UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK and RENEE BEAM,

Plaintiffs, **Civil Action No. 07-cv-1227**

Honorable Rebecca R. Pallmeyer

vs.

FEDERAL ELECTION COMMISSION,

Defendant.
_____/

PLAINTIFFS' OBJECTIONS TO DEFENDANT'S BILL OF COSTS

By and through counsel, Plaintiffs respectfully request that this Honorable Court exercise its discretion under Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920 and deny Defendant's Bill of Costs for the following reasons.

Federal Rule of Civil Procedure 54(d) provides for taxable costs "[u]nless . . . a court order provides otherwise." Fed. R. Civ. P. 54(d). The United States Supreme Court has long held that a district court may, in its discretion, refuse to tax costs, including a witness's travel expenses in excess of 100 miles, against an unsuccessful plaintiff. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964). Relying on the express language of Rule 54, the *Farmer* Court concluded that a court has the discretion to decline the taxation of costs against a non-prevailing party.

In *Crawford v. Gibbons*, 482 U.S. 437 (1987), the Supreme Court again reiterated its holding from *Farmer* that Rule 54(d) vests district courts with the discretion to grant or decline the taxation of costs. Furthermore, 28 U.S.C. § 1920 also provides that "[a] judge or clerk of any court of the United States *may* tax as costs" certain items, including witness fees and transcripts. As the Supreme Court made clear in *Crawford*, "Section 1920 is phrased permissibly because R.54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party." *Crawford*, 482 U.S. at 437-38. *See also Weeks v. Samsung Heavy Indust. Co.*, 126 F.3d 926, 945 (7th Cir. 1997); *Northbrook Excess and Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633 (7th Cir. 1991). Plaintiffs respectfully assert that this Court should exercise the discretion vested in it under the rules and deny, in its entirety, Defendant's bill of costs.

In this case, Plaintiffs had *prima facie* evidence that Defendant Commission had violated the Right to Financial Privacy Act. Specifically, Defendant's agent, Mr. Philip Olaya, had testified under oath during his deposition that he had seen Plaintiffs' private financial records. There was ample testimony and evidence that Defendant had in fact obtained and/or shared with the Justice Department the bank records for dozens of individuals associated with the Fieger Law Firm of which Plaintiff Jack Beam serves *of counsel*. To be more clear, Plaintiffs survived summary judgment based not on slight inferences or circumstantial evidence, but rather based on the direct, unequivocal testimony of Mr. Olaya whose testimony, alone, was *prima facie* proof of Plaintiffs' claims.

Armed with Olaya's testimony, and the discrepancies of other witness' testimony, Plaintiffs proceeded to trial before this Court. And while the Court, sitting as the fact-finder, ultimately ruled in favor of Defendant, there was sufficiently strong evidence and testimony, including Mr. Olaya's, that prompted a trial on the merits. While Plaintiffs recognize that the Court ruled against them on

the merits, Plaintiffs should not be penalized, again, with having to incur Defendant's taxable costs. This is especially true given that Plaintiffs had strong and direct evidence on their claim against Defendant. Indeed, the testimonial evidence came from Defendant's own agent and attorney, Mr. Olaya.

This was not a situation where Plaintiffs proofs were flimsy or rested on independent, third-party witnesses. Plaintiffs proceeded to trial with Defendant's admissions by their own agent. Of course, at trial, Defendant's agent flipped his testimony and explained that he made a mistake during his prior deposition testimony. Regardless, Plaintiffs are not attempting here to re-litigate the Court's decision on the merits of their claims, but rather are asking this Court to consider these factors as the *raison d'etre* for the trial which resulted in Defendant's taxable costs.

As Rule 54(d) makes clear, and the Supreme Court's cases interpreting the same, this Court has the discretion to decline to tax costs in favor of the prevailing party. Plaintiffs believe that the reasons stated herein militate in favor of the Court exercising its discretion to decline to tax costs against Plaintiffs.

Moreover, it is well established that "he who comes in equity must come with clean hands." *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945). The "clean hands" doctrine operates to deny recovery to one who is "tainted with inequitableness." *Id.* Under this doctrine, trial courts may deny, in whole or in part, relief to a litigant with unclean hands. Such is the case here.

Here, facts came out at trial including that the Commission threatened Plaintiffs, without any basis in fact, with a felony offense. Specifically, Defendant's agent Roger Hearron testified that

although he found records of several past contributions by Jack and Renee Beam, Defendant nevertheless accused them of having never previously contributed to a federal campaign. This demonstrably false fact was an underpinning of Defendant's false claims that Plaintiffs violated federal campaign finance laws. It was also this demonstrably false fact which ultimately led to Plaintiffs' RFPA claims against Defendant. The Commissions claims and investigation against Plaintiffs was eventually dropped without any recourse whatsoever. This fact shows that, at a minimum, Defendant did not come to Court with clean hands regardless of the Court's ultimate ruling.

The Court should also consider Defendant Commission's actions of forcing Plaintiffs to incur thousands of dollars of costs throughout this litigation. On October 15, 2008, this Court denied Defendant's motion to dismiss and/or for summary judgment. Following this Court's ruling, Plaintiffs served on Defendant its discovery requests for interrogatories, documents, and depositions. Without any legitimate basis, Defendant Commission objected to each and all of Plaintiffs' deposition notices. Defendant Commission also refused to produce any documents under a vague claim of privilege, and objected to nearly each and all of Plaintiffs' interrogatories. Defendant's baseless objections prompted Plaintiffs to file their first motion to compel discovery (Docket No. 113) which forced Plaintiffs' to incur substantial costs.

During a hearing on the matter, the Court ordered Defendant to comply with Plaintiffs' discovery request and to provide a privilege log for any documents being withheld under a claim of privilege (Docket No. 117). During a subsequent hearing, the Court further ordered the depositions requested by Plaintiffs (Docket No. 126). Many of these discovery disputes and Defendant's objections appeared designed only to increase Plaintiffs' costs and fees associated with these matters.

These actions demonstrate, at a minimum, that Defendant has unnecessarily caused Plaintiffs to incur substantial costs arising from their uncooperative and often baseless objections in this case. It would hardly seem fair to now assess costs against Plaintiffs given Defendant's strategy of forcing Plaintiffs to incur substantial costs of their own. These facts further reveal the inequities of granting Defendant's instant request for taxable costs.

For these reasons, Plaintiffs respectfully request that this Honorable Court deny Defendant's request for taxable costs.

Travel and Lodging Expenses

In the event that the Court decides to tax Plaintiffs with costs, it should disallow many of the requested costs. In its bill of costs, the Commission claims transportation, lodging, and *per diem* for five government employees. The Commission claims three nights hotel for Andersen, Hearron, Olaya, and Shonkwiler. Plaintiffs object to these costs as excessive. The trial in this matter was held on Wednesday and Thursday August 25-26, 2010. Given the conclusion of the trial on Thursday afternoon, August 26, 2010, there is no reason that Plaintiffs should be taxed costs for these witnesses third night of lodging. *Majeske v. City of Chicago*, 218 F.3d 816, 824 (7th Cir. 2000)(finding that assessed cost must be reasonable).

Indeed, the other witness for whom Defendant claims taxable costs, Mr. Kendall Day, is claiming only two nights lodging. Mr. Day flew back to Washington D.C. after the trial on Thursday; there is no reason to justify a third night lodging as costs for Defendant's other four witnesses.

Likewise, these four witnesses are not entitled to a third day *per diem*. Witnesses Day and Shonkwiler sought only two-and-a-half days *per diem* while witnesses Andersen, Hearron, and Olaya sought three-and-a-half day *per diem*. These *per diem* costs are both excessive and unreasonable. Given that the trial was two business days, the witnesses, if at all, are only entitled to two days *per diem*.

The Court should also disallow Defendant's claim for ground transportation as it is unsupported by documentation and excessive. For instance, Mr. Hearron claims $50 for taxi service from Chicago's O'Hare airport to the Palmer House Hotel, and $47.55 for return taxi. These charges are unsupported and excessive. Mr. Olaya's taxis are $27.10 each way, which is the average amount that the undersigned counsel has paid no less than 40 times while traveling to Chicago for this case.

The Court should also reject Defendant's transportation costs as to each witness. It is unclear why certain witnesses claim $383.45 (Roger Hearron) for transportation costs, while other witnesses who traveled the same route, for the same trial, paid only $239.90 (Phillip Olaya). Based on its submission, it is impossible to calculate or explain the differences between these costs between Defendant's witnesses.

The Court should also disallow internet fees and ATM fees as claimed by Mr. Day and Mr. Andersen (Defendant indicates that it isn't seeking these costs, but they are listed on their submissions). These costs are not contemplated under 28 U.S.C. § 1920 or § 1821.

Transcript Expenses

Plaintiffs also object to Defendant's claim for costs of $325 for its videotaped deposition of Ms. Wassom Bayes. There was no reason that Ms. Bayes's deposition needed to be videotaped, as

the undersigned counsel had previously indicated to Defendant's counsel. The transcript was sufficient for court purposes, and this case did not involve claims of injury or the like by Ms. Bayes that would have required a videotaped deposition. This costs was both unnecessary and excessive.

Plaintiffs also object to Defendant's request for the costs of transcripts from hearings before this Court in January and February 2009. Defendant claims that these transcripts were necessary "to ensure that plaintiffs kept within the limits the Court set for then-upcoming depositions." (Declaration of Harry Summers, pg. 5). Contrary to Defendant's contention, these transcripts were unnecessary and served no purpose other than to add extra items to its bill of costs.

CONCLUSION

Given Defendant's unclean hands, Plaintiffs do not believe an assessment of costs, in any amount, should be taxed against them in this action. Plaintiffs' proofs were strong and unequivocal. Plaintiffs survived summary judgment and went to trial with admissions from Defendant's agent which proved a *prima facie* violation of the RFPA regardless of the ultimate outcome. Among other things, the trial revealed that Defendant Commission harassed and threatened Plaintiffs without any basis in fact and contrary to the information it had obtained by its investigators. Defendant's unclean hands should preclude, entirely, an assessment of costs against Plaintiffs. On a balance of the

equities in this matter, the Court should exercise its sound discretion and decline to tax costs against Plaintiffs in any amount.

Respectfully submitted,

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Dated: November 17, 2010

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record in this matter.

s/ Michael R. Dezsi
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