UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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ESTATE OF ZARDA,

Plaintiff-Appellant, **15-3775**

-against-

ALTITUDE EXPRESS, Inc., et ano.

Defendants-Appellees

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DEFENDANTS-APPELLEES' OPPOSITION TO PLAINTIFF-APPELLANT'S BILL OF COSTS

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I. PRELIMINARY STATEMENT

Defendants-Appellees, ALTITUDE EXPRESS, INC., doing business as Skydive Long Island, and RAY MAYNARD (collectively "Defendants-Appellees"), respectfully submit this Memorandum of Law in opposition to the application of Plaintiff-Appellant, Estate of Zarda ("Plaintiff-Appellant"), for a Bill of Costs, pursuant to Federal Rule of Appellate Procedure ("Fed .R. App. P.") 39(d)(2).

For the reasons set forth below, Plaintiff-Appellant is not entitled to the costs that it asks to Court to tax upon Defendants-Appellees. As such, Plaintiff-Appellant's instant application must be denied. However, should the Court find that Plaintiff-Appellant is entitled to certain costs, we ask that the amount awarded be reduced to conform with Fed. R. App. P. 39 and the fee schedule adopted by the Second Circuit, which does not allow for the additional sums that Plaintiff-Appellant now seeks.

II. PLAINTIFF-APPELLANT IS NOT ENTITLED TO COSTS

Fed. R. App. P Rule 39(a), entitled "Costs", reads in pertinent part:

> The following rules apply unless the law provides or the court orders otherwise:
>
> (1) If an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
>
> (2) If a judgment is affirmed, costs are taxed against the appellant;

> (3) If a judgment is reversed, costs are taxed against the appellee;
>
> (4) If a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

Fed. R. App. 39.

Thus, "[w]here a judgment is affirmed in part, reversed in part, modified, or vacated,' costs must be ordered before a party filing a bill of costs under [F.R.A.P.] 39(d) is entitled to receive them." *Lafaro v. New York Cardiothoracic Grp., PLLC*, 576 F.3d 128 (2d Cir. 2009) (quotations omitted). As a result, only the appellate court retains discretion to award or not award costs. *Essex Ins. Co. v. Zota*, No. 04-60619-CIV, 2008 WL 11333322, at *2 (S.D. Fla. Dec. 3, 2008).

Said another way, "an appellate court operating under Rule 39(a)(4) may "tax the costs of [the] appeal as [it] see[s] fit ... That is, in a situation in which Rule 39(a)(4) applies, the appellate court may award all costs to one party, *see, e.g., Feingold v. New York,* 366 F.3d 138, 161 (2d Cir.2004) ('Pursuant to Federal Rule of Appellate Procedure 39(a)(4), costs of this appeal are awarded to the plaintiff.'); may award costs to no party, *see, e.g., M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.,* 226 F.3d 60, 69 (2d Cir.2000) ('We decline to award costs of this appeal to either party. *See* Fed. R. App. P. 39(a)(4).'); or may award costs in whatever combination it sees fit." *L-3 Commc'ns Corp. v. OSI Sys., Inc.*, 607 F.3d

24, 29 (2d Cir. 2010). Thus, "[w]here 'a judgment is affirmed in part, reversed in part, modified, or vacated,' Fed. R. App. P. 39(a)(4), costs must be ordered before a party filing a bill of costs under [Fed. R. App. P.] 39(d) is entitled to receive them." *Lafaro v. New York Cardiothoracic Grp., PLLC*, 576 F.3d 128 (2d Cir. 2009).

To begin, we note that on February 26, 2018, this Court: (1) vacated the district court's judgment on Plaintiff-Appellant's Title VII claim; (2) remanded the matter back to the district court for further proceedings consistent with the February 26, 2018 decision; and (3) affirmed the judgment of the district court in all other respects. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018).

Importantly, this Court's February 26, 2018 decision did not award costs to either party. *See id.*

Equally significant, the February 26, 2018 decision held that Plaintiff-Appellant is "entitled to bring a Title VII claim for discrimination based on sexual orientation." *Id.* at 132. Thus, the applicable law in regard to Plaintiff-Appellant's claim and appeal is Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. 2000e *et seq.*

As stated above, Fed. R. App. P Rule 39(a) provides, in pertinent part, that its provisions on costs apply "unless the law provides … otherwise." Fed. R. App. P Rule 39; *see also id.* advisory committee's note ("Subdivision (a) ... A few statutes contain specific provisions in derogation of these general provisions. ... These

statutes are controlling in cases to which they apply."); *Ocean Conservancy, Inc. v. Nat'l Marine Fisheries Serv.*, 382 F.3d 1159, 1161 (9th Cir. 2004) ("When the federal statute forming the basis for the action has an express provision governing costs, however, that provision controls over the federal rules.").

42 U.S.C.A. § 2000e-5(g)(2)(B) – the provision of Title VII entitled "Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders" (i.e., the provision pertinent to costs) – provides:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –
>
> (i) May grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title.

42 U.S.C. § 2000e-5(g)(2)(B)(i).

42 U.S.C. § 2000e-2(m) provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

Thus, as per the provisions of Title VII, Plaintiff-Appellant's entitlement to costs occurs once he proves a violation pursuant to 42 U.S.C. § 2000e-2(m). Plaintiff-Appellant has not done so.

As such, we submit that Plaintiff-Appellant is not within the category of prevailing parties entitled to costs as enumerated under Fed. R. App. P. 39(a)(1)-(4). Indeed, the status of Plaintiff-Appellant is more akin to the taxing of fees, to which Judge Posner has opined:

> A procedural victory that may be a way station to utter substantive defeat creates no right to fees. It makes no difference whether the procedural victory is the denial of a motion to dismiss, the denial of summary judgment, the denial of a motion for a directed verdict, appellate reversal of the grant of such a motion (as in *Hanrahan*), or, as in this case, appellate reversal of the grant of summary judgment – for that is the equivalent of a denial of summary judgment and leaves the plaintiff still having to prove his case at trial.

Richardson v. Penfold, 900 F.2d 116, 119 (7th Cir. 1990).

Here, Plaintiff-Appellant has not obtained a victory as regards the merits of its Title VII claim. We respectfully submit that Plaintiff-Appellant has merely obtained a procedural victory, and is thus far from proving a violation under section 2000e-2(m) to recover the costs it seeks.

Again, we note that the February 26, 2018 decision did not award costs to either party, but rather vacated the district court's judgment on Plaintiff-Appellant's Title VII claim; (2) remanded the matter back to the district court for further

proceedings consistent with the February 26, 2018 decision; and (3) affirmed the judgment of the district court in all other respects. *Zarda*, 883 F.3d at 108.

We also note that Defendant-Appellee will file a *writ of certiorari* with the United States Supreme Court to petition for the review of this Court's February 26, 2018 decision. This is further evidence that the matter has not been resolved, nor has Plaintiff-Appellant in any way prevailed on the merits of its Title VII claim.

Accordingly, Plaintiff-Appellant is not a prevailing party and not statutorily entitled to costs. Plaintiff-Appellant's instant application must be denied in its entirety.

III. IN THE ALTERNATIVE, PLAINTIFF-APPELLANT IS NOT ENTITLED TO THE SUMS IT SEEKS

In the event this Court finds that Plaintiff-Appellant may recover costs, we request the amount taxed reflect a sum aligned with the costs enumerated under Fed. R. App. P. 39 and this Court's local Fee Schedule.

Fed. R. App. P. 39(c) provides that "[e]ach court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix." Consistent with that requirement, this Court's Local Rule 39.1 provides that the "cost of reproducing necessary copies of briefs or appendices is taxable at the lesser of the actual cost or the maximum rate set by the court and posted on the court's website under Fee Schedule." Rule 39 of the United States Circuit Court of Appeals for the Second Circuit. (emphasis added). The Fee

Schedule, in turn, provides for reproduction costs at the taxable rate of the lesser of the actual costs or twenty cents (.20¢) per page; one hundred twenty-five dollars ($125.00) per cover; and five dollars ($5.00) per binding.

Plaintiff-Appellant requests this Court grant costs amounting to the total amount specified in the "Cockle invoices". ECF Doc 521-2 at ¶ 12. Although Plaintiff-Appellant fails to specify the actual amount it seeks, a review and calculation of the invoices [ECF Docs 521-3] shows that the amount to be three thousand five hundred ninety-seven dollars and sixty cents ($3,597.60). However, the request does not incorporate the Court's Fee Schedule and must therefore be summarily denied.

In the alternative, Plaintiff-Appellant requests costs in the amount of three thousand six hundred dollars and eighty cents ($3,600.80). *Id.* Plaintiff-Appellant claims this amount incorporates the Court's Fee Schedule for the costs of briefs and appendices, as well as the docketing fee of five hundred five dollars ($505.00). *Id.* Despite Plaintiff-Appellant's claim, this request, too, does not properly incorporate this Court's Fee Schedule.

Fed. R. App. P. 39 enumerates four (4) costs which are taxable: (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedes bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal. And,

as stated above, this Court's Fee Schedule sets the specific maximum amount a party may be taxed for certain costs.

Simply put, Plaintiff-Appellant's alleged actual costs exceed the maximum costs allowable under this Court's Fee Schedule.

To begin, this Court's Fee Schedule grants reimbursement of reproduction costs up to twenty cents ($.20) per page. It also grants reimbursement for binding up to five dollars ($5.00) per copy. However, Local Rule 39 directs costs to be taxed at the lesser of these rates or the actual cost.

"Cockle" charged Plaintiff-Appellant approximately $0.10 per page for the brief with special appendix and the joint appendix, and approximately $0.15 per page for the reply brief. "Cockle" further charged $1.00 per copy for each binding of the briefs and appendices. *See* ECF Doc. No. 521-3 at pages 4, 6, 8, and 10.

Therefore – and momentarily putting aside Plaintiff-Appellant's request for addition sums for color copies – the actual taxable amounts for reproduction and bindings are as follows:

Description of Cost	Quantity	Price per Unit	Total Amount
Printing of Brief and Special Appendix (97 Pages)	15	$9.80 (or approx. $0.10 per page)	$147.00
Printing of Volume I of Joint Appendix (305 pages, which includes the 5-page Table of Contents)	15	$30.70 (or approx. $0.10 per page)	$460.50
Printing of Volume II of Joint Appendix (305 pages, which includes the 5-page Table of Contents)	15	$30.70 (or approx. $0.10 per page)	$460.50
Printing of Volume III of Joint Appendix (124 pages, which includes the 5-page Table of Contents)	15	$12.60 (or approx. $0.10 per page)	$189.00
Printing of Reply Brief (27 Pages)	2	$4.00 (or approx. $0.15 per page)	$8.00
Binding for all Copies	62	$1.00	$62.00
		TOTAL	$1,327.00

Thus, pursuant to Local Rule 39 and this Court's Fee Schedule, the total taxable amount for reproduction and bindings is one thousand three hundred twenty-seven dollars ($1,327.00).

As for color copies, Plaintiff-Appellant fails to posit why these specific reproductions were "necessary" as per Fed. R. App. P. 39(c). Indeed, in accordance with Fed. R. App. P. 39(c), costs are only accorded to "'necessary copies' of briefs and appendices and at rates not higher than those generally charged for such work in the area where the Clerk's office is located.... Reproduction costs for the appendix

are limited by Local Rule 39 to a maximum of $.20 per page." *Furman v. Cirrito*, 782 F.2d 353, 356 (2d Cir. 1986).

Apart from the self-serving description these copies as "important if not essential", Plaintiff-Appellant offers no further justification as to why color copies were, in any way, necessary. *See generally* ECF Doc. 521-2 at ¶ 11. This Court made no mention of these color copies in its February 26, 2018 decision to justify Plaintiff-Appellant's position. *See generally Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018). We respectfully submit that these copies were not "necessary" and, accordingly, should be taxed – if at all – at the rates identified in the table, above, wherein they were incorporated in the "Total" cost.

Moreover, it remains uncertain from the content of Plaintiff-Appellant's application how many "covers" they request to be taxed. In any event, the "Cockle invoices" do not delineate how much Plaintiff-Appellant was charged for covers or whether they were incorporated in another fee within the itemized charges. Given the impossibility in ascertaining this figure, the absence of proof submitted by Plaintiff-Appellant in its request for this specific cost, and the speculation required to even "ballpark" the amount expended, we submit said costs should not be taxed.

Further, Plaintiff-Appellant appears to have incurred fees identified as a "base cost" amounting to two hundred dollars ($200.00) per transaction with "Cockle". *See* ECF Doc. 521-3, pages 4, 6, 8, and 10. Plaintiff-Appellant blames

these costs on incorrect information obtained from the Clerk's office. *See* ECF Doc. No. 521-2 at ¶ 5.

Plaintiff-Appellant is not entitled to reimbursement of any amount associated with this "base cost" because neither Fed. R. App. P. 39 or Local Rule 39.1 specify this as a taxable cost. However, should this Court disagree with this position, we note that it would be prejudicial to tax Defendant-Appellee eight hundred dollars ($800.00) – or two hundred dollars ($200.00) per "Cockle" invoice – that arose from Plaintiff-Appellant use of "Cockle's" services on four (4) separate occasions, regardless of whether the need for this repeat patronage was due to Plaintiff-Appellant, the Clerk, or "Cockle".

Plaintiff-Appellant claims to have incurred other fees, associated with "Cockle," and identified as "Additional Proofs," "Alterations," "PDF File," "Typeset TOC," and "Proofs and Postage." *See* ECF Doc. No. 521-3, Pages 3 and 4. These additional fees amount to a total of four hundred fifteen dollars ($415.00). Any request by Plaintiff-Appellant in regard to these amounts must also be denied, since Fed. R. App. P. 39 or Local Rule 39.1

Therefore, should this Court grant Plaintiff-Appellant's application for costs – sums that we submit it is not entitled – Defendant-Appellee must only be taxed those amount specifically allowed under Fed. R. App. P. 39 and Local Rule 39.1. Pursuant to that authority, the actual taxable costs related to Plaintiff-Appellant's

application total one thousand eight hundred thirty-two dollars ($1,832.00), said amount being the costs associated with reproduction and binding the briefs and appendices (as reflected in the table above) and the docketing fee of five hundred five dollars ($505.00).

IV. CONCLUSION

For the reasons set forth above, we submit that Plaintiff-Appellants application for costs must be denied. Pursuant to Fed. R. App. P Rule 39(a)(4), costs are taxed only as ordered by the court. In it February 26, 2018 decision, this Court did not order costs to either party. Moreover, Plaintiff-Appellant is not otherwise statutorily entitled to costs, but rather must succeed on the merits of its Title VII claim to become eligible for such sums.

In the alternative, we further submit that in the event this Court does award costs to Plaintiff-Appellant, the amount taxed upon Defendant-Appellee accord with Fed. R. App. P. 39 and the local rules and Fee Schedule adopted by this Court. Indeed, using the parameters therein, the amounts taxable are one thousand eight hundred thirty-two dollars ($1,832.00).

Dated: March 22, 2018
Bohemia, New York

Respectfully submitted,
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