

DEBORAH R. COOKE and CHRISTINA
M. RODINO,

11 Civ. 0201 (AKH) (RLE)

Plaintiffs,

-against-

DB 85 GYM CORP. d/b/a DAVID BARTON GYM,
CV II GYM, LLC d/b/a DAVID BARTON GYM,
CV VI, LLC d/b/a DAVID BARTON GYM, DB
BROADWAY GYM CORP. d/b/a DAVID
BARTON GYM, KEVIN KAVANAUGH, and
CARL HELMLE, III,

Defendants.

-----X

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS MOTION TO ENFORCE THE
SETTLEMENT AGREEMENT AND FOR SANCTIONS**

**Corey Stark
On the Brief**

THE DWECK LAW FIRM, LLP
75 ROCKEFELLER PLAZA
NEW YORK, NY 10019

TABLE OF CONTENTS

	<u>Page</u>
Authorities Cited.....	ii
Preliminary Statement.....	1
Argument	2
I. This Court Should Enforce The Settlement Agreement	2
II. Defendants Should Be Sanctioned.....	2
Conclusion	3

AUTHORITIES CITED

Cases

Meetings & Expositions, Inc. v. Tandy Corp., 490 F.2d 714, 717 (2d Cir. 1974) 2

Vari-O-Matic Machine Corp. v. New York Sewing Machine Attach Corp., 629
F.Supp. 257, 258 (S.D.N.Y. 1986) 2, 3

Other Authorities

28 U.S.C. §1927 3

Preliminary Statement

This memorandum of law is submitted on behalf of Plaintiffs in support of their motion to enforce the settlement agreement, and for sanctions against Defendants for bad faith and abusive litigation conduct.

This is an employment discrimination case. Briefly stated, this matter is based upon shocking and repeated harassment, and disparate treatment/discipline, which eventually culminated in the illegal termination of Plaintiffs' employment. Defendants harassed and discriminated against Plaintiffs because of their sexual orientation.

On August 31, 2012, the parties reached an agreement to settle this matter. (Stark Dec. ¶2).¹ After negotiation, the terms the settlement agreement between the parties were reduced to writing (the "Settlement Agreement"). (Stark Dec. ¶4 and Exhibit "2").² Pursuant to Section 1(a) of the Settlement Agreement, Defendants' deadline to deliver the settlement proceeds expired 17 days after Plaintiffs executed the Settlement Agreement. (Stark Dec. Exhibit "2"). Plaintiffs executed the Settlement Agreement on September 24, 2012. (Stark Dec. Exhibits "2" and "3"). Despite this, Defendants have failed to deliver the settlement proceeds to Plaintiffs. To date, the settlement proceeds are nearly two weeks overdue.

Defendants have insurance coverage for the claims herein. (Stark Dec. ¶9). Defendants' insurance carrier has tendered the settlement proceeds to Defendants. (Stark Dec. ¶9). The settlement proceeds are under the control of Defendant Kevin Kavanaugh ("Kavanaugh"). (Stark Dec. ¶9). Despite receiving the settlement proceeds from

¹ References to (Stark Dec. ___) are to the Declaration of Corey Stark, which is dated October 23, 2012.

² Plaintiffs submitted Exhibit "2" to the Hon. Alvin K. Hellerstein, but did not file it electronically because the terms of the Settlement Agreement are strictly confidential.

Defendants' insurance carrier, in direct contravention of the terms of the Settlement Agreement, Kavanaugh has elected to refrain from delivering the settlement proceeds to Plaintiffs. (Stark Dec. ¶9).

Argument

I. This Court Should Enforce The Settlement Agreement

A court has the inherent power, and indeed the duty, to enforce a settlement in a case pending before it. *Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974); *Vari-O-Matic Machine Corp. v. New York Sewing Machine Attach Corp.*, 629 F.Supp. 257, 258 (S.D.N.Y. 1986).

In this case, there is no factual dispute concerning whether the parties entered into a settlement agreement. On August 31, 2012, the parties agreed to a settlement amount during a mediation session through the Southern District of New York's Alternative Dispute Resolution Program. (Stark Dec. ¶2). Thereafter, the parties negotiated the terms of the settlement and incorporated them into the Settlement Agreement. (Stark Dec. ¶4). On September 24, 2012, Plaintiffs signed the Settlement Agreement and delivered it to Defendants' attorneys. Despite this, Defendants failed to deliver the settlement proceeds. (Stark Dec. Exhibits "2" and "3"). It appears that Defendants will not abide by the terms of the Settlement Agreement voluntarily. Accordingly, this Court should exercise its authority to enforce the Settlement Agreement.

II. Defendants Should Be Sanctioned

Sanctions are available when a party is forced to resort to motion practice in order to enforce a settlement agreement. *Vari-O-Matic Machine Corp.*, 629 F.Supp. at 259.

Sanctions are appropriate upon a showing that the noncompliant party acted in bad faith or engaged in abusive litigation conduct. *Id.*; 28 U.S.C. §1927.

Defendants' conduct is worthy of sanctions. Defendants have received the settlement proceeds from Defendants' insurance carrier. (Stark Dec. ¶9). Defendants are well aware that the deadline to deliver the settlement proceeds to Plaintiffs expired nearly two weeks ago. (Stark Dec. ¶9 and Exhibit "2"). Nevertheless, Defendants have not requested an extension of time or offered any excuse for their failure to abide by the terms of the Settlement Agreement. (Stark Dec. ¶9). Defendants have, instead, ignored their obligations. The facts reflect that Defendants' bad faith has necessitated this motion. Accordingly, Defendants should be ordered to pay Plaintiffs sanctions in the sum of \$1,125.00.³

Conclusion

For the reasons set forth hereinabove, it is respectfully submitted that this Court should enforce the Settlement Agreement and award Plaintiffs sanctions.

Dated: New York, New York
October 23, 2012

THE DWECK LAW FIRM, LLP



By: Corey Stark (CS-3897)
Attorneys for Plaintiffs
75 Rockefeller Plaza
New York, New York 10019
(212) 687-8200

³ Three hours of attorney time at \$375.00 per hour.