UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 13-17204
	)	
MINNIE M. BOWERS SMITH and JAMES SMITH,	)	Chapter 11
	)	
	)	Chief Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	**MEMORANDUM OF OPINION**
	)	**AND ORDER**

The debtors Minnie Bowers Smith and James Smith objected to an amended proof of claim filed by the United States of America on behalf of its agency the Internal Revenue Service. After discovery and just before the evidentiary hearing, the debtors attempted to withdraw their objection. The court ultimately permitted them to withdraw it with prejudice and then entered judgment for the IRS. The IRS moved for a bill of costs, which Minnie Bowers Smith opposes.[1] For the reasons stated, the motion for costs is granted. (Docket 154, 156, 157).

JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B) and (O), and it is within the court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S.Ct. 2594 (2011) and its progeny.

[1] The court notes with sympathy that Mr. Smith recently passed away. Because of that, and for clarity, this opinion will refer only to the debtor Minnie Bowers Smith in the singular even though many of the actions were taken by the debtors together. *See* docket 144.

DISCUSSION[2]

The IRS moves for costs under Federal Rule of Bankruptcy Procedure 7054. Under that rule, the court may allow costs "to the prevailing party except when a statute of the United States or these rules otherwise provides." FED. R. BANKR. P. 7054(b)(1). There is a presumption that costs should be awarded, but the court may deny costs in its discretion. *Singleton v. Smith*, 241 F.3d 534, 539 (6th Cir. 2001).

1. Does Bankruptcy Rule 7054(b) apply to this contested matter?

The debtor contends that Bankruptcy Rule 7054(b) applies to adversary proceedings, but not to an objection to a proof of claim. This is incorrect. An objection to claim is a contested matter. *In re Plastech Engineered Products, Inc.*, 399 B.R. 1, 10 (Bankr. E.D. Mich. 2008). And Bankruptcy Rule 9014(c) makes Bankruptcy Rule 7054 applicable to contested matters. *See* FED. R. BANKR. P. 9014(c).

2. Did the IRS establish that it is the prevailing party?

The debtor's second argument is that costs may only be awarded to the prevailing party and the IRS did not prevail. Looking at the situation rather narrowly, the debtor argues that she prevailed because she ultimately sought to withdraw her objection and allow the IRS claim, which was the relief that the court allowed. If the IRS is the prevailing party, then she contends that the costs requested are not reasonable.

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[2] Although the IRS noticed this matter for hearing, oral argument is unnecessary because motions of this type are generally decided on the papers filed. *See* LBR 9013-1(e).

These are the uncontested relevant facts: The debtor objected to the IRS's claim, the IRS responded, the parties engaged in discovery, and the court set an evidentiary hearing.[3] The parties brought several discovery and trial issues to the court in the week before the hearing. After the court ruled on those issues, the debtor filed a notice of withdrawal of the claim objection. As filed, the notice would have had the effect of dismissing the objection and cancelling the hearing, but it left open the possibility that the debtor could raise an objection in the future.

Bankruptcy Rule 9014 incorporates Bankruptcy Rule 7041, which governs how an action may be dismissed. FED. R. BANKR. P. 7041. After an answer is filed, a plaintiff cannot unilaterally dismiss the matter. In the context of this case, the IRS's response to the objection served as the equivalent of an answer. To dismiss, the plaintiff-equivalent—here the debtor—had to either obtain IRS approval or obtain a court order "on terms that the court consider[ed] proper." FED. R. CIV. P. 41(a)(2); *see In re Wotkyns*, 274 B.R. 690, 693 (Bankr. S.D. Tex. 2002) (applying Rule 41(a)(2) to a claim objection). Because of this procedural requirement, the court entered an order instructing the debtor to file a supplement clarifying whether she was seeking to dismiss with prejudice and stating that the matter would proceed to trial if not.[4] When the debtor elected to have the withdrawal be with prejudice, the court entered an order permitting the dismissal with prejudice and allowing the claim as filed. The issue is whether the IRS can be characterized as the prevailing party under these facts.

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[3] *See* docket 62, 64 and 69. All of this followed resolution of the adversary proceeding brought by the debtor against the IRS. Adv. Pro. 13-1248.

[4] Docket 141.

The Sixth Circuit applies the Supreme Court's analysis of the term "prevailing party" set out in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001). *Maker's Mark Distillery, Inc. v. Diageo N.A., Inc.*, 679 F. 3d 410, 425 (6th Cir. 2012). Under that analysis, a party is the prevailing party where (1) it receives some relief on the merits of its claim; and (2) there is a judicially sanctioned change in the legal relationship of the parties. *Id.* at 425 (citing *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 605). However, the Circuit has not decided whether a party's voluntary dismissal with prejudice under Rule 41(a)(2) entitles the opposing party to prevailing party status under the *Buckhannon* analysis. *See Wolfe v. Perry,* 412 F.3d 707, 722-23 (6th Cir. 2005) (identifying this as an open question); *United States v. Alpha Medical, Inc.,* 102 Fed. App'x 8 at *10 (6th Cir. 2004) (declining to decide whether voluntary dismissal with prejudice under Rule 41(a)(2) satisfied prevailing party test). The Circuit's opinion in *Knology, Inc. v. Insight Commc'ns Co.*, 460 F.3d 722, 727-28 (6th Cir. 2006) suggests, however, that a party's voluntary dismissal with prejudice does not automatically mean that the opposing party has prevailed where the dismissing party was initially granted relief and then decides not to continue the litigation.

Other case authority in the circuit is inconsistent on the issue. *Compare Lum v. Mercedes Benz, USA, L.L.C.*, 246 F.R.D. 544, 546-47 (N.D. Ohio 2007) (concluding that there is not sufficient judicial involvement in granting a plaintiff's motion for voluntary dismissal with prejudice to render the opposing party the prevailing party for purposes of Rule 54(d)), *with Amherst Exempted Vill., School Dist. Bd. of Educ. v. Calabrese*, 2008 WL 2810244 at *4 and *18 (N.D. Ohio 2008) (concluding that a voluntary dismissal with prejudice under Civil Rule 41(a)(2) satisfies the requirements for prevailing party status); *Whittle v. Procter & Gamble,*

2008 WL 4925797 at *3 (S.D. Ohio 2008) (stating that "because the Court granted Plaintiff's motion to dismiss . . . with prejudice, Defendant is the prevailing party"), and *United States v. Estate of Rogers*, 2003 WL 21212749 at *1- 4 (E.D. Tenn. 2003) (same).

The facts in this case satisfy the first part of the *Buckhannon* analysis as to the IRS. The court's order authorizing the dismissal of the objection and allowing the claim gave the IRS all of the relief it requested. Conversely, the debtor did not prevail because she sought to disallow the proof of claim.

The second part of the analysis–whether there is a judicially sanctioned change in the parties' relationship–is more problematic. *Compare Lum*, 246 F.R.D. at 546-47 (concluding that the court does not determine or oversee a dismissal with prejudice under Rule 41(a)(2), *with Amherst Exempted Village School Dist. Bd. of Educ.*, 2008 WL 2810244 at *18 (noting that "when the court enters judgment dismissing the defendant with prejudice, a judicially-sanctioned change in the legal relationship between the parties has occurred: Plaintiff is forevermore estopped from asserting any claims it raised or could have raised against the defendant in the plaintiff's action."). The question is whether dismissing the claim objection had the "necessary judicial imprimatur" on the change in the parties' legal relationship. *Buckhannon*, 532 U.S. at 605. The court concludes that it did.

The court played an active role in the dismissal by virtue of the procedure chosen by the debtor. When the debtor decided to give up her objection to claim, she did not select either of the two routes available to her under the rules: obtain consent of the IRS or move to dismiss. FED. R. CIV. P. 41(a)(2). The court reviewed the filing and imposed the condition that any withdrawal had to be with prejudice. Based on the debtor's response, the court permitted the debtor to withdraw

the objection to claim with prejudice and allowed the claim as filed. This decision is the equivalent of an adjudication on the merits for the IRS in this case. *See Michigan Surgery Inv., LLC v. Arman*, 627 F.3d 572, 576 (6th Cir. 2010). As one court noted:

> [W]hen the court enters judgment dismissing the defendant with prejudice, a judicially-sanctioned change in the legal relationship between the parties has occurred: Plaintiff is forevermore estopped from asserting any claims it raised against the defendant in the plaintiff's action. As the Sixth Circuit observed in *Smoot v. Fox*, 340 F.2d 310, 303 (6th Cir. 1964), a case in which plaintiff sought voluntarily to dismiss defendant, "Dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties. An adjudication in favor of the defendants, by the court or jury, could rise no higher than this."

Amherst Exempted Village School Dist. Bd. of Educ., 2008 WL 2810244 at *18.

Under this reasoning, the IRS is the prevailing party and is entitled to request costs under Rule 7054(b).

3. <u>Should the IRS be awarded its costs for obtaining the deposition testimony of two individuals listed as witnesses?</u>

The IRS requests its costs for obtaining the deposition testimony of Frank Sossi and Amos Mahsua. The categories that may be taxed are identified in 28 U.S.C. § 1920, which provides for the taxation of "[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case[.]" 28 U.S.C. § 1920(2); *see also* 28 U.S.C. § 1920(4) (providing that costs for obtaining copies of materials necessary for the case may be taxed). This authorizes "taxing as costs the expenses of taking, transcribing and reproducing depositions" so long as the depositions are reasonably necessary. *Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989). On the other hand, depositions that are "merely investigative, preparatory, or useful for discovery are not taxable as costs." *Baker v. First Tenn. Bank Nat'l Assoc.*, 142 F.3d 431 at *5 (6th Cir. 1998) (unpublished

opinion). The necessity of a deposition "is determined as of the time of taking, and the fact that a deposition is not actually used at trial is not controlling." *Sales,* 873 F.2d at 120.

The debtor argues that Frank Sossi's deposition was unnecessary because: (1) there is no evidence that Mr. Sossi would have been unavailable for trial; and (2) his testimony at deposition was unfavorable to the IRS's position. These arguments are unpersuasive for the reasons cited by the IRS in its opposition: (1) the IRS used the transcript to support the filings it made as required by the scheduling order;[5] and (2) there was some question as to whether Mr. Sossi was subject to subpoena for the evidentiary hearing as he considered Nashville, Tennessee to be his residence, putting him beyond the subpoena power of this court. Mr. Sossi served as the debtor's former tax advisor and attorney, and his testimony related to the issue of whether of whether the IRS had sent the debtor certain required notices–one of the primary issues to be resolved at trial.[6] The government's costs for the deposition in the amount of $641.21, therefore, are taxed to the debtor.

The debtor also posits that costs for deposing Amos Mahsua, an individual named by the debtor as an expert, should not be taxed because the court ultimately granted the IRS's motion to preclude him from testifying at trial. This argument lacks merit. The relevant focus is whether a deposition was necessary for the litigation and Mr. Mahsua's certainly was. The debtor identified him as her expert. And the deposition proceeded despite their motion to quash because they indicated they intended for him to testify at trial.[7] Whether the deposition was used at trial is not

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[5] See the IRS's exhibit list at docket 94, which identifies the deposition transcript as an exhibit, and its supplemental hearing brief at docket 95, which cites to Mr. Sossi's deposition to support its position.

[6] *See* the Order denying the debtor's motion to quash the subpoena on Mr. Sossi to appear at the deposition at docket 84.

[7] *See* the Order denying the debtor's and Mr. Mahsua's motion to quash at docket 107.

controlling. As a result, the fact that the IRS obtained an order granting the IRS's motion to preclude him from testifying at trial does not weigh in favor of denying the cost of the deposition. Rather, the IRS's use of the deposition to obtain the order provides additional support for taxing this cost. The government's costs for the deposition in the amount of $344.84 are taxed to the debtor.

For the reasons stated, the IRS's motion for costs in the amount of $986.05 is granted.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge