

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED CORPORATION,)	
)	Civil No. SX-13-CV-0003
Plaintiff,)	
)	Action for Damages, Injunctive Relief
v.)	and Declaratory Relief
)	
WALEED HAMED,)	
)	
Defendant.)	

**WALEED HAMED’S RESPONSE TO UNITED CORPORATION’S
MOTION TO DISMISS WITHOUT PREJUDICE**

Waleed Hamed (“Mr. Hamed”), the defendant in the above-captioned civil action (this “Action”) files this response (the “Response”) to the Motion to Dismiss without Prejudice (“Plaintiff’s Motion to Dismiss”), filed on September 8, 2014 by United Corporation (“Plaintiff”).

I. INTRODUCTION

Although this Action must be dismissed, Plaintiff’s Motion to Dismiss must be considered in light of the following:

First, Plaintiff’s Motion to Dismiss ignores Mr. Hamed’s Rule 12(c) Motion to Dismiss for Lack of Standing, which was filed on April 23, 2014 (“Defendant’s Rule 12(c) Motion”). Plaintiff has never filed an opposition to Plaintiff’s Rule 12(c) Motion because, for reasons now admitted by Plaintiff in Plaintiff’s Motion to Dismiss, there was no way to oppose Defendant’s Rule 12(c) Motion in good faith. Defendant’s Rule 12(c) Motion seeks an award of attorneys’ fees. Having failed to respond for almost five (5) months, Plaintiff has conceded Defendant’s Rule 12(c) Motion and the relief sought therein can be properly granted by the Court, including Defendant’s request for an award of attorneys’ fees.

Second, Plaintiff's Motion to Dismiss evidences that this Action should be dismissed *with* prejudice together with an award of attorneys' fees to Mr. Hamed. Given the extreme bad faith, vexatious and harassing nature of this Action – especially when taken in context of Plaintiff's larger "scorched earth" litigation campaign against Mr. Hamed and his family – this Action qualifies as an instance where attorneys' fees are properly awarded together with a dismissal *with* prejudice.

Third, after the filing of an answer,¹ unless otherwise stipulated between the parties, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." See Fed.R.Civ.P. 41(a). In the event that the Court does not dismiss this Action as requested in either of Mr. Hamed's first or second points above, case law governing voluntary dismissals dictates that Plaintiff has a choice: (i) dismiss *without* prejudice and pay Mr. Hamed's attorneys' fees or (ii) dismiss *with* prejudice and accept the legal and evidentiary ramifications thereof in other cases.

II. FACTUAL BACKGROUND

Plaintiff portrays its Motion to Dismiss as an attempt to dismiss this Action on a "no harm, no foul" basis. Dismissal of this Action, however is far from a "no harm, no foul" matter. This Action must be viewed in context of the larger litigation war spawned from Plaintiff's attempt to wrongfully convert Mohammed Hamed's half ownership of the Plaza Extra partnership to its use.

As part of Plaintiff's scheme to convert Mohammed Hamed's share of the Plaza Extra partnership, Plaintiff and various members of the Yusuf family filed a plethora of ancillary civil actions in what can only be characterized as a "scorched earth" litigation strategy. All of Plaintiff's

¹ Mr. Hamed filed an answer on February 11, 2013. Contrary to citation in Plaintiff's Motion to Dismiss, Fed.R.Civ.P. 7 does not govern dismissal of civil actions.¹ Dismissal of civil actions is governed by Fed.R.Civ.P. 41. Plaintiff's odd citation to Fed.R.Civ.P. 7 is indicative of the larger course and scope of Plaintiff's bad faith and gamesmanship throughout Plaintiff's litigation campaign against the Hamed family.

and the Yusuf family member's lawsuits essentially restated the same claims in multiple forums: (i) against Wally Hamed here, (ii) against Willie Hamed on St. Thomas, and (iii) against a Plaza Extra employee, Wadda Charriez, after she was a witness against Plaintiff at a preliminary injunction hearing in yet a fourth case. Despite numerous prior admissions under oath, Plaintiff brazenly maintained a new position throughout its litigation campaign (i) that it **owned** 100% of the Plaza Extra partnership, (ii) that the Hameds were mere employees of the Plaza Extra Supermarkets and (iii) that the Hameds and Wadda Charriez could be fired at will. At one point, Fathi Yusuf even called the police to have them removed from the stores. See Hamed v. Yusuf and United Corporation, 2013 WL 1846506 (V.I.Super. 2013).

After extensive, brutal and extremely costly litigation in which Plaintiff and the Yusuf family have suffered defeat after defeat, on April 7, 2014, Plaintiff admitted the existence of the Plaza Extra partnership in Hamed v. Yusuf (Case No. SX-12-CV-370). By admitting the existence of the Plaza Extra partnership, Plaintiff and the Yusuf family admitted that their many denials of the existence of partnership were all stated in bad faith. Plaintiff then lost its case against Willie Hamed in St. Thomas on September 4, 2014 because its claims against Willie Hamed, even if taken as valid, were all more than a dozen years old. See United Corporation v. Waheed Hamed (Case No. ST-13-CV-101, September 4, 2014) (Dunston, J.). Plaintiff lost its case against Willie Hamed on summary judgment grounds based on statute of limitations issues in which the Court noted that Plaintiff ignored successive Court orders to respond to Willie Hamed's motion to dismiss. Id. Plaintiff has also refused to respond to a motion to dismiss for lack of standing filed on or about April 23, 2014 in United Corporation v. Wadda Charriez, (Case No. SX-13—CV-152).

In this Action, Plaintiff has defied Court rules and played games with the Court's time and resources, all at great financial expense to Mr. Hamed. Plaintiffs have now refused to respond to

Mr. Hamed's Rule 12(c) Motion, filed on April 23, 2014. Rather than grant Plaintiff's Motion to Dismiss, the Court should enter judgment upon Mr. Hamed's unopposed Rule 12(c) Motion to Dismiss and grant to Mr. Hamed his attorneys' fees.

III. DISCUSSION

A. **The Court Should Dismiss this Action *With Prejudice* Pursuant to Mr. Hamed's Rule 12(c) Motion and Award to Mr. Hamed his Attorneys' Fees.**

Plaintiff's Motion to Dismiss is an attempt to avoid an award of attorneys' fees. Plaintiff has never responded to Mr. Hamed's Rule 12(c) Motion, filed April 23, 2014. The Court must not grant Plaintiff's Motion to Dismiss in the presence of Mr. Hamed's 5-month old unopposed Rule 12(c) Motion. See LRCi 7.1(e)(1), made applicable by Super. Ct. R. 7 ("A party ***shall*** file a response within fourteen (14) days after service of the motion.") (emphasis added); see also LRCi 7.1(e)(3) ("Nothing herein shall prohibit the Court from ruling without a response or reply when deemed appropriate."). To grant Plaintiff's Motion to Dismiss instead of Mr. Hamed's Rule 12(c) Motion would open the door for plaintiffs everywhere to file ridiculous lawsuits, refuse to answer a motion to dismiss and then six months later request voluntary dismissal with no real effect. Such gamesmanship must not be supported by the Court. The Court should dispose of this Action by granting Mr. Hamed's Rule 12(c) Motion and granting to Mr. Hamed his attorneys' fees as requested therein.

B. **In the Alternative, this Action Should Be Dismissed *With Prejudice*, together with an Award of Attorneys' Fees to Mr. Hamed, pursuant to Fed.R.Civ.P. 41(a)(2).**

After the filing of an answer, except as otherwise stipulated between the parties, "an action may be dismissed at the plaintiff's request only by court order, ***on terms that the court considers proper.***" Fed.R.Civ.P. 41(a)(2) (emphasis added). A plaintiff has no right to a dismissal pursuant

to Rule 41(a)(2); such matters are entrusted to the discretion of the court. Tesma v. Maddox-Joiner, Inc., 254 F.R.D. 699, 701 (S.D. Fla. 2008) (quoting In re Bayshore Ford Trucks Sales, Inc., 471 F.3d 1233, 1259 (11th Cir. 2006)). When considering a plaintiff's request for voluntary dismissal, "*the court must keep in mind the interests of the defendant, for Rule 41(a)(2) exists chiefly for protection of defendants.*" Id. (emphasis added).

Virgin Islands law authorizes the Court to award attorneys' fees to any prevailing party in litigation. 5 V.I.C. § 541(b). "Though a defendant may recover fees and costs with respect to a dismissal without prejudice, it cannot recover them where the dismissal is with prejudice *barring exceptional circumstances.*" Grand Union Supermarkets v. H.E. Lockhart Management, Inc., 2013.WL 163830, at *3 (D.V.I. January 10, 2013) (emphasis added) (quoting Nolen v. Henderson Nat'l Corp., 986 F.2d 1428 (10th Cir. 1993)). "An award of attorney fees under Rule 41(a)(2)'s 'exceptional circumstances' is parallel to the award of attorney fees under the 'bad faith' exception to the American Rule." Steinert v. Winn Group, Inc., 2000 WL 1466178, at *2 (D. Kan. August 2, 2000); see also Freymiller v. CMS Transp. Servs., Inc., 1998 WL 769846, at *2 (10th Cir. October 29, 1998) ("the underlying rationale for fee-shifting is punitive and 'bad faith' is an essential element").

"[B]ad faith in bringing an action or in causing the action to be brought . . . justifies the award of fees." Id. "Exceptional circumstances" are also found where "there was substantial doubt as to the justification of the suit" at the time the complaint was filed. See, e.g., Krasnow v. Sacks & Perry, Inc., 58 F.Supp. 828 (S.D.N.Y. 1945). "Exceptional circumstances" may also be found for "dominating reasons of justice . . . where the litigation is false, unjust, vexatious, wanton, or oppressive, or where it is unnecessary and groundless or conducted in bad faith or with fraudulent intent." Murdock v. Prudential Ins. Co. of America, 154 F.R.D. 271, 273 (M.D. Fla.

1994) (quoting Lawrence v. Fuld, 32 F.R.D. 329, 331 (D. Md. 1963)); see also Kreager v. Solomon & Flanagan, P.A., 775 F.2d 1541, 1542-43 (11th Cir. 1985) (courts have the inherent power to assess attorney fees when a party willfully disobeys a court order, or when a losing party acts in bad faith, vexatiously, wantonly, or for oppressive reasons); Gap, Inc. v. Stone Int'l Trading, Inc., 169 F.R.D. 584, 588 (S.D.N.Y. 1997) (“Although a court may impose attorneys’ fees and costs under Rule 41(a)(2), it should do so only when justice so demands.”).

In Tesma, the Court awarded attorneys’ fees to the defendant upon a dismissal *with* prejudice because the defendant “[was] forced to litigate this case without reason.” Tesma v. Maddox-Joiner, Inc., 254 F.R.D. at 701. The Tesma court found that a “without prejudice” dismissal, even with an award of attorneys’ fees, would not serve to protect the defendant because “because the record clearly establishes that Plaintiff could never refile this action in good faith against Defendant.” Tesma v. Maddox-Joiner, Inc., 254 F.R.D. at 702. The Tesma court dismissed the action *with* prejudice together with an award of attorneys’ fees to the defendant. Id.

This Action fits well within the “exceptional circumstances” permitting an award of attorneys’ fees when a case is dismissed *with* prejudice. Plaintiff’s and the Yusufs’ denial of the existence of the Plaza Extra partnership was the genesis of Plaintiff’s entire scorched earth litigation campaign against the Hamed family. Although recounted with attempted masterful spin in Plaintiff’s Motion to Dismiss, the fact is that Plaintiff and Fathi Yusuf only admitted the existence of the Plaza Extra partnership after they were forced to do so by repeated exposure of the ridiculousness of their arguments.

Plaintiff’s admission of the existence of the Plaza Extra partnership raises in this Action virtually every one of the factors discussed above: (i) this Action was brought in bad faith (for example, Plaintiff has brought the same claims in another case before this Court); (ii) there was

substantial doubt concerning the justification for this suit at the time it was commenced by Plaintiff; (iii) this Action was false, unjust, vexatious, wanton, and oppressive, having been filed for no other purpose other than to try to spend the Hamed family into oblivion and to harass them with more scorched earth litigation.

As in Tesma, Mr. Hamed was forced to litigate this Action without any reason whatsoever. Mr. Hamed deserves an award of attorneys' fees. Dismissal *without* prejudice serves no purpose and provides no protection for Mr. Hamed. Given Plaintiff's admission of the existence of the Plaza Extra partnership, there is no way that Plaintiff could ever, in good faith, file these claims against Mr. Hamed again. See Tesma v. Maddox-Joiner, Inc., 254 F.R.D. at 701 ("Rule 41(a)(2) exists chiefly for protection of defendants."). If not dismissed pursuant to Mr. Hamed's Rule 12(c) Motion with an award of attorneys' fees, then this case must be dismissed *with* prejudice together with an award of attorneys' fees to Mr. Hamed.

C. As a Second Alternative, Plaintiff has a Choice to Make: (i) Dismiss Without Prejudice and Pay Mr. Hamed's Attorneys' Fees or (ii) Dismiss With Prejudice.

Ignoring for the moment the USVI's statute as to attorney fees, "[f]ee awards are often made when a plaintiff dismisses a suit *without* prejudice under Rule 41(a)(2)." Colombrito v. Kelly, 764 F.2d 122, 133 (2d Cir. 1985) (citing 9 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 2366, at 177-80 (1971 & Supp. 1984)). "The purpose of such awards is generally to reimburse the defendant for the litigation costs incurred, in view of the risk (often the certainty) faced by the defendant that the same suit will be refiled and will impose duplicative expenses upon him." Id. (citing Smoot v. Fox, 353 F.2d 830, 833 (6th Cir. 1965), cert. denied, 384 U.S. 909 (1966); John Evans Sons, Inc. v. Majik-Ironers, Inc., 95 F.R.D. 186, 191 (E.D. Pa. 1982)). In contrast, barring exceptional circumstances (discussed above), "where a motion for voluntary

dismissal is granted **with** prejudice . . . an award of attorneys' fees is not appropriate because there is no risk that the defendant can be called again to defend and thus no risk of any duplication of expense." Metro Media Entertainment, LLC v. Steinruck, 2014 WL 4268838, at *3 (D. Md. August 27, 2014) (citing Lawrence v. Fuld, 32 F.R.D. 329, 331 (D. Md. 1963)).

In the event that the Court is not inclined to dismiss this Action consistent with one of the alternatives advocated above, Plaintiff has a choice: (i) dismiss **without** prejudice and pay Mr. Hamed's attorneys' fees or (ii) dismiss **with** prejudice and accept the legal and evidentiary ramifications thereof in other cases. In the event of a dismissal **without** prejudice, Plaintiff is no less obliged to reimburse Mr. Hamed's attorneys' fees. If Plaintiff insists on dismissal **without** prejudice, case law is very clear that attorneys' fees are properly awarded in connection with dismissals **without** prejudice even in the absence of any "exceptional circumstances."

IV. CONCLUSION

The bad faith inherent in this Action is egregious. Plaintiff's long-standing admissions of the existence of the Plaza Extra partnership followed by a new theory and then a final admission is tantamount to stating that this Action was completely unnecessary – and filed for no purpose other than to ratchet up fees for Mr. Hamed. And the same claims being brought before two different judges of this Court is equally probative. Plaintiff's refusal to answer Mr. Hamed's Rule 12(c) Motion is a continuation of its bad faith. Whether by granting Mr. Hamed's Rule 12(c) Motion, granting a dismissal **with** prejudice or dismissal **without** prejudice, Mr. Hamed deserves an award of attorneys' fees for being forced to litigate this unnecessary Action.

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WHEREFORE, for the reasons set forth above, Mr. Hamed respectfully requests that the Court enter an order (i) granting Mr. Hamed's Rule 12(c) Motion and awarding to Mr. Hamed his attorneys' fees; (ii) dismiss this Action *with* prejudice and grant to Mr. Hamed his attorneys' fees; (iii) dismiss this Action *without* prejudice and grant to Mr. Hamed his attorneys' fees; or (iv) dismiss this Action *with* prejudice and, in any case, grant to Mr. Hamed such other and further relief as is just and proper.

Respectfully submitted,

ECKARD, PC

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Dated: September 17, 2014

Counsel to Waleed, Mufeed and Hisham Hamed

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September 2014, I served a copy of the foregoing in compliance with the parties' consent to electronic service of all documents in this Action, pursuant to Fed. R. Civ. P. 5(b)(2)(E), on: Nizar A. DeWood, Esquire (dewoodlaw@gmail.com); Gregory H. Hodges, Esquire (ghodges@dtflaw.com); Joel H. Holt, Esquire (holtvi@aol.com); Carl Hartmann, Esquire (carl@carlhartmann.com); and Jeffrey B.C. Moorhead, Esquire (jeffreylaw@yahoo.com).

