

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FREDERICK M. CARGIAN,

Plaintiff,

Civil Action No.:

15-CV-01084(GBD)(HBP)

-against-

BREITLING USA INC.,

Defendant.

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**REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
APPLICATION FOR COSTS**

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INTRODUCTION

Pursuant to Rule 54 of the Federal Rules of Civil Procedure, Local Civil Rule 54.1, and 28 U.S.C. §§1920 and 1923, Defendant Breitling USA, Inc. (“Breitling”) submits this reply memorandum of law in support of its Applications for a Bill of Costs to address issues raised by Plaintiff Fred Cargian (“Plaintiff”) in his Opposition to Defendant’s Bill of Costs that was filed with the Court on October 13, 2021 (Docket Numbers “Dkt Nos.”: 95-97).

Breitling is seeking costs for deposition transcripts that were used in its successful Motion for Summary Judgment. These costs are statutorily authorized, and Plaintiff has not presented any admissible evidence that his is indigent or would suffer financial hardship if he paid the award of costs. Further, Plaintiff has not presented any other evidence to support his contention that the requested costs should not be awarded to Breitling. Accordingly, the Court should grant Breitling its Bill of Costs as originally submitted.

BACKGROUND

Plaintiff is a former sales representative of Breitling whose employment was terminated in December 2013 for legitimate and non-discriminatory reasons; namely, his failure to achieve his sales goals, a decrease in his actual total sales numbers, and his negative attitude towards his job and his boss. On February 17, 2015, Plaintiff filed the instant action alleging that he was discriminated against on the basis of his age, sex (male) and sexual orientation (homosexual) in violation of the Age Discrimination in Employment Act (“ADEA”), Title VII of the Civil Rights Act of 1964 (“Title VII”), the New York State Human Rights Law (“SHRL”), and the New York City Human Rights Law (“CHRL”).

One year later, on February 29, 2016, Breitling moved for summary judgment on all of Plaintiff’s claims. On September 29, 2016, this Court granted Breitling’s summary judgment

motion dismissing Plaintiff's ADEA and Title VII claims and declining to exercise supplemental jurisdiction over Plaintiff's SHRL and CHRL claims. Specifically, this Court noted in its September 29, 2016 decision that Breitling "has established that there is no admissible evidence sufficient to allow a trier of fact to find that [Breitling] discriminated against Plaintiff." Dkt No. 63 at 1.

Plaintiff appealed this Court's decision to grant summary judgment to Breitling on his Title VII claim; he did not appeal the dismissal of his ADEA claim. After the Court issued its September 29, 2016 decision, there was a change in the law. Specifically, in *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) *aff'd* 140 S. Ct. 1731 (2020), the Second Circuit reversed the Circuit's precedent finding, for the first time, that sexual orientation discrimination was cognizable under Title VII. In light of *Zarda*, the Second Circuit instructed this Court to reexamine Breitling's summary judgment motion. *See Cargian v. Breitling USA, Inc.*, 737 Fed.Appx. 41, 42 (2d Cir. 2018) (Summary Order). Thus, contrary to Plaintiff's assertion, he did not make law or succeed in changing the law – *Zarda* did.

On November 9, 2020, Breitling renewed its Motion for Summary Judgment. On September 13, 2021, this Court granted Breitling's Motion in full. The Court found that Breitling had articulated a legitimate, non-discriminatory reasons for all the actions about which Plaintiff complained, and that Plaintiff could not show that such reasons were pretextual. As such, summary judgment in favor of Breitling was warranted on Plaintiff's Title VII and SHRL claims. Further, this Court held that summary judgment was even warranted on Plaintiff's CHRL claim, which has a significantly lower standard for Plaintiff to satisfy than Title VII or the SHRL. Accordingly, this Court dismissed all of Plaintiff's claims and entered judgment for Breitling.

On September 15, 2021, the Clerk docketed Breitling's judgment. On October 4, 2021, Breitling filed its Bill of Costs seeking reimbursement of \$9,855.65 for the costs of deposition transcripts used in its successful Summary Judgment Motion. Plaintiff filed his opposition to the Bill of Costs on October 13, 2021 by submitting two identical affirmations of counsel, *see* Dkt. Nos. 95 and 97, and a memorandum of law. *See* Dkt No. 96.

ARGUMENT

Breitling is entitled to the costs it seeks because the deposition transcripts for which it seeks reimbursement were used in Breitling's successful Summary Judgment Motion. Plaintiff contends that he should not be required to pay the statutory costs that Breitling seeks because of (i) equity; (ii) Breitling's insurer likely paid for the deposition transcripts costs; and (iii) Breitling did not rely on any of the deposition transcripts in its successful motion for summary judgment. Each of Plaintiff's arguments is unavailing.

A. Legal Standard

"Unless a federal statute, these rules, or a court provides otherwise, costs – other than attorneys' fees – should be allowed to the prevailing party." Fed.R.Civ.P. 54(d). The Supreme Court has held that "costs" are limited to those items set forth in 28 U.S.C. § 1920, which provides that "[a] judge or clerk of any court of the United States may tax as costs . . . [f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." *Crawford Gitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). The Second Circuit has consistently held that the prevailing party may obtain "deposition expenses when necessarily incurred for use of the deposition in the case." *Whitfield v. Scully*, 241 F.3d 264, 270 (2d Cir. 2001) *abrogated on other grounds by Bruce v. Samuels*, 136 S.Ct. 627 (2016).

The Second Circuit has also held that the default rule is to award costs to the prevailing party. *See Wilder v. Gl. Bus Lines*, 258 F.3d 126, 129 (2d Cir. 2001). While the decision to award costs rests within the discretion of the district court, *see Cosgrove v. Sears, Roebuck & Co.*, 191 F.3d 98, 102 (2d Cir. 1999), the losing party carries the burden of showing that costs should not be imposed. *See Whitfield*, 241 F.3d at 270. In determining whether to deny costs, courts may consider the equities of the case, such as plaintiff's financial hardship and plaintiff's good faith in bringing the lawsuit. *See Moore v. Cty. of Delaware*, 586 F.3d 219, 222 (2d Cir. 2009).

B. Breitling is the Prevailing Party and Therefore Entitled to Costs

There can be no doubt that Breitling is the prevailing party for purposes of Rule 54(d). A party is a "prevailing party" where there has been a "judicially sanctioned change in the legal relationship of the parties." *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98, 101 (2d Cir. 2006). Where a party prevails "on every claim resolved on the merits," that party is the prevailing party. *Vuona v. Merrill Lynch & Co.*, 2013 WL 1971572, at *3 (S.D.N.Y. May 14, 2013).

Here, after moving for summary judgment, Breitling succeeded in having all of Plaintiff's claims dismissed by the Court. *See generally*, Dkt Nos. 63 and 90. Accordingly, Breitling is the prevailing party under applicable law entitled to costs.

C. The Costs Sought Are Taxable Pursuant to Local Rule 54.1

Pursuant to Local Rule 54.1, Breitling is entitled to costs for deposition transcripts used by the Court in ruling on its motion for summary judgment. In fact, Local Rule 54.1(c)(2) states:

Unless otherwise ordered by the Court, the original transcript of a deposition, plus one copy, is taxable if the deposition was used or received in evidence at the trial, whether or not it was read in its entirety. Costs for depositions are also taxable if they were used by the Court in ruling on a motion for summary judgment or other dispositive substantive motion.

Id.

It is well-settled that, under Local Rule 54.1, the “filing of a deposition transcript,” by attaching it to a motion for summary judgment (or in opposition to such motion), “means a court will ‘use’ it, since summary judgment may be granted only ‘if the pleadings, depositions, answers to interrogatories, admissions on file, ... how that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Whitfield*, 241 F.3d at 271.

In its moving papers, Breitling filed with the Court the deposition transcripts of Plaintiff, Thierry Prissert, and Annie Sommer. *See* Dkt. Nos. 39-1, 39-2, and 39-3. In his opposition papers, Plaintiff cited attached the depositions of Isaac Schafrath, Diana Figueroa, Melissa Vessely, and Sophie Morice. *See* Dkt Nos. 44-6, 44-9, 44-10, and 44-13. Accordingly, these deposition transcript costs that Breitling seeks are taxable costs.

D. Plaintiff’s Assertions That He Should Not Be Taxed Costs Are Unavailing

Plaintiff Opposition to Breitling’s Bill of Costs can be condensed into three arguments as to why Plaintiff should not be taxed costs. First, he argues that equity dictates against taxing him costs. Second, he claims that Breitling’s insurer paid for the deposition transcripts. Third, Plaintiff claims that Breitling did not rely on the deposition transcripts. All three arguments are specious.

1. Plaintiff’s Equity Argument Is Fallacious

Plaintiff asserts that equity dictates that no costs should be awarded and he should therefore be relieved of having to pay costs. Plaintiff is wrong.

In determining whether equity prohibits the taxing of costs to a plaintiff, courts consider the financial hardship to the taxed party, the good faith plaintiff had in bringing the case, and the public importance of the case. *See Jackson v. Time Warner Cable Administration LLC*, No. 16-cv-8639(PKC), 2018 WL 572925, at *1 (S.D.N.Y. Nov. 1, 2018). Plaintiff contends that all three of these elements are present. None are; thus, costs should still be awarded to Breitling.

The first equity argument that Plaintiff raises is that it would cause him financial hardship. However, “indigency *per se* does not automatically preclude an award of costs.” *Whitfield*, 241 F.3d at 270. Indeed, “[a] non-prevailing party relying on indigency must make a ‘strong showing of financial hardship’ before a court will decline to award costs.” *Jackson*, 2018 WL 5729295, *1 (quoting *Sims v. City of New York*, No. 08-cv-5965 (JGK), 2011 WL 4801363, at *3 (S.D.N.Y. Oct. 11, 2011)). Furthermore, if a party is going to rely on financial hardship to avoid costs, the party must provide evidence “documenting his alleged lack of financial resources.” *Campbell v. Empire Merchants, LLC*, No. 16-cv-5643 (ENV)(SMG), 2020 WL 587484, at *1 (E.D.N.Y. Feb. 6, 2020) (citing *Hogan v. Novartis Pharm. Corp.*, 548 F.App’x 672, 674 (2d Cir. 2013)). When the party fails to document such financial hardship “and, instead, relies solely on bald assertions...a district court should not excuse the taxing of costs on that basis.” *Id.*

In his Opposition to Breitling’s Bill of Costs, Plaintiff did not present any evidence to support his contention that financial hardship prevents him from paying costs. *See* Dkt Nos. 95-97. Indeed, Plaintiff did not even present an affidavit attesting to his financial hardship. *See id.* Instead, he merely relies on “bald assertions” of indigency. Accordingly, he should not be excused from paying costs due to financial hardship.

Second, Plaintiff contends that he brought the case in good faith. However, “good faith alone does not compel the denial of costs.” *Campbell*, 2020 WL 587484, *2. If a plaintiff could avoid costs by simply arguing that he had good faith in bringing the lawsuit, then defendants would never be entitled to costs unless plaintiff’s complaint was filed in contravention to Rule 11 or the plaintiff otherwise engaged in sanctionable conduct. That has never been the standard. This is why courts routinely grant a prevailing defendant costs even if plaintiff brought his case in good faith. *See, e.g., Pierre v. City of New York*, No. 05-cv-5018 (JFB) (KAM), 2008 WL 1700441, at

*3 (E.D.N.Y. Apr. 9, 2008) (“[P]laintiff’s good faith in pursuing this lawsuit is insufficient . . . to warrant vacating the costs.”). Therefore, Plaintiff the second equitable grounds to avoid costs is misplaced and does not reveal Plaintiff of his obligation to pay costs.

Third, Plaintiff contends that his case was important because civil rights actions serve an important public interest and Plaintiff “was the prevailing party on the central issue: the extension of Title VII to the protection against [*sic*] sexual orientation.” Dkt No. 96 at 6. If simply filing a civil rights claim is enough to avoid costs, then courts would never award costs to defendant’s who prevail in such cases. Yet, courts routinely grant costs to prevailing defendants in civil rights cases. *See, e.g., Campbell*, 2020 WL 587484 (granting costs to defendant in Section 1981 employment discrimination case).

Further, Plaintiff’s argument that he “was the prevailing party on the central issue: the extension of Title VII to the protection [to] sexual orientation” is disingenuous at best, and a lie at worst. The Second Circuit changed the law and extended Title VII to sexual orientation discrimination claims in *Zarda*, which was upheld by the Supreme Court. Plaintiff had nothing to do with *Zarda*; the law had changed before the Second Circuit heard Plaintiff’s appeal. Therefore, Plaintiff played no role whatsoever in changing the law or extending Title VII protections to victim of sexual orientation discrimination.

Moreover, the Second Circuit did not find Plaintiff to be the prevailing party on his sexual orientation discrimination claim; it merely remanded the case back to this Court to review Breitling’s summary judgment motion in light of *Zarda*. This Court followed the Second Circuit’s instructions and found that even after *Zarda*, no rational fact finder could hold that Plaintiff suffered from unlawful discrimination. Accordingly, equity does not weigh in favor of allowing Plaintiff to avoid costs in this case.

2. Breitling Is Entitled To Costs Even If It Has An Insurance Policy

Plaintiff's second argument to excuse him from costs fares no better than his first. Plaintiff contends that Breitling has an insurance policy and therefore it is likely that the insurance carrier paid for the transcripts and not Breitling. This argument borders on the ridiculous.

Whether Breitling or its insurance carrier paid for the deposition transcripts is irrelevant. Local Rule 54.1 permits a prevailing defendant to recover the costs of deposition transcripts relied upon by the Court in granting the defendant summary judgment. It does not include a carve out for defendants with insurance policies nor does it even state that the defendant had to have paid for the transcripts. Indeed, the defendant might still owe the money to the stenographer or the stenographic company. Thus, it is irrelevant whether Breitling or its insurer paid for the transcript or even if transcript bills from the stenographer are still outstanding. By their express language, Rule 54 and Local Rule 54.1 permit Breitling to recover deposition transcript costs.

Nevertheless, courts around the country have held that a prevailing defendant is entitled to costs even if the costs incurred were paid by a third-party such as an insurance carrier. *See, e.g., Kevin M. Ehringer Enters., Inc. v. McData Servs. Corp.*, No. 3:06-CV-812-L (BH), 2012 WL 1835759, at *2 (N.D.Tex. Apr. 30, 2012) ("On its face, Rule 54(d) merely provides that costs should be allowed to a prevailing party and does not create an exception for a prevailing party whose costs are paid by another."); *Guarrasi v. Gibbons*, No. 07-5475, 2011 WL 382598, at *1 (E.D.Pa. Feb. 3, 2011) ("Indeed, other courts that have considered the issue have concluded that costs may be awarded 'to a prevailing party even if such costs were initially paid by a third party on the prevailing party's behalf.'" (citation omitted)). Furthermore, at least one circuit court of appeals has specifically found that costs covered by a non-party insurer are recoverable by the insured as the prevailing party. *See Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 638-

39 (11th Cir. 1991); *see also Bilezikjian v. Baxter Healthcare Corp.*, No. 92 CIV. 9498(HB), 1999 WL 945522, at *2 (S.D.N.Y. Oct. 18, 1999) (noting that the prevailing party “may have insurance coverage for all expenses associated with this litigation”).

Accordingly, Plaintiff’s argument that he should be excused from paying costs because Breitling has an insurance policy should be rejected.

3. The Deposition Costs That Breitling Seeks Is Proper

Finally, Plaintiff contends that Breitling did not rely on the deposition transcripts for which it seeks costs. This is demonstrably untrue.

As set forth above, when a court grants a defendant’s summary judgment motion, in reaching its decision, it is assumed that the court relied upon the deposition transcripts submitted by the parties. *Whitfield*, 241 F.3d at 271. Either Plaintiff or Breitling (or both) attached to their papers the deposition transcripts for which Breitling now seeks costs. Accordingly, under well-settled law, the Court relied on such transcripts in granting Breitling’s summary judgment motion.

Therefore, the deposition transcript costs that Breitling seeks are taxable costs and Plaintiff should not be excused from having to pay same.

CONCLUSION

For the reasons set forth herein above, Breitling’s Bill of Costs should be granted in its entirety.

Dated: New York, New York
October 15, 2021

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