Aubin Industries, Incorporated v. Smith et al Doc. 135

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

AUBIN INDUSTRIES, INC.,	:	Case No. 1:04-cv-681
	:	
Plaintiff,	:	
	:	Magistrate Judge Timothy S. Black
vs.	:	
	:	
JEFF SMITH, *et al.*,	:	**ORDER**
	:	
Defendants.	:	

This civil case is currently before the Court on Plaintiff's motion to review and overturn the clerk's order taxing all costs to Plaintiff. (Doc. 129) and Defendants' memorandum in opposition (Doc. 132). The Court heard oral argument on May 27, 2009.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

On April 29, 2004, Plaintiff Aubin Industries, Inc., a small business in California, filed a complaint against four large corporate defendants, Wellington Industries, Inc., Standex International Corporation, Colson Caster Company, and The Colson Group, and an individual principal, Jeff Smith, for breach of distributorship and requirements agreements, among other claims.

Plaintiff pursued the litigation in good faith throughout 2004, 2005, and several months of 2006, including the production and review of numerous documents and the taking of depositions of several witnesses. (Doc. 129 at 3). Plaintiff and Defendants filed cross motions for summary judgment in May 2006. (*Id.*)

On September 6, 2007, this Court denied Plaintiff's motion for summary judgment, granted Defendants' motion for summary judgment, and dismissed the case. (Doc. 117). The Sixth Circuit affirmed the District Court's grant of summary judgment and dismissal of the case on November 20, 2008. (Doc. 123).

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Defendants filed a bill of costs seeking reimbursement of $11,474.09 in costs, itemized as "fees for witnesses," "docket fees under 28 U.S.C. § 1923," and "other costs." (Doc. 119).

In response, Plaintiff requests that the Court deny Defendants' bill of costs in total, because imposing such costs against Plaintiff would be inequitable and unfair. (Doc. 129 at 2-6). In the alternative, Plaintiff requests that the Court reduce the costs to reflect only the necessary items, alleging that many of the costs sought are not taxable under 28 U.S.C. §§ 1821, 1920, and 1923. (*Id.* at 6-13).

II. ANALYSIS

28 U.S.C. § 1920 provides that certain specific costs incurred in litigation are permitted to be taxed as costs against the losing party. By terms of that statute, those permissible costs are:

> "(1) fees of the clerk and marshal; (2) fees of the court reporter for all and any part of the stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under section 1923 of this title; and (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services under section 1828 of this title."

As to taxation of costs pursuant to statute, Federal Rule of Civil Procedure 54(d) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." The Sixth Circuit has held that this provision "creates a presumption in favor of awarding costs, but allows denial of costs at the discretion of the trial court." *White & White v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 730 (6th Cir. 1986).

In exercising that discretion, a court should look "first to whether the expenses are allowable cost items and then to whether the amounts are reasonable and necessary." *Jefferson v. Jefferson County Pub. School Sys.*, 360 F.3d 583, 591 (6th Cir. 2004). The court may not award costs until it has determined that the expenses sought to be taxed as costs were for material or services "'necessarily obtained for use in the case' . . . and in an amount that is reasonable." *Hartford Fin. Servs. Group, Inc. v. Cleveland Pub. Library*, No. 1:99-CV-1701, 2007 U.S. Dist. LEXIS 22528, at *2 (N.D. Ohio Mar. 28, 2007) (quoting *Berryman v. Hofbauer*, 161 F.R.D. 341, 344 (E.D. Mich. 1995)) (quoting 28 U.S.C. § 1920). Even with the presumption to award fees, Rule 54(d) does not give district courts "unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur" and so should always subject submitted costs to "careful scrutiny." *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964) (rev'd on other grounds, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)).

A. Denial of Costs

Trial courts must base their decision to award or deny costs on factors enumerated in *White & White, Inc.,* 786 F.2d at 728: "Such circumstances for denial of costs include cases where taxable expenditures are unnecessary or unreasonably large; where the prevailing party should be penalized for unnecessarily prolonging trial or for injecting unmeritorious issues; where the prevailing party's recovery is so insignificant that the judgment amounts to a victory for the defendant; and cases that are "'close and difficult.'"[1]

[1] Additional factors courts consider in determining whether or not to award costs include, whether the action was reasonable and brought in good faith, whether the prevailing party can bear its own costs without hardship, and whether awarding costs could have a chilling effect on small businesses to bring complex matters against bigger corporations. *White & White, Inc.,* 786 F.2d at 730-31.

The *White & White* factors, which were recently affirmed in *Knology v. Insight Commc'ns Co.,* 460 F.3d 722, 729 (6th Cir. 2006), were more clearly restated in question form by this Court in *Rosser v. Pipefitters Union Local 392,* 885 F. Supp. 1068, 1071-72 (S.D. Ohio 1995):

a) Were the taxable expenditures unnecessary to the case or unreasonably large?
b) Should the prevailing party be penalized for unnecessarily prolonging trial or for injecting unmeritorious issues?
c) Was the prevailing party's victory so insignificant that the judgment amounted to a victory for the opponent?
d) Was the case close and difficult?
e) Did the losing party act reasonably and in good faith in filing, prosecuting or defending the case?
f) Did the losing party conduct the case with propriety?
g) Have other courts denied costs to prevailing defendants in similar cases?
h) Did the prevailing party benefit from the case?
I) Did the public benefit from the case?
j) Did the case result in a profound reformation of current practices by defendant?
k) Does the award of costs have a chilling effect on other litigants?

Id. See also, *Singleton v. Smith*, 241 F.3d 534, 539 (6th Cir. 2001) (citing *White & White*, 786 F.2d at 732-33) (such circumstances which may justify excusing or reducing an award are recognized as including "the losing party's good faith, the difficulty of the case, the winning party's behavior and the necessity of the costs."); *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1233 (6th Cir. 1986)) (another factor to consider that may excuse or reduce an award is the indigency of the losing party).[2]

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[2] In *Lindsey v. Vaughn,* the district court determined that forcing indigent prisoners to pay costs would be unduly burdensome. No. CIV.A. 93-2030, 2001 U.S. Dist. LEXIS 15117, at *2 (E.D. Pa. Sept. 24, 2001). Similarly, the district court in *Culp v. Zaccagnino* vacated an award of costs finding that such an award would be inequitable due to the indigence of the prisoner who brought the unsuccessful civil rights action. No. 96 CIV3280, 2000 U.S. Dist. LEXIS 548, at *2 (S.D.N.Y. Jan. 18, 2000).

An unsuccessful party objecting to the taxation of costs has the burden of showing circumstances to overcome the presumption that favors the award of permissible costs to the prevailing party. *White & White*, 786 F.2d at 732; *Pion v. Liberty Dairy Co.*, 922 F. Supp. 48, 49 (W.D. Mich. 1996) (citing *White & White, Inc.*, 786 F.2d at 732) (if the unsuccessful party "seeks to be excused from the burden of paying costs, it is incumbent upon her to show circumstances sufficient to overcome the presumption favoring an award of costs to the prevailing party."); *see also* 10 C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure*: Civil 3d § 2679 (1998).

In fact, the Supreme Court has recognized that the rule, which provides that costs "shall be allowed as of course to the prevailing party unless the court otherwise directs," signals the general proposition that "liability for costs is a normal incident of defeat." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981); s*ee also Klein v. Grynberg*, 44 F.3d 1497, 1507 (10th Cir. 1995) (denying costs to a prevailing party is a "severe penalty" for which "there must be some apparent reason to penalize the prevailing party if costs are to be denied.").

1. Close and Difficult

Plaintiff argues that this court should exercise its discretion to deny Defendants' bill of costs *in toto* because this case was complex and difficult. (Doc. 129 at 2-3). In order to determine whether a case was close and difficult, a court does not simply look at whether one party clearly prevails over another, but at "the refinement of perception required to recognize, sift through and organize relevant evidence, and . . . the difficulty of discerning the law of the case." *White & White, Inc.,* 786 F.2d at 732-33.

The Sixth Circuit has upheld the denial of costs in several "close and difficult" cases involving numerous parties, lengthy trials, and voluminous exhibits and transcripts. *White & White Inc.*, 786 F.2d at 732 (citing *United States Plywood Corp. v. Gen. Plywood Corp.*, 370 F.2d 500, 508 (6th Cir. 1966)).

In *White & White, Inc.*, the court declined to order costs where the trial had taken 80 days, and there were 43 witnesses, 800 exhibits, 15,000 pages of transcripts, and a 95-page opinion by the district court. 786 F.2d at 732.

In *United States Plywood*, after a lengthy trial involving the validity of a patent and counterclaims for patent infringement, the court ruled that the defendant's patent was valid, but that there was no infringement by the plaintiff. 370 F.2d at 508. It therefore found that it would be inequitable for one side to pay the other's costs.

The instant case is not on par with the complexity of these cases.

Nevertheless, the undersigned finds that the instant case was both close and difficult, despite the fact that Defendant prevailed on summary judgment. However, simply because a case is close and difficult does not provide a basis, standing alone, to deny costs *in toto*.

2. Good Faith and Propriety

Like the close and difficult case factor, the good faith of the losing party is a relevant factor in determining whether costs should be awarded, but is not, by itself, a basis to deny all costs. *White & White, Inc.*, 786 F.2d at 730-31.

This Court is confident that Plaintiff filed this lawsuit in good faith. In fact, at oral argument, Defendants' counsel begrudgingly conceded that Plaintiff conducted itself with propriety. However, although the non-prevailing party may have demonstrated good faith in filing, prosecuting, or defending an action, such good faith is merely a relevant consideration and alone is an insufficient basis upon which to deny costs. *White & White, Inc.*, 786 F.2d at 730-31.

3. Chilling effect

Next, Plaintiff claims that awarding Defendants the costs they seek in this case will act as a deterrent and chilling effect on small businesses bringing legitimate lawsuits against big businesses for unlawful practices. (Doc. 129 at 3). However, Plaintiff offers no legal or factual support for this argument.

4. Financial hardship

In order to show an inability to pay costs, one must demonstrate both that payment would be a burden, and that the party is indigent. *Rashid v. Commc'n Workers of Am.*, No. 3:04-cv-291, 2007 WL 315355, at *2 (S.D. Ohio Jan. 30, 2007) (citations omitted) (finding that because plaintiff was earning a monthly wage, was not indigent, and identified financial hardship as the only circumstance upon which the court should deny payment of costs, he did not sufficiently demonstrate that denial of costs was a proper exercise of discretion). The burden is on the losing party to show that she is unable, as a practical matter and as a matter of equity, to pay the defendant's costs. *Weaver v. Toombs*, 948 F.2d 1004, 1014 (6th Cir. 1991). Plaintiff failed to meet this burden.

Although Plaintiff's counsel presented evidence that Plaintiff lost a considerable amount of money as a result of its dealings with the Defendants, there is no evidence that Plaintiff ever was or is indigent.

Plaintiff also maintains that the Court should consider that Defendants are prosperous companies and are able to finance their own costs.[3] (Doc. 129 at 3-4). However, the courts have made clear that an award of costs should not be reduced or denied merely because of financial disparity between the parties. *Singleton*, 241 F.3d 534 ("[T]he ability of the winning party to pay his own costs is irrelevant."); *Chapman v. A1 Transp.*, 229 F.3d 1012, 1039 (11th Cir. 2000); *Smith v. Sw. Pa. Transp. Auth.*, 47 F.3d 97, 99-100 (3rd Cir. 1995).

Balancing *all* of the factors identified by the appellate courts, Plaintiff has failed to meet its burden as required to overcome the strong presumption that a prevailing party is entitled to costs. This Court would abuse its discretion if it were to deny recovery of costs *in toto*, notwithstanding that this was a close and difficult case where equity favored Plaintiff.

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[3] For example, Plaintiff references Defendant Standex's 2008 Annual Report which reports revenues of $698 million. (Doc. 129, Ex. 1).

B. Reduction of Costs

In the alternative, Plaintiff argues that Defendants' bill of costs is excessive on its face and therefore should be reduced. When considering an award of costs under Rule 54(d), the Supreme Court has cautioned that,

> "We do not read that Rule as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be."

Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964).

Here, the Defendants' bill of costs includes "Deposition Transcripts" of $6,078.66, "Reproduction Charges" of $5,009.64, and "Fact Witness Fees" of $385.79, for a total demand of $11,474.09. (Doc. 119). The Court will address each category of costs in turn.

1. Deposition Transcripts

Courts consider deposition expenses to be taxed as costs under 28 U.S.C. § 1920, but there are limitations on such deposition expenses. *Elabiad v. Trans-West Express,* No. 303cv7452, 2006 U.S. Dist. LEXIS 48252, at *4 (N.D. Ohio 2006). Courts divide deposition costs into "overhead" and "incidental" charges. *Id.* at 6. Incidental deposition charges such as court reporter fees and transcript charges are taxable, while overhead charges such as postage and shipping and handling are not taxable. *Id.*

First, Plaintiff complains that Defendants should not recover the $150 paid to obtain an electronic copy of the videotaped depositions of Pati Radford and Dan Knapp. (Doc. 129 at 7). However, the Sixth Circuit has made clear that a party may recover both the cost of the video and the stenographic transcription. "In the Sixth Circuit, taxing both the cost of videotaping and transcribing a deposition are permissible." *Hartford Fin. Servs. Group*, 2007 U.S. Dist. LEXIS 22528, at *16 (internal citations omitted); *see also, Baker v. First Tennessee Bank*, No. 96-6740, 1998 U.S. App. LEXIS 5769, at *17 (6th Cir. 1998) ("Subsection (2) and (4) of 1920 have interpreted to authorize taxing as costs the expenses of taking, transcribing and *reproducing* depositions." (internal citations omitted) (emphasis added)). Plaintiff suggests that Defendants should have obtained a video tape instead of a copy in an electronic medium, but there is no authority for this position. Defendants appropriately asked, not for a video tape, but for a copy of the video in electronic format. Defendants are entitled to recover these costs.

Next, Plaintiff argues that the costs related to Cliff Butts' deposition transcript should not be allowed. (Doc. 129 at 8). As evidenced from the invoice, Defendants obtained a copy of the Butts transcript in electronic format (no paper copy) and therefore were charged by the court reporter for the preparation of the electronic copy of the transcript and the digital media used. Contrary to Plaintiff's allegation, the invoice does not show that three copies of the transcript were ordered, rather it shows that three CDs were needed to hold one copy. Again, these charges were in lieu of the charges for a paper copy of the transcript, and, therefore, are appropriate.

Plaintiff also submits that Defendants are not entitled to recover postage and shipping related to the depositions. (Doc. 129 at 8). Defendants, however, argue that because the *only* postage and shipping costs sought in this case are court reporter costs transferred from the court reporter to the Defendants – and not postage and shipping costs incurred between the attorney and client – such costs are allowable and should be awarded to Defendants. (Doc. 131 at 4). Defendants' argument is contrary to established caselaw.

"Postage is not a taxable cost because it is an administrative expense that represents the cost of doing business and is an expense generally incurred for a party's convenience." *Thalji v. TECO Barge Line*, No. 5:05cv-226-R, 2007 U.S. Dist. LEXIS 74817, at *5-6 (W.D. Ky. Sept. 27, 2008) (denying costs for shipping and handling of depositions and videos); *see also, Hadix v. Johnson*, 322 F.3d 895, 899-900 (6th Cir. 2003) (denying plaintiff's claim for costs including lost wages, copying costs, word processors and repairs, supplies, storage lockers, and *postage* as not costs within the meaning of § 1920).

Defendants' deposition transcript invoices include charges for shipping and handling, postage, and delivery/courier charges that total $106.26. These charges are not taxable costs and will therefore be deducted from the bill of costs. Accordingly, Defendants' "Deposition Transcripts" cost shall be reduced to $5,972.40.

2. Reproduction Charges

According to 28 U.S.C. § 1920, a clerk may tax as costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case[.]" According to the Southern District of Ohio Clerk of Courts Guidelines, the essential criteria for determining whether to tax fees for exemplification and copies is *necessity*.

Photocopying and printing costs are subject to greater scrutiny than other costs. *Bowling v. Pfizer, Inc.*, 132 F.3d 1147, 1152 (6th Cir. 1998) ("On remand, the District Court should cast a strict eye toward counsel's [photocopying] expense submissions"). "The burden is on the party seeking reimbursement for photocopying costs to show that the copies were necessary for use in the case." *Hartford*, 2007 U.S. Dist. LEXIS 22528 at 21-22 (citing *Charboneau v. Severn Trent Labs.,* No. 5:04cv116, 2006 U.S. Dist. LEXIS 16877, at *4 (W.D. Mich. 2006)).

The Sixth Circuit has warned that a court should not simply "rubber stamp" a party's photocopying expenses without examining the costs for reasonableness. *Bowling*, 132 F.3d at 1151-1152 ("Allowing a several thousand dollar payment for [in-house] photocopying expenses without looking into the cost per photocopy is exemplary of an impermissible laxity"). Further, it is necessary for the party seeking costs to submit an affidavit for any photocopying and printing costs, so the court can determine whether the charges are proper. *Hartford*, 2007 U.S. Dist. LEXIS 22528 at 24. Additional copies for the convenience of counsel and bates labeling are not taxable. *Id.* at 26; *See also*, *Twee Jonge Gezellen LTD. v. Owens-Illinois*, No. 3:04cv7349, 2007 U.S. Dist. LEXIS 96790, at *27 (N.D. Ohio, Dec. 18, 2007) ("costs associated with electronic scanning, . . . and bates labeling are not usually allowable as taxable costs.").

Defendants have submitted "Reproduction Charges" in the amount of $5,009.64. The undersigned finds that it is impossible to determine whether a substantial portion of Defendants' "Reproduction Charges" were necessary because Defendants failed to

itemize these costs properly as required by the bill of costs form and failed to file an affidavit explaining the costs.[4]

Defendants only provided copies of invoices for four out of sixteen of its claimed "Reproduction Charges." The remaining twelve "Reproduction Charges," at $2,286.68, are merely listed by invoice number with no description as to what the invoices pertain.

As evidenced from one of the invoices produced by Defendants,[5] some of the "Reproduction Charges" include costs of bates labeling, which is clearly not appropriate to be taxed as costs to Plaintiff. *See Hartford*, 2007 U.S. Dist. LEXIS 22528 at 26 (charges for bates labeling are not appropriate). Since Defendants failed to submit all of the invoices in support of their "Reproduction Charges," it is impossible to determine what charges are associated with proper copying costs and what charges are associated with inappropriate costs, if any, such as bates labeling or extra copies for Defendants' counsel.

Defendants failed to meet their burden of proof in evidencing all reproduction costs. *See Hartford*, 2007 U.S. Dist. LEXIS 22528 at 24 (court only allowed plaintiff's request for copy charges that were explained by affidavit and denied all other copy charges).

Accordingly, the Court finds that Defendants are entitled to reduced costs for "Reproduction Charges," in the amount of $2,167.26 (IKON invoices and Lopes invoice minus bates numbering cost).

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[4] Defendants' counsel, Christy M. Nageleisen-Blades, did submit a generic declaration with the bill of costs, declaring that the costs submitted were correct and necessary, but did not specifically address the individual copying costs. (Doc. 119).

[5] *See* Bill of Costs exhibit 2.B, IKON Invoice, which includes a charge for bates labeling of $555.70. (Doc. 119).

3. Fact Witness Fees

A prevailing party may recover fees for witnesses under 28 U.S.C. § 1920(3). *Hartford*, 2007 U.S. Dist. LEXIS 22528 at 29. Such expenses include attendance, travel, and subsistence fees as specified in 28 U.S.C. § 1821. *Id.* The attendance fees for witnesses is $40 day for each day of attendance. *Id.* at 30. Moreover, pusuant to 28 U.S.C. § 1821(d)(1), "[a] subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day."

Defendants' bill of costs for "Fact Witness Fees" totals $385.79. These costs include witness Fred Krein's charges of $28.44 for mileage, $15.00 for parking, and $170.35 for the hotel charges. (Doc. 119). Plaintiff argues that such fees are not a necessity and, therefore, should not be taxed to Plaintiff. (Doc. 129 at 12). Defendants do not address this point in their memorandum in opposition, nor did they refute Plaintiff's representations regarding Mr. Krein during oral argument. (*See, e.g.*, Doc. 132).

The deposition testimony of witness Fred Krein was taken on February 6, 2006 at the Hilton Hotel in Hartford, Connecticut. (Doc. 129 at 13). That location was chosen by Defendants' counsel because Mr. Krein lives in Somers, Connecticut, which is part of the Hartford Metro Area. (*Id.*) Mr. Krein's home in Somers, Connecticut is approximately 27 miles from the hotel where the deposition testimony was taken. Accordingly, Plaintiff argues that it was unnecessary and unreasonable for Mr. Krein to stay at the Hilton at a rate of $170.35 a night, when he lived only 27 miles from the hotel and could have easily traveled to and from the hotel for the deposition. The undersigned agrees.

Further, Mr. Krein submitted a total of 79 miles to be compensated for on his expense report. (Doc. 129 at 13). However, a trip to and from the hotel would have been a mere 54 miles. (*Id.*)

Therefore, this Court finds that the fact witness fees should be reduced to $191.44.

III. CONCLUSION

Accordingly, based on the foregoing, the undersigned revises the Clerk's bill of costs (Doc. 128) as follows:

(1) Plaintiff shall pay costs in the amount of $5,972.40 for "Deposition Transcripts";

(2) Plaintiff shall pay costs in the amount of $2,167.26 for "Reproduction Charges"; and

(3) Plaintiff shall pay costs in the amount of $191.44 for "Fact Witness Fees,"

for a total amount owing of $8,331.10.

IT IS SO ORDERED.

Date: 6/15/09

s/ Timothy S. Black
Timothy S. Black
United States Magistrate Judge