IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STILLLWATER LAKES CIVIC ASSOCIATION, INC.,	:	
Plaintiff	:	
v.	:	3:08 CV 2264
NOREEN GORKA, MICHAEL GLASSIC, STILLWATER LAKES CITIZENS, and STILLWATER LAKES COMMUNITY ACTIVISTS, a nonprofit corporation,	:	(Magistrate Judge Blewitt)
Defendants	:	

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO VOLUNTARILY DISMISS CASE WITH PREJUDICE

Background.

Plaintiff Stillwater Lakes Civic Association, Inc.'s Amended Complaint contains seven counts, all related to the Defendants having impermissibly misappropriated the Association's trade name, confusing users, via Defendants' Website and domain names.

Prior to initiating this action, by letter dated September 11, 2007, the Association requested that Defendants immediately remove their website. See Exhibit D to Amended Complaint (Letter 9/11/07). The Association explained: "This is due to the fact that the website is not authorized or censored by the Board of Directors. In addition, it contains misinformation which prompted a lawsuit against the Association last year." Id. The Defendants refused to terminate the website. To the contrary, attached as Exhibit A to Plaintiff's Amended Complaint is a copy of the home page for the website as it existed in the months preceding the initiation of this action. As of October 2008, Defendants' home page contained a large introductory banner which included a photograph in the background of the community's lake with the boldfaced words "Stillwater Lakes Civic Association" in the foreground. Further, the first letters in each word (SLCA) were highlighted by being increased in font size and a different color from the rest of the text. A couple inches below the banner appeared the sentence, "Welcome to SLCA!" Underneath that salutation was a photograph of the Association's physical road sign which reads "Stillwater Lakes Civic Association." Next to the sign was a sentence that read: "Stillwater Lakes Civic Association (SLCA) is conveniently located off Route 940, near Interstates 380 & 80, in Pocono Summit,

Pennsylvania." Clearly, the SLCA acronym was quite important to Defendants, as the site went on to make other references to SLCA. Any reasonable person viewing this website would unquestionable have been left to believe that it was owned and operated by the Association.

This resulted in the Association, through its attorney, sending Defendants a second letter. See Exhibit E to Amended Complaint (Letter 10/23/08). The second letter explained the following:

> [W]e are concerned with: 1) the prominent presence of the Association's official corporate name on the site, and 2) the lack of any formal disclaimer on the site stating that the site is ***not*** the official site of Stillwater Lakes Civic Association. As you know, the Association obtained all rights to its corporate name upon the filing of Articles of Incorporation many years ago. Thus, your present use of SLCA's corporate name on your website is confusing users and leading them to an unofficial website. You are misappropriating the Association's corporate name without its authorization, which constitutes unfair competition and common law trademark infringement. Your tortious interference with the Association's trade name is in bad faith, adversely affects the Association's operations, and must cease immediately.
>
> This letter serves as notice that our firm is authorized to file a Complaint and a Motion for Preliminary Injunction against you on November 3 if the following actions are not taken:
>
> 1. You transfer your registration and rights to the domain names www.stillwaterlakes.com and www.stillwaterlakes.net to the Association;

> 2. You take no steps to register any domain name that is substantially similar to "Stillwater Lakes Civic Association" or any similar derivative name;
> 3. Any site that you presently or in the future may maintain cannot include any prominent use of the Association's corporate name; and
> 4. Any site that you presently or in the future may maintain must include a prominent specific disclaimer advising users that the site is not the official site of SLCA.
>
> While the Association cannot impinge upon any unit owner's free speech rights, it can take action to protect against the misappropriation of its valid corporate name. Thus, it is imperative that you take the above steps no later than close of business on Friday, October 31, 2008 to avoid litigation. Id.

Instead of complying with the Association's demands, Defendants made changes to the website so as create even more confusion. See Exhibit F to Complaint. While they did change the wording in the banner from "Stillwater Lakes Civic Association," they made sure to pick a phrase with the same "SLCA" acronym. The banner now read: "Stillwater Lakes Community Activists" with the first letters of each word still highlighted by being increased in font size and a different color from the rest of the text. The updated website still proclaimed, "Welcome to SLCA!" It now, however, also contains this passage: "Stillwater Lakes Community Activists (SLCA) is a growing group of property owners in the planned community known as Stillwater Lakes Civic Association." This phrase,

alone, is inaccurate and confusing. Plaintiff Stillwater Lakes Civic Association is not a planned community, rather it is the planned community's unit owners association. See 68 Pa. C.S. § 5103. Most importantly, the updated site also made constant mention of the Association and repeatedly confused the reader by utilizing the acronym "SLCA" to reference both the Stillwater Lakes Community Activists and the Association without distinction.

Since the initiation of this action, however, Defendants have made changes to the website's home page that decrease the chance of confusion regarding Plaintiff's involvement and/or affiliation with the website. A copy of the website's current homepage is attached to Plaintiff's Motion to Dismiss as Exhibit "C" and incorporated herein.

Importantly, the homepage of the website now states "Welcome to Stillwater Lakes Community Activist!" It also more clearly distinguishes between Defendant Stillwater Lakes Community Activist and Plaintiff Stillwater Lakes Civic Association. Moreover, it no longer confusingly refers to both entities using the same "SLCA" acronym.

Finally, and perhaps most importantly, the homepage now also contains two separate disclaimers which proclaim:

> **Please note:** This website is neither owned or operated by Stillwater Lakes Civic Association or its Board of Directors. We are just community members frustrated by the lack of communication and fiscal responsibility of the board and management company. The articles, notices, advertisments (sic) and any other information on this site does not necessarily reflect the views or opinions of the website or the Stillwater Lakes Civic Association's Board of Directors or management company, unless expressly and specifically stated therein.

Aside from the decreased risk of confusion, Plaintiff can no longer afford to fund this case through trial.

Procedurally, the parties have exchanged written discovery and Plaintiff has deposed three non-party witnesses. Plaintiff has also subpoenaed documents from a non-party. The parties have not yet, however, deposed each other. If this case were to proceed forward, it is expected that all parties to the lawsuit would need to be deposed at great cost and effort.

Accordingly, Plaintiff filed its Motion to Dismiss with Prejudice along with this Brief in Support of same.

Statement of Issues Presented.

Whether Defendants should be allowed to voluntarily dismiss this case with prejudice.

Suggested Answer: Yes.

Discussion.

Defendants should be allowed to voluntarily dismiss this case with prejudice.

Federal Rule of Civil Procedure 41(a)(2) reads, in relevant part, as follows: "[A]n action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper…" Further, a "motion for voluntary dismissal under Fed.R.Civ.P. 41(a)(2) lies within the sound discretion of the district court." Citizens Sav. Ass'n v. Franciscus, 120 F.R.D. 22, 24 (M.D.Pa., 1988). Nonetheless, "[i]t is generally considered an abuse of discretion for a court to deny a plaintiff's request for voluntary dismissal with prejudice." Degussa Admixtures, Inc. v. Burnett, 471 F. Supp. 2d 848, 852 (W.D. Mich. 2007) (citing Smoot v. Fox, 340 F.2d 301, 303 (6th Cir. 1964)); see also Lum v. Mercedes Benz, USA, L.L.C., 246 F.R.D. 544, 545 (N.D. Ohio 2007).

Along these lines, the District Court for the Eastern District of Pennsylvania has explained the following:

> Whether a dismissal should be granted on a Rule 41(a)(2) motion lies within the sound discretion of the Court. Ockert v. Union Barge Line Corp., 190 F.2d 303, 304-05 (3d Cir. 1951); 9 Wright & Miller s 2364 at 161. The purpose of the Rule is primarily to prevent voluntary dismissals which will prejudice the opposing party, and to permit the Court to impose curative conditions by the Court to avoid such

prejudice. Id. at 165. Generally, courts have followed the principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit. See Westinghouse Electric Corp. v. United Electrical Radio and Machine Workers of America, 194 F.2d 770, 771 (3d Cir. 1952); 9 Wright & Miller s 2365 at 165. ***In a case such as this, where the plaintiff has consented to dismissal with prejudice, the contention that the motion should not be granted is unpersuasive***. As stated by Professor Moore,

> A different situation may be presented where the plaintiff moves to dismiss with prejudice. A trial court may abuse its discretion in denying such a motion where dismissal would terminate the entire action since courts should not conduct useless trials. Caution should be exercised, however, in considering such a motion in multiple party litigation, since the interests of parties to claims not subject to the motion should also be considered.

5 Moore's Federal Practice P 41.05(1) at 41-74; See Smoot v. Fox, 340 F.2d 301, 303 (6th Cir. 1964); Slotkin v. Brookdale Hospital Center, 377 F.Supp. 275 (S.D.N.Y. 1974). A dismissal of this action with prejudice terminates the entire action and will avoid a useless trial. Furthermore, there is no potential for prejudice to Majik-Ironers since the dismissal of Evans' case with prejudice will give Majik-Ironers the basic relief which it seeks, i.e., a final determination of the controversy in its favor and freedom from the possibility of further suit by the plaintiff and its privies on the same cause of action. For these reasons the Court will grant Evans' motion for a voluntary dismissal of this action with prejudice.

John Evans Sons, Inc. v. Majik-Ironers, Inc., 95 F.R.D. 186, 190 -191 (D.C.Pa., 1982) (emphasis added).

In the case at hand, Plaintiff has consented to dismissal of the case with prejudice. Such a dismissal will provide Defendants with a final determination of the controversy in their favor and freedom from the possibility of further suit by the Plaintiff on the same causes of action. Accordingly, there is no reason to deny Plaintiff's Motion.

Conclusion.

Based upon the above, Plaintiff's Motion to Dismiss should be granted.

YOUNG & HAROS, LLC

Date: May 9, 2011

BY /s/ Nicholas Charles Haros

NICHOLAS CHARLES HAROS, ESQ.
Attorney I.D. No. PA 76195
802 Main Street
Stroudsburg, PA 18360
(570) 424-9800
FAX: (570) 424-9288
nharos@eastpennlaw.com

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2011, I caused a copy of Plaintiff's Motion to Dismiss to be served on counsel electronically via the ECFS of the Middle District Court:

MARSHALL E. ANDERS, ESQ.
18 North 8th Street
Stroudsburg, PA 18360
(570) 424-1117
FAX: (570) 424-2814
marshall@andersmasington.com

Attorney for Defendants

/s/ Nicholas Charles Haros_____

NICHOLAS CHARLES HAROS, ESQ.
Attorney I.D. No. 76195
802 Main Street
Stroudsburg, PA 18360
(570) 424-9800
FAX: (570) 424-9288
Email: nharos@eastpennlaw.com
Attorneys for Plaintiff