

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATHAN FREY, a minor,	:	CIVIL ACTION
by and through his parents,	:	
RICHARD AND ELEANOR FREY, and	:	NO. 96-7290
RICHARD AND ELEANOR FREY,	:	
in their own right,	:	
	:	
Plaintiffs	:	
	:	
v.	:	
	:	
CROSMAN AIRGUN and	:	
CROSMAN PRODUCTS OF CANADA, Ltd.,	:	
	:	
Defendants.	:	

OPINION

BUCKWALTER, J.

March ____, 1999

I. INTRODUCTION

Plaintiff Nathan Frey filed this action on October 28, 1996. At that time, he was a minor and was represented by his parents, who also sued in their own right. Judgment was entered in favor of Defendants and against Plaintiffs on July 28, 1997. Defendants filed their bill of costs on November 6, 1997, to which Plaintiffs filed objections on August 4, 1998, after awaiting the unsuccessful outcome of their appeal. Defendants replied to the objections shortly thereafter. On February 3, 1999, after reviewing the submissions and conducting a telephone conference with the parties, the Clerk of Court taxed costs against Plaintiffs in the amount of \$13,060.45.

Pursuant to Fed. R. Civ. P. 54(d)(1), Plaintiff (but not his parents) now moves this Court to review the Clerk's award. For the reasons discussed below, the decision of the Clerk of Court will be AFFIRMED in its entirety.

II. DISCUSSION

A. STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 54(d)(1), "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. . . . 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." Thus, Plaintiff's "appeal" is more properly framed as a motion for this Court to review the Clerk of Court's award.

A Clerk of Court's taxation of costs is subject to de novo review by the district court. See Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 232-33 (1964). Although "[c]osts, unlike attorney's fees, are awarded to a prevailing party as a matter of course unless the district court directs otherwise," Croker v. Boeing Co. (Vertol Div.), 662 F.2d 975, 998 (3d Cir. 1981) (en banc), an award of costs remains within the sound discretion of the district court, see Farmer, 379 U.S. at 233-34. However, the court may not tax costs unless they are explicitly delineated in 28 U.S.C. § 1920 and concomitantly defined in 28 U.S.C. § 1821. See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S. Ct. 2494, 2497 (1987); In re Philadelphia Mortgage Trust, 930 F.2d 306, 307-10 (3d Cir. 1991). If a court concludes that a prevailing party is not

entitled to costs, it must articulate reasons for that determination. See ADM Corp. v. Speedmaster Packaging Corp., 525 F.2d 662, 664-65 (3d Cir. 1975).

B. DISPARITY OF RESOURCES AND INDIGENCE

Plaintiff first contends that the Clerk failed to take into account the disparity of resources between the parties and his indigence. See Pl.’s Mem. at 1-2. Specifically, he alleges that “the disparity of resources between the parties to this litigation is great and that the imposition of imposing costs would cause him significant financial hardship.” Id. at 2. The Court finds no merit to this argument.

Costs may be awarded if the court finds them established by the record unless the “court concludes that such an award would be ‘inequitable.’” Friedman v. Ganassi, 853 F.2d 207, 211 (3d Cir. 1988), cert. denied, 488 U.S. 1042 (1989). However, it is not “‘inequitable’ to tax costs in favor of a prevailing party with substantially greater wealth than the losing party.” Smith v. SEPTA, 47 F.3d 97, 99 (3d Cir. 1995). So long as the losing party can afford to pay, the disparity between the parties’ financial resources is not germane to the issue of taxing costs. See id. at 100.

Consequently, the only portion of Plaintiff’s argument that this Court need consider is the allegation that he is indigent. And yet, that naked allegation is all that is proffered; Plaintiff provides nothing to support such a finding of indigence. See, e.g., Braxton v. United Parcel Serv., 148 F.R.D. 527 (E.D. Pa. 1993) (attaching affidavit setting forth circumstances in support of claim that award should be reduced because of plaintiff’s indigence).

In any event, the record demonstrates that Plaintiff has the ability to pay, notwithstanding counsel's unsupported allegation that Plaintiff is now attending college full-time. For example, Plaintiff received \$100,000 in a settlement of his claim against another defendant in this case, John Smith; he has now reached the age of majority and capable of, at least, part-time employment; and his parents remain jointly and severally liable for these costs.

Accordingly, the Court concludes that the Clerk committed no error on this ground.

C. DEFENDANTS' ALLEGED DEFECTION

Plaintiff next maintains that the Clerk was unable to make a determination as to whether Defendants had increased the costs of this case through their own defection because the Clerk lacked a mechanism by which to find facts relevant to that inquiry. See Pl.'s Mem. at 3-5. Specifically, Plaintiff claims that Defendant committed substantial acts of defection, including, inter alia, joining a non-party on an alternative theory of liability, filing numerous motions in limine, and incurring excessive copy fees.

“[T]he denial of costs to the prevailing party . . . is in the nature of a penalty for some defection on his part in the course of the litigation.” Speedmaster, 525 F.2d at 665 (internal quotations and citation omitted). Examples of “defection” include “calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or . . . delaying in raising objection fatal to the plaintiff's case.” Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 926 (3d Cir. 1985) (internal quotations and citation omitted).

After independently reviewing the record, the Court concludes that there is no support for Plaintiff's contention. The parties were faced with numerous legal and factual issues, and the Court cannot agree that Defendants engaged in any defection in the defense of this litigation such that their request for costs should be denied. In light of these circumstances, an award of \$13,060.45 is patently reasonable, and the Court concludes that the Clerk committed no error on this ground.

D. SERVICE FEES

Plaintiff also claims that the Clerk erred in that costs for service fees were awarded in contravention of the provision allowing taxation for copies. See Pl.'s Mem. at 5. Plaintiff's argument is misguided and lacks merit.

Courts have interpreted the provision allowing for taxing of fees on the Marshal (§ 1920(1)), and not the provision allowing for taxing of copies (§ 1920(4)), as permitting the Clerk to tax the costs for private process servers. See, e.g., Griffith v. Mt. Carmel Med. Ctr., 157 F.R.D. 499 (D. Kan. 1994). Courts have even permitted prevailing defendants in product liability actions to recover such fees. See, e.g., Roberts v. Homelite Div. of Textron, Inc., 117 F.R.D. 637 (N.D. Ind. 1987). However, some courts have limited such fees to that charged by the United States Marshals Service. See, e.g., Brown v. Kemper Nat'l Ins. Cos., Civ. A. No. 94-7505, 1998 WL 472586, at *1 (E.D. Pa. July 27, 1998). The Marshals Service currently charges \$40.00 for the first two hours and \$20.00 for every hour thereafter until process is served, plus travel costs (including round-trip mileage) and any other out-of-pocket expenses. See 28 C.F.R. § 0.114(a)(3) (1999).

An examination of the bill of costs reveals that the amounts requested are roughly equivalent to the amount charged by the Marshals Service for effecting service. Moreover, none of the witnesses were unnecessarily subpoenaed by Defendants. Accordingly, the Court concludes that the Clerk committed no error on this ground.

E. WITNESS FEES

Finally, Plaintiff claims that the witness fees awarded were excessive and that the fees for witnesses who failed to testify were awarded in error. See Pl.'s Mem. at 5-7. Plaintiff's contention again lacks merit.

The witnesses for which fees were awarded comprise those witnesses who were not real parties in interest to the litigation. To the extent they did not ultimately testify, Defendants possessed a good faith expectation of calling them to testify and thus, fees were properly awarded. Moreover, subsistence and reasonable travel costs were properly within the parameters of 28 U.S.C. § 1821. Accordingly, the Court concludes that the Clerk committed no error on this ground.

III. CONCLUSION

For the foregoing reasons, the Court concludes that the Clerk of Court committed no errors in taxing costs against Plaintiff. The Court has also independently reviewed Defendants' request for costs and concludes that they were properly awarded pursuant to 28 U.S.C. §§ 1920 and 1821. Accordingly, the decision of the Clerk of Court is **AFFIRMED** in its entirety. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATHAN FREY, a minor,	:	CIVIL ACTION
by and through his parents,	:	
RICHARD AND ELEANOR FREY, and	:	NO. 96-7290
RICHARD AND ELEANOR FREY,	:	
in their own right,	:	
	:	
	:	
Plaintiffs	:	
	:	
v.	:	
	:	
CROSMAN AIRGUN and	:	
CROSMAN PRODUCTS OF CANADA, Ltd.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this ____ day of March 1999, upon consideration of Plaintiff Nathan Frey's Appeal of Clerk's Taxation of Costs (Docket No. 117), Defendants' response thereto (Docket No. 119), and other relevant items in the record (Docket Nos. 112 and 114), it is hereby ORDERED that the order of the Clerk of Court taxing costs against Plaintiffs (Docket Nos. 115 and 118) is AFFIRMED in its entirety, in accordance with the accompanying opinion.

BY THE COURT:

RONALD L. BUCKWALTER, J.