UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

VICTORIA ZWERIN, on behalf of herself and those similarly situated,

Plaintiff,

v.

533 SHORT NORTH LLC, et al.,

Defendants.

Case No. 2:10-cv-488
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Terence P. Kemp

OPINION AND ORDER

This matter is before the Court on Plaintiffs' Motion to Increase Bond. (ECF No. 119.) For the reasons set forth below, the Court **GRANTS** Plaintiffs' Motion.

I.

The parties in this case engaged in settlement negotiations beginning in November 2011. The parties agree that a settlement was reached on December 31, 2011. By joint motion of the parties (Doc. No. 80), this Court preliminarily approved the Confidential Settlement Agreement on June 7, 2012 (Doc. No. 82).

On August 31, 2012, the Court held a hearing on Plaintiffs' Unopposed Motion for Certification of a Settlement Class, Final Approval of the Class Settlement and Approval of the Fair Labor Standards Act Settlement. (Doc. No. 86.) All parties were represented at the hearing and there were no objections to the settlement. The Court, having reviewed the Confidential Settlement Agreement *in camera*, granted the plaintiffs' unopposed motion, certified the Settlement Class, and approved the Confidential Settlement Agreement. The Court issued the following judgment and dismissed this case:

ORDERED AND ADJUDGED . . .

1. The Final Settlement Approval Hearing took place on August 31, 2012 at 10:00 a.m.

2. Ten (10) days from the date of this Order, Defendants shall transmit the Settlement Payment to Plaintiffs' counsel for administration of the class proceeds to the class members.

3. Within twenty-one (21) days from the date of this Order, Plaintiffs' counsel shall mail the Individual Payments to Representative Plaintiff and the Class Members, and distribute the first installment of attorneys' fees and reimbursement of litigation expenses to Plaintiff's Counsel.

4. Thereafter, the Defendants shall comply with the installment payment plan outlined in the Settlement Agreement.

5. The Court shall retain jurisdiction to enforce the Settlement Agreement until the final payment is made by Defendants thereunder.

(Doc. No. 90.) The Court then dismissed this action.

Since that time, the defendants have refused to perform their obligations under the Confidential Settlement Agreement. The defendants' position is that the plaintiffs have breached the Agreement's confidentiality provisions, thereby releasing the defendants from the contract. The defendants filed a motion to dismiss based upon this argument and the plaintiffs filed a motion to enforce the settlement agreement and to accelerate the due date of the installment payments.

On November 2, 2012, this Court denied the defendants' request for dismissal and granted the plaintiff's request to enforce the settlement agreement; however, the Court denied the plaintiff's request to accelerate the agreement so that the entire amount of the settlement became due. (Doc. No. 100.) The Court concluded that since it had approved the Confidential Settlement Agreement, the plaintiffs had not breached it, and that if there was a breach prior to

the Court's approval of the Agreement the defendants waived their right to complain about it:

> The alleged breaches in the instant action occurred on May 25 and 31, 2012. The Court, however, was asked to approve the parties Confidential Settlement Agreement on August 24, 2012–three months after the alleged breaches. The Court held a hearing on the request on August 31, 2012. All parties were represented at that hearing and were directly asked if there were any objections to the Court approving the Agreement and entering judgment accordingly. There were no objections.

Id. at 4.

The Court went on to explain:

> The defendants do not provide any reason for their delay in requesting relief from this Court. Indeed, the defendants indicate throughout their briefing that they became aware of the *Dispatch* article when it was published [on May 31, 2012] and "immediately" asked the plaintiffs' counsel to submit a retraction. The defendants aver that the plaintiffs at first agreed to prepare and submit a retraction, but that they later reneged on this offer. The defendants, however, continued the negotiation, finalization of the negotiations and request of this Court's approval of the Confidential Settlement Agreement. The Court finds that the defendants' acts of asking this Court to approve the settlement without any objection unequivocally imported their purpose to sleep upon their rights, and not to assert them.

Id. (citing *Natl. Football League v. Rondor, Inc.*, 840 F. Supp. 1160, 1167 (N.D. Ohio 1993) (Under the doctrine of estoppel by acquiescence, a party will be held to have lost his rights against another party, if the first party has committed some act which "amount[s] to an assurance to the [second party], express or implied, that [the first party] would not assert his . . . rights against the [second party]."); *see also Zivich v. Mentor Soccer Club, Inc.*, Case No. 95-L-184, 1997 Ohio App. LEXIS 1577, 1997 WL 203646 at *12 (Ohio Ct. App. 1997) (holding under doctrine of estoppel by acquiescence a plaintiff loses his rights against a defendant if he committed some act amounting to an assurance he would not assert his rights), superceded by statute on other grounds as noted in *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 2002 Colo. LEXIS 528, 31 Colo. Law. 230 8 (Colo. 2002)).

The Court also addressed the plaintiffs' mistaken belief that the Confidential Settlement Agreement was no longer confidential because it is the subject of further litigation. The Court found no bad faith in this mistake and simply directed the Clerk to remove the Agreement that the plaintiffs had filed on the docket and to place it under seal.

Although the Court found that the defendants could not back out of a properly negotiated and approved settlement agreement based upon events that occurred and were known before finalizing the contractual agreement, the Court did caution the plaintiffs about future behavior: "The plaintiffs and their counsel are here admonished to forthwith abide by the confidentiality agreements made throughout their negotiations with the defendants and in the Confidential Settlement Agreement." *Id.* at 5.

Since the Court's November 2, 2012 Opinion and Order directing the defendants to comply with the Confidential Settlement Agreement, the plaintiffs have twice moved for an order requiring the defendants to comply with that Order. This Court granted both requests. (Doc. No. 106, 112.)

The defendants have appealed to the Sixth Circuit and this Court has stayed enforcement of the judgment pursuant to Federal Rule of Civil Procedure 62(d). That rule entitles a defendant to an automatic stay of enforcement of a judgment during the disposition of any appeal by posting a supersedeas bond. Because the amount of the bond was determined based upon the amount of the confidential settlement between the parties, the Court directed the Clerk in a sealed order to accept the bond from the defendants. (Doc. No. 119.)

The plaintiffs have now moved to increase the bond based on the fact that all of the scheduled payments established in the Confidential Settlement Agreement have become due,

thereby causing the amount of the supersedeas bond to be insufficient. This Court has jurisdiction to determine whether to increase the bond despite the fact that this case is on appeal. *See Ribbens Int'l, S.A. de C.V. v. Transp. Int'l Pool, Inc.*, 40 F. Supp. 2d 1141, 1143 (C.D. Cal. 1999) ("The Court agrees with TIP that it has jurisdiction to hear and decide this ex parte application for enforcement of the supersedeas bond and stay of execution (application) despite the fact that a notice of appeal has been filed in this Court."; *Sheldon v. Munford, Inc.*, 128 F.R.D. 663, 665 (N.D. Ind. 1989) ("[T]his Court has jurisdiction to regulate the collection proceedings including the enforcement of the supersedeas bond . . . [despite the pending appeal].").

II.

The defendants argue that not only should the Court deny the plaintiff's request to increase the amount of the supersedeas bond, it should decrease by half the amount. The defendants contend that the plaintiffs are not in compliance with this Court's November 12, 2012 Order directing them to "forthwith abide by the confidentiality agreements made throughout their negotiations with the defendants and in the Confidential Settlement Agreement." (Doc. No. 100 at 5.) The defendants' arguments are not well taken.

The defendants do not rely on any purported breach that occurred *after* the Court directed the plaintiffs' in its November 2, 2012 to abide by the confidentiality agreements. Instead, the defendants re-argue their previous assertions related to the plaintiffs' alleged breaches of the Confidential Settlement Agreement, which this Court has already ruled upon, and explained *supra*.

The only complaint upon which the defendants rely that allegedly occurred after the

November 2, 2012 decision is the contention that the "plaintiffs' counsel continues to use and publish the newspaper story from May 31, 201[2] in the *Columbus Dispatch* about the settlement, in which he and several plaintiffs were quoted as proclaiming 'victory' and disparaging the defendants and their business practices, as a means of promoting himself on his internet blog where he maintains a direct link to the article on the blog website!" (Doc. No. 120 at 2.) The defendants, however, provide no evidence that such a link exists on the plaintiffs' counsel's website, this Court's search for the link was unfruitful, and indeed, the plaintiffs deny any such link exists:

> Defendants' continued knowing misrepresentations to this Court are unethical on their face. For example, a citation on page 2 of Defendants' Opp., repeated on page 4, referring to the undersigned's blog, continues to make an accusation that is demonstrably false. While Defendants assert that the blog "provides a direct link to the article published by the Columbus Dispatch on May 30 and 31, 2012 about the settlement," Defendants are well aware that there is no (nor has there ever been) such a link.

(Doc. No. 123 at 1 fn. 1.)

Consequently, the Court finds that there is nothing present in this case to cause the Court to forego the imposition of a supersedeas bond in an amount sufficient to "protect[] the non-appealing party 'from the risk of a later uncollectible judgment' and also 'provides compensation for those injuries which can be said to be the natural and proximate result of the stay.'" *Hamlin v. Charter Twp. of Flint*, 181 F.R.D. 348, 351 (E.D. Mich.1998) (citations omitted). Therefore, the defendants shall post an additional amount that will account for the installment payments that have become due, an estimated amount of attorneys fees referred to in the Confidential Settlement Agreement, and an estimated amount of post-judgment interest. *See United States ex rel. Lefan v. Gen. Electric Co.*, 397 F. App'x 144, 151 (6th Cir. 2010) (noting

that generally "the amount of the [supersedeas] bond usually will be set in an amount that will permit satisfaction of the judgment in full, together with costs, interest, and damages for delay"); *Norton v. Canadian Am. Tank Lines*, No. 06-411-C, 2009 WL 3172105, at *1 (W.D. Ky. Sept. 29, 2009) ("Courts generally require that the amount of the [supersedeas] bond include the full amount owed under the award, post-judgment interest, attorney's fees and costs." (quoting *Verhoff v. Time Warner Cable. Inc.*, No. 05-cv-7277, 2007 WL 4303743, at *3 (N.D. Ohio Dec.10, 2007))). The Court shall issue under seal an Order directing the Clerk to accept the amount this Court finds appropriate here.

IV.

For the reasons set forth above, the Court **GRANTS** Plaintiffs' Motion to Increase Bond. (ECF No. 119.) The Defendants are **ORDERED** to submit to the Clerk of this Court an amount set forth in an Order that shall issue under seal forthwith.

IT IS SO ORDERED.

12-18-2013
DATE

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE