

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

-----X
JEFFREY BARTELS,

Plaintiff,

- against -

ORDER

CV 08-1256 (AKT)

THE INCORPORATED VILLAGE OF LLOYD
HARBOR, LELAND M. HAIRR, GEORGE M.
MCCABE, JEAN THATCHER, CHARLES FLYNN,
VINCENT O'SHAUGHNESSY, RENALD DIFONZO,
CHRISTOPHER GRIMM, JOHN RITTER, JR.,

Defendants.

-----X

A. KATHLEEN TOMLINSON, Magistrate Judge:

I. PRELIMINARY STATEMENT

The Defendants, who obtained a jury verdict in their favor in this § 1983 action, subsequently filed with the district clerk a request to tax costs against the Plaintiff in the amount of \$18,671.83, pursuant to Fed. R. Civ. P. 54. On May 4, 2011, the Clerk of the Court determined that \$3,869.35 of the total amount of \$18,671.83 sought by Defendants was taxable as costs against the Plaintiff.¹ Defendants now appeal to this Court, pursuant to Fed. R. Civ. P. § 54(d)(1) and Local Civ. R. § 54.1 (c)(1) to have the remaining \$14,802.48 taxed against the Plaintiff. This figure represents the expenses incurred by Defendants in ordering five days of

¹ The \$3,869.35 figure reflects \$3,709.35 in costs associated with deposition transcripts and \$160 in subpoena fees.

trial transcripts.² Also pending before the Court is Plaintiff's cross-motion for an award of attorneys' fees in the amount of \$2,800.00, pursuant to the Court's inherent powers and under 28 U.S.C. § 1927, for Plaintiff's counsel having had to oppose an interlocutory appeal taken by Defendants on October 22, 2010.

For the reasons set forth below, Defendants' motion for costs is GRANTED, in part, to the extent provided in this Order, and Plaintiff's motion for attorneys' fees is DENIED.

II. PARTIES' CONTENTIONS

Defendants appeal to this Court from the Clerk of the Court's decision not to tax an additional \$14,802.48 in costs against the Plaintiff for the trial transcripts ordered by Defendants. First, Defendants contend that the aforementioned transcripts were obtained by order of the Court and/or out of necessity and that Defendants should therefore be entitled to reimbursement of these costs under Fed. R. Civ. P. § 54(d)(1) and Local R. § 54.1(c)(1). Specifically addressing necessity, Defendants argue that the transcripts were ordered to review the confusing testimony of the Plaintiff in preparation of their defense and for cross-examination as well as for inclusion in their summation. Moreover, the Defendants contend that it is the general rule that the prevailing party enjoys a presumption that its costs will be awarded and that the losing party bears the burden of showing that costs should not be imposed.

Plaintiff, on the other hand, emphasizes the provision of Local R. § 54.1(c)(1) which states that only trial transcripts necessarily obtained are taxable. Plaintiff contends that Defendants did not actually use the trial transcripts for any purpose, and that their claim for the

² Based on the invoices submitted to the Court, Defendants incurred \$11,464.20 in obtaining trial transcripts for the days covering March 7 through March 10, 2011 and \$3,338.28 for the March 14, 2011 transcript.

costs of the transcripts should be precluded. Contemporaneous with opposing Defendants' motion for costs, Plaintiff cross-moves for an award of attorneys' fees under the Court's equitable powers and under 28 U.S.C. § 1927 for having had to oppose what he claims was a "frivolous appeal" taken in bad faith by the Defendants. Plaintiff contends that the interlocutory appeal filed by Defendants after the Court denied summary judgment was made only to delay the start of trial. Plaintiff, therefore, argues that this Court is entitled to award attorneys' fees "for multiplying the proceedings unreasonably and vexatiously."

Defendants respond that Plaintiff is not entitled to his requested attorneys' fees since: (1) Plaintiff makes his application for costs nearly three months after his allotted time to do so expired under Federal Rule of Appellate Procedure § 39(d); and (2) defense counsel had a legitimate basis on which to bring the appeal, and, as such, there was no sanctionable bad faith.

III. DISCUSSION

A. Defendants' Motion for Costs

"A district court reviews the clerk's taxation of costs by exercising its own discretion to 'decide the cost question [it]self.'" *Whitfield v. Scully*, 241 F.3d 264, 269 (2d Cir. 2001) (quoting *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 233, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964)). Rule 54(d)(1) of the Federal Rules of Civil Procedure, which governs the taxation of costs against an unsuccessful litigant, states that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party." The Supreme Court, in construing this provision, held that "costs" include only those specific items enumerated in 28 U.S.C. § 1920. *Whitfield*, 241 F.3d at 269. Under this statute, costs that may be taxed by a judge or clerk include "[f]ees for printed or electronically recorded

transcripts necessarily obtained for use in the case.” 28 U.S.C. § 1920(2). Similarly, under Local Civ. R. § 54.1(c)(1), “[t]he cost of any part of the original trial transcript that was *necessarily obtained* for use in this Court or on appeal is taxable.” (emphasis added). The prevailing party must first demonstrate that its costs “fall within an allowable category of taxable costs.”

Patterson v. McCarron, No. 99 Civ. 11078, 2005 WL 735954, at *1 (S.D.N.Y. Mar. 30, 2005).

After such a showing is made, the prevailing party enjoys a presumption that the costs sought will be awarded. *Id.*; see also *Whitfield*, 241 F.3d at 270 (concluding that since Rule 54(d) allows costs “as of course,” awarding costs is the rule, not the exception in civil litigations, and as such, “the losing party has the burden to show that costs should not be imposed”). However, costs may still be denied “because of misconduct by the prevailing party, the public importance of the case, the difficulty of the issues, or the losing party’s limited financial resources.”

Whitfield, 241 F.3d at 270.

The central issue to be decided here is whether the trial transcripts ordered by Defendants were “necessarily obtained.” As a starting point, courts are quick to point out that “daily transcripts of trial testimony are not customary.” *John and Kathryn G. v. Bd. of Educ.*, 891 F. Supp. 122, 123 (S.D.N.Y. 1999). However, after reviewing the applicable case law in this Circuit, the Court notes that the determination of “necessarily obtained” transcripts is a case-by-case, fact-sensitive inquiry. See, e.g., *Karmel v. City of New York*, No. 00-CV-9063, 2008 WL 216929, at *3 (E.D.N.Y. Jan. 9, 2008) (denying request for taxing trial transcripts as costs); *Bucalo v. East Hampton Union Free School Dist.*, 238 F.R.D. 126, 129 (E.D.N.Y. 2006) (same); *Perks v. Town of Huntington*, No. 99-CV-4811, 2008 WL 8091034, at *3 (E.D.N.Y. Mar. 31, 2008) *aff’d* 331 Fed. Appx. 769 (2d Cir. 2009) (allowing trial transcripts to be taxed against

unsuccessful plaintiff); *Cohen v. Stephen Wise Free Synagogue*, No. 95 Civ. 1659, 1999 WL 672903, at *2 (S.D.N.Y. Aug. 27, 1999) (same). Nevertheless, certain key factors regarding this issue of “necessity” have been identified by various courts. For instance, “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.” *Perks*, 2008 WL 8091034, at *3; *see also Bucalo*, 238 F.R.D. at 129 (“[T]rial transcripts are rarely necessary for trials that are not particularly long or complex.”) (internal quotations and citations omitted).

In the Court’s view, the particular circumstances involved in this case lend themselves to a finding that the ordered transcripts were necessarily obtained for use in this case. As an initial matter, the trial in this case lasted three weeks. The transcripts at issue covered the first five days of trial: March 7 through March 10, 2011 and March 14, 2011. During this time, the primary parties to this action – Plaintiff Jeffrey Bartels, Defendant Mayor Leland Hairr, Defendant Chief of Police Charles Flynn and Defendant Jean Thatcher – all testified. Plaintiff’s testimony, the credibility of which was crucial to this case, covered most of the first three days of the trial. Defendants represent to the Court that the ordered transcripts were used for the cross-examination of Plaintiff as well as for their closing arguments. The Court is aware that simply using the transcripts to prepare for cross-examination and in closing arguments does not alone equate to necessity. *See Bucalo*, 126 F.R.D. at 129. However, the totality of the circumstances here support a finding of necessity. By way of comparison, the court in *Cohen* held that

[T]he transcripts were necessary for defendant's use in the trial. The trial went on for nearly three weeks, and plaintiff's three days of testimony was critical to his case. Defendant needed the transcripts to cross-examine him

Cohen, 1999 WL 672903, at *2; *see also Perks*, 2008 WL 8091034, at *4 (awarding trial transcript costs where "Plaintiff's credibility [was] a crucial issue").

The specific circumstances of this litigation presented a complex action from both a legal and factual standpoint. The alleged violations forming the basis for Plaintiff's First Amendment retaliation claim involved at least seven separate incidents spanning approximately three years. One such incident between the Plaintiff, Defendant Village Highway Superintendent George McCabe, and Defendant Village Police Officer Christopher Grimm resulted in Plaintiff being criminally charged with harassment. This incident raised legal issues of probable cause and qualified immunity. The determination of these issues affected the standard three-prong analysis for First Amendment retaliation actions. Also significant is the fact that during the days for which Defendants ordered the trial transcript, Michael Miranda was the sole attorney who appeared on the Defendants' behalf. *Compare Karmel*, 2008 WL 216929, at *3 ("Defendants had at least two attorneys present at all times during the trial, one of whom could have been taking sufficient enough notes during the proceeding to make daily trial transcripts unnecessary."). It was not until later in the trial that an associate from the Miranda Sambursky law firm made an appearance for the Defendants.

In addition, on March 14, 2011, an issue arose regarding prior testimony given by the Plaintiff in connection with a series of recorded messages he left on an answering machine at Village Hall which Defendants sought to offer into evidence. In reserving decision, this Court

instructed: “I’ll look back at the testimony. I’ll ask counsel to do the same thing I think it is important for all of us to take a look at the testimony. Okay?” Trial Tr. at 861. Another issue arose on March 14 as to whether Defendant Flynn could testify regarding calls made by the Plaintiff to the Village of Lloyd Harbor Police Department after the Plaintiff had filed his Complaint in March 2008. The Defendants argued that Plaintiff, during his examination, opened the door to such testimony. The Court, initially overruling Defendants’ objection to go into such testimony, gave the following directive: “Here is what we’re going to do. When we get to the break you’re going to spend some time finding that point in the testimony and you’re going to get it to me. And if that is the case, then I’ll reconsider this.” Trial Tr. at 887. These directives, which placed the responsibility on Defendants to point to specific testimony in order to resolve various evidentiary disputes, made the possession of the trial transcripts more than just a mere convenience. *Compare Perks*, 2008 WL 8091034, at *4 (concluding that the court “placed the burden on counsel for Defendants to point to the transcript to resolve confusion . . . with respect to evidence, Plaintiff’s claims and legal theories and prior testimony”), *with Bucalo*, 238 F.R.D. at 129 (dismissing argument that court instructed defendant to purchase transcript on the basis that “the Court only inquired whether the Defendant planned to purchase the transcript and stated that it was beneficial to possess the transcript”).

However, where the Court specifically directed the parties to go back through prior testimony, that testimony came into evidence exclusively through the Plaintiff. As such, the Court, in its discretion, finds that only those portions of the record ordered by Defendants which encompass Plaintiff’s testimony were those “necessarily obtained.” Since Plaintiff’s testimony began on March 7 and concluded on March 9, 2011, only the costs incurred in obtaining the

transcripts encompassing the totality of Plaintiff Bartels' own testimony will be taxed against the Plaintiff. The Court finds this figure to be \$ 5,167.80.³

Finally, it is also worth noting here that a court "need not award costs if it finds that such an award would be inequitable." *Bekiaris v. United States*, No. 96 Civ. 302, 1998 WL 734362, at *1 (S.D.N.Y. Oct. 20, 1998). In making that determination, a court may "consider factors such as the plaintiff's financial hardship and good faith in bringing the action." *Bucalo*, 238 F.R.D. at 129. Here, the Plaintiff has not even raised an issue of financial disparity between him and the Defendants nor has he asked for consideration on the basis of financial hardship. As one court has observed, in the Second Circuit, "a court may properly deny the imposition of costs on the ground of indigency if the losing party makes a sufficient enough showing, but indigency per se is not a grounds for denying costs." *Karmel*, 2008 WL 216929, at *2. There has been no such showing here, let alone a "sufficient enough showing." *See Perks*, 2008 WL 8091034, at *4 (plaintiff's conclusory assertion that taxation of the cost of trial transcripts should be denied in light of plaintiff's financial means was insufficient for the court to deny costs); *Nazaire v. Kingsbrook Jewish Med. Ctr.*, No. 04-CV-1415, 2006 WL 2946331, at *2 (E.D.N.Y. Oct. 11, 2006) (granting costs where plaintiff "failed to offer any proof of financial hardship, much less indigency"). Although this Court has no specific knowledge of the Plaintiff's financial condition, the Court did sit through three days of testimony from the Plaintiff himself and it is reasonable to assume that an award as large as \$18,671.35, in total, imposed on an individual

³ Defendants provided the Court with an invoice from the court reporter who covered the trial from March 7 through March 10, 2011. The amount due for transcribing these four days of testimony was \$11,464.20 (965 pages at \$11.88 per page). Plaintiff's direct testimony begins on page 44 of the record and ends with his counsel's final re-direct on page 479. Therefore, the amount to be taxed against the Plaintiff is \$5,167.80 (435 pages at \$11.88 per page).

plaintiff of presumably modest means would likely result in some type of financial hardship. *See Bucalo*, 238 F.R.D. at 130. Plaintiff's counsel, however, has not raised this issue and, consequently, has not met any burden here. Therefore, the \$5,167.80 incurred by Defendants in obtaining the record of Plaintiff's trial testimony between March 7 and March 9, 2011 should be taxed as costs against the Plaintiff in addition to the \$3,3869.35 already found to be taxable costs by the Clerk of the Court.

B. Plaintiff's Motion for Attorneys' Fees

Each Federal court has the "inherent power to sanction parties and their attorneys, a power born of the practical necessity that courts be able 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000) (quoting *Chambers v. Nasco, Inc.*, 501 U.S. 31, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)). This power to assess attorneys' fees may be exercised where a party or the attorney has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 44 L. Ed. 2d 689 (1987) (internal quotation marks omitted).

In addition, pursuant to 28 U.S.C. § 1927, "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." "Section 1927 authorizes the imposition of sanctions when 'there is a clear showing of bad faith on the part of an attorney.'" *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999) (quoting *Shafii v. British Airways, PLC*, 83 F.3d 566, 571 (2d Cir. 1996)).

To impose sanctions under either theory, “a court must find clear evidence that (1) the offending party’s claims were entirely without color, and (2) the claims were brought in bad faith - that is, motivated by improper purposes such as harassment or delay.” *Eisemann v. Greene*, 204 F.3d 393, 396 (2d Cir. 2000) (citation and internal quotation omitted). Claims or conduct is considered to be entirely without color “when it lacks any legal or factual basis.” *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 390 (2d Cir. 1985). Moreover, while courts have recognized that it is possible under certain circumstances to infer bad faith from the lack of merit of the action alone (*see Schlaifer*, 194 F.3d at 338), in most instances “[t]he test is conjunctive and neither meritlessness alone nor improper purpose alone will suffice.” *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 390 (2d Cir. 1985). Further, courts in this Circuit have stressed that “the bad faith standard is not easily satisfied and sanctions are warranted only in extreme cases.” *McCune v. Rugged Entm’t LLC*, No. 08-CV-2677, 2010 WL 1189390, at *4 (E.D.N.Y. Mar. 29, 2010).

Plaintiff seeks attorneys’ fees associated with having had to oppose Defendants’ allegedly frivolous appeal. Defendants appealed, on qualified immunity grounds, from the Court’s September 22, 2010 Memorandum and Order which denied summary judgment for each of the individual Defendants. The September 22 Order stated the following:

[T]he Court finds that in the specific circumstances of this case, the resolution of the qualified immunity defense involves disputed factual questions as to the objective reasonableness of the Defendant’s actions. Whether it was Plaintiff’s encounters with Officers O’Shaughnessy, DiFonzo and Grimm, or Plaintiff’s dispute with Highway Superintendent McCabe, or Plaintiff’s interactions with Mayor Hairr and Trustee Thatcher at Board meetings, or Plaintiff’s receipt of a letter from Village Attorney Ritter, there are genuine issues of fact to be resolved regarding the basis for the actions taken

by Defendants. Accordingly, these factual issues preclude any determination, at this juncture and as a matter of law, that defendants are entitled to qualified immunity.

Bartels v. Village of Lloyd Harbor, 751 F. Supp. 2d 387, 403 (E.D.N.Y. 2010).

As an initial matter, Defendants' argument that Plaintiff's request for attorneys' fees is untimely pursuant to Rule 39(d) of Federal Rules of Appellate Procedure is misplaced since this Rule applies to costs, not attorneys' fees. Therefore, the Court will focus on Defendants' remaining argument, namely, that they had a legitimate basis on which to bring the appeal.

According to the Defendants, the Second Circuit's decision in *Faghri v. Univ. of Conn.*, 621 F.3d 92 (2d Cir. 2010) provided them with the basis to seek an interlocutory appeal in this matter. In an action also involving claims of retaliation for exercise of First Amendment rights, the district court in *Faghri* refused summary judgment on the basis of qualified immunity stating that there were genuine issues of material fact preventing the court from concluding that the individual defendants were entitled to qualified immunity. *Faghri*, 621 F.3d at 96. The *Faghri* defendants, appealing solely on the issue of qualified immunity, argued that even assuming as plaintiff contends, they were "entitled, as a matter of law without regard to any disputed issue of fact, to summary judgment." *Id.* The Second Circuit, finding that jurisdiction was proper, held that "[e]ven accepting as true [plaintiff's] contentions as to all disputed issues of fact . . . Defendants were entitled to summary judgment on the basis of qualified immunity." *Id.* at 97.

The Second Circuit has made it clear that "the fact that the district court has found certain factual issues in dispute does not foreclose the [interlocutory] appeal." *Coons v. Casabella*, 284 F.3d 437, 440 (2d Cir. 2002). In fact, "[e]ven where the lower court rules that material disputes preclude summary judgment on qualified immunity, we may still exercise interlocutory

jurisdiction if the defendant . . . contends that he is entitled to qualified immunity even under plaintiff's version of the facts." *Tierney v. Davidson*, 133 F.3d 189, 194 (2d Cir. 1998).

In this action, after Defendants' filed their appeal, Plaintiff moved before the Second Circuit to dismiss the appeal for lack of jurisdiction. In Defendants' opposition, which was annexed to the submissions to this Court, counsel argued that "the individual defendants should be entitled to qualified immunity, even taking plaintiff's version of the facts as true for the limited purpose of this appeal." While the Second Circuit found Defendants' argument unpersuasive and dismissed the appeal for lack of jurisdiction (*see* DE 110), there was no finding by the Second Circuit that the appeal was without color. In light of the fact that Second Circuit precedent allows for interlocutory appeals to denials of qualified immunity on summary judgment, albeit in limited circumstances, the Court does not find that Defendants' appeal was "frivolous" as a matter of law.

Nevertheless, even assuming the first prong of the analysis was satisfied, the Court concludes that the record does not establish bad faith on the part of the Defendants in filing the appeal. Plaintiff claims that the purpose behind Defendants' appeal was to delay the start of trial. To support this argument, Plaintiff points to the fact that (1) the appeal was filed exactly thirty days after the Order was issued; and (2) Defendants did not disclose their intent to appeal during the October 20, 2010 conference with the Court. However, the Court declines to find bad faith behind a party's filing of a document on the last day it is permitted to do so. Although courtesy might have prompted notice to this Court, the Defendants were under no legal obligation to inform the Court of their decision to appeal. Consequently, the Court draws no bad faith inference from this activity either.

Because the Court has found no clear evidence that Defendants' appeal was entirely without color and brought in bad faith, Plaintiff has not met his burden to establish that attorneys' fees are warranted in these specific circumstances.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion for costs is GRANTED, to the extent provide above, and Plaintiff's motion for attorneys' fees is DENIED. The Clerk of the Court is directed to enter an amended Bill of Costs consistent with this Order.

SO ORDERED.

Dated: Central Islip, New York
January 6, 2012

/s/ A. Kathleen Tomlinson
A. KATHLEEN TOMLINSON
U.S. Magistrate Judge