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BRYAN PRINGLE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

BRYAN PRINGLE, an individual,

Plaintiff,

v.

WILLIAM ADAMS, JR.; STACY FERGUSON; ALLAN PINEDA; and JAIME GOMEZ, all individually and collectively as the music group The Black Eyed Peas, *et al.*,

Defendants.

Case No. SACV 10-1656 JST(RZx)

REPLY IN FURTHER SUPPORT OF PLAINTIFF BRYAN PRINGLE'S MOTION FOR VOLUNTARY DISMISSAL OF CERTAIN PARTIES WITHOUT PREJUDICE AND WITHOUT FEES OR COSTS

DATE: May 14, 2012
TIME: 10:00 a.m.
CTRM: 10A

I. INTRODUCTION

After the Court granted summary judgment to the Guetta Defendants[1] and requested that the parties submit a status on the remaining defendants, Plaintiff suggested to the Adams Defendants[2] that they should seek to join the motion, and that Plaintiff would not oppose such a joinder. In response, the Adams Defendants made clear that they had no intention of seeking to join in the Motion for Summary Judgment: "**we have not asked to file a joinder (late or otherwise).**" See, Exhibit A to Declaration of Kathleen Koppenhoefer (hereafter "Koppenhoefer Decl."). We also know, of course, that the Adams Defendants deliberately chose not to make their own Motion for Summary Judgment, and deliberately chose not to join the Guetta Defendants motion in November 2011. The Adams Defendants now complain that they will be prejudiced unless the Court denies Plaintiff's Motion for Voluntary Dismissal and instead *sua sponte* enters summary judgment in their favor so they can get what they presume to be an automatic award of attorneys' fees. That the Adams Defendants were given three distinct chances to obtain summary judgment and deliberately rejected each opportunity undermines any credible claim of prejudice. As such, the Court should grant Plaintiff's motion without prejudice and without an award of costs and fees.

II. BACKGROUND

On November 17, 2011, the Guetta Defendants moved for summary judgment. (Dckt. No. 160). The Adams Defendants and Interscope Defendants did not join in the motion. On April 3, 2012, the Court entered summary judgment on behalf of the Guetta Defendants, and entered an order directing the parties to submit a joint status report as to the remaining, non-moving defendants. (Dckt. Nos. 252, 256). On April

[1] Plaintiff adopts and incorporates by reference the defined terms from the Response in Opposition to Plaintiff's Motion for Voluntary Dismissal.

[2] Although the arguments set forth here are directed to the Adams Defendants specifically, they apply to the joinder filed by the Interescope Defendants (Dckt. No. 272) as well.

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4, 2012, counsel for the Adams Defendants asked Plaintiff to voluntarily agree to entry of summary judgment against him. See, Koppenhoefer Decl., Exhibit A. Instead, Plaintiff suggested that the remaining defendants seek to join the Motion for Summary Judgment, and further indicated that Plaintiff would not oppose the request. See, Koppenhoefer Decl., Exhibit B. In response, the Adams Defendants made it clear that they had no intention of joining the granted motion for summary judgment: "we have not asked to file a joinder (late or otherwise)." See, Koppenhoefer Decl., Exhibit C. Defendants now insist that Plaintiff's Motion should be granted as (1) untimely and (2) prejudicial because they should be awarded summary judgment even though they chose not to seek summary judgment and refused to join in the Guetta Defendants' motion.

III. ARGUMENT

The Ninth Circuit has consistently held that a "district court should grant a motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as a result." *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001) (citing *Waller v. Fin. Corp. of America*, 828 F.2d 579, 583 (9th Cir. 1987)); *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145-46 (9th Cir. 1982). In this context, legal prejudice means "prejudice to some legal interest, some legal claim, some legal argument." *Smith*, 263 F.3d at 975 (internal citations omitted); *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996). Prejudice is **not** established by showing that Defendants face the threat of a second lawsuit, or a tactical disadvantage. *U.S. v. Berg*, 190 F.R.D. 539, 543 (E.D. Cal. 1999).

Courts have identified several factors to consider in determining legal prejudice:

(1) The defendant's effort and expense involved in preparing for trial;

(2) Excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action;

(3) Insufficient explanation of the need to take a dismissal; and

(4) The fact that summary judgment **has been filed** by the defendant.

Id. (emphasis added) (granting the government's motion for voluntary dismissal in an action to enforce tax liens against a real property owner, in part because the owner had not filed a motion for summary judgment).

None of these factors alone is sufficient to support a denial of a motion for voluntary dismissal. "[P]lain legal prejudice does not result merely because defendant will be inconvenienced by having to defend in another forum." *Burnette v. Godshall*, 828 F.Supp. 1439, 1443 (N.D. Cal. 1993) (citing *Hamilton*, 679 F.2d at 145). Nor does prejudice result "when the dismissal may cause defendant to incur substantial expense in preparing for trial." *Burnette*, 828 F. Supp. at 1443 (citing *Durham v. Florida East Coast Railway Co.*, 385 F.2d 366, 368) (5th Cir. 1967). A court may grant a Rule 41(a)(2) motion even where a plaintiff would gain a tactical advantage from the voluntary dismissal. *Id.* (citing *Hamilton*, 679 F.2d at 145); *see also Hepp v. Conoco, Inc.*, 97 Fed. Appx. 124, 125 (9th Cir. 2004) (finding that defendant's loss of its ability to have the opinions of plaintiff's experts excluded by a motion *in limine*, and thus the loss of its ability to have summary judgment granted in its favor, "is based on the loss of an opportunity to raise a legal argument, not an injury to an actual legal right.").

Additionally, other circuits have held that a mere attempt to avoid an adverse summary judgment ruling, without more, does not constitute plain legal prejudice. *Pontenberg v. Boston Scientific Corp.*, 252 F.3d 1253, 1258 (11th Cir. 2001); *McCants v. Ford Motor Co., Inc.* 781 F.2d 855, 857 (11th Cir. 1986).

Courts in this Circuit and other jurisdictions have found that a defendant's motion for summary judgment filed after a motion for voluntary dismissal weighs strongly against granting summary judgment or denying voluntary dismissal. *See Westlands*, 100 F.3d at 98 (reversing district court decision to deny Rule 41(a)(2) motion for voluntary dismissal and grant defendant's subsequently filed motion for

summary judgment); *see also Conafay by Conafay v. Wyeth Laboratories*, 841 F.2d 417, 419-420 (D.C. Cir. 1988) (finding that the "equities" were not with the defendant-appellee, where the appellee filed for summary judgment while a motion for voluntary dismissal was pending). There is no direct case on point where a defendant requests entry of summary judgment in lieu of granting a Rule 41(a)(2) motion to dismiss where the defendant never sought summary judgment or failed to join in the summary judgment motion despite multiple opportunities to do so.

A. Granting the Plaintiff's Motion for Voluntary Dismissal is Proper Given Defendants' Own Deliberate Refusal to Seek or Join in the Motion for Summary Judgment.

The existence of a summary judgment motion filed **after** a motion to dismiss pursuant to Rule 41(a)(2) is not sufficient reason to deny a motion to dismiss. *Conafay*, 841 F.2d at 419-420 ("Granting voluntary dismissal would mean that appellee would lose an opportunity for a favorable final disposition of the case, but that is not important as long as appellee suffers no legal prejudice from dismissal."). In *Conafay*, the D.C. Court of Appeals noted that the district court placed great emphasis on the fact that the defendant-appellee submitted a motion for summary judgment with its memorandum in opposition of the appellant's motion to dismiss. *Id.* at 419. Not only did the Court of Appeals find this fact irrelevant to the issue of the motion for voluntary dismissal, but the court stated that the equities were not with the defendant-appellee. *Id.* at 419-420. Instead of easily declining to oppose the motion to dismiss the appellee and saving its energy for the next round of litigation, the appellee "took a large risk" by filing its subsequent motion for summary judgment, which could easily be renewed in the reinstituted action. *Id.*

In *Westlands Water Dist*, the U.S. Court of Appeals for the Ninth Circuit relied on the holding in *Conafay* to reverse and remand the district court's denial of the plaintiff-appellant's motion to voluntary dismiss. *Westlands*, 100 F.3d at 98. There, the court "suggested" that on remand the district court consider the fact that the

defendant waited to file a motion for summary judgment until after the filing of the motion for voluntary dismissal. The court stated that "the district court also may wish to delete any award of costs and fees attributable to the defendants' summary judgment motions, if the court concludes those costs and fees might have been avoided if the defendants had waited to file their summary judgment motions and responded initially to the Districts' motion for voluntary dismissal." *Id.* at 97-98. Thus, not only did the court find that the defendant would not be prejudiced by voluntary dismissal, but that the subsequent filing of the motion for summary judgment was not necessarily entitled to attorney fees. *Conafay* and *Westlands Water District* both provide insight into the proper analysis of a Rule 41(a)(2) motion. A motion for summary judgment filed after a motion for voluntary dismissal should be afforded less weight during voluntary dismissal analysis.

In *Piedmont Resolution, L.L.C. v. Johnston, Rivlin & Foley*, the court addressed this issue in the context of multiple defendants and multiple motions for summary judgment. *Piedmont Resolution*, 178 F.R.D. 328. There, the plaintiff filed its motion for voluntary dismissal two days after the court granted partial summary judgment to one of several defendants. *Id.* at 330. The remaining defendants filed motions for summary judgment shortly thereafter. *Id.* The remaining defendants opposed the motion for voluntary dismissal on the grounds that their motions for summary judgment were pending. **The Court dismissed this argument, finding voluntary dismissal did not prejudice defendants who subsequently filed dispositive motions**. *Id.* at 331.

Even if the Court rejects the argument that the subsequent consideration of summary judgment under Rule 56(f) should be given less weight than the previously filed motion for voluntary dismissal, a basic factor for considering legal prejudice in Rule 41(a)(2) analysis is no longer present. The fact that the opposing defendant **has filed** a motion for summary judgment is one factor a court will consider in its Rule 41(a)(2) analysis. *Berg*, 190 F.R.D. at 543. Here, however, the Adams Defendants to

date have never filed any motion for summary judgment, and refused to join in the Guetta Defendants' Motion, even after Plaintiff invited them to do.

Defendants suggest that Plaintiff's Motion is moot because the Court entered summary judgment for other defendants. In support of this argument, Defendants cite *Steward v. New Chrysler*, 415 Fed. Appx. 632, 637-38 (6th Cir. 2011) and *Vega v. Wiley*, 2008 WL 4371876 at *5 (D. Colo. Sept. 22, 2008).[3] In both of those cases, the defendants filed a motion for summary judgment ***before*** the plaintiffs filed their motions for voluntary dismissal under Rule 41(a)(2).

B. Defendants Will Suffer No Legitimate Prejudice By Entry of Voluntary Dismissal.

Defendants suggest that they will be prejudiced by voluntary dismissal but have identified no supporting facts that establish actual prejudice. Really, the Adams Defendants mean that they will suffer a tactical disadvantage unless they are rewarded with summary judgment despite their choice not to seek it. There is no legitimate or actual plain legal prejudice that will result from their voluntary dismissal without prejudice and without fees and as such, the Court should grant the motion.

1. There is No Prejudice Due to the Timing of the Motion or Expenses Incurred by the Defendants in Litigating the Case.

First, the Adams Defendants argue that Plaintiff's Motion is untimely, and that they were forced to incur costs in litigating the matter. Like many of Defendants' arguments, this is a red herring. Plaintiff's request for voluntary dismissal is not untimely. Plaintiff's request was made in direct response to the Court's directive that the parties deal with the remaining defendants in light of the Adams Defendants'

[3] Defendants also cite a number of cases in which the court denied the *defendant's* motion for involuntary dismissal under Rule 41(b) as moot after granting the same defendant's motion for summary judgment. Those cases bear no relevance to the present case.

strategic choice not to seek summary judgment. The only option the Adams Defendants presented was for Plaintiff to volunteer to take a judgment against himself, a procedure that Plaintiff reasonably declined to do in light of its potential adverse impact on Plaintiff's appellate rights. *Id.* Further, if timeliness should weigh against any party, it should be the Adams Defendants who, even after summary judgment was granted, refused to join in the Motion for Summary Judgment but who now insist that the only just outcome is for summary judgment to be granted in their favor.

The Adams Defendants argue that the Court should deny Plaintiff's Motion for Voluntary Dismissal and instead enter summary judgment on their behalf because they have been forced to incur expenses to litigate the claim. This does not constitute prejudice, however, and is not grounds to deny Plaintiff's motion. *In re Lowenschuss*, 67 F.3d 1394, 1400–1401 (9th Cir. 1995). Any expenses incurred in trial preparation and discovery could be applied should the case be re-filed.

2. Defendants Are Not Automatically Entitled to Attorneys' Fees and Their Complaint That They Cannot Seek them Is Not Plain Legal Prejudice.

Defendants argue that they will be prejudiced if summary judgment is not entered in their favor because they will lose their ability to recover attorneys' fees under the Copyright Statute. Ignoring the waiver argument for a moment, if defendants obtained summary judgment, there would be no automatic right to attorneys' fees as they suggest. There is not even a presumption of attorneys' fees for the prevailing party in a copyright infringement case; it is up to the sound discretion of the trial court taking all circumstances into consideration. 17 U.S.C. § 505. An award of fees should only be granted upon a finding of "frivolousness, motivation, objective unreasonableness . . . and the particular need to advance compensation and deterrence." *Fogerty v. Fantasy*, 510 U.S. at 534 n.19. None of these factors exists here. Plaintiff's claim was not frivolous, as evidenced by the Court's denial of the

various motions to strike and dismiss. The claims for copyright infringement were objectively reasonable and consistent with the Copyright Act's purposes given the factual evidence and expert opinions Plaintiff offered with respect to his creation of the original and derivative versions of "Take a Dive" in 1999. See, Dckt No. 249-2, Declaration of Kathleen E. Koppenhoefer in Opposition to Rule 11 Sanctions. Although the Adams Defendants have admittedly been successful in their efforts at painting a skewed and inaccurate portrait of Plaintiff, the fact remains that he has offered credible proof of creation of his song in 1999 that is identical to the song they released more than a decade later. As such, there is no guarantee that Defendants would even obtain an award of attorneys' fees. If Defendants felt as strongly as they do about the merits of their claim relative to the Plaintiff, they should have moved for summary judgment in November 2011. Or sought joinder at that time. Or made an unopposed motion for joinder in April as Plaintiff proposed. Every litigation decision involves risk. They took a gamble in deciding not to move for summary judgment for strategic reasons. That gamble is not a reason to deny Plaintiff's well founded Motion for Voluntary Dismissal.

C. The Adams Defendants Are Engaging In Prejudicial Gamesmanship.

Finally, even if the Court were to accept Defendants' argument that Plaintiff's Rule 41(a)(2) motion is nothing more than a ploy to avoid an adverse summary judgment ruling, it is the behavior of the remaining Defendants that has had the effect of delaying Plaintiff's ability to appeal this courts previously-granted summary judgment. *See James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1070 (9th Cir. 2002) (finding that partial summary judgment and dismissal of remaining claims without prejudice created a final, appealable judgment); *see also Romoland School Dist. v. Inland Empire Energy Center, LLC,* 548 F.3d 738, 748 (9th Cir. 2008) (citing *Concha v. London*, 62 F.3d 1493, 1507 (9th Cir. 1995)); *Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1105-1106 (8th Cir. 1999) (summary judgment

as to several defendants became final and appealable when the other defendants were voluntarily dismissed from the lawsuit). Here, where Plaintiff validly seeks to appeal the Court's granting of summary judgment as to the Guetta Defendants, the non-moving Defendants gamesmanship and delay in joining to the Guetta Defendants' summary judgment motion or filing a timely motion for summary judgment on their own stands in the way of Plaintiff pressing on toward appeal.

IV. CONCLUSION

The Adams Defendants made a tactical, strategic choice to let the Guetta Defendants move for summary judgment while they sat back and did nothing. Having made that election, they cannot now claim that their choice not to seek or join in summary judgment means that they will be prejudiced if the Court grants Plaintiff's motion for voluntary dismissal without prejudice and without an award of fees. Because they have failed to make a showing of any legitimate or real prejudice, their request that summary judgment be entered, or else dismissal be with prejudice and with an award of full attorneys' fees, should be denied.

Dated: April 30, 2012

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By: /s/ Dean A. Dickie
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CERTIFICATE OF SERVICE

On April 30, 2012, I electronically filed the foregoing REPLY IN FURTHER SUPPORT OF PLAINTIFF BRYAN PRINGLE'S MOTION FOR VOLUNTARY DISMISSAL OF CERTAIN PARTIES WITHOUT PREJUDICE AND WITHOUT FEES OR COSTS using the CM/ECF system which will send notification of such filing to the following registered CM/ECF Users:

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I am unaware of any attorneys of record in this action who are not registered for the CM/ECF system or who did not consent to electronic service.

I certify under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

Dated: April 30, 2012 /s/Colin C. Holley

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