

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

REAL ESTATE ONE - TROY, et al,

Plaintiffs,

v

Case No. 13-137703-CK
Hon. Wendy Potts

KASMAROGI ENTERPRISES, INC, et al,

Defendants.
_____ /

OPINION AND ORDER RE:
PLAINTIFF JACK BUTRIS'S MOTION TO DISMISS COMPLAINT
AND
DEFENDANT RIAD SHEENA'S MOTION FOR SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(8) AND (C)(10) AND FOR ATTORNEY FEES, COSTS
AND SANCTIONS AGAINST PLAINTIFFS
AND
DEFENDANT SAMER KASMAROGI'S MOTION FOR SUMMARY DISPOSITION
REGARDING CLAIMS ARISING OUT OF THE RESIDENTIAL LISTING
AGREEMENT (COUNTS I AND IV), PURSUANT TO MCR 2.116(C)(7), (C)(8), AND
(C)(10)
AND
DEFENDANT KASMAROGI ENTERPRISES, INC AND SAMER KASMAROGI'S
MOTION FOR SUMMARY DISPOSITION REGARDING CLAIMS ARISING OUT OF
THE COMMERCIAL REAL ESTATE LISTING AGREEMENT (COUNTS II, V, AND
VI), PURSUANT TO MCR 2.116(C)(7), (C)(8), AND (C)(10)

At a session of Court
Held in Pontiac, Michigan

On
JUL 31 2014

Plaintiff Jack Butris is a real estate salesperson at the office of Real Estate One, Inc. in Troy. In June 2012 Defendant Samer Kasmarogi signed a listing agreement with Real Estate One to sell his Commerce Township residence. Defendant Kasmarogi Enterprises, Inc. also entered into a listing agreement with Real Estate One to sell its St. Clair Shores store. Butris claims he

procured buyers for the properties, however, the Kasmarogi Defendants failed to follow through with the closings. Butris filed this action in December 2013 asserting breach of contract and other claims against the Kasmarogi Defendants on behalf of an entity named “Real Estate One – Troy.” Butris also alleged that Defendant Riad Sheena tortiously interfered with the listing agreements. Butris later amended the complaint to remove Real Estate One – Troy as a Plaintiff and substitute himself instead.

The matter is now before the Court on several dispositive motions. Defendants seek summary disposition of Butris’s claims on various grounds, and Butris asks the Court to voluntarily dismiss this case without prejudice. Butris and Defendants all appear to agree in principal that the claims should be dismissed, however, they dispute whether the dismissal should be with prejudice and whether Butris and his attorney should be sanctioned for filing frivolous claims.

The decision to grant a voluntary dismissal is discretionary. *African Methodist Episcopal Church v Shoulders*, 38 Mich App 210, 212; 196 NW2d 16 (1972). In exercising its discretion, the Court must “weigh the competing interests of the parties along with any resultant inconvenience to the court from further delays.” *Id.* The motion should be granted unless Defendants will be legally prejudiced as a result. *Id.* Because Defendants are not contesting dismissal, the Court grants Plaintiff’s motion and dismisses his claims. Further, the dismissal of Plaintiff’s claims moots most of the arguments in Defendants’ summary disposition motions. The only issues remaining are whether the claims were frivolous and whether dismissal is with prejudice.

Defendants assert that Butris’s claims are frivolous because he never had the right to assert the claims either on his own behalf or on behalf of Real Estate One and he knew this fact

before he filed this action. Whether a claim or pleading is frivolous depends on the facts of the case. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). Although Butris filed the initial complaint on behalf of himself and “Real Estate One – Troy,” he now concedes that he had no authority to bring the claims. Because Real Estate One was the broker and Butris was not a party to either listing agreement, he had no basis to pursue contractual claims against the Kasmarogi Defendants, to seek unpaid commissions, or assert a tortious interference with contract claim against Sheena. Thus, Butris had no basis to believe that he was a real party in interest with the right to bring these claims. MCR 2.201(B); *Hofmann v Auto Club Ins Assn*, 211 Mich App 55, 95; 535 NW2d 529 (1995).

In addition, Butris had no authority to bring a claim on behalf of Real Estate One. At the outset, the original Plaintiff “Real Estate One – Troy” is a nonentity and this case was never pursued in the name of the real entity. Even if Butris had property named Real Estate One, he did not have authority to do so. Real Estate One had a written policy on collection of unpaid commissions that required Butris to complete and submit to Real Estate One’s legal department a form asking it to investigate and pursue the claims. If Real Estate One decided to pursue the claims, it would do so in its own name. If it decided not to pursue them, Real Estate One could have assigned the claim to Butris. However, Butris did not request an investigation or obtain an assignment before filing this action. Because Butris did not have the right to bring a claim either for himself or on behalf of Real Estate One, his claims were devoid of legal merit. MCL 600.2591(3)(a)(iii).

Further, it appears that Butris knew or should have known about this policy and his lack of authority before he filed this claim. Although Butris claims that his manager David Reese approved him bringing this action, he presented no evidence to support this claim. Even if Butris

had presented evidence that Reese knew about and approved this action before Butris filed it, Real Estate One's written policy negates any claim by Butris that he reasonably believed that Reese had authority to authorize it. Even if Butris could somehow claim that he genuinely believed he could bring this action in December 2013, both he and his counsel learned in May 2014 that he had no authority to do so. Ellen Tickner, Real Estate One's legal counsel, wrote Butris's counsel George Serkian on May 27, 2014 stating in no uncertain terms that Real Estate One did not authorize Butris to bring this action and demanding that Butris immediately remove Real Estate One from the case. Tickner claimed that Butris was given a copy of the collection policy and Reese reminded him about it before Butris filed this action. According to Tickner, Butris did not inform Reese about this case until May 14, 2014 and did not request that Real Estate One investigate his commission claim until May 15. Tickner also stated that Real Estate One investigated Butris's claim and it would neither initiate an action nor assign the claim to Butris. Thus, by May 27, 2014, Butris was fully aware that his claim lacked any legal or factual merit. Yet, Butris did not file this motion for voluntary dismissal until June 23, 2014.

In sum, Butris claims he believed in good faith that he had the right to bring this action, however, he presents no evidence to support that claim and there is compelling evidence that he knew he had no authority to file this action. Thus, this action was frivolous because it was not well-grounded in fact or law, it was devoid of legal merit, and Butris had no reasonable basis to believe that the claims had merit. See MCR 2.114(D)(2) and MCL 600.2591(3)(a). The Court orders Butris to pay Defendants taxable costs and reasonable attorney fees incurred in defending against his claims.

As for whether attorney Serkian should be sanctioned, the Court concludes that the evidence presented does not support a finding that he knew or had reason to know when this

action was filed that Butris did not have authority to do so. Serkian had a duty to make a reasonable inquiry into the factual and legal viability of Butris's claims before he filed the complaint. *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). There is no evidence that Serkian knew that Butris's claims were meritless before this action was filed or that Serkian failed to investigate their merits. The fact that Serkian was later informed that his client's claims lacked merit does not invalidate a prior reasonable inquiry. *Harkins, supra*. Thus, the Court will not sanction Serkian.

The final question is whether the dismissal should be with prejudice. Because Butris seeks dismissal with prejudice, the dismissal of the claims as to Butris will be with prejudice. However, the Court declines to enter a dismissal with prejudice of the claims improperly brought on behalf of Real Estate One. Normally, a voluntary dismissal is without prejudice, MCR 2.504(A)(2)(b), and the parties present no compelling reason to dismiss Real Estate One's claims with prejudice. As noted above, these claims never belonged to Butris and he did not have authority to bring any action on behalf of Real Estate One. Even though it appears that Real Estate One was never a party to this case, and it does not intend to pursue a claim against these Defendants, its interests are not represented by any of the parties to this action and the Court has not been apprised of its position on the dismissal. Thus, the dismissal with prejudice will be only as to Butris's claims against Defendants, and the claims of the nonentity "Real Estate One – Troy." However, the Court will not dismiss with prejudice any potential claim that Real Estate One may have against Defendants.

In sum, the Court grants the motion and dismisses the claims of Butris and Real Estate One – Troy with prejudice. The Court sanctions Butris for filing a frivolous claim and orders him to pay Defendants' taxable costs and reasonable attorney fees. The Court denies Defendants'

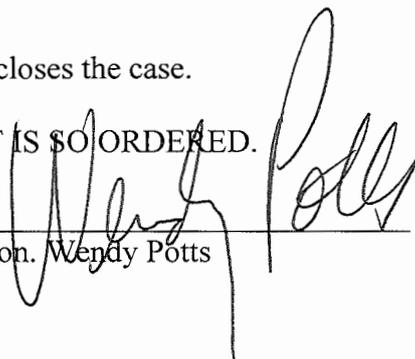
request to sanction attorney Serkian. Within 14 days, Defendants must file and serve on Butris their bill of costs and evidence of their reasonable attorney fees incurred in defending against this action. Butris may file any objections to the costs and attorney fees claimed within 7 days of service.

This order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

Dated:

JUL 31 2014


Hon. Wendy Potts