ORDERED.

Dated: July 20, 2021

Caryl E. Delano
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re:

Benjamin H. Yormak,

Debtor.
_____/

Case No. 2:15-bk-04241-FMD
Chapter 7

ORDER ON STEVEN R. YORMAK'S MOTION TO SET ASIDE CLERK'S ORDER (DE 882) WHICH ORDER INCLUDED COSTS IN JUDGMENT (DE 851) AS AGAINST CREDITOR
[Doc. No. 883]

THIS CASE came before the Court without a hearing to consider Steven R. Yormak's *Motion to Set Aside Clerk's Order (DE 882) Which Order Included Costs in Judgment (DE 851) as Against Creditor* (the "Reconsideration Motion").[1] At the Court's direction,[2] Steven Yormak ("Claimant") supplemented the Reconsideration Motion,

[1] Doc. No. 883.
[2] Doc. No. 887.

Benjamin Yormak ("Debtor") responded to the supplement, and Claimant replied to Debtor's response.[3]

I. BACKGROUND

Claimant is a Canadian attorney who has never been licensed to practice law in the State of Florida. Debtor, who is Claimant's son, is a Florida attorney. The parties' dispute relates to Consulting Agreements entered into between Claimant and Debtor. Claimant filed a lawsuit against Debtor in the Circuit Court in and for Collier County, Florida,[4] which Debtor removed to the United States District Court for the Middle District of Florida (the "District Court Action").[5]

On April 24, 2015, Debtor filed a petition under Chapter 13 of the Bankruptcy Code, and on September 1, 2016, the Chapter 13 case was converted to a case under Chapter 7. Claimant timely filed Claim No. 4-2 (the "Claim"), in an amount exceeding $1,095,275.00, in connection with his claims under the Consulting Agreements. Debtor objected to the Claim, asserting that the Consulting Agreements were unenforceable because they provided for Claimant's unlicensed practice of law (the "UPL Issue").

On February 3, 2021, after years of litigation and appeals, the Court entered an order on the parties' final motions for summary judgment on the UPL Issue (the "SJ

[3] Doc. Nos. 893, 899, 901.
[4] Doc. No. 822-101 (filed under seal pursuant to Court order (Doc. No. 821)).
[5] District Court Case No. 2:14-cv-00033-JES-CM.

Order"). The Court denied Claimant's motion for summary judgment, granted Debtor's cross-motion for summary judgment, and disallowed Claimant's Claim, finding (a) the Consulting Agreements were unenforceable as providing for the unlicensed practice of law, and (b) Claimant's activities under the Consulting Agreements constituted the unlicensed practice of law.[6]

On February 17, 2021, Debtor filed and served a Bill of Costs in which he stated that judgment was entered on February 3, 2021, against Claimant – referring to the SJ Order – and requesting costs in the amount of $26,558.48 for copying charges, mediation fees, hearing and deposition transcripts, the filing fee for removing Claimant's state court lawsuit to the District Court, and expert witness fees.[7]

Claimant did not object to Debtor's Bill of Costs, and on April 28, 2021, under Fed. R. Bankr. P. 7054(b)(1), the Clerk of the Bankruptcy Court taxed the costs against Claimant in the amount requested.[8]

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[6] Doc. No. 851. Claimant timely filed a motion for reconsideration of the SJ Order (Doc. No. 853), which the Court denied (Doc. No. 859). Claimant then timely filed a notice of appeal of the SJ Order and the Court's order denying reconsideration (Doc. No. 863), which is now pending in the District Court. Later, Claimant filed a *Motion to Stay and/or Abate Bankruptcy Proceedings Pursuant to Bankruptcy Rule 8007* (Doc. No. 888) (the "Stay Motion"). The Court granted the Stay Motion in part, ruling that Claimant may participate and be heard on the pending matters in the Chapter 7 case, including his Bill of Costs, as though his Claim had not been disallowed (Doc. No. 914).

[7] Doc. No. 854.

[8] Doc. No. 882. Under Fed. R. Bankr. P. 7054(b)(1), [c]osts may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court."

Claimant timely filed the Reconsideration Motion, seeking to set aside the Clerk's award of costs.[9] After reviewing the Reconsideration Motion, the Court entered an order that, *inter alia*, (a) directed Claimant to supplement the Reconsideration Motion to set forth each specific cost on the Bill of Costs that Claimant contends is not an allowable cost under 28 U.S.C. § 1920, the reason why the cost falls outside the parameters of § 1920, any other objection to the costs taxed by the Clerk of the Bankruptcy Court, and the basis for the objection; and (b) directed Debtor to file a response to the Reconsideration Motion and supplement.[10]

Claimant filed the supplement as directed (the "Supplement").[11] Generally, as discussed in more detail below, Claimant contends that under § 1920, Debtor "may only be entitled to costs of transcripts and nothing else in his Bill of Costs."[12]

Debtor filed a response to the Supplement,[13] and Claimant filed a reply.[14]

II. ANALYSIS

Under Fed. R. Bankr. P. 7054(b)(1), courts "may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides."[15] Allowable costs are listed in 28 U.S.C. § 1920 as:

[9] Doc. No. 883.
[10] Doc. No. 887.
[11] Doc. No. 893.
[12] *Id.*, ¶ 12.
[13] Doc. No. 899.
[14] Doc. No. 901.
[15] Fed. R. Bankr. P. 7054(b)(1).

> (1) Fees of the clerk and marshal;
>
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
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> (3) Fees and disbursements for printing and witnesses;
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> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
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> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.[16]

Although courts have discretion to award costs under Rule 7054(b) and § 1920, there is a "strong presumption in favor of an award of costs to the prevailing party absent an affirmative showing by the losing party that 'the costs [] fall outside the parameters of § 1920, were not reasonably necessary to the litigator, or that the losing party is unable to pay.'"[17]

Here, it is undisputed that Debtor is the prevailing party in the SJ Order and Claimant does not contend otherwise in his Reconsideration Motion, the

[16] 28 U.S.C. § 1920.

[17] *In re Amodeo*, 2019 WL 10734046, at *4 (Bankr. M.D. Fla. July 30, 2019) (quoting *In re O'Callaghan*, 304 B.R. 887, 889 (Bankr. M.D. Fla. 2003)).

Supplement, or his reply. Likewise, Claimant does not contend that the requested costs "were not reasonably necessary" to Debtor, or that Claimant is unable to pay.

The Court addresses Claimant's objections to the specific cost items claimed by Debtor in the Bill of Costs as follows:

A. Copying Costs

Debtor submitted a check dated August 21, 2019 from Debtor's law firm to Cecil's Copy Express in the amount of $789.49.[18] Debtor asserts that the payment is for "the scanning of documents pursuant to Claimant's request for production of documents" related to the UPL Issue.[19]

Claimant contends that the expense is "unreasonably high" because of Debtor's sanctionable conduct in discovery.[20]

The record reflects that on August 14, 2019, a week before the payment, the Court entered an order requiring Debtor to produce documents relating to the UPL Issue to Claimant by August 23, 2019.[21] The Court finds that the copying cost in the amount of $789.49 is allowed under § 1920 as a cost of copying materials necessarily obtained for use in the case.

[18] Doc. No. 854, p. 40.
[19] Doc. No. 899, p. 8.
[20] Doc. No. 893, p. 3.
[21] Doc. No. 626.

B. Debtor's Expert Witness – Mr. Larson

Debtor submitted an invoice dated June 30, 2015 from Edward L. Larsen, Esq., in the amount of $6,379.25.[22] Debtor retained Mr. Larsen as his expert to prepare an opinion on Claimant's claim for unjust enrichment and quantum meruit.

Claimant contends that the expenses submitted by Debtor are not taxable because Mr. Larsen is not a "court appointed expert" under § 1920.[23]

In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,[24] the United States Supreme Court addressed "the power of federal courts to require a losing party to pay the compensation of the winner's expert witnesses" under Fed. R. Civ. P. 54(d) and § 1920. The Court determined that the "inescapable" combined effect of § 1920(3) and § 1920(6) is that federal courts may not tax expert witness fees more than the amounts set out in 28 U.S.C. § 1821(b) unless the witness is court-appointed, and therefore held that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of § 1821(b), absent contract or explicit statutory authority to the contrary."[25] Generally, 28 U.S.C. § 1821 provides for daily attendance fees and travel allowances to be paid to a witness in attendance at any federal court or deposition. In *In re Weihert*,[26] the bankruptcy court found that

[22] Doc. No. 854, p. 30.
[23] Doc. No. 893, p. 3.
[24] 482 U.S. 437, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987).
[25] *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. at 439.
[26] 493 B.R. 61 (Bankr. W.D. Wis. 2013).

the Supreme Court's decision in *Crawford* "controls in the bankruptcy context as well," and held that taxable witness fees for a prevailing party's non-court appointed expert were limited to the amounts listed in § 1821.[27]

Mr. Larsen was hired by Debtor as Debtor's own, non-court appointed expert. Consequently, the Court finds that the fees charged by Mr. Larsen are not taxable against Claimant.[28]

C. Claimant's Expert Witness – Mr. Greenberg

Debtor also submitted an invoice dated July 13, 2020, from Richard A. Greenberg, Esq., in the amount of $7,515.00.[29] Claimant retained Mr. Greenberg as his expert on the UPL Issue, and Debtor deposed Mr. Greenberg in May 2020, as permitted under Fed. R. Bankr. P. 7026(b)(4).

Claimant contends that the expenses submitted by Debtor are not taxable because Fed. R. Bankr. P. 7026(b)(4)(E) requires Debtor, as the party who sought discovery from an expert, to pay Mr. Greenberg for the time spent preparing for and attending the deposition.[30]

Under Rule 7026(b)(4)(E), the party seeking discovery from an expert is required to pay the expert a reasonable fee, and the Rule does not provide for the

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[27] *In re Weihert*, 493 B.R. at 64-65. *See also In re Quesos del Pais La Esperanza, Inc.*, 2020 WL 1190630, at *2 (Bankr. D.P.R. Mar. 11, 2020).
[28] Under 28 U.S.C. § 1821, taxable costs include daily fees or travel allowances paid to a witness, but Debtor has not requested these items in his Bill of Costs.
[29] Doc. No. 854, p. 36.
[30] Doc. No. 893, p. 3.

shifting of the expert's fees in the event that the party taking the discovery prevails in the litigation. The amounts charged by Mr. Greenberg represent his compensation for time spent responding to Debtor's discovery, and Mr. Greenberg was not a court-appointed expert. Consequently, under *Crawford*'s analysis of § 1920(3) and § 1920(6), Mr. Greenberg's compensation is not taxable against Claimant.

D. Mediation Fees

Debtor submitted an invoice dated December 22, 2014, from Nulman Mediation Services, Inc., for $1,618.75;[31] a check dated February 21, 2020, from Debtor's law firm to Mandel & Mandel, LLP, in the amount of $2,500.00 (of which $257.50 was later refunded);[32] and an invoice dated August 10, 2016, from Simon M. Harrison in the amount of $450.00.[33]

Claimant contends that the mediation fees are not taxable against him because they are not listed in § 1920.[34] Debtor acknowledges that it is "generally true that mediation costs under § 1920 are not [] taxed as costs in the Middle District of Florida."[35] However, Debtor asserts that the mediation costs are taxable in this case because two exceptions apply: first, the District Court in the District Court Action ordered in a *Case Management and Scheduling Order* that the prevailing party's share

[31] Doc. No. 854, p. 29.
[32] Doc. No. 854, pp. 38-39.
[33] Doc. No. 854, p. 31.
[34] Doc. No. 893, p. 3.
[35] Doc. No. 899, p. 9.

of mediation fees may be taxed as costs; and second, Florida law governs the issue because this is essentially a "diversity case," and Florida law provides for the taxing of mediation costs in favor of the prevailing party.[36]

Mediation fees are not taxable under § 1920. "[S]ection 1920 is interpreted narrowly and can apply only to those costs specifically incorporated in the statute, and a mediator's fee is not one of those enumerated costs."[37]

Further, the mediation fees in Debtor's Bill of Costs are not allowed as taxable costs for two additional reasons. First, the *Case Management and Scheduling Order* cited by Debtor applied only to the District Court Action and to a specific mediation conference described in the order, which was to be completed by November 5, 2014, prior to Debtor filing this case.[38] But the mediation services by Mandel & Mandel, LLP, and Simon Harrison were performed in the bankruptcy case, not the District Court Action, and the Court cannot determine whether the mediation performed by Nulman Mediation Services, Inc., is the mediation described in the District Court

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[36] Doc. No. 899, pp. 9-10; Doc. No. 899-1.

[37] *Incarcerated Entertainment, LLC v. Cox*, 2019 WL 8989846, at *1 (S.D. Fla. Nov. 4, 2019). *See also Rizzo-Alderson v. Tawfik*, 2019 WL 3324298, at *5 (M.D. Fla. July 1, 2019) ("Of the circuits that have squarely addressed whether mediation costs may be taxable under § 1920, all have held that they are not.") (quoting *Van Voorhis v. Hillsborough Board of County Commissioners*, 2008 WL 2790244, at *4 (M.D. Fla. July 18, 2008)).

[38] Doc. No. 899-1. For example, the order provides that it "controls the subsequent course of *this proceeding*;" that the mediator was Tara Miller Dane; that the mediation deadline was November 5, 2014; and that, "[u]pon motion of the prevailing party, the party's share [of the mediator's compensation] may be taxed as costs *in this action*." (emphasis added).

order.[39] And, second, because federal law governs the taxing of costs in a bankruptcy case, Florida law does not apply to the Bill of Costs filed by Debtor as the prevailing party in this bankruptcy case.[40]

E. Hearing Transcripts

Debtor submitted 25 invoices from Johnson Transcription Service for transcripts of court hearings conducted in the Bankruptcy Court between October 22, 2016, and May 6, 2020.[41] The invoices total $2,371.45. Debtor asserts that transcripts are a taxable cost under § 1920 and that hearing transcripts have been used throughout this case.[42]

Claimant contends that the transcripts are "unrelated to motions for summary judgment,"[43] without specifying any objectionable transcript.

All of the transcripts were for hearings held in the bankruptcy case. The costs of printed or electronic transcripts are taxable under § 1920(2). Claimant has not made an affirmative showing why the transcripts are unrelated to Debtor's objection

[39] The District Court order identifies the mediator as Tara Miller Dane and imposes a mediation deadline of November 5, 2014. The invoice from Nulman Mediation Services, Inc., cites the District Court Action, but does not include Ms. Dane's name or address and states that the mediation took place on December 22, 2014 (Doc. No. 854, p. 29).

[40] *See In re Keogh*, 509 B.R. 915, 943 (Bankr. E.D. Mo. 2014) (The prevailing party in a bankruptcy proceeding was entitled to have its costs taxed in accordance with federal law, not Missouri law as it contended.).

[41] Doc. No. 854, pp. 4-28.

[42] Doc. No. 899, p. 10.

[43] Doc. No. 893, p. 3.

to his Claim or why the transcripts are outside the parameters of § 1920.[44] The hearing transcript costs are taxable in the amount of $2,371.45.

F. Deposition Transcripts

Debtor submitted invoices for transcripts of (1) a deposition of Claimant taken on March 11, 2020, in the amount of $1,288.75,[45] (2) a deposition of Mr. Greenberg taken on May 18, 2020, in the amount of $1,689.64,[46] (3) a deposition of Claimant taken on February 23, 2015, in the amount of $1,364.00,[47] and (4) a deposition of Claimant taken on December 11, 2015, in the amount of $449.65.[48]

Claimant asserts that the deposition taken in February 2015 pre-dates Debtor's bankruptcy case, and the transcript cost therefore is not taxable, and that under Fed. R. Bankr. P. 7026((b)(4)(E)(i), Debtor is required to pay for the transcript of Mr. Greenberg's deposition.[49] Debtor contends that the cost of deposition transcripts is taxable under § 1920(2).[50]

The Court will only tax costs incurred in connection with the matters filed and prosecuted before it.[51] Claimant's deposition in February 2015 was taken in the pre-bankruptcy District Court Action, and the deposition transcript is not taxable in this

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[44] See *In re Amodeo*, 2019 WL 10734046, at *4.
[45] Doc. No. 854, p. 35.
[46] Doc. No. 854, p. 33.
[47] Doc. No. 854, p. 32.
[48] Doc. No. 854, p. 34.
[49] Doc. No. 893, p. 3.
[50] Doc. No. 899, p. 11.
[51] *In re Haun*, 396 B.R. 522, 535 (Bankr. D. Idaho 2008).

case. However, the costs of the three remaining deposition transcripts are taxable under § 1920(2). Rule 7026(b)(4)(E)(i) does not prevent the taxation of the cost of Mr. Greenberg's deposition transcript; the Rule relates only to an expert's compensation for his services, not transcript fees.

G. Filing Fee for Removal of Lawsuit to District Court

Debtor includes $400.00 as a filing fee paid to the United States District Court on January 22, 2014, as a taxable cost. Debtor asserts that the fee relates to his removal of Claimant's prepetition state court complaint to District Court, and that the clerk's fee is taxable under § 1920 because Claimant attached the complaint to his proof of claim in the bankruptcy case.

However, the cost was incurred pre-bankruptcy, not in connection with Debtor's objection to Claimant's Claim in this Court and is not taxable in this case.[52]

III. CONCLUSION

For the reasons explained above, the Court taxes costs against Claimant and in favor of Debtor in the total amount of $6,588.09. The taxed costs represent $789.49 for copying costs, $2,371.45 for hearing transcripts, and $3,428.04[53] for deposition transcripts.

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[52] *In re Haun*, 396 B.R. at 535.

[53] The taxable deposition transcripts are for the deposition of Claimant taken on March 11, 2020, in the amount of $1,288.75, the deposition of Mr. Greenberg taken on May 18, 2020, in the amount of $1,689.64, and the deposition of Claimant taken on December 11, 2015, in the amount of $449.65.

However, costs claimed by Debtor in the total amount of $19,969.50 are not taxable items under Rule 7054 and § 1920 and are not taxable against Claimant. The disallowed costs represent $13,894.25 for experts' compensation,[54] $4,311.25 for mediation fees,[55] $1,364.00 for the transcript of the pre-bankruptcy deposition of Claimant, and $400.00 for the pre-bankruptcy fee for the removal of Claimant's state court complaint to the District Court.

Accordingly, it is

ORDERED:

1. Steven R. Yormak's *Motion to Set Aside Clerk's Order (DE 882) Which Order Included Costs in Judgment (DE 851) as Against Creditor* (Doc. No. 883) is granted in part and denied in part as set forth in this Order.

2. Costs are taxed in favor of Debtor and against Claimant in the amount of $6,588.98. The balance of the costs claimed by Debtor in the Bill of Costs (Doc. No. 854) are disallowed.

The Clerk's office is directed to serve a copy of this Order on interested parties via CM/ECF.

[54] The disallowed experts' fees are the fees for Mr. Larsen in the amount of $6,379.25 and the fees for Mr. Greenberg in the amount of $7,515.00.

[55] The disallowed mediation fees are the fees for Nulman Mediation Services, Inc., in the amount of $1,618.75, the fees for Mandel & Mandel in the amount of $2,242.50, and the fees for Simon Harrison in the amount of $450.00.