

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

MARSHALL BELL, II and  
FELITA BELL,

Plaintiffs,

v.

PORTFOLIO RECOVERY  
ASSOCIATES, LLC,

Defendant.

CIVIL ACTION NO.

1:21-cv-04819-JPB-RGV

**ORDER**

This matter has been referred to the undersigned for a determination of whether plaintiffs Marshall Bell, II and Felita Bell, jointly referred to as “plaintiffs,” and their counsel should be ordered to pay the reasonable costs and attorney’s fees incurred by defendant Portfolio Recovery Associates, LLC (“PRA”), following the dismissal of this action with prejudice. [Doc. 51 at 2].<sup>1</sup> In response to the Court’s Order to show cause why they should not be ordered to pay the reasonable costs and attorney’s fees incurred by PRA in defending this action, [*id.*], plaintiffs and their current counsel, Gary Hansz (“Hansz”) and Joon Jeong (“Jeong”), filed a response, arguing that an award of attorney’s fees and costs is not warranted

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<sup>1</sup> The listed document and page numbers in citations to the record in this Order refer to the document and page numbers shown on the Adobe file reader linked to the Court’s electronic filing database, CM/ECF.

under either 15 U.S.C. § 1692k(a)(3) or 28 U.S.C. § 1927. [Doc. 52 at 5-11].<sup>2</sup> However, plaintiffs and their counsel did not address the propriety of awarding attorney's fees and costs under Rule 41(a)(2) of the Federal Rules of Civil Procedure, as contemplated by the Court's Order, adopting the Report and Recommendation. [Doc. 49 at 8-10; Doc. 51 at 2-3]. Having considered the record in this case and the response to the show cause Order filed by plaintiffs and their counsel, the Court concludes that an award of reasonable attorney's fees and costs that PRA incurred after the withdrawal of plaintiffs' first motion to dismiss with prejudice on October 4, 2022, see [Doc. 28], is warranted under Rule 41(a)(2), for the reasons that follow.

Plaintiffs filed this action on November 22, 2021, alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq. [Doc. 1]. On July 28, 2022, PRA deposed the plaintiffs, [Doc. 33 at 2 (citation omitted)], and on September 29, 2022, plaintiffs moved to voluntarily dismiss their claims with prejudice because, based on plaintiffs' deposition testimony, "it became apparent that they had made misrepresentations in this case to their counsel regarding

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<sup>2</sup> The Order further provided that if plaintiffs and their counsel opposed such an award of fees, they should also show cause why Hansz should not be deposed, [Doc. 51 at 2], and in their response, plaintiffs and their counsel assert that since their claims have been dismissed with prejudice, "any deposition of [] Hansz would no longer be relevant," [Doc. 52 at 12].

various matters,” [Doc. 26 at 1]. In particular, the motion to voluntarily dismiss indicated that “it was not until the depositions were conducted that [p]laintiffs’ counsel learned of the untrue statements made by [p]laintiffs regarding contact with mortgage company and other issues.” [Id. at 2].

A few days later, on October 4, 2022, Hansz emailed PRA’s counsel to inform them that he was going to seek admission *pro hac vice* in this case and would be withdrawing the motion to dismiss. [Doc. 33-2 at 1]. That same day, plaintiffs, through their only counsel of record at the time, Jack Morris Downie (“Downie”), filed a notice to withdraw their motion to dismiss, stating simply that it was “filed in error.” [Doc. 28 at 1]. On October 7, 2022, Hansz applied for admission *pro hac vice*, [Doc. 30], and his application was granted on October 11, 2022, see [Docket entries dated 10/11/2022]. Two days later, PRA deposed plaintiffs for a second time, with Downie appearing on behalf of both plaintiffs.<sup>3</sup> [Docs. 33-1 & 33-3]. During these depositions, plaintiffs testified about the misrepresentations mentioned in their motion to voluntarily dismiss and about Hansz’s role in the decision to withdraw the motion to dismiss, which was filed before Hansz sought admission *pro hac vice*. See [Docs. 33-1 & 33-3]; see also [Docs. 26 & 30].

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<sup>3</sup> Hansz appeared briefly at the end of Felita Bell’s deposition. [Doc. 33-1 at 20, 25-26].

Based on plaintiffs' testimony that Hansz was the moving force in withdrawing their motion to voluntarily dismiss given plaintiffs' inconsistent and equivocal testimony regarding whether they wanted to dismiss the case, PRA moved to depose Hansz. See [Doc. 33 at 4-6]; see also [Doc. 33-1 at 18-25 (when asked whether she wanted to move forward with dismissal of the case, Felita Bell testified that she was "not 100 percent sure"); Doc. 33-3 at 19-20, 25-26 (when asked why he filed a withdrawal of the motion to dismiss, Marshall Bell testified that he "was going with what the attorney said," he "was just being led by him," and Hansz "said we had to," despite also repeatedly testifying that he wanted to dismiss the case)]. PRA sought to determine, at a minimum:

1. Why counsel continue[d] pursuit of a case in which [p]laintiffs have unequivocally testified that their claims are based upon misrepresentations;
2. Why counsel filed a motion and subsequent notice of withdrawal of that motion where [p]laintiffs are patently confused by the direction they seek to take;
3. What [] Hansz' relationship to [p]laintiffs and this case is; and
4. If [] Hansz is [p]laintiffs' counsel, when and how that relationship began and the details surrounding any such representation as they relate to the instant litigation.

[Doc. 33 at 7]. Since plaintiffs did not respond to PRA's motion for leave to depose Hansz regarding these matters, the motion was deemed to be unopposed, see LR

7.1(B), NDGa., and the Court granted the motion on November 17, 2022, [Doc. 34], and ordered the deposition to take place within thirty (30) days of entry of the Order, [id. at 6].

The day after the Court entered the Order granting PRA's motion to depose Hansz, plaintiffs filed a motion for summary judgment, [Doc. 36], and PRA subsequently sought an extension of time to respond to plaintiffs' motion for summary judgment until Hansz could be deposed, [Doc. 38]. On December 15, 2022, the Court granted PRA's motion, extending the deadline to depose Hansz until January 30, 2023, and extending the time for PRA to respond to plaintiffs' motion for summary judgment until 30 days after Hansz's deposition, [Doc. 39], but on December 21, 2022, plaintiffs filed a second motion to voluntarily dismiss this action with prejudice, [Doc. 40], asserting that they sought "a dismissal of their case as they believe they cannot continue with their case in light of the representations and pleadings before this Court," [id. at 2], and requested "that the case be dismissed in its entirety with prejudice and without fees and costs to either party," [id. at 3].

In its response to plaintiffs' motion to voluntarily dismiss, [Doc. 43], PRA did not oppose dismissal of the action with prejudice but asserted that it "ha[d] expended substantial time and resources into the defense of this matter, including,

extensive document discovery, third party discovery, and the taking of both [p]laintiffs' depositions twice," [id. at 9]. Therefore, PRA "request[ed] that in the event of a dismissal with prejudice of [p]laintiffs' claims that the Court retain jurisdiction of this matter for the imposition of sanctions, fees, and costs, as may be appropriate, and further request[ed] leave to file its motion for fees and costs within thirty (30) days of the Court's ruling on [p]laintiffs' [m]otion to [d]ismiss," [id. at 2], arguing that "it is patently clear that the second [m]otion to [d]ismiss is being utilized, in part, by [p]laintiffs' counsel to evade this Court's discovery orders and avoid Hansz's deposition," [id. at 6 (internal citation omitted)]. PRA further "request[ed] that the Court retain jurisdiction to compel [] Hansz to sit for his deposition as previously ordered by the Court and that such deposition take place before the timeframe for PRA to file its motion for fees and costs," [id. at 7], and "for the consideration of any other sanction the Court may deem appropriate under the circumstances," [id. at 10 (citations omitted)]. In reply, plaintiffs and their counsel denied "PRA's allegations of disregard of this Court's orders and misuse of the litigation process and conduct driving baseless litigation" and opposed PRA's request "for additional discovery, depositions, and an award of attorney fees and costs and any other sanction it requests in this case." [Doc. 44 at 1-2].

The Honorable J.P. Boulee, United States District Judge, adopted the recommendation of the undersigned to grant plaintiffs' motion to voluntarily dismiss this action, [Doc. 40], and dismissed the action with prejudice but retained jurisdiction to determine whether plaintiffs and their counsel should be ordered to pay the reasonable costs and attorney's fees PRA incurred in defending this action, and ordered plaintiffs and their counsel to show cause why they should not be ordered to pay PRA's reasonable costs and attorney's fees, and if plaintiffs and their counsel opposed such an award, to also show cause why Hansz should not be deposed, and referred the matter back to the undersigned for further proceedings regarding whether to impose sanctions. [Doc. 51 at 2].<sup>4</sup>

Plaintiffs and their counsel filed their response to the show cause order, arguing that an award of attorney's fees and costs is not warranted under either 15 U.S.C. § 1692k(a)(3) or 28 U.S.C. § 1927 and that "any deposition of [] Hansz would no longer be relevant" since their claims have been dismissed with prejudice. [Doc. 52 at 6-12]. In particular, plaintiffs and their counsel contend that sanctions may be imposed under 15 U.S.C. § 1692k(a)(3) only when "a plaintiff both knew that his or her claim was meritless and pursued it with the purpose of

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<sup>4</sup> Judge Boulee denied as moot plaintiffs' motion for summary judgment. See [Doc. 51 at 2]; see also [Doc. 36].

harassing the defendant” and maintain that they did not file this action in bad faith or for the purpose of harassing PRA. [Id. at 7-9 (emphasis, citation, and internal marks omitted)]. Similarly, with respect to sanctions under 28 U.S.C. § 1927, plaintiffs and their counsel argue that it “does not apply to the filing of the action, because it only concerns the multiplication of proceedings,” and they maintain that plaintiffs’ counsel did not unreasonably or vexatiously multiply the proceedings. [Id. at 9-11 (citation omitted)]. However, plaintiffs and their counsel did not address whether attorney’s fees and costs should be assessed pursuant to Rule 41(a)(2) as a condition of granting their motion to voluntarily dismiss this action with prejudice, which was a contested issue with respect to their second motion to voluntarily dismiss this action with prejudice, as explained in the Report and Recommendation adopted by Judge Boulee. See [Doc. 49 at 7-9].

Rule 41(a)(2) grants the Court discretion to condition a voluntary dismissal of an action “on terms that the court considers proper.” Fed. R. Civ. P. 41(a)(2). “Although attorneys’ fees and costs are typically not awarded when a matter is voluntarily dismissed with prejudice under Rule 41(a)(2),” several circuit courts have recognized “that such an award may be granted when exceptional circumstances are demonstrated.” Carroll v. E One Inc, 893 F.3d 139, 152–53 (3d Cir. 2018); see also AeroTech, Inc. v. Estes, 110 F.3d 1523, 1528 (10th Cir. 1997);



Colombrito v. Kelly, 764 F.2d 122, 133-35 (2d Cir. 1985). While “the phrase ‘exceptional circumstances’ has not been clearly defined in the context of Rule 41(a)(2) dismissals with prejudice,” Fast v. GoDaddy.com LLC, No. CV-20-01448-PHX-DGC, 2022 WL 901380, at \*3-4 (D. Ariz. Mar. 28, 2022), the Third Circuit has reasoned that such “[e]xceptional circumstances include a litigant’s failure to perform a meaningful pre-suit investigation, and a repeated practice of bringing claims and dismissing them with prejudice after inflicting substantial costs on the opposing party and the judicial system,” Carroll, 893 F.3d at 152. Thus, an award of fees and costs upon dismissal of an action with prejudice may be warranted in unusual circumstances where “fees and costs were unnecessarily incurred.” Id. at 147 (footnote omitted).

The record in this case presents exceptional circumstances supporting a partial award of attorney’s fees and costs because it reflects a failure to perform an adequate pre-suit investigation with respect to plaintiffs’ claims that was exposed during their first depositions, repeatedly seeking to dismiss the case with prejudice after inflicting costs on PRA, and persisting in pursuing the action and even moving for summary judgment after the second depositions of plaintiffs again raised concerns for counsel about plaintiffs’ credibility and claims, which caused PRA to unnecessarily incur attorney’s fees and costs. See Tesma v.

Maddox-Joines, Inc., 254 F.R.D. 699, 700-02 (S.D. Fla. 2008) (citations omitted) (finding “the payment of [d]efendant’s reasonable costs and attorney’s fees in the defense of this action [] an appropriate condition to [] dismissal” with prejudice where “[p]laintiff’s intentions in this matter [were ] suspect,” since plaintiff indicated in a sur-reply “that in an effort to settle th[e] case he offered to pay [d]efendant’s costs[,]” but within one hour of filing the sur-reply, “[p]laintiff’s [c]ounsel withdrew the same,” and stating that “[d]efendant ha[d] been forced to litigate this case without reason” and plaintiff had “wasted the time of the Court and [p]arties alike” after plaintiff acknowledged that he had sued the wrong party and the claims asserted were “totally without merit” but “he offered no plausible explanation for filing this frivolous action or the failure to name the proper corporate defendant”). In the first motion to dismiss this action with prejudice, plaintiffs’ counsel asserted that based on plaintiffs’ first deposition testimony, “it became apparent that they had made misrepresentations in this case to their counsel regarding various matters.” [Doc. 26 at 1]. In particular, the motion to dismiss indicated that “it was not until the depositions were conducted that [p]laintiffs’ counsel learned of the untrue statements made by [p]laintiffs regarding contact with mortgage company and other issues.” [Id. at 2]. Plaintiffs’ counsel has failed to explain why these “untrue statements” were not discovered

prior to the depositions or explored more fully before withdrawing the first motion to dismiss with prejudice. Having erroneously relied on the representations of the plaintiffs, counsel initially sought to dismiss the action when the inadequacy of the pre-suit investigation of plaintiffs' claims was exposed during their first depositions, see [*id.* at 1-2], but instead of pursuing that path and relieving PRA of further expenses in defending the case, Hansz entered the case as counsel and plaintiffs reversed course by withdrawing the motion to dismiss, [Doc. 28]. The second depositions of plaintiffs failed to reveal the reason for the course reversal and indicated that Hansz played a key role in the decision to persist in asserting claims without providing an explanation of the factual bases for those claims, which led PRA to file a motion to depose Hansz, [Doc. 33], that plaintiffs did not oppose, see [Doc. 34 at 1]. The day after the Court entered the Order granting PRA's motion to depose Hansz, [Doc. 34], plaintiffs filed a motion for summary judgment, [Doc. 36], but subsequently moved again to dismiss the action with prejudice, [Doc. 40], after the Court granted PRA an extension of time to depose Hansz and to respond to plaintiffs' motion for summary judgment, [Doc. 39]. Hansz was never deposed, and plaintiffs now assert that there is no reason to conduct his deposition since the case has been dismissed with prejudice. [Doc. 52 at 12].

While an award of attorney's fees and costs upon dismissal of a case with prejudice usually is not warranted in the ordinary case because "dismissal with prejudice protects a defendant from otherwise repetitive litigation, whereas dismissal without prejudice leaves a defendant at risk of re-litigating dismissed issues," Carroll, 893 F.3d at 146, this is not an ordinary case. Rather, for the reasons discussed, "this case is unusual and it therefore calls for an unusual solution." Id. (citation and internal marks omitted). The Court is persuaded that PRA should be awarded reasonable attorney's fees and costs incurred after plaintiffs withdrew their original motion to voluntarily dismiss this action with prejudice on October 4, 2022, because the course of action plaintiffs and their counsel pursued by withdrawing the original motion to voluntarily dismiss with prejudice only to file a second motion to voluntarily dismiss with prejudice after PRA was required to expend resources deposing plaintiffs a second time, filing a motion to depose Hansz, seeking an extension of time to depose Hansz and respond to plaintiffs' motion for summary judgment, and responding to the second motion to dismiss with prejudice resulted in "fees and costs [that] were unnecessarily incurred." Id. at 147 (footnote omitted). Had plaintiffs maintained their original motion to voluntarily dismiss with prejudice after discovering plaintiffs had made "untrue statements" in support of their claims, PRA would not have incurred these

additional attorney's fees and costs, and the explanation plaintiffs and their counsel have provided in their response to the show cause order for continuing to pursue the case after this revelation is unpersuasive for avoiding an award of reasonable attorney's fees and costs.

The response to the show cause order filed by plaintiffs and their counsel states that "[p]laintiffs' testimony at their first deposition regarding a refinance of their mortgage and other issues raised [p]laintiffs' counsel's concern," [Doc. 52 at 8], and well it should have since plaintiffs had made "untrue statements" about their claims, [*id.* at 4], and "[w]hen it became clearer to [p]laintiffs' counsel that [p]laintiffs' claims were put in question after their deposition testimony in this case, then the [p]laintiffs sought dismissal of their complaint," [*id.* at 3], and had plaintiffs maintained that position, PRA would not have incurred any further attorney's fees and expenses in defending this action. However, plaintiffs withdrew the motion to voluntarily dismiss with prejudice and persisted in making claims without an adequate investigation of the veracity of the plaintiffs and their claims as the response to the show cause order goes on to state that "[a]fter the [p]laintiffs' second deposition and further discussion with the [p]laintiffs with [p]laintiffs' counsel, [p]laintiffs' counsel's concerns were raised again about the [p]laintiffs' credibility and willingness to continue their lawsuit,"

[id. at 8], and PRA should not have to bear the expense of plaintiffs' lack of candor and their counsel's failure to fully address concerns about their credibility and questions about their claims after the first depositions.

Plaintiffs' withdrawal of the first motion to voluntarily dismiss this action with prejudice without any explanation for the reversal in their course of action required PSA to incur attorney's fees and costs in taking plaintiffs' depositions a second time, and when their deposition testimony failed to shed light on the bases of their claims and reasons for maintaining the action given the "untrue statements" revealed at their first depositions, PRA incurred additional attorney's fees and costs in filing a motion to depose Hansz, that plaintiffs did not oppose. The Court granted the motion to depose Hansz, and the next day, plaintiffs inexplicably filed a motion for summary judgment prior to Hansz's deposition, necessitating a further expenditure of attorney's fees by PRA in seeking an extension of time to depose Hansz and to respond to the motion for summary judgment. Accepting plaintiffs' and their counsel's representation in the response to the show cause order that plaintiffs' testimony at their second depositions and conversations with counsel raised concerns "again" about "the [p]laintiffs' credibility and willingness to continue their lawsuit," [id.], the Court fails to see why PRA should have had to incur attorney's fees and costs for filing these

motions, and the actions of plaintiffs and their counsel which necessitated the motions support an award of reasonable attorney's fees and costs to PRA.<sup>5</sup>

Finally, the record presently before the Court supports requiring plaintiffs Marshall Bell, II and Felita Bell and their counsel, Gary Hansz, to jointly and severally pay PRA's reasonable attorney's fees and costs incurred after the withdrawal of the first motion to voluntarily dismiss with prejudice.<sup>6</sup> The plaintiffs' "untrue statements" and persistence in pursuing their claims after initially moving to dismiss them with prejudice contributed to PRA unnecessarily incurring attorneys' fees and costs, and their counsel's role in advising this course

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<sup>5</sup> Because the Court concludes that an award of PRA's reasonable attorney's fees and costs incurred after plaintiffs withdrew their first motion to dismiss with prejudice is warranted pursuant to Rule 41(a)(2) as a condition of plaintiffs' subsequent voluntary dismissal of this action with prejudice, the Court does not reach plaintiffs' arguments regarding the propriety of imposing sanctions under 15 U.S.C. § 1692k(a)(3) or 28 U.S.C. § 1927.

<sup>6</sup> Jeong did not enter an appearance in the case until December 5, 2022, [Doc. 37], and he replaced Downie as lead counsel on February 21, 2023, [Doc. 45], but there is no indication in the record that he took any action in the litigation of the case that caused PRA to unnecessarily incur attorney's fees and expenses. Therefore, the Court has not included him among those who are jointly and severally responsible for the payment of PRA's reasonable attorney's fees and expenses. If plaintiffs and Hansz contend that Downie should also be held jointly and severally responsible for the payment of PRA's reasonable attorney's fees and costs, they may petition the Court for relief, and the Court will consider whether to order further proceedings, which may include authorizing depositions of plaintiffs, Hansz, and Downie.

of conduct without an adequate investigation of plaintiffs' credibility and their claims and the filing of a motion for summary judgment after plaintiffs' second depositions again raised concerns support requiring both plaintiffs and their counsel to jointly and severally pay PRA's reasonable attorney's fees and costs incurred after the withdrawal of the first motion to voluntarily dismiss with prejudice. In their response to the show cause order, plaintiffs and their counsel contend that Hansz's deposition is no longer required since the case has been dismissed with prejudice, and in the absence of Hansz's testimony about the reasons for maintaining the action after initially moving to voluntarily dismiss it with prejudice, there is no basis for arriving at a different apportionment of responsibility for the payment of PRA's attorney's fees and costs than stated.<sup>7</sup>

For the reasons stated, pursuant to Rule 41(a)(2), PRA is entitled to an award of its reasonable attorney's fees and costs incurred after plaintiffs withdrew their first motion to voluntarily dismiss this action with prejudice on October 4, 2022.

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<sup>7</sup> During plaintiffs' second depositions, PRA attempted to obtain information regarding what claims plaintiffs were still pursuing despite admitted misrepresentations and the reasoning behind the withdrawal of their first motion to dismiss, but to no avail, see [Doc. 33 at 9-11; Doc. 33-1 at 7-25; Doc. 33-3 at 6-29], and since Marshall Bell testified that Hansz made the decision to withdraw the motion to dismiss, see [Doc. 33-3 at 19-20, 24-27], deposing Hansz was the only avenue available to PRA to determine why the motion to dismiss was withdrawn, despite the admitted misrepresentations, but Hansz was never deposed.



Accordingly, within **thirty (30) days** of the entry of this Order, PRA shall file a statement of its reasonable attorney's fees and costs incurred after October 4, 2022, including taking the second depositions of plaintiffs, filing the motion to depose Hansz, filing the motion for extension of time to depose Hansz and to respond to plaintiffs' motion for summary judgment, filing the response to plaintiffs' second motion to voluntarily dismiss this action with prejudice, and filing the statement in support of the award of attorney's fees and costs. Plaintiffs and their counsel shall have **fourteen (14) days** after the statement is filed by PRA to object to the reasonableness of the attorney's fees and costs requested, and if a response is not filed by that date, the amount requested by PRA will be deemed to be unopposed.

**IT IS SO ORDERED**, this 1st day of December, 2023.

  
RUSSELL G. VINEYARD  
UNITED STATES MAGISTRATE JUDGE