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United States District Court, N.D. Texas, Dallas Division.

Debra WALKER, et al
v.
UNITED STATES DEPARTMENT OF HOUSING and Urban Development, et al

No. 3–85–CV–1210–R, 3–96–CV–1866–R.
|
Sept. 18, 2001.

ORDER

BUCHMEYER, District J.

***1** After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the findings, conclusions and recommendation of the United States Magistrate Judge are adopted.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to the District Court's order of reference filed on March 30, 2001, on August 8, 2001, came on to be heard Homeowner Plaintiffs' Motion for Attorneys' Fees and Costs filed on June 18, 1999, and having considered the relevant pleadings and exhibits and the testimony of Eric W Pinker, the magistrate judge finds and recommends as follows:

In their motion the Movants seek an award of in excess of one quarter of a million dollars from the Dallas Housing Authority (DHA) pursuant to 42 U.S.C. § 1988

Issue is joined on several issues which are addressed seriatim:

1. Are Movants "prevailing parties" as that term has been interpreted by the courts in applying § 1988?
The Movants became parties to this 15 year old controversy with the filing of their original complaint on July 3, 1996, in No. 3–96–CV–1866–R, which was subsequently consolidated with the present action on July 12, 1996. In April 1996 the District Court had entered its remedial order which in pertinent part ordered DHA to develop all new public housing units in predominantly white areas until there were as many units in predominantly white areas as there were in minority areas. *Walker v. City of Mesquite, Texas,* 169 F .3d 973, 977 (5th Cir.1999). In carrying out its obligations imposed by the said remedial order, DHA selected sites adjacent to Movants' neighborhoods on which to build a portion of its new public housing units.

Movants sought an order from the District Court enjoining the construction of the public housing in their neighborhoods. Following a three day hearing before the District Court in late October 1996, the District Court denied the Homeowners' request for injunctive relief on September 18, 1997. *See* also Transcript, Docket Item No. 1652. The Homeowners appealed and sought *inter alia* a stay of the District Court's remedial order, which was granted by the Fifth Circuit.

On March 16, 1999, the Fifth Circuit vacated the remedial order and remanded the case to the District Court for further proceedings with the further proviso that the stay previously granted would remain in effect pending entry of a revised remedial order. *See Walker v. City of Mesquite, supra,* 169 F.3d at 988. The Fifth Circuit's opinion addressed in detail the issue of whether "race conscious" site selection was appropriate. *Id.* at pages 981–987. In addressing whether the Homeowners are

"prevailing parties" it is important to note that the Court did not foreclose a remedial order permitting or requiring DHA to build public housing on the subject sites, but rather left the issue open for the District Court to decide after a further hearing.

***2** Although the Homeowners have achieved a preservation of the status quo *ante,* it does not constitute a judgment in their favor, a necessary prerequisite to establishing a party's entitlement to "fee shifting" as a "prevailing party." *See Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources, Inc.,* 532 U.S. 598, 121 S.Ct. 1835, 1839 (2001). Moreover, were DHA to choose not to build public housing on the site and to sell the property to a third party, *Buckhannon* makes clear that recovery of attorneys' fees under § 1988 would be foreclosed.[1]

The Homeowner Plaintiffs are not "prevailing parties". Therefore their motion for attorneys' fees should be denied.

2. Should an award of attorneys' fees be made?
Although the magistrate judge is of the opinion that the first issue is dispositive of the motion, I will address this issue. While § 1988(b) expressly provides that attorney's fees *may* be awarded in the court's discretion, as interpreted by the case law, a court abuses its discretion in refusing to award a prevailing plaintiff attorneys' fees and expenses absent "special circumstances". *E.g. see Ellwest Stereo Theatre v. Jackson,* 653 F.2d 954 (5th Cir. Unit B 1981).

It is well established that a "losing defendant" cannot defeat a request for attorneys' fees based upon the defendant's "good faith" belief that it was doing the right thing or that it believed that its conduct was lawful. Even under circumstances where a governmental entity's conduct is consonant with existing state law or when a legislative body has withheld funds from such a defendant to perform services which a civil action seeks to obtain, courts have held that such do not constitute "special circumstances" foreclosing a fee award.

However, DHA's situation is somewhat unique in that it was under a court order to do that which it did, i.e. to construct new public housing units in predominantly white areas. The fact that DHA purchased land for such construction adjacent to the Homeowners' neighborhoods appears to have been mere happenstance and driven only by economics and the availability of vacant land. DHA's involvement in this action is briefly recounted in *Walker, supra,* at 169 F.3d 976–77. The order which mandated DHA's conduct was entered only after DHA was found to have repeatedly violated a previously entered consent decree, and after the District Court held a trial in September 1994 with respect to remedies.

Unlike those cases in which "good faith" in various contexts was insufficient to constitute a "special circumstance," DHA was under a specific federal court order to act in the manner in which it did in selecting sites in predominantly white areas of metropolitan Dallas. In such a situation DHA should not be placed to the Hobson's choice of *either* violating an order of a court, thereby avoiding the possibility of later filed claims, while at the same time exposing itself to contempt proceedings (particularly in light of its past history) *or* of obeying the order and exposing itself to being required to reimburse complaining homeowners for their attorneys' fees and expenses. Accordingly this warrants a finding of "special circumstances" justifying denial of the Homeowner Plaintiffs' motion.

***3** Further, although it is understandable why Movants do not seek recovery of any of their fees and expenses from the indigent Walker Plaintiffs, it appears to the magistrate judge to be inequitable to permit them to recover all of their recoverable fees and expenses from DHA.[2] I would find this to be a special circumstance—which in the event that DHA is determined to be liable under § 1988—warranting an equitable reduction of the "lodestar" to more appropriately reflect a *pro rata* assessment of the fees and expenses which should be reimbursed by DHA.

Finally, the magistrate judge is of the opinion that the Homeowner Plaintiffs' fee request should be denied or substantially reduced as a result of their failure to substantiate their request under well-established principles. *See* Part 3, *infra.*

3. How much are the Homeowner Plaintiffs entitled to receive?
Although for the reasons stated in Part 1, *supra,* the Movants have failed to establish that they are "prevailing parties", in both the court's notice letter to counsel and at

the hearing on August 8, 2001, the magistrate judge advised counsel that he would include a recommendation as to the amount of attorneys' fees and expense Movants would be entitled to receive if it were determined that they were "prevailing parties." For the reasons set out below, the magistrate judge *sua sponte* finds that such a calculation should be deferred.

In *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933 (1983), the principal case dealing with the assessment of attorneys' fees, the Supreme Court set out the requirements to be met by a party seeking attorney's fees under § 1988 and the standards by which a court is to determine the amount to be assessed. The Court observed that "A request for attorney's fees should not result in a second major litigation. *Ideally,* of course, litigants will settle the amount of a fee." (Emphasis added). *Id.* at 438, 103 S.Ct. 1941. This overly optimistic prediction may derive from the fact that the Supreme Court is two-tiers above the district courts, which in the first instance must make such determinations.

Under the best of circumstances assessing the amount of attorneys' fees in Movants' case would be a daunting task. For example, during the period covered by their request—May 10, 1995 through April 30, 1999—over 55 pages of docket entries have been generated, albeit not all related to matters involving the homeowners. At the time the magistrate judge threw up his hands, as it were, I had spent more than nine hours perusing the homeowners' billing statements sent by their attorneys, as well as reviewing six volumes of the court's records in an effort to discharge my judicial function. Frankly judicial resources are too scarce to warrant this amount of time to a matter which does not directly deal with the merits of a federal court action.

Given that Movants are seeking more than $250,000.00, the long established principles of *Hensley,* and the numerous reported opinions dealing with attorney fee issues, most particularly the Fifth Circuit's opinion in *Walker v. U.S. Department of Housing and Urban Development,* 99 F.3d 761 (5th Cir.1996)—an attorney's fee opinion arising out of this *very* case, it is inconceivable that the Homeowner Plaintiffs would have the audacity to rely on such a shoddy marshaling of evidence to support their claim.[3]

***4** As *Hensley* notes, "... the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended. The applicant should exercise 'billing judgment' with respect to hours worked." *Id.* In *Walker, supra,* 99 F.3d at 769 and at n. 9, the Fifth Circuit noted that ideally both hours charged and hours written off should be provided. Here no hourly records reflecting hours expended, but not charged, have been included. However, the billing records themselves demonstrate an absence of "billing judgment". The Movants did such a poor job of documenting their attorneys' time that they initially included time billed by one of their attorneys while engaging in drafting press releases and preparing for a media interview. These errant charges were not lost on DHA and in their reply Movants concede that these non-legal related hours cannot be recovered.

Another demonstrable instance of lack of 'billing judgment' appears in the law firm's invoice dated August 27, 1997, which includes over 26 hours of time devoted to research regarding mandamus proceedings. No mandamus action was ever instituted. As noted by the Fifth Circuit in *Walker, supra,* 99 F.3d at 769. "[Parties] cannot have prevailed on issues they did not pursue."

These are not the only instances of a lack of billing judgment reflected in Movants' documents which the magistrate judge has examined, but a more detailed cataloging of additional questionable non-reimbursable charges will await the time if and when it becomes appropriate to calculate their transferable fees and expenses.

A more grievous error appearing in their documentation—which at best constitutes gross negligence—is their attempt to recover from DHA fees charged by their attorneys for time devoted *exclusively* to responding to the Walker Plaintiffs' motions and discovery issues. Specifically they seek to recover for 39 hours of attorneys' time in researching and responding to the Walker Plaintiffs' motion for summary judgment filed on August 13, 1996. On September 28, 1996, the Walker Plaintiffs filed a motion to determine the sufficiency of Movants' response to a Rule 36 request. This dispute was ultimately addressed by the magistrate judge in an order filed on October 21, 1996. Movants did not prevail on their discovery posture, but more to the point there is no basis for their attempt to recover for more than 75 hours of time beginning on August 14, 1996, with respect to discovery in which DHA was not even involved.[4] The foregoing examples include over 100 hours of attorneys' time on matters which did not involve DHA at all and are clearly not recoverable from DHA.

RECOMMENDATION:
For the foregoing reasons it is recommended that the District Court find that the Homeowner Plaintiffs are not prevailing parties. In the alternative, it is recommended that the District Court find that "special circumstances" exist which warrant denying the Homeowner Plaintiffs' motion for attorneys' fees and expenses.

***5** Further, in the event that the District Court finds that the Homeowner Plaintiffs are entitled to recover fees and expenses pursuant to 42 U.S.C. § 1988, that the motion be referred back to the magistrate judge for recommendation with respect to the amounts which should be awarded.

A copy of this recommendation shall be transmitted to counsel for the parties.

All Citations

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Footnotes

1 In *Buckhannon* the Supreme Court squarely rejected the "catalyst theory" as a basis for finding that a party was a "prevailing party" within the purview of § 1988. The petitioners in *Buckhannon* apparently argued strenuously that a failure to accept the "catalyst theory" would enable a party, by its own conduct, to foreclose an opponent's ability to obtain attorney fees. This argument notwithstanding, the court held that the "catalyst theory" was not authorized under the clear legislative language and the Supreme Court's prior opinions. *Id.* at 1842–43. *See also Johnson v. Rodriguez,* 260 F.3d 493, 2001 WL 845180 (5th Cir.2001).

2 The magistrate judge is aware that non-prevailing parties in this case *may* be held jointly and severally liable for attorneys' fees. *See Walker v. U.S. Department of Housing and Urban Development,* 99 F.3d 761, 772–73 (5th Cir.1996).

3 Their evidence consists of the law firm's billing records, an affidavit of Thomas M. Melsheimer with respect to the hourly rates charged by the law firm's attorneys and paralegals (a non-issue in light of DHA's concession that the rates were customary and reasonable) and less than thirty minutes of testimony presented by Eric Pinker.

4 It is unnecessary to recount the numerous instances in which Movants seek to recover for time devoted to telephone conferences with the Walker Plaintiffs' counsel.