77 Fed.Appx. 948
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3.
(Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

R. VANKE, Plaintiff—Appellant,
v.
Sherman BLOCK; Los Angeles County Board of Supervisors; Lee Baca, Sheriff, Defendants—Appellees.
R. Vanke, Plaintiff—Appellee,
v.
Lee Baca, Sheriff, in his official capacity only, Defendant—Appellant.

Nos. 02–55600, 02–56472. | Argued and Submitted Sept. 11, 2003. | Decided Oct. 9, 2003.

Pretrial detainees brought action alleging they were "over-detained" in county jail so that there could be a check made on them for warrants, wants, and holds. Some 30 months after a preliminary injunction was granted, a motion for permanent injunction was denied and the action was dismissed as moot as a result of sheriff's full compliance with the preliminary injunction. Detainees then moved for an award of attorneys' fees pursuant to the civil rights attorney fee statute. The United States District Court for the Central District of California, Dean D. Pregerson, J., 2002 WL 1836305, awarded fees. Both parties appealed. The Court of Appeals held that: (1) detainees' claim for injunctive relief was moot; (2) detainees were not entitled to additional discovery; and (3) Prison Litigation Reform Act (PLRA) precluded awarding attorneys' fees.

Affirmed in part and reversed in part.

***949** Appeal from the United States District Court for the Central District of California, Dean D. Pregerson, District Judge, Presiding. D.C. No. CV–98–04111–DDP.

Before: KLEINFELD, WARDLAW, and W. FLETCHER, Circuit Judges.

Opinion

MEMORANDUM[*]

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36–3.

R. Vanke, on behalf of a class of similarly situated persons (collectively, "Vanke"), appeals the district court's grant of summary judgment in favor of defendants the former and current Los Angeles County Sheriffs and the County of Los Angeles (collectively, "Block"). Block cross-appeals the district court's award of attorneys' fees to Vanke. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm the grant of summary judgment and reverse the award of attorneys' fees.[1]

[1] Block's motion to strike Vanke's "third brief on the consolidated appeals" is DENIED.

[1] The district court correctly ruled that Vanke's claim for injunctive relief is moot. "A case m[ay] become moot if subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior c[annot] reasonably be expected to recur." *United States v. Concentrated Phosphate Ass'n,* 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). According to the uncontroverted declaration of Charles M. Jackson, the Commander of the Correctional Services Division of the Los Angeles County Sheriff's Department, Block has adopted a new policy for processing court-ordered releases that complies with the terms of the preliminary injunction, and which goes even further toward promoting the prompt release of detainees. Such a conclusive change in policy, absent an indication that it was promulgated only in response to ongoing litigation, is sufficient to render a claim moot. *See White v. Lee,* 227 F.3d 1214 (9th Cir.2000).

[2] Nor did the district court abuse its discretion in denying Vanke's Rule 56(f) motion. Vanke's attorneys did not diligently pursue their previously available discovery options, having conducted only two depositions in the three-year period ***950** during which the preliminary injunction was pending, one of which was terminated at Vanke's counsel's behest only twenty minutes after it commenced. *Panatronic USA v. AT & T Corp.,* 287 F.3d 840, 846 (9th Cir.2002) (no abuse of discretion unless the movant diligently pursued its previous discovery opportunities and shows how allowing discovery would have precluded summary judgment). Furthermore, Vanke's counsel failed to "proffer" facts to show that the information sought, "the names of persons (inmates) who were subjected to the unconstitutional policy in violation of the preliminary injunction," actually exists. *See Nidds v. Schindler Elevator Corp.,* 113 F.3d 912, 921 (9th Cir.1996) ("The burden is on the party seeking additional discovery to proffer sufficient facts to show that the

evidence sought exists, and that it would prevent summary judgment"); *see also VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.,* 784 F.2d 1472, 1475 (9th Cir.1986) (appropriate to deny a Rule 56(f) motion "where it was clear that the evidence sought was almost certainly nonexistent or was the object of pure speculation").

[3] Although the district court correctly found that Vanke was the "prevailing party" under 42 U.S.C. § 1988(b), *Watson v. County of Riverside,* 300 F.3d 1092, 1096 (9th Cir.2002), it erred in awarding attorneys' fees because the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, precludes such an award. PLRA section 1997e(d) requires that a "prisoner" plaintiff prove an "actual violation" of his rights to be entitled to fees. "Prisoner" is in turn defined as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h). The definition of plaintiff's class, as certified by the district court in its order "Granting Motion for Class Certification," by its plain language, brings the class within the PLRA definition of a prisoner. Because this case became moot before the plaintiff class had shown an actual violation of rights, section 1997e(d) precludes an award of attorneys' fees.

AFFIRMED in part/REVERSED in part. Each party shall bear its own costs on appeal.

Parallel Citations

2003 WL 22331964 (C.A.9 (Cal.))