

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

VICKIE ANN CARTER,)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Action No. 1:08-cv-01219-JDB-egb
NATIONAL PRODUCT SERVICES, INC.,)	
)	
Defendant.)	

**ORDER ON PLAINTIFF’S MOTION AND OBJECTION
CONCERNING PAYMENT OF DEFENDANT’S ATTORNEY FEES AND EXPENSES
FROM CASE HANDLED BY PREVIOUS COUNSEL**

Before the Court is Plaintiff Vickie Ann Carter’s Motion and Objection Concerning Payment of Defendant’s Attorney Fees and Expenses for Case Handled by Previous Counsel (“Motion”) (Doc. 3). Defendant has responded (Doc. 7) and Plaintiff has filed a Reply (Doc. 10). For the following reasons, Plaintiff’s Motion is GRANTED in part and DENIED in part.

Plaintiff originally filed this action in state court on or about May 15, 2006. On July 7, 2006, Defendant removed the action to this Court. The Court subsequently granted an Order Compelling Plaintiff to provide certain discovery and ordered payment of Defendant’s attorney fees and costs in that connection. Thereafter, Plaintiff moved to dismiss without prejudice, which Defendant opposed. In granting Plaintiff’s Motion for Voluntary Dismissal, Judge Todd ordered: “If Plaintiff re-files this action, Defendant will submit a statement of attorney’s fees and expenses incurred to this point within thirty (30) days of service. Plaintiff will have thirty (30) days to pay the costs or object. Defendant’s answer time will not begin to run until Plaintiff has paid prior costs.” (Order Granting Plaintiff’ Motion for Voluntary Dismissal, Case No. 1:06-cv-

01147, August 10, 2007). Plaintiff did not move for reconsideration of the Order nor did she appeal.

Plaintiff has now re-filed this case, and, in accordance with the Court's August 10, 2007 Order, Defendant has submitted a detailed Statement of Expenses showing a total of \$11,796.47 in fees and expenses incurred in the original action (Ex. D to Notice of Removal). In response, Plaintiff filed the instant Motion, challenging the requirement that she pay these fees and costs in order to proceed in this case. Plaintiff argues that she should not be responsible for these fees because her prior counsel, Bradley Kirk of Lexington, Tennessee, was at fault for seeking the dismissal without her knowledge and consent. Citing primarily "fundamental fairness," Plaintiff urges the Court to impose the fees and expenses on her prior counsel rather than on her. There is some precedent in this Circuit for this type of relief. *See Harmon v. CSX Trans. Inc.*, 110 F.3d 364, 367 (6th Cir. 1997) (*citing Coleman v. Am. Red Cross*, 23 F.3d 1091, 1095 (6th Cir. 1994)) ("We have increasingly emphasized directly sanctioning the delinquent lawyer rather than an innocent client."). In response, Defendant asserts that clients are generally responsible for the acts of their attorneys, who are their "freely selected agent[s]." *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962). Moreover, they point out, "there is no constitutional or statutory right to effective assistance of counsel in a civil case." *Watson v. Moss*, 619 F.2d 775, 776 (8th Cir. 1980).

In this case, Plaintiff has filed an affidavit to accompany the Plaintiff's Motion and Objection Concerning Payment of Defendant's Attorney Fees and Expenses From Case Handled by Previous Counsel. In her affidavit, she states that, with regard to the original proceeding, her efforts to contact her prior attorney throughout 2007 were met with general responses from his staff to the effect of "federal courts take a very long time." She continues that in the spring of

2008 she confronted her attorney, who advised her that the trial was postponed again to September 2008. In May 2008, she became “suspicious” and determined from another attorney that her case had been dismissed in August 2007. This affidavit, dated October 1, 2008 and presumably prepared by her current attorney, notes that Plaintiff “recently learned” her case had been dismissed. This sequence of events, unfortunately, seems to be consistent with the general conduct attributed to her prior attorney as described in Plaintiff’s Motion and Objection Concerning Payment of Defendant’s Attorney Fees and Expenses From Case Handled by Previous Counsel. There is no evidence before this Court contrary to this information, all of which, if true, is of great concern and clearly raises the important issue of fundamental fairness.¹

Given the posture of the current lawsuit,² this Court conducted a *sua sponte* review of the Defendant’s Statement of Attorney’s Fees And Expenses In Prior Litigation. In conducting this review the Court considered the reasonableness and necessity of the fees and expenses submitted. The Court also considered the amount and type of work performed in the prior case, and the extent it is available for use in the present lawsuit. For instance, attorneys for Defendant already have prepared a responsive pleading and discovery documents which likely can be replicated without significant additional expense to their client. The Court also has taken into account the time and related expense already consumed in investigating, analyzing the facts and

¹ Assuming Plaintiff’s very serious allegations of attorney misconduct are true, the Plaintiff may pursue other options available to her, including a legal action against Mr. Kirk through the courts or an administrative action through the Tennessee Board of Professional Responsibility. Additionally, there may be financial relief available through the Lawyer’s Fund for Client Protection, which is part of the Board of Professional Responsibility’s Consumer Assistance Program. See <http://www.tbpr.org/Cap/> for information about this program.

² Though Defendants argue that Plaintiff does not object to the Statement of Expenses as excessive in amount, Plaintiff’s broad objection is certainly sufficient to permit the Court to review and make a determination as to the reasonableness of Defendant’s Statement of Expenses. Moreover, Plaintiff has specifically argued that the high amount of the fees would be a bar to Plaintiff’s ability to proceed, as she makes eleven dollars per hour. (Motion at 2).

law, and developing strategies, as well as evaluating liability and damages in discussions with the Defendant and its insurance carrier.

Taking into consideration the above factors, a significant amount of legal work has been accomplished in the prior case that is available for use in the present litigation. As such, the Plaintiff is entitled to some degree of relief in the Court's assessment of Defendant's attorney fees and expenses incurred in the prior action as it relates to the Order Granting Plaintiff's Motion For Voluntary Dismissal entered on August 10, 2007. While reserving a final determination on the exact amount of the Defendant's attorney fees and expenses incurred in the prior lawsuit which may have been unreasonable, unnecessary, attributable to the category of re-use in the present lawsuit or which may for other reasons not be recoverable, the Court will permit the Plaintiff's present lawsuit (Civil Action No. 1:08-cv-01219-JDB) to proceed, but only on the condition that Plaintiff, within sixty (60) days, pays \$2,500 of Defendant's costs and expenses incurred in the prior lawsuit.

Accordingly, Plaintiff's Motion is GRANTED in part. Plaintiff is ORDERED to pay \$2,500 of Defendant's fees and expenses from the prior lawsuit (1:06-cv-01147) within sixty (60) days of this Order. Defendant's answer time will not begin to run until Plaintiff has paid this amount. Should Plaintiff not pay this \$2,500 to Defendant within sixty (60) days, this case will be dismissed. Any remaining requests for relief in Plaintiff's Motion not addressed above are DENIED.

IT IS SO ORDERED.

s/ Edward G. Bryant
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

Date: February 27, 2009