

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

)
GBPT, LLC,)
)
Plaintiff,)

Civil Action No.: 2021-CP-42-00086

vs.)

)
RUMSFELD INDIGO, LLC,)
)
Defendant.)

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Oct 10 2022

SC Court of Appeals

)
GIBBS INTERNATIONAL, INC.,)
)
Plaintiff,)

Civil Action No.: 2021-CP-42-00504

vs.)

)
VIDALIA INDUSTRIAL FACILITIES, LLC,)
)
Defendant.)

ORDER DENYING MOTIONS TO STRIKE

This matter comes before the Court on two motions which are substantively identical in Civil Action No.: 2021-CP-42-00086 and Civil Action No.: 2021-CP-42-00504. The Motions, filed by Rumsfeld Indigo, LLC, Indigo Industrial Investments, LLC, Vidalia Industrial Facilities, LLC and Vidalia Specialty Mills, LLC (collectively, “the Rumsfeld Indigo Parties”), ask the Court to Strike a Confession of Judgment. The Confession of Judgment was filed by GBPT, LLC and Gibbs International, Inc. (collectively the “Gibbs Parties”) in each of the cases on June 21, 2022. The Motions to Strike the Confession of Judgment were filed on June 29, 2022, and oral arguments related thereto heard via Webex on August 16, 2022. This Order addresses and denies the motions in both cases for the following reasons.

BACKGROUND

With the knowledge and consent of their counsel, representatives of the parties began settlement negotiations directly in October of 2021. On April 4, 2022, the parties executed a settlement agreement to resolve the cases. The Motions to Strike do not address the validity of the settlement agreement, and no arguments regarding the validity of the settlement agreement were made at the hearing. The complete settlement agreement was not provided to the Court.

One term of the settlement agreement was for the Rumsfeld Indigo Parties to provide a confession of judgment for one million four hundred thousand dollars (\$1,400,000), which was to be held by the Gibbs Parties and filed only if there was a default in the Rumsfeld Indigo Parties' payment obligations. After paying one hundred thousand dollars (\$100,000), the Rumsfeld Indigo Parties failed to make the remaining required payments under the settlement agreement. The Rumsfeld Indigo Parties now seek to strike the Confession of Judgment on the basis that the Rumsfeld Indigo Parties' counsels lacked "knowledge, participation, or consent" in the execution of the Confession of Judgment.

ANALYSIS

The Rumsfeld Indigo Parties' Counsel seek to strike the Confession of Judgment because it was drafted by the Gibbs' Parties' Counsel but not seen by the Rumsfeld Indigo Parties' Counsel until after it was signed. South Carolina Rule of Professional Conduct Rule 4.2 provides that a lawyer representing a client "shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." SCRCP 4.2. Comment [4] to Rule 4.2 expressly acknowledges, however, that "[p]arties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." *Id.*

ABA Formal Opinion 11-461 (“ABA Opinion”) provides: “Parties to a legal matter have the right to communicate directly with each other.” ABA Opinion at p. 1. Permissible communications between parties include “where the parties wish to cement a settlement or break an impasse in settlement negotiations.” *Id.* While the goal of Rule 4.2 is to prevent undue pressure from opposing counsel, “without violating Rules 4.2 or 8.4(a), a lawyer may give substantial assistance to a client regarding substantive communications with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used.” *Id.* at p.4. Further, “the lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted” and the “client also could request that the lawyer draft the basic terms of a proposed settlement agreement.” *Id.* at pp. 4-5. Any contrary position would “unduly inhibit permissible and proper advice to the client regarding the content of the communications . . .” *Id.* at p. 3.

Although drafting a proposed settlement agreement is permissible, an attorney should avoid overreaching. *See* ABA Opinion at p. 1. The ABA Opinion provides, “[p]rime examples of overreaching include assisting the client in securing from the represented person and enforceable obligation . . . without the opportunity to seek advice of counsel.” *Id.* at p. 5. The Rumsfeld Indigo Parties presented at the hearing an email noting the Rumsfeld Indigo Parties must sign and notarize the confession of judgment that they agreed to provide in the previously executed settlement agreement. There is no evidence the Rumsfeld Indigo Parties did not have the opportunity to seek advice of counsel prior to executing the Confession of Judgment.

The Rumsfeld Indigo Parties argue the Gibbs’ Parties’ Counsel should have “include[d] in such [settlement] agreement conspicuous language on the signature page that warns the other party to consult with his lawyer before signing the agreement.” ABA Op. The complete settlement agreement, however, was not presented to the Court for consideration.

The Rumsfeld Indigo Parties assert that *Weckesser v. Knight Enters. S.E. LLC*, 392 F. Supp. 3d 631 (D.S.C 2019) supports their position. *Weckesser* involved defense counsel’s sending settlement letters to several individuals in a class action. *Id.* at 632. The letters misrepresented the plaintiffs’ maximum recovery and threatened retaliatory litigation if the offers were not accepted. *Id.* at 635. The court in *Weckesser* was concerned about protecting against “unequal bargaining power,” but the relationship between those parties was that of corporate employer defendant and individual former employee plaintiffs. *Id.* at 635. The cases currently before this Court involve an arms-length negotiation between experienced business entities encouraged by both sides’ counsel to pursue settlement directly. While the court in *Weckesser* found that the communications involved therein were “abusive and threaten[ed] the proper functioning of [the]litigation,” the Rumsfeld Indigo Parties have not presented a misleading or threatening communication. *See id.*

The Rumsfeld Indigo Parties’ Counsel knew and approved of the settlement negotiations outside of counsel, and only objected to the Confession of Judgment after the Rumsfeld Indigo Parties defaulted on their agreed payment plan under the settlement agreement. Given these facts, the Court declines to find the Confession of Judgment at issue should be stricken in this matter.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the motions to strike the Confession of Judgment are **DENIED**. The Clerk of Court is instructed to enter the Confession of Judgment.



Spartanburg Common Pleas

Case Caption: Gbpt, Llc , plaintiff, et al VS Rumsfeld Indigo, Llc , defendant, et al

Case Number: 2021CP4200086

Type: Order/Other

IT IS SO ORDERED.

s/ Shannon M. Phillips - 3087