

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

M3 GIRL DESIGNS, LLC

Plaintiff,

v.

BLUE BROWNIES, LLC

KRISTA DUDTE, and

ROBERT DUDTE

Defendants.

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CIVIL ACTION NO. 3-09-CV-2390-F

ORDER DENYING DEFENDANTS' MOTION FOR TAXABLE COSTS

BEFORE THE COURT is Defendants' Motion for Taxable Costs filed on August 31, 2012 (Doc. No. 271). Plaintiff filed a response on September 7, 2012 (Doc. No. 278) to which Defendants replied on September 21, 2012 (Doc. No. 285). Having considered the arguments, the Defendants' Motion is **DENIED**.

I. Factual Background

M3 Girl Designs ("Plaintiff") is in the business of producing and selling bottle cap jewelry. Krista Dudte, Robert Dudte, and their business Blue Brownies (collectively "Defendants") are also in the business of producing and selling bottle cap jewelry. Plaintiff filed this suit in December 2009, alleging that Defendants had committed copyright infringement, trademark infringement, and unfair competition under Texas law. On June 27, 2012, the jury rendered a unanimous verdict in favor of Defendants. Now Defendants seek taxable costs as part of the Court's final judgment.

II. Legal Standard

“Unless a federal statute, [the Federal Rules of Civil Procedure], or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. Fed. R. Civ. P. 54. Rule 54(d)(1) “contains a strong presumption that the prevailing party will be awarded costs,” and the district court “may neither deny nor reduce a prevailing party’s request for costs without first articulating some good reason for doing so.” *Pacheco v. Mineta*, 448 F.3d 783, 795 (5th Cir. 2006).

In *Pacheco v. Mineta*,¹ the Fifth Circuit acknowledged that courts have justified withholding costs from a prevailing party for a wide range of reasons, including “(1) the losing party's limited financial resources; (2) misconduct by the prevailing party; (3) close and difficult legal issues presented; (4) substantial benefit conferred to the public; and (5) the prevailing party's enormous financial resources. “ *Id.* However, the court held “that the losing party's good faith is alone insufficient to justify the denial of costs to the prevailing party.” *Id.*

III. Discussion

This entire litigation was devoid of civility and professional conduct. The parties’ pretrial disputes became such a problem that this Court required the clients themselves, in addition to counsel, be present for any hearing before the Court. *See* Doc. No. 97.

This behavior continued throughout the trial as well. The parties’ lack of professionalism presented a problem almost immediately when a dispute arose over Plaintiff’s demonstrative aid during opening statements. After the first day of trial, the Court asked the parties to brief their dispute. The next morning, while addressing the parties’ dispute, the parties began arguing about

¹ *Pacheco v. Mineta*, 448 F.3d 783 (5th Cir. 2006).

whether Plaintiff's counsel permitted Defendants' counsel to inspect the demonstrative aids prior to beginning opening statements. Once again, the parties were accusing each other of misrepresenting facts to the Court. Each party's credibility had become so eroded at this point that the Court could not accept either party's account of what occurred and, instead, had to rely on the court reporter's recollection of the events occurring the previous morning. Having become so concerned about the professional conduct of the lawyers during trial, the Court admonished both party's counsel and instructed that any display of unprofessional behavior would lead to verbal sanctions in front of the jury. Trial Tr. vol. 2, 2–16 (June 19, 2012). Almost immediately following the Court's admonitions, and after trial had resumed, Mr. Hanor, defendants' counsel, without permission, walked before the Court and began to turn Plaintiff's exhibits so that the jury could not see them as Mr. Hemingway, Plaintiff's counsel, questioned his witness. The Court instructed Mr. Hanor to never touch opposing counsel's exhibits without permission. Trial Tr. vol. 2, 17:2–9 (June 19, 2012).

Additionally, The Court was required to issue several corrective jury instructions throughout the trial because of improper arguments and failure to follow the rules of evidence and procedure. Mr. Hanor kept going to the edge of propriety sometimes seeming to suggest that the jury search the Internet and go to stores to see how many other companies were selling the products in which the Plaintiff asserted trade dress rights. As a result, the Court had to remind the jury members on several occasions that they were not permitted to conduct independent investigations regarding the case.

Mr. Hanor displayed Ms. Bradshaw's unredacted personal tax return to the jury despite the fact that it was not admitted into evidence. The Court sustained Plaintiff's objection to admitting Ms. Bradshaw's personal income tax return information because it was unrelated to

M3 Girl Designs and instructed the jury that some information is irrelevant and/or confidential, and must be redacted. However, the Court permitted Mr. Hanor to discuss any “Schedule C” information within the tax return that was related to Plaintiff’s business. Although the Court gave Mr. Hanor clear instruction to show only the Schedule C information, he continued to display and scroll through Ms. Bradshaw’s confidential information only to make the point that Ms. Bradshaw’s tax return did not contain a Schedule C. Trial Tr. vol. 2, 222–226 (June 19, 2012). The Court ruled that the exhibit would not be admitted into evidence to which Mr. Hanor responded: “Well, not yet. We’re not completely done with them. But I’ll get back to them.” *Id* at 225. Frustrated by Mr. Hanor’s deceptive conduct in presenting the jury with Ms. Bradshaw’s confidential information and unprofessional conduct in arguing with the Court regarding its evidentiary ruling, the Court verbally sanctioned Mr. Hanor and instructed the jury why such a sanction was necessary. *Id* at 225–26.

During closing arguments, Mr. Hanor argued that he found it offensive that Plaintiff would seek punitive damages although the Court had declared that punitive damages would not be presented to the jury. Once again, the Court had to issue a jury instruction to rectify Mr. Hanor’s presentation of issues not in evidence.

These occurrences, although not an exhaustive list of the misconduct during this trial, typify the tenor of the entire litigation. While both sides are not guiltless in regard to civility issues, it is Mr. Hanor’s conduct that is in question here because of the filing of this Motion. Although the Court has determined that counsel’s conduct did not cause a miscarriage of justice entitling the Plaintiff to a new trial, the Court is of the opinion that this misconduct is sufficient to overcome the presumption that Defendants, as the prevailing parties, should be awarded taxable costs.

IV. Conclusion

Defendants' Motion for Taxable Costs is **DENIED** for the aforementioned reasons.

IT IS SO ORDERED

Signed this 2nd day of January, 2012.



Royal Furgeson
United States Senior District Judge