

amount, given that a significant portion of the claimed fees were expended for witnesses not called and for photocopies not introduced at trial¹, and (6) Plaintiff did not sufficiently itemize costs in a manner which provides reasonable guidance for the Court to assess them. For the following reasons, Defendants' Motion is granted in part and denied in part.

I. BACKGROUND

This case arose from a fee dispute between Defendant Hill and ERSE, a law firm which represented Hill in late 1995 in a replevin action in the state of New Jersey. As a result of Hill's dissatisfaction with ERSE's performance in that New Jersey action, Hill terminated ERSE's representation in January 1996. Afterward, ERSE filed the above-captioned lawsuit, seeking payment of \$59,622.43 in unpaid legal fees. Hill responded with a counterclaim for professional negligence and misrepresentation for ERSE's alleged mishandling of the replevin action in New Jersey.

Following protracted discovery, arbitration hearings and a bench trial on certain issues, the case was tried to a jury

¹ The Clerk correctly recognized that the taxing of witness fees is proper even though a witness does not testify where counsel incurs the witness fee in question with a "good faith" expectation of calling the witness to testify. (Clerk's Taxation of Costs at 7)(citing cases). Defendants' failure to substantiate their contention that Plaintiff is not entitled to such costs leaves this Court with no basis to reconsider the Clerk's award for witness fees or for photocopies not introduced at trial.

from July 12, 1999 to July 21, 1999. At the close of all of the evidence, the jury returned a verdict on ERSE's claim against Hill in the amount of \$29,831.22, with no liability on the part of Mr. Richter. With respect to Hill's counterclaim, the jury found that ERSE was not liable.

II. STANDARD OF REVIEW

Rule 54(d) of the Federal Rules of Civil Procedure provides the standard for use in taxing costs in all cases.² Smith v. SEPTA, 47 F.3d 97, 99 (3d Cir. 1995). It states the following:

Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

FED. R. CIV. P. 54(d).

The language of Rule 54(d)(1) creates a presumption in

² This Court may only tax costs explicitly mentioned in 28 U.S.C. § 1920, which includes the following: (a) fees of the clerk and marshal; (b) 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 28 U.S.C. § 1923; (6) compensation of court-appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828.

favor of awarding costs to the prevailing party, which makes such an award automatic in the absence of an express direction to the contrary by the district court. Nat'l Information Serv. v. TRW, 51 F.3d 1470, 1471-72 (9th Cir. 1995); see also Smith, 47 F.3d at 99 ("Under this rule, a prevailing party generally is entitled to an award of costs unless the award would be `inequitable.'").

The unsuccessful litigant can overcome this presumption by pointing to some impropriety on the part of the prevailing party that would justify a denial of costs. The loser bears this burden because the denial of costs is by nature a penalty. A district court therefore generally must award costs unless the prevailing party is guilty of some fault, misconduct, or default worthy of punishment.

Nat'l Information, 51 F.3d at 1472 (citations omitted); see also Smith, 47 F.3d at 99 (describing the limits on a district court's discretion to deny costs to a prevailing party as a penalty for some defection displayed by said party during the course of the litigation); Greene v. Fraternal Order of Police, 183 F.R.D. 445, 448 (E.D. Pa. 1998) ("[T]he Third Circuit has ruled that for a district court to deny costs to a prevailing party is in the nature of a penalty.").³

Thus, this Court has limited discretion in taxing costs and must explain its conclusions on the record. Farley v. Cessna

³ Examples of misconduct that would warrant denying costs to a prevailing party include: calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or delaying in raising objections fatal to the plaintiff's case. Smith, 47 F.3d at 99 (citation omitted).

Aircraft Co., No. CIV. A. 93-6948, 1997 WL 537406, *3 (E.D. Pa. Aug. 1, 1997) ("If the court denies a cost, it must articulate a reason why the prevailing party is not entitled to that cost.").

III. DISCUSSION

Defendants begin their appeal by arguing that this Court already decided the issue at hand against ERSE on July 21, 1999, at a charging conference with the parties. At that conference, this Court heard argument from counsel concerning Plaintiff's and Defendants' proposed jury instructions. One of the instructions proposed by Plaintiff dealt with an award of attorney's fees to Plaintiff, which was denied. (Defs.' Mem., Exs. D & E.) Defendants' attempt to characterize that ruling as pertaining to a motion for costs under Fed. R. Civ. P. 54(d) is unavailing. Indeed, no such ruling would be justifiable in the absence of a resolution of the case in favor of Defendants. Accordingly, Defendants' contention is unsupported and Defendants' appeal of the Clerk's Taxation of costs shall be denied in this regard.

Next, Defendants submit that because Hill previously tendered reasonable offers to settle the amount in dispute, this Court should refuse ERSE's request for taxation of costs. In support of their position, Defendants cite S.G.C. v. Penn-Charlotte Assocs., 116 F.R.D. 284 (W.D.N.C. 1987), in which the defendant had made, and the plaintiff refused, a verbal offer to

settle that case for an amount greater than what the plaintiff later won at trial. Defendants assert that the court in S.G.C. did not hold the offer of settlement to the same standards as an offer of judgment under Federal Rule of Civil Procedure 68, reasoning that the offer was enough for the court to exercise its equitable discretion and deny the plaintiff any costs incurred after it refused the offer. (Defs.' Mem. at 8)(citing S.G.C., 116 F.R.D. at 287). Thus, Defendants contend that the Clerk's taxation opinion errs in its attempt to hold Hill's offer of settlement to the Rule 68 standard.

In response, ERSE argues that the holding in S.G.C. is distinguishable in that the offer in that case was made ten days before trial, and the court found that the plaintiff had acted in bad faith. ERSE asserts that in the instant action the good faith of Plaintiff's claims is exemplified by the fact that an arbitration panel found in Plaintiff's favor on the attorney's fees and costs claims. Moreover, ERSE points out that Defendants have not cited any applicable case law holding that an offer to settle, in the absence of bad faith conduct, militates against an award of costs. (Pl.'s Resp. at 10.)

It is regrettable that the parties were unable to resolve this matter before litigation ensued in which both parties have fought vigorously. (N.T., dated 7/21/99, at 45-46.) As the Clerk stated, however, a mere offer to settle does not

erase the presumption that the prevailing party shall recover costs. (Clerk's Taxation of Costs at 5.) This Court will not scrutinize the parties' settlement discussions except to acknowledge that Defendants could have made an offer of judgment under Rule 68, but opted not to do so. Withrow v. Cornwell, 845 F. Supp. 784, 787 (D. Kan. 1994) ("The Court sees no need to delve into the disparity and reasonableness of the parties' settlement offers."). Based on the above, this Court concludes that the Clerk did not err in disallowing Hill's objection to taxation of costs.

Defendants also contend that taxation of costs should be denied given that ERSE's recovery at trial was half of its claimed damages and a small percentage of its claimed costs. In responding to this argument, the Clerk properly recognized that the test for whether a plaintiff is "the prevailing party" and therefore entitled to its costs is whether the plaintiff obtained some of the benefit the party sought in bringing suit.⁴ (Clerk's

⁴ Defendants contend that costs should not be imposed on a joint and several basis in light of the fact that ERSE was not a "prevailing party" against Irvin Richter and David Richter and, thus, ERSE cannot receive costs for litigating the claims against those defendants as a matter of law; nor should the Clerk's award have included Irvin Richter. However, the costs incurred by the Defendants were incurred for the pursuit of Plaintiff's breach of contract claim and the defense against all of Defendants' counterclaims. As a result, this Court sees no justification for departing from the generally accepted rule that losing parties are jointly and severally liable for costs. See, e.g., United States v. Local 1804-1, 1996 WL 22377, at *2 (S.D.N.Y. 1996); Morales v. Smith, No. 94 CIV. 4865(JSR), 1998 WL 352595, *2

Taxation of Costs at 4)(citing Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 910-11, 926 (3d Cir. 1985)). In this case, ERSE not only received a verdict in its favor, awarding the law firm \$29,831.22 for its breach of contract claim, but ERSE also was successful defending against Defendants' fifteen-million dollar counterclaim. Under such circumstances, it is clear that Plaintiff is entitled to costs as the prevailing party in this action. Cf. Lacovara v. Merrill Lynch, Pierce, Fenner & Smith, 102 F.R.D. 959, 961 (E.D. Pa. 1984)(party that did not succeed on counterclaim, but successfully defended against larger claim was prevailing party).

Defendants further argue that even assuming that ERSE has established a right to receive costs, it is not entitled to certain copying costs for which it has failed to provide a proper itemization. Plaintiff responds that Exhibit G to the Bill of Costs demonstrates that the copies were all made on dates specifically associated with major events occurring in the litigation and are attested to by Attorney Siedzikowski as being copies of papers necessarily obtained for use in the case.

Fees for exemplification and copies of papers may be recovered by a prevailing party. 28 U.S.C. § 1920(4). However, Defendants are correct in their assertion that Plaintiff has not

(S.D.N.Y. June 26, 1998); Posner v. Lankenau Hospital, CIV. A. No. 82-1387, 1990 WL 18250, *3 (E.D. Pa. Feb. 26, 1990).

sufficiently itemized its \$34,000.61 copying costs to enable this Court to determine which copies were necessarily obtained for use in the litigation or were made for the convenience of counsel. See Ass'n of Minority Contractors & Suppliers, Inc. v. Halliday Properties, Inc., No. CIV. A. 97-274, 1999 WL 551903, *4 (E.D. Pa. June 24, 1999). Indeed, a review of Exhibit G as submitted by Plaintiff simply reveals a chart with dates and corresponding amounts with no description of what was copied. Because Plaintiff has not submitted a sufficient itemization for its substantial copying costs, this Court will reduce the Clerk's award for such costs by fifty percent. Id. at *5; Nugget Distributors Cooperative v. Mr. Nugget, Inc., 145 F.R.D. 54, 57 (E.D. Pa. 1992)(reducing taxable costs for photocopying by fifty percent because clearly excessive); Proffitt v. Municipal Auth., 716 F. Supp. 837, 854 (E.D. Pa. 1989)(same), aff'd, 897 F.2d 523 (3d Cir. 1990); see also Peters v. Delaware River Port Auth., Civ. A. No. 91-6814, 1995 WL 37614, *2 (E.D. Pa. Jan. 27, 1995)(reducing copying charges from \$11,935.78 to \$2,185.25 based on court's inability to determine whether charges were incurred necessarily for use in the case).

For all of the above reasons, Defendants' Motion to Appeal Taxation of Costs is granted with respect to Plaintiff's copying costs and denied in all other respects. An appropriate order follows.

