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E-FILED on 3/26/10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ADVANTICA, INC., a Delaware corporation,

Plaintiff,

v.

GOLD WING ENGINEERING, a California
corporation, ERIK GUTIERREZ, an
individual, JOEL GUTIERREZ, an individual,
and J&J PIPELINE COMPANY, a California
corporation,

Defendants.

No. C-05-01709 RMW

ORDER DENYING MOTION FOR
ATTORNEY'S FEES

Plaintiff's motion for attorney's fees pursuant to 28 U.S.C. §1927 has been submitted for decision without oral argument. Having considered the papers submitted by the parties, the motion is denied.

Under section 1927, whenever an attorney unreasonably and vexatiously multiplies the proceedings, the court has authority to require the attorney "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Plaintiff has not met this standard.

Plaintiff initially sought an award of \$10,948 in attorney's fees, which it increased to \$26,202.50 in its supplemental letter brief filed on March 9, 2010 (Docket 139). Plaintiff contends that these fees resulted from what it considers to be defense counsel's unreasonable refusal to cooperate in the finalization and execution of the parties' written settlement agreement after the

1 parties reached an oral agreement in a settlement conference before Magistrate Judge Lloyd on June
2 26, 2009.

3 The evidence submitted by the parties establishes that defense counsel was not particularly
4 prompt in their responses to plaintiff's counsel's efforts to obtain executed copies of the settlement
5 agreement. The individual attorney who was largely coordinating these efforts was experiencing
6 medical problems at the time, which undoubtedly hampered the speed with which she could reply to
7 plaintiff's counsel's e-mail messages, but it is also clear that there were other attorneys who were
8 part of the defense case team who presumably could have responded more promptly to plaintiff's
9 counsel's efforts to obtain fully executed documents. Nevertheless, the evidence also shows that
10 plaintiff's counsel received a copy of the settlement agreement on October 21, 2009, executed by all
11 defendants except Eric Gutierrez (whom plaintiff agreed did not have to sign), yet plaintiff's counsel
12 found this inadequate because the agreement was not also signed by defense counsel. Thereafter,
13 much of the delay and claimed legal expenses, resulted from plaintiff's counsel's insistence that
14 defendants and their counsel personally execute the settlement documents before plaintiff itself
15 signed the agreement. Plaintiff's counsel has offered no explanation for why it was necessary for
16 counsel to sign the settlement agreement, nor has he established that there was any agreement to do
17 so (except, perhaps, by silence in response to his e-mail proposal that the defendants and counsel
18 should sign and return the agreement before plaintiff signed it). In the court's view, it appears that
19 the parties had already reached a binding agreement, albeit oral, and the written agreement would
20 have become binding upon the parties' execution regardless of whether counsel also signed the
21 agreement. Thus, it was within plaintiff's power to resolve this dispute over the settlement
22 agreement as of October 21, 2009. The delays and expense incurred since that date are equally the
23 fault of both sides.

24 Additionally, the court notes that the tenor of several of the e-mail messages from plaintiff's
25 counsel rendered it significantly unlikely that he would receive a pleasant, prompt or cooperative
26 response. While this does not excuse an unduly delayed response, it may explain why defendants'
27 counsel may not have placed responding to plaintiffs' counsel's demands at the top of their list of
28 things to do.

