

Winterthur Swiss Ins. Co. v. Socio Micronesia, Inc., 8 ROP Intrm. 212 (2000)
In re: THE K-B BRIDGE LITIGATION

**WINTERTHUR SWISS INSURANCE CO.,
Appellant,**

v.

**SOCIO MICRONESIA, INC., ALFRED A. YEE & ASSOCIATES, INC.,
AIKEN, INC., LEO A. DALY COMPANY, SOCIO CONSTRUCTION
COMPANY, INC., KOREAN REINSURANCE CORP., HARDING
LAWSON ASSOCIATES, INC., HARDING LAWSON ASSOCIATES
GROUP, INC., DYWIDAG SYSTEMS INTERNATIONAL USA,
DYCKERHOFF & WIDMANN AG, T.Y. LIN INTERNATIONAL,
Appellees.**

CIVIL APPEAL NO. 99-36
Civil Action No. 132-97

Supreme Court, Appellate Division
Republic of Palau

Decided: August 17, 2000

Attorneys for Appellant Winterthur Swiss Insurance Co.: Robert Ted Parker, Berg & Parker
LLP; Ernestine Kawai Rengil

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Fowler LLP

Attorneys for Appellees Harding Lawson Associates, Inc., and Harding Lawson Associates
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Attorneys for Appellees Dywidag Systems International USA, Inc.: Friedrich W. Seitz, Richard
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1213

Attorneys for Appellees Korean Reinsurance Corp.: Stephen A. Postelnek, James F. O'Brien,
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Attorneys for Appellees Leo A. Daly Company and Alfred A. Yee, Trustee for Aiken, Inc., Alfred
A. Yee & Associates, Inc.: Kenneth R. Kupchak, Damon Key Leong Kupchak Hast

Winterthur Swiss Ins. Co. v. Socio Micronesia, Inc., 8 ROP Intrm. 212 (2000)
BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate
Justice.¹

PER CURIAM:

Appellees Socio Micronesia, Inc. (“Socio”), Dywidag Systems International, USA (“Dywidag”), Leo A. Daly Company and Alfred A. Yee (“Daly”), and Harding Lawson Associates (“Lawson”) have filed motions for appellate costs and fees expended in defending the judgment issued in their favor and against Appellant Winterthur Swiss Insurance Company (“Winterthur”). The motions are granted in part and denied in part. We grant the motions for the portions attributed to reasonably necessary photocopying expenses, but not the portions attributed to telephone calls, facsimile charges, fees for computerized legal research, or travel expenses. We also hold that postage and courier fees are not recoverable as costs.

Applicable Law

Pursuant to its rule-making authority,² this Court has promulgated the Rules of Appellate Procedure. Rule 39 provides in pertinent part that “if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered” ROP R. App. Pro. 39(a). “Costs” in this context does not mean all expenses related to the litigant’s success. Allowable costs vary from jurisdiction to jurisdiction, but generally costs will include court-related expenses, such as fees paid to the court or process servers. These costs are expressly mentioned in the Palau National Code.³ Two other common categories of costs are expenses for items actually used in court, and expenditures necessary to comply with the Rules of Court.⁴ Hence, photocopying expenses required to properly file and serve a brief may be classified as “costs.” *Kulas v. Becheserrak*, 7 ROP Intrm. 106 (1998). Phone calls, facsimile transmissions, and computerized research charges do not fall within any of the usual categories, and are not reimbursable “costs.” *Id.* Attorney travel expenses are not “costs” as such, but may sometimes be recoverable because of vexatious or bad-faith actions on the part of the losing party, or by a showing that the prevailing party had no choice but to hire off-island counsel. *Id.* at 107.

¹ Associate Justice Beattie was a member of the panel that decided the appeal. He subsequently resigned, and took no part in the decision on this motion.

² “The Supreme Court shall promulgate rules governing the administration of the court, legal and judicial professions, and practice and procedure in civil and criminal matters.” ROP Const. art. X, § 14.

³ 14 PNC § 703.

⁴ *See, e.g.*, 28 U.S.C. §§ 1920(3) and (4), permitting an award of costs for printing, and for copies of papers needed for use in the case, and §§ 1920(2) and (6), allowing an assessment for fees of the court reporter and court-appointed experts and interpreters.

Winterthur Swiss Ins. Co. v. Socio Micronesia, Inc., 8 ROP Intrm. 212 (2000)
Socio's motion

Socio asks for a total of \$3,292.90, with a breakdown as follows: \$100 deposited with this court to cover the cost of faxing and mailing of orders to Socio; \$1,111.60 for photocopying documents for filing with the court and service on other parties, at the rate of \$.10 per page; \$131.90 for courier service fees; \$180.59 for telephone and fax charges; \$164.40 for postage fees; and \$1,604.41 for travel expenses incurred for oral argument.

The photocopying charges were all for documents served to the other parties, and because they were necessary for the case, are recoverable. Socio has not made any allegations of bad faith or vexatious actions on Winterthur's part, nor have they alleged that they had no choice but to hire off-island counsel. Therefore, under *Kulas*, the travel expenses are not allowed. Also under *Kulas*, the telephone and fax expenses are not allowed.

We have not yet spoken on whether postage and courier fees are recoverable, but such expenses generally are not considered taxable costs. Federal courts in the United States do not recognize these as statutory costs. See *In re Penn Central Transportation Co.*, 630 F.2d 183, 191 (3d Cir. 1980); *Wahl v. Carrier Manufacturing Co.*, 511 F.2d 209, 217 (7th Cir. 1975); *Litton Systems, Inc. v. American Tel. and Tel. Co.*, 613 F. Supp. 824, 836 (S.D.N.Y. 1985); cf. *Burda v. M. Ecker Co.*, 2 F.3d 769 (7th Cir. 1993) (postage allowed in case involving award of Rule 11 sanctions against plaintiff's two attorneys). We hold that postage and courier fees are expenses that do not fall within any of the categories of reimbursable costs, will not be considered "costs" within the meaning of Rule 39, and therefore are not recoverable here. The \$100 fee Socio paid to this Court for postage to expedite mailings to it are similarly not recoverable. Socio's motion is granted in the amount of \$1,111.60, and the remainder is denied.

Dywidag's motion

Appellee Dywidag has moved to recover costs in the amount of \$39,084.59. An accompanying affidavit indicates that these expenses were incurred largely in the Trial Division, rather than in the Appellate Division. This Division does not award trial costs in the first instance, so all costs incurred at the trial level will not be considered.

The only two expenses of Dywidag that could be deemed incurred on appeal are the trip to Palau for oral argument in April, 2000, and possibly some portion of the copying expenses; however, it is not possible to ascertain which portion of the copying is attributable to the appeal. Because of Dywidag's failure to adequately break down its photocopying costs, such costs will not be awarded.

Dywidag cites to *Intercontinental Trading Co. v. Johnsrud*, 1 ROP Intrm. 569 (1989), in support of its motion for travel expenses. There the Appellate Division upheld an award of counsel's travel expenses "in view of the circumstances," where the opposing party had "not behaved appropriately with respect to the litigation." *Id.* at 576-77. The party taxed had "repeatedly and wilfully failed to meet deadlines" and eventually defaulted, admitting later that they had forgotten about the case. *Id.* at 573-74. Those facts are not applicable here, where no

Winterthur Swiss Ins. Co. v. Socio Micronesia, Inc., 8 ROP Intrm. 212 (2000) such showing of inappropriate behavior on Winterthur's part has been made. The portion of the motion regarding travel expenses is denied, as are the other portions of the motion.

1215 Daly's motion

Daly asks for a total of \$6,163.32, broken down as follows: \$502.75 for copying documents for service on other parties, at rates of \$.20 and \$.15 per page; \$77.10 in courier services; \$3,181.30 in travel expenses; \$406 in telephone calls; \$1,037.47 in fax charges; and \$919.30 for computerized legal research. For the reasons given above, the copying charges are allowed, but not the expenses for telephone calls, fax services, computer research, or courier services.

Daly argues that given the few private attorneys available on Palau, travel expenses should be recoverable. Daly cites the complexity and potential damages involved in this case, and the need of parties to retain counsel experienced in complex litigation in cases when local counsel cannot be expected to provide such expertise. However, the original construction litigation was settled. This phase concerned prosaic issues of contract interpretation and indemnification. There is no showing that local counsel could not have adequately addressed these issues, and travel expenses are therefore denied. *See Nakatani v. Nishizono*, 1 ROP Intrm. 718, 721 (1989) (refusal of an award of travel expenses as a sanction where local counsel could have handled the matter).

Daly also argues that Winterthur engaged in bad faith discovery tactics, and cites to actions occurring in the Trial Division. This argument is irrelevant to the appeal, however. Daly further characterizes several statements that Winterthur made as misstatements of fact, but the objected-to statements do not rise to the level of sanctionable behavior. Daly's motion is thus granted in part, for the total amount of \$502.75.

Lawson's motion

Lawson moves for a total reimbursement of \$5,453.88, broken down as follows: \$77.80 for copying costs "associated with the appeal," and travel expenses of \$5,376.08. Lawson also alleges that it was unable to retain adequate local counsel to represent its interests.

Lawson's conclusory statement that its copying charges were "associated with the appeal" does not allow this Court to determine if the copying was reasonable necessary or for the mere convenience of the attorneys. Because of the inadequacy of the statement, we deny reimbursement. As to Lawson's arguments regarding travel expenses, the above analysis is applicable, and as a result, Lawson's motion is denied in its entirety.

CONCLUSION

The motions are granted in part and denied in part. The portion of costs stemming from reasonably necessary photocopying associated with the appeal are allowable; the portions relating to telephone calls, facsimile charges, fees incurred for computerized legal research,

Winterthur Swiss Ins. Co. v. Socio Micronesia, Inc., 8 ROP Intrm. 212 (2000)
travel expenses, postage, courier fees, and costs associated with the trial proceedings are denied.