IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CREATIVE TOUCH INTERIORS, INC.	*	
Plaintiff,	*	
v.	*	**Case No.: 3:15-cv-00860-MMH-JBT**
STEVEN E. SPADE *et al.*	*	
Defendants.	*	

* * * * * * * * * * * *

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS

Plaintiff Creative Touch Interiors, Inc. ("CTI"), by counsel, and pursuant to Fed. R. Civ. P. 11(c) and Local Rule 3.01(b), hereby responds to and opposes Defendants' Motion for Sanctions (the "Motion for Sanctions") (Doc. 39)[1] filed by all defendants (collectively the "Defendants"), and states as follows:

INTRODUCTION

In the Motion for Sanctions, Defendants seek attorneys' fees and costs as a sanction against CTI and its counsel under Fed. R. Civ. P. 11, 28 U.S.C. § 1927, and the Court's inherent authority to sanction litigants and counsel, for (i) alleging Computer Fraud and Abuse Act ("CFAA") claims, which Defendants assert "have no legal basis in

[1] References to "Doc. __" are to the Document Number of the referenced pleading or court paper.

this District and especially before the U.S. District Judge presiding over this action;" (ii) bringing the CFAA claims as a pretext to forum shop; and (iii) filing a motion in state court seeking to stay pending state court proceedings and opposing Defendants' motion for abstention (*See* Motion for Sanctions ¶ 1).

Defendants' Motion for Sanctions should be denied because (i) CTI's CFAA claims have been upheld by at least one judge in this District (and elsewhere) and therefore are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (ii) Defendants' pretext and forum shopping arguments are faulty as this Court has diversity jurisdiction over all of CTI's claims, and this Court has previously acknowledged that dismissing a state court action without prejudice and pursuing the same claims in federal court does not constitute impermissible forum shopping; and (iii) CTI's state court filings are not sanctionable by this Court, nor is there any basis to sanction CTI's opposition to Defendants' motion for abstention filed in this case, which did nothing more than suggest the motion was moot.

FACTUAL AND PROCEDURAL BACKGROUND

I. Procedural posture of this case

1. CTI commenced this action by filing its Complaint (Doc. 1) on May 8, 2015. The Complaint contained claims under the Computer Fraud and Abuse Act ("CFAA").

2. Defendants filed a motion for more definite statement (Doc. 11) and a motion seeking abstention by this Court (the "Abstention Motion") (Doc. 10) on June 8, 2015 (Doc. 11).

3. CTI filed an opposition to Defendants' Abstention Motion on mootness grounds based on its dismissal of the State Court Action (Doc. 13), and filed its first amended complaint (the "Amended Complaint") (Doc. 14) on June 25, 2015. The Amended Complaint contains claims under the CFAA.

4. Defendants filed a motion to dismiss the CFAA claims, the conversion claim, the tortious interference claim, and portions of the conspiracy claim stated in the Amended Complaint (Doc. 24) on July 13, 2015. Defendants later dropped their motion to dismiss with respect to the tortious interference claims (Doc. 34).

5. On July 17, 2015, the Court invited Defendants to file a reply to CTI's opposition to Defendants' Abstention Motion by August 3, 2015 (Doc. 26).

6. On July 28, 2015, Defendants filed their reply to CTI's opposition to their Abstention Motion in which they conceded that CTI's voluntary dismissal of the State Court Action mooted their Abstention Motion (Doc. 29).

7. CTI filed an opposition to Defendants' motion to dismiss (Doc. 33) on July 30, 2015.

8. Defendants served a copy of their Motion for Sanctions on CTI's counsel on August 5, 2015.

9. Counsel conferred regarding the Motion for Sanctions by telephone on August 5, 2015 at 10:00 a.m.

10. Defendants did not at that time file their Motion for Sanctions.

11. On October 19, 2015, CTI moved (Doc. 35), with the Defendants' consent, to extend the deadline to move to add parties or amend pleadings (the need for which was occasioned by Defendants' delays in producing documents); the Court granted the motion (Doc. 36) on October 21, 2015, extending the deadline through November 19, 2015.

12. On November 19, 2015, CTI moved (Doc. 38) to amend its pleading and add an additional party. The proposed amended pleading attached to CTI's motion for leave to amend drops CTI's CFAA and conversion claims. CTI sought Defendants' consent to the proposed amendment, however Defendants refused to consent.

13. Defendants filed their Motion for Sanctions on November 20, 2015, the day following CTI's motion for leave to amend.[2]

II. Procedural Background of State Court Action

As set forth more fully below, activities which occurred in the now dismissed state court proceedings are irrelevant for purposes of the Motion for Sanctions. However, because Defendants' Motion for Sanctions relies heavily on these facts, CTI sets for the procedural background of the state court action below:

1. CTI commenced an action on May 8, 2014, in the Circuit Court for the Fourth Judicial Circuit, in and for Duval County, Florida, Case No. 16-2014-CA-003258 (the "State Court Action").

[2] CTI notes that Defendants' Motion for Sanctions may well be untimely. The advisory committee note on the 1993 amendments to Rule 11 states that "[o]rdinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely." In this case, the conduct complained of occurred on May 8, 2015 (the date the Complaint was filed) and June 25, 2015 (the date CTI opposed Defendants' abstention motion). Defendants waited until August 5, 2015, to serve their Motion for Sanctions, and waited a further three and one half months to file.

2. Defendants moved to dismiss the State Court Action. The Court granted the Defendants' motion to dismiss, with leave to amend.

3. CTI filed an amended pleading in the State Court Action on May 8, 2015, in order to prevent the dismissal from becoming a dismissal with prejudice. CTI simultaneously filed a motion to stay the State Court Action to permit this action to proceed.

4. Defendants filed a motion for more definite statement in the State Court Action on May 18, 2015.

5. CTI dismissed the State Court Action voluntarily and without prejudice on June 16, 2015.

6. Defendants filed a motion for attorneys' fees in the State Court action on June 26, 2015, seeking attorneys' fees as sanctions based largely on the same allegations of "forum shopping" presented in their Motion for Sanctions. Defendants' state court motion for attorneys' fees has been fully briefed and argued but remains pending.

MEMORANDUM OF LAW

I. CTI's CFAA claims have been upheld by at least one judge in this District (and elsewhere) and therefore are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law

Rule 11 prohibits a party from, *inter alia*, including in a pleading "claims, defenses, and other legal contentions [that are not] warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2).

In their Motion for Sanctions, Defendants argue that the CFAA claims are frivolous because a majority of the judges within the Middle District have adopted the "narrow view" of the term "exceeds authorized access" in the CFAA, an interpretation they contend would prevent CTI from prevailing on its CFAA Claims. As set forth below, Defendants are wrong.

CTI's CFAA claims are patently nonfrivolous and cannot be objectively viewed as a violation of Rule 11(b)(2). CFAA claims require a showing that the wrongdoer either intentionally (i) accessed a computer without authorization or (ii) exceeded his authorized access to a computer. 18 U.S.C. §1030(a)(2)(C). There is a split of authority among Federal district courts, including within the Middle District of Florida, on how the CFAA applies to an employee that has authorization to access proprietary information for work purposes, but in fact accesses or uses it in violation of the terms of such access. Under the broader view, an employee "exceeds authorized access" when he or she has authority to access information for a proper purpose, but accesses or uses such information in violation of the terms of that authorization, *i.e.* for purposes other than authorized by the employer. Under the narrow view, an employee does not exceed authorized access where he has authorization to access information for certain purposes, but in fact accesses or uses such information for other purposes. Motion, ¶ 8 (quoting *Enhanced Recovery v. Frady*, 2015 WL 1470852, *2 (M.D. Fla. Mar. 31, 2015). CTI's CFAA claims fall within the broad view, but Defendants argue not within the narrow

view.[3] Defendants argue that, despite the split in authority between Federal District Courts and within the Middle District, CTI and its attorneys should be sanctioned for advancing the broad view adopted by Judge Antoon in *Aquent LLC v. Stapleton*, 65 F.Supp.3d 1339 (M.D. Fla. 2014).

Advancing a claim supported by at least one court within this district and several others within the Eleventh Circuit cannot, as a matter of law, meet the standard of an objectively frivolous claim under Rule 11(b)(2). A claim in a pleading or paper that advances "a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law" does not violate Rule 11(b)(2) and is not sanctionable. The fact that CTI asserted a claim supported by district courts both in the Eleventh Circuit, and specifically, within the Middle District of Florida, requires that this Court find, *as a matter of law*, that CTI's CFAA claims do not violate Rule 11(b)(2).

II. CTI has not Engaged in Sanctionable "Impermissible Forum Shopping"

a. Rule 11 Applies to Pleadings, not Component Claims.

Rule 11(b)(1) prohibits a party from filing a *pleading* "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Rule 11(b)(1) goes to the entirety of a *pleading*, not to individual counts raised therein (which are addressed by Rule 11(b)(2)). In this case, the operative *pleading* is CTI's Amended Complaint.

[3] CTI asserts that its CFAA claims are valid under both the broad and narrow views of "exceeds authorized access," and incorporates herein by reference the portions of its Memorandum in Opposition to Defendants' Motion to Dismiss and for More Definite Statement (Doc. 33) addressing its CFAA claims.

Defendants do not assert that CTI's entire Amended Complaint was filed for an improper purpose; rather Defendants suggest that CTI's CFAA claims, which comprise but three of twelve counts in the Amended Complaint, were asserted for an improper purpose and therefore violate Rule 11(b)(1). Because Rule 11(b)(1) does not address component parts of pleadings, Defendants' Motion for Sanctions must be denied to the extent it seeks sanctions for CTI's alleged pleading of CFAA claims for an improper purpose.

b. Defendants' Pretext Argument is Misplaced as this Court has Diversity Jurisdiction over CTI's Claims

Assuming, *arguendo*, that Rule 11(b)(1) can be read to apply to component parts of pleadings, Defendants' assertion that CTI "brought the CFAA claims as a pretext to forum shop" (Motion for Sanctions, ¶ 1(b)) is belied by their acknowledgement that "[e]ven without the CFAA claims, [CTI] could have filed this action in this Court … pursuant to diversity jurisdiction" (Motion for Sanctions, ¶ 21(c)).

c. CTI has the Right to Dismiss its State Court Action and Proceed in this Court, and such is not Forum Shopping in the Traditional Sense.

CTI, as the plaintiff, had the nearly absolute right to voluntarily dismiss the state court action.[4] *See* Rule 1.420, Fla. R. Civ. P.; *Kelly v. Colston*, 977 So.2d 692, 694 (Fla. 1st DCA 2008).

A plaintiff's choice to re-file a previously dismissed state court action in the federal forum with jurisdiction and proper venue is not forum shopping. *See PNC Bank, N.A. v. Roy A. Alterman, P.A.*, 2014 WL 505129 at *1 (M.D. Fla. February 7, 2014)("In

[4] Defendants acknowledge CTI's right and ability to dismiss the state court action in the Motion for Sanctions. *See* Motion for Sanctions, ¶ 19.

fact, Plaintiff's choice to bring suit in the federal forum encompassing the relevant county rather than the state forum is not even 'forum shopping' in the classical sense. *See* Barbara J. Van Arsdale *et al*., *Federal Procedure* § 1:782 (2013) ("A plaintiff is guilty of forum shopping if it brings an action in a particular district because the court of appeals in the circuit encompassing that district has decided a question of law involved in the suit which has not been decided in the transferee district"). Rather, Plaintiff is simply exercising its right as master of the claim, and Defendants concede that both jurisdiction and venue are proper in this forum. This Court certainly has the same ability to apply the relevant law as the state court.").

Defendants improperly seek to cast CTI's exercise of its right, "as master of its claim," to choose to litigate its claims in federal rather than state court as impermissible forum shopping. The relative timing of the dismissal of the state court action and the filing of this action, and the inconsequential temporal overlap of the two cases, is immaterial.

Defendants are not entitled to sanctions under 28 U.S.C. § 1927 against CTI's counsel for moving this case from state to federal court. As a threshold matter, sanctions are not available under 28 U.S.C. § 1927 for filings or litigation in state court. Furthermore, after the state court dismissed the state court complaint with leave to amend, CTI decided to proceed in federal court rather than in state court, which it had the right to do. CTI could not simply permit the State Court Action to remain dismissed while it filed its federal complaint, as it had to protect against the possibility that the state court's dismissal of the action with leave to amend might be construed as dismissal "on

the merits" if CTI failed to amend.[5] Although CTI's counsel could have waited to file the complaint commencing this action until after dismissing the state court action, it did not. Counsel's decision not to do so does not constitute impermissible forum shopping, and was not unreasonable, vexatious, in bad faith, or otherwise sanctionable.

Defendants' Motion for Sanctions tries to color this procedural history as an attempt by CTI to impermissibly forum shop after receiving an adverse ruling from the state court. To be clear, the 'adverse' ruling was merely a dismissal with leave to amend to cure a pleading deficiency. The ruling was not a ruling on the merits in any meaningful sense. Defendants fail to explain how the procedural timing of CTI's filing of the complaints and subsequent dismissal of the state court action violates a rule or law.

III. CTI's State Court Filings are not Sanctionable by this Court, nor is there any Basis to Sanction CTI for its Opposition to Defendants' Abstention Motion.

a. Neither Rule 11 nor 18 U.S.C. § 1927 Provides any Basis to Sanction CTI for Filing its State Court Motion to Stay

Defendants seek sanctions pursuant to Rule 11 and 28 U.S.C. § 1927 with respect to CTI's motion to stay the State Court Action ([Motion at ¶ 1.c.]). Rule 11 does not apply to state court filings. *See e.g. Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1091 (11th Cir. 1994). Similarly, sanctions under 28 U.S.C. § 1927 can only be based on proceeding before this Court. *See Smith v. Psychiatric Solutions, Inc.*, 864 F.Supp.2d 1241, 1269-70 (N.D. Fla. 2012)("With respect to conduct occurring in connection with [a prior proceeding in a different forum], Plaintiff's counsel cannot be sanctioned under §

[5] *See Edward L. Nezelek, Inc. v. Sunbeam Television Corp.*, 413 So.2d 51, 53 (Fla. 3d DCA 1982) (if notice is given, the trial court has the authority to dismiss with prejudice the complaint of that party for failure to timely amend).

1927 because, based on its plain language, § 1927 applies only to filings after the lawsuit has begun. . . . Nor can counsel be sanctioned for conduct committed in the state court proceedings . . . .").

b. Neither CTI nor its Counsel have Engaged in the Type of Bad Faith Conduct Necessary to Sanction Under 28 U.S.C. § 1927.

Section 1927 provides that: "any attorney . . . who so multiplies the proceedings in any case unreasonably or vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonable incurred because of such conduct." 28 U.S.C. § 1927. The provisions of section 1927 must be strictly construed, due to their penal nature, and used only where an attorney has demonstrated a "serious and standard disregard for the orderly process of justice." *Peterson v. BMI Refractories,* 124 F. 3d 1386, 1395 (11th Cir. 1997); *Dreiling v. Peugeot Motors of America, Inc.,* 768 F.2d 1159, 1165 (10th Cir. 1985).

The statute is not a "catch-all" for sanctioning any and all attorney conduct the court wishes to discourage or finds to be less than in the best and highest traditions of the legal profession. *Peterson,* 124 F. 3d at 1396. Rather, it requires the movant to establish three essential elements to justify imposing sanctions: (1) that the attorney engaged in unreasonable and vexatious conduct; (2) that such unreasonable and vexatious conduct caused the multiplication of the proceedings; and (3) that the amount of the sanction does not exceed the costs occasioned by the objectionable conduct. *Norelus v. Denny's, Inc.,*

628 F.3d 1270, 1281 (11th Cir. 2010). An attorney multiplies court proceedings "unreasonably and vexatiously, thereby justifying sanctions under 28 U.S.C. § 1927, ***only*** when the attorney's conduct is so egregious that it is tantamount to bad faith." *Id.* (emphasis added).

Defendants have failed to offer any evidence that CTI or its counsel acted in bad faith. CTI's decision to simultaneously file an amended complaint in the state court action and a similar complaint in federal court and shortly thereafter dismiss its state court complaint does not constitute forum shopping, and cannot not rise to the level of bad faith.

c. CTI's Filing of an Opposition to Defendants' Motion for Abstention on Grounds of Mootness is not Sanctionable

Defendants' final assertion is that CTI should be sanctioned because it opposed Defendants' Abstention Motion. Defendants filed their Abstention Motion on June 8, 2015. CTI dismissed its State Court Action on June 16, 2015, mooting the Abstention Motion. On June 25, 2015, CTI filed its opposition to Defendants' Abstention Motion noting that it was moot. Defendants acknowledged the mootness of their Abstention Motion on July 28, 2015, in their reply. Defendants fail to set forth any basis for sanctions against CTI for filing its opposition to Defendants Abstention Motion.

IV. No Basis for Sanctions Pursuant to Court's Inherent Authority

Section 1927, discussed above, is a "natural outgrowth" of the court's inherent authority to assess costs and attorneys' fees as sanctions. *Dreiling v. Peugeot Motors of America, Inc.*, 768 F.2d 1159, 1165 (10th Cir. 1985). The court has inherent authority to award fees and costs against a party who has acted "in bad faith, vexatiously, wantonly,

or for oppressive reasons." *Eisenberg Development Corp. v. City of Miami Beach,* 95 F. Supp. 3d 1376, 1380 (S.D. Fla. 2015). The court's inherent authority to sanction requires a finding of bad faith. *Id.* (quoting *Barnes v. Dalton,* 158 F.3d 1212, 1214 (11th Cir. 1998)).

Defendants have failed to offer any evidence of conduct that might be sanctionable under the Court's inherent authority. CTI's decision to simultaneously file an amended complaint in the state court action and a similar complaint in federal court and shortly thereafter dismiss its state court complaint does not constitute forum shopping, and cannot not rise to the level of bad faith.

CONCLUSION

CTI's CFAA claims have legal support in the Middle District of Florida. CTI's assertion of its CFAA claims was not frivolous, nor in bad faith. Thus, neither CTI nor its counsel has violated Rule 11 or 28 U.S.C. § 1927, nor is there any basis for the Court to exercise its inherent authority to sanction CTI. The Motion for Sanctions against CTI and its counsel should be denied.

WHEREFORE, Plaintiff, Creative Touch Interiors, Inc., respectfully requests that the Court deny the Defendants' Motion for Sanctions in its entirety.

Dated: December 7, 2015

Respectfully submitted,

CREATIVE TOUCH INTERIORS, INC. d/b/a HD SUPPLY INTERIOR SOLUTIONS

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2015, copies of the foregoing paper or pleading were served electronically *via* the Court's CM/ECF system upon all registered users who have entered an appearance in this action.

/s/ Andrew Lynch Cole
Andrew Lynch Cole