

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

_____ )	
IRA GREEN, INC., )	
Plaintiff, )	
)	
v. )	C.A. No. 10-207-M
)	
MILITARY SALES & SERVICE CO., )	
Defendant. )	
_____ )	

**MEMORANDUM AND ORDER**

The jury returned its verdict and the Court has entered an Amended Judgment. (ECF No. 160.) Defendant Military Sales and Service Co. (“MSS”) has filed a Motion for Bill of Costs (ECF No. 172) to which the Plaintiff Ira Green, Inc. (“Ira Green”) has objected. (ECF No. 173.)<sup>1</sup> Along with the Motion, an affidavit from MSS’s counsel was filed attesting that the costs submitted are “costs and related expenditures accrued by [defense counsel] on behalf of MSS in defending this matter.” (ECF No. 172-2.)

**I. Standard for the Award of Costs**

Fed. R. Civ. P. 54(d) provides that “costs . . . shall be allowed as of course to the prevailing party unless the court otherwise directs.” Pursuant to 28 U.S.C. § 1920,

“[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 for printed or electronically recorded transcripts necessarily obtained for use in the case;

---

<sup>1</sup> Local Rule Cv 54 provides that a prevailing party should first file its bill of costs and the clerk will tax the costs. Any objection to the taxation by the clerk is made by way of motion to the Court. LR Cv 54(d). Because MSS did not follow this procedure and instead filed its bill of costs as a motion, this Court entered a text order instructing the clerk not to enter costs and informing the parties that the Court would simply rule on the costs by way of the motion and objection thereto. (Text Order, Nov. 7, 2013.)

- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are 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.

The Court may exercise discretion when awarding the prevailing party costs and reimbursement of expenses. *See In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 736-37 (1st Cir. 1999). The Court will consider the facts and equities on a case-by-case basis. *In re San Juan Dupont Plaza Hotel Fire Litig.*, 142 F.R.D. 41, 46 (D.P.R. 1992). In the First Circuit, the rule is that “[o]rdinarily the taxation of costs would be limited to those ordinary costs authorized by [§] 1920.” *Gradmann & Holler GmbH v. Continental Lines, S.A.*, 679 F.2d 272, 274 (1st Cir. 1982).

## **II. Prevailing party**

The Court’s first task is to determine whether MSS is the prevailing party at trial.

To be a prevailing party [a] party need not prevail on all issues to justify a full award of costs, however. Usually the litigant in whose favor judgment is rendered is the prevailing party for purposes of rule 54(d) . . . A party who has obtained some relief usually will be regarded as the prevailing party even though he has not sustained all his claims . . . Cases from this and other circuits consistently support shifting costs if the prevailing party obtains judgment on even a fraction of the claims advanced.

*Head v. Medford*, 62 F.3d 351, 354 (11th Cir. 1995) (quoting *United States v. Mitchell*, 580 F.2d 789, 793–94 (5th Cir. 1978)) (citations omitted).

The Court finds that MSS is the prevailing party in this case. Ira Green sued MSS for in excess of a million dollars and the jury found in MSS’s favor on all counts and judgment entered in its favor. (*See* ECF No. 160.) The fact that the Court granted summary judgment against MSS on its counterclaims (filed almost two years after Ira Green filed its complaint (*see* ECF

No. 75)) does not mean that MSS cannot be determined to be the prevailing party. A party need not have prevailed on all issues raised in the litigation in order to be considered a prevailing party. *See Head*, 62 F.3d at 354.

### **III. Timeliness**

Ira Green claims that MSS did not timely file its bill of costs pursuant to LR Cv 54 because it was filed more than fourteen days after the judgment entered on September 19, 2013. (ECF No. 153.) That judgment, however, contained an error that, though clerical, may have affected the determination of whether costs could have been awarded in whole or in part. The Court acknowledged the clerical error on a telephone conference with counsel and allowed the parties to brief the issue. (*See* ECF Nos. 155, 157.) Post-briefing, the Court entered the Amended Judgment on October 16, 2012 in MSS's favor on all claims. (ECF No. 160.) MSS filed its motion for costs within two days of the entry of the Amended Judgment. (*See* ECF No. 172.) It is not unreasonable for MSS to have waited until the Court determined the proper judgment and entered an Amended Judgment before submitting its bill of costs. Therefore, the Court finds that MSS timely filed its bill of costs.

### **IV. Costs**

#### **A. Summons and subpoena**

MSS seeks a total of \$2,279.71 under the category of "Fees for service of summons and subpoena." (ECF No. 175.) Ira Green objects to taxing these costs, asserting that the costs of service should not exceed that which the U.S. Marshal charges. (ECF No. 173-1 at 8.) This Court finds that although the statute does not specifically provide for the allowance of costs when private servers are used, courts tend to allow for recovery of the private servers because of the desire expressed a number of years ago to relieve the United States Marshal from that

obligation. *See, e.g., Shared Med. Sys. v. Ashford Presbyterian Cmty. Hosp.*, 212 F.R.D. 50, 54 (D.P.R. 2002). This Court finds that a total of \$2,279.71 may be taxed as a cost of MSS.

B. Transcripts

MSS also seeks a total of \$22,677.43 for “Fees for printed or electronically recorded transcripts obtained for use in the case.” This total appears to be a combination of what was listed in a previous submission (ECF No. 172-3) as “Fees to the Court Reporter for stenographic transcript” totaling \$3,103.65 and “Deposition Expenses” totaling \$19,573.78. The former costs appear to be for trial transcripts, the latter for deposition transcripts. Ira Green objects to \$1,938.15 that appears to represent the cost of a transcript from a case in the Western District of Washington involving some of the same parties as are involved in the present case. (ECF No. 173-1 at 8.) The Court will not allow that expense to be taxed as a cost in this case, but will allow the remainder of the trial transcript costs.

As to the costs of depositions, many courts have found that Section 1920(2) includes the costs associated with taking depositions. *Templeman v. Chris Craft Corp.*, 770 F.2d 245, 249 (1st Cir. 1985). “While some cases hold that the costs of depositions are taxable only if they were either introduced in evidence or used at trial, other cases allow the recovery of such costs if the taking of the depositions is shown to have been reasonably necessary in light of the particular situation at the time it was taken.” *Id.* Therefore, while deposition costs are general allowed, MSS’s submission is not specific enough to enable the Court to determine the appropriateness of its deposition costs. If MSS wishes the Court to consider these expenses as costs, it must submit within seven (7) days the name of each deponent, the date the deposition was taken, a statement of why each deposition was necessary, which party noticed the deposition, a description of what

type(s) of transcript(s) were ordered, and the cost per deposition. Absent that information, these costs totaling \$19,573.78 are excluded. Therefore, a total of \$1,165.50 is allowed at this time.

C. Printing

MSS seeks a total \$10,517.80 for “Fees and disbursements for printing” and \$2,073.95 for “Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.” Ira Green objects to the printing expenses claiming there is no evidence produced that these copies were necessary and recoverable as a cost. (ECF No. 173-1 at 9-10.) MSS submitted an affidavit, signed by its attorney, stating that the attached costs are “costs and related expenditures accrued by [defense counsel] on behalf of MSS in defending this matter.” (ECF No. 172-2.) This attestation by counsel, along with this Court’s observation of the litigation of this case and the amount of paper exchanges, leads this Court to find that these are reasonable and taxable costs.<sup>2</sup> A total of \$12,591.75 is allowed.

D. Witnesses

MSS seeks \$1,073.96 for “fees for witnesses” and attaches a list of the five witnesses for whom it seeks reimbursement. Ira Green objects for various reasons, including that the costs submitted exceed the per diem caps set by 28 U.S.C. § 1821 (1996). (ECF No. 173-1 at 10-11.) A review of the submissions shows that the costs for Margo Freedman (\$78.85) and Matthew Sinclair (\$40.00) are within limits and thus appropriate. MSS also submitted costs for Todd Silver, Jason Clevenger, and Rick Fox. Messrs. Silver and Fox had to travel from the West Coast (Washington and California respectively) and therefore are entitled to per diem for two days. At a \$192/day limit (\$121 per diem rate for lodging and \$71/day per diem for food) for

---

<sup>2</sup> “The Court does have discretion to allow unverified costs where it is clear from the nature of the cost that it was necessarily incurred.” *O’Rourke v. City of Providence*, 77 F. Supp. 2d 258, 264 (D.R.I. 1999) (citing *Phetosomphone v. Allison Reed Grp, Inc.*, 984 F.2d 4, 9 (1st Cir. 1993)).

two days (\$384), neither Mr. Fox's submitted amount (\$376.46) nor Mr. Silver's (\$237.45) exceeds the per diem cap. *See* 28 U.S.C. § 1821. Therefore, the Court will award MSS the amount submitted for Messrs. Silver and Fox. As for Dr. Clevenger, because he lives in Massachusetts, a one day per diem is appropriate. Therefore, the Court will award MSS the per diem maximum of \$192.00 rather than the amount submitted of \$341.20. A total of \$924.76 is allowed.

5. Docket fee

MSS seeks \$50.00 for docket fees. It is unclear what these fees are for and how the amount was derived. A review of 28 U.S.C. § 1923 does not shed any light on the submission. Because MSS has failed in its burden, these costs will not be allowed.

6. Other Costs

MSS lists \$51,552.18 as "Other Costs." On Exhibit A, MSS delineates these costs as (a) "Attorney Airfare and Accommodations" (\$37,061.05); (b) "Messenger Services and Postage" (\$1,791.99); (c) "Telephone Calls and Faxes" (\$33.50); (d) "Computer-Assisted Research" (\$588.19); and (e) "Electronic Discovery Digital Document Production" (\$12,077.45).

The parties all agree that the expenses MSS listed as "Other Costs" are beyond those specified by Congress as fees in 28 U.S.C. § 1821, and made taxable by 28 U.S.C. § 1920, but that the Court has discretion to award them. *In re Two Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 994 F.2d 956, 962 (1st Cir. 1993) (concluding that Rule 54(d) confers no discretion on federal courts independent of the statute to tax various types of expenses as costs).

In this case, based on its travel and history, the Court declines to exercise whatever discretion it may have to award these non-statutory costs. This was a long and extensively

fought lawsuit.<sup>3</sup> The Court dismissed MSS's counterclaims against Ira Green. (ECF No. 159.) Ira Green had what it believed to be a legitimate dispute with MSS and brought that matter to court to be determined by the jury. This Court does not believe that it should use its discretion to tax as costs the discretionary matters that arose through Ira Green's exercise of its Seventh Amendment right to a jury trial. U.S. Const. amend. VII.) ("... the right of trial by jury shall be preserved . . .") Therefore, MSS's "Other Costs" will not be allowed.

**V. Conclusion**

The Court will allow a total of \$16,961.72, consisting of the following expenses, to be taxed as costs:

1. Summons and subpoena - \$2,279.71
2. Transcripts - \$1,165.50
3. Printing - \$12,591.75
4. Witnesses - \$924.76

MSS may submit the required information for each deponent within seven (7) days if it wants to pursue recovery of \$19,573.78 for deposition costs.

All other costs are disallowed.

IT IS SO ORDERED:



John J. McConnell, Jr.  
United States District Judge

January 15, 2014

---

<sup>3</sup> The parties litigated this case for over three and a half years. The electronic docket contains over 175 docket entries and 45 motions.