

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

E. A. RENFROE & COMPANY, INC.,)
)
Plaintiff,)
)
-vs-)
)
CORI RIGSBY MORAN and)
KERRI RIGSBY)
)
Defendants.)
_____)

CIVIL ACTION
NO 2. 06-WMA-1752-S

**RENFROE’S AMENDED RESPONSE TO THE COURT’S
QUESTIONS RAISED IN ITS JANUARY 20, 2009
MEMORANDUM OPINION AND ORDER, and RESPONSE TO THE
COURT’S JANUARY 28, 2009 ORDER**

As a result of the Court’s January 28, 2009 Order [dkt. no. 414], counsel for Plaintiff E. A. Renfroe & Company, Inc. (“Renfroe”) now realizes that certain statements contained in Renfroe’s Response to the Court’s Questions [dkt. no. 413] posed in the January 20, 2009 Memorandum Opinion and Order [dkt. no. 411] are at best, imprecise, thereby leaving this honorable Court with a misperception of Renfroe’s intentions with regard to recovery of its attorneys’ fees. Renfroe therefore respectfully submits this amended response to dkt. no. 411 and response to dkt no. 414.

A. Renfroe does not seek attorneys' fees under a theory that they are compensatory or other legal damages.

In the Joint Stipulations of the Parties [dkt. no. 409] and the Joint Motion to Continue Pretrial Conference and Set Briefing Schedule [dkt. no. 408], the parties indicated that “Renfroe is seeking to recover the amounts that are known to have been paid by the Scruggs Law Firm directly to the Defendants [that they called “consulting fees”] and a portion of Renfroe’s attorneys’ fees incurred in its successful prosecution of the contract claim.” (Dkt. no. 409, ¶ 1. *See also* dkt. no. 408 at p.1). The parties stipulated that the “issues of the Plaintiff’s entitlement to recovery can be most efficiently adjudicated by motion without need for trial”, they stated their waiver of a trial on damages, and they stipulated to have “the issues of Renfroe’s entitlement to recovery decided on motion.” (Dkt. no. 409, ¶ 2. *See also* dkt. no. 408 at p.1).

The phrase “entitlement to recovery” was purposefully employed in lieu of the word “damages”, since Renfroe has not considered it entitlement to attorneys’ fees to arise under a theory of compensatory or other damages in the legal sense, but rather from the just and proper exercise of this Court’s equitable discretion to award attorneys’ fee to redress the Defendants’ bad faith, malicious conduct.

Renfroe’s counsel initiated and filed the stipulation that included the parties’ waiver of trial, intending it to serve as a mechanism to simply inform the Court that the parties were in agreement that no trial was necessary so that the Court

could free up the resources it had reserved for a pretrial conference and trial. Although in hindsight it should have been readily apparent when the Court on January 20, 2009 directed the parties to answer three questions, Renfroe's counsel was focused on the question of whether or not Renfroe was going to seek recovery of its attorney fees, not apprehending that the Court might consider its pursuit of attorneys' fees to be a claim for "damages" in the classic legal sense.¹

B. Renfroe intends to seek equitable relief in the form of attorneys' fees.

In its January 20, 2009 order [dkt. no. 411], the Court directed the parties to answer three questions, two of which related specifically to Renfroe's claim for its attorneys' fees. First, the Court asked: "Is the court to understand that plaintiff is waiving any claim it may have to damages in the form of its attorneys' fees except for the previously paid \$65,000?" (Dkt no. 411 at p.1, ¶ 2). Counsel for Renfroe responded in rote fashion: "No, Renfroe does not waive its claim for damages in the form of attorneys' fees incurred in pursuing its claim for breach of contract (excluding the \$65,000 already paid)." (Dkt no. 413, at p.1, ¶ 2). Focusing on the the word "waiving" and failing at the time to appreciate what now appears to be a quite deliberate use by the Court of the word "damages", Renfroe's counsel's

¹ Also in hindsight, Renfroe perhaps could have avoided confusion by following its first inclination (as was discussed with and agreeable to opposing counsel, and as is often done in various cases) to file a motion for attorneys' fees after the Court had ruled upon the issue of Renfroe's recovery of the "consulting fees" as restitution. Rightly or wrongly, Renfroe's counsel thought that, by filing Renfroe's restitution motion and its attorneys' fees motion simultaneously, it would be advancing the Court's and the parties' interests in trying to promptly close out this case.

answer was imprecise, at best, and inaccurate, at worst. Renfroe’s counsel should have stated – and now states – “No, Renfroe is not seeking *damages* in the form of attorneys’ fees; it is seeking *equitable relief* in the form of attorneys’ fees (excluding the \$65,000 already paid)²

Renfroe’s counsel regrets its casual, pedestrian use of the word “damages” as if that term was interchangeable with the words “recovery” or “relief.” Renfroe’s counsel should have made clear in answering the Court’s questions that, as they have discussed with opposing counsel, Renfroe is seeking to recover its attorneys’ fees, but not as legal “damages” for which a trial would be expected. Rather, Renfroe’s intent was and is to seek its attorneys’ fees as a form of equitable relief for which no trial is expected.

Renfroe has, from the outset, been mindful of the ‘American Rule’ that absent a statutory or contractual provision, each party must generally bear its own nontaxable litigation costs, including attorneys’ fees. In this case, Defendants’ bad faith and malicious conduct, occurring both prior to and during this litigation, warrant the application of the well-established exception to the American Rule and the invocation of this Court’s unquestioned equitable powers to award litigation costs, including attorneys’ fees. *See, e.g., Hall v. Cole*, 412 U.S. 1, 5 (1973) (“it is unquestioned that a federal court may award counsel fees to a successful party

² Renfroe is also seeking certain limited expenses incurred in connection with its attorneys’ fees.

when his opponent has acted ‘in bad faith, vexatiously, wantonly, or for oppressive reasons’’) (citations omitted); *F.D. Rich Co., Inc. v. U.S. for Use of Indus. Lumber, Co.*, 417 U.S. 116, 129 (1974) (citing *Vaughan v. Atkinson*, 369 U.S. 527 (1962) for the established equitable principle permitting award of fees absent entitlement under statute or contract). *See also Reynolds v. First Alabama Bank*, 471 So.2d 1238, 1240-43 (Ala. 1985) (noting exceptions to the American Rule recognized in Alabama, including the equitable exception “where fraud, willful negligence or malice has been practiced”); *King Development & Realty, Inc. v. Eslami*, 964 So.2d 51, 57-58 (Ala. Civ. App. 2007) (recognizing special equity exception to the American Rule in cases where the breach of contract has been malicious).

As will be more fully shown in Renfroe’s motion for attorneys’ fees and expenses to be filed by February 13, 2009 in accordance with the Court’s January 28, 2009 Order [dkt. no. 414], the Defendants’ flagrant breaches of their contracts, which involve acts of misrepresentation, recalcitrance, manipulation, abuse and other wanton, vexatious and oppressive behavior, were undertaken in bad faith, for the purpose of benefiting themselves and their alter ego, Richard Scruggs, thereby necessitating Renfroe’s incurrence of substantial attorneys’ fees and expenses. It is from this bad faith, malicious conduct that Renfroe will appeal to this Court’s equitable powers for relief.

- C. The parties' waiver of trial on damages does not affect the determination of Renfroe's entitlement to attorneys' fees because they are sought in equity and not as damages at law.

Renfroe never intended to pursue its attorneys' fees as legal damages for breach of contract. Renfroe's counsel unintentionally led the Court to believe it would be conducting a trial by affidavit on a question of its attorney fees. Renfroe never expected that either party should be afforded a trial on the attorneys' fees issue, as there is no right to trial in equity, and attorneys' fees requests are typically resolved on motion. Because Renfroe has always viewed its recovery of attorneys' fees as equitable relief as opposed to legal damages, it has envisioned the familiar determination by affidavit of a claim for reasonable attorneys' fees as would typically occur in any case where the successful party seeks attorneys' fees under any of the three available avenues (statute, contract or equitable exception). In this case, it is the equitable exception.

Unfortunately, counsel's answers to the Court's questions created confusion because they were based on counsel's own faulty assumptions about what the Court 'already knew.' Not realizing it then, Renfroe's counsel now sees they were in essence expecting the Court to read their minds. They were expecting the Court to know that, despite the use of the word "damages", they would not attempt to recover attorneys' fees as compensatory or other legal damages in a contract case, but rather that the facts of this case, would call for the Court's exercise of its

discretion to award Renfroe attorneys' fees in equity. Counsel should have then, and does now plainly state it is Renfroe's intention to proceed under an equitable theory of recovery of attorneys' fees and expenses.

Renfroe's counsel apologizes to this honorable Court. They will file Renfroe's motion for attorneys' fees with affidavit(s) as directed, along with its restitution motion, by 4:30 p.m. on February 13, 2009.

Respectfully submitted this 30th day of January, 2009.

By: **/s/ Jack E. Held**

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CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of January, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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