

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERIC E. HOYLE,

Plaintiff,

v.

**AFFIDAVIT IN SUPPORT OF
DEFENDANTS' MOTION FOR
VOLUNTARY DISMISSAL
WITHOUT PREJUDICE**

Civil Action No. 08-CV-347C

FREDERICK DIMOND, ROBERT DIMOND,
and MOST HOLY FAMILY MONASTERY,

Defendants.

CHARLES C. RITTER, JR., hereby declares, under penalty of perjury:

1. I am an attorney admitted to practice before this Court and am a partner with the law firm Duke, Holzman, Photiadis & Gresens LLP, attorneys for the Defendants Frederick Dimond ("Brother Michael Dimond"), Robert Dimond ("Brother Peter Dimond") and Most Holy Family Monastery ("MHFM") (collectively "Defendants") in this action.

2. I submit this Affidavit in Support of Defendant's motion pursuant to Fed. R. Civ. P. 41 for dismissal without prejudice with the right to re-file counterclaims in any subsequent legal proceeding or if any claim is brought by Eric Hoyle or on his behalf against the above named Defendants.

BACKGROUND

A. The Pleadings

3. Plaintiff filed his original Complaint on May 9, 2008, alleging four causes of action: fraud, constructive fraud/negligent misrepresentation, unjust enrichment/constructive trust, and money had and received. (*See*, Docket No. 1).

4. On March 10, 2009, Plaintiff filed an Amended Complaint adding six additional causes of action: mandatory accounting, violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(c) and (d), deceptive trade practices, false advertising, and vicarious liability of MHFM. (*See*, Docket No. 42). This pleading also included allegations about an alleged agreement between Plaintiff and Defendants for money to be returned to Plaintiff. (Docket No. 42 ¶¶ 39, 44-45).

5. Defendants filed an Answer to the Amended Complaint on March 20, 2009 and interposed seven counterclaims: defamation/injurious falsehood, violation of the Lanham Act, interference with prospective advantage/tortious interference with contract, conversion, breach of fiduciary duty, misappropriation of trade secrets, and violation of the Electronic Communications Privacy Act (“ECPA”). (*See*, Docket No. 43).

6. Plaintiff filed his reply to the counterclaims on April 9, 2009. (*See*, Docket No. 44).

7. Defendants filed a Motion for Summary Judgment on January 6, 2012. (*See*, Docket No. 89).

8. The Court granted Defendants’ motion for summary judgment and dismissed the Plaintiff’s complaint on June 22, 2012, (*See*, Docket No. 106), but held in abeyance that aspect of the Defendant’s Motion in which they sought judgment on their counterclaims. *See Id.*

9. This Court denied Defendant's motion for summary judgment on their counterclaims and granted summary judgment to Plaintiff, *sua sponte*, dismissing Defendants' counterclaims under the Lanham Act and the ECPA.

B. Dispositive Motion and Current Status

10. The only claims remaining in this action to be disposed of at trial are Defendants' remaining counterclaims.

11. Defendants have proposed that they withdraw their counterclaims without prejudice based on the belief that, despite an anticipated judgment, it will be difficult, if not impossible, to actually collect against Plaintiff. Plaintiff has refused to stipulate to dismissal without prejudice.

DISCUSSION

A. Fed. R. Civ. P. 41(a)(2)

12. "Where a plaintiff moves for voluntary dismissal of an action without defendant's consent, the court may grant the motion only 'upon such terms and conditions as the court deems proper.'" *AET Rail Grp., LLC v. Siemens Transp. Sys., Inc.*, 08-CV-6442, 2009 WL 5216960 at *2 (W.D.N.Y. Dec. 30, 2009) (applying Fed. R. Civ. P. 41 to Fed. R. Civ. P. 41(a)(2)).

13. "Where, as here, an answer with counterclaims and motions for summary judgment have been filed, and the plaintiff has refused to stipulate to dismissal of defendant's counterclaims, voluntary dismissal may only be effectuated by order of the court." *AET Rail Grp., LLC v. Siemens Transp. Sys., Inc.*, 08-CV-6442, 2009 WL 5216960 at *2; *See* Fed. R. Civ. P. 41(a)(2) (court may grant motion for voluntary dismissal only "upon such terms and

conditions as the court deems proper.”); *see also* Fed. R. Civ. P. 41(c) (rule applies to counterclaims as well as to plaintiff’s claims).

14. “The decision whether to grant a Rule 41(a)(2) motion for voluntary dismissal lies within the sound discretion of the court.” *AET Rail Grp., LLC v. Siemens Transp. Sys., Inc.*, 08-CV-6442, 2009 WL 5216960 at *2; *See Catanzano v. Wing*, 277 F.3d 99, 109 (2d Cir.2001).

B. Zagano Factors

15. “The court’s decision should be informed by the following factors: (1) the diligence in bringing the motion; (2) any “undue vexatiousness” on the part of the defendant in this case; (3) the extent to which the suit has progressed, including plaintiff’s effort and expense in preparation for trial; (4) the duplicative expense of potential relitigation; and (5) the adequacy of the defendant’s explanation for the need to dismiss.” *AET Rail Grp., LLC v. Siemens Transp. Sys., Inc.*, 08-CV-6442, 2009 WL 5216960 at *2; *See Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir.1990).

16. In this case, all the aforementioned factors favor dismissal under Rule 41(c).

17. First, the Defendants conduct in this case has not been unduly vexatious. Defendants’ counterclaims are not baseless or frivolous. Defendants have not engaged in any patently dilatory or inappropriate motion practice. Defendants’ counterclaims were based in both fact and existing law. There is no suggestion that the counterclaims were so devoid of merit that its only purpose could have been to harass Plaintiffs. *See AET Rail Grp., LLC v. Siemens Transp. Sys., Inc.*, 08-CV-6442, 2009 WL 5216960 at *3. Indeed, the remaining counterclaims will need to proceed to trial to be resolved. Nevertheless, it is apparent that a judgment will be difficult, if not impossible, to collect upon given Plaintiff’s out of state residence and apparent lack of assets.

18. Defendants' "view of the law may be reasonable even if it is not ultimately sustained." *Id.* The Court need only "find that the counterclaims were filed in good faith, and that the legal arguments and litigation strategies employed by Defendant were neither malicious, nor frivolous, nor otherwise improper." *Id.*

19. Dismissal without prejudice would not result in duplicative expenses should the counterclaims be re-asserted in the future. Defendants have no expectation of recovering damages from Plaintiff based on its voluntary dismissal of the counterclaims. *See Id.*

20. Defendants acted diligently by not delaying in bringing the motion for voluntary dismissal. *See Id.*

21. Accordingly, the five *Zagano* factors weigh in favor of dismissal of the counterclaims. *See Id.*

C. Camilli Factor

22. The opposing party of a motion under Fed. R. Civ. P. 41(A)(2) must suffer some plain legal prejudice besides the prospect of a second lawsuit to justify denying the order. *See Camilli v. Grimes*, 436 F.3d 120, 123 (2d Cir. 2006).

23. Where a defendant moves to dismiss its counterclaims, it can only reassert them in defense of any related suit that the plaintiff may bring against it. Therefore, the plaintiff is actually in control of relitigation of the counterclaims. *See Id.*

24. Here, Defendant is moving to dismiss its counterclaims without prejudice, subject to re-filing those counterclaims if Plaintiff brings another action.

25. Therefore, Plaintiff suffers no plain legal prejudice by an Order dismissing the counterclaims without prejudice. *See Id.*

WHEREFORE, the Defendants respectfully request that the Court grant an Order dismissing Defendant's counterclaims without prejudice and providing for Defendants' right to re-file said counterclaims in any subsequent legal proceeding or if any claim is brought by Eric Hoyle against Defendants together with such other and further relief as this Court deems just and proper.

Dated: December 18, 2013

/s/Charles C. Ritter, Jr.
Charles C. Ritter, Jr.