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United States District Court, D. Connecticut.

Richard MESSIER, et al., Plaintiffs
v.
SOUTHBURY TRAINING SCHOOL, et al.,
Defendants

No. 3:94CV01706 (EBB). | Sept. 14, 1999.

Opinion

RULING ON PLAINTIFFS' MOTION FOR REIMBURSEMENT OF EXPENSES

BURNS, Senior J.

INTRODUCTION

*1 Plaintiffs have filed this motion, seeking \$9,942.80 for reimbursement to expert witness Dr. Sue Gant, for time she spent in Connecticut allegedly waiting to testify at the trial of this matter. Due to the extreme poor health of defendants' lead counsel, he was unavailable to cross-examine Dr. Gant during the week of February 21–26, 1999. She has filed a bill, seeking \$1,800 per day for “trial fee” for the days of February 21–25 and miscellaneous charges for lodging, meals, and rental cars from February 21–26.

DISCUSSION

Cross-examination of Dr. Gant by lead defense counsel commenced on the afternoon of February 12, 1999. The Court had previously notified counsel that the trial of the matter would be suspended during the week of February 15 through, and including, February 19. As a matter of normal course, the cross-examination of Dr. Gant would have continued on the morning of February 22. The Court accepts defense counsel's representation that he did not know how long his cross-examination of this expert would take.

During the week of February 15, defense counsel became very ill with severe influenza symptoms. The Court will take judicial notice of the many newspaper and medical

reports that the “flu season” was especially virulent during the winter of 1998–1999.

As a result of his illness, after several losses of consciousness and high fever, defense counsel went to the doctor, who confirmed he had a serious case of influenza. Resultingly, on the morning of February 19, defense counsel's co-counsel placed a conference call with the Court and opposing counsel to give a status report of the health of lead defense counsel and requested a two day continuance, until February 24. The Court granted the continuance. Thus, Dr. Gant had three days warning that she would not be needed at the trial of this matter on February 22. She nevertheless came to Connecticut and has submitted a bill along with the present motion for \$5,913.90 for the dates of February 21–23 for “trial time” and other miscellaneous expenses.

On the morning of February 22, lead defense counsel was forced to return to his doctor, as his illness was not getting any better. He received a medical note which indicated that he could not return to work until at least February 24, but that if lead defense counsel was not better by then, the doctor would provide a further notice of disability.

Upon receiving this report, defense co-counsel contacted the Court and opposing counsel and asked for a continuance until either February 26 or February 29. The Court granted the continuance until February 26. The continuance was granted with no penalty of any sort to the defendants.

Hence, Dr. Gant was again given notice in advance that she need not appear until February 26 and could attend to other commitments until that time. She nevertheless has submitted a bill totaling \$3,942.60 for “trial fees” and other miscellaneous expenditures for the days of February 24 and 25.

*2 Plaintiffs' counsel determined next that he would have to take a witness, one Bill Ale, out of turn on February 26 due to Ale's vacation plans. Dr. Gant has submitted a bill for miscellaneous expenses for this date of \$86.30.

LEGAL ANALYSIS

Plaintiffs' counsel contends that defense counsel could have advised him and the Court on February 15 that Dr. Gant's testimony would not take place during the week of February 22–26 and seeks the requested sanctions herein for the intentional obstruction of the effective and efficient administration of justice, pursuant to Local Rule 31. Counsel further argues that no requirement of willingness or bad faith exists in ordering sanctions under

this Local Rule. However, the Second Circuit has held that sanctions are not warranted, under a local rule or any of the federal rules for “conduct attributable to mistake, inadvertence or error of judgment.” *In re Sutter*, 543 F.2d 1030, 1035 (2d Cir.1976) (emphasis added). Each of the cases relied upon by plaintiffs involve: (1) a party who has failed to defend a case diligently; (2) dilatory, improper behavior on the part of counsel; (3) groundless requests for continuances; and (4) the undue burden endured by one party due to the other party’s conduct. See Plaintiffs’ Memorandum of Law at pages 5–9.

The Court declines to accept the analysis of defense counsel’s behavior as being dictated by any of these severe standards. Illness of an attorney, documented by medical notes, most assuredly does not call for the extreme sanctions requested by plaintiffs. Plaintiffs claim that “[i]t was not just once or twice that defendants failed to disclose the true length of delay to the plaintiffs and the Court. Rather, defendants engaged in an incremental practice which resulted in substantial unnecessary costs to the plaintiff.” The Court finds that it was impossible for defense counsel to give an accurate time at which he could return to trial, due to an obviously serious illness. Through no fault of his own, counsel was physically unable to give an accurate date of his ability to return to the trial of this matter. This fact was documented through

medical evidence in the form of the note from his physician. Accordingly, sanctions of any form are unavailable to plaintiffs herein. Had the plaintiffs sent Dr. Gant home until the trial could have commenced again, the Court would have given plaintiffs a concomitant extension of time for Dr. Gant to return to Connecticut. It was plaintiffs who made the incorrect decision to have Dr. Gant remain in Connecticut, when such decision was an unreasonable one, given the reasons for the extensions sought by defense counsel.

CONCLUSION

The Motion for Reimbursement of Expenses [Doc. No. 574] is DENIED. If, however, defendants have not made payment for the depositions of plaintiffs’ experts, as ordered by this Court on April 9, 1999 to be made by May 1, 1999, the payments shall be made by October 15, along with interest at 8% from May 1, 1999. If the payments are not made by October 15, the rate of interest shall rise incrementally on a monthly basis until such payments are made.