

Not Reported in F.Supp.2d, 2008 WL 123596 (S.D.Fla.)  
(Cite as: 2008 WL 123596 (S.D.Fla.))

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United States District Court,  
S.D. Florida.  
David HERARD, Plaintiff,  
v.  
ATN RESTAURANT, INC. d/b/a Harvest Café,  
and Michael Yodice, Defendants.

No. 07-60269-CIV.  
Jan. 8, 2008.

Anthony Maximillien Georges-Pierre, Remer &  
Georges-Pierre, Miami, FL, for Plaintiff.

Chris Kleppin, Barry G. Feingold, Glasser, Boreth,  
Ceasar & Kleppin, Plantation, FL, for Defendants.

*OMNIBUS ORDER*

WILLIAM J. ZLOCH, District Judge.

\*1 THIS MATTER is before the Court upon Plaintiff David Herard's Motion For Reconsideration And Amendment of Court's 11/19/2007 Order (DE 54) On Involuntary Dismissal And Sanctions And For Ratification Of Final Judgment On Alternate Grounds (DE 60), Defendants ATN Restaurant, Inc. d/b/a Harvest Cafe and Michael Yodice's Verified Motion To Tax Costs Against Plaintiff And Remer & Georges-Pierre, P.A. (DE 62), and Defendants ATN Restaurant, Inc. d/b/a Harvest Cafe and Michael Yodice's Motion For Attorney's Fees Against Plaintiff And Remer & Georges-Pierre, P.A. (DE 64), and Plaintiff David Herard's Motion For Sanctions (DE 67). The Court has carefully reviewed said Motions and the entire court file and is otherwise fully advised in the premises.

*I. Background*

Plaintiff David Herard initiated the above-styled cause with the filing of a Complaint (DE 1) on February 26, 2007 alleging certain violations of the Fair Labor Standards Act 29 U.S.C. §§ 201, *et seq.* by Defendants. By prior Order (DE 54), the

Court granted Defendants ATN Restaurant, Inc. d/b/a Harvest Cafe and Michael Yodice's Motion For Involuntary Dismissal For Violation Of Court Order Sanctioning Plaintiff And His Counsel And Requiring Various Documents To Be Produced For The Second Time (DE 51). The Court made several findings of fact, including that Plaintiff's Counsel Anthony M. Georges-Pierre (hereinafter "Georges-Pierre") made three misrepresentations to the Court. Additionally, the Court found that Plaintiff David Herard (hereinafter "Herard") failed to produce tax records requested in Defendants Request For Production propounded on April 24, 2007, and in contravention of two Court orders to produce. *See* DE Nos. 33 & 41.

Georges-Pierre made three misrepresentations to the Court, First, on July 30, 2007, in response to this Court's Order (DE 33) compelling the production of Herard's tax returns, Georges-Pierre filed a Notice Of Compliance (DE 35) reflecting that he fully complied with the Order (DE 33). However, as established at a hearing before the Court on November 13, 2007, Georges-Pierre did not send Defendants' Counsel the requested tax documents. Instead, Georges-Pierre sent an IRS Form 4506, which is used to obtain copies of tax records. Second, in response to this Court's second Order (DE 41) compelling production of Herard's tax returns, Georges-Pierre represented in his Memorandum Of Good Cause (DE 44) filed on October 31, 2007, that "the undersigned has served all items in existence and possession that was (sic) requested in Defendant's Request for Production." DE 44, ¶ 6. Although three months had elapsed since the Court first ordered the production of the tax returns, thus affording Herard and Georges-Pierre sufficient time to acquire the tax returns from the IRS, said returns were not produced. Third, in the same Memorandum Of Good Cause, Georges-Pierre represented that "Defendant is in possession of the outstanding production request .... Thereby, obviating any further Court sanction concerning the now served pro-

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duction requests.” *Id.* This statement by Georges-Pierre can only be interpreted as a representation that the tax returns had been produced and that Defendants were in possession of the same. However, Georges-Pierre subsequently admitted at the hearing held on November 13, 2007, that he never sent the tax returns to Defendants’ Counsel and he never had the tax returns in his possession. DE 58, p. 2.

\*2 After seven months passed from the time Defendants initially requested said records, together with two Court Orders compelling production, the Court granted Defendants’ Motion For Involuntary Dismissal (DE 51), in its Order (DE 54) entered on November 19, 2007. Subsequent to the dismissal of the case, the Court granted Defendants’ Motion For Attorneys Fees (DE 57) and assessed the fees incurred by Defendants in the preparation and execution of their Motion For Involuntary Dismissal against the law firm of Plaintiff’s Counsel, Remer & Georges-Pierre, P.A. *See* DE 59.

#### II. Plaintiff’s Motion For Reconsideration (DE 60)

In the instant Motion (DE 60), Georges-Pierre raises two grounds for reconsideration: first, he asserts that he did not make a misrepresentation by stating “the undersigned has served all items in existence and possession that was (sic) requested in Defendant’s Request For Production;” second, he alleges that Herard misunderstood the deposition question that inquired as to whether he possessed tax records.

Turning to the first ground, Georges-Pierre attempts to rebut only the second misrepresentation listed above. The Court will not engage in a semantics debate as to what Georges-Pierre intended to convey to the Court. Even if the Court accepts as truthful Georges-Pierre’s statement that “the undersigned has served all items in existence and possession that was (sic) requested in Defendant’s Request for Production,” there remain two unexplained misrepresentations that cannot be explained and which impinge upon the veracity of Plaintiff’s Motion. Thus, the Court will not vacate its sanction against the law firm of Georges-Pierre.

The instant Motion (DE 60) also alleges that Herard misunderstood a prior deposition question that inquired as to whether he was in possession of his tax returns. Herard filed an Affidavit (DE 60, Ex. D) on November 28, 2007, after the Court entered its Order (DE 54) dismissing his Complaint, in which he explained his misunderstanding and clarified that he was not in possession of the tax records.

The Court notes that Herard was aware of his misunderstanding on July 27, 2007, when he and Georges-Pierre represented the same to Defendants in the Amended Responses To Request For Production.<sup>FN1</sup> However, neither Herard nor Georges-Pierre ever produced the tax returns. From the time this Court first ordered the production of said tax returns on July 17, 2007, until the dismissal of the action on November 19, 2007, the tax returns were never produced. Regardless of whether Herard possessed the tax records at the time of the deposition, he had sufficient time to acquire and produce them to Defendants.

FN1. In the Amended Responses To Request For Production, Plaintiff amended response number five to reflect the following:

Enclosed IRS Form 4506, Plaintiff is not in possession of his tax returns. Plaintiff has enclosed IRS Form 4506 as well as W-2 forms for the years 2004, 2005 and 2006. At Plaintiff’s deposition, Plaintiff testified that he had his tax returns, believing that his w-2 forms are what Mr. Loyd Glasser was referring to at his deposition. DE Nos. 39, Ex. 2 & 60, Ex. C.

In conclusion, the Court notes that its Order (DE 54) involuntarily dismissing Plaintiff’s Complaint with prejudice, does not result in any more prejudice to Herard than a dismissal without prejudice. Plaintiff’s Counsel stated at the evidentiary hearing that Plaintiff’s claim is now time-barred, and a dismissal without prejudice would prevent

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Plaintiff from seeking further redress. DE 58, p. 9. Plaintiff's Counsel further stated that he sought dismissal without prejudice only to protect his client from the assessment of fees and costs, *Id.* As discussed *infra*, the Court will tax costs against Plaintiff Counsel's firm Remer & Georges-Pierre, P.A., and the Court will deny Defendants Motion For Attorney's Fees (DE 64). Therefore, Herard will not suffer further harm as a result of this Court's dismissal of his Complaint with prejudice, than he would under Plaintiff Counsel's suggested relief of dismissal without prejudice.

### III. Defendants' Motion For Taxation Of Costs (DE 62)

\*3 Defendants move for taxation of costs pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920. Rule 54(d) provides that costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs. Section 1920 provides that a court may tax (1) fees of the clerk and marshal, (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case, (3) fees and disbursements for printing and witnesses, (4) fees for exemplification and copies of papers necessarily obtained for use in the case, (5) docket fees under 28 U.S.C. § 1923, and (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828.

The Court will assess costs against Plaintiff Counsel's firm Remer & Georges-Pierre, P.A., rather than against Plaintiff David Herard. Although it is uncommon to assess costs against counsel, it is within the Court's power pursuant to 28 U.S.C. § 1927 and pursuant to the Court's inherent power. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). With respect to the Court's inherent power, "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and

*submission to their lawful mandates."* *Id.* at 43 (quoting *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821)) (emphasis added).

The Court notes that Plaintiff, through counsel Georges-Pierre disobeyed two Court Orders (DE Nos. 33 & 41). Additionally, Georges-Pierre represented with respect to each Order that Plaintiff had complied with said Orders. In response to the first Order (DE 33) compelling production, Georges-Pierre filed a Notice Of Compliance (DE 35) representing that Herard fully complied with said Order. However, Georges-Pierre sent an IRS Form 4506 rather than the requested tax records. This propelled Defendants to file a Motion For Sanctions (DE 38), which the Court granted. *See* DE 41. The Court's Order (DE 41) ordered Plaintiff, for a second time, to produce the requested tax records. However, Plaintiff failed to do so once again. Although Plaintiff did not produce the tax records, Georges-Pierre filed a Memorandum Of Good Cause (DE 44) representing that "Defendant is in possession of the outstanding production request .... Thereby, obviating any further Court sanction concerning the now served production requests." *Id.* ¶ 6. Due to the flagrancy with which Herard and Georges-Pierre disobeyed this Court's Orders and misrepresented their compliance therewith, the Court dismissed the case. *See* DE 54.

The Supreme Court explained in *Chambers* that "[t]here are ample grounds for recognizing ... that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel." *Chambers*, 501 U.S. at 45. Specifically, a court may assess attorney's fees as a sanction for the "willful disobedience of a court order." *Id.* (quoting *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967)) (internal quotations omitted). In fact, the Court may impose attorney's fees "representing the entire cost of litigation." *Id.* (citing *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 43 S.Ct. 458, 67 L.Ed. 719 (1923)). Thus, the Court certainly possesses the inherent

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power to assess costs against an attorney as a sanction. Additionally, the Court may assess costs against an attorney pursuant to § 1927 when counsel has acted in bad faith. Georges-Pierre's misrepresentations to the Court and failure to obey this Court's Orders demonstrate bad faith. Therefore, the Court will assess costs against Plaintiff Counsel's firm Remer & Georges-Pierre, P.A. pursuant to S 1927 and its inherent power to sanction conduct that abuses the judicial process. The Court now turns to each request by Defendants.

#### A. Service of Process

\*4 According to the instant Motion (DE 62) and the attached Bill Of Costs (DE 62, Ex. 2), Defendant paid \$72.00 in fees to private process servers who served subpoenas, and now seeks taxation thereof. The Eleventh Circuit has held that private process server fees may be taxed pursuant to § 1920. *Equal Employment Opportunity Comm'n v. W & O, Inc.*, 213 F.3d 600, 624 (11th Cir.2000). Accordingly, taxation of the \$72.00 in costs incurred by Defendant for service of process is proper.

#### B. Witness Fees

The Court notes that in the Instant Motion (DE 62), Defendants requested taxation of \$40.00 incurred in witness fees, even though Defendants actually incurred \$45.00. 28 U.S.C. § 1821 limits witness fees to \$40.00 per day. Accordingly, taxation of \$40.00 incurred by Defendant for witness fees is proper.

#### C. Copies Of Records

According to the instant Motion (DE 62) and the attached Bill Of Costs (DE 62, Ex. 2), Defendant incurred \$196.46 in costs for copying records for use in the case, and now seeks taxation thereof. The Court notes that "in evaluating copying costs, the court should consider whether the prevailing party could have reasonably believed that it was necessary to copy the papers at issue." *Equal Employment Opportunity Comm'n v. W & O, Inc.*, 213 F.3d 600, 623 (11th Cir.2000). The Court finds that \$196.46 in costs for photocopying records is unreasonable, especially considering the case did not

proceed to trial. Accordingly, the Court will reduce Defendants request and award taxation of \$50.00 in costs incurred by Defendants for photocopying.

#### D. Court Reporter Fees and Transcript Costs

According to the instant Motion (DE 62) and the attached Bill Of Costs (DE 62, Ex. 2), Defendants incurred \$1,339.15 in costs for deposition transcripts and fees and court transcripts, and now seeks taxation thereof. The Court notes that the taxation of deposition costs is authorized by S 1920 as long as "the deposition was wholly or partially 'necessarily obtained for use in the case.'" *Id.* at 620 (citing *Newman v. A.E. Staley Mfg. Co.*, 648 F.2d 330, 337 (5th Cir. Unit B 1981)). The Court further notes that the Eleventh Circuit has upheld the "taxation of deposition where the losing party listed the deponent on its witness list." *Id.* at 621. Accordingly, taxation is appropriate for all of the deposition costs incurred. Defendants also incurred transcript costs in the amount of \$9.90 for a copy of the transcript of an evidentiary hearing held on November 13, 2007. Accordingly, taxation of \$1,339.15 for the deposition and transcript costs incurred by Defendants is proper.

#### E. Interpreter Costs

According to the instant Motion (DE 62) and the attached Bill Of Costs (DE 62, Ex. 2), Defendants incurred \$425.00 in costs to hire an interpreter for Plaintiff David Herard's deposition. Recovery of costs for the use of interpreters is provided by 28 U.S.C.1920(6). Because Plaintiff David Herard does not speak English as his first language, and required an interpreter to understand questions asked in the deposition, the costs for his interpreter are justified. Accordingly, taxation of \$425.00 for the interpreter costs incurred by Defendants is proper.

\*5 In sum, the Court finds taxation of the following costs appropriate: (1) \$72.00 for service of process; (2) \$40.00 for witness fees; (3) \$50.00 for copies of records; (4) \$1,339.15 for deposition and transcript fees; and (3) \$425.00 for interpreter costs.

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*IV. Defendants' Motion For Attorney's Fees (DE 64)*

In their Motion For Attorneys' Fees, Defendants seek an award of their entire fees incurred during the course of the above-styled cause. Defendants cite the following three reasons to justify such relief: 1) Plaintiff filed a claim knowing that Defendant ATN Restaurant, Inc.'s (hereinafter "ATN") gross annual sales volume falls below the statutory minimum of \$500,000 pursuant to 29 U.S.C 5203(s)(1)(A)(ii) (2006); 2) According to computerized time records, Plaintiff never worked overtime; and 3) Plaintiff and his counsel engaged in abusive litigation tactics.

Regarding the first allegation, there is insufficient evidence in the record to establish that Plaintiff knew ATN's sales volume fell below the statutory minimum. In fact, the record establishes that Plaintiff sought discovery of ATN's tax returns to determine the sales volume from the outset of litigation. However, Defendants did not produce said tax returns until being compelled by this Court, *See* DE 39. With respect to the second allegation, the Court finds it is insufficient to warrant the assessment of attorney's fees as a sanction. Thus, the Court will determine whether it is appropriate to award attorney's fees solely on the basis of the abusive litigation tactics employed by Herard and Georges-Pierre, to which the Court has previously referred.

As discussed *supra*, the Court's inherent power enables it to assess attorney's fees against counsel. *Chambers*, 501 U.S. at 45. However, the Court finds it would be unjust to award Defendants all attorney's fees they have incurred in this case. The Court notes that Defendants may have been able to resolve this case more expeditiously if they had forthwith provided Plaintiff with the tax records establishing ATN's sales volume fell below the statutory minimum and filed the appropriate Motion. Therefore, the Court finds that its prior award of attorney's fees for Defendants' motions filed in an attempt to compel Herard to produce his tax records

is a sufficient sanction.

Accordingly, after due consideration, it is

**ORDERED AND ADJUDGED** as follows:

1. That Plaintiff David Herard's Motion For Reconsideration And Amendment of Court's 11/19/2007 Order (DE 54) On Involuntary Dismissal And Sanctions And For Ratification Of Final judgment On Alternate Grounds (DE 60) be and the same is hereby **DENIED**;

2. That the Defendants ATN Restaurant, Inc. d/ b/a Harvest Cafe and Michael Yodice's Verified Motion To Tax Costs Against Plaintiff And Remer & Georges-Pierre, P.A. (DE 62), to the extent the instant Motion seeks taxation of costs against the law firm of Remer & Georges-Pierre, P.A., it be and the same is hereby **GRANTED**;

\*6 3. Defendants do have and recover from Renter & Georges-Pierre, P.A., the sum of \$1,926.15 as costs incurred in the above-styled cause, together with interest thereon from the date of the Court's Order (DE 54) of involuntary dismissal on November 19, 2007, at a rate of 3.42% per annum, for all of which let execution issue; and

4. That Defendants ATN Restaurant, Inc. d/b/a Harvest Cafe and Michael Yodice's Motion For Attorney's Fees Against Plaintiff And Renter & Georges-Pierre, P.A. (DE 64) be and the same is hereby **DENIED**; and

5. That Plaintiff David Herard's Motion For Sanctions (DE 67) be and the same is hereby **DENIED**.

**DONE AND ORDERED.**

S.D.Fla., 2008.

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(S.D.Fla.)

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