

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

)	
UNITED AUTO GROUP, INC., a)	
Delaware Corporation,)	
)	
Plaintiff,)	
)	
vs.)	No. <u>04-2802 D/P</u>
)	
ADAM EWING and ANDREW BARBEE,)	
Individuals,)	
)	
Defendants.)	

REPORT AND RECOMMENDATION

Before the court is plaintiff/counter-defendant United Auto Group, Inc.'s ("UAG") Motion For Rule 11 Sanctions Against Defendants And Their Counsel For Filing Frivolous Counterclaims, filed March 3, 2006 (dkt #103). Defendants/counter-plaintiffs Adam Ewing and Andrew Barbee ("defendants") filed a response in opposition on March 16, 2006. The matter was referred to the Magistrate Judge for report and recommendation. For the reasons below, the court recommends that plaintiff's motion with respect to the breach of settlement agreement counterclaim be DENIED without prejudice, and that plaintiff's motion with respect to the malicious prosecution counterclaim be DENIED.

I. PROPOSED FINDINGS OF FACT

Defendants Ewing and Barbee are former employees of Covington Pike Toyota, a car dealership located in Memphis, Tennessee and owned by UAG. Ewing and Barbee were formerly plaintiffs in an employment discrimination case filed in this district, styled Alexander v. United Auto Group, No. 01-2096 (W.D. Tenn. filed Feb. 5, 2001). The Alexander case settled prior to trial, and as part of the settlement agreement, Ewing and Barbee agreed not to do or say anything that would hurt or prejudice UAG's reputation or goodwill.

After the settlement in Alexander, Ewing and Barbee agreed to serve as paid expert witnesses in a consumer fraud class action, styled James v. United Auto Group, No. 01-1122-1 (Shelby Co. Chancery Ct.). Their testimony in James apparently related to the business practices of UAG. Additionally, defendants participated in interviews on the investigative television show *60 Minutes* and answered questions regarding their interaction with consumers while they were employees of the car dealership. In the present lawsuit, UAG alleges that defendants violated their settlement agreement in Alexander by testifying as expert witnesses in James and appearing on *60 Minutes*.

Defendants responded to plaintiff's complaint by filing two counterclaims on August 8, 2005. In their first counterclaim, defendants allege that they have a good faith belief that UAG has violated the Alexander settlement agreement by criticizing

defendants' work ethic and truthfulness when providing employment references to potential employers. Defendants' second counterclaim alleges that plaintiff's complaint is baseless and filed for the improper purposes of harassment and intimidation.

Plaintiffs filed the present motion for Rule 11 sanctions on March 3, 2006. Plaintiffs argue that defendants' breach of settlement agreement counterclaim is unfounded, as defendants have not provided any evidentiary support to substantiate their claim. Plaintiffs argue further that defendants' malicious prosecution claim is premature, as the underlying action has not been resolved in defendants' favor.

II. PROPOSED CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 11 authorizes the district court to award sanctions:

(1) when a party presents pleadings, motions or papers to the court for an improper purpose, (2) if the claims, defenses or other legal contentions therein are not warranted by existing law or a nonfrivolous extension of the law, or (3) if the allegations and other factual contentions therein do not have evidentiary support.

Elfelt v. United States, 149 Fed. Appx. 402, 409-410 (6th Cir. 2005). "The test for imposition of Rule 11 sanctions is whether the litigant's conduct was reasonable under the circumstances." Id. at 410; see also Caisse Nationale De Credit Agricole-CNCA v. Valcorp, Inc., 28 F.3d 259, 264 (2d Cir. 1994) (internal citations omitted) ("An argument constitutes a frivolous legal position for purposes of Rule 11 sanctions if, under an 'objective standard of

reasonableness,' it is 'clear . . . that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands.'"). Rule 11 sanctions should not be applied against a party "whose only sin was being on the unsuccessful side of a ruling or judgment," Dura Systems, Inc. v. Rothbury Invest., Ltd., 886 F.2d 551, 556 (3d Cir. 1989), but instead should be applied to deter litigants from offering frivolous and objectively unreasonable filings and arguments. Palazzolo v. Benson, No. 95-1067, 1996 U.S. App. LEXIS 12444, at *6 (6th Cir. April 3, 1996) (unpublished).

A. Breach of Settlement Agreement Counterclaim

The court submits that plaintiff's motion for Rule 11 sanctions with regard to defendants' breach of settlement agreement counterclaim is premature. Rule 11 recognizes that "sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation." Fed. R. Civ. P. 11 advisory committee's notes (1993). Although the rule does not designate any particular time for filing a motion for Rule 11 sanctions, such motions are generally considered at the conclusion of a lawsuit. Fed. R. Civ. P. 11 advisory committee's notes (1983) ("[I]t is anticipated that in the case of pleadings the sanctions issue [sic] under Rule 11 normally will be determined at the end of litigation."); Mann v. G

& G Mfg., Inc., 900 F.2d 953, 960 (6th Cir. 1990); Ellipsis, Inc. v. The Color Works, Inc., No. 03-2939, 2005 U.S. Dist. LEXIS 38641, at *8 (W.D. Tenn. Dec. 15, 2005) (unpublished).

Rule 11 therefore provides defendants the opportunity to develop their breach of settlement agreement counterclaim through discovery. Defendants and their attorneys have a continuing obligation to conduct a reasonable inquiry into the law and facts of their counterclaim, and failure to withdraw a meritless or frivolous claim upon further discovery may subject them to Rule 11 sanctions. Ridder v. City of Springfield, 109 F.3d 288, 293 (6th Cir. 1997) (concluding that under Rule 11, "litigants may be sanctioned under the amended rule for continuing to insist upon a position that is no longer tenable"); In re Welding Fume Prods. Liab. Litig., No. 03-17000, 2006 U.S. Dist. LEXIS 16407, at *20 (N.D. Ohio April 5, 2006) (unpublished). The court recommends that plaintiff's motion for Rule 11 sanctions with respect to defendants' breach of settlement counterclaim be DENIED without prejudice.

B. Malicious Prosecution Counterclaim

To sustain a claim for malicious prosecution under Tennessee law, the plaintiff must show that "(1) a prior suit or judicial proceeding was brought against plaintiff without probable cause, (2) defendant brought such prior action with malice, and (3) the prior action was finally terminated in favor of plaintiff."

Christian v. Lapidus, 833 S.W.2d 71, 73 (Tenn. 1992). Because the present case has not been "finally terminated" in favor of Ewing and Barbee, UAG argues that defendants' claim of malicious prosecution is "unripe" and "premature as a matter of law."

There is, however, at least some support for defendants' position. Defendants argue that Federal Rule of Civil Procedure 18(b) allows them to raise their malicious prosecution claim before the underlying lawsuit has been resolved. Rule 18(b) provides that "[w]henever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties." Fed. R. Civ. P. 18(b). In at least one circuit, the language of Rule 18(b) has been construed to support defendants' argument. See Schwartz v. Coastal Physician Group, Inc., No. 98-2085, 1999 U.S. App. LEXIS 2844, at *10 (10th Cir. Feb. 23, 1999) (unpublished) (interpreting North Carolina Rule of Civil Procedure 18(b), which is identical to federal rule; "Under North Carolina's procedural rules, plaintiff was permitted to raise the malicious prosecution claim even though it would not mature until the underlying lawsuit was terminated in his favor."); see also N.C. R. Civ. P. 18(b) ("Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant

relief in that action only in accordance with the relative substantive rights of the parties."). For purposes of Rule 11, because there is some support for defendants' position, this court cannot conclude that defendants were objectively unreasonable in raising their malicious prosecution claim at this point in the litigation. It is therefore recommended that UAG's motion with respect to this counterclaim be DENIED.

III. RECOMMENDATION

For the reasons above, the court recommends that plaintiff's Motion For Rule 11 Sanctions Against Defendants And Their Counsel For Filing Frivolous Counterclaims be DENIED without prejudice with respect to defendants' breach of settlement agreement counterclaim. The court recommends further that plaintiff's motion be DENIED with respect to defendants' malicious prosecution counterclaim.

Respectfully Submitted.

S/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

June 6, 2006

Date

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.

