

08-4621-cv

Lafaro v. New York Cardiothoracic Group

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

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6  
7 August Term, 2008

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9 (Argued: March 16, 2009 Decided: August 7, 2009)

10  
11 Docket No. 08-4621-cv

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13  
14 ROCCO J. LAFARO, M.D., ARLEN G. FLEISHER, M.D., CARDIAC SURGERY  
15 GROUP, P.C.,

16  
17 *Plaintiffs-Appellants,*

18  
19 -v.-

20  
21 NEW YORK CARDIOTHORACIC GROUP, PLLC, STEVEN L. LANSMAN, M.D., DAVID  
22 SPIELVOGEL, M.D., WESTCHESTER COUNTY HEALTH CARE CORPORATION,  
23 WESTCHESTER MEDICAL CENTER,

24  
25 *Defendants-Appellees.*

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28  
29 Before:

30 CALABRESI and WESLEY, *Circuit Judges*, and DRONEY, *District*  
31 *Judge.*\*

32  
33 Plaintiffs-appellants' itemized bill of costs submitted  
34 pursuant to Rule 39(d) of the Federal Rules of Appellate

\_\_\_\_\_  
\* The Honorable Christopher F. Droney, United States District Court for the District of Connecticut, sitting by designation.

1 Procedure following a judgment of this Court, entered July  
2 1, 2009, that vacated and remanded a September 11, 2008  
3 order of the United States District Court for the Southern  
4 District of New York (Robinson, J.), is hereby construed as  
5 an application for costs and GRANTED.

6  
7 GRANTED.  
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11 \_\_\_\_\_  
12 RICHARD G. MENAKER, Menaker & Herrmann, LLP, New  
13 York, NY, *for Plaintiffs-Appellants.*

14 JORDY RABINOWITZ, Senior Associate General Counsel,  
15 Westchester County Health Care Corporation,  
16 Office of Legal Affairs, Valhalla, NY, *for*  
17 *Defendants-Appellees.*  
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19 \_\_\_\_\_  
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21 PER CURIAM:

22 In the appeal underlying this application for costs, we  
23 vacated the district court's order and remanded the case for  
24 further proceedings. *Lafaro v. N.Y. Cardiothoracic Group*,  
25 No. 08-4621-cv, 2009 U.S. App. LEXIS 14283 (2d Cir. July 1,  
26 2009). Plaintiffs-appellants, who sought the remand,  
27 subsequently filed their itemized bill of costs, to which  
28 defendants-appellees object on the ground that, in the event  
29 of vacatur and remand, Federal Rule of Appellate Procedure  
30 39(a)(4) provides for costs only as ordered by the Court.

31 We have previously allowed the party seeking and

1 obtaining vacatur and remand to obtain costs by filing a  
2 bill of costs where not previously ordered by the court.  
3 *Gierlinger v. Gleason*, 160 F.3d 858, 867, 881-82 (2d Cir.  
4 1998). However, in *Gierlinger*, the party against whom costs  
5 were asserted did not timely file an objection. *See id.*  
6 That is not the situation here.

7 Where "a judgment is affirmed in part, reversed in  
8 part, modified, or vacated," Fed. R. App. P. 39(a)(4), costs  
9 must be ordered before a party filing a bill of costs under  
10 Federal Rule of Appellate Procedure 39(d) is entitled to  
11 receive them. We therefore construe plaintiffs-appellants'  
12 bill of costs as an appropriate application for costs and  
13 GRANT the motion.

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