

EXHIBIT A

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WILLIAM LEWIS, Plaintiff(s), - vs - ACB BUSINESS SERVICES, INC., Defendant(s).

Case No. C-3-94-233

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

1994 U.S. Dist. LEXIS 21318

**November 8, 1994, Decided
November 9, 1994, Filed**

DISPOSITION: [*1] Plaintiff's Motion for an Award of Fees and Costs for Defendant's Failure to Waive Service of Process, (Doc. 5), GRANTED.

COUNSEL: For WILLIAM LEWIS, plaintiff: Mary L Wiseman, Faruki Gilliam & Ireland, Dayton, OH.

For WILLIAM LEWIS, plaintiff: Jason David Fregeau, Yellow Springs, OH.

For ACB BUSINESS SERVICES INC, AMERICAN EXPRESS TRAVEL RELATED SERVICES CO INC, defendants: James Patrick Connors, Law Offices of James P Connors, Columbus, OH.

JUDGES: Michael R. Merz, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: Michael R. Merz

OPINION:

DECISION AND ORDER

This case is before the Court on Plaintiff William Lewis' ("Lewis") Motion for Award of Fees and Costs for Defendant's Failure to Waive Service of Process. (Doc. 5). The issues have been briefed by the parties, (*Id.*, Doc. 8, 10), and the matter is ripe for decision on the merits.

The parties have unanimously consented to plenary Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c). (Doc. 9).

Lewis filed this action against Defendant ACB Business Services, Inc. ("ACB") on May 31, 1994, alleging that ACB violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a, *et seq.*, and the Ohio Consumer

Sales Practices Act, [*2] O.R.C. § 1345.01, *et seq.* (Doc. 1). On that same date, Lewis' counsel sent, via certified mail, a file stamped copy of the Complaint, a Request for Waiver of Service, two (2) Waiver of Service forms, and a self-addressed, stamped envelope to John Gavin, ACB's President. (Doc. 5, Ex. D, E, F, and G attached thereto). The Request for Waiver of Service was dated May 31, 1994, and requested that ACB return the Waiver within thirty (30) days. The certified mail delivery was made on June 2, 1994, and signed for by someone representing himself or herself as Gavin's agent. n1 (Doc. 5, Ex. E attached thereto).

n1 The Court is unable to clearly read the name of the person who signed the return receipt.

By letter dated June 2, 1994, Janet Schohan, ACB's Compliance Officer, advised Lewis' counsel, *inter alia*, that ACB "will not sign the Waiver of Service." (Doc. 5, Ex. B attached thereto). On June 15, 1994, a process server, Brad Diana, personally served CT Corporation Systems, tile registered agent for ACB, at [*3] its Phoenix, Arizona, office. (Doc. 5, Ex. C attached thereto). ACB filed its Answer on July 20, 1994. (Doc. 2).

Lewis has moved, pursuant to *Fed.R.Civ.P. 4(d)(3)* and (5) for an award of costs incurred in effecting service, as well as for an award of costs and attorney fees incurred with respect to his present Motion. In support of his Motion, Lewis has submitted, *inter alia*, counsel's affidavit and time and expense records with respect to service and the present Motion. Lewis seeks an award of \$ 57.90 in costs associated with service, \$ 18.32 in costs associated with the present Motion, and an award of \$ 460.00 in attorney fees associated with the Motion (4.6 hours at an hourly rate of \$ 100.00) for a total award of \$ 536.22. Although counsel's time records reflect that he

expended .5 hours with respect to effecting service, Lewis has not moved for an award of attorney fees associated with service. n2

n2 An award of attorney fees associated with arranging for formal service is arguably not authorized by Rule 4(d)(5). See, David D. Siegel, *Supplementary Practice Commentaries*, 28 *U.S.C. Rule 4* at C4-17 (Supp. 1994) [at p. 51].

[*4]

ACB does not deny that it received the relevant documents which Lewis' counsel sent on May 31, 1994, nor does it deny that it refused to execute the Waiver of Service. In addition, ACB does not dispute the reasonableness of Lewis' counsel's hourly fee, the reasonableness of the time his counsel expended on the current Motion, or the costs associated with effecting service and the current Motion. Rather, ACB opposes Lewis' Motion on essentially three (3) grounds: (1) the request for waiver of service form which Lewis sent ACB was deficient in that it fails to set out the consequences of failure to comply with the request for waiver of service required under Rule 4(d)(2)(D); (2) Lewis sent the relevant documents to its president rather than to its present counsel whom Lewis' counsel knew represented it by virtue of the pendency of other litigation; and (3) Lewis failed to provide a copy of his fee arrangement with counsel which would be an indication of fees for actions of this nature. ACB's position is that Lewis' Motion should be denied, or in the alternative that the \$ 72.28 for service be entered as costs of this action.

Upon amendment, effective December 1, 1993, former Rule 4(c)(2)(C)(ii), [*5] concerning service of process by mail was superseded by Rule 4(d), which provides for, *inter alia*, "waiver" of service of process. The aims of the provisions of Rule 4(d) are to eliminate unnecessary costs of service and to foster cooperation among adversaries and counsel. See, Rule 4, Notes of Advisory Committee on Rules. A defendant has a duty to avoid unnecessary costs of serving the summons. See, *e.g.*, Rule 4(d)(2).

Paragraph (5) of Rule 4(d) is a cost-shifting provision retained from the former rule. Rule 4, Notes of Advisory Committee. The paragraph is explicit that the costs of enforcing the cost-shifting provision are themselves recoverable from a defendant who fails to return the waiver. *Id.* The cost-shifting provisions of Rule 4(d) are limited to costs of effecting service after the time expires for the defendant to return the waiver. *Id.*

As an initial matter, the Court notes that neither Lewis or ACB has addressed the issue concerning Rule

4(d)'s limitation with respect to an award of costs *after* the time expires for a defendant to return the waiver. In the present case, it is clear that Lewis effected personal service on ACB prior to the thirty-day [*6] expiration of the time in which he requested that ACB return the waiver. However, it is also clear that on June 2, 1994, ACB advised Lewis that it refused to execute the waiver. Under these circumstances, and in view of the spirit of Rule 4(d), this Court concludes that it would have been futile for Lewis to wait until the expiration of the thirty-day time limit to effect personal service on ACB.

As noted above, ACB's first challenge to the present Motion is that the forms he sent to its president were deficient. The Court is not persuaded by this argument.

The forms which Lewis sent to ACB's president are identical to those contained in the Appendix of Forms which were promulgated as a part of the overhaul of Rule 4. Compare, Fed.R.Civ.P. Appendix of Forms, Form 1A and 1B with, Doc. 5, Ex. F and G attached thereto; see, 28 U.S.C. Appendix of Forms (Supp. 1994); *Federal Rules of Civil Procedure*, 146 *F.R.D.* 401, 491-93 (1993). The forms contained in the Appendix of Forms are sufficient under the Rules and are intended to indicate the simplicity and brevity of statement which the Rules contemplate. *Fed.R.Civ.P.* 84.

ACB's next argument is that Lewis should have sent [*7] the relevant documents to its present counsel rather than its president. Again, this Court is not persuaded by ACB's argument.

First, it does not automatically follow that because ACB is represented by counsel in other, unrelated litigation that it would be represented by the same counsel in newly initiated litigation. Second, there is no indication, nor does ACB argue, that it has authorized or appointed its present counsel as its agent for service. See, *Fed.R.Civ.P.* 4(d)(2)(A); see also, *Fed.R.Civ.P.* 4(h)(1). Third, Lewis clearly complied with the requirement of Rule 4(d)(2)(A) by addressing the notice and request directly to ACB's president.

ACB's last argument in opposition to Lewis' present Motion is that the Motion should be denied on the basis that Lewis has not provided a copy of his fee agreement with counsel which would be an indication of fees for actions of this nature. ACB's argument seems to go to the issue of the reasonableness of the requested fees.

In establishing the reasonableness of hourly rates for the purpose of an award of attorney fees, testimony may be obtained from attorneys who have rendered similar services and the seeking counsel himself may [*8] testify as to his customary rates. See, *Brinkman v. Gilligan*, 557 *F. Supp.* 610, 611 (*S.D. Ohio* 1982), *aff'd*, 697 *F.2d* 163 (*6th Cir.* 1983).

As noted *supra*, Lewis seeks attorney fees in the amount of \$ 100.00 per hour. Lewis' counsel's affidavit with respect to reasonableness of the requested fees stands unopposed. On that basis, the Court finds that the requested fee of \$ 100.00 per hour is reasonable. In addition, although ACB has not challenged the number of hours for which Lewis seeks an award of attorney fees, this Court concludes that 4.6 hours of counsel's time for the preparation of the present Motion is reasonable. The Court's review of Lewis' Motion, his Memorandum in Support, and his [Reply] to ACB's Memorandum Contra shows that counsel has diligently prepared Lewis' claims and diligently and effectively presented those claims. *See, Brinkman, supra*. This is particularly true in light of

the fact that the amendments to Rule 4 are relatively new and there are few, if any, reported (or unreported) opinions which address the issues raised in Lewis' Motion.

For all of the foregoing reasons, Plaintiff's Motion for an Award of Fees and Costs for Defendant's Failure [*9] to Waive Service of Process, (Doc. 5), is well taken and is hereby GRANTED. Defendant shall forthwith pay Plaintiff \$ 536.22 in attorney fees and costs.

November 8, 1994.

Michael R. Merz

UNITED STATES MAGISTRATE JUDGE