VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

AV AUTOMOTIVE LLC, ET AL., Plaintiff,	)	
v.	)	CL 2018-7749
BRANDON PRESKE, ET AL., Defendant.	)	

no env 12/30/20

ORDER

THIS CAUSE came before the Court upon Defendant Gebreyessus' Motion for Sanctions against Plaintiff and their Counsel. On May 14, 2020, this Court granted Defendant's motion and entered a sanction amount of $213,196.95 against only the Plaintiff. Thereafter, Plaintiff filed a Motion for Partial Reconsideration and a Motion for Reconsideration Regarding Amount of Fees Awarded. Counsel for the parties appeared on November 19, 2020 for a WebEx hearing on the reconsideration motions and upon conclusion, the Court took the matter under advisement.

IT APPEARING to the Court from the pleadings and argument of counsel that the intent of the sanctions award was not clear to the parties. It should be clarified that the Court granted the sanctions award based on the Plaintiff's: (1) repeated misrepresentations of actual penalties from AUDI USA in the amount of approximately $700,000.00; (2) the designation of Mr. Conti as an expert without his knowledge; and (3) actions related to court ordered deposition dates. The Court in determining the appropriate sanction amount considered the total amount of attorney's fees

incurred by the Defendant and fashioned the award in an amount to sufficiently deter the sanctionable conduct at issue.

Plaintiff asks this Court to reconsider the previous award of sanctions on primarily three grounds: (1) the award of attorney's fees sanctions, (2) the legitimacy of Plaintiff's claims, and (3) the amount of the attorney's fee sanctions award.

The Award of Attorney's Fees Sanctions

In Plaintiff's Counter-Affidavit to Defendant's Amended Affidavit of Attorney's Fees, Plaintiff argues that Defendant has not suffered the cost of any legal fees because a non-party has admitted to funding Defendant's litigation costs and, as such, Defendant cannot be granted attorney's fees when she has not incurred any. In support of this argument, Plaintiff cites Nageotte v. Bd. of Sup'rs of King George Cty., 223 Va. 259, 270 (1982); Flanagan v. Flanagan, 2010 WL 3742226 (Va. App. Sept. 28, 2010); Ibrayeva v. Kublan, 2012 WL 6114971 (Va. App. 2012); and Cahill v. Cahill, 2014 WL 4287949 (Va. App Sept. 2, 2014). These cases are easily distinguished from the case at hand. Every case cited by Plaintiff concerned a pro se litigant who – quite literally – did not incur any attorney's fees as the litigants in those cases proceeded without counsel. Here, we have a different case. Defendant has retained counsel and has actually incurred attorney's fees because of that representation. Despite the language of Va. Code § 8.01–271.1, case law clearly indicates the statute's intent is to bar pro se litigants from obtaining awards for "attorney's fees" not actually incurred and not to create a barrier preventing courts from granting attorney's fees sanction awards to represented Defendants.

Legitimacy of Plaintiff's Claims

Plaintiff argues that there are legitimate triable issues in this matter. Upon review of Plaintiff's motions and the accompanying evidence, and without commenting on the substantive

merits of Plaintiff's claims, it appears that Plaintiff established factual grounds to form a reasonable belief that Defendant participated in a coordinated effort to submit a fraudulent employee survey following the sale of an Audi. The evidence does show that Defendant deleted Mr. Asari's email from the database on April 17, 2017. Exhibit L shows that Donna Bavely emailed Mr. Asari's survey form to Mr. Preske on April 26, 2017. The same exhibit goes on to show that Mr. Preske, on April 27, 2017, submitted a top-marks survey about Defendant on behalf and without the consent of Mr. Ansari. Without commenting on the merits of Plaintiff's claim, evidence of these acts does show that Plaintiff had well-grounded facts on which it based its reasonable belief that Defendant submitted fraudulent surveys in violation of her agreements with Plaintiff. As such, the Court cannot find the Plaintiff's claims of Fraud, Breach of Fiduciary Duty to Employer, Business Conspiracy, and Conspiracy are frivolous nor sanctionable.

Not all issues in Plaintiff's Amended Complaint and Second Amended Complaint, however, are legitimately triable. Though Plaintiff has shown reasonable grounds for its claims of fraud and conspiracy, Plaintiff has failed to establish factual grounds to form a reasonable belief it had a claim for damages under its contract claim with AUDI USA. Though Plaintiff argues that its reasonable belief is not disputed, the simple existence of Defendant's Demurrer (and the explicit arguments made in the same) would tend to provide evidence to the contrary. Most notably, Plaintiff fails to establish that it was ever fined by Audi because of Defendant's alleged acts and thus fails to show any factual basis for a reasonable belief that Plaintiff incurred damages stemming from a fine by Audi.

Though Plaintiff argues that Audi does not delineate whether a dealer is receiving a warning or a penalty, Plaintiff's Amended Complaint and Second Amended Complaint both state – in no uncertain terms – that Plaintiff had already received a penalty from AUDI USA and

required to repay approximately $700,000.00. Such an allegation can only be well grounded in fact if Audi made clear to Plaintiff that it was indeed receiving a penalty for violating the terms of their agreement. Plaintiff says it best: "[I]n this conversation between [Plaintiff] and Audi – [Plaintiff] was simply advised of the rules and penalties for such conduct." This statement confirms what has been admitted not only in the submitted depositions but also in Plaintiff's own initial Complaint – AUDI USA never imposed a fine nor suggested that a fine would be imposed on Plaintiff for the alleged violation of the policy at issue in this case. In fact, the emails attached to Plaintiff's motion as Exhibit C state that, upon a second violation, "[The] chargeback will be communicated by the area team and followed up with a letter from AoA Audi Insight team with details of violation, impacted timeframe and chargeback amount, etc." Plaintiff makes no claim of receiving such a communication or letter from Audi.

Plaintiff points to the affidavit of AV Automotive, LLC and AV Imports, LLC President George Liu in support of their reasonable belief at the time of filing the Amended Complaint and Second Amended Complaint. Mr. Liu's affidavit, signed and sworn after the filing of Defendant's motion for sanctions, does not include a single effort Plaintiff made to verify or confirm the status of any potential penalty.

The Amount of the Attorney's Fee Sanction Award

Plaintiff challenges whether fees must be properly separated before this Court can make an award under *Oxenham v. Johnson*, 241 Va. 281 (1991). The Court finds that the Supreme Court's ruling in *Oxenham* is distinguishable from the case that is now before it. The Supreme Court in *Oxenham* based its decision on the failed attempt of the parties to separate its fees based on defending against the purely compensatory damages versus the punitive damages. *Oxenham v. Johnson*, 241 Va. 281, 290 (1991).

In this case, it would be impossible to separate time spent solely defending against the frivolous Audi Penalty claim because the Plaintiff itself mixed in that frivolous claim with its request for damages within nearly every count of Amended Complaint and Second Amended Complaint. While there is merit in Plaintiff's claims of fraud and breach of fiduciary duty, the request for damages of these claims also include the Audi Penalty. To hold that sanctions cannot be awarded simply because the plaintiff is clever enough to mix its frivolous claims with its colorable claims, would practically eliminate this Court's statutory power to grant sanctions in the form of attorney's fees.

Here, while the claim pertaining to the Audi violation carried a value of approximately $700,000 according to Plaintiff, the requested damages in this case totaled more than $5,000,000. Because Plaintiff argues these damages in every count of its Complaint, separating the damages from the overall nature of the case would seem to run contrary to the nature of the pleadings. Plaintiff's argument that loss profit as an additional method of calculating damages is undercut and does not bless the sanctionable misrepresentations given that their expert was designated without prior consultation. The lack of consultation with a designated expert witness is even more egregious when said expert is an employee of the Plaintiff.

Considering the nature of the case, then, Defendant's claim of $213,196.95 in legal fees is proportional. The sanction amount awarded by the Court is reasonably calculated to deter the conduct at issue in this matter.1 Therefore, it is

ORDERED that Plaintiff's Motion for Partial Reconsideration and Motion for Reconsideration Regarding Amount of Fees Awarded are hereby denied. The suspension of the

1 It is worth noting that this Court has exercised discretion in not sanctioning Plaintiff's Counsel in addition to Plaintiff. This Court has concerns on the extent of due diligence on the part of Plaintiff's Counsel but gives Counsel the benefit of the doubt given that Counsel's actions were based on information received from Plaintiff.

Court's May 14, 2020 order is lifted, and Plaintiff is ordered to pay the sanction amount of $213, 196.95 to Defendant Gebreyessus within sixty (60) days of this order. The parties may note any objection to this Order by written filing with the clerk's office within twenty-one (21) days of this Order. This Order is final as to all remaining issues in this matter.

AND THIS MATTER IS ENDED.

ENTERED this 30th day of December 2020.

Judge Dontaè L. Bugg

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.