

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

PAMELA HERRINGTON, individually and on behalf of)	
all others similarly situated)	
)	
Plaintiff(s),)	
v.)	Case No. 3:11-cv-00779-bbc
)	
WATERSTONE MORTGAGE CORPORATION)	
)	
Defendant.)	

MOTION TO STAY DISCOVERY

Now comes Defendant Waterstone Mortgage Corporation (hereinafter, "Waterstone"), by and through its undersigned counsel, and hereby moves this Court to stay discovery. In support thereof, Waterstone states as follows:

1. This matter arises out of Plaintiff's allegations that her employer, Waterstone, violated the Fair Labor Standards Act (hereinafter, "FLSA") by failing to pay Plaintiff overtime and a minimum wage. See, Complaint at ¶¶ 83 - 87. Plaintiff also alleges that Waterstone breached certain common law contract and/or quasi-contract obligations to Plaintiff by purportedly failing to pay her in accordance with the terms of her Employment Agreement, (hereinafter referred to as "Agreement").

2. Count I of Plaintiff's Complaint alleges a collective action for violations of the FLSA pursuant to 29 U.S.C. §216(b). Count II of Plaintiff's Complaint alleges a class action for contract and/or quasi-contract violations pursuant to F.R.Civ.P. 23.

3. In response to Plaintiff's Complaint, Waterstone filed a Motion to Dismiss or, in the Alternative, Motion to Compel Arbitration and Motion for Costs (hereinafter, "Motion to Dismiss"). See, ECF No. 13. In short, the aforementioned motion seeks to enforce a mandatory

arbitration provision contained in the employment agreement executed by Plaintiff that requires "any dispute between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship shall be resolved through binding arbitration."

4. The Motion to Dismiss is fully briefed and is ripe for resolution by this Court.

5. Despite the pending Motion to Dismiss, Plaintiff served written discovery on Waterstone on February 7, 2012. See, Interrogatories and Request for Production of Documents and ESI to Waterstone, attached hereto as Exhibits 1 and 2, respectively.

6. Waterstone now requests that this Court stay discovery so that a ruling may be obtained on its Motion to Dismiss prior to conducting discovery.

7. Specifically, the law is clear that participating in discovery could result in the waiver of a claim for arbitration. Dickinson v. Heinold Secur., Inc., 661 F.2d 638, 642 (7th Cir. 1981) ("discovery efforts on arbitrable claims may constitute a waiver of the right to arbitration"). Accord, Midwest Window Systems, Inc. v. Amcor Industries, Inc., 630 F.2d 535, 537 (7th Cir. 1980); St. Mary's Medical Center, Inc. v. Disco Aluminum Products Co., 969 F.2d 585, 591 (7th Cir. 1992); Cabinetree of Wisconsin v. Kraftmaid Cabinetry, 50 F.3d 388, 391 (7th Cir. 1995); Ernst & Young LLP v. Baker O'Neal Holdings, Inc., 304 F.3d 753, 756 (7th Cir. 2002) ("A contractual right to arbitrate may be waived expressly or implicitly, and a party that chooses a judicial forum for the resolution of a dispute is presumed to have waived its right to arbitrate. Courts must examine the totality of the circumstances and determine whether based on all the circumstances, the party against whom the waiver is to be enforced has acted inconsistently with the right to arbitrate.") (internal quotations omitted). As a result, Waterstone

cannot respond to Plaintiff's written discovery until and unless this Court denies its Motion to Dismiss without risking waiver of its pending dispositive motion.

8. Moreover, the written discovery propounded on Waterstone is not available in an arbitration proceeding. Cabinetree, 50 F.3d at 391 ("the discovery provisions of the Federal Rules of Civil Procedure are more generous than those of the American Arbitration Association"). As a result, to the extent this Court concludes that the arbitration provision contained in Plaintiff's employment agreement is valid, Waterstone is not properly subject to discovery and, by virtue of its agreement with Plaintiff, cannot be required to respond to discovery. In other words, Waterstone retained, as a benefit of the employment bargain with Plaintiff, the right to proceed only in arbitration, free from the formal discovery available in the Federal Courts.

9. Counsel for Waterstone emphatically raised these concerns during the telephonic preliminary pretrial conference on January 13, 2012 before Magistrate Judge Stephen L. Crocker. During this conference, Judge Crocker acknowledged this issue, but declined to formally stay discovery, instead pointing out that the schedule he set forth allows ample time for discovery after a ruling on the Motion to Dismiss. Judge Crocker explained that the parties should first attempt to resolve any discovery issues on their own accord and, if necessary, could request a stay pending a ruling on the Motion to Dismiss.

10. With Judge Crocker's guidance in mind, counsel for Waterstone conducted a telephone conference with Plaintiff's counsel on February 21, 2012, in order to request that Plaintiff either withdraw her discovery until such a time that the Motion to Dismiss is denied or, alternatively, to request a modification of the schedule set forth in the Preliminary Pretrial Conference Order. Counsel for Plaintiff was unwilling to compromise and instead demanded the

production of at least some discovery or a concession on the issue of Rule 23 class certification.¹ See, 2/14/12 Letter from Plaintiff's Counsel, attached hereto as Exhibit 3. Counsel for Plaintiff has now threatened to file a Motion to Compel. See, 2/23/12 Email from Plaintiff's Counsel, attached hereto as Exhibit 4.

11. As a result, Waterstone requests that this Court stay discovery pending resolution of the Motion to Dismiss so as to allow for resolution of the arbitration issue prior to Waterstone having an obligation to respond to written discovery from Plaintiff.

WHEREFORE, the Defendant, Waterstone Mortgage Corporation, respectfully prays this Court enter an order staying discovery, and for such other and further relief as may be just and proper.

DATED: February 23, 2012

Respectfully submitted,

/s/
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¹ It should be noted that Plaintiff's deadline to seek certification of a Rule 23 class is not until June 1, 2012. ECF No. 34 at ¶ 3.

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that on this 23rd day of February 2012, a copy of the foregoing Motion to Stay Discovery was electronically filed and delivered via CM/ECF to:

Dan Getman
Matthew Dunn
Getman & Sweeney, PLLC
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Attorneys for Plaintiff

/s/
Russell B. Berger