

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

MIDLAND FUNDING LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No.: CPU4-10-005630
)	
STEPHEN SISMAN,)	
)	
Defendant.)	

ORDER

AND NOW THIS 24th day of April, 2012, the Court having considered (1) Plaintiff Midland Funding LLC’s (“Plaintiff’s”) Motion to Dismiss pursuant to Court of Common Pleas Civil Rule 41(a); (2) Defendant Stephen Sisman’s (“Defendant”) Motion to Dismiss the Complaint with prejudice pursuant to Court of Common Pleas Civil Rule 37(b)(2)(C) for failure to comply with discovery; and (3) Defendant’s petition for an award of expenses and costs incurred to defend this action,¹ it appears to the Court that:

1. On September 20, 2010, Plaintiff Midland Funding LLC (“Plaintiff”) filed a civil debt action against Defendant. On October 17, 2011, Defendant filed an Answer to the Complaint. Together with his Answer, Defendant filed a request for discovery.

¹ While Defendant does not cite any authority for either of these requests, the Court notes that pursuant to section 5101 of Title 10 of the Delaware Code, a prevailing party “shall recover, against the adverse party, costs of suit” A voluntary dismissal of the action qualifies under this section. Finally, Court of Common Pleas Civil Rule 54(d) and (e), the Court has discretion to award costs of suit to the prevailing party, as well as tax a party who caused unnecessary expense, regardless of the outcome of the matter.

Because he did not receive a response, Defendant filed a Motion to Compel Discovery which was granted by Judge John Welch on December 2, 2011. The Court ordered Plaintiff to produce documents responsive to the requests minus the transcripts of telephone conversations between the parties. The docket does not reflect that a notice of discovery compliance was filed.

2. Trial was scheduled for January 6, 2012. On that date, the parties appeared in Court and Plaintiff offered to enter a stipulation of dismissal with prejudice. Plaintiff represented that he did not have a witness to proceed to trial. Plaintiff's Counsel conceded that his client performs a cost/benefit analysis to determine whether the amount sought justifies the expense of bringing a witness to trial.²

3. Defendant also moved the Court to dismiss the action with prejudice based upon Plaintiff's failure to comply with court-ordered discovery. He had a written motion which he handed to Plaintiff's counsel the morning of trial – it had not been filed, nor served to opposing counsel, prior to January 6, 2012. Plaintiff's position was that by granting Plaintiff's motion to dismiss, Defendant's motion would be rendered moot.

4. Following colloquy on the matter, Defendant agreed to stipulate to a dismissal of the case with prejudice, conditioned upon being reimbursed for his out-of-

² The Court recognizes that Plaintiff sought to resolve this matter prior to trial to avoid necessitating a court appearance. The Court further acknowledges Plaintiff's right to perform a cost/benefit analysis to determine whether the amount sought justifies the investment of bringing a witness to trial. However, the Court cautions counsel that a trial date is not target date for settlement. Parties need to be prepared to move forward on that date. If not, litigants should be on notice that a potential consequence will be The Court's consideration of imposing costs and/or expenses against a party who files a suit that it does not intend to try.

pocket expenses and lost wages to defend the action. Defendant represented that he is a commissioned real estate agent, and that he spent 20 to 25 hours (a full week's pay) to defend this matter. He also sought reimbursement for certified mailing and parking expenses. He petitioned the Court for reimbursement in the amount of \$ 860.47.

5. The Court ordered both parties to file responses to the cross-motions to dismiss, and Defendant's petition for costs and lost wages, within 30 days. The Court further requested that Defendant submit documentation to corroborate the petition for lost wages and out-of-pocket costs incurred to defend the suit.

6. On January 9, 2012, Defendant filed its response to the Court's request and submitted the corroborating documents for his petition. Plaintiff responded by letter dated February 6, 2012 to Defendant's Motion to Dismiss for failure to Comply with Discovery, and Defendant's request for lost wages and costs. Plaintiff argued first that it did comply with discovery and provided all the documents within its possession. Second, Plaintiff stated that it attempted several times to contact Defendant to resolve the matter the week of trial to avoid an unnecessary court appearance, but that Defendant was non-responsive by telephone or mail. Finally, Plaintiff submitted that it could not properly respond to Defendant's application for costs and lost wages as Defendant failed to provide an "adequate basis for this application, as no discernible lost wage has been proven." In response, Defendant submitted a rebuttal dated February 20, 2012 to the Court.

7. By letter dated February 28, 2012, a copy of which was sent to Plaintiff's counsel, the Court issued a supplemental request to Defendant dated February 28, 2012 to

submit documents to justify the award sought in the amount of \$ 860.47³ by March 15, 2012 as the submission was deficient in that regard. On March 14, 2012, Defendant submitted a copy of his 2010 1099 tax form reflecting his annual compensation as an independent contractor for Delaware County Regional Realty, LLC in Media, Pennsylvania. Defendant also submitted proof of 6 certified mailings, for which he only submitted 5 receipts,⁴ as well as a request for parking expenses on 7 occasions, only two of which are corroborated by “Amano” receipt.⁵ Plaintiff did not respond to Defendant’s February 24 or March 14, 2012 submissions.

8. Pursuant to Court of Common Pleas Civil Rule 41(a)(2), a Court may order an action dismissed at Plaintiff’s request upon such “terms and conditions” as the Court deems proper. The Court considered the parties’ respective cross motions to dismiss this action; the parties’ written submissions; and oral argument made by the parties at the

³ Defendant requested a total of \$ 860.37 for lost earnings. He calculates this number by adding the figures of \$ 840.37 plus \$ 20 for additional time. These figures were provided by letter dated February 7, 2012, which was received by the Court February 20, 2012.

⁴ For the five (5) receipts that are included, the amount paid ranges from \$ 5.59 to \$ 5.79. Even though the Court recognizes that Defendant did not submit a receipt for the 6th certified mailing # 7011 0110 0000 4783 2726, he did provide the S Form 3811 which proves he mailed a certified letter to Plaintiff’s counsel, and that it was received. Thus, even though there is no receipt, based upon prior mailings, the Court finds that it is reasonable to conclude Defendant paid a minimum of \$ 5.59 to send that letter. The total amount paid for certified mailings by Defendant is \$ 34.26.

⁵ Defendant does not have receipts for three submitted parking expenses: November 11, 2011; January 4, 2012 and January 6, 2012. Docket review for this case reflects that on November 7, 2011, Defendant filed a motion to compel in the Clerk’s office. As for the January 4th expense, the docket does not confirm why he came to Court. Defendant prepared a Motion to Dismiss which he provided to opposing counsel the day of trial, but it was not filed with the Court or otherwise docketed and/or date-time-stamped. As for the final undocumented parking expense for January 6th, Defendant was here for trial as per court records. Defendant submitted receipts for two parking fees incurred November 3, 2011 and December 2, 2011.

January 6th hearing. **Having considered the foregoing, this Court hereby GRANTS Plaintiff's Motion to Dismiss this action with prejudice.** Because the Plaintiff's motion is granted, the Court need not reach the merits of Defendant's motion as it is rendered moot by the Court's ruling.⁶

9. The Court further finds that, as the prevailing party, Defendant is entitled to an award of costs pursuant to 10 *Del. C.* § 5101 and Court of Common Pleas Civil Rule 54(d). Costs are considered to be allowances made to reimburse a successful party for his/her/its expense necessarily incurred.⁷ The decision to award costs in a civil suit is a matter of judicial discretion.⁸ Based upon the Court's review of the Defendant's documents submitted to corroborate his request for certified mailings and parking expenses incurred for courthouse appearances to defend this matter, the Court finds Defendant's claim to be reasonable. **The Court hereby orders Plaintiff to reimburse Defendant for out-of-pocket costs in the amount of \$ 52.26, which Defendant itemized as \$ 34.26 for certified mailings and \$ 18.00 for parking expenses.**

10. Moreover, pursuant to Court of Common Pleas Civil Rule 41(a)(2), the Court may invoke its discretion to impose any "terms and conditions" to the entry of dismissal of an action. In addition to incidental costs, Defendant petitioned this Court for

⁶ Contrary to Defendant's representation, Plaintiff appears to have complied with Judge Welch's December 2, 2011 Order on Defendant's Motion to Compel. Plaintiff produced all relevant documents within its possession to the Defendant thereby satisfying its obligation under the rules of this Court. Plaintiff cannot produce what it does not possess.

⁷ *Ableman v. Katz*, 481 A.2d 114 (Del. Super. 1984).

⁸ CCP Civ. R. 54(d); *Donovan v. Delaware Water and Air Resources Commission*, 358 A.2d 717 (Del. 1976).

an award for income lost while defending this suit. In view of the circumstances in this particular case, the Court finds that an award to Defendant for lost wages is fair and reasonable.

11. Defendant's 1099 tax form confirms that Defendant earned \$ 33,719.20 for the 2010 tax year. Defendant stated at the January 6th hearing that he is on a "reduced schedule," working only "20 to 25" hours per week. Defendant explained that he lost 20 to 25 hours of work to defend this case, for which he was not compensated. Defendant stated that he failed to earn his typical commissions and avers that he is owed \$ 860.37 for lost wages. The Court disagrees.

12. The Court finds that Defendant did not submit any evidence beyond the 1099 tax form as proof of his earnings. Defendant failed to submit any history of commissions, or proof of foregone commissions, as a result of this litigation. Since he represented he is commission only, the Court assumes that the income set forth in the 1099 represents income derived from commissions earned. Based upon the 2010 earnings of \$ 33,719.20, the Court finds that Defendant's weekly wages are \$648.45. Accepting as true Defendant's representation to this Court that he works a reduced schedule of twenty-five hours per week, the Court finds that Defendant earns approximately \$ 25.94 per hour. Defendant claims he spent "20 to 25 hours" to defend this claim. The Court thus concludes that reimbursement at the rate of \$ 25.94 per hour and Defendant's minimal estimate of 20 hours spent are reasonable under the circumstances. **Therefore, the Court awards Defendant a total amount of \$ 518.80 (the hourly wage of \$ 25.94**

multiplied by 20 hours) for earnings lost to defend a claim that Plaintiff conceded it had no intent to prosecute on the day of trial.

WHEREFORE, for the reasons stated above, **IT IS HEREBY ORDERED THAT:**

1. Plaintiff's Motion to Dismiss the claim pursuant to Court of Common Pleas Civil Rule 41(a)(2) is **GRANTED**. The Complaint is **DISMISSED WITH PREJUDICE**.

2. Defendant as the prevailing party is entitled to an award of costs incurred to defend this matter pursuant to 10 *Del. C.* § 5101 and Court of Common Pleas Civil Rule 54(d). Plaintiff shall pay Defendant \$ **52.26** as reimbursement for certified postage and parking expenses all of which were incurred to defend this action.

3. The Court invokes its discretion pursuant to Rules 41(a)(2) to set terms and conditions for the entry of dismissal with prejudice requested by Plaintiff. Accordingly, the Court orders Plaintiff to pay Defendant \$ **518.80** as compensation for earnings lost to defend this suit.

IT IS SO ORDERED.

Andrea L. Rocanelli

Andrea L. Rocanelli
Judge