Incentive Capital v. Camelot Entertainment Group et al Doc. 11

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UNITED STATES DISTRICT COURT

DISTICT OF UTAH, CENTRAL DIVISION

INCENTIVE CAPITAL, LLC, a Utah Limited Liability Company, Plaintiff, v. CAMELOT ENTERTAINMENT GROUP, INC., a Delaware Corporation; CAMELOT FILM GROUP, INC., a Nevada Corporation; CAMELOT DISTRIBUTION GROUP, INC., a Nevada Corporation, ROBERT P. ATWELL, an individual; JAMIE R. THOMPSON, an individual; STEVEN ISTOCK, an individual; TED BAER, an individual; PETER JAROWEY, an individual, Defendants.	**DEFENDANT PETER JAROWEY'S OBJECTIONS TO PLAINTIFF'S PROPOSED ATTORNEYS' PLANNING MEETING REPORT** Civil No. 2:11-CV-00288 Judge Clark Waddoups

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Defendant Peter Jarowey ("Jarowey"), by and through his attorneys, respectfully submits his objections to the "Proposed Attorneys' Planning Meeting Report" submitted by Plaintiff Incentive Capital, LLC ("Incentive") on October 10, 2011 (the "Proposed Report") (Docket No. 116).

Summary of Objections

Pursuant to the Proposed Report, Incentive has requested that the Court enter an order forcing Jarowey to participate in expensive and time-consuming discovery when (i) the parties have settled, (ii) Jarowey has not been served, (iii) Jarowey is not a principal of the corporate defendant, and (iv) dispositive motions are pending. Under these circumstances, entry of an order authorizing the discovery set forth in the Proposed Report would be oppressive, unduly burdensome, and an inefficient use of the parties' resources.[1]

Argument

Incentive's request for an order authorizing discovery against Jarowey as set forth in the Proposed Report should be denied for the following reasons:

1. The Parties Have Settled.

Counsel for Camelot (with the express authority of co-defendants Ted Baer ("Baer") and Jarowey), and counsel for Incentive, settled this matter by agreeing to the essential business terms of a deal. Under Utah law, that agreement to settle is binding on Incentive. A finalized, formal and detailed "settlement agreement" is not required. McKelvey v. Hamilton, 211 P.3d 390 (Utah Ct. App. 2009) (letters between the parties' attorneys prove that the parties had entered into an enforceable settlement agreement).

[1] Attempts to negotiate a Proposed Report, which would have taken these facts into consideration, were unsuccessful.

The agreement to settle can only be set aside if Incentive can prove that its counsel (Mr. Pia) did not have the authority to settle on behalf of his client (Incentive). See, e.g., Johnson v. Utah State Tax Comm'n, 2000 U.S. App. LEXIS 23175, 8-9 (10th Cir. 2000) ("Once it is shown that an attorney has entered into an agreement to settle a case, a party who denies that the attorney was authorized to enter into the settlement has the burden to prove that authorization was not given.") (quoting Turner v. Burlington N. R.R., 771 F.2d 341, 345-46 (8th Cir. 1985) and applying Utah law).[2]

Because the parties have entered into an enforceable settlement agreement, forcing Jarowey to expend time and money participating in discovery would be inappropriate.

2. Jarowey Has Not Been Served, And His Motion To Quash Is Pending.

On May 31, 2011, Jarowey moved to quash the service of the summons and complaint based on the undisputed fact that Incentive's counsel had served Jarowey's son, instead of Jarowey. (Docket No. 47). Incentive conceded the error via a "Stipulation." (Docket No. 86). Incentive then tried again, and, in violation of Massachusetts law, failed to properly serve Jarowey. (Docket No. 72). Therefore, on August 22, Jarowey moved to quash service based on, among other things, the fact that the Process Server filed a fraudulent affidavit, asserting that he personally served Jarowey at this home, which is impossible because Jarowey was hundreds of miles away that day. (Docket Nos. 95, 96 and 97). Incentive served its opposition to the motion on

[2] We understand that Camelot and Incentive may soon move the Court for an order staying the litigation. Theses objections are necessary, however, to protect Jarowey's interests should that motion, for whatever reason, not be made.

September 6 (Docket No. 106), and Jarowey's reply is due on October 28 (Docket No. 115).

Incentive's Proposed Report would require Jarowey to exchange his Rule 26(a) Initial Disclosures by November 9, only days after his reply papers are due and well in advance of a ruling by the Court on the motion to quash. An order endorsing the Proposed Report would require Jarowey to sit for a deposition, answer up to 25 interrogatories and produce documents at a time when he is not yet a proper party to the action. As a matter of federal law, persons who have not been served, and who are not parties to a lawsuit, are not subject to discovery in the pending action. They must be subpoenaed for information: nonparties are served with subpoenas, and only parties are served with notices. Fed.R.Civ.P 45 (outlining procedures for issuing subpoenas on non-parties), 26 (requiring *parties* to provide initial disclosures), 33(a) ("a party may serve on any *other party* no more than 25 written interrogatories") (emphasis added).

Until Jarowey is a party to this case, he should not be subject to the discovery demands of the Proposed Report.

3. <u>Jarowey Is An Independent Contractor, Not A Principle Of Camelot.</u>

It is undisputed that Jarowey was never an employee of the defendant corporation and he is not a signatory to any of the loan-related documents at issue in this action. <u>See</u> Amended Complaint (Docket No. 2). He is not a public corporation that trades shares on the open market with deep pockets for protracted discovery. He never should have been sued in the first place. To force him to provide initial disclosures and documents in these circumstances would amount to nothing more than an oppressive tactic by Incentive.

4. Baer's Motion To Dismiss Is Pending And Jarowey Is In The Same Position As Baer Vis-à-Vis This Court's Lack Of Jurisdiction Over Him.

On May 16, 2011, based on his lack of any meaningful contact with the State of Utah, co-defendant and fellow independent consultant Baer moved to dismiss the Amended Complaint for lack of jurisdiction. (Docket No. 42). That motion has been fully briefed and is *sub judice*. If Baer's motion is granted, and if it is found that Jarowey has been served, then Jarowey will immediately move for the same relief because Jarowey – like Baer – had no meaningful contacts with Utah. It would, therefore, be oppressive and unduly burdensome to force Jarowey to participate in discovery when, in the not-too-distant-future, it may very well be determined that Jarowey is not a party to this case.

The wiser course, it is respectfully submitted, is to wait until the dispositive motions have concluded. And this Court has the power, under its discretionary authority, to do just that. Dochterman v. Res. Realizations, 2003 U.S. App. LEXIS 3442 (10th Cir. 2003) (magistrate judge did not abuse his discretion in staying discovery pending a ruling on a dismissal motion).

CONCLUSION

For the foregoing reasons, Jarowey respectfully objects to the Proposed Report and Incentive's request that the Court enter an order authorizing the discovery as set forth in that report.

Dated: October 12, 2011

Respectfully submitted,

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By: /s/ David J. Shapiro
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Certificate of Service

I hereby certify that on this 12th day of October, 2011, I caused a true and correct copy of the foregoing **PETER JAROWEY'S OBJECTIONS TO PLAINTIFF'S PROPOSED ATTORNEYS' PLANNING MEETING REPORT** as indicated upon the following:

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