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United States District Court, N.D. Illinois, Eastern Division.

Peso CHAVEZ, et al. Plaintiffs,
v.
THE ILLINOIS STATE POLICE, et al. Defendants.

No. 94 C 5307. | Jan. 19, 2000.

Opinion

MEMORANDUM AND ORDER

MANNING, J.

***1** The plaintiffs' motions to alter or amend the court's order awarding $22,800.72 in costs to the defendants as a price of the voluntary dismissal of certain claims on the eve of trial and their motion for a stay of this order pending appeal without the posting of a supersedeas bond are before the court. For the following reasons, the motion to reconsider is denied and the motion for a stay without the posting of a supersedeas bond is granted.

Motion to Reconsider

To briefly recap, on September 7, 1999, the court issued an order addressing the plaintiffs' motion to voluntarily dismiss certain claims on the eve of trial and held, among other things, that under Rule 41(a)(2), "an award of reasonable costs [was] a condition precedent to entry of an order permitting the plaintiffs to voluntarily dismiss their remaining claims." (September 7, 1999 Order at 10). The court then permitted the plaintiffs to decide, pursuant to Fed.R.Civ.P. 41(a)(2), whether they wished to accept the conditions of dismissal set by the court. When the plaintiffs elected to do so, the court permitted the plaintiffs to dismiss their remaining claims and the plaintiffs filed their promised appeal.

On October 22, 1999, the court revisited this order when the plaintiffs indicated that they did not believe that they were obligated to pay costs while their appeal was pending, stating:

> The fundamental problem with the plaintiffs' position regarding costs is that the court specifically ordered that "an award of reasonable costs will be a condition precedent to entry of an order permitting the plaintiffs to voluntarily dismiss their remaining claims." (September 7, 1999 Order at 10). In other words, this is not a garden-variety type of costs award made to a prevailing party, where a stay may be appropriate since the party who ultimately wins on appeal is the "prevailing party."
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> Instead, the award of reasonable costs to the defendants reflects the court's decision that the price of a Rule 41(a)(2) voluntary dismissal with prejudice on the eve of trial in this hotly-litigated 1994 case is payment of reasonable costs. The plaintiffs agreed to pay this price (which the court described as a "condition precedent"), dismissed their claims with prejudice, and filed an appeal. If the plaintiffs wish to renege on their acceptance of this condition, they must establish that they misunderstood its nature, as a change of heart is not enough to reopen proceedings at this point. *See generally Marlow v. Winston & Strawn,* 19 F.3d 300, 304 (7th Cir.1994) (Rule 41(a)(2) requires the court to provide the plaintiffs with an opportunity to withdraw their motion and proceed to trial if the conditions of dismissal are too onerous). The plaintiffs are advised that, if they successfully repudiate their prior acceptance of costs, the court will (among other things) issue an order seeking remand under Circuit Rule 57.

On November 19, 1999, the court issued an order, which was entered on the court's docket on November 26, 1999, assessing costs. It also repeated what has turned out to be its monthly comment regarding the award of costs: that reasonable costs were a condition precedent to the voluntary dismissal of the plaintiffs' remaining claims as opposed to an award of costs to a prevailing party. As the court explained, it found, in an exercise of its discretion, that an award of costs against the plaintiffs fairly reflected the fact that they sought a dismissal with prejudice on the eve of trial after five years of vigorous and costly pursuit of these (and other) claims.

***2** The plaintiffs currently seek reconsideration of the court's order assessing costs under Rule 59, asserting that they did not understand that they would be required to pay costs regardless of the outcome of their appeal in order to voluntarily dismiss their remaining pending claims, avoid a trial, and take an immediate appeal. According to the plaintiffs, allocating all taxable costs to them is unfair because they may ultimately become the prevailing party if things go their way on appeal. The problem with this argument is that it has been considered and rejected by the court a number of times after extensive briefing.

Motions to reconsider cannot be used to rehash arguments previously considered by the court. *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.,* 90 F.3d 1264, 1270

(7th Cir.1996). Instead, "[t]he only grounds for a Rule 59(e) motion ... are newly discovered evidence, an intervening change in the controlling law, and manifest error of law." *Cosgrove v. Bartolotta,* 150 F.3d 729, 732 (7th Cir.1998). Here, the plaintiffs have failed to bring a significant change in the law or facts to the court's attention, or to convince the court that it misunderstood [them] or made its decision outside the adversarial issues presented to the court. *See Bank of Waunakee v. Rochester Cheese Sales, Inc.,* 906 F.2d 1185, 1191 (7th Cir.1990).

The court exercised its discretion, against a backdrop of over five years of highly contested litigation, and found that requiring the plaintiffs to pay all of the defendants' reasonable costs (but no fees) was an appropriate price for a last-minute pass on a trial of their remaining claims. It is true that costs are often awarded for a Rule 41(a)(2) dismissal *without* prejudice, on the theory that the defendant will be subject to suit again in the future. *See, e.g., Babcock v. McDaniel,* 148 F.3d 797, 799 (7th Cir.1998). This rationale is inapplicable in this case as the plaintiffs have elected to dismiss with prejudice.

Nevertheless, Rule 41(a)(2) gives courts the latitude to fashion conditions and terms of dismissal as it deems proper. *See* Fed.R.Civ.P. 41(a)(2). The court has devoted substantial time and attention to this case since its inception in August of 1994 and is intimately familiar with its convoluted procedural posture and the myriad steps the plaintiffs and defendants took to further their respective positions throughout the case's over five year life span. Contrary to the plaintiffs' current characterization, the dismissed claims were not peripheral, as they in fact required substantial discovery and consideration by the court and the parties.

Moreover, it is fundamentally unfair for the plaintiffs to force the defendants to defend against the now-dismissed claims for over five years and then, after compelling them (and, by extrapolation, all Illinois taxpayers) to incur substantial costs, abandon ship at the last moment due to a strategy shift. On one day, the plaintiffs describe their now-dismissed claims as substantial; on another, they say they are peripheral. The defendants should not have to bear all of the costs of this kind of gamesmanship.

***3** While the court finds that an award of attorneys' fees would be inappropriate, for the reasons explained in its prior orders, an award of costs is an equitable and proper response to the plaintiffs' trial strategy. The court also notes that the plaintiffs' latest motion to reconsider is not the correct time to contend, for the first time, that an award of *all* costs is excessive. A motion to reconsider is not the appropriate time to reload one's brief-writing quiver with arguments that the party omitted from its earlier efforts. The court also notes that the plaintiffs seem to want to have it both ways. They elected to accept the court's proposed conditions of dismissal but are now attempting to renege and secure a cost-free dismissal. The court cannot condone this litigation strategy.

In short, Rule 41(a)(2) provides for dismissal "upon such terms and conditions as the court deems proper." The court found, in its discretion, that an award of costs was proper, and declines to revisit its decision imposing costs as a condition precedent to the voluntary dismissal of the plaintiffs' remaining claims. Hence, the plaintiffs' motion to reconsider is denied.

Motion to Stay Judgment and Waive the Posting of a Supersedeas Bond

Under Rule 62(d) of the Federal Rules of Civil Procedure, a party may obtain an automatic stay of execution of a money judgment pending appeal by posting a supersedeas bond. *See, e.g., BASF Corp. v. Old World Trading Co.,* 979 F.2d 615, 616 (7th Cir.1992). In its discretion, however, the district court may waive the bond requirement. *Dillon v. City of Chicago,* 866 F.2d 902, 904 (7th Cir.1988). In considering whether a party must post a bond, the Seventh Circuit directs us to consider five factors: (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment if and after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the party's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the party is in such a precarious financial situation that the requirement to post a bond would prejudice its other creditors. *Id.*

Here, the ACLU has advised the court that it, rather than the named plaintiffs, will be responsible for any costs taxed against the plaintiffs, and points to a declaration from its independent auditors to the effect that the ACLU of Illinois and the Roger Baldwin Foundation of ACLU, Inc. has the financial capacity to pay the costs awarded in this case. It does not appear that there will be any "substantial delay or difficulty" paying the costs if the plaintiffs' appeal is unsuccessful. *Id.* at 905. Thus, the court finds, in its discretion, that the plaintiffs need not post a bond to secure payment of costs.

Conclusion

For the foregoing reasons, the plaintiffs' motion to reconsider is denied and their motion for a stay without the posting of a supersedeas bond is granted.