Filed
D.C. Superior Court
06/25/2012 15:54PM
Clerk of the Court

THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

BRADLEE DEAN, *et al.*, Plaintiffs, v. NBC UNIVERSAL (NBC), *et al.*, Defendants.	)))))))))	Case No. 2011 CA 006055 B Judge Joan Zeldon

MEMORANDUM AND ORDER

The Court has before it (1) Defendants' Motion to Recover Attorneys' Fees and Costs (hereafter "Defendants' Motion"), dated and filed May 7, 2012, (2) Plaintiffs' (combined) Motion for Reconsideration, Opposition to Defendants' Motion to Recover Attorneys Fees, and Cross Motion for Sanctions, dated May 23, 2012 (hereafter "Plaintiffs' Combined Motion"), (3) Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motions for Reconsideration and Sanctions, filed June 4, 2012, (4) the Court's Orders docketed June 6 and June 12, 2012, (5) Plaintiff's Reply[1] (filed June 11, 2012), (6) the Supplemental Affidavit of Laura R. Handman filed June 18, 2012, and (7) Plaintiffs' Reply to Defendants' Supplemental Affidavit, filed June 22, 2012. The Court will grant Defendants' Motion to Recover Attorneys' Fees and Costs in part and deny Plaintiffs' Motion for Reconsideration and Cross Motion for Sanctions for the reasons set forth below.

[1] Plaintiffs have no right to file a Reply because Superior Court Civil Rules do not authorize the filing of a Reply. The correct procedure would have been for Plaintiffs' counsel to file a Motion for Leave to File a Reply, with the proposed Reply attached as an exhibit to the Motion. However, for the sake of completeness in the record, the Court has considered Plaintiffs' Reply.

Background

Defendants' submitted their Motion pursuant to an order of this Court, entered April 23, 2012, which also vacated a Notice of Dismissal that Plaintiff had filed on February 21, 2012.[2] The motive for Plaintiffs' effort to abandon this action seven months after it was filed is to pursue the same claims against the same Defendants in the U.S. District Court for the District of Columbia. *See Dean v. NBC Universal*, 12 cv 00283-RJL.

Plaintiffs wish to discontinue this case and to pursue the same matter in Federal Court because, at the time they filed the praecipe of dismissal, there had been at least one decision by a District of Columbia federal judge holding that D.C. Code § 16-5501, *et seq.*, the District's "Anti-SLAPP Act"[3] violated the Federal Rules of Civil Procedure, and thus was unavailable to a defamation defendant sued in Federal Court.[4] Notwithstanding the fact that this Court was proceeding to address first Defendants' converted Motion for Summary Judgment, Plaintiffs' counsel did not want to have the Anti-SLAPP issue "hanging over our head." Status Hearing of February 17, 2012.

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[2] The reasons the Court vacated the Praecipe of Dismissal, which was docketed by the Clerk's Office without any ruling by the judge, are set forth in the April 23, 2012 Order. The explanation need not be repeated in this Memorandum and Order.

[3] SLAPP stands for Strategic Lawsuits Against Public Participation.

[4] *See 3M Co. v. Boulter*, Civil No. 11-1527(RLW), 2012 WL 386488 (D.D.C. Feb. 2, 2012) (Wilkins, J.) (finding Anti-SLAPP law to be procedural, and therefore inapplicable to a federal court sitting in diversity under *Erie*). *But see Sherrod v. Breitbart*, Civil Case No. 11-477 (RJL), 2012 WL506729, *1 (D.D.C. Feb. 15, 2012) (Leon, J.) (finding the Anti-SLAPP Act to be "substantive—or at the very least, ha[ve] substantive consequences"), *and Farah v. Esquire Mag., Inc.*, Civil Action No. 11-cv-1179 (RMC), slip op. at 11, n.10 (D.D.C. June 4, 2012) (Collyer, J.) (citing *Sherrod*) ("The Court finds the [substantive] view persuasive. It was certainly the intent of the D.C. Council and the effect of the law—dismissal on the merits—to have substantive consequences."). (The Court notes that Mr. Klayman and Ms. Handman represent the parties—plaintiffs and defendants, respectively—in the *Esquire Magazine* case.)

Anti-SLAPP statutes have been enacted by more than twenty-five states and the District of Columbia. Broadly stated, their avowed purpose is to provide protection at an early stage of civil defamation actions for defendants who claim that their allegedly defamatory statements regarding plaintiffs were made in exercise of their constitutional right of free speech regarding an issue of public interest. Among other provisions, most of these statutes set out an expedited procedure to consider the question of the availability of such a defense, and require the plaintiff to demonstrate a likelihood of success on the merits to keep the court from dismissing the action.

Plaintiffs' claims in this case are for alleged defamations that occurred during MSNBC broadcasts of The Rachel Maddow Show on August 9, 2010, and May 11, 2011. The Rachel Maddow Show, televised nationally five days a week during prime time, is about politics from a liberal perspective. It is not a straight news show in the traditional sense; rather, the show is a running commentary about what is happening in the political realm. Consequently, the District's Anti-SLAPP Act presumably would have facial application to the present case.

On September 9, 2011, Defendants filed a Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act of 2010 and Motion to Dismiss Pursuant to Superior Court Civil Rule 12 (b)(6). On October 7, 2011, Plaintiffs' counsel moved for an extension of time to respond to the motions, and a few days later opposed both motions to dismiss. Both sides filed additional papers, but no Anti-SLAPP Motion hearing was set for 2011 because Plaintiffs' counsel, Larry Klayman, Esq., was living in California and informed the Court that health problems required him to forego travel. During this time, numerous conferences on the record were held via telephone, and a hearing on the record by phone was held on January 24, 2012, also to accommodate Mr. Klayman.

Eventually, the Court set the hearing on Plaintiffs' Anti-SLAPP motion for February 23, 2012. However, because Defendants' motions had been accompanied by an affidavit with numerous attachments from Defendants' counsel that presented material outside the pleadings, the Court converted the pending motion to dismiss into one for summary judgment.[5] This was the posture of the case when, on February 21, 2012, Plaintiffs filed with the Clerk a praecipe purporting to unilaterally dismiss the action—obviously without prejudice.

[5] *See* Court Order dated April 23, 2012, for a full recitation of the facts leading up to the conversion of the Motion to Dismiss to a Motion for Summary Judgment.

On February 27, 2012, Defendants filed a Motion to Vacate Plaintiffs' February 21, 2011 Notice of Dismissal. On April 23, 2012, this Court vacated the notice of dismissal, reinstated the action and entered an order that conditioned a voluntary dismissal of the Complaint without prejudice upon Plaintiffs' payment of reasonable attorneys' fees and costs to cover what cannot be applied to the subsequent lawsuit covering the same claims. *See Thoubboron v. Ford Motor Co.*, 809 A.2d 1204, 1211 (D.C. 2002).

Discussion of Pending Motions

It is appropriate to first focus on Plaintiffs' Motion for Reconsideration because if the Court were to enter an Order providing what is requested by Plaintiffs, they would not be required to pay any fees or costs in connection with their intended discontinuance of their case before this Court without prejudice.

Plaintiffs' motion claims that they seek to dismiss this action "to avoid parallel claims that would have required both parties to needlessly waste the time and expense required to litigate the same claim in two courts." Pls. Combined Mots. at 1. Before Plaintiffs filed the same case in the Federal District Court, there was no risk of a "needless waste of time and expense" owing to the same claim being asserted in two different courts. It is only the filing of the second action by Plaintiffs in the Federal Court (seven months after they filed this Superior Court case) that created any risk of a "waste of time and expense" that might result from the same claims being litigated before two different courts.

To speak plainly, the Court cannot credit Plaintiffs with their purported reason for seeking to discontinue the action in this Court. In this context, the Court finds that Plaintiffs' accusations that the Defendants' conduct in this litigation is "a bad faith attempt to further harm

Plaintiffs" or that Defendants are engaging in "underhanded and extreme methods of delaying and raising the cost of this litigation"[6] to be a gross and transparent distortion of the record. It is Plaintiffs—not Defendants—who have created the possibility of increased time and expense arising out of duplicate actions, and the certainty that some of the time and expenses that Defendants have experienced, unless reimbursed by Plaintiffs, would be wasted.[7]

Plaintiffs are reminded that the Court's Order conditioning the grant of an Order of Dismissal without prejudice upon payment of certain attorneys' fees and costs was carefully limited to avoid any of the charges allowed by the Court being for work that can be used in the federal action. If Plaintiffs now wish to pursue their claim in a forum they believe is likely to give them a more favorable outcome than what they believe they may obtain from this Court, they may do so. However, their decision to change forums seven months later gives rise to a concomitant obligation to make that change "on their own dime," and not on that of the Defendants, who undoubtedly will continue to fight this dispute before the Federal Court with considerable costs.[8] This Court's Order of April 23, 2012, requiring Plaintiffs, as a condition of dismissal without prejudice, to pay the additional costs for work that cannot be used in the federal case is eminently fair and reasonable. It will not be modified.

Turning now to Defendants' Motion, the Court finds that with only a few exceptions, the requested fees and costs are reasonable. From Defendants' perspective, this case involves a

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[6] Pls.' Combined Mots. at 2.

[7] The Court notes that *Plaintiffs* would raise the cost of the Superior Court litigation by deposing attorneys about timesheets submitted to this Court.

[8] Plaintiffs argue that they have "few resources" and that "it would be a manifest injustice to assess punitive damages and attorneys' fees and costs" against them. However, they have created this "problem" for themselves by choosing to litigate before this Court for seven months and then changing to what they apparently perceive to be a more favorable forum. Having created this dilemma, they cannot reasonably be excused for the consequences of their actions. Moreover, the purpose of the Court's order to pay reasonable attorneys' fees and costs is not to punish but to compensate and to avoid having the Court's processes be used by a party so as to unnecessarily increase the costs of litigation.

serious attack on their First Amendment rights. They had every right to retain distinguished counsel to defend them. The Laffey Index rates that Defendants' lead counsel has used to justify Defendants' fee request are very reasonable. The Court notes that Defendants did not even request fees for corporate in-house counsel, who did much of the work.

The only requested fee for work that the Court will disallow is twenty minutes spent on August 16, 2011, to "find and send sample corporate disclosures and proposed orders to Ms. Talbert." Plaintiffs have informed the Court that the same corporate disclosure form was used in the federal action, and consequently, the Court will disallow this particular request.

The only costs disallowed are the two $20-each taxi costs requested for ground transportation in October 2011 and November 2011.

Wherefore, it is this 25th day of June, 2012, hereby

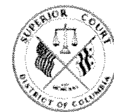
ORDERED, that Defendants' Motion to Recover Attorneys' Fees and Costs in hereby **GRANTED IN PART**; and it is further

ORDERED, that Plaintiffs shall pay Defendants $24,625.23 in attorneys' fees and costs within thirty days of the docketing date of this Order; and it is further

ORDERED, that the case will remain open until August 3, 2012, because a failure to pay these Court-ordered costs will lead to a dismissal with prejudice; and it is further

ORDERED, that Plaintiffs' Motion for Reconsideration and Cross Motion for Sanctions is **DENIED**.

Joan Zeldon



Joan Zeldon
Senior Judge
(Signed in Chambers)

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