**DEPARTMENT M LAW AND MOTION RULINGS**

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**Case Number:** BC508502 **Hearing Date:** November 18, 2021 **Dept:** M

**CASE NAME:** Wade Robson v. Doe 1, et al.
**CASE NO.:** BC508502
**MOTION:** Plaintiff's Motion to Strike or Tax Costs
**HEARING:** **11/18/2021**

## LEGAL STANDARD

A prevailing party in litigation may recover costs, including but not limited to filing fees. (Code Civ. Proc., §1033.5(a)(1).) "A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after [1] the date of service of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or [2] the date of service of written notice of entry of judgment or dismissal, or [3] within 180 days after entry of judgment, whichever is first." (Cal. Rules of Court, rule 3.1700(a).)

Under Code of Civil Procedure section 1033.5(c)(2), allowable costs are only recoverable if they are "reasonably necessary to the conduct of the litigation." Even mandatory costs, when incurred unnecessarily, are subject to section 1033(c)(2). (Perko's Enterprises, Inc. v. RRNS Enterprises (1992) 4 Cal.App.4th 238, 245.) Section 1033.5(c)(4) provides that "[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion." (Code Civ. Proc., §1033.5(c)(4).)

Under California Rules of Court Rule 3.1700, a party may file and serve a motion to tax costs listed in a memorandum of costs. (See CRC Rule 3.1700(b).) Under Rule 3.1700(b)(1), "Any notice of motion to strike or to tax costs must be served and filed 15 days after service of the cost memorandum. If the cost memorandum was served by mail, the period is extended as provided in Code of Civil Procedure section 1013. If the cost memorandum was served electronically, the period is extended as provided in Code of Civil Procedure section 1010.6(a)(4)."

A verified memorandum of costs is prima facie evidence that the costs, expenses, and services therein listed were necessarily incurred. (Rappenecker v. Sea-Land Serv., Inc. (1979) 93 Cal.App.3d 256, 266; see also Cal. Rules of Court, rule 3.1700(a)(1) ["The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case."].) A party seeking to tax costs must provide *evidence* to rebut this prima facie showing. (Jones v. Dumrichob (1998) 63 Cal.App.4th 1258, 1266.) Mere statements unsupported by facts are insufficient to rebut the prima facie showing that costs were necessarily incurred. (Id.)

"If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs." (Lowry v. Port San Luis Harbor District (2020) 56 Cal.App.5th 211, 222, review denied (Jan. 27, 2021) [quoting Ladas v. California State Automobile Assn. (1993) 19 Cal.App.4th 761, 774]; Oak Grove School Dist. of Santa Clara County v. City Title Ins. Co. (1963) 217 Cal.App.2d 678, 698–699].)

## ANALYSIS

***"Court ordered expert" fees***

Plaintiff seeks to strike $30,300.00 for the deposition of Dr. Harrison Pope. Defendants labeled this cost as a court ordered expert. Plaintiff disputes this characterization.

Expert fees are not allowable as costs, unless they are either ordered by the Court or are subject to C.C.P. § 998's cost-shifting provision. (Code Civ. Proc., §§ 1033.5(a)(8), (b)(1); Kahn v. The Dewey Group (2015) 240 Cal.App.4th 227, 237.) "The following items are not allowable as costs, except when expressly authorized by law: (1) Fees of experts not ordered by the court." (Code Civ. Proc., §1033.5(b)(1); see also Sanchez v. Bay Shores Medical Group (1999) 75 Cal.App.4th 946, 949-950.)

Plaintiff argues that the Court never ordered Defendants to retain any expert witness, never ordered an Independent Medical Examination to occur, and Defendants never extended any offer to settle under C.C.P. § 998. (Cunny Decl. ¶3.) As argued by Plaintiff, "[t]he fact that an expert is necessary to present a party's case does not mean that expert has been ordered by the court for purposes of recovery of expert witness fees as costs. [Citation omitted.]" (Sanchez v. Bay Shores Medical Group (1999) 75 Cal.App.4th 946, 950.) Here, Defendant's costs on page 5, item no. 8(c) for $30,300.00 is not recoverable since the expert is not a court-appointed expert. Therefore, Plaintiff's request to strike $30,300.00 is GRANTED.

***IME of Wade Robson - $5,081.36***

Plaintiff argues that Defendants are not entitled to $5,081.36 for the "IME of Wade Robson." Plaintiff implicitly argue that the IME is not a deposition cost. Plaintiff contends that costs of the IME video of the Plaintiff are not provided for under §1033.5 and Plaintiff reiterates that expert fees not authorized by statute, which Defendants are attempting to now re-cast as a "deposition." Here, Code of Civil Procedure section 1033.5 does not provide for costs for independent medical examinations. Therefore, Plaintiff's request to strike $5,081.36 is GRANTED.

***MSJ filing fee - $500***

Since Defendant no longer seeks to recover the costs for the first MSJ, the Court GRANTS Plaintiff's request to strike this cost.

***Deposition transcription costs***

Plaintiff argues that Defendants' transcription costs are clearly excessive. Defendants oppose, arguing that Plaintiff has not met his burden of showing that the costs are excessive. Defendants argue that under Oak Grove School Dist. of Santa Clara County v. City Title Ins. Co. (1963) 217 Cal.App.2d 678, 698, the burden is on the challenging party to show that an item is unreasonable. In reply, Plaintiff argues that under Nelson v. Anderson, (1999) 72 Cal.App.4th 111, 131, the mere filing of a motion to tax costs is sufficient. The Nelson Court addressed this contention and provided that while the Court:

> agree[d] the mere filing of a motion to tax costs may be a "proper objection" to an item, the necessity of which appears doubtful, or which does not appear to be proper on its face. (See Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal.App.2d 678, 698–699, 32 Cal.Rptr. 288.) However, "[i]f the items appear to be proper charges, the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the defendant [citations], and the burden of showing that an item is not properly chargeable or is unreasonable is upon the [objecting party]." (*Id.,* at p. 699, 32 Cal.Rptr. 288; see also, Miller v. Highland Ditch Co. (1891) 91 Cal. 103, 105–106, 27 P. 536.)

(Nelson v. Anderson (1999) 72 Cal.App.4th 111, 131, as modified on denial of reh'g (June 14, 1999).) Here, Plaintiff does not argue that Defendants failed to file a verified costs memorandum. Moreover, the mere fact that costs exceed $2,000 does not mean that the costs are improper or unreasonable on their face. Under Code of Civil Procedure section 1033.5(a)(3)(A), the "Taking, video recording, and transcribing necessary depositions, including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed" are recoverable. (Code Civ. Proc., §1033.5(a)(3)(A).) Since Plaintiff has not provided evidence that these costs are unreasonable, the motion to tax these costs is DENIED.

***Travel costs to depositions***

Travel expenses to attend depositions are recoverable. (Code Civ. Proc., §1033.5(a)(3)(C).) Plaintiff argues that Defendants claim extreme and patently unreasonable travel costs for several depositions. Plaintiff argues that the deposition travel expenses for local depositions are unreasonable because Defendants could have driven to and from such locations. Plaintiff points out that Defendants incurred several hundred dollars for various depositions (a total amount of $1,624.99. (See Mot. at 9:4-21.) Plaintiff argues that the reasonable costs for these depositions should be based on the milage rate provided by the IRS in 2017 IRS Mileage Rates for Business, Medical, and Moving Announced. (See Ex. "5" to Cunny Decl.) Plaintiff contends that the reasonable cost for these depositions is a total of $673.03. (See Mot. at 9:4-21.) In opposition, Defendants explains that the hotels for local depositions made sense given Los Angeles Metro area traffic. Defendants also argue that while Judge Cho had previously struck these costs, Defendants have now provided further evidence to support these costs. In reply, Plaintiff argues that Defendants' convenience decisions resulted in a de facto shifting of attorneys' fees to Plaintiff which are not properly recoverable costs. (Code Civ. Proc., §1033.5(c)(2) ["Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation."].)

Plaintiff also argues that Defendants claim exorbitant travel expenses for out-of-state depositions. (See Mot. 8:18-22.) Plaintiff also generally argues that out-of-state travel costs are unreasonable without explaining why they are unreasonable. Plaintiff seeks to strike $12,807.99 with respect to the out-of-state deposition travel costs. In opposition, Defendants argue that Plaintiff was the one who required defendants to travel by noticing out-of-state depositions. Defendants argue that Plaintiff has not offered evidence to show that these costs were unreasonable.

Here, Plaintiff has shown that the costs incurred for Los-Angeles area depositions merely convenient to the conduct of litigation but not reasonably necessary. However, Plaintiff has not shown that the out-of-state travel costs incurred were unreasonable. Defendants claim $14,432.98 in deposition travel costs. For the reasons explained above, Plaintiff's request to tax costs is GRANTED in part and Denied in PART. The total costs allowed will be $13,481.02.

***Service of process costs***

Plaintiff seeks to tax $2,245.05 in service of process costs for three expert witnesses. In a footnote in the opposition, Defendants agree to reduce the fees sought by $1,000. Plaintiff's motion to tax these costs is GRANTED. The cost is now $1,245.05.

***Conclusion***

For the reasons explained above, the motion to tax costs is granted in part and denied in part. The Court strikes a total of $37,533.32 in costs.