

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

---

HY CITE CORPORATION, JAMES CANTRELL,  
CYNTHIA CANTRELL, KENNETH KNEZEK,  
JAMES CAMPIDILLI, ROBERT BEAN,  
MIKE SMITH and LAUNA SMITH,

Plaintiffs,

MEMORANDUM AND ORDER

v.

05-C-722-S

ADVANCED MARKETING INTERNATIONAL, INC.,

Defendant.

---

On April 11, 2006 this Court entered an order granting defendant's motion to dismiss for improper venue based on mandatory forum selection clauses contained within individual plaintiffs' distributor agreements. Accordingly, on April 28, 2006 judgment was entered in favor of defendant dismissing plaintiffs' complaint and all claims contained therein without prejudice. The matter is presently before the Court on defendant's motion for an award of attorneys' fees pursuant to Federal Rule of Civil Procedure 54(d)(2) and provisions of individual plaintiffs' distributor agreements. Jurisdiction is based on 28 U.S.C. § 1332(a)(1). The following facts relevant to defendant's motion are undisputed.

BACKGROUND

On December 9, 2005 plaintiff Hy Cite Corporation filed its complaint with the Court seeking a declaration that it had not tortiously interfered with defendant's distributors' agreements.

On January 9, 2006 plaintiffs filed their first amended complaint with the Court naming James and Cynthia Cantrell, Kenneth Knezek, James Campidilli and Robert Bean as additional plaintiffs. In their amended complaint plaintiffs sought a declaration that: (1) individual plaintiffs' non-compete provisions contained within their distributor agreements were illegal and unenforceable, (2) individual plaintiffs had not breached non-solicitation clauses contained within their distributor agreements and said clauses were illegal and unenforceable; and (3) liquidated damages provisions contained within individual plaintiffs' distributor agreements were unenforceable penalties. Additionally, plaintiffs sought a declaration that plaintiff Hy Cite had not tortiously interfered with individual plaintiffs' distributor agreements.

On February 10, 2006 defendant filed a motion to dismiss plaintiffs' complaint for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3) and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Defendant argued venue was improper in this Court because each individual plaintiffs' distributor agreement contained a mandatory forum selection clause which fixed the Circuit Court for Lake County, Florida as the exclusive venue for resolving disputes arising under the agreements. Additionally, defendant argued plaintiffs' complaint should be dismissed as an improperly filed anticipatory declaratory judgment action. Finally, defendant argued issue preclusion barred plaintiffs Hy Cite, James and Cynthia Cantrell

and Kenneth Knezek from proceeding with litigation in this Court because the United States District Court for the Central District of California previously determined that Lake County, Florida Circuit Court was the exclusive venue for resolving their disputes under the agreements.

On February 13, 2006 plaintiffs filed their second amended complaint with the Court naming Mike and Launa Smith as additional plaintiffs. However, plaintiffs' requested declarations remained as stated in their first amended complaint. On February 27, 2006 defendant withdrew its February 10, 2006 motion to dismiss and in its place filed a motion to dismiss plaintiffs' second amended complaint once again asserting improper venue and failure to state a claim upon which relief can be granted as grounds for dismissal.

On March 17, 2006 while defendant's motion to dismiss was pending plaintiffs filed a motion to compel discovery in which they sought an order requiring defendant to supplement its response to certain interrogatories and produce information and documentation requested in certain document requests. On March 29, 2006 pursuant to agreement of counsel the Court granted plaintiffs' motion to compel discovery.

On April 11, 2006 the Court entered an order granting defendant's motion to dismiss for improper venue finding the forum selection clauses contained within individual plaintiffs' distributor agreements were mandatory. Additionally, the Court determined that plaintiff Hy Cite was bound by said clauses because

its claim was inextricably intertwined with individual plaintiffs' claims as well as entirely dependent on individual plaintiffs' agreements. Accordingly, judgment was entered in favor of defendant on April 28, 2006 dismissing plaintiffs' complaint and all claims contained therein without prejudice.

On April 25, 2006 defendant filed its motion for attorneys' fees seeking an award in the amount of \$45,405.00. Each individual plaintiffs' distributor agreement contains a provision concerning attorneys' fees which states as follows:

Attorney's Fees. If an attorney shall be retained to interpret or enforce the provisions of this agreement, the prevailing party shall be entitled to reasonable attorney's fees, including any such fees set by the trial or appellate court upon trial or appeal.

#### MEMORANDUM

Defendant asserts the attorneys' fees provision at issue in this action expressly requires that attorneys' fees be awarded to a prevailing party who retains an attorney to enforce provisions of individual plaintiffs' distributor agreements. Accordingly, defendant argues its motion for attorneys' fees should be granted because it prevailed on its motion to dismiss which enforced the forum selection clauses contained within individual plaintiffs' distributor agreements. Plaintiffs assert: (1) defendant filed its motion for attorneys' fees after the deadline expressed in Rule 54(d)(2)(B), (2) defendant is not a "prevailing party" under the agreements; and (3) defendant failed to establish that its claim for attorneys' fees is reasonable. Accordingly, plaintiffs argue defendant's motion for attorneys' fees should be denied.

As a preliminary matter, the Court must determine what law governs defendant's motion for attorneys' fees. In diversity actions such as this "state law governs the granting of attorney's fees." Jackman v. WMAC Inv. Corp., 809 F.2d 377, 383 (7<sup>th</sup> Cir. 1987) *reh'g. denied*, Feb. 20, 1987 (citations omitted). The parties agree that Florida law governs this action because of choice of law provisions contained within individual plaintiffs' distributor agreements. Accordingly, because parties are permitted to designate what law shall control their case, defendant's motion for attorneys' fees will be decided under Florida law. See Nw. Nat'l. Ins. Co. v. Donovan, 916 F.2d 372, 374 (7<sup>th</sup> Cir. 1990) (citations omitted).

Plaintiffs' first argument concerns the timeliness of defendant's motion. Pursuant to Federal Rule of Civil Procedure 54(d)(2)(B) a motion for attorneys' fees "must be filed no later than 14 days after entry of judgment." Under Rule 54 judgment means a decree or order "from which an appeal lies." Fed. R. Civ. P. 54(a). Plaintiffs assert the Court entered its Memorandum and Order on April 10, 2006 and said order was an appealable order. Accordingly, plaintiffs argue defendant's motion for attorneys' fees was untimely filed and must be denied because defendant filed its motion on April 25, 2006 one day after the deadline expressed in Rule 54. However, while the Court signed its Memorandum and Order on April 10, 2006 said order was not entered until April 11, 2006. Accordingly, the Court finds that defendant's April 25, 2006 motion for attorneys' fees was timely filed and will proceed to address the merits of defendant's motion.

### **A. Prevailing Party**

A "prevailing party" for purposes of awarding attorneys' fees is the party that prevailed on the significant issues in the litigation. Moritz v. Hoyt Enter., Inc., 604 So.2d 807, 810 (Fla. 1992) *reh'g. denied*, Oct. 5, 1992. In making the determination as to which party has prevailed a court is to focus on the "result obtained." Zhang v. D.B.R. Asset Mgmt., Inc., 878 So.2d 386, 387 (Fla. 3d DCA 2004) *reh'g. denied*, Aug. 4, 2004 (citation omitted). Generally, only one party can be deemed the prevailing party in litigation. Foley v. Fleet, 652 So.2d 962, 963 (Fla. 4<sup>th</sup> DCA 1995) *citing* (Reinhart v. Miller, 548 So.2d 1176 (Fla. 4<sup>th</sup> DCA 1989)).

Plaintiffs argue defendant cannot be classified as a prevailing party under the agreements because "it has not won anything on the merits, and has done nothing except move the legal battle to a different state." Defendant argues it is the prevailing party because it successfully enforced the forum selection clauses of individual plaintiffs' agreements. The Court finds defendant is the prevailing party in this litigation because it must focus on the result obtained.

Each individual plaintiffs' distributor agreement contains a provision concerning attorneys' fees which states as follows:

Attorney's Fees. If an attorney shall be retained to interpret or enforce the provisions of this agreement, the prevailing party shall be entitled to reasonable attorney's fees, including any such fees set by the trial or appellate court upon trial or appeal.

The parties agree that the language of this fee provision is clear

and unambiguous. Accordingly, the Court must give said language its plain and ordinary meaning. Blue Cross & Blue Shield of Fla., Inc. v. Cassady, 496 So.2d 875, 877 (Fla. 4<sup>th</sup> DCA 1986) *reh'g. and clarification denied*, Nov. 20, 1986. Under the plain language of the fees provision at issue if a party prevails in enforcing provisions of individual plaintiffs' distributor agreements then said party is considered a prevailing party. Defendant prevailed in enforcing the forum selection clauses of individual plaintiffs' distributor agreements because the Court granted its motion to dismiss finding said clauses were mandatory in nature. Accordingly, for purposes of this litigation defendant is the prevailing party because the result it obtained based on enforcement of the forum selection clauses was dismissal of plaintiffs' action. Such dismissal served as more than a tactical victory, it served as the completion of litigation in this forum which cannot be classified as anything but significant.

#### **B. Reasonableness of defendant's claim for attorneys' fees**

The Court will not address many points of law concerning Florida's approach for computing reasonable attorneys' fees because it finds one directive dispositive. Under Florida law a court cannot assess fees based solely on the testimony of the attorney seeking the fees. Yakubik v. Bd. of County Comm'rs. of Lee County, 656 So.2d 591, 592 (Fla. 2d DCA 1995) (citation omitted). While the attorney performing the services must testify regarding his or her fees an expert witness must also present testimony substantiating the value of such services. Pridgen v. Agoad, 901 So.2d 961, 962

(Fla. 2d DCA 2005)(citation omitted). Such testimony can be presented to the court through live testimony or by way of affidavit. Crittenden Orange Blossom Fruit v. Stone, 514 So.2d 351, 353 (Fla. 1987) *reh'g. denied*, Nov. 20, 1987. The fee applicant bears the burden of establishing its entitlement to a fee award. Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). Defendant failed to meet its burden to establish it is entitled to a fee award because it did not present expert testimony substantiating the value of its attorneys' services.

Defendant submitted the affidavits of its attorneys, Michael J. Furbush and Jeffrey A. Simmons, in support of its motion for attorneys' fees. It is undisputed that defendant failed to file any additional documentation in support of its claim. Additionally, it is undisputed that Furbush and Simmons were the attorneys retained to represent defendant in this action. Accordingly, the Court must deny defendant's request for attorneys' fees because a court cannot assess fees based solely on the testimony of the attorney seeking the fees. Yakubik, at 592 (citation omitted).

ORDER

IT IS ORDERED that defendant's motion for attorneys' fees is DENIED.

Entered this 1<sup>st</sup> day of June, 2006.

BY THE COURT:

s/  
\_\_\_\_\_  
JOHN C. SHABAZ  
District Judge