# IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

MARIE DENSON,	)	
Plaintiff,	)	
v.	)	C.A. No.: CPU4-12-001462
SAM SHAER d/b/a Supreme Auto Body,	)	
Defendant.	)	

Date Submitted: January 25, 2013 Date Decided: February 5, 2013

## MEMORANDUM OPINION PURSUANT TO COURT OF COMMOM PLEAS CIVIL RULES 11 AND 56(c)

**Ms. Marie Denson**, 560 S. Basswood Drive, Apt. G, Bloomington, IN 47403 *Pro-Se Plaintiff* 

**Michael Silverman, Esquire,** Silverman, McDonald & Friedman, 1010 N. Bancroft Parkway, Suite 22, Wilmington, DE 19805

Attorney for the Defendant

WELCH, J.

#### I. Introduction

On November 27, 2012 the Court entered a Memorandum Order on Defendant's Motion for Sanctions pursuant to *Court of Common Pleas Civil Rule 11* as well to dismiss or grant summary judgment pursuant to *CCP Civ.R. 50(c)* in the instant action.

The Court incorporates all the findings of facts and conclusions of law set forth in that November 27, 2012 Order and Opinion. Since that date the Court has requested Mr. Silverman, defendant's counsel file an Amended Affidavit of Attorney's Fees setting forth the required facts the eight (8) factors State Courts in this jurisdiction usually considered under established case law as well as Rule 15 of the Professional Rules of Conduct in granting and/or denying a an application for attorney's fees. Mr. Silverman's office has filed that new affidavit on January 14, 2013 which was received and docketed with the Civil Clerk. The Court granted Ms. Denson an opportunity to file a formal response to that affidavit which Ms. Denson did so on January 24, 2013. For the reasons set forth below, the Court enters Summary Judgment in favor of the defendant pursuant to *CCP Civ.R.* 56(c) and declines to enter an award of attorney's fees under *CCP Civ.R.* 11(b)(2)

#### II. The Facts

As background, this Court granted defendant Sam Shaer d/b/a Supreme Auto Body's (hereinafter "defendant") Motion for Summary Judgment under CCP Civ. R. 56(c) in this Court on September 7, 2012. The Court found that plaintiff lacked standing after hearing defendant's motions that she was not the real party in interest and title holder of the motor vehicle pursuant to CCP Civ. R.  $59(c)^{I}$ . Rather than dismiss the matter with prejudice, the Court exercised its

<sup>&</sup>lt;sup>1</sup> See Joel Tenebaum et al v. Jerome Smith and Thomas d/b/a Wilmington West Mitsubishi, 1989 WL 848986 (Del.Com.Pl.) (owners of a motor vehicle have a right to owe or claim to receive damages against auto repair companies); Norm Gershman's Things To Wear, Inc., v. Mercedes Benz of North America, Inc., 1989 WL 64146 (Del.Super.) (automotive buyer brought suit against dealer and distributor); Edward J. Kimpel v. Delaware Public

discretion and granted leave for Ms. Denson to file a Motion to Amend the Caption to add the real party in interest and title owner of the subject motor vehicle, Mr. Michael Newman who the Court understands was her roommate or boyfriend. Ms. Denson then docketed and filed a Motion to Amend the Caption to add Mr. Newman which was granted by the Court on September 20, 2012. Hence, all proper and necessary parties were before the Court in order to proceed to trial.

The clear impact of the Court's CCP Civil Rule 56(c) Summary Judgment Order granted Ms. Denson Leave to Amend, not to dismiss Ms. Denson's *pro se* complaint. Instead, this Court granted her Leave to Amend the caption and add the real party in interest, Michael Newman, the record owner of the motor vehicle in question so this matter could proceed to trial.

## (i) Ms. Denson's Motion to Remove Newman as Party Plaintiff.

The defendant through counsel, Mr. Silverman thereafter filed a Motion for a Rule 11 Sanctions when Ms. Denson filed a Motion with the Civil Clerk sought to remove Mr. Newman him as a party plaintiff. The defendant in his Motion also sought to dismiss the instant action under the doctrine of *res judicata* because the Court has previously granted leave for Ms. Denson to add the proper plaintiff and proceed to trial. Ms. Denson was advised at the hearing on her Motion to remove Mr. Newman on June 21, 2012 that defendant's counsel would move under *res judicata* for dismissal and/or for sanctions if she jointly with Mr. Newman sought to remove Newman's name from the caption. Ms. Denson was also informed that her Motion, if granted, could also result in the ultimate dismissal of the case. Nevertheless, Ms. Denson proceeded forward on her joint motion to withdraw Mr. Newman as a party plaintiff.<sup>2</sup> It was clear at the

Auction and First Extended Services Corporation, 2001 WL 1555932 (Del.Com.Pl.)(Purchase of automobile who bought car from defendant may bring breach of contract action against defendant, consumer fraud and UCC).

<sup>2</sup> Delaware Courts, at their discretion, look to the underlying substance of *pro-se* litigant's filings, rather than reject filings for formal defects and hold *pro-se* filings to "somewhat less stringent structural standard" than those drafted

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Motion hearing on November 9, 2012 that Ms. Denson was adamant about removing Mr. Newman as a party plaintiff contrary to the explicit findings of the Courts Summary Judgment Order granting her Leave to Amend. The Order was approved because it was unopposed by Ms. Silverman.

## III. The Law

This Court has outlined the provisions of *Court of Common Pleas Civil Rule 11* in its November 27, 2012 Memorandum Opinion which serves as a basis for an application for attorney's fees under *Court of Common Pleas Civil Rule 11(b)(2)*. The case law that applies to this instant action has been set forth in previous Superior Court case law in this jurisdiction.<sup>3</sup> As Judge T. Henley Graves of the Superior Court noted, while he found a Rule 11 sanction to be appropriate in the *Sturnberg* decision and requested the party file an affidavit to set forth attorney's fees, he noted that an attorney awards for any sanctions motion "should be granted cautiously as the Court does not want to create cottage industry in seeking sanctions because it is profitable." In this particular case, this judge, after nearly seventeen (17) years on the bench has not made such an award of Rule 11 sanctions. "...The general rule [is] that each party must bear his or her attorneys fees and expenses of litigation unless there is a 'contractual or statutory basis for liability' or a Rule 11 violation." The Court in its November 27, 2012 outlined the reasons the Court would consider such a *CCP Civ. R. 11(b)(2)* award in this case.

In a quantum merit action the Court considers the following factors:

by lawyers." *Sloan v. Segas*, 2008 WL 81513 \*7 (Del.Ch. July 3, 2008). However, self representation is "not a blank check for defendants." *Id.* Ms. Denson is fully aware of the Court's procedures in this Court as she has formally filed a civil complaint, docketed and filed a Motion to Amend the pleading to add Newman as a party-plaintiff, and in the instant Motion, filed and docketed new to remove Newman after the Court granted Leave to Add Newman as a party.

<sup>&</sup>lt;sup>3</sup> See Richard J. Sturnberg, M.D. v. Nanticoke Memorial Hospital, et al., 2009 WL 2219287 (Del.Supr.).

<sup>&</sup>lt;sup>4</sup> See Safeway Store v. Chamberland Protective Services, 451 A.2d 66, 68 (Del. C.P. 1982); Thomas v. Marta, 1990 WL 35292 at \*2 (Del.Super., Ct.3<sup>rd</sup> 1990).

- 1. The time and labor required, the novelty and difficulty, the questions involved and the skill requisite to perform the legal services properly;
- 2. The likelihood, if apparent the client, that the substance of the particular employment will preclude other employment by the lawyers;
- 3. The fees customarily charged in the locality for similar services:
- 4. The amount involved and results obtained;
- 5. The time limitations imposed by the client or by the circumstances;
- 6. The nature and length of the professional relationship with the client:
- 7. The experience, reputation and ability of the lawyer or lawyers to perform the services;
- 8. Whether the fee is fixed or contingent;
- \*9. The employer's [opposing parts] ability to pay; and
- 10. Whether a claimant's counsel has received or expects to receive compensation from any other source.

Under *Court of Common Pleas Civil Rule 11(B)(2)* "Nature of Sanctions; Limitations" the following applies to the instant case after considering these factors that defendant's counsel set forth in his affidavit:

## (2) Nature of Sanctions; Limitations.

A sanction imposed for the violation of this Rule shall be limited to what is sufficient to deterrents of such conduct or comparable conduct by other similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction <u>may consist of or include, directives of a non-monetary nature, in order to pay a penalty into court, or, if impose on motion warren for infective deterrents, or an <u>order of directing payment to the movement of sum of all the reasonable attorneys fees and other expenses incurred as a direct result of the violation.</u></u>

Emphasis supplied. Hence, the Court may enter a non-monetary award of sanctions.

#### IV. Discussion

In this regard Mr. Silverman's office has set forth an affidavit that he spent 5.3 hours and requested \$1,500.00. According to his affidavit, the amount charged by Mr. Silverman "per hour

in similar cases is \$300.00 per hour." Mr. Silverman set forth in his affidavit in paragraph three (3) that there was no uniqueness of the case or other facts pertinent to an award of attorney's fees. In paragraph four (4) he asserted that the acceptance of the particular employment rule would not preclude other employment by the undersigned and there were no time limitations by the circumstances. Under paragraph 6 of his affidavit he certified he been a member of the bar in good standing for over twenty years and the agreement with his client was a flat fee of \$1,500.00. The amount listed in plaintiff's complaint was \$19,138.40<sup>5</sup> according to paragraph 8. All those averments were sworn in Mr. Silverman's affidavit and signed by his co-counsel as true and correct to the best of his knowledge and belief.

### V. Opinion and Order

The Court must note that plaintiff appears to be a fairly sophisticated pro-se litigant in this action. The Court notes after the Court exercised its discretion and granted leave for plaintiff to add the proper party plaintiff in the action, she docketed a Motion to Amend with the Civil Clerk and properly added Mr. Newman as a co-plaintiff on September 28, 2012. Hence, she understood Court procedures and the Civil Rules of the Court for attorney's fees. As noted above, Ms. Denson was familiar enough with the Civil Rules and procedures of this Court to formally file a civil complaint, add a party plaintiff pursuant to *CCP Civ.R.15(a)*, as well as now file a Motion to Remove Newman as a party plaintiff. Ms. Denson did not seek further review by Re-argument or an Appeal to the Superior Court of the Court's September 7, 2012 Summary Judgment Order. In addition, in her last filing in response to Mr. Silverman's amended affidavit with the Court she acknowledged that "I was not the registered owner of the vehicle in question when I went to do business with him". Clearly she lacked standing, as noted, however, after the

<sup>&</sup>lt;sup>5</sup> \$15,000 represents preventative damages sought by Ms. Denson.

<sup>&</sup>lt;sup>6</sup> See, CCP Civ.R. 59(e); CCP Civ R. 72.

Motion to Amend was granted by the Court the proper parties were before the Court and Ms. Denson could thereafter proceed to trial, she then sought to remove Mr. Newman as a party plaintiff and "un-do" the case which was now ready to be set for trial by the Court

What appears to be troubling to this Court is that Ms. Denson directly "un-did" what the Court ruled when it set up this case from trial and . Ms Denson, even though *pro-se* must follow the rulings of this case to file pleadings and defend the client in Court. She had an obligation to follow the law of this Court. "The *pro-se* complainant must exercise reasonableness and good in prosecution of his [her] claims. In this case, defendant Shaer hired counsel and paid a flat fee of \$1,500.00 to defend her civil action and the matter was scheduled to have Ms. Denson's day in court. Nevertheless, even when advised at the Motion hearing, Ms. Denson moved to withdraw Mr. Newman as party plaintiff subjecting herself to the *res judicata* decision of the previous September 7, 2012 Summary Judgment Order and/or dismissal of the action. This caused undue expenses and attorneys fees to Shaer as well as more time and counsel fees for his attorney Silverman. Silverman.

This Court was careful in its analysis to advise that Mr. Silverman's Rule 11 sanction would be considered only for the time spent preparing for Ms. Denson's Motion to Withdraw Newman as a party plaintiff and Mr. Silverman's presentation for Motion for Sanctions. A review of this affidavit and the civil docket indicates based upon his \$300.00 hourly rate that he should be awarded two (2) hours of litigation or \$600.00 for attorney's fees. Nevertheless, the Court believes the entry of Summary Judgment in defendant's favor is a sufficient sanction in this case. Defendant's counsel charged a flat fee and was paid. Ms. Denson has filed different

<sup>&</sup>lt;sup>7</sup> See, Arots v. Salesianum School, Inc., 2003 WL 21398017 (D.Del. 2003).

<sup>&</sup>lt;sup>8</sup> A review of the transcript will indicate that when Ms. Denson was told that her action may be dismissed, she advised the Court that she would simply add Newman back in as a party plaintiff later. Hence, Ms. Denson was prepared to file yet a new Motion to add Newman back in the docket.

pleadings in this case that appear to indicate she does not even have a fixed address to live at the present time. The Court believes she has no resources to pay attorneys fees and this factor weighs in the Court's ruling.<sup>9</sup>

The Court notes Ms. Denson had a duty to follow the law in this case. All parties were now in the captioned in order to proceed to trial. Ms. Denson sua sponte decided to remove Newman as a party plaintiff even after being cautioned that res judicata would cause seeking his removal, that judgment may be entered in defendant's favor. The Motion was unopposed by defendant. As Judge Graves ruled "...[A]ll judges are sympathetic to the problems faced by prose litigants, but the problems and perils experienced by pro-se litigants does not mean a separate set of rules should be applied when a person is not represented by an attorney. 10 Ms. Denson was informed of the parameters of her Motion and she nevertheless proceeded in its presentation.

Since Mr. Silverman's Motion also asserts res judicata and Ms. Denson was advised at the hearing that if she withdrew Ms. Newman, her action would be subject to dismissal, the Court hereby enters Summary Judgment pursuant to Court of Common Pleas Civil Rule 56(c) in defendant's favor.11

Each party shall bear their own costs.

IT IS SO ORDERED this 5<sup>th</sup> day of February, 2013.

John K. Welch, Judge

/jb cc:

Ms. Tamu White, CCP, Chief Civil Supervisor

<sup>&</sup>lt;sup>9</sup> See Factor No. 9 set forth above.

<sup>&</sup>lt;sup>10</sup> See, Joan A. Labarge v. John Hensley, et al. 2006 WL 306925 (Del.Supr).

<sup>11</sup> Before concluding, the Court notes it declined to address many of Ms. Denson's arguments attacking the Court and the procedures of this Court, including her assertion that she was purposely placed at the end of the trial motion calendar on Monday. These arguments are simply unfounded.