
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc.,
an Illinois non-profit corporation, and
Danny Lee Shelton, individually,

Case No. 07-40098-FDS

Plaintiffs,

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO IMPOSE COSTS

INTRODUCTION

Plaintiffs Three Angels Broadcasting, Inc. ("3ABN") and Danny Lee Shelton ("Shelton") submit this memorandum in opposition to Defendants' Motion to Impose Costs [Docket # 130]. Plaintiffs oppose the motion because their claimed litigation expenses are not recoverable under the "American Rule" that each party pay its own legal fees and litigation expense, absent express statutory or contractual authority otherwise.

The only legal basis for an award of costs would be the Court's discretion under Fed. R. Civ. P. 41(a)(2) to condition dismissal on terms that protect the Defendants from legal prejudice arising from the dismissal. This discretion permits the Court to impose conditions only to the extent they are necessary to alleviate prejudice arising from the

dismissal. But under the American Rule, Defendants' litigation expenses would have been unreimbursable no matter what the outcome of the litigation was – even if they had prevailed by obtaining a dismissal on the merits. They are no worse off with respect to their litigation costs because of the dismissal.

The only way their position with respect to litigation expense is worsened because of the dismissal is that they will not be eligible for the very narrow list of “costs” that are awardable to the prevailing party under 28 U.S.C. § 1920, which Defendants will not have an opportunity to recover because the dismissal without prejudice means that they are not the “prevailing party.” These potentially recoverable costs may have been what the Court had in mind when it allowed the Defendants to file a motion for costs. But Defendants' claim reveals that they have not incurred any § 1920 costs to this point.

In short, the Defendants have suffered no form of legal prejudice arising from the dismissal that could be addressed by an award of their litigation expenses. From the standpoint of litigation expense, the dismissal is to their benefit. Their petition for litigation expenses is simply an effort at an end-run around the American Rule, and must be denied in its entirety.

FACTS

Plaintiffs' Complaint sought relief based on allegations that the Defendants owned and operated internet websites that published defamatory statements about the Plaintiffs, which drove away potential supporters and deterred donations. Defendants consider themselves “ecclesiastical journalists” whose primary focus is the doings of the Plaintiffs and their associates. The Complaint identified 24 specific defamatory statements made

by the Defendants on their web sites and demanded that they be retracted. (Complaint ¶¶ 46-50, Doc. 1).

Although Defendants claimed to have proof of the truth of their defamatory statements about Plaintiffs, the sources turned out to be anonymous informants whose identities the Defendants refused to reveal on grounds of a claimed reporter's privilege. (E.g., Answer to Complaint ¶¶ 46a through 46j, Doc. 9 at pp. 25-29). Their answers to Interrogatories continued the pattern of refusing to reveal the sources of their challenged statements. This matter would have come before the Court had the case not been dismissed.

Unable or unwilling to offer proof of the defamatory statements that was supposedly in their possession, Defendants purported to seek information proving the truth of their assertions directly from the Plaintiffs. They were given thousands of pages of records in discovery including virtually all of 3ABN's corporate records and tax filings, and the internet postings that contained the defamatory statements.

Finding little help among the Plaintiffs' *relevant* documents, the Defendants adopted a strategy of seeking oppressively large amounts of irrelevant information that they hoped would contain at least *something* that would show the Plaintiffs in a bad light. In an email to a confidante, Defendant Gailon Arthur Joy explained the Defendants' plan to expand the scope of the case beyond the complaint:

Unfortunately, because of the very narrow charges pressed by 3ABN and Danny Lee Shelton, we must substantially expand the case to bring in the most damaging and certain to sway the jury details. I have deliberately dragged my feet hoping the IRS would move a bit quicker and finish their investigation before we would have to

become extremely aggressive. It also conserved badly needed cash, but D-day H-hour is just ahead and we cannot afford to delay further.

(Affidavit of Kristin Kingsbury, Doc. 76 Exhibit 21).

True to their word, the Defendants set about to use the tools of discovery to gather every scrap of information about the Plaintiffs since 1991, and in some cases even earlier. (*E.g.*, Defendant Robert Pickle's Requests for Production of Documents, Exhibits 1 and 2 to Affidavit of Kristin Kingsbury, Doc. 76). But Defendants were unable to gain full access to Plaintiffs' records because the Plaintiffs sought to restrict the scope of permissible discovery to issues raised by the pleadings, and to protect their financial information from being made public. (*See* Motion for Protective Order, Doc. 40 and Motion for Protective Order Limiting Scope and Methods of Discovery, Doc. 74).

The Defendants adopted as a litigation theme the position that the Plaintiffs' efforts to restrict discovery to potentially relevant matters, and to keep their records private, was stonewalling or, what became their catch-phrase, "a fraud on the court." The only judicial finding on this topic, however, is Magistrate Judge Hillman's finding that the Defendants' "production requests and Rule 45 subpoenas appear to be overbroad and far-reaching," and that "a substantial number of documents which would fall within the subject matter of the requests would be irrelevant to any claims or defenses, and otherwise outside the scope of discoverable information under Federal Rule of Civil Procedure 26(b)(1)." (ECF Doc. 106 at pp. 2-3). In other words, Plaintiffs' efforts to narrow the scope of discovery were justified.

To circumvent the discovery delays and limitations they encountered in this forum as these issues worked their way to a conclusion, Defendants served at least six third-party subpoenas seeking more or less the same information as was requested from the Plaintiffs. (See Mag. Judge Hillman's order, Doc. 106 at p. 2). The information they sought in other courts was largely information that they could have obtained directly from the Plaintiffs. For example, they sought Plaintiff Shelton's personal bank records dating back to 1998 from his bank. (See Subpoena on Mid-Country Bank, attached as Exhibit 6 to Kingsbury Affidavit, Doc. 76). They sought information on Shelton's royalties from the publication of his books directly from the publisher. (See Subpoena on Remnant Publications, attached as Exhibit 3 to Kingsbury Affidavit, Doc. 76). They sought all financial and accounting records for *both* 3ABN and Shelton from their accountants. (See Subpoena on Gray, Hunter, Stenn, LLP, attached as Exhibit 4 to Kingsbury Affidavit, Doc. 76). They sought records regarding an employee who had filed a charge of discrimination against 3ABN, which was later dismissed, directly from the employee. (See Subpoena on Kathi Bottomley, attached as Exhibit 7, Doc. 76).

All of this information could have been obtained directly from the Plaintiffs by use of authorization forms or otherwise, but Defendants sought to circumvent any limitations that this Court might place on their factual foraging by using third party subpoenas issued by other courts. Plaintiffs resisted the end-run around this Court, and participated in motions to quash or limit the scope of the subpoenas in Minnesota and Illinois, in which they persuaded the courts to transfer the issue of relevance to this Court for resolution. (See Kingsbury Aff. ¶¶ 11, 16 and 17). The Defendants thus greatly increased the

expense of the litigation for everybody, which was manifestly not necessary to the litigation but rather to investigate every aspect of Plaintiffs' activities throughout 3ABN's existence for purposes of reporting negative information to the public.

Magistrate Judge Hillman put a stop to Defendants' indiscriminate use of discovery tools to satisfy their journalistic curiosity about the Plaintiffs when he nullified their document requests and ordered them to obtain leave of the Court before using third party subpoenas. (Doc. 106). Judge Hillman concluded that "Pickle's production requests and Rule 45 subpoenas appear to be overbroad and far-reaching." (ECF Doc. 106 at p. 2). He therefore ordered them to serve new document requests "tailored to comply with this Court's rules governing discoverable information." (*Id.* at p. 4). He ordered that they henceforth submit third party subpoenas to the Court for preapproval. (*Id.*) In other words, Judge Hillman agreed with the Plaintiffs' position that the Defendants were seeking information well beyond even the liberal boundaries of permissible discovery.

For the reasons set forth in their motion for voluntary dismissal and the accompanying legal memorandum (ECF Doc. 120 & 121), Plaintiffs made the decision to dismiss the lawsuit. The primary reasons were that the goals of the lawsuit had been met by means outside the lawsuit, namely by purchasing the offending web sites from Defendant Joy's bankruptcy trustee and by obtaining favorable rulings from the governmental agencies that had been investigating the Plaintiffs' conduct. (See Affidavit of Walt Thompson ¶ 8, Doc. 123). It had been apparent from the start that the Defendants would be unable to pay any appreciable damage award, and the desire for an

award of money damages had never been a significant motivation for the lawsuit. When it became apparent that the Defendants' incessant badmouthing of the Plaintiffs had ceased to be a major concern within Plaintiffs' community, and donations were restored, it became obvious that nothing more could be gained by way of this lawsuit. Plaintiffs then moved to dismiss it.

Defendants opposed the motion to dismiss the lawsuit on the grounds that it was merely an "attempt to obstruct discovery." (Defendants Mem. in Opp. to Plaintiffs Mot. for Voluntary Dismissal, p. 1, Doc. 126). In reviewing their opposition memo, it is clear that Defendants did not want the litigation to end because they had not yet received the information they hoped to obtain via discovery. They were refreshingly oblivious to the fact that they would not *need* the information once the lawsuit was over, apparently unaware that pressing their demands for the discovery information after the suit was over proved beyond doubt that their true motive for seeking the information was unrelated to the litigation.

On October 30, 2008, this Court heard Plaintiffs' motion for voluntary dismissal. The rule authorizing voluntary dismissal permits the Court in its discretion to impose conditions that it deems necessary to avert legal prejudice to the Defendants arising from the dismissal. *See* Fed. R. Civ. P. 41(a)(2). A discussion ensued regarding what conditions would be necessary to avert prejudice to the Defendants from the dismissal. The only legal prejudice that Defendants identified was the possibility that the Plaintiffs would refile the litigation in another forum. The Court addressed this issue by conditioning the dismissal on the Plaintiffs' agreement to refile any related litigation only

in the same Court. Plaintiffs readily agreed to that stipulation, since forum shopping was the last thing on their mind.

Discussion also occurred on the issue of whether dismissal should be with or without prejudice. The Court heard argument that despite its chronological age of more than a year, the progress of the case had been delayed by Defendant Joy's bankruptcy and by several motions regarding discovery such that it was still in the document discovery phase. Since no dispositive or substantive motions had been heard or filed, and no counterclaims were on file, in the exercise of its discretion the Court dismissed the case without prejudice.

The significance of the dismissal without prejudice was twofold: (1) it meant that there would be no award of costs under Fed. R. Civ. P. 54(d) because there was no prevailing party; and (2) it meant that if the Defendants commenced a suit against the Plaintiffs, as they often have threatened to do since the lawsuit started, Plaintiffs would be able to resurrect their claims defensively or as counterclaims because the claims would not be *res judicata*.

Defendants then brought up the issue of their litigation costs. The Court verbally advised the parties that the Defendants may file a motion for costs, that the Plaintiffs would have an opportunity to respond to it, and that costs might or might not be awarded. The Court advised the parties that its allowance of a motion for costs did not indicate that it had determined costs were awardable. Notably, the Court did *not* authorize a motion for reimbursement of attorneys' fees and general litigation expenses. The order that

ensued stated that “any motion for costs ... be filed by 11/21/2008.” [Electronic Clerk’s Notes for Proceeding entered on 10/31/2008].

On November 13, 2008, the Defendants filed the present motion ostensibly for “costs,” but in substance seeking recovery of \$110,000 of claimed expenses which are clearly not recoverable as costs. Half of the claimed amount is for attorneys fees; \$20,000 is for an undisclosed expert whose services were never used in any court filing; and \$30,000 is for Defendant Pickle’s “cost of time.” None of the items claimed would qualify as costs under 28 U.S.C. § 1920.

Not only are the claimed expenses not recoverable because they are not necessary to avert legal prejudice to the Defendants arising from the dismissal and are not “costs,” there is insufficient justification provided to determine whether the amounts claimed are justified – that is, whether the expenses were reasonable and necessary. The entire claim must be rejected for these reasons.

ARGUMENT

Defendants do not claim a right to costs under Fed. R. Civ. P. 54(d), which allows costs to the “prevailing party.” A dismissal without prejudice does not make the defendant a prevailing party. *Szabo Food Serv. v. Canteen Corp.*, 823 F.3d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988). The ordinary rule regarding attorneys fees, the so-called “American Rule,” is that fees are not recoverable absent express authorization in a statute or contract. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S. Ct. 1404, 1407, 18 L. Ed. 2d 475 (1967). The Defendants are not entitled by contract, common law or statute to an award of costs and fees.

The only authority for an award of costs in this case would therefore be the authority in Fed. R. Civ. P. 41(a)(2) to dismiss an action at the plaintiff's request "on terms that the court considers proper." This authority, reviewable only for abuse of discretion, allows the court to fashion terms that will safeguard the defendant against "legal prejudice" resulting from the dismissal. *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 51 (1st Cir. 1981). Thus, Rule 41(a)(2) does not compel the imposition of costs or fees as a condition of voluntary dismissal. *Id.* at p. 51. Where legal prejudice does not result from the dismissal, the district court does not abuse its discretion in granting dismissal without award of costs or fees. *Id.* at p. 51.

A. Defendants' Motion Should be Denied in its Entirety Because an Award of Costs and Fees is Not Necessary to Avert Legal Prejudice.

The Defendants' memorandum complains that the voluntary dismissal causes them prejudice "due to the current impossibility to reuse most discovery in future litigation, the likely future spoliation of evidence by the Plaintiffs, the risk of incapacitation [sic], death or removal of key witnesses, and other factors." (Doc. 131 at p. 1). Defendants' argument appears to be that if they bring another lawsuit against the Plaintiffs, they will have to do some of the things over again that they did in this lawsuit, although they don't explain what those things are or how much of their claim for fees and costs relates to them. They suggest that the future lawsuit might be a civil RICO action, but openly express doubt that they have facts to support such a lawsuit. (Doc. 131 at p. 2). What Defendants are asking for, in substance, is an award of their otherwise unawardable costs and fees incurred in *this* lawsuit so that they can bring a completely

new lawsuit seeking damages consisting of, presumably, their costs and fees incurred in the first lawsuit.

But the terms that this Court may impose under Rule 41(a)(2) are supposed to address prejudice in *this* litigation, not in some hypothetical future litigation. The issue here is whether an award of costs and fees is necessary to avert prejudice as things stand today, not how things would stand if the Defendants decided to bring a new lawsuit in the future. Defendants cannot identify any form of legal prejudice that would result from dismissal without an award of costs and fees. Their claims of prejudice due to loss of evidence through spoliation, incapacitation of witnesses or otherwise would not be mitigated by an award of costs and fees. The Court should not impose fees or costs as a condition of dismissal because such a condition is not necessary to address legal prejudice to the Defendants.

Defendants' legal authority is primarily a district court decision from Texas, *Radiant Tech. Corp. v. Electrovert USA Corp.*, 122 F.R.D. 201, 204 (N.D. Tex. 1988), which actually stands for the proposition that *duplicative* legal fees may be awarded in order to avert prejudice to the defendants. That case involved "virtually identical" litigation in two different courts, one of which the plaintiff sought to dismiss. 122 F.R.D. at 201. The Texas district court awarded fees and costs for work that would have to be re-done in the surviving lawsuit, but declined to order "reimbursement for work that need not be duplicated or abandoned." 122 F.R.D. at 205. Thus, the Texas court recognized that fees which are *not* duplicative of another identical lawsuit would *not* be awarded as a condition of voluntary dismissal. The *Radiant Tech.* case does not support Defendants'

position that they should be awarded fees and costs incurred in this lawsuit that might be duplicative of an as-yet unfiled and undefined lawsuit that they may or may not file in the future.

The Court may award fees and costs in this case only as an exercise of its discretion under Fed. R. Civ. P. 41(a)(2) to impose terms that alleviate legal prejudice to the Defendants. Defendants are unable to identify any form of legal prejudice that would be lessened by an award of costs and fees. Therefore, costs and fees should not be imposed.

B. Defendants' Motion Should be Denied Because the Claimed Costs and Fees Were Not Reasonably and Necessarily Incurred.

Defendants' claim for costs and fees should be denied for the additional reason that Plaintiffs have not met their burden of showing that the fees and costs were necessarily incurred. They have not presented evidence that would permit this Court to ascertain what the expenses were for, and how they advanced the litigation. Instead, Defendants have simply presented, in effect, all the expenses they incurred and left it to the Court to divine which ones were reasonable and necessary. The Court should deny the request based on the complete absence of evidentiary justification.

1. The Claim for Attorneys Fees Must be Denied Because it is Factually Insufficient.

Defendants claim a right of reimbursement for invoices submitted by their former attorney, Laird Heal. The claim consists of two invoices totaling \$54,266.94. As argued above, an award of this item of the claim would do nothing to alleviate legal prejudice to the Defendants resulting from the dismissal, and therefore would be an unwarranted

exercise of the discretion granted by Fed. R. Civ. P. 41(a)(2). A second reason that this part of the claim must be denied is because it is factually unsupported. There is no evidence in the record showing that these fees would need to be duplicated in a second lawsuit, nor is there even an affidavit from the attorney supporting the reasonableness of his invoices.

Motions for attorneys fees are governed by Fed. R. Civ. P. 54(d)(2). The party seeking fees bears the burden of establishing the right to a fee, as well as the hours claimed and the appropriate hourly rate, and must carry that burden by submitting adequate evidentiary proof. *In re Central Ice Cream Co.*, 836 F.2d 1068, 1074 (7th Cir. 1987); *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (“the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.”).

Defendants have not submitted any evidence supporting the invoices for attorneys fees. The invoices are simply attached to the Affidavit of Robert Pickle, Doc. 132, as Exhibits B and C. There is no evidence in the record indicating that the \$175/hour rate is justified, nor is there any evidence that the hours expended were reasonable and necessary. Since all of the invoices are dated November 10, 2008, it is apparent that the invoices were created after-the-fact, for the sole purpose of this motion. Failure to keep contemporaneous records typically results in a substantial reduction in the fee claim. *Tennessee Gas Pipeline Co. v. 104 Acres of Land*, 32 F. 3d 632, 634 (1st Cir. 1994); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984).

If Defendants eventually are permitted to submit evidentiary support for their fee petition, it would not only have to support the hourly rate and the hours and tasks reflected on the invoices, but would also have to explain how reimbursement of each billing entry would alleviate prejudice from the dismissal of this lawsuit. Since there is no prejudice to the Defendants from the dismissal of the lawsuit, that would be an impossible task.

If Defendants hereafter submit evidence supporting their fee petition, Plaintiffs would request first that the evidence be disregarded and stricken from the record as untimely and contrary to the rules of civil procedure. If the Court determines to consider such evidence, Plaintiffs request their rights under Fed. R. Civ. P. 54(d)(2)(C), including the right of an opportunity for adversary submissions on the motion. Plaintiffs would request an opportunity to take evidence from the witnesses on the reasonableness and necessity of the attorneys' fee petition.

For the reasons stated above, Defendants' petition for attorneys fees should be denied because it is legally and factually unsupported.

2. The Claim for Pickle's "Cost of Time" Must be Denied.

Defendants submits a novel request for the value of Defendant Pickle's time, in the amount of \$30,114.75. Defendants have the burden of demonstrating a legal and factual basis for their claimed costs, and none is shown for this item. This part of the claim must be denied.

3. The Claim for Expert Witness Fees Must be Denied.

Defendants submit a claim for invoices submitted by a supposed expert witness, Lynette Rhodes, in the amount of \$20,342.32. Again, the claim does not provide a legal or factual basis for payment of this invoice. The invoice is simply attached to Pickle's affidavit, with no verification of the reasonableness and necessity of the services performed. There is also no information supplied that would permit the Court to ascertain which of Ms. Rhodes' accounting services should be reimbursed in order to avoid legal prejudice to the Defendants that would otherwise result from the dismissal of this action.

In any case, expert witness fees are tightly limited by statute even when there is a prevailing party. When there is a prevailing party, the daily attendance fee established by 28 U.S.C. § 1821(b) may be taxed as costs under 28 U.S.C. § 1920(3). Where Defendants are not a prevailing party, there is no authority to grant them even the daily witness fee, let alone their full invoice. There is simply no legal or factual basis to award the Rhodes invoices as costs.

If the Court is inclined to consider Defendants request for an award of the Rhodes invoices, Plaintiffs request their rights under Fed. R. Civ. P. 54(d)(2)(C), including an opportunity for adversary submissions on the motion.

4. The Claim for Mileage Must be Denied.

Defendants seek \$993.62 as reimbursement for two "fact-finding" trips to locations in Illinois and Wisconsin. Defendants do not supply any authority for the award of a party's transportation expense, which is not on the exclusive list of recoverable costs found at 28 U.S.C. § 1920. Further, Defendants do not show how

reimbursement of these expenses would mitigate legal prejudice arising from the voluntary dismissal of the case. The claim for mileage must be denied.

5. The Claim for Miscellaneous Expenses Must be Denied.

Defendants seek \$4,614.90 as reimbursement of “miscellaneous” expenses incurred that are listed in the Pickle Affidavit at Table 2. None of these items is a recoverable cost. None of them need be reimbursed in order to avert prejudice arising from the dismissal. Some extreme examples of Defendants’ overreaching can be found on Table 2, for example, where Pickle seeks \$6.00 for a shower he took on April 25, 2008 at the North Lisbon Travel Center. In the annals of jurisprudence, it is doubtful that anybody ever sought reimbursement for a shower as a litigation cost. More to the point, it is hard to see how reimbursing Pickle for his shower will alleviate prejudice resulting from dismissal of this lawsuit. Presumably he would have showered anyway. The same is true of each expense on the list – they would have been incurred and would not have been recoverable no matter what the outcome of the litigation was, and reimbursing Defendants for them will not alleviate any legal prejudice arising from the dismissal.

6. The Claim for Copy Costs Must be Denied.

Defendants seek \$206.70 as reimbursement for copying costs. Copying costs are recoverable in the circumstances authorized by 28 U.S.C. § 1920(4), namely where “necessarily obtained for use in the case.” Defendants do not supply evidence supporting their copying costs, or explain how they were “necessarily obtained for use in the case.” Since there were no substantive motions filed in this case, the copying costs were not

necessary in the sense contemplated by § 1920(4). The motion for copying costs should be denied.

CONCLUSION

For the reasons stated above, Plaintiffs oppose the motion of the Defendants for an award of their costs and attorneys fees.

Respectfully Submitted:

Dated: November 26, 2008

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Certificate of Service

I, M. Gregory Simpson, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 26, 2008.

Dated: November 26, 2008

/s/ M. Gregory Simpson
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