

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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WILLIAM PERKS,

Plaintiff,

MEMORANDUM AND ORDER

99-CV-4811(JS)

-against-

TOWN OF HUNTINGTON, and SUSAN  
SCARPATI-REILLY, as Councilwoman  
for the Town of Huntington and  
Individually,

Defendants.

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APPEARANCES:

For Plaintiff: Edward Yule, Esq.  
46 Woodbine Ave.  
Northport, NY 11768

For Defendants:  
Town of Huntington James Patrick Clark, Esq.  
Cullen & Dykman LLP  
100 Quentin Roosevelt Blvd.  
Garden City, NY 11530

Ernest R. Stolzer, Esq.  
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1399 Franklin Avenue  
Garden City, NY 11530

Susan Scarpati-Reilly Jason L. Abelow, Esq.  
666 Old Country Road  
Garden City, NY 11530

SEYBERT, District Judge:

Presently pending are Defendants Town of Huntington's  
("Town") and Susan Scarpati-Reilly ("Scarpati-Reilly")  
(collectively, "Defendants") appeals of certain costs taxed by the  
Clerk of the Court pursuant to Federal Rule of Civil Procedure  
54(d)(1). For the reasons discussed herein, Defendants' requests

are GRANTED in part and DENIED in part.

BACKGROUND

After an approximately one-month trial, on November 10, 2005, a jury returned a verdict dismissing Plaintiff William Perks' ("Plaintiff") claims of sexual harassment, discrimination, hostile work environment and retaliation. Previously, on November 7, 2005, this Court had granted in part and denied in part the Town's motion for judgment as a matter of law ("JMOL") pursuant to Federal Rule of Civil Procedure 50. On December 14, 2005, Defendants filed Bills of Costs, to which Plaintiff filed an Affirmation in Opposition. On May 18, 2006, the Court denied Plaintiff's motion for JMOL pursuant to Federal Rule of Civil Procedure 50 or for a new trial pursuant to Rule 59. A decision on Defendants' requests for costs was stayed pending Plaintiff's appeal to the Second Circuit.

On May 10, 2007, the Second Circuit affirmed the judgment of the Court in favor of Defendants. As a result, the Clerk of the Court scheduled a telephone conference, with the consent of counsel for all parties, for June 4, 2007 to discuss Defendants' applications for costs. (Town Letter Mot. Ex. C.) Without providing notice or reason, Plaintiff's attorney, Mr. Edward Yule, Esq., failed to appear for the June 4, 2007 telephone conference. (Id. Ex. D.) The telephone conference was rescheduled for

July 30, 2007; however, Mr. Yule again, without notice or excuse, failed to appear. (Id. Ex. B.) The Clerk of the Court proceeded with the scheduled telephone conference despite Mr. Yule's absence.

The Town requested costs totaling \$33,455.61, (Docket Entry 208), and Scarpati-Reilly requested costs totaling \$27,128.11. (Docket Entry 207.) With respect to the costs requested by the Town, the Clerk disallowed the costs for daily trial transcripts (\$25,334.16), reduced the requested copying costs from \$1,628.25 to \$119.40, and granted \$6,493.20 in costs incident to taking depositions, for a total of \$6,612.60 in costs taxed against Plaintiff in favor of the Town. (Docket Entry 218.) With respect to the costs requested by Scarpati-Reilly, the Clerk disallowed the costs for daily trial transcripts (\$25,334.16), reduced the requested copying costs from \$1,012.95 to \$674.62, and granted \$781.00 in costs incident to taking depositions, for a total of \$1,455.62 in costs taxed against Plaintiff in favor of Scarpati-Reilly. (Docket Entry 219.)

Defendants appeal the Clerk's taxation of costs in as much as he failed to award costs for the daily trial transcripts and reduced the costs related to copies. Plaintiff filed a letter opposing the appeals.

## DISCUSSION

### I. Standard Of Review

On appeal, district courts review an award of costs by the Clerk of the Court de novo. See Karmel v. City of New York, No. 00-CV-9063, 2008 U.S. Dist. LEXIS 3804, at \*4 (S.D.N.Y. Jan. 9, 2008) ("Where an unsuccessful litigant appeals the Clerk of the Court's award of costs, the district court reviews the award de novo."); see also Bucalo v. E. Hampton Union Free Sch. Dist., 238 F.R.D. 126, 128 (E.D.N.Y. 2006) (quoting Whitfield v. Scully, 241 F.3d 264, 269 (2d Cir. 2001) ("A district court reviews the clerk's taxation of costs by exercising its own discretion to decide the cost question [it]self.")) (additional citations omitted) (alteration in original). As noted above, Defendants appeal the denial of costs related to the daily trial transcripts and the reduction of the costs related to exemplification and copies. As such, the Court undertakes a de novo review of such costs. The Court need not review, however, the awards related to deposition costs.

### II. Taxation Of Costs

The Court has discretion to tax costs within the confines of 28 U.S.C. § 1920, Federal Rule of Civil Procedure 54(d) and Local Civil Rule 54.1. See Whitfield, 241 F.3d at 269; Perry v. Metro. Suburban Bus Auth., 236 F.R.D. 110, 112 (E.D.N.Y. 2006)

("Taxation of costs is left to the discretion of the Court, and may be overturned on appeal only in the event of an abuse of discretion.") (internal quotation marks and citations omitted). Rule 54(d)(1) of the Federal Rules of Civil Procedure awards costs, other than attorneys' fees, to the prevailing party "as of course," and, therefore, "the losing party has the burden to show that costs should not be imposed." Whitfield, 241 F.3d at 270. In fact, "the district court may not deny costs to the prevailing party without explanation of adequate reasons." DLC Mgmt. Corp. v. Town of Hyde Park, 45 F. Supp. 2d 314, 315 (S.D.N.Y. 1999); see also Karmel, 2008 U.S. Dist. LEXIS 3804, at \*5-6 ("though a district court may deny a prevailing party costs, . . . its reasons for doing so must be articulated") (citations omitted). The Court remains mindful that in denying costs to the prevailing party, "the prevailing party is punished, and that should not occur unless there is reason to do so." Murphy v. Bd. of Educ. of the Rochester City Sch. Dist., 308 F. Supp. 2d 148, 150 (W.D.N.Y. 2004).

The costs referred to in Rule 54(d) include only those taxable costs delineated in 28 U.S.C. § 1920. Section 1920 provides, in pertinent part, that a judge or clerk of the court 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" and "[f]ees for exemplification and copies of papers

necessarily obtained for use in the case." 28 U.S.C. § 1920. Defendants seek an award of costs for daily trial transcripts, exemplification and copies of papers and costs incident to taking of depositions. As a preliminary matter, the Court notes that the mandate issued by the Second Circuit makes clear that Defendants are prevailing parties, and Plaintiff does not now argue that they are not prevailing parties.

A. Fees For Daily Trial Transcripts

Defendants seek a combined award of \$50,668.32, to be shared equally, related to fees of the court reporter for daily trial transcripts necessarily obtained for use in the case. Local Civil Rule 54.1(c) provides in pertinent part the following:

(1) **Transcripts.** The cost of any part of the original trial transcript that was necessarily obtained for use in this court or on appeal is taxable. The cost of a transcript of court proceedings prior to or subsequent to trial is taxable when authorized in advance or ordered by the court.

Local Civil Rule 54.1(c)(1). The rules clearly authorize the award of costs where the trial transcript was "necessarily obtained for use in this court." Id.

Defendants contend that daily trial transcripts were necessary to litigate this case because of the length and "haphazard way in which Plaintiff's counsel tried the case." (Town's Letter Mot. 3.) Specifically, Defendants assert that the

transcripts were used, as early as the second day of trial, to clarify what had previously been admitted as evidence, to probe Plaintiff's credibility on cross-examination, to manage the litigation in light of the confusing and sometimes misleading manner in which Plaintiff's direct case was presented, to make Rule 50 motions, and to draft the jury charge. Based on the foregoing, Defendants argue the daily transcripts were not just necessary, but essential to trying the case. Nevertheless, the Clerk disallowed the cost of the daily trial transcripts. Plaintiff argues that the Clerk's decision should not be disturbed because (1) Defendants did not seek prior Court approval to purchase daily transcripts, (2) Plaintiff did not have the benefit of their use during the trial, (3) the issues presented were neither complex nor confusing and Defendants already had the benefit of deposition transcripts, and (4) in light of Plaintiff's limited financial means, such an award would be unreasonable.

The Court begins by noting that "daily transcripts of trial testimony are not customary." Bucalo, 238 F.R.D. at 129 (internal quotation marks and citations omitted); Karmel, 2008 U.S. Dist. LEXIS 3804, at \*9. "The relevant inquiry is whether the transcripts of plaintiff's trial testimony were necessary for defendant's use in the case." Bucalo, 238 F.R.D. at 129 (internal quotation marks and citations omitted). In determining whether the

transcripts were necessary, courts consider the length and complexity of the case, whether more than one attorney for the requesting party was present at the trial, whether the transcript was a mere convenience and other extraordinary circumstances. See id. (considering the length of trial, complexity of issues, number of attorneys present during trial and financial hardship the award would have on plaintiff in denying fees related to daily trial transcripts); Malloy v. City of New York, No. 98-Cv-5823, 2000 U.S. Dist. LEXIS 8673, at \*2-3 (E.D.N.Y. June 23, 2000) (considering length and complexity of case and number of attorneys present during trial in denying fees related to daily trial transcripts); Karmel, 2008 U.S. Dist. LEXIS 3804, at \*9-10 (same). “[T]rial transcripts are rarely necessary for trials that are not particularly long or complex.” Bucalo, 238 F.R.D. at 129 (internal quotation marks and citations omitted). Moreover, the Court’s use of the transcript is not dispositive. Malloy, 2000 U.S. Dist. LEXIS 8673, at \*3 (denying costs of daily transcripts even where court relied upon it); Morales v. Smith, Nos. 94-CV-4865, 94-CV-8773, 1998 U.S. Dist. LEXIS 9546, at \*3-4 (S.D.N.Y. June 26, 1998) (rejecting costs for expedited trial transcripts even where court used it in deciding Rule 50 motion).

Here, the trial was relatively long, spanning four weeks, and while Plaintiff’s employment discrimination claims did not

involve complex issues of law, the presentation of Plaintiff's direct case rendered this case quite confusing and muddled. The Court does note that each Defendant had two attorneys present during the trial. As a result, three to four attorneys could have been taking notes during the entire trial. See Bucalo, 238 F.R.D. at 129 (denying cost of transcripts where there were eight days of testimony, employment discrimination claims were not complex and counsel could have taken notes throughout trial); Malloy, 2000 U.S. Dist. LEXIS 8673, at \*2-3 (denying where there were two and one-half trial days and three defense attorneys); Karmel, 2008 U.S. Dist. LEXIS 3804, at \*9-10 (denying where at least two attorneys were present at the trial at all times); but see Cohen v. Stephen Wise Free Synagogue, No. 95-CV-1659, 1999 U.S. Dist. LEXIS 13215, at \*5 (S.D.N.Y. Aug. 26, 1999) (finding plaintiff's trial transcripts necessary in a nearly three-week trial where plaintiff's three days of testimony were crucial to the case); Maxwell v. City of New York, No. 93-CV-5834, 1998 U.S. Dist. LEXIS 13933, at \*4 (S.D.N.Y. Sept. 3, 1998) (awarding fees associated with trial transcripts of plaintiff and main defense witness where there were crucial credibility issues).

Nevertheless, the Court finds that extraordinary circumstances during the trial warranted the purchase of daily trial transcripts. Not only was Plaintiff's credibility a crucial

issue, the manner in which Plaintiff's counsel proceeded rendered a daily transcript essential to managing the litigation process. (See Tr. 578, 619, 665, 667, 675, 682, 1806-1808.) The Court notes that it frequently relied on, or placed the burden on counsel for Defendants to point to, the transcript to resolve confusion created by Plaintiff's counsel with respect to evidence, Plaintiff's claims and legal theories and prior testimony. (See Tr. 726, 856, 865-868, 971-972, 1409-11, 1428-29, 1822, 2872, 2878-79, 2884.) Although not dispositive, both the Court and counsel relied on the transcripts in connection with the Town's Rule 50 motion. (Tr. 2683, 2700.) Additionally, the transcripts were absolutely necessary in clarifying Plaintiff's claims so that the jury charge and verdict sheet could be drafted. (Tr. 2865.)

Plaintiff's conclusory assertion that taxation of the cost of trial transcripts should be denied in light of Plaintiff's financial means, is insufficient for this Court to deny costs. The Second Circuit has advised that the losing party's burden to show that costs should not be imposed can be met by a showing of the prevailing party's misconduct, public importance, or the losing party's financial circumstances. See Whitfield, 241 F.3d at 270. If relying on the losing party's financial circumstances, the non-prevailing party must make a strong showing of financial hardship. See id. at 272-73 ("indigency per se does not preclude an award of

costs against an unsuccessful litigant"); Nazaire v. Kinsbrook Jewish Med. Ctr., No. 04-CV-1415, 2006 U.S. Dist. LEXIS 74004, at \*2 (E.D.N.Y. Oct. 11, 2006) (granting costs where plaintiff "failed to offer any proof of financial hardship, much less indigency"); Hickey v. City of New York, 241 F.R.D. 150, 153 (S.D.N.Y. 2006) (refusing to deny costs where plaintiffs simply asserted that they could not afford the costs); Murphy, 308 F. Supp. 2d at 151 ("If the court in its discretion considers the non-prevailing party's financial status, it should decline to impose costs only where there is clear proof of the non-prevailing party's dire financial circumstances.") (internal quotation marks omitted). While the Court notes the hefty cost of the daily trial transcripts, and the strain such an award would impose on an individual of modest means, see Bucalo, 238 F.R.D. at 129-30, Plaintiff has not met his burden in demonstrating financial hardship, and Defendants have demonstrated that the transcripts were necessary.

Based on the foregoing reasons, the Court finds that daily trial transcripts were necessarily obtained for use in the case. Accordingly, with respect to fees of the court reporter, the Court taxes \$25,334.16 in favor of the Town and against Plaintiff and \$25,334.16 in favor of Scarpati-Reilly and against Plaintiff.

B. Fees For Exemplification And Copies Of Papers

The Town sought \$1,628.25 in costs for photocopies of

6,513 pages at \$0.25 per page. The Clerk reduced the award for exemplification and copies to \$119.40. Specifically, the Clerk disallowed the copies of the deposition transcripts used at trial, a total of 5,319 pages, and reduced the rate per page to \$0.10. Accordingly, the Clerk's award of costs for copies in favor of the Town consists of 1,194 pages at \$0.10 per page. Scarpati-Reilly sought \$1,012.95 in costs for photocopies of 6,753 pages at \$0.15 per page. The Clerk reduced the award for copies to \$674.62, allowing \$0.10 per page rather than \$0.15 per page.<sup>1</sup>

Local Civil Rule 54.1(c) provides in pertinent part the following:

(5) **Exemplifications and Copies of Papers.** A copy of an exhibit is taxable if the original was not available and the copy was used or received in evidence. The cost of copies used for the convenience of counsel or the court are not taxable. The fees for a search and certification or proof of the non-existence of a document translated is used or received in evidence.

Local Civil Rule 54.1(c)(5). Defendants submit that the 5,319 pages of deposition transcripts should be allowed because Section IV.B.v. of this Court's Individual Rules provides that counsel should include two copies of any deposition testimony to be

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<sup>1</sup> Because Scarpati-Reilly merely submitted a letter of appeal joining in the Town's arguments, it is not readily apparent to the Court why the Clerk awarded \$674.62 for copies rather than \$675.30 (6,753 pages at \$0.10 per page).

utilized at trial, and Defendants used the submitted deposition transcripts to cross examine Plaintiff. The Court disagrees.

The cost of the depositions, which includes one original and one copy, are covered by Local Civil Rule 54.1(c). Local Civil Rule 54.1(c) provides in pertinent part the following:

(2) **Depositions.** 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. Costs for depositions taken solely for discovery are not taxable.

Local Civil Rule 54.1(c)(2); see also Whitfield, 241 F.3d at 270-71. Accordingly, costs related to depositions that were used during the trial were already recovered under the category "costs incident to taking of depositions." See Karmel, 2008 U.S. Dist. LEXIS 3804, at \*12-13 (vacating an award of costs for a second copy of a deposition transcript and noting that Local Civil Rule 54.1 only permits taxation for the original plus one copy); Sevenson Env'tl. Servs. v. Shaw Env'tl., Inc., 246 F.R.D. 154, 156 (W.D.N.Y. 2007). That the Town may have had to make one additional copy to comply with the Court's Individual Rules and still retain a copy of the relevant depositions for itself, does not warrant an award of costs for three photocopies. See Local Civil Rule 54.1(c)(5)

("[t]he cost of copies used for the convenience of counsel or the court are not taxable").

Additionally, the Town argues that law firms generally charge their clients \$0.25 per page for photocopies and, therefore, that is the amount to be used. While this argument is undermined by the fact that attorneys for Scarpati-Reilly charged \$0.15 per page for photocopies, courts have upheld \$0.25 per page for copies as reasonable. See, e.g., Ogilvy Group Swed., AB v. Tiger Telematics, Inc., No. 05-CV-8488, 2006 U.S. Dist. LEXIS 54581, at \*21 (S.D.N.Y. July 20, 2006) (finding per page cost of \$0.25 reasonable); LaBounty v. Rivera, No. 95-CV-2617, 2000 U.S. Dist. LEXIS 1881, at \*3 (S.D.N.Y. Feb. 22, 2000) (holding copying charges of \$0.75 per page unreasonable but \$0.25 per page reasonable). Accordingly, the Court grants the Town costs for exemplification of 1,194 pages at \$0.25 per page, totaling \$298.50.

With respect to Scarpati-Reilly's request for reimbursement of copy costs, the Court is hindered in its determination by Scarpati-Reilly's failure to submit an explanation or itemization of such costs at the time of her initial motion for costs or at the time she appealed the Clerk's award. "Exemplification costs may be shifted pursuant to Section 1920, but the party seeking them must 'itemize those costs or explain why all those copies were necessary.'" See New Leadership Comm. v.

Davidson, No. 97-CV-2271, 1997 U.S. Dist. LEXIS 22987, at \*23-24 (E.D.N.Y. Dec. 5. 1997) (quoting United States v. Merritt Meridian Constr., 95 F.3d 153, 173 (2d Cir. 1996)); see also Baker v. Power Sec., 174 F.R.D. 292, 294 (W.D.N.Y. 1997) (reducing the amount sought for photocopies where it was not clear whether the sum requested included multiple copies of the same documents for the convenience of counsel). Based on Scarpati-Reilly's lack of supporting documentation, the Court assumes that, similar to the Town's request, a large portion of the 6,753 copied pages were deposition transcripts. The Court bases this assumption on the fact that the total amount of copied pages, 6,753, was quite close to the total number of copied pages submitted by the Town - 6,513 - and their requests for costs were similar in nature. Accordingly, the Court grants Scarpati-Reilly costs for exemplification totaling \$215.10; that is 1,434 pages (6,753 pages less 5,319 pages for deposition transcripts) at \$0.15 per page.

In sum, with respect to costs related to exemplification and copies of papers, the Court taxes \$298.50 in favor of the Town and against Plaintiff and \$215.10 in favor of Scarpati-Reilly and against Plaintiff.

CONCLUSION

For the reasons set forth above, costs are taxed in favor of the Town and against Plaintiff in an amount totaling \$32,125.86 (comprised of \$25,334.16 for costs of daily trial transcripts, \$298.50 for costs of exemplification and copies and \$6,493.20 for deposition costs) and in favor of Scarpati-Reilly and against Plaintiff in an amount totaling \$26,330.26 (comprised of \$25,334.16 for costs of daily trial transcripts, \$215.10 for costs of exemplification and copies and \$781.00 for deposition costs). The Clerk of the Court is directed to enter judgment in said amounts.

SO ORDERED.

/s/ JOANNA SEYBERT  
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York  
March 31, 2008