

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MUSLIM COMMUNITY
ASSOCIATION OF ANN ARBOR,

Plaintiff,

Civil Action No. 12-10803
Honorable Patrick J. Duggan
Magistrate Judge David R. Grand

v.

PITTSFIELD TOWNSHIP, *et al.*,

Defendants.

**SUPPLEMENTAL ORDER ON NON-PARTY ZABA DAVIS’
MOTION TO QUASH AND FOR PROTECTIVE ORDER [89]**

A. Background

On July 2, 2014, this Court issued an Order Granting Non-Party Zaba Davis’ (“Davis”) Motion to Quash and for Protective Order. (Doc. #103). In that Order, the Court noted that, pursuant to Fed. R. Civ. P. 37(a)(5)(A), Davis had requested reimbursement of the costs and fees she incurred in filing the underlying motion. (*Id.* at 11, n. 8). The Court found such an award appropriate under the circumstances and directed the parties to confer regarding an appropriate amount to be paid to her pursuant to this rule. (*Id.*).

On August 7, 2014, Plaintiff Muslim Community Association of Ann Arbor (“MCA”) filed objections to this Court’s Order, arguing that the Court misapplied the provisions of Rule 37(a)(5)(A) in awarding costs and fees to Davis, and in failing to apply Rule 45(d)(1)’s sanctions provision (which it argued governs fee and costs awards for actions regarding subpoenas). (Doc. #172). On August 14, 2014, Davis filed a response to MCA’s objections (Doc. #174), and on August 25, 2014, MCA filed a reply (Doc. #175).

On January 29, 2015, the Honorable Patrick J. Duggan issued an Opinion and Order

regarding MCA's objections to this Court's Order. (Doc. #214). In his Order, Judge Duggan noted that "because the potentially sanctionable conduct here [by MCA] involves the misuse of this Court's subpoena power, Rule 45(d)(1) may be the more appropriate Rule under which to consider expense-shifting sanctions." (*Id.* at 4-5). However, Judge Duggan noted that neither party had raised Rule 45(d)(1) in briefing the underlying issue before this Court, and, thus, this Court may not have had the opportunity to consider whether Rule 37(a)(5) or Rule 45(d)(1) was the more appropriate rule to apply when considering Davis' motion for costs and fees. (*Id.* at 5). Judge Duggan concluded as follows:

For this reason, the Court will return the matter to Magistrate Judge Grand so that he can consider in the first instance whether to proceed under Rule 37(a)(5) or Rule 45(d)(1). If the Magistrate Judge chooses to proceed under Rule 37(a)(5), he should consider whether Plaintiff's actions were "substantially justified" and/or whether an award of expenses would be "unjust" under the circumstances. *See* Fed. R. Civ. P. 37(a)(5).

On February 12, 2015, this Court ordered the parties to file supplemental briefs on two issues: (1) whether an award of sanctions is more properly considered under Rule 37(a)(5) or Rule 45(d)(1); and (2) if the Court chooses to apply Rule 37(a)(5), whether MCA's actions were "substantially justified," or "other circumstances make an award of expenses unjust," such that the Court should decline to award sanctions. (Doc. #215). Davis filed her supplemental brief on February 19, 2015 (Doc. #216), and MCA filed its supplemental brief on February 26, 2015 (Doc. #217).

B. Analysis

In her underlying motion, Davis asked this Court to quash subpoenas issued by MCA, pursuant to Fed. R. Civ. P. 45, and to enter an order protecting her from further discovery in this case, pursuant to Fed. R. Civ. P. 26. (Doc. #89). Rule 45(d)(3)(A)(iii) and (iv) provide that, on timely motion, the court must quash or modify a subpoena that requires disclosure of privileged

or other protected matter, or subjects a person to undue burden. Fed. R. Civ. P. 26(c)(1)(A) provides that, for good cause shown, the court may issue a protective order forbidding disclosure or discovery in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Both Rule 26 and Rule 45 provide for an award of costs and attorney's fees under certain circumstances. Rule 26(c)(3) specifically provides that Rule 37(a)(5) governs fee awards in connection with a motion for protective order. Under the terms of that rule, a court must award reasonable expenses (including attorney's fees) to a party or non-party who successfully litigates a motion for protective order, unless the losing side shows that its position was "substantially justified" or "other circumstances make an award of expenses unjust."¹ Fed. R. Civ. P. 37(a)(5). Under Rule 45(d)(1), an attorney or party invoking the Court's subpoena power has a duty to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and courts are required to enforce that duty through the imposition of "an appropriate sanction," including attorney's fees.

In this case, the Court granted Davis' motion to quash (pursuant to Rule 45) and entered a protective order forbidding further discovery (pursuant to Rule 26). (Doc. #103). As the District Court pointed out, then:

[O]n the facts here, expense-shifting is appropriately considered under either Rule 37(a)(5) (because Davis won on her request for a protective order) or Rule 45(d)(1) (because Davis won on her request that the subpoenas be quashed). See 7 Moore's Federal Practice §37.23[11] (3d ed. 2014) ("[I]f a nonparty were to file [a motion for protective order] ... and prevail, and if the court were to conclude that the party pursuing the discovery had resisted the motion without substantial justification, sanctions would appear to be appropriately based either on Rule 45(d)(1) or Rule 37(a)(5)(B)."); *Builders Ass'n of Greater Chicago v.*

¹ MCA does not assert that "other circumstances" exist that would make an award of sanctions unjust. Thus, the Court will not discuss this exception further.

City of Chicago, No. 96-C-1122, 2002 WL 1008455, at *3 (N.D. Ill. May 13, 2002) (“A violation of the duty under Rule 45[(d)(1)] may also be a violation of other rules relating to discovery.”).

(Doc. #214 at 4 (emphasis added)). As did Judge Duggan, this Court acknowledges that there is some authority for MCA’s argument that Davis’ request for an award of costs and attorney’s fees should be considered under Rule 45(d)(1), as opposed to Rule 37(a)(5), because Rule 45(d)(1) is more narrowly-tailored to situations involving the misuse of a court’s subpoena power, and the central underlying issue here was the propriety of the subpoena MCA issued to Davis. (*Id.* (citing *Georgia-Pacific LLC v. Am. Int’l Specialty Lines Ins. Co.*, 278 F.R.D. 187, 189-90 (S.D. Ohio 2010)). Given the facts of this case, however, the Court need not decide whether it is more appropriate to consider Davis’ request for fees and costs under Rule 45(d)(1) or Rule 37(a)(5), as such an award is appropriate under both rules.

As set forth above, under Rule 37(a)(5), a court must award reasonable expenses to a party or non-party who successfully litigates a motion for protective order, unless the losing side shows that its position was “substantially justified.” In other words, “[t]he award of costs is the norm, rather than the exception.” *Boles v. Lewis*, 2009 WL 2021743, at *3 (W.D. Mich. July 7, 2009) (internal citations omitted). A party’s “conduct need not arise to a sanctionable level before costs are awarded; rather, costs should be awarded unless [an exception applies].” *Id.*

In this case, MCA argues that its position – in opposing Davis’ motion to quash and for protective order – was substantially justified. “Substantially justified” means “justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Sixth Circuit has held that a party meets the “substantially justified” standard if “there is a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action.” *Doe v. Lexington-Fayette Urban Co. Gov’t*, 407 F.3d 755, 765 (6th Cir. 2005) (quoting *Pierce*, 487 U.S. at 552)). In this case, MCA has failed to make such a showing. As this Court

made clear in its prior Order, MCA's subpoenas – which sought, among other things, Davis' private correspondence with her neighbors, as well as with Pittsfield Township's representatives – imposed an undue burden on Davis, a private citizen who, at most, is alleged to have distributed materials which increased public opposition to MCA's zoning application. (Doc. #103 at 8-9). In opposing the motion to quash, MCA admitted that it did not suspect that Davis herself engaged in any wrongdoing. (Doc. #95 at 6). Under the circumstances, then, this Court held that MCA's subpoenas unduly burdened Davis' First Amendment rights, as they “would clearly cause her and other individuals to be hesitant about becoming involved in the political process.”² (Doc. #103 at 9-10). The Court concludes that a “reasonable person” would have recognized this impermissible infringement on Davis' First Amendment rights, and therefore finds that in serving the subpoenas and then opposing Davis' motion to quash and for protective order, MCA's actions were not “substantially justified.” *Pierce*, 487 U.S. at 565; *Doe*, 407 F.3d at 765. Thus, under Fed. R. Civ. P. 37(a)(5), Davis is entitled to be reimbursed for the reasonable costs and fees she incurred in filing the underlying motion.

Likewise, if the Court were to accept MCA's argument that Rule 45's sanctions provisions should be applied, an award of costs and fees would still be appropriate because, for the reasons set forth above and in this Court's prior Order (Doc. #103), MCA failed to “take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” Fed. R. Civ. P. 45(d)(1). In its supplemental brief, MCA correctly points out that, “While Fed. R. Civ. P. 45 requires a court to ‘impose an appropriate sanction’ for violations of the rule, it does not mandate the sanction be a fee award.” (Doc. #217 at 3). However, Rule 45(d)(1) clearly gives the court the *discretion* to impose a fee award, as it explicitly provides that

² MCA did not file an objection to this aspect of the Court's ruling.

an “appropriate sanction” may include “reasonable attorney’s fees.” Here, for all of the reasons previously articulated, the Court concludes that an award of costs and fees is equally appropriate under Rule 45(d)(1) because MCA failed to take reasonable steps to avoid imposing an undue burden on Davis in issuing the underlying subpoenas, which led to the instant third-party motion practice. *See, e.g., Night Hawk Ltd. v. Briarpatch Ltd., L.P.*, 2003 WL 23018833, at *9 (S.D.N.Y. Dec. 23, 2003) (“Sanctions are properly imposed and attorney’s fees are awarded where, as here, the party improperly issuing the subpoena refused to withdraw it, requiring the non-party to issue a motion to quash.”); *Green v. MOBIS Alabama, LLC*, 2014 WL 2041857, at *2-3 (M.D. Ala. May 16, 2014) (awarding costs and fees where party “failed to take any steps, let alone any reasonable ones, to avoid imposing an undue burden or expense on [the subpoenaed person]”).

C. Conclusion

For the foregoing reasons, **IT IS ORDERED** that Davis may pursue recovery of the costs and fees she reasonably incurred in connection with her Motion to Quash and for Protective Order [89]. Within twenty-one (21) days of the date of this Order, counsel for Davis and MCA shall meet and confer to discuss, in good faith, an appropriate amount of such fees and costs to be paid to her by MCA. In the event no agreement is reached, Davis may, within that same timeframe, submit a properly-supported petition to the Court for her reasonable costs and fees. MCA shall have seven (7) days after the filing of any such petition to file a response.

SO ORDERED.

Dated: April 24, 2015
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE TO PARTIES REGARDING OBJECTIONS

The parties' attention is drawn to Fed. R. Civ. P. 72(a), which provides a period of fourteen (14) days from the date of receipt of a copy of this order within which to file objections for consideration by the district judge under 28 U.S. C. §636(b)(1).

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on April 24, 2015.

s/Eddrey O. Butts

EDDREY O. BUTTS

Case Manager