

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,) CIVIL ACTION NO. 2008-004
)
Plaintiff-Counterdefendant,)
)
vs.)
)
GMP HAWAII, INC., a Hawaii)
corporation, d/b/a GMP ASSOCIATES,)
)
Defendant-Counterclaimant.)
_____)

ORDER AWARDING SANCTIONS

Dennis K. Yamase
Associate Justice

Decided: March 11, 2010

APPEARANCES:

For the Plaintiff: Dana Smith, Esq.
Program Management Unit
Office of the FSM President
P.O. Box PS-4
Palikir, Pohnpei FM 96941

For the Defendant: Daniel M. Benjamin, Esq. (pro hac vice)
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HEADNOTES

Attorney's Fees – Court-Awarded; Civil Procedure – Sanctions

When making an attorney fees award, the court will award reasonable attorney's fees based on the customary fee in the locality in which the case is, or will be, tried. For a case tried on Pohnpei, the court will award fees on the basis of \$125 an hour. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 86, 89 (Pon. 2010).

Civil Procedure – Sanctions

If a discovery sanctions motion is granted in part and denied in part, the court may apportion among the parties and persons in a just manner the reasonable expenses incurred in relation to the motion. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 86, 89 n.1 (Pon. 2010).

Civil Procedure – Sanctions

Besides awarding reasonable expenses to a prevailing movant on a sanctions motion, Rule

37(a)(4) also provides that if a sanctions motion is denied, the court must, after opportunity for hearing, require the moving party, the attorney advising the motion or all of them to pay to the party who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees. So when the attorney work done in opposing the plaintiff's sanctions motion was necessary for the defendant to prevail on its sanctions motion and the two were so closely intertwined as to be inseparable, the expenses for work done in opposing the plaintiff's sanctions motion were thus expenses incurred in obtaining the sanctions order denying the plaintiff's and granting the defendant's sanctions motion. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 86, 89 (Pon. 2010).

Civil Procedure – Sanctions

The great operative principle of Rule 37(a)(4) is that the loser on sanctions motions pays and the rule is mandatory unless one of the conditions for not making an award is found to exist. The loser may be either the movant or the motion's opponent. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 86, 89 (Pon. 2010).

Civil Procedure – Sanctions

Although, in order to achieve Rule 37(a)(4)'s purpose of discouraging obstructionist discovery conduct, the "expenses" that are imposed as a sanction for discovery misconduct are to be given a more expansive meaning than the "costs" that are awarded as part of a judgment, even those "expenses" should not include normal overhead, such as Westlaw fees or in-house copying costs within a law office. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 86, 90 (Pon. 2010).

Civil Procedure – Filings; Civil Procedure – Service

Filing in duplicate is required and opposing parties must each be served a copy. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 86, 90 (Pon. 2010).

Civil Procedure – Sanctions

Postage expenditure will be allowed as a Rule 37(a)(4) sanctions expense. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 86, 90 (Pon. 2010).

Civil Procedure; Civil Procedure – Sanctions

Although the court must first look to FSM sources of law rather than start by reviewing other courts' decisions, when the court has not previously considered whether a deponent and an attorney may be jointly held liable for Rule 37(a)(4) sanctions and that FSM civil procedure rule is identical or similar to a U.S. rule, the court may look to U.S. sources for guidance. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 86, 91 n.3 (Pon. 2010).

Civil Procedure – Depositions; Civil Procedure – Sanctions

When counsel supported the deponent in his unreasonable demands, did not advise the deponent that his demands were unjustified, and did advise the deponent that he could leave the deposition, in effect, advising the deponent not to answer, this advice (to leave – to not testify) was not substantially justified. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 86, 91 (Pon. 2010).

Civil Procedure – Sanctions

Rule 37(a)(4) does not require that the court find that the attorney instigated the discovery misconduct nor does it require a finding of bad faith before sanctions may be imposed upon an attorney. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 86, 91 (Pon. 2010).

Civil Procedure – Sanctions

When counsel's advice to a deponent was not substantially justified and was, in fact, unjustified, he and the deponent will be jointly and severally liable for the Rule 37(a)(4) sanctions thereafter

imposed. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 86, 91 (Pon. 2010).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

On December 22, 2009, the court denied the FSM's motion for discovery sanctions and granted GMP Hawaii, Inc.'s ("GMP's") motion for discovery sanctions and gave GMP an opportunity to submit its request for its expenses (attorneys' fees and costs) incurred in obtaining that discovery order and its position on how the sanction should be apportioned between FSM counsel and deponent Andrew Yanoviak and gave the FSM counsel and deponent Yanoviak, the persons who might be personally liable for the expenses, an opportunity to respond. FSM v. GMP Hawaii, Inc., 16 FSM Intrm. 648, 652 (Pon. 2009). On January 18, 2010, GMP filed its request with supporting exhibits. The FSM attorneys filed their response on February 8, 2010.

GMP is awarded \$2,942.90 in sanctions for which FSM counsel Dana Smith and deponent Andrew Yanoviak will be jointly and severally liable. The court's reasons follow.

I. BACKGROUND

GMP seeks a total of \$7,259.34 in attorneys' fees and other expenditures as its necessary expenses in obtaining the December 22, 2009 discovery sanctions order. This sum includes 19.1 hours of attorney work time at \$320 an hour (\$6,112); 6.3 hours of attorney work at \$150 an hour (\$945); \$191.89 of "apportioned" Westlaw charges; \$5.40 in postage; and \$5.05 for in-house copies. GMP contends that Andrew Yanoviak, the deponent whose conduct necessitated the motion, and FSM counsel should be jointly and severally liable for the sanctions because, in its view, they are equally blameworthy.

FSM counsel objects to: 1) the \$320 hourly rate as unreasonable for a case pending in an FSM court; 2) any attorney time spent on either opposing the FSM's motion for sanctions or on GMP's motion to disqualify Yanoviak as contrary to the court's sanction order which was, in counsel's view, limited to the expenses GMP incurred on its sanctions motion; 3) the "apportioned" Westlaw charges as continuing overhead for which GMP's counsel would be liable regardless of whether he did any research on the GMP case; and 4) in-house copy charges as overhead. FSM counsel also asserts that it is unreasonable to impose GMP's fee request on FSM counsel considering the annual income received by FSM government attorney employees.

FSM counsel also contends that the sanctions should be borne entirely by the deponent Yanoviak because it was his actions that gave rise to the court sanction. FSM counsel asserts that it was Yanoviak who, as an independent contractor, set his own terms and conditions for his deposition testimony and who prepared his own written contract with the terms under which he would agree to be deposed, which the FSM counsel never saw, read, helped to prepare, or had a copy of, and that it was Yanoviak who was solely responsible for his own decision to walk out of the deposition, which was not the result of either FSM counsel's advice.

II. DISCUSSION

A. *Attorneys' Fees Sanctions*

The first objection is to the amount of the hourly rate requested. When making an attorney fees award, the court will award reasonable attorney's fees based on the customary fee in the locality in which the case is, or will be, tried. See Tolenoa v. Kosrae, 3 FSM Intrm. 167, 173 (App. 1987); Bank of Guam v. O'Sonis, 9 FSM Intrm. 106, 110 (Chk. 1999). In 2006, the court, when it made an attorney fee sanction award in Amayo v. MJ Co., 14 FSM Intrm. 355, 361 (Pon. 2006), ruled that it would not award attorney's fees of \$200 an hour, counsel's usual hourly rate on Guam, because \$110 to \$120 an hour would be in the range reasonable for a case tried on Pohnpei. This case will be tried on Pohnpei. The court will therefore award fees in this case on the basis of \$125 an hour.

The next objection is to any attorney time spent on either opposing the FSM's motion for sanctions or on GMP's motion to disqualify Yanoviak. GMP asserts that it seeks only the time its counsel spent on its sanctions motion and on defending against the FSM's sanctions motion since they were closely related, and nothing else. The court's review of GMP's submission and the attached billings has not revealed any particular time spent on the motion to disqualify Yanoviak as opposed to the two (FSM's and GMP's) sanctions motions and the response has not pointed to any particular billing entry as time spent on the Yanoviak disqualification motion.

Although GMP filed separate disqualification and sanctions motions, a small portion of GMP's sanction motion did deal with a separate attempt to disqualify Yanoviak and to strike his testimony. GMP did not prevail on this point. The court will therefore reduce¹ the total attorney time by 7½% (1.9 hours), leaving 23.5 hours as time spent on both the GMP sanctions motion and opposition to the FSM sanctions motion.

The response also objected to an award for any time spent responding to the FSM's sanctions motion as outside the scope of the court's award. This objection is rejected. Although in retrospect the court could have been more precise when it stated that GMP could submit "its request for expenses incurred in obtaining this order granting its sanctions motion," GMP Hawaii, Inc., 16 FSM Intrm. at 652, the court considered the two motions together and, in order for GMP to prevail on its sanctions motion and obtain the order, it first had to prevail on the FSM's earlier-filed sanctions motion and have the FSM's motion denied. Besides awarding reasonable expenses to a prevailing movant on a sanctions motion, Rule 37(a)(4) also provides that if a sanctions motion "is denied, the court shall, after opportunity for hearing, require the moving party, the attorney . . . advising the motion or all of them to pay to the party . . . who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney . . . fees" Furthermore, the attorney work done in opposing the FSM's sanctions motion was necessary for GMP to prevail on its sanctions motion and the two were so closely intertwined as to be inseparable. The expenses for work done in opposing the FSM's sanctions motion were thus expenses incurred in obtaining the December 22, 2009 sanctions order.

The great operative principle of Rule 37(a)(4) is that the loser on sanctions motions pays and the rule is mandatory unless one of the conditions for not making an award is found to exist. FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 253 (App. 2006). The loser may be either the movant or the motion's opponent. GMP prevailed on both sanctions motions. For all the foregoing reasons, the court

¹If a discovery sanctions motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 497 (Chk. 2004).

therefore concludes that the attorney time spent opposing the FSM's sanctions motion should not (and probably could not) be excluded from the time GMP spent on its own sanctions motion.

Accordingly, GMP is awarded \$2,937.50 in attorneys' fees calculated at \$125 an hour for 23.5 hours of work.

B. Expenses Other than Attorneys' Fees

The court has previously held, in a Rule 54(d) costs context, that Westlaw electronic research charges are properly reflected as a part of a law firm's overhead, and as such, are already included in the attorney's fees as opposed to ordinary costs and that therefore Westlaw charges would be disallowed as costs. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 15 FSM Intrm. 53, 74 (Yap 2007), *rev'd sub nom. on other grounds*, M/V Kyowa Violet v. People of Rull ex rel. Mafel, 16 FSM Intrm. 49 (App. 2008). Although, in order to achieve Rule 37(a)(4)'s purpose of discouraging obstructionist discovery conduct, the "expenses" that are imposed as a sanction for discovery misconduct are to be given a more expansive meaning than the "costs" that are awarded as part of a judgment, Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 448 (Pon. 2003), even those "expenses" should not include normal overhead. The request for Westlaw fees is accordingly denied.

Even though copying costs are generally not allowed as Rule 54(d) costs, People of Rull, 15 FSM Intrm. at 74, expenses may be allowed for copying costs if they represent payments to others for that service, but not when they represent copying in-house within a law office, Lippwe v. Weno Municipality, 14 FSM Intrm. 347, 354 (Chk. 2006); FSM Social Sec. Admin. v. Jonas, 13 FSM Intrm. 171, 173 (Kos. 2005); Udot Municipality v. FSM, 10 FSM Intrm. 498, 501 (Chk. 2002); Damarlane v. United States, 7 FSM Intrm. 468, 470 (Pon. 1996). The rationale is that in-house copying is part of overhead. Counsel need multiple copies. Filing in duplicate is required. FSM Civ. R. 5(d); FSM GCO 1981-1, ¶ 4. Opposing parties must each be served a copy. FSM Civ. R. 5(a). This is all part of normal overhead. The request for copy costs will be disallowed.

No objection was made to the \$5.40 in postage expenditure and none is apparent. It is therefore allowed as a Rule 37(a)(4) expense.

C. Apportionment

The FSM counsel contends that Andrew Yanoviak should bear the entire sanction since it was Yanoviak's decision not to continue the deposition when his demands were not met. FSM counsel asserts that they are not blameworthy since they did not advise Yanoviak to pursue that course of conduct.

The court, however, notes the following: 1) FSM counsel Dana Smith, when GMP would not agree to Yanoviak's demanded conditions² to resume his deposition, stated that, "Our position is that we support our witness, Andrew Yanoviak," Dep. Tr. at 59:4-5 (Sept. 17, 2009); 2) when GMP still would not agree to Yanoviak's demands, Smith told Yanoviak, "you may leave," *id.* at 60:4; 3) FSM counsel did not try to dissuade Yanoviak from his course of action or to inform him that he was entitled to payment after he was deposed, not before; and 4) that FSM counsel Smith, not Yanoviak, decided to and did file the FSM's unsuccessful motion for sanctions, which necessitated a GMP response and

²Yanoviak's stated reason for his demands was that he did not "trust" GMP. This is irrelevant. GMP's counsel would be responsible for Yanoviak's compensation. It would be GMP's counsel's concern whether GMP could be "trusted" to reimburse counsel for Yanoviak's compensation, not Yanoviak's concern.

thus more time and expense incurred by GMP.

In Rockwell International, Inc. v. Pos-A-Traction Industries, Inc., 712 F.2d 1324, 1326 (9th Cir. 1983),³ the court affirmed a sanctions award imposed jointly upon a non-party deponent and an attorney and held that "Rule 37(a)(4) also provides for expenses to be awarded against the attorney advising a deponent not to answer if the advice was not substantially justified." In this case, FSM counsel Smith supported "our witness" in his unreasonable demands, did not advise Yanoviak that his demands were unjustified, and did advise Yanoviak that he could leave the deposition, in effect, advising Yanoviak not to answer. This advice (to leave – to not testify) was not substantially justified. Rule 37(a)(4) does not require that the court find that the attorney instigated the discovery misconduct, Devaney v. Continental Am. Ins. Co., 989 F.2d 1154, 1161 (11th Cir. 1993), nor does it require a finding of bad faith before sanctions may be imposed upon an attorney, *id.* at 1162. Since FSM counsel Dana Smith's advice to deponent Andrew Yanoviak was not substantially justified and was, in fact, unjustified, he and the deponent shall be jointly and severally liable for the Rule 37(a)(4) sanctions hereby imposed. Sanctions may be imposed on Yanoviak in conformity with the court's previous setoff instructions in its December 22, 2009 order, see GMP Hawaii, Inc., 16 FSM Intrm. at 652.

III. CONCLUSION

Accordingly, Rule 37(a)(4) sanctions in the amount of \$2,942.90 are imposed jointly and severally on FSM counsel Dana Smith and deponent Andrew Yanoviak.

* * * *

³ Although the court must first look to FSM sources of law rather than start by reviewing other courts' decisions, when an FSM court has not previously construed an FSM civil procedure rule that is identical or similar to a U.S. rule, the court may look to U.S. sources for guidance. *See, e.g.*, Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 589 n.1 (App. 2008); Arthur v. FSM Dev. Bank, 14 FSM Intrm. 390, 394 n.1 (App. 2006); Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 444 (App. 1994). The court has not previously considered whether a deponent and an attorney may be jointly held liable for Rule 37(a)(4) sanctions.