

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

FURLS SUPERMARKETS, INC.,
Debtor.

NO. 7-01-10779 SA

YVETTE GONZALES, TRUSTEE,
Plaintiff,

v.

Adv. No. 02-1205 S

ALBUQUERQUE TORTILLA COMPANY, INC.,
F & R FOODS, L.L.C., a New Mexico limited liability company,
M.I. DISTRIBUTING, an unincorporated entity,
M.I. DISTRIBUTING, INC., a Texas corporation,
and ROBERT MARTINEZ,
Defendants.

**MEMORANDUM OPINION ON PLAINTIFF'S MOTION
FOR ORDER TAXING COSTS UNDER LOCAL
BANKRUPTCY RULE NM LBR 7054-1(g)**

This matter is before the Court on Plaintiff's Motion for Order Taxing Costs under Local Bankruptcy Rule NM-LBR 7054-1(g) (doc 138) and the objection thereto filed by M.I. Distributing, M.I. Distributing, Inc. and Robert Martinez (collectively "MID"). For the reasons set forth below, the Court finds that the Motion is well taken in part and will be granted in part. This is a core proceeding.

BACKGROUND

Yvette Gonzales, the Chapter 7 Trustee, sued Albuquerque Tortilla Company, Inc. ("ATC"), F & R Foods, L.L.C., and MID for overpayments made by the debtor-in-possession during the Chapter 11 phase of the Furr's Supermarkets, Inc. bankruptcy case. The adversary proceeding was based on various common law causes of

action, not on a specific statute. After a lengthy discovery period the case came on for a three day trial. F & R Foods, L.L.C. settled with Plaintiff the morning of trial. The Court took the remainder of the matter under advisement and ultimately entered judgment for Plaintiff against ATC in the principal amount of \$111,468,49, plus pre-judgment interest of \$109,666.67, to accrue interest at the federal judgment rate, and against MID in the principal amount of \$146,346.73, plus pre-judgment interest of \$148,658.10, to accrue interest at the federal judgment rate. The Court denied Plaintiff's request for attorney fees.

After the Court entered judgment, Plaintiff filed two motions for costs. The first, doc 136, seeks costs for trial transcripts, copies and depositions. It is pending before the Clerk of the Court. The second motion for costs is the one presently before the Court. Doc 138. It seeks costs for compiling summaries and computations necessary in the case. Plaintiff and ATC settled the costs issue, therefore the only remaining issue is MID's liability for costs.

DISCUSSION

Plaintiff seeks \$40,497.85 for "summaries and computations." The bill that evidences this cost is based on the number of hours that Rachel Kefauver, Trustee's accountant, spent working on this adversary proceeding. There is no question as to the accuracy or

completeness of the time-keeping. Likewise, there is no question as to the very considerable value to the Court of the evidence arising from the services of Ms. Kefauver.

Plaintiff's claims against the Defendants were common law causes of action not based on statutes; no specific statutes, therefore, govern the award of costs in this case. Rather, Plaintiff must rely on Fed.R.Civ.P. 54, which provides in part:

(d) Costs; Attorney's Fees.

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party.

"Costs" as used in Fed.R.Civ.P. 54(d) are defined by 28 U.S.C. § 1920. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441 (1987). That section provides:

A judge or clerk of any court of the United States may tax as costs the following:

- (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 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.

28 U.S.C. § 1920. "Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d)." Crawford Fitting, 482 U.S. at 441-42. "It

is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party." Id. at 442. But, section 1920 also serves as the outer limit of what a court should award as costs; the Court has no discretion to award items as costs that are not set out in section 1920. Bee v. Greaves, 910 F.2d 686, 690 (10th Cir. 1990).

When the cost is a "witness" fee, see 28 U.S.C. § 1920(3), other than a "court appointed expert" fee¹, see 28 U.S.C. § 1920(6), that cost is further limited by 28 U.S.C. § 1821, which states in part:

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate Judge, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(b) A witness shall be paid an attendance fee of \$40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

¹ Ms. Kefauver was approved to assist the Trustee in her statutory duties. She was not appointed as a "court appointed expert" under Federal Rule of Evidence 706. See Baehr v. Touche Ross & Co. (In re Philadelphia Mortgage Trust), 930 F.2d 306, 308 (3rd Cir. 1991). "Approval" is not "appointment." Id. at 309. "Had Congress intended that the selection of professionals by a bankruptcy trustee should entitle the bankruptcy estate to recover their fees in an adversary proceeding, presumably it would have included specific language to that effect in the Bankruptcy Code." Id. at 310.

"We ... hold that when a prevailing party seeks reimbursement for fees paid to its own expert witness, a federal court is bound by the limit of § 1821(b), absent contract or explicit statutory authority to the contrary." Crawford Fitting, 482 U.S. at 439.

The logical conclusion from the language and interrelation of these provisions is that § 1821 specifies the amount of the fee that must be tendered to a witness, § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed against the losing party unless the court otherwise directs.

Id. at 441.

Therefore, under the rules and statutes discussed above, the Plaintiff is not entitled to the full \$40,497.85 sought. Rather, she is entitled to a total of \$120, representing three days of attendance at trial. There is no question that Ms. Kefauver's efforts benefitted the estate and assisted the trial court immensely in deciding the case. However, this Court lacks discretion to award expert fees in excess of the amounts set forth in the statutes. See Burton v. R.J. Reynolds Tobacco Co., 395 F.Supp.2d 1065, 1081 (D. Kan. 2005):

Plaintiff claims \$229,202.77 as costs for fees for "witness/experts." Section 1920(3) allows the court to tax as costs "[f]ees and disbursements for ... witnesses." Expert witness fees are taxable under § 1920(3) only to the relatively modest extent allowed by 28 U.S.C. § 1821. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987); Hull ex rel. Hull v. United States, 978 F.2d 570, 572-73 (10th Cir. 1992) (district court erred in awarding expert witness fees in excess of those allowed by § 1821). Section 1821 generally

allows a \$40 per day attendance fee plus travel and subsistence expenses related to attendance.

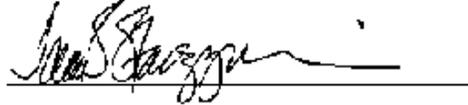
Therein lies the problem with the overwhelming bulk of plaintiff's claimed witness fees. Most are for non-attendance related expenses for expert witnesses such as consultations, affidavit production, medical record review, analysis, and preparation of expert reports and disclosures. These types of items clearly are not witness attendance fees or related travel expenses. As such, they are not taxable.

See also Holland v. Valhi Inc., 22 F.3d 968, 979 (10th Cir. 1994)("[A]bsent a specific statutory provision, an award of expert fees must be based on 28 U.S.C. §§ 1821 and 1920, limiting the amount to \$40 a day.")(Citations omitted.); Gray v. Phillips Petroleum Co., 971 F.2d 591, 594-95 (10th Cir. 1992)("Costs of the action' are specifically defined in 28 U.S.C. § 1920, and do not include expert witness fees unless the expert is appointed by the court. 28 U.S.C. § 1920(6).") And see Shapiro v. Gherman (In re Gherman), 102 B.R. 270, 271 (Bankr. S.D. Fla. 1989)("Expenses incidental to or incurred in preparation for trial, including accountant's fees connected with trial preparation are not taxable as costs.")

There is no statute or rule governing allocation of costs when multiple defendants are responsible for costs. Gagliano v. Ford Motor Co., 556 F.Supp. 1390, 1391 (D. Kan. 1983). But, the Court has the discretion to reduce or allocate costs. Id. In this case, two defendants participated at trial so the Court will divide the \$120 witness fee between them.

CONCLUSION

The Court will enter an Order awarding the Trustee \$60.00 in costs against MID.

A handwritten signature in black ink, appearing to read "James S. Starzynski", is written over a horizontal line.

Honorable James S. Starzynski
United States Bankruptcy Judge

Date Entered on Docket: October 15, 2008

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