

NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS- 11333

RED VENTURES, LLC and MODERN
CONSUMER RV, LLC,

Plaintiffs/Counterclaim
Defendants,

v.

MODERN CONSUMER, LLC, MICHAEL
FISHMAN, MICHAEL JACOBSON,
STEVEN LEAVY and JOSH REZNICK,

Defendants/Counterclaim
and Third-Party Plaintiffs,

v.

RICARDO ELIAS, MARK BRODSKY and
DAN FELDSTEIN,

Third-Party Defendants.

ORDER

THIS MATTER is before the Court on Plaintiffs' and Third-Party Defendants' Motion for Sanctions against Defendants Michael Jacobson and Steven Leavy for their failure to attend a mediated settlement conference. After considering the Motion, the briefs of the parties, and the arguments of counsel, the Court makes the following:

FINDINGS OF FACT

1. Plaintiffs filed their Complaint on 14 May 2009.
2. The case was designated as mandatory complex business on 17 June 2009.
3. On 18 August 2009, the Court entered a Case Management Order ("CMO") requiring the parties to select a mediator by 18 September 2009 and complete mediation by 30 June 2010.

4. The parties agreed to mediate the case before conducting extensive discovery.

The parties also agreed that this initial mediated settlement conference would be “preliminary,” and would not result in an impasse if the parties could not settle the case at that time.

5. On 18 September 2009, the parties designated David B. Hamilton as their Mediator.

6. After consulting with the parties, the mediator set the initial mediated settlement conference (the “Conference”) for 12 October 2009 at the Mediator’s office.

7. All parties received notice of the Conference.

8. Plaintiffs and Third-Party Defendants attended the Conference.

9. Defendants Jacobson and Leavy did not attend the Conference, nor did they give notice that they would not attend.

10. Plaintiffs and Third-Party Defendants declined to proceed with the Conference without having all parties present.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Rule 4 of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions (the “Rules”) requires all individual parties to attend a mediated settlement conference. Rules 4A(1)(a)(i).

2. The Rules also provide that a party:

may have the attendance requirement excused or modified, including the allowance of that party’s or person’s participation without physical attendance: (a) By agreement of all parties and persons required to attend and the mediator; or (b) By order of the Senior Resident Superior Court Judge, upon motion of a party and

notice to all parties and persons required to attend and the mediator.

Rules 4A(2).¹

3. If a party required to attend a mediated settlement conference fails to do so, the Court may impose sanctions “including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.”

Rules 5.

4. Defendants Jacobson and Leavy contend that the mediated settlement conference scheduled for 12 October 2009 was not the mandatory conference contemplated by the Rules, but was instead a “voluntary” proceeding that they were not obligated to attend. The Court disagrees.

5. In this case, the parties agreed in advance to convene a preliminary mediated settlement conference before undertaking substantial discovery. The parties also understood that if the Conference did not result in a settlement, the mediator would re-convene it at a later date.

6. The duly appointed mediator scheduled the Conference pursuant to the Rules and the CMO. Jacobson and Leavy received notice of the Conference, and they failed to attend.

7. Jacobson and Leavy gave no notice that they would not attend, nor did they seek to be excused from attending the conference. Moreover, there simply is no basis in the record for Defendants’ belief that they were free to attend the Conference—or not—at their pleasure.

8. The Court concludes that Jacobson and Leavy failed to attend the Conference without good cause. Accordingly, these Defendants should be sanctioned for their misconduct.

¹ Defendants could have submitted such a motion to me for consideration. BCR 15.1 (2006).

9. After considering the affidavits submitted by counsel for Plaintiffs and Third-Party Defendants, the Court finds that counsel's \$405.00 hourly rate is comparable to the rates of other attorneys with similar experience and practices in the Charlotte, North Carolina, market.

10. Accordingly, the Court awards sanctions in the amount of \$5,000.00, allocated as follows:

a. \$368.75, representing that portion of the mediation fee incurred by Plaintiffs and Third-Party Defendants for the Conference;

b. \$1,215.00 for the time spent by counsel for Plaintiffs and Third-Party Defendants attending the Conference; and

c. \$3,416.25, reflecting the Court's estimate of a reasonable fee for the time spent by counsel for Plaintiffs and Third-Party Defendants preparing and arguing the Motion.

11. The Court **DENIES** the Third-Party Defendants' request to recover sanctions for their lost time, as well as for the time counsel spent preparing for the Conference.

12. Jacobson and Leavy shall be jointly and severally liable for payment of the sanction, which shall be paid on or before **29 January 2010**.

CONCLUSION

The Court **GRANTS** the Motion for Sanctions. Defendants Michael Jacobson and Steven Leavy shall pay Plaintiffs and Third-Party Defendants a total sum of **\$5,000.00** on or before **29 January 2010**.

SO ORDERED, this the 22nd day of December, 2009.

/s/ Albert Diaz
Albert Diaz
Special Superior Court Judge