

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

HELEN GURECKI,	:	NO. 3:96 CV 1047
Plaintiff	:	
	:	
v.	:	(JUDGE MUNLEY)
	:	
NORTHEAST MEDICAL	:	
ASSOCIATES, P.C.,	:	
Defendant	:	

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MEMORANDUM

Before the court for disposition are the plaintiff's appeal from the clerk's taxation of costs and plaintiff's motion for attorney's fees and excess costs pursuant to 28 U.S.C.A. § 1927. The plaintiff is Helen Gurecki, and the defendant is Northeast Medical Associates, P.C. The matters have been briefed and are ripe for disposition. After a careful review, and for the reasons that follow, the motions will be denied.

Background

Plaintiff brought an employment discrimination case against the defendant. After a trial, the jury returned a verdict for the defendant. The defendant filed a bill of costs totaling \$ 22,877.47, which it later amended to \$24,346.12. Plaintiff filed objections to the defendant's bill of costs and first amended bill of costs. Subsequently, the Clerk of Court taxed costs in the amount of \$6,506.80 against the plaintiff. Plaintiff now appeals from this taxation of costs. In addition, the plaintiff has filed a motion for attorney's fees and excess costs pursuant to 28 U.S.C. § 1927. We shall address these two matters separately.

I. Plaintiff's appeal from clerk's taxation of costs

First we shall address the plaintiff's appeal from the clerk's taxation of costs. The law provides as follows:

A judge or clerk of any court of the United States may tax as costs the following:

- (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;
- (5) Docket fees under section 1923 of this title;
- (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance included in the judgment or decree.

28 U.S.C. § 1920.

Further, Federal Rule of Civil Procedure 54(d) provides that costs, other than attorney's fees, shall be allowed as of course to the prevailing party unless the court otherwise directs. In the instant case, the Clerk of Court taxed costs in the amount of \$6,506.80 against the plaintiff, which the plaintiff now appeals. Plaintiff's appeal from the clerk's taxation of costs is broken into three categories, deposition costs, subpoena costs/witness fees and a general argument concerning the merits of plaintiff's case. We will address each separately.

A. Depositions

Initially, the plaintiff contends that the Clerk of Court incorrectly taxed the costs of various depositions. Plaintiff presents two different arguments regarding the depositions. First, she claims that some were taken in support of the defendant's unsuccessful motions to dismiss, and therefore, the cost is not taxable. Other depositions she contends were only taken for discovery purposes and their costs cannot be recovered. After examining these arguments, we find them to be without merit.

1. Depositions in support of motions to dismiss

Plaintiff claims that some of the depositions were merely taken in support of the defendant's unsuccessful motions to dismiss, and therefore, their cost is not taxable. In support of this proposition, Plaintiff cites law which holds the charges of the court reporter for transcripts of depositions reasonably necessary for use in the case, even though not used at trial, are recoverable. See Moore v. Carrier Manufacturing Co., 511 F.2d 209, 217 (7th Cir. 1975). Plaintiff emphasizes the phrase "reasonably necessary for use in the case" and claims that the depositions at issue here were not reasonably necessary for use in the case.

Plaintiff further cites a legal treatise for the proposition that if a deposition is not used at trial or as evidence in a successful preliminary motion, costs of the same should be disallowed if the issue dealt with in the deposition becomes moot prior to the trial. Wright, Miller & Kane Federal Practice and Procedure: Civil 3d § 2676 at 425-27 (1998)(hereinafter "Wright and Miller"). We are in disagreement with the plaintiff. We believe that her interpretation of Wright and Miller is incorrect.

The proper legal standard to be derived from Wright and Miller is that when a

deposition is not actually used at trial or as evidence on some successful preliminary motion, whether its cost may be taxed generally is determined by deciding if the deposition reasonably seemed necessary at the time it was taken. Id. at 424-427.

Federal district courts sitting in the Third Circuit have had similar holdings to the general law stated in Wright and Miller. See Fitchett v. Stroehmann Bakeries, Inc., 1996 WL 47977 (E.D.Pa. 1996)(holding that the determination of necessity of the depositions is properly made in light of the facts known at the time of the deposition, without regard to intervening developments that later render the deposition unneeded for further use); Harrisburg Coalition Against Ruining the Environment v. Volpe, 65 F.R.D. 608, 611 (E.D.Pa. 1974)(holding that the general rule regarding deposition costs is that they are recoverable if the taking of the depositions is found to have been reasonably necessary at the time of taking); and Slook v. Killington Ski Area and Summer Resort, 1991 WL 4407 (E.D.Pa. 1991)(holding that costs for the taking of depositions are taxable when the depositions appear reasonably necessary to a party's preparation for trial in light of the facts known at the time the deposition was taken). Accordingly, we find that if the depositions were reasonably necessary at the time of taking, that their costs are recoverable.

In the instant case, at the time that the motions to dismiss were being considered, the depositions taken for that purpose were certainly needed, even though the defendant was ultimately unsuccessful on the underlying motions. Accordingly, we will deny plaintiff's appeal regarding these depositions.

2. Depositions obtained for discovery purposes

The other general class of depositions that the plaintiff objects to are depositions which she claims were taken solely for discovery purposes. Plaintiff contends that because the depositions for discovery purposes only, their costs are not taxable. Plaintiff's contention is without merit as we find the plain language of Local Rule 54.4(3) to be controlling. This rule provides as follows: "The reporter's charge for the original deposition and/or a copy is taxable whether or not the same is actually received into evidence, and *whether or not it is taken solely for discovery, regardless of which party took the deposition.*" (emphasis added). Accordingly, plaintiff's argument on this ground will be denied.

B. Subpoena/Witness Fees

Next plaintiff alleges that the Clerk of Court improperly taxed certain subpoena/witness fees pursuant to Local Rule 54.4(4) which provides that: "The rate for witness fees, mileage and subsistence are fixed by statute (see 28 U.S.C. § 1821). Such fees are taxable even though the witness does not take the stand provided the witness necessarily attends the court. Such fees are taxable even though the witness attends voluntarily upon a request and is not under subpoena.... No party shall receive witness fees for testifying in his or her behalf but this shall not apply where a party is subpoenaed to attend court by the opposing party...."

Plaintiff's arguments regard factual issues such as who subpoenaed witnesses, and compelled witnesses to appear at trial. Plaintiff has submitted no evidence to support her factual allegations. She merely makes factual assertions in her brief. Where a party challenges a Clerk's taxation of costs, the challenger must introduce affidavits averring the

facts upon which the challenge is based. Statements made in briefs are not evidence of the facts asserted. Bell v. United Princeton Properties, Inc., 884 F.2d 713, 720 (3d Cir. 1989).

To the extent that the plaintiff makes contentions involving which party subpoenaed which witness, whether plaintiff required witnesses to appear at trial, and what plaintiff informed defense counsel regarding the appearance of witnesses, her appeal must be denied, as the court is not in a position to make a factual determination on these issues. While making this determination, we do not hold that plaintiff would be entitled to relief had her factual assertions been supported. We are merely holding that we need not address plaintiff's arguments, and they will be denied because they are not supported by evidence.

C. Meritorious claim against defendant

Lastly, the plaintiff alleges that costs should not be taxed against her as she brought and presented a meritorious claim against defendant and supported that claim with credible evidence at trial. Plaintiff cites absolutely no authority for this approach to the taxation of costs. We find that the statutory authority for the taxation of costs and the case law in this area establish that plaintiff's argument is without merit. Whether plaintiff presented a meritorious claim supported by credible evidence is a jury question, and it is only after the jury finds against one of the parties in the case that the taxation of costs for the prevailing party is addressed. In the instant case, defendant was the prevailing party, therefore, taxation of costs is appropriate.

For the all the above reasons, plaintiff's appeal of the Clerk's taxation of costs will be denied. In its brief in opposition to the plaintiff's appeal, the defendant requests that the

court add interest to the amount awarded by the Clerk of Court. Defendant has cited no authority that such interest is recoverable, and our research has uncovered none. Therefore, the request to add interest will be denied.

II. Plaintiff's motion for excess costs

The second motion at issue is plaintiff's motion for excess costs pursuant to 28 U.S.C. § 1927. With this motion, plaintiff seeks to recover the costs of arguing against four motions to dismiss filed by the defendant. The law provides as follows:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (hereinafter "section 1927").

Plaintiff claims that the defendant filed several motions to dismiss which were duplicative and vexatious attempts to delay this case which resulted in plaintiff incurring excessive costs, expenses and attorneys' fees pursuant to section 1927. Plaintiff seeks to recover these expenses in the amount of \$23,996.43.¹ Defendant maintains that the motion should be denied as it does not establish that the filing of the motions to dismiss was unreasonable and vexatious conduct. After a careful review of the matter, we are in

¹In the "wherefore clause" of plaintiff's motion she asks for a total of \$23,816.60. We cannot determine the manner in which this number was reached as she is seeking \$21,965.00 in attorneys fees and copying and postage in the amount of \$2031.43, for a total of \$23,996.43. This discrepancy is apparently fixed in the proposed order which asks for \$23,996.43. (This amount is also mentioned in paragraph 20 of the motion.)

agreement with the defendant.

The law provides as follows:

Imposition of attorney's fees and costs under section 1927 is reserved for behavior "of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation." Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204, 208 (3d Cir. 1985)(quoting Colucci v. New York Times Co., 553 F.Supp. 1011, 1014 (S.D.N.Y. 1982)). Thus, fees may not be awarded unless there is a "finding of willful bad faith on the part of the offending attorney." Baker, 764 F.2d at 209.

In re: Orthopedic Bone Screw Products Liability Litigation, 193 F.3d 781, 795 (3d Cir. 1999).

Plaintiff has not demonstrated bad faith in the instant case. It is the plaintiff's position that defendant filed four motions to dismiss on the same grounds (lack of subject matter jurisdiction) and such action was unreasonable and vexatious. We disagree.

In our decision on the fourth motion to dismiss, this court examined the three previously filed motions to dismiss. We found that the first motion was dismissed without prejudice to the defendant raising the issue of subject matter jurisdiction after discovery. The second motion to dismiss was withdrawn without prejudice and with the right to again file a motion to dismiss at the completion of discovery. See, Doc. 99, Memorandum of July 7, 1999, at pg. 1, n1. We further determined that the court denied the third motion to dismiss without prejudice. The court ruled that a subsequent re-examination of the issue might be appropriate. Id. at 2. Accordingly, the fourth motion to dismiss was filed and ultimately denied. Based on the manner in which the motions were ruled on, with the court always seeming to leave the door open for the defendant to file subsequent motions to dismiss, we

find that the plaintiff has not established that the defendant acted in bad faith so as to justify relief under section 1927. Consequently, the plaintiff's motion for attorney's fees and excess costs pursuant to 28 U.S.C. § 1927 will be denied.

Conclusion

In conclusion, we find that the plaintiff's appeal of the Clerk of Court's taxation of costs should be denied and the award of costs affirmed. Further, we find no merit to the plaintiff's motion for attorney's fees and excess costs, and it too will be denied. An appropriate order follows.

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NORTHEAST MEDICAL	:	
ASSOCIATES, P.C.,	:	
Defendant	:	

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ORDER

AND NOW, to wit, this 13th day of December 2000 it is hereby **ORDERED** as follows:

- 1) Plaintiff's appeal from clerk's taxation of costs [167-1] is **DENIED** and the Clerk of Court's taxation of costs in favor of defendant and against the plaintiff in the amount of \$6506.80 is **AFFIRMED**; and

- 2) Plaintiff's motion for attorney's fees and excessive costs [169-1] is **DENIED**.

BY THE COURT:

JUDGE JAMES M. MUNLEY
United States District Court

Filed: 12/13/00