

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

AVIS RENT A CAR SYSTEM, LLC, :
et al., :
 : Case No. 3:12-cv-399
 :
 Plaintiffs, :
 :
 v. :
 : JUDGE WALTER H. RICE
 :
 CITY OF DAYTON, OHIO, :
 :
 Defendant. :

ENTERPRISE RENT A CAR :
COMPANY OF CINCINNATI, LLC :
dba ENTERPRISE RENT-A-CAR, et :
al., : Case No. 3:12-cv-405
 :
 Plaintiffs, :
 :
 v. : JUDGE WALTER H. RICE
 :
 CITY OF DAYTON, OHIO, :
 :
 Defendant. :

DECISION AND ENTRY DISMISSING, WITH PREJUDICE, COUNT TWO OF THE AMENDED COMPLAINT (DOC. #65 IN 3:12-CV-399) OF PLAINTIFFS AVIS RENT A CAR SYSTEM, LLC AND BUDGET RENT A CAR SYSTEM, INC.; DISMISSING, WITH PREJUDICE, COUNT TWO OF THE AMENDED COMPLAINT (DOC. #37 IN 3:12-CV- 405) OF PLAINTIFFS ENTERPRISE RAC COMPANY OF CINCINNATI, LLC DBA ENTERPRISE RENT-A-CAR AND VANGUARD CAR RENTAL USA, LLC DBA NATIONAL AND ALAMO; DIRECTING PLAINTIFFS TO FILE MOTIONS FOR ATTORNEY FEES, WITHIN 14 CALENDAR DAYS FROM DATE, UNDER RULE 54(d)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE; MOTIONS FOR ATTORNEY FEES TO BE RESOLVED AFTER ANTICIPATED APPEAL WITH NO BRIEFING AND NO QUANTIFICATION OF AMOUNT OF REQUESTED FEES OR HOURS EXPENDED AT THIS TIME; CONSOLIDATING, UNDER RULE 42(a)(2)

OF THE FEDERAL RULES OF CIVIL PROCEDURE, CASE NO. 3:12-CV-399 AND CASE NO. 3:12-CV-405; THE PARTIES ARE DIRECTED TO FILE ALL FUTURE MATTERS IN CASE NO. 3:12-CV-399; CASE NO. 3:12-CV-405 ORDERED ADMINISTRATIVELY PROCESSED; JUDGEMENT TO ENTER AS SET FORTH HEREIN, FOLLOWING FILING OF MOTION FOR ATTORNEY FEES; DIRECTIVE TO COUNSEL.

On July 24, 2013, the Court sustained the Motion for Summary Judgment (Doc. #37 in Case No. 3:12-cv-399) of Plaintiffs Avis Rent A Car System, LLC ("Avis") and Budget Rent A Car System, Inc. ("Budget") (collectively, the "Avis Plaintiffs"), and the Motion for Partial Summary Judgment (Doc. #38 in Case No. 3:12-cv-405) of Enterprise RAC Company of Cincinnati, LLC dba Enterprise Rent-A-Car ("Enterprise") and Vanguard Car Rental USA, LLC dba National and Alamo ("Vanguard") (collectively, the "Enterprise Plaintiffs") on their breach of contract claims against Defendant, the City of Dayton ("City"). See Doc. #77 of Case No. 3:12-cv-399 ("Avis Case") and Doc. #74 of Case No. 3:12-cv-405 ("Enterprise Case"). The Court also overruled the City's Cross-Motions for Summary Judgment (Avis Case at Doc. #58; Enterprise Case at Doc. #40). *Id.*

Before the Court ruled on the summary judgment motions, Plaintiffs each amended their Complaints to include a count seeking attorneys' fees, based on alleged "bad faith" conduct by the City. Both Plaintiffs' Amended Complaints state said count as Count Two. Avis Case, Doc. #65 at 13; Enterprise Case, Doc. #37 at 26. Therein, the Avis Plaintiffs state that "[b]ased upon the City's bad faith conduct, [Avis] Plaintiffs seek to recover their attorneys' fees and costs." Avis

Case, Doc. #65 at 14, ¶ 70. They also seek attorneys' fees and costs in their prayer for relief. *Id.* at 16. Likewise, in their Count Two, the Enterprise Plaintiffs also seek to recover attorneys' fees and costs based on alleged bad faith conduct by the City. Enterprise Case, Doc. #37 at 27, ¶ 129. They, too, also state their request for attorneys' fees and costs in their prayer for relief. *Id.* at 30.

The Court's Decision and Entry only addressed the language of the relevant documents and the alleged breach of the lease agreements, and, therefore, necessarily left unresolved the issue of attorney's fees that Plaintiffs argue are justified by the City's allegedly "bad faith" conduct. There was no need for the Court to address the allegation of bad faith in order to resolve the Plaintiffs' breach of contract claims. Neither was there a need for the City to respond to said allegations, nor adequate time for the City to respond after the amendment of Plaintiffs' complaints (one of which was amended while the summary judgment motions were pending).

There is, therefore, a concern that the Plaintiffs' Amended Complaints may appear to present outstanding claims that the Court has yet to resolve, as Count Two of Plaintiffs' respective Amended Complaints are separately pled from their breach of contract claims and are not resolved by the Court's summary judgment

decision.¹ Thus, the Court believes that the following course of action will provide the clearest and most efficient manner of going forward, in order to expedite any appeal that the City wishes to pursue, while simultaneously preserving the Plaintiffs' right to pursue attorney fees.

Rule 54(d)(2) of the Federal Rules of Civil Procedure requires that "[a] claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Under Ohio law, attorneys' fees are assumed to be in the nature of costs, not damages. *Christe v. GMS Mgt. Co., Inc.*, 726 N.E.2d 497, 499 (stating that "[u]nder our common law, attorney fees are in the nature of costs" and emphasizing that only express statutory language defining attorney fees as an element of damages would justify departing from the "long-standing practice of treating statutorily authorized attorney fees as costs"). Thus, in breach of contract cases, Ohio courts that award attorneys' fees after a showing of bad faith conduct

¹ When each group of Plaintiffs filed a Motion to File an Amended Complaint, setting forth a claim of bad faith, each indicated that the amendment would not delay the trial date set for July 30th, given that a "streamlined trial" could be had after the trial on the 30th, in order to resolve all claims. That apparently was a position no longer followed by the Plaintiffs, during the conference call of July 25th, given that they indicated that the bad faith claim was, in reality, not a free-standing claim. Yet, in the Court's view, it certainly bore on the scope of the injunctive relief requested, much of which relief this Court cannot order, based upon what is now before it. With the exception of the broader injunctive relief, as the result of a showing of bad faith (if same can be made), Plaintiffs are not prejudiced by the dismissal of Count Two of the Amended Complaint, given that they will have the opportunity to demonstrate, by a preponderance of the evidence, sufficient bad faith upon which to ground the Court's discretionary award of attorney's fees and costs.

do so as an award of costs to the prevailing party, not as an element of damages. See, e.g., *SST Bearing Corp. v. Twin City Fan Co., Ltd.*, 2012 WL 2053315, 2012 Ohio-2490 (Ohio Ct. App. June 8, 2012) (affirming trial court's award of attorney fees based on bad faith of defendant shown by using plaintiff's offered price for product as leverage with competitors, attempting to obtain plaintiffs' trade secrets, repudiating sales contract before testing products, canceling orders for non-defective products, and refusing to give plaintiff the chance to cure potential defects); *Columbus Med. Equip. Co. v. Watters*, 468 N.E.2d 343 (Ohio Ct. App. 1983) (affirming trial court's award of attorney fees based on bad faith of defendant who breached non-compete provision of employment contract by entering into it with declared intention not to abide by its terms). Even though the Plaintiffs have pled a separate count for attorneys' fees based on allegations of bad faith conduct, such a claim is not cognizable under Ohio law as a free-standing cause of action, as "good faith is part of a contract claim and does not stand alone." *Lakota Local Sch. Dist. v. Brickner*, 671 N.E.2d 578, 584 (Ohio Ct. App. 1996). Thus, the issue of whether to award attorneys' fees to Plaintiffs is entirely appropriate to award post-judgment, or even post-appeal, after a complete and final resolution of the merits of their case. As the Supreme Court noted in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 451-52 (1982), "[r]egardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits – an inquiry that cannot even commence until one party has

'prevailed.'" Although *White* specifically addressed attorneys' fees requested under 42 U.S.C. § 1988, shortly thereafter, the Supreme Court concluded that its reasoning applied to the issue of attorneys' fees in virtually all cases, including diversity cases such as the one before the Court. See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988). State law applied as a rule of decision in a diversity case must yield to the federal statute governing appeals, which allows for the appeal of "all final decisions of the district courts" to the Circuit Courts of Appeals. *Id.* at 198 (citing 28 U.S.C. § 1291). In *Budnich*, the plaintiff argued that state decisional law affected the issue of appealability because such law made it "plain" that the attorney fees in question were "to be part of the merits judgment." *Id.* at 201. However, the Supreme Court concluded that the "effect of an unresolved issue of attorney's fees for the litigation at hand" on the appealability of the judgment "should not turn upon the characterization of those fees by the statute or decisional law that authorizes them." *Id.* Thus, it adopted "a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final." *Id.* at 202. The ability of the City to appeal the Court's judgment, therefore, will not be affected by the delayed resolution of the issue of attorneys' fees. Furthermore, in the case before the Court, there is no conflict between state substantive and federal procedural law of the type asserted by the *Budnich* plaintiff because, as discussed, Ohio law does not consider attorneys' fees awarded for "bad faith" as elements of a cause of action or damages. Thus, even without the benefit of the

clear *Budnich* rule, the City would be free to pursue an appeal without the Court's present resolution of the issue of attorneys' fees. *E.g., Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210 (6th Cir. 1987) (refusing, pre-*Budnich*, to consider plaintiffs' argument that district court should have granted their motions for attorneys' fees because the motions, "having not been ruled on by the district court, are not currently reviewable by this court," while still considering appeal of final judgment).

With the foregoing in mind, the Court believes that the appropriate course of action is for the Plaintiffs to pursue attorney fees by motion under Rule 54(d)(2) of the Federal Rules of Civil Procedure. The Court, therefore, DISMISSES WITH PREJUDICE Count Two of each of the Plaintiffs' Amended Complaints. In addition, the Court ORDERS the Plaintiffs to file, within fourteen (14) calendar days from date, Motions for Attorneys' Fees under Federal Civil Rule 54(d)(2), subject to later quantification after the conclusion of the appellate process, should the Court's summary judgment rulings be affirmed. This will provide the City with ample time to respond to the Plaintiffs' arguments for attorneys' fees and their quantification of same, through contra memoranda. During any future evidentiary hearing on attorneys' fees, the Plaintiffs will be required to prove, by a preponderance of the evidence, that the City acted in "bad faith" when it breached its contract with Plaintiffs. Only if Plaintiffs are able to show, by the greater weight of the evidence, a degree of bad faith conduct by Defendant that an Ohio court might

consider sufficiently egregious to justify an award of attorneys' fees, will the Court then consider, purely at its discretion, such an award.

Finally, on July 25, 2013, during a telephone status conference, the Court agreed to formally consolidate the above-captioned cases. Under Rule 42(a)(2) of the Federal Rules of Civil Procedure, actions that "involve a common question of law or fact" may be consolidated by the Court. Here, the related cases of *Avis Rent A Car System, LLC, et al. v. City of Dayton, Ohio*, Case No. 3:12-cv-399, and *Enterprise RAC Company of Cincinnati, LLC dba Enterprise Rent-A-Car et al., v. City of Dayton*, Case No. 3:12-cv-405, involve common questions of law and fact, and, therefore, merit consolidation. All Plaintiffs' breach of contract claims arose from a series of actions by the City that Plaintiffs believed to be breaches of their contractual relationships with the City, and the resolution of their claims involved the interpretation of identical provisions of the Plaintiffs' respective lease agreements with the City. For reasons of efficiency, as this case moves toward an appeal and a possible future evidentiary hearing on the issue of attorney fees, consolidation is warranted.

Therefore, in accordance with Rule 42(a)(2) of the Federal Rules of Civil Procedure, the Court ORDERS the consolidation, for all purposes, of the above-captioned cases, and DIRECTS the parties to file all future matters in Case No. 3:12-cv-399. The Court ORDERS Case No. 3:12-cv-405 to be administratively processed.

Following the filing of the Plaintiffs' Motions for Attorneys' Fees, within fourteen (14) calendar days from date, the Court will ENTER JUDGMENT in favor of all Plaintiffs against the City on their breach of contract claims, with the declaration of attendant rights and responsibilities of all parties, including the following:²

1. The twenty-year lease term of each Plaintiffs' Ready/Return Agreement commenced on August 1, 2010, the Garage Completion Date, and will terminate on July 31, 2030;
2. Accordingly, each Plaintiffs' Ready/Return Agreement did not terminate on December 31, 2012;
3. The City and all Plaintiffs are bound by each Ready/Return Agreement to which they are a party, subject to any future amendment or successor agreements negotiated in good faith by the parties;³ and

² The Court declines to provide any relief requested by Plaintiffs that exceeds the scope of the breach in question. The Court will, therefore, not address provisions of the Memorandum of Understanding or the Concession Agreement that were not found to be breached by the City. Doc. #65 ¶ 79. Likewise, the Court will not enter declaratory judgment that addresses the rights and responsibilities of other rental car companies that are not parties to this litigation, as the Enterprise Plaintiffs request. *Id.* at 29, prayer for relief at e).

³ The Court will not accommodate the Enterprise Plaintiffs' request for a declaratory judgment that the City must "provide a successor agreement to the Concession Agreement that conforms to all relevant provisions of the Ready/Return Agreement," because the provisions of the Ready/Return Agreement itself are in effect. Enterprise Case, Doc. #37 ¶ 134, prayer for relief at f). The provisions of the Ready/Return Agreement are the subject of Plaintiffs' breach of contract claims, and their enforcement provides sufficient remedy.

Nor will the Court, as Plaintiffs request, enter an order prohibiting future "bad faith" negotiation by the City, or retaliating against Plaintiffs for filing the

4. The City is enjoined from instituting a permit process to replace its existing Ready/Return Agreements with all Plaintiffs until the expiration of said agreements on July 31, 2030.⁴

Finally, in the Court's opinion, no further conference call will be needed. Should any party have any procedural or substantive objections to this Court's filing, the parties are directed to address them by motion within ten (10) days from this Court's filing.

Date: August 22, 2013



WALTER H. RICE
UNITED STATES DISTRICT JUDGE

lawsuit. Ohio law already imposes an obligation on the City to negotiate in good faith. *See, e.g., Wauseon Plaza Ltd. Partnership v. Wauseon Hardware Co.*, 807 N.E.2d 953, 961-62 (Ohio Ct. App. 2004) (recognizing that good faith and fair dealing apply to parties to a contract). Furthermore, there is no evidence before the Court that suggests that the City harbors any intention to retaliate against Plaintiffs going forward.

⁴ The Court declines the Enterprise Plaintiffs' request to enjoin the City from permanently implementing the permit process, which would exceed the twenty-year term of the Ready/Return Agreement. Doc. #37 at 29.