

IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT,  
IN AND FOR PALM BEACH COUNTY, FLORIDA

CHENEY BROS, INC.,  
a Florida Corporation  
Plaintiff,

vs.

Case No. 2023-CA-001432

WESLEY RICHARDS,  
Defendant.

**AMENDED MOTION FOR ATTORNEY'S FEES**

COMES NOW the Defendant, WESLEY RICHARDS, by and through his undersigned counsel, and files this Amended Motion for Attorney's Fees and states as follows:

1. On February 16, 2023 Plaintiff filed the instant lawsuit against Defendant.
2. In response, Defendant filed a Motion to Dismiss which included a request for attorney's fees and costs.
3. Defendant's Motion to Dismiss was granted without prejudice on May 18, 2023.
4. Plaintiff filed an Amended Complaint on June 1, 2023.
5. Defendant filed a Motion to Dismiss the Amended Complaint which was granted after argument December 13, 2023. Counsel for the Plaintiff was given until January 15, 2024 to file a Second Amended Complaint. In lieu of doing that, Plaintiff filed a voluntary notice of dismissal.
6. Within 30 days of the Notice of Voluntary Dismissal, Defendant served on Plaintiff a Motion for Attorney's fees pursuant to Fla.Stat. §57.105.
7. After the expiration of the 21-day period under §Fla. Stat. 57.105(4) Defendant filed the Motion for Attorney's fees on February 26, 2024.

8. Plaintiff then served a Motion for fees under Fla.Stat. §57.105 giving Defendant 21 days to withdraw its Motion for Attorney's fees because Defendant's initial Motion for Attorney's fees was not filed prior to the voluntary dismissal of the suit.
9. Defendant was not anticipating that Plaintiff would file a Notice of Voluntary Dismissal and had intended to file its Motion for Attorney's fees at the same time that the Second Amended Complaint was filed.
10. Regardless, Defendant is also entitled to attorney's fees under Fla.R.Civ.P. 1.525, which provides:
- Any party seeking a judgment taxing costs, attorneys' fees, or both shall **serve** a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal, which judgment or notice concludes the action as to that party (emphasis added).
11. Defendant served its Motion for Fees before the expiration of the 30-day period as required under Fl.R.Civ.P. 1.525.
12. Accordingly, Defendant is entitled to fees and is filing this Amended Motion for Attorney's fees.

### **MEMORANDUM OF LAW**

#### **INTRODUCTION**

Plaintiff was on notice at the time suit was filed, that Defendant took the position that there was no legal basis to support the suit and that Defendant would be seeking costs and fees for having to defend it if Plaintiff proceeded. See Exhibit A. Notwithstanding, Plaintiff filed suit. The fact that the Plaintiff could not state a prima facie case and the suit was dismissed twice on

motions to dismiss shows that there was no basis applying the facts to the law to pursue these claims. The Court advised counsel for the Plaintiff at the December 13, 2023 hearing on the Motion to Dismiss Plaintiff's Amended Complaint that if the suit were dismissed again, it would be **with prejudice**. To avoid a dismissal with prejudice, Plaintiff voluntarily dismissed the suit. This does not negate Defendant's entitlement to an award of fees and costs.

### **ARGUMENT**

Fla.R.Civ.P. 1.525 provides that

Any party seeking a judgment taxing costs, attorney's fees or both shall **serve** a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal, which judgment or notice concludes the action as to that party. (emphasis added).

Defendant served its Motion for Fees before the expiration of the 30-day period as required under Fl.R.Civ.P. 1.525. As stated above, Defendant put Plaintiff on notice prior to the filing of the lawsuit that there was no legal basis to support the claims for which Plaintiff was threatening to sue. Defendant also notified Plaintiff pre-suit of its intent to seek fees and costs if the claims were pursued. Further, in Motion to Dismiss, Defendant requested attorney's fees pursuant. Accordingly, the Plaintiff knew or should have known that the claims were frivolous. Defendant is the prevailing party in this matter and, therefore, is entitled to attorney's fees.

The general rule in Florida is that "when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party." Catamaran B.Y., Inc. v. Giordano, 337 So. 3d 439, 441 (Fla. 3d DCA 2022) citing Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 919 (Fla. 1990). "It is not necessary for there to be an adjudication on the merits in order to be entitled to fees as a prevailing party." Valcarcel v. Chase Bank USA NA, 54 So. 3d 989, 990 (Fla. 4th DCA 2010).

However, if there is any issue about the prevailing party, the court may look behind a

voluntary dismissal at the facts of the litigation to determine if a party has prevailed. *Tubbs v. Mechanik Nuccio Hearne & Wester, P.A.*, 125 So. 3d 1034, 1040, 1041 (Fla. 2d DCA 2013). Stated differently, "courts must look to the substance of litigation outcomes—not just procedural maneuvers—in determining the issue of which party has prevailed in an action." *Id.*, citing *Residents for a Better Cmty.*, 291 So. 3d at 634.

Here, even if the Court were to determine that the Plaintiff's voluntary dismissal did not make the Defendant the prevailing party, the previous course of the litigation shows that two separate Motions to Dismiss were granted. This clearly makes the Defendant the prevailing party.

#### **REASONABLENESS OF HOURS AND THE HOURLY RATE**

An award of attorney's fees must be supported by competent, substantial evidence. *Shortes v. Hill*, 860 So. 2d 1, 2 (Fla. 5th DCA 2003). This evidence should include "records detailing the amount of work performed and the time to perform each task" as well as expert testimony to establish "both the reasonableness of the hours and a reasonable hourly rate." *Horowitz v. Rossdale Cle, Inc.*, 357 So. 3d 260, 262 (Fla. 5th DCA 2023) citing *Nants v. Griffin*, 783 So. 2d 363, 366 (Fla. 5th DCA 2001).

For defending this lawsuit, which included, but is not limited to, the filing two motions to dismiss and arguing at hearings on those, arguing at a hearing on Plaintiff's motion to compel, responding to two sets of discovery, preparing Defendant for deposition, representing him at his deposition and preparing the initial Motion for Fees, counsel spent 44.55 hours. For the Court to determine the reasonableness of the time spent on the work performed, counsel is attaching a detailed description by date of the work performed and the time spent. Exhibit B.

Counsel for Defendant is seeking \$395 per hour for her fees. In support of that rate, the affidavit of David Miklas is being provided. Exhibit C. Mr. Miklas also reviewed the time records and attests that he reviewed the time records in this case and believes that the time spent is reasonable for the work performed.

**CERTIFICATION OF CONFERRAL**

Counsel for the Defendant has conferred with counsel for the Plaintiff who disagrees with Defendant's entitlement to attorney's fees.

Dated: March 18, 2024

Respectfully submitted,

/s/Beth Coke

Beth Coke

Fla. Bar. #70726

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Attorney for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing document is being filed on March 18, 2024, through the Florida Court E-Filing Portal, which will automatically serve a copy on Andrew Tharp and David S. Tadros , Wyland & Tadros LLP, the attorneys for the Plaintiff.

/s/ Beth Coke

Beth Coke