

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
THREE ANGELS BROADCASTING)	
NETWORK, INC.,)	
)	
Plaintiff,)	Civil Action No.
)	07-40098-FDS
v.)	
)	
GAILON ARTHUR JOY and)	
ROBERT PICKLE,)	
)	
Defendants.)	
_____)	

ORDER ON DEFENDANT’S BILL OF COSTS

SAYLOR, J.

On October 30, 2008, pursuant to Fed. R. Civ. P. 41(a)(2), this Court granted plaintiff’s motion to dismiss without prejudice on the condition that any renewed claims brought by plaintiff shall be brought in this Court.

On November 13, 2008, defendants, proceeding *pro se*, filed a motion for costs. They seek to recover from plaintiff some or all of the costs incurred during this lawsuit in order to alleviate substantial prejudice resulting from the voluntary dismissal. Defendants seek reimbursement for the following costs: (1) mileage attributable to two fact-finding trips by defendant Pickle, in the amount of \$993.62; (2) various miscellaneous expenditures by defendant Pickle over the course of the lawsuit, in the amount of \$4,614.09; (3) costs for copies made on defendant Pickle’s equipment for filing, in the amount of \$206.70; (4) cost of time invested in research and motion preparation by defendant Pickle, in the amount of \$30,114.75; (5) invoices from an expert retained by the defendants, in the amount of \$20,342.32; and (6) invoices from an

attorney in the amount of \$54,266.94.

Plaintiff argues that none of the items claimed as costs by the defendant qualify as costs under 28 U.S.C. § 1920. Plaintiff further argues that the costs are not necessary to avoid prejudice arising from the dismissal because the defendants have not suffered any form of legal prejudice that would be lessened by an award of costs and fees.

Defendants were not the prevailing party, so recovery of costs is not governed by Fed. R. Civ. P. 54(d). When granting dismissal without prejudice under Fed. R. Civ. P. 41(a)(2), the decision of whether to impose costs on the plaintiff lies within the discretion of the judge. *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 51 (1st Cir. 1981) (finding no abuse of discretion in court's failure to impose any terms or conditions to voluntary dismissal when parties alleged abuse of the discovery process). Rule 41(a)(2) does not require the imposition of costs, but it is often considered necessary for the protection of the defendant. *Id.*

Recovery of costs is governed by 28 U.S.C. § 1920, which states that the “judge or clerk of any court of the United States may tax as costs” various fees, including:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or 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; [and]
- (5) Docket fees

28 U.S.C. § 1920.

Four items on defendants' list of requested costs are neither attorneys' fees nor costs

delineated in § 1920: (1) mileage attributable to two fact-finding trips by defendant Pickle; (2) various miscellaneous expenditures by defendant Pickle over the course of this lawsuit; (3) cost of time invested in research and motion preparation by defendant Pickle; or (4) invoices from an expert retained by the defendants.¹ Accordingly, the defendants are not entitled to recover those costs. What remains are (1) costs for copies made on defendant Pickle's equipment for filings and (2) attorney's fees.

The Court concludes that costs should not be awarded. While the Court is sympathetic to the time and money expended by the defendants in preparing their defense, the Court addressed any potential legal prejudice when the dismissal was conditioned upon the fact that any renewed claims brought by plaintiff shall be brought in this Court.

The decision whether to impose attorneys' fees also lies within the discretion of the judge. *Blackburn v. City of Columbus, Ohio*, 60 F.R.D. 197, 198 (S.D. Ohio 1973); *Less v. Berkshire Hous. Servs.*, 2000 U.S. Dist. LEXIS 13700, at *15 (D. Mass. Aug. 18, 2000). Attorneys' fees are awarded less frequently than other litigation costs. Courts have declined to award attorney fees unless there is evidence that the suit was brought "to harass, embarrass, or abuse either the named defendants or the civil process," or that a plaintiff "deliberately sought to increase the defendants' costs by unduly protracting the litigation." *See Less* at *16, *citing Blackburn*, 60 F.R.D. at 198. There is nothing in the record to suggest that the plaintiffs filed this suit simply to

¹ Although § 1920 provides for witness fees, expert witness fees are not recoverable beyond a statutorily prescribed per diem. *See Denny v. Westfield State College*, 880 F.2d 1465, 1468 (1st Cir. 1989) (citing the Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), for the proposition that Fed. R. Civ. P. 54(d) does "not constitute an independent source of judicial discretion sufficient to shift the burden of expert witness fees"); *Walden v. City of Providence*, 2008 U.S. Dist. LEXIS 82002, at *34-*35 (D.R.I. Oct. 15, 2008) ("The First Circuit has declined to allow the fees of expert witnesses in excess of the witness fees provided in 28 U.S.C. § 1821.") (collecting cases). Thus, in accordance with § 1821, defendants would only be allowed to recover an "attendance fee of \$40 per day for each day" of a witness's appearance in court.

harass, embarrass, or abuse the defendants or that they sought to increase their costs, and the Court sees no other reason to award attorneys' fees under the circumstances.

Accordingly, Defendant's Motion to Impose Costs is DENIED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: April 13, 2009