IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00884-CMA-STV

CHAYCE AARON ANDERSON,

Plaintiff,

v.

JASON SHUTTERS

Defendant.

DEFENDANT JASON SHUTTERS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REVIEW COSTS

Defendant, Jason Shutters, through his Attorneys, Hall & Evans, LLC, submits the following as his Response in Opposition to Plaintiff's Motion to Review Costs (ECF No. 175):

I. INTRODUCTION

Plaintiff initially filed the present matter generally alleging a violation of various Constitutional rights stemming from his arrest, trial, and conviction for sexual assault. The Court dismissed most of Plaintiff's claims set forth in the Second Amended Complaint (*See generally*, Adoption of Magistrate's Recommendation, ECF No. 93), with the only remaining claim consisting of one for excessive force arising from the handcuffing of Plaintiff by Detective Shutters. Plaintiff claimed that as a result of the handcuffing he suffered severe nerve damage, which continues to the present period of time. The evidence in this matter, including the uncontroverted medical testimony however,

established that the Plaintiff suffered nothing more than a scratch, and ultimately he never complained of an injury or issue to Detective Shutters. This fact was uncontroverted and wholly supported by the audio recording made by Detective Shutters at the time of the arrest, where Plaintiff specifically stated the handcuffs were "fine", after being asked if they were too tight by Detective Shutters (ECF No. 148 at 12). Magistrate Judge Varholak recommended Defendant's Motion for Summary Judgment be granted (ECF No. 152). Despite Plaintiff' objections, the Recommendation was ultimately accepted by the Court (ECF No. 163).

Plaintiff now seeks to avoid the imposition of costs and in support posits two theories (1) any such costs should be precluded by his indigency, and; (2) Plaintiff was appointed pro bono Counsel.

II. ARGUMENT

A. Proceeding in forma pauperis does not automatically abrogate Plaintiff's obligation to pay costs.

"A plaintiff's inmate and/or indigent status does not take away a prevailing defendant's right to an award of reasonable costs." ***Brooks v. Gaenzle***, 2009 U.S. Dist. LEXIS 121665 at *13 (D. Colo., December 15, 2009), referring to ***Anderson v. Cunningham***, 319 Fed. Appx. 706 (10th Cir. 2009) (affirming cost award against pro se inmate upon a grant of summary judgment). "Rule 54(d)(1) clearly allows costs to the prevailing party, unless otherwise prohibited by a federal statue, the Federal Rules of Civil Procedure, or a court order." ***Brooks***, 2009 U.S. Dist. LEXIS 12166 at *13-14, citing ***Rodriguez v. Whiting Farms, Inc.***, 360 F.3d 1180, 1190 (10th Cir. 2004). "This principle must be applied, unless the losing party can show that equity and good conscience

require a different judgment." ***Brooks***, 2009 U.S. Dist. LEXIS 12166 at *14, citing ***Hodgman v. Atl. Refining, Co***., 20 F.2d 949, 951 (D. Del. 1927). The burden of avoiding the taxation of costs, therefore, is on the party against whom said costs are taxed. "A district court does not abuse its discretion in awarding costs to the prevailing party simply because the non-prevailing party was indigent." ***Brooks***, 2009 U.S. Dist. LEXIS 121665 at *14-15, referring to ***Rodriguez***, 360 F.3d at 1190-91. The burden of establishing indigency is also on the non-prevailing and objecting party. ***Treaster v. Healthsouth Corp***., 505 F. Supp. 2d 898, 903 (D. Kan., April 3, 2007) citing ***Rivera v. City of Chicago***, 469 F.3d 631, 635 (7th Cir. 2006). "The non-prevailing party has the burden of providing the court with sufficient documentation to support…a finding" of indigency. ***Treaster***, 505 F. Supp. 2d at 903 citing ***Rivera***, 469 F.3d at 635.

"The denial of costs is 'in the nature of a severe penalty…and there must be some apparent reason to penalize the prevailing party if costs are to be denied.'" ***Brooks***, 2009 U.S. Dist. LEXIS 121665 at *15, citing ***Klein v. Grynberg***, 44 F.3d 1497, 1507 (10th Cir. 1995) and referring to ***Burroughs v. Hills***, 741 F.2d 1525, 1537 (7th Cir. 1984) (reasoning that the denial of costs against a financially-strapped plaintiff would not contribute to a more egalitarian distribution of wealth, since the legal expenses of the public official defendants were borne by taxpayers, most of whom are themselves persons of limited means).

Pursuant to Fed. R. Civ. P. 54(d), there is a presumption the "district court will award costs to the prevailing party." ***Cantrell v. Intl. Bhd. Of Elec. Workers***, 69 F.3d 456, 459 (10th Cir. 1995) citing ***Serna v. Manzano***, 616 F.2d 1165, 1167 (10th Cir. 1980).

See also Fed. R. Civ. P. 54(d). The award of reasonable costs is also provided for in the same federal statute which allows a person to request proceeding in forma pauperis. 28 U.S.C. § 1915 *et seq.* "Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings…" 28 U.S.C. § 1915 (f) (2020).

Besides indigency, factors considered with respect to taxing costs include the success of the prevailing party on all of Plaintiff's claims, ***Cantrell***, 69 F.3d at 459, citing ***Howell Petroleum Corp. v. Samson Resources Co.***, 903 F.2d 778, 783 (10th Cir. 1990); whether the prevailing party was obstructive or acted in bad-faith during the litigation of the matter, ***Cantrell***, 69 F.3d at 459, referring to ***Sheets v. Yamaha Motors Corp., U.S.A.***, 891 F.2d 533, 539 (5th Cir. 1990) and; when the taxed costs are unreasonably high or deemed unnecessary, or the issues were "close and difficult" ***Cantrell***, 69 F.3d at 459 citing ***White & White, Inc. v. American Hosp. Supply Co.***, 786 F.2d 728, 730 (6th Cir. 1986).

Being indigent is but one factor to consider. Here, the drawn-out litigation of this matter necessarily warrants an award of the relatively minimal amount of costs sought by the Defendant. In particular, Plaintiff initially sought to prosecute claims for unreasonable search and seizure, excessive force, violation of the "Youthful Offender Act", and intentional infliction of emotional distress (ECF No. 63 at 1-2). The pursuit of these claims was set forth in three iterations of Plaintiff's Complaint, requiring the Defendant to respond to at least two versions with either motions to dismiss or an answer (*see* ECF Nos. 1, 50, and 61). Ultimately, the only remaining claim involved the alleged excessive force upon application of handcuffs by Detective Shutters, which was subsequently dismissed after

discovery, depositions, and extensive briefing of a motion for summary judgment (ECF No. 93). The Defendant, therefore, endured three-years of litigation culminating in successfully defending against all six-claims for relief. Despite the extensive briefing, depositions and other discovery efforts, the Defendant is seeking a taxation of costs in the amount of $1,704.88. Such an amount is not disproportionate to the results obtained in this matter or unnecessarily high, nor has Plaintiff offered any argument the costs taxed were somehow "unnecessary". Furthermore, despite his burden the Plaintiff does not provide any documentation supporting the notion he is somehow unable to pay any amount, due to his indigency. *See* ***Treaster***, 505 F. Supp. 2d at 903 citing ***Rivera***, 469 F.3d at 635.

In addition, the issues in this matter do not involve a "close call". Without attempting to rehash the Defendants' Motion for Summary Judgment, Plaintiff nowhere cites to any medical testimony necessarily establishing the Plaintiff suffered anything other than a scratch, when he was handcuffed by Detective Shutters (*see* ECF No. 148 at 5), or that he complained to Detective Shutters about the alleged tightness of the handcuffs (ECF No. 148 at 12, referring to the reasoning in ***Vondrak v. City of Las Cruces***, 535 F.3d 1198, 1208-09 (10th Cir. 2008)). Plaintiff also never offers a legitimate argument refuting the evidence establishing that not only did he fail to complain to Detective Shutters, he affirmatively indicated the handcuffs were "fine." (ECF No. 148 at 12). Although it took three-years, the Defendant was ultimately successful in dismissing

all of Plaintiff's claims, with a relatively minimal amount of costs which he now seeks to recover[1].

Lastly, there are no indications Counsel for the Defendant acted in bad-faith, or was otherwise obstructive during the litigation of this matter. ***Cantrell***, 69 F.3d at 459,

B. Appointment of pro bono Counsel is not dispositive of the issue regarding taxation of costs.

In his Motion, Plaintiff argues the appointment of Counsel should necessarily be considered, and coupled with his indigency should result in a denial of costs. (*See* ECF No. 175 at 6, citing ***Shapiro v. Rynek***, 250 F. Supp. 3d 775, 780 (D. Colo. April 25, 2017). The Plaintiff, however, offers no reasoning behind such a result. The Court in ***Shapiro*** recognized a unique situation involving the representation of the Plaintiff by students from the University of Denver, Sturm College of Law with the assistance and tutelage of more seasoned attorneys. The Court also recognized that the Plaintiff in ***Shapiro*** was able to overcome dismissive pleadings and although he did not obtain an ultimate verdict in his favor, a jury did determine his Constitutional rights were violated. ***Shapiro***, 250 F. Supp. 3d at 781. Those circumstances are not present in this matter and should not be considered as a basis to deny the Defendant costs. In the present matter, Plaintiff was represented by three-attorneys from a relatively large law Denver area law firm.

[1] It should also be noted Detective Shutters, as a City of Fort Collins Police Officer, is a public employee. Ultimately, the expenditure of costs was made by the tax-payers. *See* ***Klein v. Grynberg***, 44 F.3d 1497, 1507 (10th Cir. 1995) and referring to ***Burroughs v. Hills***, 741 F.2d 1525, 1537 (7th Cir. 1984).

Ultimately, despite very competent and skilled representation, all of Plaintiff's claims were dismissed. The appointment of pro bono Counsel, coupled with Plaintiff's purported indigency, should not overcome the other factors weighing in favor of affirming the taxation of costs.

III. CONCLUSION

WHEREFORE, Defendant Jason Shutters respectfully requests the Court deny Plaintiff's Motion, and affirm the taxation of costs in favor of the Defendant.

Dated this 19th day of May 2020.

HALL & EVANS, L.L.C.

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 19th day of May 2020, I electronically filed the foregoing **DEFENDANT JASON SHUTTERS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REVIEW COSTS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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