UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

WEST COAST PRODUCTIONS, INC.,	)	
Plaintiff,	)	**CIVIL ACTION**
v.	)	**FILE NO. 4:11-cv-00211-HLM**
ROBIN POPHAM,	)	
Defendant.	)	

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR VOLUNTARY DISMISSAL AND SUPPORTING MEMORANDUM OF LAW

Plaintiff West Coast Productions, Inc. ("Plaintiff") hereby briefly replies in support of its Motion for Voluntary Dismissal, showing this Court as follows:

Defendant Robin Popham ("Defendant") meets neither the threshold that courts require to deny a motion for voluntary dismissal nor that required to entitle Defendant to an award of attorney's fees or costs. "[I]n most cases, a voluntary dismissal should be granted unless the defendant will suffer clear legal prejudice, other than the mere prospect of a subsequent lawsuit, as a result." *Pontenberg v. Boston Scientific Corp.*, 252 F.3d 1253, 1255 (11th Cir. 2001) (citing *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 857 (11th Cir. 1986) (holding dismissal of

action without prejudice was not abuse of discretion)) (affirming dismissal without prejudice and ruling that plaintiff would be required to pay defendant's costs only if plaintiff were to re-file action).

Here no legal prejudice would result to Defendant and Plaintiff's motion should be granted without taxation of costs or fees.

I. No Legal Prejudice Would Result from an Unconditional Dismissal Without Prejudice.

In determining whether legal prejudice would result, courts consider "the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant." *Bridgeport Music, Inc. v. Universal-MCA Music Pub., Inc.*, 583 F.3d 948, 953 (6th Cir. 2009); *cf. Pontenberg*, 252 F.3d at 1258-59 & n.5 (noting that there "is not . . . a mandate that each and every factor be resolved in favor of the moving party before dismissal is appropriate," but rather that the factors should be a "guide to the trial judge, in whom the discretion ultimately rests" (internal quotations and citations omitted)). None of the factors set forth show legal prejudice in this case.

Courts have found that legal prejudice exists if the defendant would lose the benefit of some legal defense were the plaintiff's motion for voluntary dismissal

without prejudice granted. *See Grover by Grover v. Eli Lilly & Co.*, 33 F.3d 716, 719 (6th Cir. 1994) ("At the point when the law clearly dictates a result for the defendant, it is unfair to subject him to continued exposure to potential liability by dismissing the case without prejudice."); *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176, 180 (5th Cir. 1990) (ruling that voluntary dismissal without prejudice would have resulted in plain legal prejudice to defendants when plaintiff would have re-filed case in different state, effectively stripping defendants of their forum-non-conveniens defense, which was recognized in ruling court's state but not in state where plaintiff intended to re-file); *Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984, 987 (5th Cir. 1989) (denying plaintiff's motion for voluntary dismissal without prejudice when the dismissal would have resulted in defendant losing statute-of-limitations defense in face of prospect of second lawsuit); *Kern v. TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984) (holding that it was error for trial court to have allowed plaintiff to voluntarily dismiss case after trial had begun and judge had stated that "the court [would] more than likely direct a verdict in favor of the defendant"); *cf. McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 859 (11th Cir. 1986) (authorizing dismissal without prejudice despite that the dismissal would have stripped defendant of its statute-of-limitations defense if

plaintiff re-filed case in another jurisdiction). Again, none of these circumstances exist in the case at bar.

In the case cited by Defendant, *Spencer v. Bus Forms, Inc.*, Judge Shoob stated that plain legal prejudice would result to the defendants from a dismissal without prejudice of all claims when the case had been pending for more than four years and had seen four extensions of the discovery period, the parties had taken one dozen depositions, and the parties had filed twelve substantive motions. 87 F.R.D. 118, 120 (N.D. Ga. 1980). Notably, had the dismissal of all claims been without prejudice, the defendants would have lost the advantages of several decisions on the merits in their favor. *Id.* at 122, 124. The court had granted the corporate defendant's motion for summary judgment in its entirety and the individual defendants' motion for summary judgment in part. *Id.* at 122. Nevertheless, even in that instance, the court did not order the plaintiff to pay the defendants' attorney's fees, but simply ruled that certain of the claims were to be dismissed with prejudice. *Id.* at 124. None of the circumstances in *Spencer* exist in the case before the Court.

There is no legal prejudice that would result to Defendant if this case were dismissed without prejudice. Defendant has devoted effort and expense to delay

the case,[1] to set forth untenable arguments,[2] and to obstruct Plaintiff's efforts to gain discoverable information.[3]

Defendant would have this Court believe that she has gone through "considerable expense in preparing for trial." Def.'s Resp. at 11, 13. However, in the case that Defendant cites for this proposition, *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 860 (11th Cir. 1986), the defendant had briefed a motion for summary judgment and had taken depositions—neither of which Defendant has done here. Moreover, in that case, the defendant would have lost a statute of limitations defense had the plaintiff been permitted to dismiss the case in Alabama

[1] Counsel for Defendant admits that he represented Defendant at the time that Plaintiff filed the Complaint. Def.'s Resp. at 4, ECF No. 32; Def.'s Resp., Ex. A, ¶ 6-7, ECF No. 32-1. Yet counsel filed no timely responsive pleadings, leaving Plaintiff with no choice but to apply for a clerk's entry of default. Pl.'s Appl. for Clerk's Entry of Default, ECF No. 6. Not until December 18, 2011, did Defendant file her Answer to the Complaint. Answer, ECF. No. 14.

[2] For example, Defendant attempted to object to Plaintiff's request for production of documents and things not otherwise produced that Defendant relied upon in answering Plaintiff's First Set of Interrogatories. Defendant claimed that she was unable "to discern what the phrase 'documents and things' mean[t]," Pl.'s Mot., Ex. A, at 16, ECF No. 29-1, despite that the Federal Rules of Civil Procedure define such terms. *See* Fed. R. Civ. P. 34.

[3] Plaintiff served written discovery requests on Defendants on January 27, 2012, ECF Nos. 20, 21, and received responses from Defendant on February 27, 2012, which were deficient. The discovery responses that Plaintiff received from Defendant are attached to Plaintiff's Motion as Exhibit A.

and re-file in Mississippi, where no such statute would have applied.[4] Finally, and most importantly, Defendant misquotes *McCants* when she states that "the Court remanded the case with instructions for the trial court to 'reimburse the defendant for at least a portion of his expenses of litigation.'" Def.'s Resp. at 12. On the contrary, in *McCants* the Eleventh Circuit remanded the case for the district court to "weigh and advise us concerning the equities . . . that militate for and against the imposition of the various conditions" that defendant claimed were due. *McCants*, 781 F.2d at 861. No directive to award costs was given. *See id.* at 860-61.

Second, Plaintiff has been diligent and has not delayed in prosecuting this action. After Defendant served no timely responsive pleadings, Plaintiff applied for a clerk's entry of default. Pl.'s Appl. for Clerk's Entry of Default, ECF No. 6. When Defendant ultimately indicated that she would answer the Complaint, Plaintiff consented to lifting the default, Pl.'s Resp. and Mem. to Def.'s Mot. to Set Aside Entry of Default at 2, ECF No. 10, seeking to get the case moving. Plaintiff served written discovery requests on Defendant on January 27, 2012, promptly after the discovery period opened. *See* Certificate of Serv., Pl.'s First Req. Produc. Docs. & Other Tangible Things to Def., ECF No. 20; Certificate of Serv., Pl.'s First Set Interrogs. to Def., ECF No. 21. When Plaintiff received responses from

[4] Despite this consideration, the court held "the loss of a valid statute of limitations defense not to constitute a bar to a dismissal without prejudice." *Id.* at 859.

Defendant that improperly asserted wholesale objections and withheld discoverable information,[5] Plaintiff again acted promptly and diligently in scheduling discussions with Defendant to remediate Defendant's responses.[6]

Third, Plaintiff made a business decision to discontinue the litigation as it is entitled to end "the litigation and to avoid unnecessary costs and expense to all parties." *ACEquip, Ltd. v. Am. Eng'g Corp.*, 219 F.R.D. 44, 45 (D. Conn. 2003) (granting plaintiff's motion to dismiss under Fed. R. Civ. P. 41(a)(2) without prejudice or an award of costs to defendant where there was no evidence that plaintiff had not been diligent in pursuing discovery or bringing motion, and defendant had been responsible for delay in the case).

After Defendant failed to provide Plaintiff with supplemental discovery responses, even after promising to do so, Plaintiff was faced with the likelihood of incurring further legal fees to make Defendant provide discovery. At that point, given the mounting procedural costs, Plaintiff made a decision, arising out of cost-benefit analysis, to discontinue the case. Such a decision is an acceptable explanation for seeking dismissal. *See Bridgeport Music*, 583 F. 3d at 955 (noting

[5] *See* Pl.'s Mot., Ex. A.

[6] Plaintiff initiated two separate telephone conferences with counsel for Defendant to discuss deficient responses to discovery in multiple cases including this one. Those conferences took place on March 8 and March 12, 2012. *Id.* at 2-3. Although Defendant promised to produce supplemental responses, Plaintiff never received further supplementation from Defendant. *Id.*

that "plaintiffs' cost-benefit analysis provided a reasonable explanation for seeking dismissal in these cases"); *see also Omega Inst., Inc. v. Universal Sales Sys., Inc.*, No. 08-CV-6473, 2010 WL 475287, at *5 (W.D.N.Y. Feb. 5, 2010) (holding that plaintiff's explanation for seeking voluntary dismissal was reasonable where plaintiff had encountered financial constraints).

Furthermore, Plaintiff seeks dismissal without prejudice because of the prospect of ongoing infringement.[7] Given Defendant's past conduct giving rise to this lawsuit, Plaintiff seeks to safeguard its position to enforce all of its intellectual property rights. In addition, based on Plaintiff's initial investigation and limited discovery, Plaintiff finds support for Defendant's liability for direct and/or contributory infringement—and thus the dismissal should not operate as a decision on the merits.

II. Plaintiff Made a Reasonable Investigation into the Facts of the Case.

Plaintiff has articulated the risk of future infringement that necessitates a dismissal without prejudice, and there is no evidence of bad faith (on Plaintiff's part) that would warrant dismissal with prejudice. *See Pontenberg*, 252 F.3d at 1258-60 (suggesting that finding of bad faith is required for court to impose

[7] *See* Compl. ¶¶ 20, 30, 31. The Complaint prays for a permanent injunction to enjoin Defendant from further infringement of Plaintiff's rights in its copyrighted motion picture.

dismissal with prejudice, and holding that voluntary dismissal without prejudice was not abuse of discretion—even though discovery had expired, plaintiff had conducted no timely discovery, and defendant's motion for summary judgment was pending—because there was no evidence of bad faith).

There really is no dispute that Defendant owned the Internet account that was used to illegally download Plaintiff's copyrighted motion picture. If Defendant herself downloaded the film, she would be directly liable for copyright infringement. If she did not herself download the film but knowingly allowed her Internet connection to be an instrumentality of a third party's infringement, liability would still follow for contributory copyright infringement. *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (citing 2 William F. Patry, *Copyright Law & Practice* 1147 ("'Merely providing the means for infringement may be sufficient' to incur contributory copyright liability[.]")) (concluding that auction company could have been liable for contributory infringement when it provided rental space for activity that it knew to be infringing).

Defendant's position is untenable that the allegedly exculpatory affidavit renders Plaintiff 's efforts to pursue discovery to be actions taken in bad faith. *See* Def.'s Resp. at 17. Defendant cites no case holding that a plaintiff must refrain

from pursuing litigation based on an affidavit executed by a defendant in another case. Affidavits are nothing more than hearsay and are generally not admissible evidence. *See* Fed. R. Evid. 801.

Likewise, Defendant attempts to equate Plaintiff's use of Defendant's name as "Robin Popham" to that of action taken in bad faith. Def.'s Resp. at 6, 17. However, Defendant represented herself as "Robin Popham Mason" in her waiver of service, and indeed represented that her address was the address in Georgia that Plaintiff alleged in the Complaint. *See* Waiver of the Service of Summons at 2, ECF No. 5. Defendant cites no authority—and Plaintiff knows of none—standing for the proposition that the failure to include a litigant's new married name on a court document amounts to bad faith.

This action concerns illegal file downloading, which is copyright infringement that constitutes digital theft. Plaintiff is entitled to question the veracity of Defendant's affidavit in such a case, especially given that it was executed regarding a different lawsuit. Further, Plaintiff was not required to inspect Defendant's computer prior to discovery. Notably, Defendant cites no authority for the assertion that plaintiff had these obligations.

III. Defendant's Response Brief Is Improper.

In numerous places, Defendant's response brief improperly discloses Plaintiff's settlement offers and negotiations to the Court. *See* Def.'s Resp. at 4, 5, 6, 8; Def.'s Resp., Ex. A, ¶¶ 7, 10, 11, 14, 15. Conduct and statements made during settlement negotiations are prohibited from disclosure. Fed. R. Evid. 408. Defendant made no showing that the purpose of disclosing such information to the Court was for a use that qualifies as an exception to this rule. *Id.* (b). Courts have stricken portions of pleadings that contain such confidential information. *See, e.g.*, *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 40 (S.D.N.Y. 1992) (striking as "immaterial and potentially prejudicial" those portions of complaint that referred to settlement discussions), *aff'd*, 23 F.3d 398 (2d Cir. 1994). Even a pro se party who made such disclosures at trial was sanctioned. *See, e.g.*, *Hodge v. American Home Assurance Co.*, 150 F.R.D. 25, 26-27 (D.P.R. 1993) (sanctioning litigant for disclosure of defendant's settlement offers to jury).

Further, Defendant makes factual misrepresentations to the Court in her brief.[8] Defendant writes that "[o]n January 11, 2012, Mason identified [Dunlap,

[8] Defendant also contends that counsel for Plaintiff "threatened to 'call the judge' if Defendant did not accept its March 20th settlement offer." Def.'s Resp. at 8, 9; *see* Def.'s Resp., Ex. A, ¶¶ 14, 16. Plaintiff declines to occupy the Court's time with a battle of affidavits, but asserts that the representation is inaccurate. Counsel for Plaintiff had mentioned contacting the deputy clerk to schedule a discovery

Grubb & Weaver] as an interested party in this action even though Plaintiff did not previously failed [sic] to do so." Def.'s Resp. at 6. However, Plaintiff disclosed to the Court at the beginning of the case that Dunlap, Grubb & Weaver had a financial interest in the case. *See* Pl.'s Certificate of Interested Persons & Corporate Disclosure Statement, ECF No. 2, at 2.

Neither Defendant nor her counsel should be rewarded for this misconduct through the Court denying Plaintiff's motion for voluntary dismissal or by an award of costs or fees in connection with this case.

Plaintiff respectfully requests that the Court grant its Motion for Voluntary Dismissal, with each party to bear its own costs and attorney's fees.

This 26th day of April, 2012.

Respectfully submitted,

s/Elizabeth Ann Morgan
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conference with Judge Totenberg in accordance with the Judge's Standing Order at 18.

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LR 7.1(D) CERTIFICATION

This Memorandum of Law has been prepared with Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2012, I electronically filed the **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR VOLUNTARY DISMISSAL AND SUPPORTING MEMORANDUM OF LAW** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following attorney of record:

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