UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXCESS INSURANCE COMPANY, LTD.,

Plaintiff,

- against -

ODYSSEY AMERICA REINSURANCE CORPORATION, formerly known as METROPOLITAN REINSURANCE COMPANY and ODYSSEY RE HOLDINGS CORP.,

Defendants.

MEMORANDUM AND ORDER

05 Civ. 10884 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Presently before the Court is defendants' Odyssey American Reinsurance Corporation ("OARC") and Odyssey Re Holdings Corp. ("Odyssey Holdings")(collectively "defendants") motion to dismiss for failure to prosecute pursuant to Fed. R. Civ. P. 41(b). Since plaintiff has now agreed to dismiss the action, we construe the motion as one for voluntary dismissal under Fed. R. Civ. P. 41(a)(2), which provides for dismissal at plaintiff's instance, "upon such terms and conditions as the court deems proper." Thus, the remaining issue is the defendants' request for $17,352.75 in attorneys' fees. For the reasons that follow, we award defendant $4,500 in attorneys' fees, and dismiss the case with prejudice.

Background

This action was commenced December 30, 2005. Plaintiff, an insurance company, sought reimbursement under re-insurance

agreements it had executed in 1979 and 1980 with Metropolitan Reinsurance Company ("Met Re").[1] The re-insurance contracts covered policies that plaintiffs had issued to Pittsburgh Corning, and upon which Pittsburgh Corning had recently collected from plaintiff.[2]

At the initial pre-trial conference, on April 24, 2006, defendants maintained that they were not the proper party in this suit because they were not the successors-in-interest to Met Re, and therefore were not liable on the reinsurance contracts plaintiffs had signed. The Court directed both parties to commence discovery, and suggested that defendants produce affidavits as to the relationship between themselves and Met Re.

After a delay, defendants finally produced such an affidavit, albeit unsigned, in or around September, 2006.[3] In December 2006, defendants asked the Court for permission to move for summary judgment.[4] Plaintiffs, however, were not satisfied that the contents of the affidavit fully clarified the relationship between defendants and MetRe, and asked for more time in which to complete discovery. In a telephone conference call on January 26, 2007,

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[1] Complaint ¶ 11.

[2] Complaint ¶ 18.

[3] See Unsigned Affidavit of Gerard A. Dugan, Vice President of Odyssey America Reinsurance Corporation, transmitted to plaintiffs on September 21, 2006.

[4] See Defendants' Exhibit C (Letter from Jeffrey S. Shandel to Hon. Naomi Reice Buchwald, dated December 21, 2006).

this Court granted plaintiff until the end of April, 2007 to complete discovery.

After the January conference call, plaintiff did not serve any discovery requests nor take any other action in this case.[5] Rather, in March, 2007, plaintiff commenced an arbitration with Metropolitan Group Property and Casualty Insurance Corporation, ("Met Group"), a company which acknowledged that it was in fact the successor to MetRe.[6]

On May 2, 2007 attorney for defendants, Bruce M. Friedman, Esq. ("Friedman") contacted the attorney for the plaintiff, Lawrence W. Rose, Esq., ("Rose") about the possibility of dismissing the instant case given the plaintiff's pending arbitration against the proper party, and the lack of any discovery or other progress in the case since January.[7] (In the arbitration, Rose represented plaintiff, and Friedman represented Met Group). Rose responded to Friedman a few weeks later that he would get back to him shortly.[8]

Rose never did respond, however, and plaintiff fell out of contact with the defendants as well as with this Court. In June, this Court's law clerk tried calling Rose to request a status

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[5] Defendants Motion to Dismiss, at 2.

[6] See Plaintiff's Exhibit C (Letter from Michael J. McCabe to Lawrence Rose, dated March 22, 2007, sent on behalf of MetGroup and demanding arbitration in accord with the reinsurance certificates issued by MetRe to plaintiff).

[7] Defendants' Exhibit H.

[8] See Affidavit of Bruce M. Friedman ¶ 14; defendants' Exhibit I.

update, but to no avail.[9] On July 9, Friedman emailed Rose again, asking if he would agree to dismiss the instant case in light of the pending arbitration.[10]

Finally, still not having heard from Rose, on July 25, 2007, Friedman wrote a letter to this court with a carbon copy to Rose seeking permission to move to dismiss based on failure to prosecute.[11] Having still not heard back from Rose, on August 22 chambers telephoned Friedman and orally granted defendants' permission to so move.[12] Friedman then filed the motion to dismiss on September 11. The motion requests $17,352.75 in attorneys' fees, which consists of defendants legal fees from the period of September 22, 2006 up through the filing of the motion to dismiss.

This Court still had not heard from Rose until a law clerk called him on October 2, 2007.[13] Rose said that he had recently spoken with the defendants' counsel, and was in the process of arranging a stipulation that would extend his time to respond to defendants' motion. Such stipulation was eventually received by this Court on October 9, 2007, and signed the same day.

On October 15, Rose called Chambers to inform the Court that plaintiffs were now willing to dismiss the case, but defendants

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[9] See Court Docket Sheet, entry for June 18, 2007.

[10] Defendants' Exhibit J

[11] Defendants' Exhibit A.

[12] Court Docket Sheet, entry for August 22, 2007.

[13] Court Docket Sheet, entry for October 2, 2007.

refused to drop their demand for attorneys' fees. Accordingly, on October 22, 2007 this Court held a phone conference with both parties wherein we set an expedited briefing schedule on the issue of attorneys' fees.

Analysis

A. Applicable Law

In the context of a voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(2),[14] courts have both statutory and inherent powers to award attorneys' fees.

Under 28 U.S.C. § 1927, any attorney who "so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." See Mone v. C.I.R., 774 F.2d 570, 574 (2d Cir. 1985). Although other circuits have held that sanctions under § 1927 do not require a showing of bad faith, the Second Circuit has held that something "akin to bad faith" must be shown. State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada, 374 F.3d 158, 180 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1309 (2005) (sanctions are not appropriate under 28 U.S.C. § 1927 unless the offending conduct is " akin to bad faith"; activities must be so completely

[14] Fed. R. Civ. P. 41(a)(2) states that an action shall not be dismissed at the plaintiff's instance "save upon order of the court and upon such terms and conditions as the court deems proper." See, e.g., Cauley v. Wilson, 754 F.2d 769, 772 (7th Cir. 1985).

without merit that it must be concluded that they were undertaken for some improper purpose such as delay).

Federal courts also retain inherent power to sanction attorneys and award fees. See Chambers v. NASCO, Inc., 501 U.S. 32, 111 (1991) ("Indeed, [t]here are ample grounds for recognizing . . . that in narrowly defined circumstances federal courts have inherent power to assess attorneys' fees against counsel, even though the so-called 'American Rule' prohibits fee shifting in most cases.")(internal citations omitted). The purpose of such authority is to allow a court "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." Id. at 43 (citations omitted). See also Link v. Wabash Railroad Co., 370 U.S. 626, 630-31 (1962). Any award of sanctions under the court's inherent power must be based on "clear evidence" and must be accompanied by "a high degree of specificity in the factual findings." Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir.1986) (internal quotation marks omitted), *cert. denied*, 480 U.S. 918(1987). Courts must be careful "to ensure that any such decision [to sanction a party or attorney] is made with restraint and discretion." Chambers, 501 U.S. at 334.

In most circumstances, the touchstone for awarding fees under a court's inherent powers remains "bad faith" on the part of a litigant. See, e.g., Lucas v. Spellings, 408 F. Supp. 2d 8, 63 (D.D.C. 2006). However, the Second Circuit has recognized an exception to the bad faith requirement when attorney misconduct is

not related to the course or substance of a litigation, but is rather a "negligent or reckless failure to perform his or her responsibility as an officer of the court." United States v. Seltzer, 227 F.3d 36, 41 (2d Cir. 2000).

In Seltzer, a district court, using its inherent authority, ordered an attorney to pay a $350 fine for her negligent failure to return to court in a timely fashion following a lunch break, and for her failure to apologize to the court for being late. On appeal to the Second Circuit, the central issue was whether imposition of the fine required the district court to make a finding of bad faith. The Second Circuit reviewed its previous holdings on a court's inherent authority, and determined that its earlier cases requiring a finding of bad faith only addressed situations where a court had imposed attorneys' fees as a sanction for "conduct integrally related to the attorney's role as an advocate for his or her client." Seltzer, 227 F.3d at 40. In Seltzer, by contrast, "there [was] no allegation that either of these actions was undertaken as part of Seltzer's role in representing her client. Rather, both of these charges involve a lawyer's negligent or reckless failure to perform his or her responsibility as an officer of the court." Id., at 41.

Thus, the Second Circuit held that when attorneys' actions do not relate to the conduct of the litigation or are not undertaken for the client's benefit, the threshold for imposing sanctions is negligence or recklessness, and not bad faith: "[W]hen the district

court invokes its inherent power to sanction misconduct by an attorney that involves that attorney's violation of a court order or other misconduct that is not undertaken for the client's benefit, the district court need not find bad faith before imposing a sanction under its inherent power." Id. at 41-42.

B. Rose's conduct

The facts here evidence no misconduct at all on the part of the plaintiff's attorney during the first year and a half of this litigation. Rose made a good faith effort to determine the successor to MetRe, the party that he believed owed his client money.

However, plaintiff's counsel's more recent conduct has been grossly negligent. Plaintiff has not conducted any discovery in this case since January, 2007. In March, 2007 plaintiff began arbitration against Met Group, which acknowledged that it was the actual successor to MetRe. The time allowed for discovery in this case ended in April. Defendants then contacted plaintiff's counsel in May about the possibility of voluntarily dismissing the case. Defendants made numerous entreaties by letter, and by email. This Court also tried to get in touch with Rose in June, but Rose did not return the call. Faced with complete radio silence, defendants finally wrote to this Court, and to plaintiff's counsel, on July 25, 2007, and asked for permission to move for dismissal for failure to prosecute. Having still not heard back from plaintiff's

counsel for yet another month, on August 22, 2007 this Court gave defendants permission to so move. Defendants so moved on September 11, 2007, still not having had any communication with plaintiff.

Rose's failure to respond or communicate with defendants, or with this Court, for a number of months - and not until *after* defendants formally moved for dismissal - directly resulted in defendants' having to prepare and file an unnecessary motion. Such negligence is sanctionable under Seltzer. For, on this record, there is no evidence that plaintiff's silence was strategic, or in anyway related to representing his client's interests in this case. Plaintiff has not conducted any discovery since January, 2007, and makes no suggestion that any new information became available since then. If, upon receipt of defendant's July 25, 2007 letter requesting permission to move for dismissal, Rose had needed more time to contact his client, or for his client to consider voluntarily dismissing the case, Rose could have at the very least informed opposing counsel and this Court that he needed more time. As it was, at least six weeks passed between defendant's July 25, 2007 letter and September 11, 2007 - when defendant submitted formal motion papers - without so much as a word from Rose. Even in his papers opposing the request for fees, Rose has not offered any excuse or explanation for his repeated failures to contact defendants' counsel or the Court.

Under these circumstances, the Court determines that an award of $4,500 to be paid by plaintiff's attorney to defendants is

appropriate, as the reasonable costs incurred in filing the September 11 motion to dismiss for failure to prosecute.

Conclusion

Plaintiff's counsel is directed to pay a sum of $4,500 to defendants. The Clerk of the Court is directed to close the case, with prejudice.

SO ORDERED.

Dated: New York, New York
November 28, 2007

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Order have been mailed on this date to the following:

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