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

PACIFIC CYCLE, INC.,

Plaintiff,

v.

POWERGROUP INTERNATIONAL, LLC (a/k/a POWERGROUP INTERNATIONAL, INC.), TOMBERLIN AUTOMOTIVE GROUP, INC. and MICHAEL TOMBERLIN,

Defendants.

OPINION & ORDER

12-cv-529-wmc

Currently before the court are the parties' respective motions for costs, as well as Pacific Cycle's motion to alter or amend the judgment to include its reasonable attorney's fees.

BACKGROUND

In this civil action, Pacific Cycle, Inc. sued PowerGroup International, LLC ("PowerGroup") to recover damages for PowerGroup's alleged breach of a license agreement between the parties. PowerGroup filed counterclaims for breach of contract and fraudulent inducement, seeking rescission of the agreement. Pacific Cycle moved for partial summary judgment that it was entitled to damages for breach of contract and that PowerGroup's counterclaims be dismissed. The court granted that motion in full.

This left a single remaining question for trial: whether defendants Tomberlin Automotive Group, Inc. ("TAG") and Michael Tomberlin were liable for the $1.56 million judgment against PowerGroup. The claim against TAG was stayed pending bankruptcy proceedings, but on October 28, 2013, a trial to the court was held as to whether Tomberlin was the alter ego of PowerGroup and thus personally liable. At trial,

the court granted Tomberlin's motion for a directed verdict at the close of plaintiff's case and dismissed the case against him with prejudice. (*See* Opinion & Order (dkt. #131).)

OPINION

Federal Rule of Civil Procedure 54(d) states that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party." This rule "creates a presumption that the prevailing party should recover costs." *McGill v. Faulkner,* 18 F.3d 456, 458 (7th Cir. 1994). Accordingly, "a denial of costs to a prevailing party must be accompanied by an explanation of the district court's 'good reasons' for this denial." *Krocka v. City of Chi.*, 203 F.3d 507, 518 (7th Cir. 2000).

Defendants object neither to Pacific Cycle's asserted costs against PowerGroup (dkt. #134), nor to Pacific Cycle's motion to add attorney's fees to the judgment (dkt. #136). (*See* Def.'s Resp. Bill of Costs (dkt. #140); Def.'s Resp. Mot. Alter Amend (dkt. #141).) Those motions, therefore, are granted.[1]

Pacific Cycle does object to Tomberlin's bill of costs, however, arguing: (1) Tomberlin is not the prevailing party; and (2) even if he is, the costs he seeks were not necessarily incurred by him in defense of the claim on which he prevailed. With respect to the first objection, "[c]ourts and commentators have interpreted 'prevailing party' to mean 'the party in whose favor judgment has been entered.'" *Republic Tobacco Co. v. N. Atl. Trading Co., Inc.*, 481 F.3d 442, 446 (7th Cir. 2007). However, the Seventh Circuit

[1] As requested by both parties, the attorneys' fees sought by Pacific Cycle will be reduced by the costs awarded to Pacific Cycle. (*See* Mot. Alter Amend (dkt. #141) ¶ 7; Def.'s Resp. (dkt. #141) 1.)

has also stated that "under Rule 54(d) the 'prevailing party' is the party who prevails 'as to the substantial part of the litigation.'" *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633, 641 (7th Cir. 1991) (quoting *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1015 (7th Cir. 1985)). For example, in *Northbrook,* an insurer, Commercial, was found to be liable to its insured, Procter & Gamble ("P&G"), meaning judgment was entered in P&G's favor. Even so, P&G had sought $5 million and the jury only awarded $45,500. *Id.* at 641-42. Accordingly, the Seventh Circuit agreed with the district court that P&G's recovery was so minimal that it could not be deemed the prevailing party. *Id.*

Pacific Cycle asks the court to view this case through the same lens, arguing that the central issues in the case were (1) "whether the license agreement for Schwinn Motor Sports had been breached, entitling Pacific Cycle to damages;" and (2) relatedly, whether Pacific Cycle had fraudulently induced PowerGroup to enter that agreement, which might have entitled PowerGroup to rescission. (Pl.'s Mem. Opp'n Bill of Costs (dkt. #142) 2.) Because Pacific Cycle prevailed entirely on those issues, plaintiff argues that Tomberlin is not entitled to costs for prevailing "on a secondary issue," as to his personal liability. (*Id.* at 3.)

Tomberlin correctly points out, however, that Pacific Cycle's citations all involve cases apportioning costs between a partially (or minimally) successful plaintiff and a single defendant. That is not the case here. This case is more properly characterized as one in which plaintiff succeeded completely on its claims against defendant PowerGroup

but was wholly unsuccessful in the single claim for alter ego liability it brought against defendant Tomberlin himself.

On these facts, a more analogous case is *Perlman v. Zell*, 185 F.3d 850 (7th Cir. 1999), which Tomberlin cites in support of his argument for an award of costs. In that case, Perlman sued multiple defendants, four of whom "prevailed on every claim in the district court, and a fifth . . . won on appeal." *Id.* at 858. Nevertheless, the district court concluded that Perlman was the prevailing party and awarded him about $90,000 in costs, apparently including costs against all five defendants. *Id.* The Seventh Circuit rejected any award of costs, explaining that since all "[f]ive defendants have prevailed outright," those five defendants were "entitled to recover their own costs of defense." *Id.* Tellingly, Pacific Cycle does not address *Perlman* in its reply. Moreover, other courts have echoed its reasoning. *See, e.g.*, *Bryant v. Gordon*, 503 F. Supp. 2d 1062, 1067 (N.D. Ill. 2007) (Bryant entitled to recover costs against defendants Gordon and Mach 1, LLC, but defendant Urtis entitled to recover costs from Bryant because he was "the prevailing party on Bryant's only claim against him").

Based on the above, Tomberlin is entitled to an award of his costs incurred in successfully defending the only claim that Pacific Cycle brought against him -- that he was personally liable for the breach of contract damages as PowerGroup's alter ego. The court having entered judgment with respect to that claim in his favor (*see* dkt. #133), Tomberlin is "entitled to recover [his] own costs of defense." *Perlman*, 185 F.3d at 858.

The next question is whether all of the costs Tomberlin enumerates are properly taxed to him under Rule 54(d). While Tomberlin has a "strong presumptive entitlement

to recover costs" as the prevailing party, *id.* at 858, "the court must determine that the expenses are allowable cost items and that the amounts are reasonable and necessary." *Northbrook Excess*, 924 F.2d at 642. Here, Pacific Cycle does not argue that any category of the costs Tomberlin seeks are not generally authorized by statute. In any event, the costs he seeks -- for deposition transcripts, copying and witnesses -- *are* expressly authorized by 28 U.S.C. § 1920(2), (3) and (4). (*See* Def.'s Bill of Costs (dkt. #138) 1.)

Instead, Pacific Cycle challenges individual costs on the grounds that they are not reasonable and necessary. More specifically, Pacific Cycle argues that: (1) the depositions of Alice Tillett, Danna Dueck, Earl Hensley and Tomberlin himself were largely related to defendants' counterclaim for fraudulent inducement, not to Tomberlin's defense on the charge of alter ego liability; and (2) the copying costs were incurred to accommodate defendants' change of counsel, not as a necessary part of Tomberlin's defense.[2]

With respect to the costs of depositions, Pacific Cycle has not met its burden in challenging them. "The introduction of a deposition in a summary judgment motion or at trial is not a prerequisite for finding that it was necessary to take that deposition. The proper inquiry is whether the deposition was 'reasonably necessary' to the case at the time it was taken, not whether it was used in a motion or in court." *Cengr v. Fusibond Piping Sys., Inc.*, 135 F.3d 445, 455 (7th Cir. 1998) (internal citations omitted). The

[2] Pacific Cycle also questions the necessity of the costs related to Thomas Frazee's trial appearance, but it offers no authority for its apparent argument that limitations imposed on the scope of Frazee's testimony rendered him unnecessary to Tomberlin's defense. Moreover, the court reviewed the fees requested and finds them appropriate under 28 U.S.C. § 1821, which allows for the $40 attendance fee, $135.11 subsistence allowance, and $505.11 in travel costs.

court finds that it was reasonable for Tomberlin's counsel to order each of these deposition transcripts. Tomberlin himself was the defendant; Hensley, as PowerGroup's former controller, had information relevant to PowerGroup's finances, Tomberlin's control over PowerGroup and the circumstances surrounding the Management Agreement; and Tillett and Dueck, as Pacific Cycle's president and licensing manager, respectively, had information regarding the original license agreement between Pacific Cycle and PowerGroup and the circumstances surrounding PowerGroup's breach. Given that alter ego liability requires inquiry into wrongdoing and causation, as well as inquiry into the equities, it was reasonable for Tomberlin to acquire these four deposition transcripts for trial preparation purposes, even though only one deposition was ultimately used at trial. *Cf. id.* (finding it "entirely reasonable" for defendant to have ordered deposition transcripts even where the transcripts were "used sparingly" in its motion for summary judgment).

Pacific Cycle also argues briefly in its reply that it appears the $5,119.66 in transcript costs that Tomberlin seeks represents the costs incurred by all the defendants collectively, rather than by Tomberlin individually, and that he should not be permitted to recover costs for transcripts that derived to the benefit *of all three defendants*, when he's really the only prevailing party of the three. There is more merit to this argument, since all three defendants were represented by the same counsel and so, effectively, Tomberlin (who may end up the only "winner" out of TAG, Tomberlin and PowerGroup) is claiming the costs for materials that served *everyone*, not just him. Neither party has actually pointed to any case law on this point, however, nor has the court found any. As

a matter of fairness, the court will nevertheless award one-third of the amount incurred as deposition costs here, to account for the fact that both PowerGroup and TAG would have benefitted from the depositions as well.

As for copying costs, Tomberlin appears to concede that these costs arose as a result of the change in lead counsel as the alter ego liability trial approached. (*See* Def.'s Br. Supp. Bill of Costs (dkt. #146) 9.) Pacific Cycle argues that such copies cannot be "reasonable and necessary," citing *Faraca v. Fleet 1 Logistics, LLC*, 693 F. Supp. 2d 891, 896-97 (E.D. Wis. 2010), in which the Eastern District of Wisconsin stated that "[p]hotocopying is an allowable cost if the copies are necessarily for use in the case, which [has] been interpreted as meaning that the copies are for the Court and opposing counsel. . . . A party may not recover the cost of copies which are made for the convenience of counsel." While the court does not necessarily agree that copies may *only* be "reasonable and necessary" when they are made for opposing counsel or the court, the lack of detail in Tomberlin's request for copying costs is problematic. The copies in question were made in September of 2013, after summary judgment resolved all questions of liability between Pacific Cycle and PowerGroup. Tomberlin nevertheless requests reimbursement for 30,980 pages of unidentified "produced documents," leaving the court unclear as to why copies of all of these documents would be *reasonably* necessary upon change of counsel. Moeover, Ms. Rottier appears to effectively concede that the copies were made for convenience purposes based on the change in counsel. Given that Pacific Cycle bears the burden of showing that costs are inappropriate, rather than Tomberlin bearing the burden to show that they are appropriate, at least *some* of these

copies would be reasonably necessary for trial preparation and the alter ego trial. To put it another way, either a grant of all of these costs in their entirety or the denial of all costs in their entirety *both* seem unfair. On the other hand, without more detail as to how many copies were reasonably necessary to defend the claims against Michael Tomberlin, the court has no basis to further pursue this request. Accordingly, defendant Tomberlin may have seven (7) days to provide more detail and plaintiff shall have seven (7) days thereafter to dispute any such claim.

ORDER

IT IS ORDERED that:

(1) plaintiff Pacific Cycle, Inc.'s request for costs (dkt. #134) and motion to alter or amend the judgment to add attorneys' fees and interest (dkt. #136) are GRANTED;

(2) defendant Michael Tomberlin's request for costs (dkt. #138) is GRANTED IN PART AND DENIED IN PART as set forth above; and

(3) defendant Tomberlin may have seven (7) days to provide more detail with respect to the copying costs and plaintiff may have seven (7) days from any such supplementation to dispute any such claim.

Entered this 29th day of September, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge