

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

KEITH WELLIN,)	
)	No. 2:13-cv-1831-DCN
Plaintiff,)	
)	
vs.)	
)	ORDER
PETER J. WELLIN, <i>et. al.</i> ,)	
)	
)	
Defendants.)	
_____)	

This matter is before the court on a request for costs and attorneys’ fees brought by the South Dakota Trust Company. SD Trust’s Opp’n to Mot. to Dismiss 12-13, ECF No. 83. On January 22, 2014, the court granted plaintiff Keith Wellin’s motion for voluntary dismissal and dismissed South Dakota Trust Company (“SD Trust”) as a defendant in this case. Order 22-23, ECF No. 91. The court dismissed SD Trust from this case without prejudice. Id. The court’s order did not address SD Trust’s request that, pursuant to Rule 41(d) of the Federal Rules of Civil Procedure, “this Court impose as a condition of the dismissal that Plaintiff pay [SD Trust’s] costs, including attorneys’ fees, in subsequent litigation” SD Trust’s Opp’n 12-13. The court now addresses that request.

Rule 41(d) of the Federal Rules of Civil Procedure states:

If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court: (1) may order the plaintiff to pay all or part of the costs of that previous action; and (2) may stay the proceedings until the plaintiff has complied.

As an initial matter, there are conflicting opinions regarding whether attorneys' fees are "costs" that can be awarded under Rule 41(d). More importantly, the plain language of the rule requires a court to make its decision about the costs of the first litigation only after the second litigation has been filed. The rule does not allow the court to prospectively decide that any hypothetical future lawsuit that Mr. Wellin may file against SD Trust is sufficiently related to the present lawsuit such that a Rule 41(d) award of costs would be appropriate. In short, SD Trust's request is premature.

For the reasons set forth above, the court **DENIES** SD Trust's Rule 41(d) request without prejudice.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "D. Norton", written over a horizontal line.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

February 10, 2014
Charleston, South Carolina