IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EDWARD C. ANDERSON,

Plaintiff,

v.

TRANS UNION,

Defendant.

OPINION AND ORDER

05-C-0091-C

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This civil action is before the court on defendant Trans Union's petition for an award of attorney fees and expenses, brought pursuant to 28 U.S.C. § 1927. Briefing on the motion was delayed for some time in the hope that the parties might be able to settle their differences over the award of fees. Unfortunately, that hope proved to be baseless. The parties remain fixed in their positions. In defendant's view, plaintiff's counsel created the entire controversy by submitting a request for reinvestigation of plaintiff's credit report with an incorrect Social Security number and then waiting six months to respond to defendant's request for the correct number. In addition, defendants allege, when plaintiff's counsel filed suit, they did so without making an adequate investigation of the facts and the law and subsequently made unreasonable requests for discovery, failed to respond in timely fashion

to defendant's discovery requests and filed a late response to defendant's motion for summary judgment. For his part, plaintiff maintains that his decision to sue was a rational and well-considered one, that defendant's responses to plaintiff's discovery requests were often untimely and uninformative and that defendant's employee gave inaccurate answers to questions put to her at her deposition.

I note that plaintiff's counsel objects to the amount of fees and costs sought by defendant. They will have an opportunity to be heard on the size of any sanction if I decide that a sanction should be imposed.

FACTS

The facts are set out at some length in the December 9, 2005 order granting summary judgment to defendant. In brief, plaintiff learned sometime before March 4, 2004, that his consumer credit report listed as unsatisfied seven civil judgments that had been discharged by bankruptcy in 2002. Sometime in March 2004, he called defendant and spoke with a "priority processing representative." Apparently, he gave defendant his correct social security number at that time because the report generated from the call includes it. On March 19, 2004, plaintiff's attorney, J. David Krekeler, wrote to defendant to advise it that two civil judgments against plaintiff in favor of Ronald Pagel had been satisfied. He enclosed file-stamped copies of court orders of satisfaction. Krekeler's letter included an incorrect social

security number for plaintiff. Despite this inaccuracy, defendant was able to locate plaintiff's credit information and clear the records in reliance on the documentation submitted.

Krekeler wrote to defendant again on March 22, 2004, asserting that five additional civil judgments and three private credit accounts shown on plaintiff's credit report had been satisfied. (This assertion was not entirely correct; the judgments and accounts had been discharged in bankruptcy, not satisfied, and one of the private credit accounts was a business account, not a personal debt of plaintiff.) Again, Krekeler included an incorrect social security number for plaintiff. This time, defendant wrote back to ask for verification of plaintiff's Social Security number because defendant would be sending confidential credit information to the private accounts and wanted to insure that it had plaintiff's correct account. Defendant sent the letter on April 2, 2004; plaintiff's attorney did not respond until November 1, 2004. When he did, he acknowledged receipt of the April 2, 2004 request for verification, asserted that defendant had no right to request verification of plaintiff's social security number and demanded payment of $250,000.

On November 11, 2004, defendant received a letter from Briane Pagel, a lawyer with the Krekeler Strother law firm. This letter contained plaintiff's correct social security number, asserted that four judgments against plaintiff had been discharged in bankruptcy and disputed the status of three private credit accounts. Defendant investigated the disputed matters, completed the investigation on November 16, 2004 and December 1, 2004 and

cleared plaintiff's credit report to show that four civil judgments had been discharged, two private credit accounts had been discharged in bankruptcy and one private credit account had been closed. On December 2, 2004, defendant sent Pagel a letter explaining the prior activity on plaintiff's credit file and denying plaintiff's request for compensation.

Plaintiff filed this action on February 15, 2005, asserting that defendant had been notified in writing of the inaccuracy of his credit report, that defendant had failed to investigate and correct the reports in a timely manner, that defendant had been notified again in October 2004 but did not respond to the notification until December 2, 2004 and when it did, it did not provide a new consumer report based upon the revised file, did not advise plaintiff how to request a description of the procedures used to determine the accuracy of the information and did not tell him he could insert a statement into his file. Plaintiff contended that these failures violated 15 U.S.C. Chapter 41, Subchapter III, and entitled plaintiff to attorney fees, costs and actual damages, which included loss of income from denial of membership in professional societies and from the diversion of money to pay higher interest rates on loans.

On October 18, 2005, after receiving responses to its written discovery requests and deposing plaintiff, defendant wrote plaintiff to warn him that continued litigation of the case was unreasonable and could subject him to possible sanctions. Defendant asserted that plaintiff's counsel's failure to provide a correct social security number "for 8 months" (*sic*:

the actual delay was six months) prevented defendant from re-investigating the credit dispute and that plaintiff had no compensable damages.

Plaintiff did not withdraw his suit. Defendant moved for summary judgment. The motion was granted and the case dismissed.

Before moving for summary judgment, defendant had difficulty obtaining responses to discovery requests from plaintiff's counsel. Plaintiff's initial disclosures were late, incomplete and unsigned. Defendant reached agreement with plaintiff's counsel to receive plaintiff's responses to interrogatories and requests for production on October 14, the last work day before plaintiff's deposition in Madison on Monday, October 17. Plaintiff sent the responses by email; the responses were incomplete and sent after defendant's counsel had left his office in Indianapolis. Plaintiff's counsel did not mention to defendant's counsel at the deposition on Monday that plaintiff had responded to discovery requests on the previous Friday. The responses to defendant's requests for admission that plaintiff's counsel emailed on October 14 were not signed. When defendant asked for properly executed responses, plaintiff's counsel did not respond to the request.

Plaintiff was unable to show that he had suffered any actual damages. In response to an interrogatory asking him to identify the items of damages he was seeking, plaintiff's counsel listed the denial of plaintiff's company's application for membership in the builders' association and plaintiff's truck purchase. Although plaintiff knew that the truck purchase

took place before defendant would have been required ro respond to plaintiff's dispute, he did not advise defendant that he was abandoning his claim for damages for the purchase; instead, he simply omitted mention of these alleged damages in his response to defendant's motion for summary judgment. Plaintiff maintained his assertion that he was entitled to damages for the loss of membership in the builders' association despite defendant's advising him on a number of occasions that damages to a business would not be compensable under the Fair Credit Reporting Act. In the end, it was irrelevant whether such damages would have been compensable because plaintiff was unable to adduce any evidence that his business had been denied membership on the basis of his credit report.

On August 5, 2005, plaintiff served discovery requests on defendant. Defendant did not respond until September 30, 2005. Plaintiff found the answers incomplete. Defendant's employee gave an inaccurate answer at her deposition and corrected the answer later.

OPINION

The Fair Credit Reporting Act imposes very precise requirements upon credit reporting agencies such as defendant. The precision of the requirements provides opportunities for alert lawyers to identify errors and omissions by the agencies that cause problems for consumers. Sometimes, however, as in this case, lawyers can lose sight of the real purpose of the Act, which is to protect the actual rights of consumers.

It should have been obvious to any lawyer that plaintiff's rights were not violated when defendant asked him to provide his correct Social Security number in order to verify his account before defendant made inquiries of private credit accounts about plaintiff's account. Credit reporting agencies have an obligation to insure that the information they are collecting and disseminating about any consumer relates to that consumer and not to another with the same name.

Plaintiff's counsel asserts that he had a good faith belief that defendant's procedures might be unreasonable, given defendant's ability to respond to plaintiff's counsel's letter enclosing file-stamped copies of judgment and its inability to respond to plaintiff's second letter disputing other judgments and private accounts. It is hard to take this assertion seriously, given the innocuous nature of the request. Defendant was simply asking for plaintiff's correct Social Security number. Plaintiff has never suggested that he had any reason to withhold the number. He gave it to the company representative he talked to in March and his counsel included what they thought was plaintiff's Social Security number on their correspondence with defendant.

Even if plaintiff's counsel had had a good faith belief that defendant was acting improperly, they had an obligation to make sure that plaintiff had suffered any damages before filing a complaint. Plaintiff's counsel's investigation in this regard was inadequate. They never determined when plaintiff's truck purchase had taken place; had they done so,

they would have realized that it was before defendant could have finished an investigation. Defendant cannot be held liable for problems that plaintiff encountered before he gave defendant the correct information about his account. Moreover, plaintiff's counsel did not determine whether any evidence existed that plaintiff's business would have been admitted to membership in the builder's association had it not been for the erroneous credit report. Without this information, it made no difference whether plaintiff could obtain damages under the Fair Credit Reporting Act for injuries suffered by a commercial entity.

Despite plaintiff's counsel's failure to do adequate research before filing this suit, I do not believe that this conduct in this regard, deplorable as it may be, comes within the scope of § 1927. 28 U.S.C. § 1927 provides that

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof 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 attorney fees reasonably incurred because of such conduct.

Unlike Fed. R. Civ. P. 11, § 1927 does not provide for the imposition of sanctions on lawyers who file without having a good faith belief that the pleadings they are filing are not being presented for any improper purpose and are supported by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law. Rather, § 1927 focuses on conduct occurring once litigation is commenced. Bender v. Freed, 436 F.3d 747, 751 (7th Cir. 2006); Dahnke v. Teamsters

Local 695, 906 F.2d 1192, 1201 n.6 (7th Cir. 1990); see also Samuels v. Wilder, 906 F.2d 272, 275 (7th Cir. 1990) ("Section 1927 and Rule 11 are addressed to different conduct: the statute to prolonging litigation, and Rule 11 to particular filings. . . . § 1927 differs from Rule 11 because it does not require 'reasonable' investigation."). Therefore, in considering defendant's petition, I will not take into account plaintiff's counsel's failures and omissions prior to filing suit, such as their allowing six months to pass before responding to defendant's request for verification, their mischaracterization of the status of plaintiff's credit accounts and judgments in correspondence with defendant or their failure to determine before suing whether plaintiff had incurred any actual injury as a consequence of his erroneous credit report.

In addition, I will not impose any sanction on defendant for delayed or incomplete discovery from plaintiff. Defendant had available to it the full panoply of the remedies provided in Fed. R. Civ. P. 37 and chose not to pursue those remedies when doing so would have been most effective.

This leaves for consideration plaintiff's counsel's refusal to drop claims and allegations of damages once he became aware that they had no merit. Dahnke, 906 F.2d at 1201 n.6 ("Unlike Rule 11, section 1927 has been interpreted in our circuit to impose a continuing duty upon attorneys to dismiss claims that are no longer viable.") As to the allegations of damage, I find that plaintiff's counsel should have known in August 2005 that plaintiff had

no claim for damages relating to the purchase of his truck and should have known no later than October 2005 that plaintiff had no claim for damages resulting from his company's failure to win admission to the builders' association. Defendant had advised them before these dates that their claims were baseless. By failing to inform defendant that plaintiff was not going to pursue his claim for damages in connection with the purchase of the truck and by continuing to pursue a claim for damages in connection with the builders' association, plaintiff's counsel multiplied this litigation unreasonably.

Under § 1927, an applicant for sanctions need not demonstrate subjective bad faith; objective bad faith will suffice. "The standard for objective bad faith does not require a finding of malice or ill will; reckless indifference to the law will qualify." Dal Pozzo v. Basic Machinery Co., ___ F.3d ___, 2006 WL 2548250 at *4 (7th Cir. Sept. 6, 2006) (citing In re TCI Ltd., 769 F.2d 441, 445 (7th Cir. 1985)). "'If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious.'" Id., (quoting Riddle & Assocs. P.C. v. Kelly, 414 F.3d 832, 835 (7th Cir. 2005)).

Defendant is entitled to a sanction for plaintiff's counsel's violations of § 1927 in the form of the excess attorney fees and costs it incurred in responding to the violations.

ORDER

IT IS ORDERED that defendant Trans Union is entitled to an award of the excess attorney fees and costs it incurred as a consequence of plaintiff's counsel's violation of 28 U.S.C. § 1927 in failing to advise defendant that plaintiff Edward C. Anderson was dropping his claim of damages for injuries allegedly incurred in connection with a truck purchase in 2004 and for continuing to pursue a claim for injuries his business allegedly incurred when it was denied membership in a builders' association.

Defendant may have until October 4, 2006, in which to submit an itemized statement of the excess attorney fees and costs incurred. Plaintiff's counsel may have until October 16, 2006, in which to file objections to the amount of attorney fees and costs sought. Defendant may have until October 23, 2006, in which to reply.

Entered this 22d day of September, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge