

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

JOSEPH HARDIN, et al. : CIVIL ACTION
 :
v. :
 :
SOUTHEASTERN PENNSYLVANIA :
TRANSPORTATION AUTHORITY : NO. 91-7434

MEMORANDUM AND ORDER

BECHTLE, J.

JANUARY 5, 1998

Presently before the court is Joseph Hardin, Leon Conaway, Reid Henderson, Mattie Crawford, Ruth Chambers and the National Federation of the Blind of Pennsylvania, Inc.'s ("Plaintiffs") reasserted motion for reconsideration of the court's denial of attorneys' fees and costs and Southeastern Pennsylvania Transportation Authority's ("Defendant") opposition thereto. For the reasons set forth below, the court will deny the motion.

I. Procedural Background

Plaintiffs request attorneys' fees, litigation expenses and costs pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. Plaintiffs are individuals with visual impairments and the National Federation of the Blind of Pennsylvania, Inc. Defendant is a Pennsylvania corporation engaged in operating a regional public transportation system. Plaintiffs brought this civil action against Defendant to enforce compliance with the ADA. In particular, Plaintiffs requested

this court to require Defendant to improve its services so as to enable passengers with visual impairments to better use the transportation system as required under the ADA.

On September 15, 1992, the parties to this action executed a court-approved settlement agreement ("1992 Agreement") which provided that this court would "retain jurisdiction of the Agreement for a period of three years." On this same day, the court directed the Clerk of Court to close the underlying action. On February 16, 1995, Plaintiffs filed a Motion for Contempt claiming that Defendant had not complied with the express terms of the 1992 Agreement. This court held two hearings in June, 1995, on Plaintiffs' Motion for Contempt and, by Order dated July 13, 1995, denied the motion ("July 1995 Order"). By the same Order, the court retained jurisdiction over the 1992 Agreement until further order of the court. In response to a letter from Plaintiffs, on May 22, 1996, the court issued an Order clarifying its July 1995 Order ("May 1996 Order"). On May 29, 1996, Plaintiffs filed a Motion for an Award of Attorneys' Fees, Litigation Expenses and Costs with respect to their Motion for Contempt.¹ On December 9, 1996, the court denied the motion as untimely under Federal Rule of Civil Procedure 54(d)(2)(B). On December 20, 1996, Plaintiffs filed a motion for reconsideration.

1. According to the docket, no similar motion was made to obtain attorneys' fees with respect to the underlying action itself. Plaintiffs' current attorneys entered their appearance on September 23, 1994, 2 years after this case had been closed and approximately 10 months after Rule 54(d)(2)(B)'s 14-day time limitation took effect.

On June 10, 1997, the court denied the motion without prejudice, permitting Plaintiffs to reassert their motion accompanied by a complete transcript of the hearings held on Plaintiffs' motion for contempt. On June 26, 1997, Plaintiffs filed a reasserted motion along with the required transcripts, which incorporated the previous briefings to the court.

II. Discussion

The original motion for attorneys' fees was denied as untimely under Federal Rule of Civil Procedure 54(d)(2)(B). In its Memorandum Order dated December 9, 1996, the court set forth the grounds for its denial of the motion. Hardin v. Septa, No. 91-7434, 1996 WL 729942 (E.D. Pa. Dec. 9, 1996). The court stated that under Federal Rule of Civil Procedure 54(d)(2)(B), "if plaintiffs wanted to obtain attorneys' fees with respect to [their] Motion for Contempt, they were obligated to file their motion for attorneys fees by July 28, 1995 -- 14 days after the court entered its July 1995 Order." Id. at *1 (citing Resolution Trust Corp. v. Kolea, No. Civ. A. 90-6287, 1996 WL 20675, at *1 (E.D. Pa. Jan. 10, 1996)). The court then ruled that "[b]ecause plaintiffs' attorneys' fees motion was filed ten months late, the court will deny the motion." Id.

Plaintiffs argue that their motion for attorneys' fees was wrongfully denied. Specifically, Plaintiffs argue: (1) Rule 54 is inapplicable because the July 1995 Order was not a "judgment" under Rule 54 because it was "consensual" or, in the

alternative, because it was an "interim ruling;" (2) Defendant waived the untimeliness objection; and (3) Plaintiffs should be awarded attorneys' fees for "monitoring work" done after the July 1995 Order on the motion for contempt. Plaintiffs argue that, as prevailing parties, they are entitled to attorneys' fees under 54(d).

A. Application of Rule 54(d)

Plaintiffs advance two reasons why Rule 54² should not bar Plaintiffs' motion for attorneys' fees. First, Plaintiffs contend that the July 1995 Order was "consensual," and so neither party could appeal the Order. They argue that if the Order was not appealable, then it would not be a "judgment" under Rule 54(a) and would not be subject to the Rule 54(d)(2)(B) time limit for filing for attorneys' fees. Secondly, they argue that the July 1995 Order was an "interim ruling" and thus should not be treated as an order within Rule 54(d)(2)(B). Both arguments

2. Rule 54(a) defines a "judgment" to include "a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). Rule 54(d)(2)(B) states that:

[u]nless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

Fed. R. Civ. P. 54(d)(2)(B).

contend that the court wrongly applied Rule 54(d)(2)(B) to the case at hand. Neither argument is supported by the facts of this case as reflected in the record.

First, the July 1995 Order was not "consensual," as Plaintiffs argue. As the transcripts for the contempt hearings reflect, Plaintiffs asserted their claim for contempt vigorously and consistently until the court made its decision to deny the contempt motion and refused to implement the monetary penalties Plaintiffs requested. (Tr. 6/30/95 at 8-14). The court found that, contrary to Plaintiffs' assertions, the evidence did not show that Defendant was in violation of the 1992 Agreement. (Tr. 6/30/95 at 8). There is no doubt that Plaintiffs would have preferred the court to find Defendant in contempt. In the brief accompanying the motion for contempt, Plaintiffs stated that "effective enforcement of the Agreement can be accomplished only if: (1) the Court appoints an independent monitor to oversee [Defendant's] compliance through random testing, and (2) the Court imposes monetary sanctions to coerce compliance." (Mem. of Law in Supp. of Pls.' Mot. for Contempt at 2). The court did not find Defendant in contempt, did not appoint an independent monitor and did not impose fines. The court's decision denied Plaintiffs' requested relief. Therefore, the Order was not a consensual decision by Plaintiffs, it was the court's decision alone and a denial of Plaintiffs' motion. It disposed of all the issues raised by the Plaintiffs, adversely to the Plaintiffs.

Plaintiffs argue that the court's Order was "identical" to the proposed order they submitted to the court. Plaintiffs submitted the proposed order on July 12, 1995, after two days of hearings held June 7 and 30, 1995. Plaintiffs appear to forget that the proposed order merely reflected the court's findings made at the hearings, not the Plaintiffs' consent to those decisions. (Tr. 6/30/95 at 29). Plaintiffs were directed by the court to draft a proposed order that included the court's denial of the contempt motion. (Id.; July 1995 Order ¶ 1). As such, the July 1995 Order was only a denial of Plaintiffs' contempt motion, not Plaintiffs' consent to a denial or a withdraw of the motion.³

Likewise, the court's July 1995 Order was not an "interim ruling" but rather an outright denial of the motion for contempt. The motion was denied without prejudice, so that if subsequent factual grounds warranted relief in the future, Plaintiffs could bring another motion for contempt if they had reason to believe based on new factual grounds that Defendant was not in compliance with the court's Orders and the 1992 Agreement. (Tr. 6/30/95 at 14-15; July 1995 Order ¶ 1). However, based on

3. In the June 30, 1995 hearing, the court stated that the motion for contempt would be denied. (Tr. 6/30/95 at 12-14). Plaintiffs then requested that the court permit them to withdraw the motion. (Tr. 6/30/95 at 14). Instead, the court decided to let the motion "stand" and to rule on it. Id. In ruling on the motion rather than permitting Plaintiffs to withdraw the motion, the court sought to make a definitive ruling on the motion in order to avoid the very ambiguity which Plaintiffs attempt to create now.

the facts then before the court, the motion was dispositively denied. As noted above, the court evaluated all the evidence the parties provided at the time and decided that Defendant was not in contempt of court as Plaintiffs alleged. (Tr. 6/30/95 at 8-9). It is clear that although Plaintiffs were given the opportunity to file later motions if they believed Defendant to be in contempt at a later date, the July 1995 Order's ruling was final on Plaintiffs' request for a finding of contempt for Defendant's conduct up to that date. There was nothing "interim" or temporary in nature about that ruling.⁴

The July 1995 Order outlines the method by which Defendant was to implement the 1992 Agreement and the Order also preserves the court's jurisdiction over the case. (July 1995 Order ¶ 2-7). This contemplates that new and different motions for a variety of requests for relief based on new and different

4. The court denied Plaintiffs' motion without prejudice so that if they wished to bring a later motion for contempt, they would only have to renew the existing motion rather than file an entirely new motion and briefs with additional lengthy documents. (Tr. 6/30/95 at 14, 29.) In denying without prejudice, the court attempted to provide Plaintiffs with an accelerated and simplified method of filing a new contempt motion at a later date. The ruling could not have been reasonably interpreted to leave any issue before it unresolved.

As noted in the court's December 9, 1996 Order, "Plaintiffs' attorneys are sophisticated and have 'extensive experience in enforcement of the transportation provisions of the Americans with Disabilities Act.'" Hardin v. Septa, No. 91-7434, 1996 WL 729942, at *1 n.5 (E.D. Pa. Dec. 9, 1996)(citing Decl. of Thomas H. Earle at ¶ 6). Therefore, Plaintiffs' attorneys should have been aware of the meaning and context of both the court's Order and the discussions at the hearings thereon.

grounds may be warranted and, if so, they would be considered by the court.

B. Defendant's Waiver of Rule 54(d)

Next, Plaintiffs argue that Defendant waived its right to object to the timeliness of the motion by not raising the issue in their answer to the original motion for attorneys' fees. Plaintiffs argue that Rule 54(d)(2)(B) is analogous to a statute of limitations. They point out that, under Federal Rule of Civil Procedure 8(c), a statute of limitations is an affirmative defense that must be raised in the answer or it is waived.⁵ Plaintiffs then conclude that the filing deadline, like a statute of limitations, must be raised by the Defendant in responding to

5. Rule 8(c) lists several affirmative defenses which must be asserted in a responsive pleading, but does not include any procedural filing requirements under the Federal Rules of Civil Procedure:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Fed. R. Civ. P. 8(c).

the motion for attorneys' fees or the defense is waived. Although not addressed directly, Plaintiffs are also implicitly challenging the court's ability to raise the issue of a filing deadline sua sponte, as it did in this case.

The court disagrees with Plaintiffs' comparison to a statute of limitations and it finds no basis for requiring defendants to raise Rule 54(d)(2)(B) as an affirmative defense. Plaintiffs point to a Third Circuit case which they contend shows that a defendant must raise a Rule 54(d)(2)(B) "defense" in their responsive pleadings. (Pls.' Mem. Supp. Mot. Reconsid. at 21, 22 (citing Mints v. Educational Testing Serv., 99 F.3d 1253, 1260 (3d Cir. 1996)). The cited case does not address the issue presently before the court. In Mints, the Defendant first raised the 54(d)(2)(B) issue on appeal. The Third Circuit stated that it would "adhere to [its] usual practice of not entertaining arguments initially raised on appeal." Mints, 99 F.3d at 1260. One reason the Third Circuit gave for not addressing the issue on appeal is that if the issue had been raised at the trial court level, the trial court could have determined whether to extend the time limit for filing for attorneys' fees. Therefore, the only relief under 54(d)(2)(B) would be remanding the case to the trial court to determine whether it would extend the filing time. Id. The Third Circuit, therefore, recognizes that a trial court has discretion in determining whether to extend the deadline under Rule 54(d)(2)(B). As Rule 54(d)(2)(B) states, the filing time applies "[u]nless otherwise provided by statute or order of

the court." Fed. R. Civ. P. 54(d)(2)(B). Similarly, Federal Rule of Civil Procedure 6(b)(2) permits a court, upon motion and for cause shown, to excuse a late filing if the court finds excusable neglect. Therefore, a district court has discretion in either applying or extending the deadline of Rule 54(d)(2)(B). In this case, the court exercised its discretion to bar the Plaintiffs' motion for attorney fees for failure to comply with the Federal Rules of Civil Procedure. There is no requirement that a party must raise Rule 54(d)(2)(B) as an affirmative defense.

To the extent that this motion could be interpreted as a request to extend the Rule 54(d)(2)(B) deadline, such a request is denied. The purpose of Rule 54(d)(2)(B) is to provide the opposing party and the court with notice of the motion for fees. See Advisory Committee Notes, 1993 Amendments (noting that "[w]hat is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees, and the amount of such fees (or a fair estimate)"). That purpose is best effectuated by applying the Rule 54(d)(2)(B) deadline in this case. The parties in this case never discussed attorneys' fees for the contempt motion until ten months after the July 1995 Order. Neither the 1992 Agreement nor the July 1995 Order addressed whether Plaintiffs would make a request for fees, or whether the parties would ask the court to determine whether the fees were appropriate. See, e.g., Anderson v. Ford Motor Co., No. 96-913, 1997 WL 158133, at *1 n.1 (E.D. Pa. Apr. 1,

1997)(declining to apply 54(d)(2)(B) deadline when settlement agreement provided for court's determination of appropriate attorneys' fees); Contractors Assoc. of Eastern Pa. v. City of Philadelphia, No. 89-2737, 1996 WL 355341, at *3 (E.D. Pa. 1996)(declining to apply 54(d)(2)(B) deadline when "counsel announced at a[n earlier] hearing that he intended to file a motion for an interim award of attorney's fees"). After failing to file within the Rule 54 deadline, Plaintiffs failed to file a motion to extend the deadline, as the Third Circuit discussed as a possibility in Mints. The court finds no reasonable basis for excusing Plaintiffs' noncompliance with the Rule 54(d)(2)(B) deadline in this case and finds that the delay and lack of notice has caused prejudice to the Defendant. Therefore, any request by Plaintiff to extend the Rule 54(d)(2)(B) deadline is denied.

In summary, the court is not convinced that there is any basis to conclude that Rule 54(d)(2)(B) creates an affirmative defense that must be asserted by a plaintiff in an answer. To the contrary, it places the burden clearly and squarely on Plaintiffs to file a timely motion for fees. In delaying their request for attorneys' fees for over ten months, Plaintiffs have simply failed to conform to clearly articulated rules of which they had knowledge, with the consequence being that they have waived the right to request such fees.

C. Monitoring

Plaintiffs argue that Rule 54(d)(2)(B) could not have applied to the "monitoring" work done after the July 1995 Order denying Plaintiffs' motion was entered. Plaintiffs point out that any attorneys' fees or costs for monitoring done after the July 1995 Order could not have been requested within the 14 day time limit of Rule 54(d)(2)(B). Plaintiffs go on to assert that generally, fees for post-judgment monitoring may be available to prevailing Plaintiffs. Plaintiffs attempt to extend the filing deadline beyond the date of the court's July 1995 Order ruling on the contempt motion on the ground that attorney "monitoring" was a continuous activity up to and beyond the July 1995 Order. They argue this continuous activity allows the filing to be timely. The difficulty with this is that the court never approved monitoring by attorneys as a ground that could warrant recovery of costs and fees for doing so. Any such monitoring efforts that Plaintiffs' attorneys engaged in were contrary to the court's July 1995 Order.

In the absence of new evidence, the court does not believe that monitoring by Plaintiffs' counsel is necessary or appropriate in this case. Plaintiffs themselves, as opposed to their attorneys, are fully aware on a daily basis of Defendant's activities and are capable of monitoring the activities of Defendant. If Plaintiffs become aware of the Defendant's noncompliance with the 1992 Agreement or the court's Orders, they can notify their counsel and apply to the court for relief. If successful in such a motion, counsel may have a basis to request

attorneys' fees for their motion. However, there is no basis presently before the court to conclude that any monitoring by the attorneys themselves is presently necessary.

On this point, it should be recalled that at the hearing held June 30, 1995, the court and the parties specifically addressed the issue of instituting a system of monitoring. (Tr. 6/30/95 at 7, 9-10, 12, 13, 31-32). The court adopted a monitoring plan whereby Defendant would conduct a monitoring program and make periodic reports on its efforts to the court. July 1995 Order at ¶¶ 3, 5. Plaintiffs now suggest that they should receive compensation for monitoring efforts despite the court's ruling to the contrary directing an alternative method of monitoring. Defendant continues to furnish the personnel and to pay the costs of conducting internal monitoring as ordered by the court. The court concludes that it will not require unnecessary and costly additional monitoring by the Plaintiffs' attorneys.

D. Fees and Costs Generally

The ADA permits courts to grant attorneys' fees in discrimination cases, however, such fees are not mandatory. Section 12205 provides that "[i]n any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205 (emphasis added). The court finds

that attorneys' fees are not warranted under the facts of this case. The 1992 Agreement represented both the Defendant's and Plaintiffs' attempt to effectuate Defendant's responsibilities under the ADA. From the beginning, Defendant displayed a willingness to cooperate with the court and Plaintiffs to bring about a reasonably attainable beneficial change in its services to assist passengers with visual impairments.

While there were some disagreements as to the methods that should be used, Defendant does not contest that it has a responsibility to comply with the requirements of the ADA. To this date, Defendant continues to implement the agreed upon changes under the 1992 Agreement and the court's Orders and make periodic reports to the court and Plaintiffs regarding these efforts. In its motion for contempt, Plaintiff brought forward examples of instances where Defendant's employees failed to comply with their required duties under the ADA and the 1992 Agreement. The court recognizes that the Defendant has faced difficulties implementing the 1992 Agreement. However, this court finds that those difficulties are not the result of Defendant's refusal to cooperate, indifference or carelessness, but rather the direct result of the implementation of systemic changes on a large scale. A complicating difficulty is the fact that the Defendant's employees are unionized and therefore any changes in the employees' duties, which are at the heart of Plaintiffs' complaint, must be worked out through the appropriate union channels. (Tr. 6/30/95 at 25 (noting that implementation

of training is a "coordinated, collective effort" between union and management)). In the court's view, the Defendant has made good faith efforts to sustain and improve compliance levels with the 1992 Agreement and the ADA, as the court ruled in its denial of the motion for contempt.

If Plaintiffs have reason to believe that Defendant is presently in contempt of court, they may file another motion and, if successful, may then request attorneys' fees. The court believes that Plaintiffs' ability to file a renewed motion for contempt provides an adequate safeguard to protect Plaintiffs' concerns in the future. Therefore, the court finds that, to the extent Plaintiffs' claims for attorneys' fees are not barred by Rule 54(d)(2)(B), such claims are denied.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' motion for reconsideration will be denied.

An appropriate Order follows.

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JOSEPH HARDIN, <u>et al.</u>	:	CIVIL ACTION
	:	
v.	:	
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY	:	NO. 91-7434

ORDER

AND NOW, TO WIT, this 5th day of January, 1998, upon consideration of Plaintiffs' Reasserted Motion for Reconsideration of the Court's Memorandum Order Denying Plaintiffs' Motion for an Award of Attorneys' Fees, Litigation Expenses and Costs and Defendant's opposition thereto, IT IS ORDERED that said motion is DENIED.

LOUIS C. BECHTLE, J.