



Not Reported in F.Supp.2d, 2006 WL 1720461 (E.D.N.Y.)  
 (Cite as: 2006 WL 1720461 (E.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,  
 E.D. New York.  
 KEYBANK, NATIONAL ASSOCIATION, Plaintiff,  
 v.  
 QUALITY PAYROLL SYSTEMS, INC., et al.,  
 Defendants.  
 No. CV 06-3013(JS)(AKT).

June 22, 2006.

Andrew P. Karamouzis, Moran Karamouzis LLP,  
 Rockville Centre, NY, for Plaintiff.

#### ORDER

A. KATHLEEN TOMLINSON, Magistrate Judge.

\*1 This is a breach of contract action which has been referred to me for a Report and Recommendation on Plaintiffs' motion for a preliminary injunction. However, during the preliminary injunction hearing on June 21, 2006, it became clear that certain segments of the various requests for relief were based upon KeyBank, National Association's ("KeyBank" or "Plaintiff") asserted need for expedited discovery, separate and apart from the other segments seeking injunctive relief. Therefore, I am dealing with the requests for relief in two parts. This Order deals solely with the request for expedited, pre-answer discovery. The remainder of the motion for a preliminary injunction which seeks affirmative injunctive relief was also heard during the June 21, 2006 proceeding and those issues and findings will be set forth in a separate Report and Recommendation to Judge Seybert, the District Judge assigned to this case.

#### *Procedural Setting*

On June 16, 2006, KeyBank filed a Complaint and an Order to Show Cause, with supporting documentation, seeking a preliminary injunction, pursuant to Fed.R.Civ.P. 65, against Quality Payroll Systems, Inc. ("Quality Payroll") with respect to

various records and correspondence between KeyBank and Quality Payroll and Quality Payroll's customers. On June 16, 2006, District Judge Feuerstein signed the Order to Show Cause as well as a Temporary Restraining Order directing that "[p]ending the hearing of this motion, defendant is enjoined from and restrained from altering, modifying or destroying any and all relevant documents, correspondence, e-mails and financial records of its customers." See Order Granting TRO, June 16, 2006. The Order to Show Cause also directed Quality Payroll to appear and show cause, at a hearing to be conducted before me on June 26, 2006, why Plaintiff's requested relief should not be granted.

KeyBank moves the Court for an Order directing and enjoining Quality Payroll from (i) altering, modifying or destroying any documents, correspondence, e-mails, financial records and the like related to KeyBank; (ii) altering, modifying or destroying any and all documents, correspondence, e-mails, financial records and the like related to any of its customers; (iii) directing Quality Payroll to immediately produce true, accurate and complete copies of all executed authorizations from its customers as required under paragraph 4 of the Electronic Fund Transfer Service Agreement between the parties dated June 11, 1998; and (iv) directing Quality Payroll to immediately produce true, accurate and complete copies of all Client Services Agreements with its customers as required by paragraph 4 of that same Electronic Fund Transfer Service Agreement. This Order is directed only to sections (iii) and (iv) above.

At the June 26, 2006 hearing, Plaintiff's counsel appeared, along with his client's Senior Vice-President who had provided an affidavit in support of the original Order to Show Cause. In addition, counsel for two other entities, DZ Bank and Three Village Bennett Agency, were present in the courtroom. These attorneys asserted that their clients were being adversely impacted by the actions of the parties in this case. I advised both attorneys that although I permitted them to speak as a professional courtesy, they have no standing in this action currently. It appears that these entities plan to file motions to intervene, but such prospective activity has no bearing on the current hearing.



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\*2 As to Quality Payroll, Stephen D. Haber, Esq. was present in the courtroom but emphasized that he did not and was not representing Quality Payroll. According to Mr. Haber, he only came to court to ask for an adjournment of the proceedings because he understood that Quality Payroll's principals were looking for counsel to represent them in this matter.<sup>FN1</sup> When I asked Mr. Haber if he were representing the corporation solely for the purpose of appearing in the proceedings on June 26, 2006, Mr. Haber responded "no" and confirmed on several different occasions that he did not represent Quality Payroll in any capacity for any purpose at the proceedings. Mr. Haber also later confirmed that Quality Payroll essentially was not appearing and had no one appearing on its behalf, but nonetheless was seeking an adjournment. Based on those responses, Plaintiff's counsel requested that the court hold Quality Payroll in default.

FN1. KeyBank's counsel, Andrew Karamouzis, Esq. stated on the record at the June 26 hearing that he personally served the Order to Show Cause with Temporary Restraining Order upon Quality Payroll at its offices in Bohemia, New York in and around 4 p.m. on June 20, 2006, approximately an hour or so after District Judge Feuerstein signed the documents. An affidavit of service to that effect has been filed on ECF and appears as docket entry no. 6.

### **Background**

KeyBank Electronic Services, a division of KeyBank provides electronic banking services and acts as an "Originating Financial Institution"-as that term is defined under the Operating Guidelines of the National Automated Clearing House Association ("NACHA")-on behalf of various payroll processors and their customers. See Affidavit of Robert E. Harrison, ¶ 5.<sup>FN2</sup> On or about June 11, 1998, Quality Payroll entered into three agreements with KeyBank. Quality Payroll, one of the defendants in this action, provides payroll services, tax and banking services, time attendance systems, human resources and

benefits administration, including 401k and Flexible Spending Accounts, to clients throughout the United States. *Id.*, ¶¶ 6, 7; see also Quality Payroll Systems web site at www.qualitypayroll.com. One of those clients is KeyBank. Pursuant to these three agreements, KeyBank provided electronic banking services on behalf of Quality Payroll and its customers and acted as an Originating Financial Institution. See Harrison Aff. ¶ 9.

FN2. Hereafter, cited as "Harrison Aff., ¶ ---." These references are to the Affidavit of Robert E. Harrison, Senior Vice President of KeyBank Electronic Services, a division of KeyBank, National Association.

For purposes of this Order, two of these agreements are pertinent. KeyBank asserts that Quality Payroll should be required to produce immediately true and accurate copies of (1) the authorizations executed by its customers which permit debit entries to the customers' accounts and which are required to be maintained pursuant to paragraph 4 of the "Service Agreement for Electronic Fund Transfers" (hereafter referred to as the EFT Service Agreement), annexed as Exhibit C to the Harrison Affidavit, and (2) all the Client Services Agreements Quality Payroll has with its customers which are also required under paragraph 4 of that same Service Agreement.

The other agreement relevant to this Order is the July 1998 "Automated Clearing House Electronic Data Interchange Service Agreement." See Harrison Aff. Ex. B. Paragraph 14 of this Agreement provides as follows:

14. Record Retention. Client agrees to keep all written authorizations required by the Rules on file for at least two years after such authorization has been terminated. *Authorizations should be available upon request to Bank or RDFI* (emphasis supplied).

\*3 The "Bank" referenced here is Plaintiff.

Plaintiff asserts that it has an urgent need to access these records and will be irreparably harmed if it cannot do so. This entire action is precipitated by



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KeyBank's having come to learn in and around June 5, 2006 that one of Quality Payroll's accounts with Plaintiff had an overdraft in the amount of \$1,241,522.30. KeyBank promptly notified Quality Payroll's President Geller and demanded that Quality Payroll make immediate payment to satisfy the overdraft. See Harrison Aff. ¶¶ 12, 13. Notwithstanding some initial brief response from Quality Payroll, the overdraft was not paid, and, by June 12, 2006, the overdraft had increased to \$2,429,949.95. *Id.* at ¶ 16. On June 14, 2006, KeyBank notified Quality Payroll, in writing, that it was in default of its obligations under the EFT Service Agreement and that KeyBank was terminating the Agreement on two days' written notice, effective June 16, 2006, pursuant to paragraph 19(a) of the EFT Service Agreement. KeyBank asserts that Quality Payroll defaulted and as a result, KeyBank exercised its right of set-off under paragraph 9 of the Master Agreement, annexed as Exhibit A to the Harrison Affidavit. *Id.* at ¶¶ 18, 19.

At the hearing, KeyBank stated that as a result of the overdraft by Quality Payroll and the lack of available funds, KeyBank will not be able to issue the necessary credits on behalf of Quality Payroll to its various customers as they come due. Plaintiff therefore concludes that when Quality Payroll's various customers realize that payroll checks to their employees are not being funded, they will, in all likelihood, assert claims against KeyBank. *Id.* at ¶ 20. In its papers as well as at the hearing, KeyBank also stated that Quality Payroll's Geller had told KeyBank representatives that Quality Payroll had sold its client list to ADP, a national payroll processor for consideration somewhere between \$1 million and \$2.5 million. Quality Payroll also acknowledged that it had already received a \$1million payment from ADP in connection with the transaction. *Id.* at ¶ 15. During the hearing, it was also brought to the Court's attention that Quality Payroll had put its building up for sale. In addition, no accounting has been given for the whereabouts of the overdraft monies in the amount of \$2.4 million.

### Discussion

As noted previously, and as acknowledged by

KeyBank's counsel during the hearing, the relief sought by KeyBank in the third and fourth prongs of its order to show cause is essentially a request for expedited discovery. Fed.R.Civ.P. 26(d) states in pertinent part that "unless the court upon motion, for the convenience of the parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence ..." Fed.R.Civ.P. 26(d). Fed.R.Civ.P. 34(b), which concerns the procedure with respect to the production of documents states, that "without leave of the court or written stipulation, a request may not be served before the time specified in Rule 26(d)." Fed.R.Civ.P. 34(b). However, the Court may expedite discovery under certain circumstances.

\*4 As stated in Better Packages, Inc. v. Zheng, No. 05-CV-4477, 2006 WL 1373055, at \*2 (D.N.J.2006), courts generally employ two standards in determining whether expedited discovery is appropriate. *Id.* The first is the so-called "reasonableness standard," which "requires the party seeking the discovery to prove that the requests are reasonable under the circumstances." *Id.* The second standard is a multi-part test set forth in Notaro v. Koch, 95 F.R.D. 403 (S.D.N.Y.1982) and requires a plaintiff seeking expedited discovery to show:

- (1) irreparable injury; (2) some probability of success on the merits; (3) some connection between the expedited discovery and the avoidance of irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury the defendant will suffer if the expedited relief is granted.

*Id.* at 405.

As noted by Judge Edelstein in Notaro, the four requirements set forth above "parallel those showings necessary to obtain a preliminary injunction." *Id.* at 405 n. 4. Under either test, I find that the Plaintiff has satisfied the standard for obtaining expedited discovery. The Plaintiff has made a sufficient showing of irreparable harm if expedited discovery is not granted based on the uncontroverted facts presented in its motion papers and on the record at



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today's hearing. As stated in the Affidavit of Robert E. Harrison, Senior Vice-President of KeyBank, Plaintiff is faced with the possibility of being inundated with claims from various third-parties seeking their payroll monies which KeyBank will not be able to properly address without the documents sought. *See* Harrison Aff. ¶ 23. In addition, KeyBank is subject to the rules and regulations of the National Automated Clearing House Association ("NACHA") which requires it to maintain and comply with certain disclosure requirements. By not having access to Quality Payroll's documentation, KeyBank faces the possibility of irreparable harm because of their inability to comply with NACHA's rules and regulations-not to mention the harm to KeyBank's commercial reputation in the marketplace. What the Court knows of Quality Payroll's circumstances as of the hearing is disturbing. First, this entity has sold its client list very recently to ADP. Second, the Court is advised that Quality Payroll's building has been placed on the market. Third, and most importantly, \$ 2.4 million which represents the overdraft is still unaccounted for. Fourth, Quality Payroll, despite having been served with the order to show cause and temporary restraining order has not appeared in this action, despite Mr. Haber's presence in court. I further find that the relief which KeyBank seeks is nothing more than it is entitled to under paragraph 14 of the Automated Clearing House Electronic Data Interchange Service Agreement.

Further, Plaintiff satisfies the second prong of the *Notaro* test in that it has shown some probability of success on the merits. The Master Agreement, the Automated Clearing House Electronic Data Interchange Service Agreement, both dated July 13, 1998, the Service Agreement for Electronic Fund Transfers dated July 11, 1998, and the Key Exchange Services Amendment Agreement dated December 10, 2004 (collectively the "Agreements") clearly define the rights and duties of the parties. Specifically, paragraph 9 of the July 13, 1998 Master Agreement permits Plaintiff to "set off the unpaid balance of any amount owed" to it. *See* Harrison Aff., Ex. A. Therefore, I find that Plaintiff has shown some possibility of success at least with respect to its claim for a declaratory judgment. *See* Compl. ¶ 37.

\*5 In addition, there is some connection between

documents requested here and the avoidance of irreparable injury. As stated by Harrison in his affidavit, the documentation sought is critical in addressing third-party questions or claims that have already arisen from Quality Payroll's customers as a result of the overdraft. *See* Harrison Aff. ¶ 22. Therefore, I find that the injury which KeyBank faces in not having Quality Payroll provide its customer documentation to KeyBank is far greater than in directing them to provide it. This factor also satisfies the so-called "reasonableness test" for expedited discovery. *See Better Packages, Inc.*, 2006 WL 1373055, at \*2. Paragraph 14 of the Automated Clearing House Electronic Data Interchange Service Agreement, both dated July 13, 1998, states that "client agrees to keep all written authorizations required by the Rules on file for at least two years after such authorization has been terminated. Authorizations should be available upon request to Bank or RDFI." *See* Compl. Ex. B. Therefore, Quality Payroll is already under an obligation to maintain the records sought.

Based on the foregoing, I find that expedited discovery is warranted therefore, pursuant to Fed.R.Civ.P. 34(b), it is hereby;

**ORDERED**, that Defendant Quality Payroll make available for discovery and inspection by Plaintiff's counsel no later than June 27, 2006 all executed authorizations from its customers as required under paragraph 4 of the Electronic Fund Transfer Service Agreement dated June 11, 1998; and it is further

**ORDERED**, that Defendant Quality Payroll make available for discovery and inspection by Plaintiff's counsel no later than June 27, 2006 all Client Services Agreements with its customers as required by paragraph 4 of the Electronic Fund Transfer Service Agreement dated June 11, 1998; and it is further

**ORDERED**, that Defendant Quality Payroll cooperate with Plaintiff's counsel in providing the necessary documentation for discovery and inspection by June 27, 2006; and it is further

**ORDERED**, that Plaintiff's counsel is directed to



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serve a copy of this Order upon Quality Payroll Services, Inc. by personal service no later than the close of business on June 23, 2006.

Defendant Quality Payroll is hereby put on notice that failure to comply with this Order may subject it to contempt proceedings before this Court.

**SO ORDERED.**

E.D.N.Y.,2006.  
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