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ROBERT W. KAPS and DONNA C. KAPS,

Complainants,

v.

MARK JEFFREY DYM, EXECUTIVE
COMMODITY CORPORATION,
INTERNATIONAL COMMODITY
CLEARING and THOMAS COURTLAND
KENNEDY,

Respondents.

CFTC Docket No. 06-R046

**ORDER OF SUMMARY DISPOSITION CONCERNING
INTERNATIONAL COMMODITY CLEARING**

On July 26, 2007 -- at the request of complainants Robert W. Kaps and Donna C. Kaps, and respondents International Commodity Clearing ("ICC") and Alberto J. Jimenez -- we stayed this proceeding and ordered that, if no party objected on or before August 30th, we would dismiss the complaint as it relates to ICC and Jimenez.¹ The request for a stay and contingent dismissal resulted from the four parties having reached a settlement in principle and the need for time to finalize the agreement and complete performance.² However, things seemed to go awry because, on August 30, 2007, the complainants objected to

¹ Order Dismissing the Complaint as it Relates to Nilsen and Staying the Proceeding, dated July 26, 2007, at 1-2.

² Id.

the dismissal of ICC (but not to Jimenez's dismissal).³ Consequently, we dismissed the complaint as it related to Jimenez and directed the remaining parties to show cause why the stay should not be lifted.⁴

ICC responded to our order by making the following representations. On or before July 18, 2007, it executed a written settlement agreement with the complainants, that required the firm to pay \$3,500 to the complainants.⁵ On July 18th, ICC's attorneys sent a check in the amount of \$3,500 to the complainants' counsel by overnight mail.⁶ Because ICC was no longer operating and had no bank accounts, the check was drawn on the operating account of Nations Investments LLC.⁷ The complainants' attorneys received the check on July 19, 2007 but did not try to cash it until after July 30th.⁸ On July 30, 2007, the United States District Court for the Southern District of Florida issued a temporary restraining order that, among other things, froze Nations' assets.⁹ Consequently, when complainants' counsel presented the check for cashing, the bank refused to honor it and this refusal apparently

³ Complainants' Objection to Dismissal of the Proceedings Herein, filed August 30, 2007.

⁴ Order of Partial Dismissal and to Show Cause, dated September 24, 2007, at 1-2.

⁵ Response to Order to Show Cause, filed October 9, 2007, at 1.

⁶ Id. at 1-2.

⁷ Id. at 2.

⁸ Id.

⁹ Id.

caused the complainants to object to ICC's dismissal.¹⁰ On the basis of these assertions, ICC argued that we should either dismiss it from the case or enter a judgment for the complainants in the amount of \$3,500.¹¹

Because ICC's response raised jurisdictional issues, we notified the parties of our concern and authorized the firm to move for summary disposition.¹² The respondent filed a settlement-based motion for summary disposition on October 30, 2007.¹³ The Kaps filed no response.

ICC Is Entitled to Summary Disposition In Its Favor

Summary disposition is proper (and required) only if "the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and matters of official notice, show that:" (1) there is no genuinely disputed issue of material fact, (2) we need not further develop facts in the record and (3) the moving party is entitled to a decision as a matter of law.¹⁴ In determining whether these standards are met, "[t]he evidence of the nonmovant is to be

¹⁰ Id.

¹¹ Id. at 3-4.

¹² Order Instituting Summary Disposition Procedures, dated October 15, 2007, at 4-5.

¹³ International Commodity Clearing, LLC's Motion for Summary Disposition, filed October 30, 2007 ("ICC Motion"), at 3-7.

¹⁴ 17 C.F.R. §12.310(e); Levi-Zeligman v. Merrill Lynch Futures, Inc., [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,236 at 42,031 (CFTC Sept. 15, 1994).

believed, and all justifiable inferences are to be drawn in his favor."¹⁵ In addition, "any significant doubt that the parties' dispute can be reliably resolved without a hearing" precludes relief.¹⁶ However, when a motion is adequately supported, "an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits and other verified material."¹⁷ Because they let ICC's motion go unopposed, the Kaps have guaranteed that there will be no disputes of material fact. Thus, our inquiry boils down to whether the respondent has made a prima facie showing that it is entitled to summary disposition.

ICC argues that, because its agreement with the Kaps included a waiver of their claims against the firm, the Kaps can no longer press their tort claims and we lack jurisdiction over any contract claims arising from the settlement.¹⁸ This argument is legally sound and well-supported factually. "Private parties cannot, by agreement between themselves, confer jurisdiction upon the Commission that Congress has not granted."¹⁹ With limited exceptions, we

¹⁵ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

¹⁶ Levi-Zeligman, [1994-1996 Transfer Binder] ¶26,236 at 42,031.

¹⁷ 17 C.F.R. §12.310(b).

¹⁸ ICC Motion at 3-7.

¹⁹ Hollander v. Fern, CFTC Docket No. 05-R017, 2006 CFTC LEXIS 118, at *7 (CFTC Oct. 30, 2006).

lack the authority to order the payment of contract-based damages.²⁰ On the other hand, a settlement agreement may include waivers of claims that can form the basis of an affirmative defense.²¹ In other words, when a complainant enters into a settlement agreement, waives his tort claims by doing so and the agreement is breached because promised payments are not made, the complainant may seek contract remedies elsewhere.²² However, the agreement extinguishes the claims over which the Commission has jurisdiction (unless the contract also includes a provision that a breach retroactively invalidates the waivers).²³

In support of its motion, ICC presented evidence that it and the Kaps entered into a written settlement agreement in which (1) the Kaps waived their claims against ICC;²⁴ (2) ICC promised to pay the Kaps a total of \$3,500 in two

²⁰ See id. at *11. The exceptions are (1) contract-based counterclaims to recover debts stemming from debit balances in customer accounts and (2) certain contractual attorneys' fees agreements. Hollander, 2006 CFTC LEXIS 118, at *11; Pal v. Reifler Trading Corp., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,237 at 45,978 (CFTC Jan. 26, 1998).

²¹ Hollander, 2006 CFTC LEXIS 118, at *9-11.

²² See Murphy v. Madsen, CFTC Docket No. 89-R123, 1992 CFTC LEXIS 157, at *2-3 (CFTC Apr. 22, 1992).

²³ Hollander, 2006 CFTC LEXIS 118, at *9-11; Murphy, 1992 CFTC LEXIS 157, at *2-3.

²⁴ The relevant provision stated,

14. UNCONDITIONAL RELEASE OF LIABILITY BY COMPLAINANTS: Complainants do remise, release, acquit, satisfy and forever discharge ICC from all manner of action and actions, cause and causes of

(continued..)

installments;²⁵ (3) the parties agreed that, if ICC failed to make the required payments, the Kaps could move the Commission to enter a judgment for \$3,500²⁶ and (4) the parties agreed that the written agreement constituted the entire contract.²⁷ Thus, there is no dispute that the Kaps waived their tort claims against ICC in exchange for consideration that included a promise to make future monetary payments. Before us, this abandonment entitles ICC to a judgment in its favor as a matter of law (even though it may face liability in another forum).²⁸ For this reason and because there is no need to further

(..continued)

action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever, in law or in equity, which Complainants ever had, now have or, hereafter can, shall or may have against ICC from the beginning of the world to the day of these presents.

ICC Motion, Exhibit A at 3 (emphasis omitted).

²⁵ ICC Motion, Exhibit A at 1.

²⁶ ICC Motion, Exhibit A at 1.

²⁷ ICC Motion, Exhibit A at 2. In addition, ICC's evidence shows that, on July 18, 2007, the law firm representing it sent a check in the amount of \$3,500 to the Kaps' counsel by next-day delivery, and the complainants' representatives received the check on July 19th. ICC Motion, Exhibits C-D.

²⁸ As for the agreement that, in the event of a breach, the Kaps could petition us to enter a judgment for \$3,500, we lack the authority to enter such a contract-based order regardless of the parties' consent. See supra notes 19-23. Given this circumstance, it is possible that, had they responded to the ICC Motion, the Kaps would have argued that we should effectively rescind the settlement agreement by raising contract defenses such as mistake or fraud.

(continued..)

develop the record, we must summarily dispose of the claims against ICC in the firm's favor.

Conclusion

For the reasons set forth above, we **DISMISS** the complaint as it relates to ICC with prejudice.

IT IS SO ORDERED.

On this 29th day of November, 2007



Bruce C. Levine
Administrative Law Judge

(..continued)

However, it is the non-movant's obligation to present these arguments and failure to do so results in waivers that we will not cure sua sponte. See Pandrol USA, LP v. Airboss Ry. Prods., Inc., 320 F.3d 1354, 1366-67 (Fed. Cir. 2003); Blue Cross & Blue Shield of Ala. v. Weitz, 913 F.2d 1544, 1550 (11th Cir. 1990) ("Presenting such arguments in opposition to a motion for summary judgment is the responsibility of the non-moving party, not the court . . ."); Ankele v. Hambrick, 286 F. Supp.2d 485, 496 (E.D. Pa. 2003). This is especially so when a non-movant chooses not to seek the rescission of a settlement agreement upon which it may subsequently rest a complaint in another forum.