

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHELLE C. POWERS, et al.,

Plaintiffs,

vs.

Civil Action 2:10-CV-332
Judge Watson
Magistrate Judge King

CHASE BANKCARD SERVICES, INC.,

Defendant.

OPINION AND ORDER

This is an employment action in which plaintiffs allege that they were subjected to sexual harassment and were unlawfully retaliated against and eventually discharged from employment by defendant. This matter is now before the Court on defendant's *Motion for an Order Awarding It Costs and Staying the Proceedings Pending Payment of Those Costs*, Doc. No. 6 {"*Motion for Costs*"}. Plaintiffs have responded to the motion, Doc. No. 8, and defendant has replied, Doc. No. 12.

Facts

Plaintiffs originally asserted their claims in the Court of Common Pleas for Franklin County, Ohio. *Powers v. JPMorgan Chase & Co.*, 09CVH-06-8948. Plaintiff Powers experienced a panic attack during the course of her deposition, *Affidavit of Michelle C. Powers*, ¶ 10, attached to Doc. No. 8, and the parties agreed to reconvene the deposition at a later date. *Deposition of Michelle C. Powers*, at 635, attached as Exhibit 2-A to Doc. No. 8 and as Exhibit B to Doc. No. 12; *Affidavit of Plaintiffs' Counsel John S. Marshall*, ¶ 6, attached as Exhibit 2 to Doc. No. 8. In fact, however, her deposition was not rescheduled. Defendant filed a motion to compel or for a protective

order. See Exhibit C attached to *Motion for Costs*. The parties agree that, on March 30, 2010, counsel for the parties met with the assigned trial judge who directed that both plaintiffs be deposed prior to the discovery completion date and prior to the depositions of defendant's witnesses. The parties also appear to agree that the trial judge rejected plaintiffs' request that the reconvened deposition of plaintiff Powers be limited in time. *Affidavit of Plaintiffs' Counsel John S. Marshall*, ¶ 8, attached to Doc. No. 8; *Affidavit of Angelique Paul Neewcomb*, ¶ 5, attached as Exhibit C to Doc. No. 12. On March 31, 2010 - i.e., the day after the conference with the state court judge - plaintiffs filed a notice of dismissal without prejudice. Exhibit C, attached to *Motion for Costs*.¹ The same claims were thereafter presented in this case on April 16, 2010. *Complaint*, Doc. No. 2.

In its *Motion for Costs*, defendant asks that it be awarded \$4,117.35 in costs incurred in defending the state court action.²

Standard

Fed. R. Civ. P. 41(d) provides:

Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

¹Unlike the parallel federal rule, Ohio R. Civ. P. 41 authorizes dismissal by a plaintiff without stipulation or leave of court so long as trial has not commenced and a counterclaim has not been filed. Ohio R. Civ. P. 41(A)(1)(b).

²The *Motion for Costs* also asked that the action be stayed pending plaintiffs' payment of those costs. As is apparent, the litigation has proceeded. Defendant's earlier motion to vacate the preliminary pretrial conference, Doc. No. 9, was denied as moot. *Preliminary Pretrial Order*, at 2, Doc. No. 16.

(2) may stay the proceedings until the plaintiff has complied.

The rule is intended to prevent not only vexatious litigation but also forum shopping, "'especially by plaintiffs who have suffered setbacks in one court and dismiss to try their luck somewhere else.'" *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000), quoting *Robinson v. Nelson*, 1999 WL 95720, *2 (D. Mass. 1999). The rule also addresses "attempts to 'gain any tactical advantage by dismissing and refile[ing] th[e] suit.'" *Id.*, quoting *Sewell v. Wal-Mart Stores, Inc.*, 137 F.R.D. 28, 29 (D. Kan. 1991).

Where a district court in the Sixth Circuit determines, in the exercise of its discretion, see *Duffy v. Ford Motor Co.*, 218 F.3d 623, 633 (6th Cir. 2000), that an award of costs under Rule 41(d) is warranted, the United States Court of Appeals for the Sixth Circuit has suggested that the definition of "costs" found in 28 U.S.C. §1920 is useful in determining the scope of the award. *Id.*, at 875. However, the award may not include attorney's fees. *Id.*, at 874.

Discussion

Plaintiffs concede that the filing of this action after their voluntary dismissal of the state court action reflects their effort to obtain a tactical advantage not available in the forum originally selected by them. Doc. No. 8, at 4 ("*The only tactical advantage is application of the Federal Rules of Civil Procedure.*") (emphasis in original). However, they characterize that tactical advantage as insignificant in light of the fact that the discovery conducted in the state court action remains available to defendant in this action. See *Preliminary Pretrial Order*, Doc. No. 16, at 3 ("The parties stipulate

that discovery conducted in the earlier state court action may be utilized in this action."). Plaintiffs also argue that they had good cause for voluntarily dismissing the state court action. Specifically, plaintiffs contend that the examination of plaintiff Powers, combined with the trial judge's refusal "to place any limit," *Affidavit of Plaintiffs' Counsel John S. Marshall*, ¶ 8, on "what seemed to Ms. Powers to be an endless and nasty deposition," Doc. No. 8, at 2, justified the course of action pursued by plaintiffs.³

Lacking a transcript of the March 30, 2010 conference with the state court judge, this Court is unable to assess either side's characterization of that conference. This Court has, however, reviewed those portions of the Powers deposition transcript submitted by the parties and agrees with plaintiffs' characterization of defense counsel's examination of Ms. Powers: "tough, but . . . fair." Doc. No. 8, at 1. Considering the nature and scope of the claims asserted in the action, the fact that inquiry on deposition could be uncomfortable should not have come as a surprise to either the deponent or counsel.

In short, the Court concludes that plaintiffs' tactical decision to dismiss the state court action and pursue their claims in this Court was not so justified as to immunize plaintiffs from an award of costs pursuant to Fed. R. Civ. P. 41(d).

Defendant asks that it be awarded a total of \$4117.35 incurred by defendant in the state court action, that amount consisting of \$3,076.35 associated with the Powers deposition, \$436.60 in copying

³Defense counsel avers that, prior to the conference with the state court judge, she had advised plaintiffs' counsel that she "hoped to finish Plaintiff Powers' deposition in a single day, but asked that two days be reserved given Plaintiff Powers' demonstrated inability to sit for an entire day of testimony." *Affidavit of Angelique Paul Newcomb*, ¶ 6.

costs and \$604.40 in printing costs. Although the Court agrees that defendant is entitled to some award of costs, the Court declines to award to defendant the entire amount sought.

As noted *supra*, the purpose of Rule 41(d) is to discourage forum shopping. *Rogers v. Wal-Mart Stores, Inc.*, *supra*, 230 F.3d 868. An ancillary function of the Rule is to minimize prejudice to a defendant forced to mount a defense in two separate actions. *Esquivel v. Arau*, 913 F.Supp. 1382, 1385 (C.D.Ca. 1996). In this Court's view, both interests can be served by awarding to a defendant those costs caused by the voluntary dismissal and re-filing of the action. To award costs that would necessarily be incurred regardless of the dismissal and re-filing would, in the Court's view, not significantly increase the deterrent effect yet would result in a windfall to the defendant.

In this case, discovery conducted in the state court action is available for use by the parties in this action. See *Preliminary Pretrial Order*, Doc. No. 16, at 2. Thus, the costs associated with the Powers deposition and the costs associated with printing and copying discovery requests or responses in the state court action would have been incurred by defendant even if the case had been filed in only one court. The Court therefore declines to award to defendant its costs associated with that discovery.

A portion of defendant's requested costs, however, relates to the printing and copying of pleadings and other filings in the state court action. Because defendant's defense of this action will necessarily require an entirely new set of pleadings and other filings, this Court concludes that defendant is entitled to recovery of its printing and copying costs associated with its filings in the state court action.

Because it is not entirely clear to the Court, however, the precise portion of the *Motion for Costs* attributable to the printing and copying of court filings in the state court action,⁴ defendant is directed to advise the Court and plaintiffs the costs associated with the printing and copying of its state court filings.

Finally, defendant asks that the action be stayed pending payment of costs by plaintiffs. Plaintiffs opposed that request, taking the position that to do so would pose an unreasonable financial burden on plaintiff Powers and would unfairly impede the prosecution of their claims. However, plaintiffs' opposition was predicated on defendant's original request for an award that exceeded \$4,000.00. Because the Court has now reduced the amount at issue by more than \$3,000.00, and because the financial information provided by plaintiff Powers⁵ does not suggest that plaintiffs could not be expected to pay the amount awarded without undue hardship, defendant's request that the action be stayed pending payment of the costs awarded is meritorious.

WHEREUPON defendant's *Motion for Costs*, Doc. No. 6, is **GRANTED** in part. Defendant is **AWARDED** from plaintiffs its costs associated with the copying and printing of filings in the state court action. Defendant shall forthwith advise the Court and plaintiffs of the precise amount of those costs. Moreover, this action is hereby **STAYED**

⁴Defendant seeks copying costs of \$436.60 and printing costs of \$604.40 without specifying whether those costs relate to filings or to discovery. See *Affidavit of Beverly G. Ringhiser*, ¶¶ 3 - 4, Exhibit G attached to *Motion for Costs*.

⁵Although defendant proffered information relating to the financial status of plaintiff Brown, see *Plaintiff Christina Brown's Answers to Defendants [sic] First Set of Interrogatories, Interrogatory No. 8*, Exhibit 1 attached to *Affidavit of Angelique Paul Newcomb*, plaintiffs presented evidence relating only to plaintiff Powers' financial status, see *Affidavit of Michelle C. Powers*, ¶¶ 4-7.

pending payment by plaintiffs of those costs.

December 1, 2010
(Date)

s/Norah McCann King
Norah M^cCann King
United States Magistrate Judge