

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY,
BUSINESS COURT**

R & G AVIATION, LLC,)
)
 Plaintiff,)
)
 vs.)
)
 BUSINESS AIRCRAFT LEASING, INC.,)
)
 Defendant.)

NE
No. 15-1004-BC

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**MEMORANDUM AND ORDER DENYING
DEFENDANT'S MOTION TO DISMISS AND
REQUEST TO RECOVER ATTORNEYS' FEES**

On November 16, 2015, Defendant Business Aircraft Leasing, Inc. filed a Motion to Dismiss two claims of the Plaintiff's lawsuit: (1) Count III – Breach of Covenant of Good Faith and Fair Dealing; and (2) Count VII – Violation of Tennessee Consumer Protection Act.¹ In addition, the Defendant seeks attorneys' fees pursuant to Tennessee Code Annotated sections 20-12-119(c) and 47-18-109(e)(2). For efficiency, the Court informed the parties that it would rule on the Motion on the papers. For the following reasons, the Motion is denied.

¹ On the same day, the Defendant also filed a *Motion For Summary Judgment* as to the remaining claims in the lawsuit and set it for a hearing on January 8, 2016. On December 16, 2015, the Court held in abeyance setting a hearing on Defendant's *Motion For Summary Judgment* "until Plaintiff's Counsel files a notice with the Court that the Charles Mulle deposition has been taken. Plaintiff's December 7, 2015 *Discovery Report* complies with Tennessee Civil Procedure Rule 56.07 and provides sufficient grounds for continuance of the summary judgment motion." *Order (1) Denying Defendant's Motion For Protective Order On Subpoenas And (2) Structuring Preliminary Discovery And Dispositive Motions*, p. 2 (Dec. 7, 2015).

Amended Complaint

Context for the ruling herein is that subsequent to the filing of Defendant's Motion to Dismiss on November 16, 2015, and prior to oral argument, the Plaintiff filed an Amended Complaint pursuant to Rule 15.01 of the Tennessee Rules of Civil Procedure. In that *Amended Complaint*, the Plaintiff made two changes relevant to the ruling on the Motion to Dismiss. The Plaintiff withdrew the Count VII – Violation of Tennessee Consumer Protection Act claim. Additionally, as it relates to the claim for breach of the covenant of good faith and fair dealing, the Plaintiff renumbered and labeled this as “Count II – Breach Of Contract: Breach of Covenant Of Good Faith And Fair Dealing.” *Amended Complaint*, p. 5 (Jan. 13, 2016).

Count III Breach of Covenant of Good Faith and Fair Dealing—Motion to Dismiss or revised pleading is denied.

As a matter of law, the Court rejects the Defendant's position that the Plaintiff's claim for breach of the covenant of good faith and fair dealing must be dismissed or revised because it is styled in the *Amended Complaint* as “Count II.” While the Defendant is correct, as conceded by the Plaintiff, that a claim for breach of the covenant of good faith and fair dealing is not an independent cause of action but a subset of a breach of contract claim, this concession leaves only a formatting dispute whose revision would add another layer of unnecessary delay and expense which ultimately will not affect the merits of the case in any meaningful way.

In so concluding, the Court begins with the clear provision of Tennessee law cited by Defendant that a claim for breach of the covenant of good faith and fair dealing “is not a cause of action in and of itself” but is, instead, a component of a breach of contract claim. *See, e.g., Lyons v. Farmers Ins. Exch.*, 26 S.W.3d 888, 894 (Tenn. Ct. App. 2000).

Moreover, the Plaintiff candidly admits that Count II is not a separate independent cause. To clarify this point in the Amended Complaint the Plaintiff has entitled it “Count II – Breach of Contract: Breach of Covenant of Good Faith And Fair Dealing”.

With this clarification, the Court finds Plaintiff’s pleading conveys that the Plaintiff is not alleging a separate independent cause of action, but rather is merely separating out the breach of the covenant of good faith and fair dealing issue for emphasis in support of its claim for breach of contract. Such pleading, the Court finds, does not violate Tennessee’s pleading standards: TENN. R. CIV. P. 8.06 (West 2016) (“All pleadings shall be so construed as to do substantial justice.”); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426-27 (Tenn. 2011) (“Under Tennessee Rule of Civil Procedure 8, Tennessee follows a liberal notice pleading standard, *see Leach*, 124 S.W.3d at 92–93, which recognizes that the primary purpose of pleadings is to provide notice of the issues presented to the opposing party and court. *Abshure v. Methodist Healthcare–Memphis Hosps.*, 325 S.W.3d 98, 103 (Tenn. 2010); *see also* Robert *427 Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 5–4(a) (3d ed. 2009) (“The essential function of the pleadings is simply to give notice of a claim or defense. History, as Professors Wright and Miller point out, has shown that the pleadings cannot successfully do more.”) (footnotes omitted”).

Additionally, the Court does not adopt Defendant's analysis that the *Amended Complaint* violates Rule 10.02 of the Tennessee Rules of Civil Procedure. The primary function of Rule 10.02 is practicality and clarity by the use of formatting:

All averments of claim or defense shall be made in numbered paragraphs, contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

ADVISORY COMMISSION COMMENT

Rule 10.02 sets out a technique for achieving clarity and simplicity in pleading. The requirements as to separate paragraphs and counts are qualified by considerations of practicality and clarity. Thus, each claim founded upon a separate transaction is not absolutely required to be set out in a separate count unless the separation facilitates the clear presentation of the matters set forth.

TENN. R. CIV. P. 10.02 (West 2016).

With the Plaintiff's admission of record that it is not asserting a separate cause of action for breach of the covenant of good faith and fair dealing, there is no violation of Rule 10.02.

Further, the Court declines Defendant's suggestion to "order Plaintiff to consolidate Counts I and II." Now that the Plaintiff has admitted on the record that Count II is a component/subset of a breach of contract claim and put that in the Count II heading, requiring the formatting revision suggested by the Defendant at this stage of the lawsuit would not further the policy considerations of clarity and practicality outlined in

Rule 10.02, and such a revision would add another layer of delay and expense which ultimately will not advance the merits of the case.

Count VII Tennessee Consumer Protection Act Claim—Motion to Dismiss is denied as moot.

In its Motion to Dismiss, filed before the *Amended Complaint*, the Defendant asserted that the Plaintiff's Count VII – Violation of Tennessee Consumer Protection Act, failed to state a claim upon which relief could be granted “because the statute of limitations and statute of repose bar the claim.” *Motion To Dismiss*, p. 1 (Nov. 16, 2015). With the filing of the *Amended Complaint*, the Defendant has conceded in its *Reply* that “because Plaintiff has withdrawn its claim for violation of the Tennessee Consumer Protection Act (“TCPA”), BALI's Motion with respect to that claim is moot...” *Reply To Plaintiff's Response in Opposition To Defendant's Motion To Dismiss*, p. 2 (Jan. 21, 2016).

Attorneys' Fees Pursuant To TENN. CODE ANN. §§ 20-12-119(c) and 47-18-109(e)(2)—Denied.

In addition to seeking dismissal, the Defendant also seeks in its Motion recovery of reasonable attorneys' fees and costs incurred in preparing and arguing the Motion pursuant to Tennessee Code Annotated sections 20-12-119(c) and 47-18-109(e)(2).

With respect to section 20-12-119(c), a prerequisite to recovery of fees is the granting of a motion to dismiss:

20-12-119. Discretion of judge.

* * *

(c)(1) Notwithstanding subsection (a) or (b), in a civil proceeding, where a trial court grants a motion to dismiss pursuant to Rule 12 of the Tennessee Rules of Civil Procedure for failure to state a claim upon which relief may be granted, the court shall award the party or parties against whom the dismissed claims were pending at the time the successful motion to dismiss was granted the costs and reasonable and necessary attorney's fees incurred in the proceedings as a consequence of the dismissed claims by that party or parties. The awarded costs and fees shall be paid by the party or parties whose claim or claims were dismissed as a result of the granted motion to dismiss.

That prerequisite has not been satisfied in this case. Defendant's Motion to Dismiss is being denied, and the Plaintiff's withdrawal of its Consumer Protection Claim in amending its pleadings and prior to oral argument, preceded and preempted dismissal. Thus the prerequisite of a dismissal stated in section 20-12-119 to award attorneys fees is not present.

As to the Defendant's Tennessee Code Annotated section 47-18-109(e)(2) claim to attorneys fees, that statute provides as follows:

(e)(1) Upon a finding by the court that a provision of this part has been violated, the court may award to the person bringing such action reasonable attorney's fees and costs.

(2) In any private action commenced under this section, upon finding that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may require the person instituting the action to indemnify the defendant for any damages incurred, including reasonable attorney's fees and costs.

TENN. CODE ANN. § 47-18-109(e) (West 2016).

The Defendant's argument is that, regardless of the *Motion to Dismiss* being rendered moot by the Plaintiff filing an *Amended Complaint* removing its Consumer Protection claim, that removal is indicative of a frivolous or meritless claim:

Pursuant to Tenn. Code Ann. § 47-18-109(e)(2), BALI is entitled to receive its reasonable attorneys' fees and costs incurred in preparing this Motion and related filings. 'In any private action commenced under this section, upon finding that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may require the person instituting the action to indemnify the defendant for any damages incurred, including reasonable attorney's fees and costs.' Tenn. Code Ann. § 47-18-109(e)(2) (emphasis added). Here, the circumstances support an award of fees and costs to BALI.

Plaintiff withdrew its TCPA claim only after BALI filed its Motion to Dismiss based on expiration of the statute of limitations governing such claims. *See* Tenn. Code Ann. § 47-18-110. Plaintiff dropped its TCPA claim because it was baseless and without legal or factual merit. Because of the availability of treble damages and attorney's fees, TCPA claims are serious and are potentially devastating to Tennessee businesses. The TCPA's provision for the award of attorneys' fees to TCPA defendants "is designed to discourage consumers from using the Act to file frivolous or baseless claims...[i.e., those that are] so utterly lacking in an adequate factual predicate or legal ground as to make the filing of such a claim highly unlikely to succeed." *Martin v. Franklin Cool Springs Corp.*, No. M2014-01804-COA-R3-CV, 2015 WL 7062124, at *4 (Tenn. Ct. App. Nov. 10, 2015) (quoting *Glanton v. Bob Parks Realty*, No. M2003-01144-COA-R3-CV, 2005 WL 1021559, at *9 (ten. Ct. App. Apr. 27, 2005) (attached). Such is the case here. Though the award of fees under this provision is discretionary, when a complaint, on its face, fails to establish a legal predicate for a TCPA claim, the success of that claim is not merely highly unlikely, *id.*, but is impossible. Given that the statute of limitations plainly barred Plaintiff's TCPA claim and that Plaintiff utterly failed to offer any defense for its assertion of a TCPA claim so far outside the TCPA's limitations period, the Business Court should find that an award of reasonable attorneys' fees and costs to BALI is justified and warranted.

Reply To Plaintiff's Response In Opposition To Defendant's Motion To Dismiss, pp. 3-4 (Jan. 21, 2016). For several reasons, the Court does not adopt this analysis.

The Plaintiff was entitled, as a matter of right pursuant to Rule 15.01 of the Tennessee Rules of Civil Procedure, to voluntarily withdraw the Consumer Protection Claim with the filing of an *Amended Complaint*. Under these circumstances, the Court is not authorized to make a finding as to the withdrawn claim because the only pleading now at issue in the case is the *Amended Complaint*. See, *Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992) (“We first note that, under the Federal Rules of Civil Procedure,² an amended complaint supersedes the original complaint, rendering the original of no legal effect, unless the amended complaint specifically refers to or adopts the original. (FN 2 – The same result obtains under the Tennessee Rules of Civil Procedure. See *Railroad v. House*, 104 Tenn. 110, 111, 56 S.W. 836, 836 (1900); *McBurney v. Aldrich*, 816 S.W.2d 30, 33 (Tenn.Ct.App.1991)).”).

Additionally, the Defendant’s *Reply* presumes that the factual and legal reasons why the Plaintiff amended its Complaint and subsequently withdrew its TCPA claim are because the TCPA claim “was baseless and without legal or factual merit. Because of the availability of treble damages and attorney’s fees, TCPA claims are serious and are potentially devastating to Tennessee businesses.” *Reply To Plaintiff’s Response In Opposition To Defendant’s Motion To Dismiss*, pp. 3 (Jan. 21, 2016). Equally possible and plausible, however, are a number of other reasons a plaintiff may choose to withdraw a claim: the cost of discovery and litigation on the issue, encouraging settlement discussions, the risk of a protracted, expensive appeal, etc. These other reasons are especially prevalent if the issue is the tolling exception to a statute of limitations defense about when the party knew or should have known it had a claim, or the Statute of Repose

under which litigation and appeal are legion. Because of the varied reasons, the Court is unable to make the necessary finding, under the statute for assessing fees, that the TCPA claim was baseless and meritless.

As further support for an award of attorneys' fees, the Defendant cites to the case of *Martin v. Franklin Cool Springs Corp.*, No. M201401804COAR3CV, 2015 WL 7062124, at *5 (Tenn. Ct. App. Nov. 10, 2015). However, a review of the facts and circumstances involved in *Martin* reveal that it is inapplicable to this case. While the *Martin* case did involve an award of attorneys' fees pursuant to section 47-18-109(e)(2), the Court only granted the attorneys' fees *after* it had dismissed the plaintiff's TCPA claim for failure to state a claim. The *Martin* case does not address circumstances similar to this case where the Plaintiff amends a complaint as a matter of right pursuant to Rule 15.01.

In affirming the trial court, the Court Appeals in *Martin* clarified that the award of attorneys' fees under section 47-18-109(e)(2) was "predicated" on the Rule 12 dismissal:

Plaintiff does not appeal the dismissal of his complaint. Rather, Plaintiff takes issue with the court's award of attorney's fees pursuant to Section 109(e)(2) of the TCPA.

The trial court dismissed the complaint pursuant to Tenn. R. Civ. P. 12.02(6); thus, the complaint "on its face failed to establish a legal predicate for the Tennessee Consumer Protection Act, making the success of that claim highly unlikely." *Glanton*, 2005 WL 1021559, at *10.⁵ Plaintiff disagrees, arguing in his brief that:

[H]is claim was not "so utterly lacking in adequate factual predicate or legal ground as to make the filing of such a claim highly unlikely to succeed" ... [but that] once


Appellant/Plaintiff attached [WSI's] Transaction History Ledger to his Complaint showing the \$10.00 flat late fee charges, [which were] not a reasonable estimation of damages ... [or] on its face not reasonably calculated to recover for actual damages, and cited in his Complaint "The intentional actions and omissions of ... Defendant WSI constitute Unfair and Deceptive trade practices in violation of T.C.A. § 47-18-101 et seq." ..., [the foregoing] created a prima facie claim for relief which should have easily survived Appellee/Defendant WSI/UBS's Motion to Dismiss.

This argument does not address the manner in which Plaintiff contends the court abused its discretion in awarding attorney's fees for the successful defense of the TCPA claim. *The award of fees was predicated on the grant of WSI's Rule 12 motion which, in turn, invoked Section 109(e)(2) of the TCPA.* Plaintiff has not identified any act or ruling from which we could determine that the court's decision to impose attorney's fees is arbitrary, illogical, or unconscionable, and we discern none on our review of the record.

Martin v. Franklin Cool Springs Corp., No. M201401804COAR3CV, 2015 WL 7062124, at *4-5 (Tenn. Ct. App. Nov. 10, 2015) (emphasis added).

Lastly, an award of attorneys' fees pursuant to Tennessee Code Annotated section 47-18-109(e)(2) is within the discretion of the Court. *See, e.g., Martin v. Franklin Cool Springs Corp.*, No. M201401804COAR3CV, 2015 WL 7062124, at *4 (Tenn. Ct. App. Nov. 10, 2015) ("Further, this Court noted that '[a]s the language of the statute makes clear, even where this prerequisite is met, whether or not to award fees is discretionary with the court.'" *Glanton*, 2005 WL 1021559, at *9 (citing *Wagner*, 139 S.W.3d at 304)). Given the facts and circumstances of this case and the case law, the Court concludes that an award of attorneys' fees and costs would be an abuse of discretion.

For all these reasons, the Defendant's *Motion To Dismiss* and request to recover attorneys' fees are denied.



ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Jonathan Cole
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