

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION

Marva L. Austin

Plaintiff

v.

Case No. 2:07cv376

Richeryl Cooke

Defendant

**MEMORANDUM IN SUPPORT OF DEFENDANTS MOTION TO DISMISS  
FOR AN AWARD OF SANCTIONS PURSUANT TO FRCP 11  
OR IN THE ALTERNATIVE FOR LEAVE OF COURT TO FILE A LATE ANSWER**

FACTS:

On or about March 29, 2007, Richeryl Cooke a resident of the Commonwealth of Virginia, commenced an action in the Norfolk General District Court, case number GV07-13184 against Marva Austin, a resident of the Commonwealth of Virginia, for a claim of Malicious Prosecution, a civil claim, found as an intentional tort under Virginia Common Law. The claim arose out of criminal complaint wherein Marva Austin charged Richeryl Cooke with Assault and Battery alleged to have occurred on or about September 29, 2006. A trial on these proceedings was held on December 1, 2006 in the Norfolk General District Court Criminal Division, case number GC06-15859. The case was dismissed in favor of Richeryl Cooke. A copy of the transcript is attached hereto and incorporated herein as Exhibit A. As a result of the dismissal of the criminal proceedings, Richeryl Cooke commenced the civil action in the Norfolk General District Court for a claim of attorney fees, lost wages and Malicious prosecution. A copy of the Warrant in Debt is attached hereto as Exhibit B. The parties, in lieu of exercising their right to a trial by the court, voluntarily agreed to binding arbitration through the Mediation Center of Hampton Roads. A copy of the binding arbitration agreement is attached as Exhibit C. Subsequent to the agreement to binding arbitration, on May 3, 2007, Arbitrator David L. McDonald, awarded

Richeryl Cooke \$1,512.90. A copy of the award is attached hereto as Exhibit D.

Plaintiff, Marva Austin, now seeks to set aside the Arbitration Award in this action pursuant to the Federal Arbitration Act for various reasons contained in her petition.

Defendant has not filed an answer in these proceedings and the Clerk of Court has issued a Default notice on October 29, 2007. The matter is now pending for hearing November 27, 2007 at 10:00am.

Argument:

The Plaintiff, in her petition invokes Federal Question jurisdiction by the Court under the Federal Arbitration Act found in Title 9 of the United States Code. Title 9, US Code, Section 1-14, was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970 (84 Stat. 692), two new Sections were passed by the Congress in October of 1988 and renumbered on December 1, 1990 (PLs669 and 702); Chapter 3 was added on August 15, 1990 (PL 101-369); and Section 10 was amended on November 15, 1990. Jurisdiction for Federal Courts is found in 9 USC 1 as follows:

9 USC § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment

of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

As stated above in the facts of this case, the dispute between the parties arises out of an intentional common law tort case between citizens in the Commonwealth of Virginia. No transaction occurred between the parties that effects Maritime Transactions or Interstate Commerce. Further, the only other jurisdiction for this act is found in Section 4 of the Act:

9 USC § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [[28 USCS §§ 1](#) et seq.], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

In this matter, the parties voluntarily agreed to binding arbitration. There is no contractual right either party had to compel the other to arbitration in these proceedings. The Plaintiff's claims, even if taken as true, fail to state a claim upon which relief can be granted pursuant to FRCP 12(b)(6).

Further, as this Court has no Federal Question subject matter jurisdiction over the controversy in question, the matter must be dismissed pursuant to FRCP 12(b)(1).

Further, the Plaintiff has improperly brought this action in Federal Court without subject matter jurisdiction for the sole purpose to harass, delay and cause needless expenses to the Defendant. The claims of the Plaintiff are subject to the jurisdiction of the Norfolk General District Court, or a similar Court of competent general jurisdiction. The action has caused the Defendant to incur attorney fees and costs in excess of \$2,500.00 and the Defendant therefore moves for sanctions against the Plaintiff pursuant to FRCP 11 to award her reimbursement of her costs and attorney fees expended to date.

Finally, in the alternative, if the Court finds jurisdiction in this matter, the Defendant moves the Court for leave of Court to file a late answer, as the Defendant was a pro se litigant prior to the filing of these pleadings.

#### Conclusion

The Defendant prays that this Court dismiss this action pursuant to FRCP 12b(1) and/or 12(b)(6), to award sanctions to the Defendant for her attorney fees and costs expended or in the alternative grant the defendant leave to file a late answer, and to grant the Defendant any further relief as may be appropriate under the circumstances.

Respectfully Submitted,

Richeryl Cooke

By: \_\_\_\_\_/s/\_\_\_\_\_

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#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy was mailed to the Plaintiff this 20<sup>th</sup> day of November 2007 to:

Marva Austin  
145 West Moreell Circle  
Norfolk, VA 23505

\_\_\_\_\_/s/\_\_\_\_\_

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