IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

CTGW, LLC,

Plaintiff,

v.

GSBS, PC, COLVIN ENGINEERING ASSOCIATES, INC., and SPECTRUM ENGINEERS, INC.,

Defendants.

OPINION and ORDER

09-cv-667-bbc

- -

Plaintiff CTGW, LLC brought this civil action against defendants GSBS, PC, Colvin Engineering Associates, Inc. and Spectrum Engineers, Inc., asserting state law negligence and breach of contract claims arising out of a dispute regarding the design and construction of Great Wolf Lodge resort and water park in Grand Mound, Washington. Plaintiff alleged that this court had subject matter jurisdiction under 28 U.S.C. § 1332(a)(1), which applies to actions in which the plaintiff and the defendants are "citizens of different States" and the amount in controversy is more than $75,000. In an opinion and order dated July 12, 2010, the court *sua sponte* dismissed the action for lack of subject matter jurisdiction because one of plaintiff's members is a federally-recognized Indian tribe. Dkt. #117. After the action

was dismissed, each of the three defendants submitted a bill of costs to the clerk of court. Plaintiff opposed the award of any costs. In a memorandum and order dated October 19, 2010, the clerk of court concluded that the award of costs was governed exclusively by 28 U.S.C. § 1919 and that there was no basis to award costs to defendants. Now before the court are defendants' motions to review the clerk of court's order denying costs. Dkt. ## 139, 140, 141.

I agree with the clerk of court that the award of costs in this case is governed by § 1919, which allows the *court* to order the payment of just costs. It is unlike Fed. R. Civ. P. 54(d), which states that the "*clerk* may tax costs." Although defendants should have directed their submissions to the court rather than the clerk, it is not necessary for defendants to file a new motion with the court seeking costs. Rather, I will treat their motions for review of the clerk's order denying costs as motions for costs. Because I conclude that costs are not justified under the circumstances of this case, the motions will be denied.

DISCUSSION

Because plaintiff's complaint was dismissed for lack of subject matter jurisdiction, the award of costs in this case is controlled by 28 U.S.C. § 1919, not Fed R. Civ. P. 54. Citizens for a Better Environment v. Steel Co., 230 F.3d 923, 927 (7th Cir. 2000) (explaining that § 1919 and § 1447(c) allow courts to award costs in cases in which they lack jurisdiction to

decide the merits); Miles v. State of California, 320 F.3d 986, 988, n.2 (9th Cir. 2003) ("Where the underlying claim is dismissed for want of jurisdiction, the award of costs is governed by 28 U.S.C. § 1919."); Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc., 179 F.R.D. 328, 331 (N.D. Ala. 1998) ("Section 1919 was expressly and specifically designed to cover [cases dismissed for lack of jurisdiction]"). Under § 1919, "[w]henever any action or suit is dismissed in any district court, the Court of International Trade, or the Court of Federal Claims for want of jurisdiction, such court may order the payment of just costs." 28 U.S.C. § 1919.

Unlike Rule 54(d)(1), § 1919 does not create a presumption that costs be awarded to the prevailing party. Section 1919 is permissive, allows the district court to award "just costs" and does not turn on which party is the "prevailing party." Compare Fed. R. Civ. P. 54(d)(1) ("Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—*should* be allowed to the prevailing party.") with 28 U.S.C. § 1919 ("court *may* order the payment of just costs"). See also Miles, 320 F.3d at 988, n. 2; Callicrate v. Farmland Industries, Inc., 139 F.3d 1336, 1340, n.8 (10th Cir. 1998); Davis v. Eastfield Ming Quong, Inc., 2009 WL 225420, *1 (N.D. Cal. Jan. 29, 2009).

The Court of Appeals for the Seventh Circuit has not determined specifically when costs are justified under § 1919. The court has explained that § 1919 emerged from the same law as § 1447(c), which permits the recovery of costs incurred as a result of the

unjustified removal of an action to federal court. Citizens for a Better Environment, 230 F.3d at 926-27; Garbie v. Daimler-Chrysler Corp., 211 F.3d 407, 410 (7th Cir. 2000). Thus, I concluded in two previous cases that "because § 1447(c) and § 1919 originated in the same law and use the same 'just costs' term, it is reasonable to assume that the standard for awarding costs under either statute should be the same." LeVake v. Zawistowski, 2004 WL 602649, *3 (W.D. Wis. Mar. 12, 2004) (citing Bollig v. Christian Community Homes and Services, Inc., 2003 WL 23211142, *3 (W.D. Wis. Oct. 27, 2003)). I concluded that an award of costs under § 1919 is appropriate when there is no justification for a plaintiff's pursuit of its case. Id.

At least two courts have applied similar reasoning, concluding that courts should consider whether a party was justified in commencing a case in federal court when deciding whether to award "just costs" under § 1919. Tankship International, LLC v. El Paso Merchant Energy-Petroleum Co., 2006 WL 2349603, *2 (D. Conn. July 25, 2006) (denying costs in part because plaintiff's position on jurisdiction was not vexatious, frivolous or wholly unsupported by evidence); Hygienics Direct Co. v. Medline Industries, Inc., 33 Fed. Appx. 621, 626 (3d Cir. 2002) (unpublished) (affirming district court's denial of costs where plaintiff had plausible grounds for asserting jurisdiction and did not act in "vexatious or frivolous" manner). In addition, several courts consider whether the costs were incurred in an effort to obtain dismissal of the matter for lack of subject matter jurisdiction and whether

the party seeking costs is likely to use the fruits of the expenses in defending a subsequent state court action. E.g., Callicrate, 139 F.3d at 1342 (holding that it was proper to award portion of costs directed at obtaining dismissal for lack of subject matter jurisdiction, but improper to award costs incurred in challenging merits of claim where costs could be sought in state court proceeding); Plata v. Darbun Enterprises, Inc., 2010 WL 3184298, *5 (S.D. Cal. Aug. 11, 2010) (awarding costs related to deposition that was necessary to determine whether subject matter jurisdiction was present, but denying all other costs); Rechberger v. Hurlburt, 2010 WL 1491951, *1 (W.D.N.Y. April 12, 2010) (denying costs for deposition transcripts and duplicated documents that would be applicable in future state court proceedings); Tankship International, 2006 WL 2349603, at *2 (denying costs that were not incurred in obtaining dismissal of case and where fruits of costs would be relevant in ongoing state court proceedings); Ericsson GE Mobile, 179 F.R.D. at 331-34 (explaining that reasonableness of plaintiff's jurisdictional claim, unreasonableness of defendants' discovery requests and whether parties would use discovery materials in state court proceedings were relevant in deciding whether costs were just).

I am persuaded that courts should consider the totality of the circumstances when deciding whether to award costs under § 1919. The language and history of the statute suggest that it was enacted to impose costs on a party that commences a case in federal court unjustifiably, causing the opposing party to incur unnecessary costs. Thus, whether a

plaintiff was justified in bringing suit in federal court is a relevant consideration, as well as whether the costs were incurred in obtaining dismissal of the case for lack of jurisdiction and whether the fruits of the costs may be used in ongoing proceedings.

Under the circumstances of this case, I conclude that defendants are not entitled to costs. First, there is no reason to think that plaintiff's assertion of subject matter jurisdiction was unjustified or frivolous. As I explained in the order dismissing the case, neither the Court of Appeals for the Seventh Circuit nor this court had addressed the issue of a recognized Indian tribe's citizenship. Although the weight of authority holds that the presence of an Indian tribe as a party destroys diversity, there is some disagreement and uncertainty among courts regarding the issue. As the clerk of court pointed out, the jurisdictional defect was not so obvious that defendants recognized it, as they did not move to dismiss the case for lack of subject matter jurisdiction. In fact, defendants played no role in the dismissal of the case.

Second, because defendants were not responsible for dismissal of the case, none of the costs they seek were incurred in an effort to get the matter dismissed. The court dismissed the case on its own initiative. Thus, none of the costs are attributable to plaintiff having filed the case in federal court.

Third, the requested costs are related to the merits of the case and are applicable to the state court action commenced recently by plaintiff. CTGW, LLC v. GSBS PC,

2010CV003854 (filed on July 20, 2010). At this stage, it is not clear which party will prevail in state court and whether the prevailing party will be awarded costs in state court. Thus, it is inappropriate to award those costs to defendants at this point in the litigation.

Finally, the cases cited by defendants in which this court has awarded costs under § 1919 previously are distinguishable. In Cambrians for Thoughtful Development, U.A. v. Didion Milling, Inc., 2008 WL 3166306 (W.D. Wis. Aug. 5, 2008), this court granted defendants' motion for summary judgment for lack of standing and awarded costs to the defendants. Unlike the present case, a portion of the defendant's costs were incurred in securing dismissal of the case on jurisdictional grounds and there would be no future state court proceeding in which the discovery would be relevant. In both Levake, 2004 WL 602649, at *3, and Bollig, 2003 WL 23211142, at *4, I concluded that the defendant was entitled to costs because plaintiff's lawsuit was "unjustified under settled law." That reasoning does not apply in this case, because the citizenship of an Indian tribe was not a settled issue under the law of this circuit.

In sum, an award of costs under the circumstances in this case will not advance the concerns for justice and fairness that underlie the plain language of § 1919. Because plaintiff's position was not wholly unsupported in the law, because the parties remain in active litigation in state court where the issue of costs to the prevailing party may be determined and because defendants did not incur any expenses solely in connection with the

motion to dismiss or plaintiff's decision to file in federal court, an award of costs under 28 U.S.C. § 1919 is unwarranted.

ORDER

IT IS ORDERED that the motions for costs filed by defendants GSBS, PC, dkt. #139, Colvin Engineering Associates, Inc., dkt. #140, and Spectrum Engineers, Inc., dkt. #141, are DENIED.

Entered this 19th day of November, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge