IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

Oneida Nation,

Plaintiff,

v.

Case No. 16-CV-1217

Village of Hobart, Wisconsin,

Defendant.

VILLAGE OF HOBART'S REPLY IN SUPPORT OF ITS OBJECTION TO BILL OF COSTS

The Village's Objection to the Nation's Bill of Costs (Dkt. 153) is well founded. The Nation's Response (Dkt. 154) is contradictory and unsupported by both the facts of the case and the law. For reasons stated in the Village's Objection and below, the Clerk should deny the Nation's request to tax costs in the amount of $43,038.48. The Nation is permitted to recover no more than $11,050.56 in taxable costs.

I. THE CLERK SHOULD DENY THE NATION'S REQUEST FOR COSTS RELATED TO "HISTORICAL RESEARCH" IN THE AMOUNT OF $29,383.00 BECAUSE RESEARCH CONDUCTED BY AN OUTSIDE CONSULTANT IS NOT A TAXABLE COST AND WAS NOT COMPELLED DISCOVERY.

A. "Historical Research" and "Research Labor" is not a statutory cost under 28 U.S.C. § 1920, and is not equivalent to photocopying costs.

As previously stated in the Village's Objection, the Nation's expenses related to "historical research" and "research labor" that took place from September to November 2017 are not recoverable items of taxable costs because such costs are not listed in § 1920, nor are they listed in Civil Local Rule 54. That should end this matter and the Nation appears to understand

that. However, in response to the Village's Objection, the Nation now argues that its "other costs" relating to "research labor" are the "costs of making copies of any materials where the copies are necessarily obtained for use in the case" under § 1920(4) and Civil Local Rule 54(b)(4). (Dkt. 154 at 6.) This is a new characterization by the Nation. The Nation previously listed in its Bill of Costs the research costs as an item of "other costs." (Dkt. 150 at 1.) The Nation did not list the research costs as an item of "the costs of making copies of any materials where the copies are necessarily obtained for use in the case." (*See id.*) This inconsistency affirms the Village's position that such costs do not fit into one of the enumerated costs, and therefore, are not recoverable.

Additionally, the cases the Nation cites to do not offer support. The cases the Nation cite to involve "photocopying" charges. (Dkt. 154 at 6.) The cases do not relate to "research." To the extent any of the research costs are related to photocopying (as the Nation now contends), the Nicklason Research Associates invoice lists a scanning cost totaling $45.50 related to "NARA document scans." (Dkt. 150-1 at 69.) However, the Nation has never made this argument. And, as in *Faraca v. Fleet 1 Logistics, LLC*, 693 F. Supp. 2d 891, 897 (E.D. Wis. 2010), a case the Nation cites to as supposed support, the Court disallowed the party's claimed photocopying costs because the party's submissions did not provide enough information regarding the purpose of the photocopying, the documents copied, the number of copies, or the per page copying cost. Therefore, the Nation's attempt to characterize the Nicklason Research Associates hourly research labor costs totaling $23,338.00 as photocopying costs is not only disingenuous, because only $45.50 in those expenses relate to "NARA document scans," but also improper because the $45.50 is not sufficiently described to permit any recovery.

B. The Nation was not required under the Federal Rules of Civil Procedure to hire an outside research consultant to perform historical research for documents not within the Nation's possession, custody, or control.

In its Response the Nation also fails to address the Village's objection that "historical research" performed by an outside consultant is not within the scope of discovery provided in Federal Rule of Civil Procedure 34. Federal Rule of Civil Procedure 34 states a party is only required to produce documents or information "in the responding party's possession, custody, or control." Fed. R. Civ. P. 34(a)(1). Here, the Nation chose to engage an outside consultant to search for historical documents and information outside the Nation's possession, custody, or control. The Nation does not even address Federal Rule of Civil Procedure 34.

C. The Nation was not "compelled" by the Court to hire a consultant to perform historical research for documents not within the Nation's possession, custody, or control.

Likewise, the Nation was never "compelled" to produce documents (either within or outside the scope of its possession), let alone compelled to hire an outside consultant to perform "historical research." This is because a motion to compel was never filed in this case. Instead, the procedural history demonstrates that the Court granted in part and denied in part the Nation's request for a Motion for Protective Order that sought to limit the Village's ability to conduct discovery under the Federal Rules of Civil Procedure. (Decision and Order, Dkt. 46.) On this issue of discovery, the Court reasoned:

> The Nation asserts that even if the discovery requests regarding its reservation boundaries are relevant, the sheer volume of material sought by the Village is unduly burdensome and expensive. The court agrees that the Village's requests are overly broad, and many of the documents it seeks can be easily accessed through the public record. **Nevertheless, the court concludes that the Nation must provide or make available for copying all documents and records identifying the lands held in trust by the United States for the benefit of the Nation.** The court will also allow the Village time to conduct its own investigation to independently verify the establishment of the Nation's reservation and its current boundaries.

(*Id.* at 10 (emphasis added)).[1]

Nothing in the Court's Order compelled the Nation to produce documents outside its possession, custody, or control. The Nation also incorrectly argues that it was compelled "to locate records for copying and production in locations where all such records may be found: the National Archives in Washington, D.C. and College Park, Maryland." (Dkt. 154 at 5.) No such language or requirement exists in the Court's Order.

Moreover, the Nation entirely disregards what occurred in the case. After the Court entered its Decision and Order on April 19, 2017, the following events occurred:

- On May 23, 2017, the Nation filed an Amended Initial Disclosure that listed individuals, including a historian, two archivists, and a historical researcher from the Oneida Cultural Heritage Department who were expected to authenticate documents and offer testimony relative to Oneida records, history, and culture. (Dkt. 50 at 9-10.) The Nation further identified the Oneida Nation as the location for "[c]orrespondence, memoranda, reports, and other documents authorizing and memorializing the allotment of the Nation's Reservation and the issuance of trust allotments and any executive orders pertaining to the trust period." (*Id.* at 15.)

  In this Disclosure, the Nation made no reference to an outside source or location as having discoverable information.

- On July 6, 2017, the Nation and the Village jointly filed a Stipulation for Protective Order. (Dkt. 52.)

- On July 10, 2017, the Court signed the Stipulated Protective Order. (Dkt. 53.)

- On July 31, 2017, the Village filed an Agreed Civil Local Rule 7(h) Motion for Entry of an Order Regarding the Production of Documents and Electronic Data. (Dkt. 54.)

- On August 2, 2017, the Court signed the agreed motion for the Order regarding the Production of Documents and Electronic Data. (Dkt. 55.)

[1] The historical research performed by Nicklason Research Associates is described as "documenting the status of the Oneida Indian Reservation, Wisconsin, for the period between 1934 and 1975" which appears to be different than what the Nation argues the Court required discovery on. Instead, the Court's Order related to the Nation providing discovery on "documents and records identifying the lands held in trust by the United States for the benefit of the Nation." (Dkt. 46 at 10.)

As previously stated in the Village's Objection, in the Court's August 2, 2017 Order, which was based on the parties' mutual agreement, the Court further ordered the following that is now applicable to the Nation's requested costs:

- **13. <u>ESI Parameters</u>**. By 5:00 PM (Central Time), on August 1, 2017, the parties will exchange proposals regarding the manner in which they have or will identify, search, and review for production ESI **in their possession, custody, or control** that is potentially relevant and responsive to discovery requests served in this action (to the extent the responding party has agreed to produce documents in response to a request and as limited by the objections made in response to such request). The parties shall then have the opportunity to propose modifications to each other's proposals until the final ESI parameters are agreed upon that each party will use to identify, search, and review for production potentially relevant ESI **in their possession, custody, or control.**" (Dkt. 55, ¶ 13 (emphasis added)).

- **15. <u>Inaccessible or Not Reasonably Accessible Storage Media</u>.** The parties will take reasonable steps to collect potentially relevant ESI stored on servers, work stations, and readily accessible drives and databases. The parties shall discuss sources of potentially relevant information deemed "not reasonably accessible." **Where a party seeks production of information from sources designated by another party as "not reasonably accessible," the parties shall meet and confer in an effort to resolve disagreements before seeking relief from the Court.**" (Dkt. 55, ¶ 15 (emphasis added)).

- **18. <u>Costs of Production</u>**. **Each party shall bear its own costs of production.** (Dkt. 55, ¶ 18 (emphasis added)).

The above makes clear what the parties agreed to and what the Court ordered as it relates to discovery and who bears the costs. Nowhere in the Court's Order or the parties' agreements, was the Nation required to search outside locations, such as the National Archives or College Park. Moreover, the Nation provides no support or citation to any authority or order for the statement in its Response that it was "required to locate records for copying and production in the locations where all such records may be found." (Dkt. 154 at 5.) The fact is – the Nation chose to hire, at its own cost, a consultant to perform historical research – after the parties' agreements and the Court's Order on discovery – because the Nation believed it would support

its case. The Nation's request to tax this voluntary expense is not proper under 28 U.S.C. § 1920 or Civil Local Rule 54.[2]

D. The Nation admits that the Nicklason research costs are akin to expert fees, and therefore, not recoverable.

The Nation's Response further demonstrates that an expert is required to search for documents at the National Archives and College Park, Maryland. In its Response, the Nation states that "the National Archives does not permit an individual member of the public to search or obtain copies of its records unless he or she is a registered researcher with the organization." (Dkt. 154 at 5.) The Nation further states: "Even if the Nation or one of its attorneys had been registered as a researcher with the National Archives, the National Archives recommends against using someone not familiar with the National Archives to attempt to locate and obtain copies of the records it maintains." (*Id.*) The Nation argues that "the National Archives is restricted to registered researchers and . . . discourages attorneys not trained in its recordkeeping systems[.]" (*Id.* at 6.) Consequently, as the Village set forth in its Objection, the Nicklason Research Associates costs are akin to expert fees – particularly because of the specialized training and knowledge required and the hourly rate charged. Such costs related to "historical research" are not taxable. (*See* Dkt. 153 at 5-6.)[3]

II. THE CLERK SHOULD DENY THE NATION'S REQUEST FOR FEES FOR EXEMPLIFICATION AND COSTS OF MAKING COPIES IN THE AMOUNT OF $2,604.92 BECAUSE THOSE COSTS ARE EXPERT WITNESS RELATED.

The Nation concedes $1,772 should be withdrawn from its request for costs in the amount of $2,604.92 for fees for exemplification and the costs of making copies of any materials

[2] The Nation further argues that its request is difficult to square with the Village's request for costs its spent to obtain title reports. (Dkt. 154 at 7.) First, that issue is not before the Clerk. Second, the Village's request for costs is a moot point due to the Seventh Circuit's decision. And, finally, the Nation's request to tax "research labor" is entirely different than an invoice for the direct cost of "chain of title reports."

[3] The Village further reiterates its argument in its Objection that computerized research costs are not taxable. *See, e.g.*, *Haroco, Inc. v. Am. Nat. Bank & Tr. Co. of Chi.*, 38 F.3d 1429, 1440-41 (7th Cir. 1994).

where the copies are necessarily obtained for use in the case. As to the remaining $832.92 in costs the Nation claims, those costs should not be allowed because they are costs the Nation's experts charged for preparation, assembly, and mailing of their expert documents and reports. As stated in the Village's Objection, such expenses are not taxable costs.

An expert's fees associated with their document preparation and scanning of documents for their expert reports are not recoverable costs. The Nation in its Response cites no case that permits an expert to pass along their expert preparation and scanning fees and then allow that party to tax that expert's expense as a cost. Rather, as the Village cited in its Objection, the Seventh Circuit has held "expenses for such things as postage, long-distance calls, xeroxing, travel, paralegals, and expert witnesses—are part of the reasonable attorney's fee." *Heiar v. Crawford Cty., Wis.*, 746 F.2d 1190, 1203 (7th Cir. 1984).

Moreover, it is difficult to discern from the expert's invoices what documents were scanned or photocopied, what CDs were authored, and whether this scanning was for the Nation's own convenience. (*See* Dkt. 150-1 at 35, 37-39, 42-46.) As the Nation recognizes in its Response, "documents created for a party's own use are not considered to have been necessarily obtained for use in the case, and are therefore not taxable under 28 U.S.C. § 1920." (Dkt. 154 at 7-8 (citing Village's Objection, Dkt. 153, at 7).) *See, e.g.*, *Haroco, Inc. v. Am. Nat. Bank & Tr. Co. of Chi.*, 38 F.3d 1429, 1441 (7th Cir. 1994); *Am. Automotive Accessories, Inc. v. Fishman*, 991 F. Supp. 995, 997 (N.D. Ill. 1998) (further reasoning costs are not recoverable where a court cannot discern the purpose of the expense).

The Nation further argues that Seventh Circuit precedent states mailing costs are taxable. This argument also fails. First, the cases the Nation cites to do not support the Nation's argument. *Little v. Mitsubishi Motors N. Am., Inc.*, 514 F.3d 699, 701 (7th Cir. 2008) involved

the question of whether § 1920 authorizes an award of costs for stenographically transcribing a video-record deposition. Although the Seventh Circuit concluded that the party's challenge to other costs for copying, telephone use and delivery charges were without merit, the court made no further comment, nor did it cite to any precedent. *Id.* at 702. Likewise, *Burda v. M. Ecker Co.*, 2 F.3d 769 (7th Cir. 1993), was a sanctions decision, not a costs decision. The costs discussion in *Burda* did not discuss in detail the types of costs that are recoverable under § 1920.

Moreover, recent Seventh Circuit precedent holds that "[t]he 'costs' recoverable under Rule 54(d) are enumerated in 28 U.S.C. § 1920." *Peck v. IMC Credit Servs.*, 960 F.3d 972, 975 (7th Cir. 2020). And, "[t]o be compensable . . . a particular expense must fall into one of the categories of costs statutorily authorized for reimbursement" under 28 U.S.C. § 1920. *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 427 (7th Cir. 2000). In *Peck*, a case that the Village cited in support of its Objection, the Seventh Circuit explicitly held that "mailing expenses" were correctly denied by the district court as a taxable cost because they were not enumerated in § 1920. *See* 960 F.3d at 975. The Nation omits any discussion of this case in its Response.

Accordingly, the Nation's costs of $832.92 related to mailing expenses and document preparation from their experts are not recoverable.

CONCLUSION

As the Village stated in its Objection, the Nation requests certain items in its Bill of Costs that are not recoverable under § 1920 or Civil Local Rule 54, and therefore, should be denied. The Nation is permitted to recover no more than $11,050.56 in taxable costs.

Dated: November 16, 2020

Respectfully submitted,

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