

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:17-CV-00884-CMA-STV

CHAYCE AARON ANDERSON,

Plaintiff,

vs.

JASON SHUTTERS,

Defendant.

PLAINTIFF’S MOTION TO REVIEW COSTS

Pursuant to Federal Rule of Civil Procedure 54(d), Plaintiff Chayce Aaron Anderson (“Plaintiff” or “Mr. Anderson”), by and through undersigned counsel, hereby respectfully submits this Motion to Review Costs as taxed by the Clerk of the Court on April 22, 2020 (Dkt. No. 169).

CERTIFICATION OF CONFERRAL

Pursuant to D.C.COLO.LCivR 7.1, Plaintiff certifies that undersigned counsel has conferred with Defendant’s counsel regarding the substance of this Motion, and Defendant opposes the relief sought herein.

I. INTRODUCTION

Defendant should be denied an award of costs in this case. An award of costs under Fed. R. Civ. P. 54 is discretionary, and no costs were expressly awarded (despite costs recently being taxed). Indeed, the circumstances here illustrate precisely why Rule 54 costs are discretionary: costs would condemn Mr. Anderson, an indigent young man, to decades of repayment for litigating

a case that advanced past the pleadings stage and proceeded through discovery and summary judgment with the help of Court-appointed pro bono counsel. In short, equity and good conscience readily support a denial of costs in this case.

Further, while Fed. R. Civ. P. 54 creates a presumption that costs should be awarded to the prevailing party, the Tenth Circuit and District of Colorado have established circumstances that courts may consider in denying an award of costs, including the non-prevailing party's indigence and the court's appointment of pro bono counsel—factors that are present here. Accordingly, Mr. Anderson respectfully requests that the Court deny Defendant an award of costs.

II. BACKGROUND

On April 11, 2017, Mr. Anderson petitioned the Court to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. (Dkt. No. 3.) Mr. Anderson represented that he had no assets and had tens of thousands of dollars of debt. (*Id.*) As shown in supporting documents to the petition, Mr. Anderson's inmate trust fund account never exceeded \$210, and at several times was \$0. (*Id.*) The next day, the Court granted Mr. Anderson's petition. (Dkt. No. 5.)

On April 20, 2018, after recommending denial of Defendant's motion to dismiss the excessive force claim against him, the Magistrate Judge also granted Plaintiff's Motion for Appointment of Pro Bono Counsel. (Dkt. No. 89). The Court found that several factors and considerations had been met, including "the nature and complexity of the action" and "the potential merit of the claims" in issuing the order. (*Id.*)

Following the close of discovery, on July 5, 2019, Defendant filed his Motion for Summary Judgment, asserting qualified immunity. (Dkt. No. 128.) On February 25, 2020, the Court granted

Defendant’s Motion. (Dkt. No. 163.) Absent from this Order was an award of costs to Defendant. (*Id.*)

On March 10, 2020, Defendant filed a Bill of Costs, without an award of costs and without moving the Court to obtain such award, seeking \$2,290.83. (Dkt. No. 165.) The Clerk of the Court held a Bill of Costs Hearing on April 22, 2020 and taxed costs of \$1,704.88. (Dkt. No. 169.) The Clerk noted Mr. Anderson’s objection to any award of costs in this case and the discretionary nature of such an award. (*Id.*)

III. LEGAL STANDARD

“Whether or not a prevailing party shall be awarded costs is ‘within the court’s sound discretion.’” *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004) (quoting *Homestake Mining Co. v. Mid-Continent Exploration Co.*, 282 F.2d 787, 804 (10th Cir. 1960)). Federal Rule of Civil Procedure 54 creates a presumption of an award of costs to the prevailing party, and the burden is on the non-prevailing party to overcome this presumption. *Rodriguez*, 360 F.3d at 1190 (citing *Cantrell v. Int’l Brotherhood of Elec. Workers, AFL-CIO, Local 2021*, 69 F.3d 456, 459 (10th Cir. 1995)).

III. ARGUMENT

A. Equity and the Circumstances in This Case Warrant a Denial of Costs.

Costs may be denied to the prevailing party when “the losing party can show that equity and good conscience require a different judgment.” *See Brooks v. Gaenzle*, Civ. A. No. 06-cv-01436-CMA-MJA, 2009 WL 4949922, at *5 (D. Colo. Dec. 15, 2009) (quoting *Hodgman v. Atl. Refining, Co.*, 20 F.2d 949, 951 (D. Del. 1927)).

The Tenth Circuit has “discussed the circumstances in which a district court may properly exercise its discretion under Rule 54(d) to deny costs to a prevailing party.” *Cantrell*, 69 F.3d at 459. The non-prevailing party’s indigence is one such circumstance. *Id.* (holding that district courts may “deny costs when . . . the nonprevailing party was indigent.”); *see Shapiro v. Rynek*, 250 F. Supp. 3d 775, 779 (D. Colo. 2017) (“Generally, a district court does not abuse its discretion in denying costs when . . . the non-prevailing party is indigent.”); *see also Broadus v. Correctional Health Partners, Inc.*, Civ. A. No. 15-cv-0182-WJM-KLM, 2019 WL 859702, at *2 (D. Colo. Feb. 22, 2019) (“The indigence of a non-prevailing party may be a factor in denying costs.”).

Further, a denial of costs may be supported where “the court has specifically authorized or requested that pro bono counsel consider representing the non-prevailing indigent litigant.” *Broadus*, 2019 WL 859702, at *2, *3 (quoting *Shapiro*, 250 F. Supp. 3d at 780 (internal quotation marks omitted) (denying costs because plaintiff’s indigence, coupled with the court’s authorization for appointment of pro bono counsel, provided support to overcome the presumption that costs be awarded to the prevailing party); *see also Zeran v. Diamond Broadcasting, Inc.*, 203 F. 3d 714 (10th Cir. 2000) (“this Court has never attempted to create an exclusive list of valid reasons”).

1. Mr. Anderson’s indigence supports a denial of costs.

As noted, “[t]he circumstances in which a district court may properly deny costs to a prevailing party include when . . . the nonprevailing party is indigent.” *Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 659-60 (10th Cir. 2013); *see also AeroTech, Inc. v. Estes*, 110 F. 3d 1523, 1526 (10th Cir. 1997) (“We noted that other circuits have held that a district court may decline to award costs when . . . the nonprevailing party was indigent.”).

Here, Mr. Anderson is indigent, as this Court previously concluded when it granted him leave to proceed *in forma pauperis*. Since that time, Mr. Anderson has not accrued any assets and continues to lack the ability to earn even a modest wage.¹ Although he has done his best to work while incarcerated, his most recent job doing carpentry work, which paid \$10 per month, has been indefinitely suspended due to precautions taken by the Colorado Department of Corrections to manage COVID-19. Indeed, Mr. Anderson has never earned more than \$20 per month while incarcerated.

Given Mr. Anderson's indigence, if costs are awarded in this case—and assuming he could devote 100% of his monthly carpentry wages to satisfy a costs award—it would take him approximately fourteen years to satisfy the award. Assuming Mr. Anderson cannot devote 100% of his monthly carpentry wages to satisfy a cost award, that fourteen-year timeframe quickly expands to decades. In either case, the result is inequitable.

Mr. Anderson relies on his meager wages for basic needs not provided by the Colorado Department of Corrections, such as purchasing hygiene products, over-the-counter-medicine, and stamps to communicate with his family. (*See* Dkt. No. 133 at 6.) As the court reasoned in *Shapiro*, it “would be manifestly unjust to award costs or attorney’s fees against [the plaintiff], who is indigent and who would suffer great and severe hardship, presumably for the rest of his life, if he could not provide for himself through his prison wages at least some modicum of simple life comforts through his meager canteen and/or some money available to fund communications with family members.” 250 F. Supp. 3d at 781.

2. The Court’s appointment of pro bono counsel further supports a denial of costs.

¹ A supporting declaration executed by Mr. Anderson is forthcoming and will be supplemented accordingly.

“[W]hen considering whether to depart from the usual award of costs to a prevailing party, a factor that should be added to the list of discretionary considerations is whether the court has specifically authorized or requested that pro bono counsel consider representing the non-prevailing indigent litigant.” *Shapiro*, 250 F. Supp. 3d at 780; *see also Broadus*, 2019 WL 859702, at *3 (“In sum, Plaintiff’s indigence, coupled with the Court’s authorization for appointment of pro bono counsel on his behalf, provide additional support to overcome the presumption that costs be awarded to [the prevailing party]”).

Here, this Court appointed pro bono counsel to represent Mr. Anderson after the Court permitted his excessive force claim to advance beyond the pleading stage. Combined with his indigence, and in the interests of equity, Mr. Anderson has overcome the presumption that costs should be awarded.

The District of Colorado’s decision in *Broadus* demonstrates these principles in action. There, the court exercised its discretion and denied an award of costs based in part on the plaintiff’s indigence, combined with the court’s authorization of pro bono counsel. 2019 WL 859702, at *3. The court reasoned that “given the fact that Plaintiff remains in custody and will be heavily dependent on [a modest settlement sum] for basic living needs for some period of time after his release, Plaintiff remains of limited financial means.”

So too here. Like the plaintiff in *Broadus*, Mr. Anderson is indigent and anticipates that he will be dependent on whatever modest sum he may have on future release—whenever that may occur—to meet his basic living needs. And like the *Broadus* plaintiff, the Court in this case appointed Mr. Anderson pro bono counsel. Accordingly, the combined factors present here, in concert with principles of equity, support a denial of costs to Defendant.

CONCLUSION

Mr. Anderson respectfully requests that this Court deny an award of costs to Defendant and requests a brief oral hearing on this Motion.

Respectfully submitted this 29th day of April, 2020.

/s/ Alexandra Lakshmanan

Alexandra L. Lakshmanan

Christopher J. Casolaro

Travis Jordan

Heather Campbell Burgess

Faegre Drinker Biddle & Reath LLP

1144 Fifteenth Street, Suite 3400

Denver, CO 80202

Telephone: (303) 607-3500

Facsimile: (303) 607-3600

allie.lakshmanan@faegredrinker.com

christopher.casolaro@faegredrinker.com

travis.jordan@faegredrinker.com

heather.burgess@faegredrinker.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2020, I electronically filed a copy of the foregoing **PLAINTIFF'S MOTION TO REVIEW COSTS** with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all counsel of record:

s/Michelle R. Soule

Michelle R. Soule, Paralegal