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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 SHINE WILLIAMS,

4 Plaintiff,

5 v.

17 CV 3847 (JGK)

6 METRO-NORTH RAILROAD COMPANY,

7 Defendant.

8 -----x
9 New York, N.Y.
February 9, 2018
11:45 p.m.

10 Before:

11 HON. JOHN G. KOELTL,

12 District Judge

13 APPEARANCES

14 OUTEN & GOLDEN

15 Attorneys for Plaintiff Williams

16 BY: KATHLEEN PERATIS
SHIRLEY LIN

17 LITTLER MENDELSON, P.C.

18 Attorneys for Defendant Metro-North

19 BY: ERIC D. WITKIN
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1 (In Chambers; Telephone conference)

2 MS. PERATIS: Kathleen Peratis and Shirley Lin, for
3 the plaintiff.

4 MR. WITKIN: Eric Witkin, for defendants Metro North.

5 THE COURT: OK. This is Judge Koeltl. I have you on
6 the speakerphone. I have a court reporter. I'm here with my
7 deputy and one of my law clerks.

8 I received Ms. Peratis' letter asking for a conference
9 and so here we are.

10 MS. PERATIS: Thank you, judge.

11 This is Kathleen Peratis speaking. We wanted to
12 advise the Court that we have settled that matter by virtue of
13 an offer of judgment that Metro North made and that we will be
14 accepting today. We wanted to advise you that the offer of
15 judgment offers the contents of a confidential settlement
16 agreement which in the offer of judgment is incorporated
17 attached to the offer of judgment and incorporated by
18 reference.

19 We wanted to let you know that what the settlement
20 consists of is basically a structured settlement which the
21 parties negotiated and Metro North offered and we're going to
22 ever to accept. The offer the judgment is for the confidential
23 settle agreement and also an application for attorney's fees
24 and costs. And as I said, we're going to be accepting that
25 today. We wanted to insure that or ask the Court to instruct

1 the clerk not to dismiss the case once we've accepted the offer
2 of judgment and filed that with the court. Not to dismiss the
3 case until the issue of these and costs have been determined.
4 We intend to make a fee application unless the Metro North and
5 we request settlement fees issue before we make the fee
6 application but we're prepared to make the fee application
7 fairly quickly.

8 MS. LIN: Also, if I may, Kathleen? The settlement
9 will not be fully effectuated until at latest the first week
10 of, the end of the first week of March. That's another
11 reason --

12 MS. PERATIS: Right. It will take a few weeks for the
13 structure to be structure and we've all agreed upon those time
14 limits.

15 So the issue that we wanted to ask the Court, your
16 Honor, is number one whether you would be amenable to
17 instructing the clerk not to dismiss the case until the fee
18 issue is determined. And also the other complexity is that the
19 defendant -- and Mr. Witkin will speak for himself -- but we
20 understand they do not want the confidential settlement
21 agreement to be a public record and we're fine with that.

22 We are assuming though that the Court wants to see it
23 and we're prepared to give the Court a copy if you want to see
24 it. But we wanted to insure in cooperation with Mr. Witkin
25 doing this in a way that makes it not a public record which

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1 would probably mean filing it under seal. So we wanted to get
2 the Court's advice on that because as I say, the offer of
3 judgment attaches it and incorporates it by reference but we're
4 prepared to accept it without attaching that confidential
5 agreement so we need the Court's guidance on that issue.

6 MR. WITKIN: No.

7 Your Honor, this is Eric Witkin. May I speak?

8 THE COURT: Sure. Your Honor, there is an important
9 misstatement in Ms. Peratis' rendition. The confidential
10 settlement agreement is incorporated by reference in the offer
11 of judgment. This was requested by Ms. Perez. But it is not
12 attached. I don't know why she says it's attached. It's not
13 attached. The offer of judgment was amended to specify that
14 it's incorporated by reference so that it would not be
15 attached. So I have a problem with her rendition of the facts.
16 It is true to facilitate discussions about the settlement of
17 this case. We've made an offer of judgment back on December 1
18 right after the mediation with Judge Parker failed. We made an
19 offer and we kept renewing it to facilitate the settlement
20 discussions and a settlement agreement was signed by the
21 plaintiff on January 31 and on February 5 by Metro North.

22 Our understanding was that if there was an agreement
23 on fees without an application to the Court, there would be no
24 need to file either the -- no need to file the settlement
25 agreement or the offer of judgment because it would be a

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1 bilateral agreement covering all points and that all we would
2 have to file was a dismissal.

3 Ms. Peratis made clear to me however that she would
4 have to file the offer if we did not make an agreement on fees
5 because she needed to have the offer of judgment filed to
6 establish that she was a prevailing party for purposes of fee
7 application. So, I understand that.

8 So what I don't understand is why she has to have this
9 document filed now. I don't understand why she has to file the
10 offer now but if she feels she must, it cannot attach the
11 settlement agreement because that wasn't our agreement. And we
12 could, if our negotiations about fees do not succeed and if the
13 Court needs to see or Ms. Peratis wants to submit settlement
14 agreement in connection with the fee application, it would be
15 at that time that I would hope and ask the Court to receive it
16 under seal if it has to be filed at all.

17 That's our position.

18 THE COURT: Let me cut through this if I can. In my
19 view the settlement agreements don't have to be filed unless
20 the Court is asked to be a party in some way to the settlement
21 agreement. If, for example, the Court is asked to retain
22 jurisdiction to enforce the settlement agreement, then the
23 settlement agreement has to be filed and it has to be filed not
24 under seal but in the record. And if the parties maintain that
25 there is some portion of the settlement agreement that is

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1 confidential for some reason, often it's the amounts and
2 sometimes a persuasive argument is made with respect to that
3 but sometimes not. And sometimes after thinking about it, the
4 parties say that they really don't care.

5 But in any event, if the Court is not being asked to
6 do something with the settlement agreement then there is no
7 reason that the parties' private settlement agreement has to be
8 filed. They have a contract between themselves. It's
9 reflected in the settlement agreement. And the Court is not a
10 party to that. The Court doesn't participate in it. So the
11 agreement doesn't have to be filed.

12 With respect to the situation that you find yourselves
13 in, it appears to me just from the way in which you've
14 described it that there was an offer of judgment. The offer of
15 judgment was accepted and the parties then proceeded to enter
16 into a binding settlement agreement signed by both sides which
17 settles the case but it won't go into affect until early March
18 after its been funded and it doesn't resolve the issue of the
19 plaintiff's attorneys' fees. OK?

20 The plaintiff expresses some question whether the
21 agreement would have to be filed or the offer of judgment would
22 have to be filed to show that the plaintiff was the prevailing
23 party. I seriously doubt that. If there's a structured
24 settlement in which the plaintiff gets money, the plaintiff is
25 the prevailing party. Again, I don't decide anything until

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1 it's briefed on the facts and the law but I would be astounded
2 if a plaintiff brings a lawsuit and gets money that the
3 plaintiff is not then the prevailing party.

4 You've described it as a structured settlement.
5 You've described the fact that it has to be funded. Very
6 difficult for me to think that the plaintiff would not be a
7 prevailing party. So I would think that while it was
8 precipitated by the offer of judgment and the acceptance, you
9 then worked out a binding settlement agreement that you've both
10 signed. OK? So I would have thought that -- let's take the
11 next step.

12 Then there's the question of attorneys' fees. If you
13 can't work it out, there would then have to be an application
14 which would have to discuss what the terms of the settlement
15 are to establish why the settlement was substantively good for
16 the plaintiff, as well as go through the calculation of the
17 loadstar and make the necessary arguments both under the
18 percentage of the recovery approach and the loadstar. And I
19 would be amazed if that could be done other than with a public
20 filing because that's done all the time in public filings.

21 What's the amount of the settlement? What's the
22 percentage recovery? I would be astounded if the parties could
23 make a sufficient argument to keep that under seal because the
24 public does have an interest to know what the amounts of
25 settlements are, what the range of settlements are in order to

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1 be able to provide public scrutiny for amounts of attorneys'
2 fees and in order to compare it to other cases and the like.

3 So if you arrive at the point where you have a
4 disputed argument over attorneys' fees, then I think all of
5 that will end up being on the public record. So I think I've
6 laid out for you what my own thoughts are. At this point
7 you've told me that the case is settled but you don't want a
8 judgment entered until the issue of attorneys' fees is
9 resolved.

10 I appreciate that under the rules attorneys' fees can
11 be determined and there's a provision as to how much after
12 judgment the request for attorneys' fees have to be made and
13 all of that but it's a reasonable request to me that the
14 parties have advised that the case is settled and they ask that
15 I not do anything until further advice from the parties. I can
16 certainly live with that.

17 So the case is settled. I won't do anything. I'm not
18 going to advise the clerk's office to enter judgment because I
19 don't have something from the parties. I think that the
20 parties could eventually give me simply a stipulation of
21 settlement which says that the parties have settled this case
22 pursuant to a confidential settlement agreement or even not
23 even refer to it. The parties have settled the case and ask
24 that the case be dismissed with prejudice.

25 You can refer to the settlement agreement. It doesn't

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1 have to be filed if the Court isn't being asked to do anything.
2 If you want to wait until you've resolved the issue of
3 attorneys' fees, can you do that too. I'm not breathing down
4 your neck on a case that was filed in 2017. And you can simply
5 keep me advised.

6 MS. PERATIS: Your Honor, may I ask you one question?

7 THE COURT: Sure.

8 MS. PERATIS: There are cases and I've shared them
9 with Mr. Witkin that go both ways on the issue of whether a
10 plaintiff is a prevailing party for purposes of a fee
11 application in the absence of a judgment entered into favor of
12 the plaintiff. And that's the reason that we've gone to the --
13 why the offer of judgment has been made in the structure that I
14 described and why we're going to accept that offer in judgment.

15 I have made it clear to Mr. Witkin and he's been
16 extremely cooperative on that point that we need a judgment to
17 make sure that there is no argument that is made later that
18 because there's no judgment entered on behalf of the plaintiff
19 therefore, there's a question of whether we're the prevailing
20 party. But if you are telling us -- I'm sorry. Go ahead.

21 THE COURT: Thank you.

22 I understand your point now that if the only thing on
23 the record were a stipulation of dismissal or discontinuance
24 with prejudice that the defendant could argue that there was no
25 judgment in favor of the plaintiff and therefore, the plaintiff

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1 was not the prevailing party, it would take a --

2 MS. PERATIS: Exactly right.

3 THE COURT: It would take a level of breathtaking
4 dishonesty on the part of the defendant to make that argument
5 though. And --

6 MR. WITKIN: Not guilty, your Honor.

7 THE COURT: I would think that you could simply defer
8 the issue until you've tried to resolve the issue of attorneys'
9 fees and you could resolve it. If you didn't resolve the
10 attorneys' fees and you wanted to protect yourself against the
11 defendant's possible dishonesty, you could draft your
12 stipulation of discontinuance in such a way that the parties
13 agree that judgment can be entered in favor of the plaintiff
14 dismissing this case with prejudice pursuant to a confidential
15 settlement agreement. So ordered.

16 MS. PERATIS: Well, the other way we could do that
17 which is what prompted this call is that we could just accept
18 the offer of judgment today which is what we had expected to do
19 and file the acceptance on the offer of judgment without
20 attaching the confidential settlement agreement. That would
21 solve everybody's problem. But what I wanted to make sure was
22 that the Court was OK with that. And I think you have
23 suggested that you are because the confidential settlement
24 agreement doesn't involve the Court in anything.

25 THE COURT: OK.

1 MS. PERATIS: So we could accept the offer of judgment
2 today and file it, not attach the confidential settlement
3 agreement and simply make sure that the clerk does not dismiss
4 the case until we are either making our fee application or we
5 advise the Court that we've resolved the issue.

6 THE COURT: That's fine.

7 MR. WITKIN: Your Honor, may I speak to that?

8 THE COURT: Sure.

9 MR. WITKIN: Based on what your Honor just said, I
10 don't see the need for that to be done today. The problem with
11 it is that then judgment is entered and that might cause a
12 complication. Also, as I understand it, could require the
13 plaintiffs to make their fee applications within a certain
14 time. I think it's two weeks. It may put extra pressure on
15 the fee negotiations that's not necessary at this point,
16 particularly, since the, as I think Ms. Peratis said, the
17 agreement isn't even been totally paid or effectuated until
18 early March.

19 So if I have a say in this or a suggestion, it's to
20 suggest that my opponent defer filing the offer of judgment.
21 And I have extended to her and I'll say it in front of your
22 Honor, would be happy to renew the offer of judgment -- which I
23 guess expires next week -- and as we have renewed it before in
24 order to facilitate the completion of settlement negotiations
25 and not put plaintiff under any pressure fearing that she's

1 going to lose the deal, we'll just renew it so that we can talk
2 some more. I think that's worked well so far. Those are my
3 views.

4 THE COURT: Why don't you write the plaintiff a letter
5 saying that we extend the offer of judgment until March
6 whenever you think that it will be funded so that you can
7 negotiate the attorneys' fees and enter into an appropriate
8 stipulation dismissing the case and either leaving open the
9 attorneys' fees or not?

10 MR. WITKIN: I'm happy to do that.

11 MS. PERATIS: That's agreeable. I don't know what the
12 letter is going to say but, certainly, as a possibility of
13 accommodating everybody's concerns I'm certainly willing to go
14 along with that and perhaps you can just add -- the word
15 prevailing party --

16 MR. WITKIN: Actually, the settlement agreement, you
17 already have that. You and I could discuss that what the
18 letter says, Ms. Peratis, and we've usually been able to work
19 this out but I just point out that the settlement agreement
20 says that on any fee application, I think the language was that
21 you'd be treated as though you had accepted the offer of
22 judgment. So it says the application will be evaluated by the
23 Court in the same manner as if the defendant had made and you
24 had accepted the offer.

25 MS. PERATIS: You're absolutely right. As I said a

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1 moment ago to Judge Koeltl that the whole point of this
2 colloquy that we are engaging in now is my concern that there
3 are cases that say that judgment has to be entered in favor of
4 the plaintiff. So the Court should be able to entertain a fee
5 application. But I think Judge Koeltl has addressed our
6 concerns and I think we can proceed along those lines and if we
7 have a problem we can come back to the Court.

8 MR. WITKIN: I agree.

9 THE COURT: I'm perfectly happy to work with you.

10 MS. LIN: If I may, your Honor, there is one
11 housekeeping issue as to a settlement conference on the
12 calendar that we request you guess adjourn pending further
13 updates.

14 THE COURT: OK. Well, you filed a letter saying that
15 there is a settlement and I will endorse the letter by
16 saying -- and we'll call Judge Parker's chambers that the case
17 is stayed. All conferences are adjourned. All conferences are
18 canceled. The parties should advise the Court of the status of
19 the case by March 9. OK?

20 MS. LIN: Thank you.

21 MS. PERATIS: Thank you very much, your Honor.

22 THE COURT: OK. Thank you, all.

23 (Adjourned)