

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 009047

ROBERT P. SOPKO, D.D.S.

Plaintiff,

v.

SUSAN A. STANCILL,

Defendant.

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**ORDER ON PLAINTIFF'S
STATEMENT OF COSTS
AND DEFENDANT'S
AFFIDAVIT OF COSTS**

THIS MATTER comes before the Court upon the filing of Plaintiff's Statement of Costs and Defendant's Affidavit of Costs, both submitted pursuant to the Court's February 5, 2016, Order on Motions for Attorneys' Fees and Costs and to Strike Exhibits.

THE COURT, having considered Plaintiff's Statement of Costs and Defendant's Affidavit of Costs, FINDS and CONCLUDES as follows:

A. Background.

1. On July 9, 2014, Plaintiff Robert P. Sopko, D.D.S, initiated this action by filing a Verified Complaint and Motion for Temporary Restraining Order ("Verified Complaint"). On the same date, he filed a Notice of Designation of this action seeking assignment of the case to the North Carolina Business Court. On July 10, 2014, the Chief Justice of the Supreme Court of North Carolina designated this case to the North Carolina Business Court pursuant to N.C. Gen. Stat. §7A-45.4(b) (hereafter, references to this General Statutes will be to "G.S."). The Verified Complaint was filed against the remaining Defendant, Susan A. Stancill and numerous other parties, and stated six causes of action, including causes of action against for tortious interference with contract and unfair and deceptive trade practices. Plaintiff subsequently dismissed all of the defendants except for Stancill.

2. On August 6, 2014, Susan A. Stancill filed her Amended Answer to Complaint, Defenses and Counterclaims (“Answer and Counterclaim”). Defendant alleged counterclaims against Plaintiff for trespass and infliction of emotional distress.

3. On August 28, 2015, Plaintiff, pursuant to North Carolina Rule of Civil Procedure 41(a), voluntarily dismissed his remaining claims against Defendant for tortious interference with contract and unfair and deceptive trade practices.

4. On October 15 and 29, 2015, Defendant voluntarily dismissed her trespass and infliction of emotional distress claims against Plaintiff pursuant to Rule 41(a).

5. On October 29, 2015, Defendant filed a Motion for Award of Attorney’s Fees and Costs, and on November 24, 2015, Plaintiff filed his Motion for Award of Attorney’s Fees and Costs. Both parties sought an award of costs under Rule 41(d) based on the voluntary dismissal of the claims raised against them. On February 5, 2016, the Court entered an order denying both parties’ motions for attorneys’ fees, but granted each party’s individual Motion for Costs pursuant to North Carolina Rule of Civil Procedure 41(d) with regard to the claims voluntarily dismissed by the opposing party.

6. On February 19, 2016, Plaintiff filed Statement of Costs, and Defendant filed an Affidavit of Costs. Both parties filed documentation supporting the claimed costs. Neither party, however, provided any legal argument nor support for the requested costs. Neither party filed an objection to the other’s requested costs.

B. Analysis.

7. In North Carolina “costs’ may be taxed solely on the basis of statutory authority . . . [and] courts have no power to adjudge costs against anyone on mere equitable or moral grounds.” *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (internal quotations omitted).

8. Rule 41(d) provides in pertinent part that “[a] plaintiff who dismisses an action or claim under [Rule 41(a)] shall be taxed with the costs of the action”¹ The Court of Appeals has summarized the standard for an award of costs under Rule 41(d) as follows:

Rule 41(d) requires an award of costs, upon motion by a defendant, where a plaintiff takes a voluntary dismissal[.] . . . Where Rule 41(d) applies, . . . the discretion to award costs, is inapplicable because Rule 41(d) mandates that costs 'shall be awarded.'

This Court has held that "the 'costs' to be taxed under . . . Rule 41(d) against a plaintiff who dismisses an action under . . . Rule 41(a), means the costs recoverable in civil actions as delineated in [N.C.G.S.] § 7A-305(d).]" Moreover, consistent with the Supreme Court's holding in [*City of Charlotte v. McNeely*, [281 N.C. 684 (1972)]] this Court has held that expenses not listed as costs in the North Carolina General Statutes will not be accommodated.

PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 428 – 29 (2004) (affirming trial court's denial of costs pursuant to Rule 41(d) because the costs being requested were not specifically provided for in G.S. § 7A-305(d)).

9. Section 305(d) provides for an award of the following costs pertinent to the costs requested in this case:

...

(7) Fees of mediators appointed by the court, mediators agreed upon by the parties, guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

...

(10) Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts.

(11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.

¹ Rule 41(c) makes the provisions of Rule 41 applicable to the voluntary dismissal of any counterclaim.

(12) The fee assessed pursuant to subdivision (2) of subsection (a) of this section upon assignment of a case to a special superior court judge as a complex business case.

10. Although an award of costs under 41(d) prevents the Court from exercising its discretion as to whether costs should be awarded, *PharmaResearch Corp.*, 163 N.C. App. at 428; *Sims v. Oakwood Trailer Sales Corp.*, 18 N.C. App. 726, (1973), it still must determine whether such costs were “reasonably incurred.” *DOT v. Charlotte Area Manufactured Hous., Inc.*, 160 N.C. App. 461, 465-466 (N.C. Ct. App. 2003).

11. Accordingly, the Court must assess the parties’ respective requests for an award of costs against the statutorily provided costs in G.S. § 7A-305(d).

i. Plaintiff’s Statement of Costs

12. Plaintiff seeks an award of costs for the following: (a) the filing fee of \$1,200.00 for filing this case in the North Carolina Business Court; (b) half of the fee paid to the mediator for mediation of this case (\$975.00), and; (c) the cost incurred related to three depositions taken in the case, including the costs of the deposition transcripts, totaling \$3,897.90.

13. Filing fee: Plaintiff seeks recovery of the \$1,200.00 filing fee he paid for filing designating the case to the Business Court. While G.S. § 7A-305(d)(12) provides that the filing fee can be a recoverable cost under proper circumstances, the Court is convinced that Plaintiff is not entitled to recover the filing fee here. First, the lawsuit was not designated to the Business Court based on Defendant’s counterclaims. Instead, Plaintiff voluntarily incurred the filing fee, apparently believing that the claims she raised in the Verified Complaint were best served by designation to the Business Court. Second, no part of this fee can conceivably be characterized as “reasonably incurred” by Plaintiff in the defense of the counterclaims alleged by Defendant. Therefore, the Court DENIES Plaintiff’s request for recovery of the \$1,200.00 in its entirety.

14. Mediator's fees: G.S. § 7A-305(d)(7) provides that the parties may recover costs for the "fees of mediators agreed upon by the parties." Plaintiff seeks recovery of \$975.00 in mediator fees paid to Graham Shirley of Shirley & Adams, PLLC. On September 5, 2014, the Court entered its Order on Motions for Temporary Restraining Order and Equitable Relief requiring the parties to participate in mediation with a mediator of their choice. Since Defendant filed her counterclaims prior to that order, the Court finds that Plaintiff reasonably incurred the mediator fees in the defense of the counterclaims. Therefore, the Court GRANTS recovery of \$975.00 in mediator fees to Plaintiff.

15. Deposition-related costs: G.S. § 7A-305(d)(10) provides for an award of costs for the "[r]easonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts." Plaintiff seeks recovery of court reporter charges for the depositions of S. Adcock taken on July 25, 2014, in the amount of \$1,369.80; Defendant taken on September 27, 2015 in the amount of \$1,760.85, and; Plaintiff himself, taken on February 27, 2015 in the amount of \$767.25. The Court has reviewed the submitted documentation for the fees incurred related to depositions of Defendant and Plaintiff and concludes that both of those depositions were necessarily obtained and their costs reasonably incurred in the defense of the counterclaims, and are properly awarded as costs pursuant to Rule 41(d). On the other hand, the deposition of S. Adcock was taken on July 25, 2014, before Stancill filed her counterclaims against Plaintiff on August 6, 2014. These costs could not have been incurred in defense of the counterclaims. Therefore, the Court GRANTS Plaintiff an award of \$2,528.10 for the costs incurred related to the depositions of Defendant and Plaintiff, but DENIES Plaintiff an award for costs related to the deposition of S. Adcock.

ii. Defendant's Affidavit of Costs

16. Defendant seeks an award of costs for the following: (a) half of the fee paid to the mediator for mediation of this case (\$975.00); (b) the cost incurred related to the depositions of Plaintiff and Defendant in the case, including the costs of the deposition transcripts, totaling \$3,299.80, and; (c) costs and fees for expert digital forensic work Defendant had performed to extract information from Plaintiff's cellular telephone.

17. Mediator's fees: Defendant seeks recovery of \$975.00 in mediator fees. For the same reasons discussed above regarding Plaintiff's request for an award of costs, the Court GRANTS recovery of \$975.00 in mediator fees to Defendant.

18. Deposition-related costs: The Court has reviewed the submitted documentation for the fees incurred related to the depositions of Plaintiff and Defendant and concludes that both of those depositions were necessarily obtained and their costs reasonably incurred in the defense of the claims alleged against her, and are properly awarded as costs pursuant to Rule 41(d). The Court GRANTS Defendant \$3,299.80 in transcript expenses.

19. Forensic examination fees: Finally, Defendant seeks \$3,575.00 for the forensic examination of Plaintiff's cellular telephone. G.S. § 7A-305(d) does not expressly provide for the award of costs for these types of fees. In addition, while Defendant has not characterized the fees as expert witness costs, the Court is authorized to award expert fees "solely for actual time spent providing testimony at trial, deposition, or other proceedings." G.S. § 7A-305(d)(11); *Springs v. City of Charlotte*, 209 N.C. App. 271, 284, 704 S.E.2d 271, 328 (2011)("Trial court cannot "assess costs for an expert witness' preparation time"). Since a trial court does not have discretion to award costs which are not enumerated in G.S. § 7A-305(d), the Court DENIES Defendant's request for \$3,575.00 in forensic examination and phone repair expenses in its entirety.

THEREFORE, IT IS ORDERED that:

1. Plaintiff is awarded a total of \$3,503.10 as costs in this matter.
2. Defendant is awarded a total of \$4,274.80 as costs in this matter.

This the 2nd day of March, 2016.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge
for Complex Business Cases