

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAUL HAMMEL,

Plaintiff,

v.

EAU GALLE CHEESE FACTORY,

Defendant.

ORDER

02-C-0405-C

This civil case for money damages is before the court for review of the clerk's taxation of costs. Defendant sought costs in the amount of \$1,219.20 (reduced from its original request of \$1,843.22). After the clerk awarded defendant the full amount of \$1,219.20, plaintiff filed objections to the award and a request for review by the court. Plaintiff asks the court to reduce the award to zero or, in the alternative, to \$659.07.

In support of his request for an award of zero, plaintiff alleges that he has little ability to pay any costs. He has submitted his 2000 and 2001 income tax returns as evidence that his taxable income in those years never exceeded \$15,056. Alternatively, he contends that it was improper for the clerk to award costs to defendant for bringing a witness to the courthouse that defendant never called as a witness at trial, for copying costs in the absence

of a showing of the need for the copying and for service by a private process server when the statute does not authorize the recovery of costs for the private service of process.

Taking up plaintiff's alternative ground first, I note that the law does not support his objections to being taxed for the cost of a witness brought to court but never called to testify and the costs of a private process server. First, it is proper to award costs for a witness that is not called at trial. Spanish Action Comm. of Chicago v. City of Chicago, 811 F.2d 1129 (7th Cir. 1987) (abuse of discretion for trial court to deny award of witness fees for witnesses who were subpoenaed to trial but did not testify; fees compensated witnesses for their willingness to testify).

Second, although 28 U.S.C. § 1920 has not been amended to reflect the practical reality that the United States Marshal rarely serves process in private civil actions, the Court of Appeals for the Seventh Circuit allows the award of costs for service by private process servers to the extent that their fees do not exceed the statutory fees for United States Marshals. Collins v. Gorman, 96 F.3d 1057, 1060 (7th Cir. 1996). Plaintiff has not suggested that defendant's fees exceeded those that the marshal would charge. As to the copying costs, defendant's counsel represents that they relate to defendant's medical records. Plaintiff argues that defendant did not need the medical records because the parties agreed early in the litigation to stipulate to plaintiff's physical disability, but this argument is unpersuasive. Defendant would not have been in a position to stipulate had it not had

access to plaintiff's medical records. (In future cases, defendant's counsel should explain exactly why the copies for which she seeks reimbursement were necessary.) I conclude that the clerk acted correctly in awarding costs for their production.

Because plaintiff has not shown that the clerk erred in any respect in taxing costs, it is necessary to address plaintiff's contention that his relative poverty should relieve him from the burden of paying the award of costs. Fed. R. Civ. P. 54(d) provides that in the absence of express provision for an award of costs in a statute or in another rule, "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." The use of "shall" creates a presumption that costs will be awarded against the losing party. See, e.g., Weeks v. Samsung Heavy Industries, 126 F.3d 926, 945 (7th Cir. 1997); Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1165 (7th Cir. 1983). Any party that seeks to avoid the imposition of costs bears the burden of overcoming the presumption. Weeks, 126 F.3d at 945; Badillo, 717 F.2d at 945. The most common grounds for denying an award of costs are indigency (coupled with good faith), absence of clear victory and misconduct or bad faith on the part of the prevailing party. See Laura B. Bartell, "Costs and Expenses in Federal Court," 101 F.R.D. 553, 561-563 (1984).

The question is whether plaintiff's particular circumstances should exempt him from liability for any portion or all of the taxable costs. I believe that he has shown enough to be relieved of a portion of the costs. Although he did not file an affidavit, he filed his income

tax returns, which he had to sign under penalty of perjury. Those returns show that he has little if any disposable income. I recognize that defendant believes that plaintiff brought his lawsuit in bad faith, when he had no real grounds to expect he could prevail, given his poor work ethic. However, I am not prepared to say that defendant has proven that plaintiff proceeded in bad faith.

The evidence at trial showed that plaintiff has succeeded in the past in finding housing in return for some maintenance or caretaking duties. There is no reason to think he is not doing the same thing today. Therefore, I do not think it is necessary to relieve him of the full burden of the costs. However, I believe that a 50% reduction is justified in light of plaintiff's limited earning capacity.

ORDER

IT IS ORDERED that plaintiff Paul S. Hammel's motion for a review of the clerk's award of costs is DENIED with respect to plaintiff's contention that the clerk of court erred in any respect in taxing costs; it is GRANTED in part on plaintiff's contention that he should be relieved from paying the full amount of the costs because of his poverty; and plaintiff is relieved of paying 50% of the award. FURTHER, IT IS ORDERED that plaintiff is to

reimburse defendant Eau Galle Cheese Factory for its costs in the amount of \$609.60.

Entered this 12th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge