

SOUTHERN DISTRICT OF NEW YORK

----- x
FIVE BOROUGH BICYCLE CLUB, et al.,

Plaintiffs,

-against-

07 Civ. 2448 (LAK)

THE CITY OF NEW YORK, et al.,

Defendants.
----- x

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

Plaintiffs here challenged the constitutionality of a New York City regulation governing group bicycle riding (the "Parade Rules") as well as the New York City Police Department's activities in enforcing the Parade Rules and other laws applicable to bicyclists with respect to so-called Critical Mass rides that originate one a month in Union Square. After first losing on a motion for a preliminary injunction and losing an appeal from that decision, they lost at trial.

Defendants then sought an award of costs in the amount of \$31,880.81. While the Clerk disallowed \$1,985.85 of deposition costs and defendants withdrew an additional \$675 of claims, a total of \$29,219.96 was taxed over plaintiffs' objection. Both parties seek review.

Plaintiffs contend first that no costs should have been taxed at all, chiefly because the case in their view raised important issues and the City has greater financial resources than do plaintiffs. Alternatively, they dispute \$2,148.05 of the amount awarded on the ground that those costs consisted of expedite, daily copy and appearance fees that are not properly taxable in this

district, at least in these circumstances. Defendants challenge the disallowance of the \$1,985.85 for transcripts of two depositions that were not offered at trial.

The Court sustains plaintiffs' objection to the \$2,148.05 for expedite, daily copy and appearance fees. It likewise sustains defendants' objection to the disallowance of the \$1,985.85 for the depositions of McCabe and Rhambarose, as those depositions in all the circumstances were necessary for use in the case. The fact that they were not offered at trial is not dispositive on that issue. *E.g., Anderson v. City of New York*, 132 F. Supp.2d 239, 247 (S.D.N.Y. 2001). Accordingly, the adjusted bill, subject to plaintiffs' remaining objection, is \$29,057.60.

Plaintiffs' contention that no costs should be taxed against them at all because the case raised important issues and the City of New York has greater resources ignores some critical facts.

First, the City incurs enormous litigation costs every year. It pays them largely by taxing its citizens, many of whom are of very modest means. They are unable to pay litigation costs for personal matters far more important to their lives (e.g., welfare entitlement, health insurance benefits, employment discrimination, and landlord-tenant matters) than whether they should be forced to get a permit from the NYPD if they want to go on a bicycle ride involving 50 or more people. Thus, it is far from self evident that the City's taxpayers should not benefit from the recovery by the City of court costs – not attorneys' fees – that routinely are taxed against unsuccessful litigants in federal litigation where claims against the City prove to be without merit.

Second, while this case did raise constitutional claims, the plaintiffs' argument disregards their unwarranted persistence in this case. They continued their attack on the constitutionality of the Parade Rules following the Second Circuit's affirmance of the denial of the preliminary injunction. There was no real hope of success on that claim, yet they persisted at considerable cost to all concerned. Nor, as the final decision after trial made clear, did they have

much of a case with respect to their selective enforcement claim, at least as indicated by the evidence they offered in its support.

In short, the fact that the City of New York has a budget commensurate with its enormous size and the needs of its people does not justify disregarding that its budget comes from its citizens, that its citizens have a valid interest in having the City recoup such litigation costs as routinely are recovered by other successful litigants, and that suing the City should not be an entirely risk-free enterprise. This is perhaps especially so where, as here, the plaintiffs' lawyers handled the litigation at little or no cost to the plaintiffs,¹ a circumstance that removed the economic constraint that often keeps the duration and cost of litigation in some reasonable bounds. While *pro bono* efforts by the Bar generally are to be applauded, they should be undertaken with special attention to the need for ensuring that matters are not pursued without regard to a lack of realistic prospects for success and the value of the interests at stake are taken into account, as well as the very real economic costs to adversaries.

That said, the plaintiffs themselves, who will bear the economic cost of whatever costs are taxed, are only partly responsible for what transpired. While they should have seen the handwriting on the wall after the Second Circuit's affirmance of the denial of the preliminary injunction motion, they no doubt were encouraged, or at least not discouraged, by counsel.

Taking all of this into consideration, the Court grants the defendants' motion [DI 148] to the extent of allowing their claim for the additional \$1,985.85, but it also, in the exercise of discretion, grants plaintiffs' motion [DI 149] to reduce the total costs taxed to the extent of

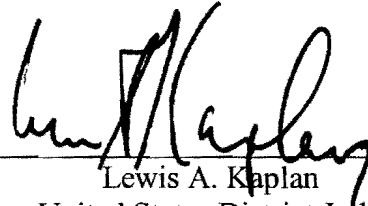
¹

DI 150, Ex. B, at 6-7.

disallowing \$13,057.60. The Clerk shall enter judgment for defendants and against plaintiff Five Borough Bicycle Club in the amount of \$4,000.00 and against each individual plaintiff in the amount of \$2,000.00. The defendants thus will be entitled to recover in the aggregate the sum of \$16,000.00, which is roughly half of their taxable costs, but plaintiffs' liability will be several rather than joint and several. No individual will be responsible for more than \$2,000.00.

SO ORDERED.

Dated: July 12, 2010

A handwritten signature in black ink, appearing to read "Lewis A. Kaplan", is written over a horizontal line.

Lewis A. Kaplan
United States District Judge