

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

MULTIFAMILY CAPTIVE GROUP,
LLC, a Maryland Corporation;
and SAMANTHA GUMENICK, an
individual,

NO. CIV. 08-cv-00547 FCD DAD

Plaintiffs,

v.

MEMORANDUM AND ORDER

ASSURANCE RISK MANAGERS, INC.,
a Colorado Corporation; LISA
ISOM, an individual;
CALIFORNIA APARTMENT
ASSOCIATION, a California
Association,

Defendants.

_____ /

-----oo0oo-----

This matter is before the court on the motions of defendants
California Apartment Association ("CAA"), Assurance Risk
Managers, Inc. ("ARM"), and Lisa Isom ("Isom") for attorneys'
fees pursuant to 28 U.S.C. § 1927. Plaintiffs Multifamily
Captive Group, LLC ("Multifamily") and Samantha Gumenick

/////

/////

1 ("Gumenick") oppose the motion. For the reasons set forth
2 below,¹ defendants' motions are DENIED.

3 **BACKGROUND²**

4 Plaintiffs brought this litigation arising out of an alleged
5 contract for exclusive insurance brokerage services. Defendant
6 CAA filed a motion to dismiss the complaint, which defendants
7 Isom and ARM joined. The motion was granted in part and denied
8 in part by the court's Memorandum and Order filed September 26,
9 2008. Subsequently, defendant CAA filed a motion for summary
10 judgment and plaintiffs filed a motion for summary adjudication
11 against all defendants on their unjust enrichment claim. By
12 Memorandum and Order filed May 27, 2009, CAA's motion for summary
13 judgment was granted in part and denied in part, and plaintiffs'
14 motion for summary adjudication against CAA was denied. By
15 Memorandum and Order filed June 25, 2009, plaintiffs' motion for
16 summary adjudication against ARM was similarly denied. Defendant
17 ARM never filed an independent dispositive motion.

18 On January 13, 2010, the court entered its pretrial
19 conference order after instructing the parties to revise their
20 joint pretrial statement. On January 29, 2010 and February 1,
21 2010, the court issued minute orders, acknowledging defendants
22 Isom and ARM's failure to file summary judgment motions and
23 instructing the parties: (1) to present argument regarding why
24

25 ¹ Because oral argument will not be of material
26 assistance, the court orders the matter submitted on the briefs.
E.D. Cal. L.R. 230(g).

27 ² The facts and allegations of the case are set forth in
28 detail in the court's Memoranda & Orders, filed June 15, 2009,
May 27, 2009, and September 26, 2008.

1 the court should not grant summary judgment on plaintiff
2 Multifamily's claim for tortious interference with contract; (2)
3 to present an offer of proof regarding Multifamily's claim for
4 tortious interference with prospective economic advantage; and
5 (3) to prepare arguments regarding why Multifamily's conspiracy
6 claim should not be dismissed based upon the court's prior ruling
7 on CAA's motion to dismiss.

8 On February 2, 2010, the court heard argument on defendants'
9 motions in limine, some of which were granted and some of which
10 were denied. After hearing argument by the parties, the court
11 dismissed Multifamily's claims against Isom and ARM for tortious
12 interference with contract and tortious interference with
13 prospective economic advantage.

14 After five days of trial, plaintiffs rested their case, and
15 defendants moved for judgment under Federal Rule of Civil
16 Procedure 50. The court granted the motions. The court held
17 that plaintiff Gumenick had presented insufficient evidence
18 relating to the formation of any contract with defendant CAA or
19 that she was representing herself individually. Accordingly,
20 plaintiff's breach of contract, interference with contractual
21 relations, and interference with prospective economic advantage
22 claims were dismissed. The court also found that plaintiffs had
23 failed to present evidence of misrepresentations by defendants
24 ARM or Isom or any reliance by plaintiffs on those
25 representations. As such, the court dismissed plaintiffs' claims
26 for fraud and conspiracy. Finally, based upon the evidence
27 submitted, the court concluded that plaintiffs were not entitled

28 /////

1 to restitution under a theory of unjust enrichment. Therefore,
2 judgment was entered in favor of defendants on February 10, 2010.

3 On March 16, defendants Isom and ARM filed a noticed motion
4 for attorney fees.³ On April 20, 2010, defendant CAA filed its
5 motion for attorney fees.

6 ANALYSIS

7 Defendants assert that § 1927 sanctions should be awarded
8 based upon counsel's failure to stipulate to facts in the
9 pretrial conference order and the court's grant of their Rule 50
10 motions at trial. As such, defendants request fees for pretrial
11 and trial expenses.

12 28 U.S.C. § 1927 allows the court to award fees against "any
13 attorney . . . who so multiplies the proceedings in any case
14 unreasonably and vexatiously." 28 U.S.C. § 1927. This section
15 is not specific to any statute, but applies to any civil suit in
16 federal court. Hyde v. Midland Credit Mgmt., Inc., 567 F.3d
17 1137, 1141 (9th Cir. 2009). Further, the statute "explicitly
18 provides for remedies against offending attorneys." Id.; F.T.C.
19 v. Alaska Land Leasing, Inc., 799 F.2d 507, 510 (9th Cir. 1986)
20 (noting that § 1927 does not authorize recovery from a party, but
21 "only from an attorney or otherwise admitted representative of a
22 party") (emphasis in original) (internal quotations and citations
23 omitted).

24 Attorneys fees under § 1927 are appropriate if an attorney's
25 conduct is in bad faith; recklessness satisfies this standard.

27 ³ Defendants filed a motion for attorney fees on March
28 12, 2010, but it was not filed in compliance with the local
rules.

1 B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1107 (9th Cir. 2002);
2 Barber, 146 F.3d at 711 ("An award of sanctions under 28 U.S.C. §
3 1927 or the district court's inherent authority requires a
4 finding of recklessness or bad faith."). The Ninth Circuit has
5 also required a finding of subjective bad faith, "which is
6 present when an attorney knowingly or recklessly raises a
7 *frivolous* argument, or argues a meritorious claim for the purpose
8 of harassing an opponent." B.K.B., 276 F.3d at 1107 (emphasis in
9 original) (quoting In re Keegan Mgmt. Co., Sec. Lit., 78 F.3d
10 431, 436 (9th Cir. 1996)). Moreover, the Ninth Circuit has
11 cautioned that "[s]anctions should be reserved for the 'rare and
12 exceptional case where the action is clearly frivolous, legally
13 unreasonable or without legal foundation, or brought for an
14 improper purpose.'" Primus Auto. Fin. Servs., Inc. v. Batarse,
15 115 F.3d 644, 649 (9th Cir. 1997) (quoting Operating Eng'rs
16 Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988)).

17 In this case, there is no evidence that plaintiffs'
18 counsel's conduct was undertaken in bad faith or with the intent
19 to harass opposing counsel.⁴ While plaintiffs ultimately failed
20 to meet their burden of proof at trial, it is noteworthy that
21 defendants Isom and ARM wholly failed to file any independent
22 dispositive motions. As such, their argument that plaintiffs'
23 counsel vexatiously multiplied the litigation by proceeding to
24 trial is unavailing; defendants Isom and ARM failed to utilize
25 procedural motions to narrow or eliminate the claims before they

26
27 ⁴ Counsel's citation to Eleventh Circuit and Sixth
28 Circuit law is wholly unpersuasive as these Circuits apply a
different standard than the Ninth Circuit in evaluating sanctions
under § 1927.

1 reached trial. Rather, the court, *sua sponte*, specifically
2 directed the parties to address whether some of plaintiffs'
3 claims were barred by the court's prior rulings on defendant
4 CAA's motion. Further, there is no evidence that plaintiffs'
5 counsel knew the claims were frivolous or wholly without merit
6 before proceeding to trial. Indeed, the court concluded that
7 there were triable issues of fact on at least some of plaintiffs'
8 claims when it denied in part defendant CAA's motion for summary
9 judgment. While the court subsequently concluded that
10 plaintiffs' claims were without sufficient evidentiary support,
11 after five days of testimony and introduction of evidence that
12 was not before the court on defendant CAA's summary judgment
13 motion, defendants have failed to cite any support for the
14 proposition that the grant of a Rule 50 motion, by itself,
15 justifies the imposition of sanctions on counsel.

16 Accordingly, because there is no evidence that plaintiffs'
17 counsel knowingly or recklessly raised a frivolous argument or
18 intended to harass defendants, defendants have failed to
19 demonstrate that plaintiffs' counsel acted in bad faith.
20 Therefore, there is an insufficient basis to impose § 1927
21 sanctions.⁵

22 CONCLUSION

23 For the foregoing reasons, defendants' motions for
24 attorneys' fees is DENIED.

25
26 ⁵ Plaintiffs also contend that defendants' motions for
27 attorneys' fees and costs should be denied because the motions
28 were not timely filed. Because the court concludes that
defendants have not demonstrate subjective bad faith by
plaintiffs' counsel, the court need not reach the merits of this
argument.

IT IS SO ORDERED.

DATED: June 2, 2010



FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28