

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ALBERT SNYDER,
Plaintiff

v.

FRED W. PHELPS, SR.,
JOHN DOES, JANE DOES, and
WESTBORO BAPTIST CHURCH, INC.
Defendants

Civil Action No. 06-CV-1389 RDB

**MEMORANDUM IN SUPPORT OF MOTION FOR
AWARD OF COSTS AND FEES**

I. BRIEF PROCEDURAL HISTORY

The plaintiff files this memorandum of law in support of his motion for costs and attorney fees for the defendants' failure to waive service pursuant to Fed.R.Civ.P. 4(d) and that motion is incorporated herein by reference. *See also* L.R. 105.1.

On June 5, 2006, the plaintiff filed a complaint alleging defamation, invasion of privacy, intentional infliction of emotional distress, and civil conspiracy. Almost immediately, the defendants, by and through counsel, acknowledged the existence of the allegations and complaint against the defendants. In fact, on June 12, 2006, the defendants wrote the plaintiff a letter concerning the allegations in the complaint. Consequently, on June 22, 2006, the plaintiff requested that the defendants waive service of the summons and complaint.

Thereafter, the defendants actively avoided service - knowing that they were increasing the costs of being served. The defendants have been represented by legal counsel at all relevant times and fully aware of their duty under the Federal Rules of Civil Procedure. Even if the defendants were previously unaware of their duty to waive service, they were informed of that duty on June 22, 2006. *See* Motion Ex. A.

Ultimately, the defendants refused and failed to waive service and required the plaintiff to absorb the costs of service. Necessarily, there are costs and attorney fees associated with the defendants' decision to avoid service and refusal to waive service. The defendants' actions - i.e., evasion of service - even required that a motion for alternative service be prepared and filed.

II. STATEMENT OF ISSUE INVOLVED

DID THE DEFENDANTS FAIL TO WAIVE SERVICE, AS THEY WERE REQUIRED TO DO, PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 4(d)?

Suggested Answer: *In the affirmative.*

IS THE PLAINTIFF'S REQUEST FOR COSTS AND FEES REASONABLE?

Suggested Answer: *In the affirmative.*

III. ARGUMENT

A. The defendants failed to waive service.

“According to the Rule’s legislative history, “[t]he purpose of this provision is to encourage the prompt return of the form so that the action can move forward without unnecessary delay,” and “[f]airness requires that a person who causes another additional and unnecessary expense in effecting service ought to reimburse the party who was forced to bear the additional expense.” *Premier Bank, Nat. Ass’n v. Ward*, 129 F.R.D. 500, 502 (M.D. La. 1990), quoting H.R. 7154, 97th Cong., 2d Sess., Section 2 at 8.” *Double “S” Truck Line, Inc. v. Frozen Food Express d/b/a FFE*, 171 F.R.D. 251, 253 (D.Minn. 1997).

In our case, the defendants were provided with the applicable form and encouraged to promptly return it without unnecessary delay. Having forced the plaintiff to bear an additional expense, fairness requires that the defendants reimburse the plaintiff for that additional expense. “The effect of this rule is to shift the cost of service to a defendant who does not agree to waive

formal service.” *Mathon v. Marine Midland Bank, et al.*, 875 F.Supp. 986, 991 (E.D. N.Y. 1995).

The Rules of Civil Procedure are unambiguous. The “plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons.” Fed.R.Civ.P. 4(d)(2). In the instant matter, the plaintiff requested that the defendants waive service. Motion Ex. A. “Once notified, a defendant “has a duty to avoid unnecessary costs of serving the summons.” Fed.R.Civ.P. 4(d)(2).” *Davilla v. Thinline Collections, LLC*, 230 F.R.D. 601, 602 (N.D. Cal. 2005).

Once the plaintiff notifies the defendants that a waiver of service is being requested, the defendants are thereafter responsible for the costs of service (to include attorney fees) if they refuse to waive service, “unless good cause for the failure be shown.” Fed.R.Civ.P. 4(d)(2). Defendants Phelps and Westboro Baptist Church, Inc. cannot carry the steep burden of proving “good cause.” The defendants received the standard form waiver notification, *see* Ex. A, and in addition, the defendants were represented by legal counsel. Tellingly, the defendants were specifically told that the plaintiff would seek to recover costs and fees if the defendants refused and failed to waive service. Motion Ex. A.

With that background, the defendants actively avoided service – fully knowing the consequences – they would be required to pay for costs of service and attorney fees associated with service.

B. The costs and attorney fees are reasonable under the circumstances.

Once the plaintiff has established that the defendants failed to waive service – and he has – the only remaining question is what are reasonable costs and fees. The Supreme Court has held that “[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.”

Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). In the instant matter, the plaintiff submitted two motions and requisite memorandum of law, pursuant to L.R. 105.1. Each motion was detailed and researched extensively, as evidenced by the numerous authorities cited within each respective motion. The hourly rate is reasonable and modest for the District of Maryland.

IV. CONCLUSION

The plaintiff respectfully requests that this Honorable Court award \$490 for costs; \$3,078 for the Motion for Alternative Service; and \$2,375 for the within motion, for a total of \$5,943.

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