UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-cv-80655-ROSENBERG

JAMES TRACY,

Plaintiff,

v.

FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES a/k/a FLORIDA ATLANTIC UNIVERSITY,

Defendant.
_____ /

DEFENDANTS' MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING IN PART AND DENYING IN PART THE DEFENDANTS' MOTION FOR COSTS [DE 505]

Defendants, Dr. John Kelly, Dr. Diane Alperin, and Dr. Heather Coltman (collectively referred to as the "individual FAU Defendants"), and Florida Atlantic University Board of Trustees a/k/a Florida Atlantic University (the "University"), pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, hereby move this Court for reconsideration of its Order Granting in Part and Denying in Part the Defendants' Motion for Costs [DE 505] (the "Order") and states in support thereof:

Introduction

Defendants ask the Court to reconsider the reduction of Defendants' costs award to correct clear error and prevent manifest injustice, and also because, based on the Court's Order, it appears the Court misapprehended at least some of Defendants' arguments in their reply. In entering the Order, the Court concluded that Defendants' request for costs in the amount of $43,958.27 was properly supported with documentation and invoices, as well as legal argument substantiating Defendants' entitlement to the requested costs. *See* [DE 505] at p. 2. The Court also agreed that

the reason Defendants' costs were substantial was because of how Plaintiff conducted his discovery and the manner in which he litigated his case. *Id*. Yet the Court also determined that, based on Plaintiff's submission of a single W-2, his wife's bankruptcy, and unsworn arguments, Plaintiff was unable to pay the costs award and reduced Defendants' cost judgment by 90%. *Id.* at p. 3.

Plaintiff should have been required, at a minimum, to submit an affidavit or sworn declaration that identified his personal income, assets, and liabilities, prior to any reduction in the cost judgment. Plaintiff did not provide any sworn statement, or any information about his personal finances, as has been required by other courts. Any costs judgment entered against Plaintiff would be entered against him individually. Plaintiff's wife's bankruptcy does not impact his personal ability to pay, where Plaintiff was not a party to the bankruptcy. A review of Plaintiff's *wife's* assets does not give any insight into *Plaintiff's* assets. Plaintiff has not provided the Court with any information about his personal financial status. Indeed, as Defendants pointed out in their reply, the question is not what *employment* Plaintiff has held, but rather what is his *income*, other assets, and liabilities. Further, Plaintiff did not provide any evidence to support that he is unable to work either now or in the future, demonstrating a true inability to pay. Finally, his unsworn argument that a full cost award would bankrupt him should not have been given any weight. To the extent Plaintiff would be required to enter bankruptcy because of a cost judgment, a bankruptcy court would be well equipped to evaluate Plaintiff's income, assets, and liabilities, and apportion payments among Plaintiff's various creditors.

For the reasons discussed herein, Defendants respectfully request the Court reconsider its Order.

Legal Standard

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002) (quoting *Z.K. Marine, Inc. v. V/V Archigetis*, 808 F. Supp. 2d 1561, 1563 (S.D. Fla. 1992)). There are typically three major grounds to justify reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *McWilliams v. Novartis AG*, 2018 WL 3637083, *1 (S.D. Fla. July 31, 2018) (quoting *Z.K. Marine, Inc.*, 808 F. Supp. 2d at 1563)); *see also Burger King*, 181 F. Supp. 2d at 1369. "The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Z.K. Marine, Inc.*, 808 F. Supp. at 1563 (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)).

Plaintiff Should Have Submitted a Sworn Declaration and a Schedule of Income, Assets and Liabilities

Under Rule 54 of the Federal Rules of Civil Procedure, the presumption is that the prevailing party is entitled to recovery of its costs expended during the litigation. *Chapman v. AI Transport*, 229 F.3d 1012, 1038 (11th Cir. 2000). While the district court may consider a non-prevailing party's financial status as a factor when determining the award of costs, the non-prevailing party's "good faith and limited financial resources are not enough" to overcome the presumption that the prevailing party's costs should be paid. *Pickett v. Iowa Beef Processors*, 149 Fed. App'x 831, 832 (11th Cir. 2005). Instead, the non-prevailing party must provide "substantial documentation of a true inability to pay." *Chapman*, 229 F.3d at 1039 (citing *McGill v. Faulkner*, 18 F.3d 456, 459 (7th Cir. 1994); *Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 447 (4th Cir.

1999)). This substantial documentation must constitute "clear proof of the non-prevailing party's dire financial circumstances." *Chapman*, 229 F.3d at 1039.

In evaluating what constitutes "substantial documentation" of a true inability to pay, the Seventh Circuit has explained "[t]his documentation should include evidence in the form of an affidavit or other documentary evidence of both income and assets, as well as a schedule of expenses." *Rivera v. City of Chicago*, 469 F.3d 631, 635 (7th Cir. 2006). The purpose of requiring such detailed documentation is to "ensure that district courts have clear proof of the non-prevailing party's dire financial circumstances. Moreover, it will limit any incentive for litigants of modest means to portray themselves as indigent." *Id*. Indeed, other courts within the Southern District have required sworn declarations and detailed information regarding the non-prevailing party's income, assets, and liabilities, before deciding whether to reduce a costs award for a purported inability to pay. *See e.g. Ang v. Coastal Int'l Security, Inc.*, 417 Fed. App'x 836, 839 (11th Cir. 2011) ("in considering Ang's indigence, the court properly found that his affidavit and his IFP status did not constitute substantial evidence of his inability to pay"); *AMG Trade & Distribution, LLC v. Nissan North Am., Inc.*, 2021 WL 1146607, *7 (S.D. Fla. Feb. 26, 2021) (rejecting a costs reduction after reviewing declarations filed by the non-prevailing parties which did not provide a clear picture of the non-prevailing parties' finances); *Gonzalez v. Batmasian*, 2017 WL 11532266, *2 (S.D. Fla. Aug. 16, 2017) ("Defendants correctly point out that an affidavit containing nothing more than verbal representations of indigence is insufficient to satisfy the non-prevailing party's evidentiary burden."); *Pronman v. Styles*, 2015 WL 6913391 (S.D. Fla. Nov. 10, 2015) (rejecting a costs reduction after evaluating affidavits and tax returns filed by non-prevailing parties); *Liese v. Indian River Memorial Hosp., Inc.*, 2011 WL 13112249, *2 (S.D. Fla. May 24, 2011) (rejecting declarations by the non-prevailing parties that did not affirmatively identify all sources of income

or the existence of assets such as bank accounts, investment funds, or property); *Jessup v. Miami-Dade Cnty.*, 2011 WL 294417 (S.D. Fla. Jan. 27, 2011) (approving a cost reduction only after non-prevailing party submitted a supplemental affidavit that identified her income, established she had no bank accounts, vehicles, real estate, insurance, or other meaningful assets, and affirmed that due to her mental illness she was unable to hold a job in the future); *Hernandez v. Mascara*, 2010 WL 11591779 (Sept. 7, 2010) (reconsidering prior denial of a request for fee reduction after the non-prevailing party explained in greater detail her financial and medical situation "and attest[ed] to its veracity").

In asking the Court to reduce the costs award on the basis that he was unable to pay, Plaintiff provided the Court with a single W-2, and his counsel represented that "Plaintiff's *employment* status remains largely unchanged since 2016, aside from Plaintiff earning only approximately $4,677.54 working as a Census enumerator in 2020—his first *employment* since 2015." *See* Plaintiff's Amended Response in Opposition to FAU Defendants' Motion for Costs [DE 503] at p. 3 (emphasis added). In its Order, the Court noted that Defendants argued that the best evidence for establishing an inability to pay is evidence from the year 2021, not from prior years. [DE 505] at p. 3. Defendants respectfully suggest the Court may have misapprehended their argument. While Defendants agree that the issue before the Court is whether Plaintiff is unable to pay the costs judgment now or in the future (rather than in the past), in their reply, Defendants were truly challenging whether Plaintiff has truthfully and adequately disclosed all sources of *income*.

Plaintiff did not submit a declaration regarding his financial status, nor did Plaintiff (or his counsel) represent to this Court that his income from working as a Census enumerator was the *only* income Plaintiff has received since 2016. *See Liese*, 2011 WL 13112249, *2 ("Notably, Mrs. Liese

does not affirmatively state that these are their *only* sources of income."). This is significant for multiple reasons. First, during discovery in this case, Plaintiff disingenuously and repeatedly questioned counsel for Defendants as to the meaning of the word "income" during his deposition. *See* Excerpts from Plaintiff's May 2, 2017 Deposition, pp. 71:11-80:19; 126:2-15, attached as Exhibit "A." After initially claiming that he could not recall receiving any "income" other than his salary from FAU, Plaintiff ultimately admitted that he received donations to his legal defense fund, had solicited and received donations through his Memory Hole Blog, and received a distribution of an honorarium for his contribution to the book "Nobody Died at Sandy Hook." *Id*. Second, as Defendants noted in their reply, Plaintiff's website asking for public donations to fund his lawsuit against FAU is still active, as is his Memory Hole Blog. *See* Defendants' Amended Reply in Support of Motion for Costs [DE 504] at p. 2. Defendants have also recently learned that Plaintiff incorporated "JFTracy Holdings 18, LLC" in May 2018, for which he is the sole manager. *See* Exhibit "B." By failing to submit a declaration or any affirmative representation that he has no other sources of *income* (which may come from sources other than official W-2 *employment*), Plaintiff has deprived the Court of the full picture of his financial status.

Moreover, Plaintiff did not provide *any* documentation of his assets or liabilities to support that he is unable to pay a costs judgment. Notably, Plaintiff was not a party to his spouse's bankruptcy proceeding. Ms. Hayashi's filings reflect only the assets she holds personally or jointly with Plaintiff. They do not reflect any assets that Plaintiff may hold individually or through JFTracy Holdings 18, LLC. Discovery exchanged during this litigation disclosed that Plaintiff held at least one investment account individually. There were also documents obtained in discovery that supported that Plaintiff purchased and sold precious metals (e.g. silver) and other items that appear to be forms of bitcoin. Plaintiff's individual assets would not have been reflected on his

spouse's bankruptcy documents and should have been disclosed to this Court to support his contention that he is purportedly unable to pay, prior to the Court entering any reduction in the costs judgment. *See Rivera*, 469 F.3d at 635. This is particularly true here, where Plaintiff has managed to find the funds necessary to support the costs associated with this protracted litigation, along with his appeal to the Eleventh Circuit Court of Appeals. Notably, Plaintiff's counsel has also recently confirmed that he intends to pursue a further appeal to the United States Supreme Court. That Plaintiff can continue to find the funds to pay the costs associated with his repeated appeals undermines his argument that he has no money to pay a judgment for the costs awarded to the prevailing Defendants. *See Pronman*, 2015 WL 6913391 (rejecting a costs reduction and stating, "Plaintiffs successfully found the funds necessary to pay for filings, witness fees, copies, and the filing fee for their appeal" (citing *Smith v. Warden, Hardee Correctional Institution*, 597 Fed. App's 1027, 1032 (11th Cir. 2015)).

To reduce Plaintiff's liability by 90% without requiring Plaintiff to submit, at the very least, a declaration identifying his individual income, assets, and liabilities, is clear error and would result in a manifest injustice.

Plaintiff has not Established he is Unable to Work

To determine whether Plaintiff is entitled to a reduction in costs judgment based on financial hardship the Court must consider whether Plaintiff, based on his income, assets, and liabilities, can pay the judgment now, or will be able to do so in the future. *See Arce v. Chicago Transit Authority*, 738 Fed. App'x 355, 360 (7th Cir. 2018) (upholding court's refusal to reduce cost award on the basis of financial inability to pay when the non-prevailing party made no claim that he could not return to work and had not demonstrated that he has a future inability to pay); *Rivera*, 469 F.3d 631, 635 ("the district court must make a threshold factual finding that the losing

party is 'incapable of paying the court-imposed costs at this time or in the future.'"); *McGill v. Faulkner*, 18 F.3d 456, 459 (7th Cir. 1994) ("[non-prevailing party] failed to establish in this record that he was incapable of paying the court-imposed costs at this time or in the future"). In its Order, the Court stated that it was persuaded by Plaintiff's position that he may never work in academia again, and that he would not accept a low-paying job because, if he were to do so, he would have to pay someone to take care of his children. [DE 505] at p. 3. Notably, Plaintiff did not make these arguments in his response in opposition to Defendant's costs motion. Plaintiff did argue that he attempted to find another job in academia after his termination and submitted a sworn declaration asserting he had been unable to do so back in 2017, but he did not put forth any argument or evidence in his response to suggest that he would not accept a low paying job due to child care obligations. Further, even had Plaintiff made such argument, Plaintiff has not established that he could not otherwise obtain a job working remotely from home, or a job working in the evenings or weekends when his wife is home to care for the children.

There are laws that address how and when Defendants could collect on its judgment, as well as what type of assets Defendants can access to satisfy that judgment. Defendants would have many years to collect on a judgment against Plaintiff. Even if Plaintiff does not have any individual income right now (which Plaintiff has not actually averred nor provided documents to support), Plaintiff has not alleged that he is disabled or physically unable to work. *See id.*; *Cf. Jessup*, 2011 WL 294417 (approving cost reduction after non-prevailing party provided documents supporting that due to her mental illness she is unable to hold a job now or in the future); *Hernandez*, 2010 WL 11591779 (granting a reduction in costs upon second motion for non-prevailing party who was permanently disabled and unable to work). To allow Plaintiff to circumvent the vast majority of the costs Defendants are entitled to receive on the grounds stated would be a manifest injustice,

as there is no evidence that Plaintiff is unable to work now, or in the future. To the extent that Plaintiff has the capacity to earn income or obtain assets in the future, FAU should be entitled to receive payment for its costs.

Plaintiff's Threat of Declaring Bankruptcy Should Not Reduce his Liability

In his arguments in opposition to the costs award, Plaintiff contended that, if the costs judgment were to be entered against him, "it is likely that Plaintiff, like his spouse, will also be forced into bankruptcy." [DE 503] at p. 3. This unadorned, conclusory allegation is insufficient to overcome the presumption that Defendants are entitled to their costs. The bankruptcy system was designed specifically to sort through assets and liabilities, and determine the priority, amounts, and timing of payments based on the filer's ability to pay. Indeed, if Plaintiff truly could not pay a costs judgment, he would not be concerned about the amount.

"If an indigent person hits someone with a car and causes a $1,000 loss, the court will award $1,000 without regard to the driver's income. If an indigent person hits someone with a lawsuit and causes a $1,000 loss (in costs of defense), the same consequence should ensue: an award of $1,000. For either award, whether collection occurs is a question for bankruptcy (including the state law of exemptions)." *Rivera*, 469 F.3d at 637 (Easterbrook, Circuit Judge, concurring). Even if a costs award did require Plaintiff to enter bankruptcy, the Bankruptcy Code has provisions that would govern what claims are paid first, how much the debtor must pay in the aggregate, and in what time frame. *Id*. "When a debtor cannot pay all creditors in full, but can pay something, there is no reason why prevailing litigants who are out of pocket should receive nothing while other creditors retain valid claims. And when a debtor is so destitute that he cannot pay anything, there is no harm in the award of costs. It is only when a person *can* pay (but tries to persuade a court otherwise) that the award matters." *Id*.

The fact remains that Plaintiff has not submitted any documentation to support that he would be required to declare bankruptcy if the Court entered a judgment for the full amount of Defendants' costs.

Conclusion

In reducing Defendants' cost judgment by 90% without requiring Plaintiff to submit a declaration or other schedule of his income, assets, and liabilities, the Court committed clear error which will result in manifest injustice to Defendants. Plaintiff has not provided any documentation of his assets or liabilities, nor has he affirmatively stated that his 2020 W-2 reflects the only income he has received since his termination for insubordination in January 2016. To the contrary, Plaintiff has managed to find the money to fund his repeated appeals.

Plaintiff simply has not provided the Court with a full picture of his financial status, nor has he argued or supported an inability to work. Plaintiff's unsupported contention that he may be required to declare bankruptcy at some point in the future if a full costs judgment is entered is not sufficient under the law to reduce Defendants costs. Defendants respectfully request this Court reconsider its 90% reduction of Defendants' costs award, as Plaintiff has failed to meet his burden to show he is unable to pay as a matter of law.

WHEREFORE, Defendants, John Kelly, Diane Alperin, Heather Coltman and Florida Atlantic University, respectfully request the Court reconsider its Order Granting in Part and Denying in Part the Defendants' Motion for Costs, entering an order taxing costs in the amount of $43,958.27, and granting such further relief as the Court deems necessary and just under the circumstances.

Dated July 26, 2021

/s/ Holly Griffin Goodman

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CERTIFICATE OF GOOD FAITH CONFERENCE

In compliance with Rule 7.1 of the Local Rules of the United States District Court Southern District of Florida, counsel for Defendants conferred with Plaintiff's counsel in a good faith effort to resolve the issues raised in the motion. Plaintiff opposes the relief sought herein.

/s/ Holly Griffin Goodman
Holly Griffin Goodman