Attorney's Fees – U.L. v. Carteret 10/2/86

• CL
• Defendant's Brief (North Brunswick)

Pgs. 15

P.i. 4009

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Ocrober 2, 1986

Honorable Eugene D. Serpentelli
Ocean County Courthouse
CN-2191
Toms River, NJ 08754

RE: Urban League of Greater New Brunswick, et al., vs. The Mayor and Council of the Borough of Carteret, et al., Civil No. C 4122-73

Dear Judge Serpentelli:

Enclosed please find original and copy of Brief regarding the above captioned matter.

Thanking you for your prompt attention in this matter, I remain,

Cordially,

ROBERT J. LECKY

RJL:gbd
Encls.

cc: Barbara Stark, Esquire

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	Civil No. C 4122-73 (Mount Laurel) DEFENDANTS' BRIEF

ATTORNEY FOR DEFENDANT
TOWNSHIP OF NORTH BRUNSWICK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Con't)

I. PLAINTIFFS ARE NOT ENTITLED TO COUNSEL FEES PURSUANT TO 42 U.S.C.A. § 3612(c).

The awarding of counsel fees in New Jersey is governed by R. 4:42-9:

> R. 4:42-9 provides that no fee for legal services shall be allowed in the taxed costs or otherwise except in certain specified instances. Subsection (a)(8) thereof allows counsel fees in all cases where permitted by statute. This rule embodies the traditional "American rule" that the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. The narrowness of the specific exceptions is to be rigorously enforced, "lest they grow to consume the general rule itself."

Martin v. American Appliance, 174 N.J. Super. 382, 383-84 (Law Div. 1980) (citation omitted). "It is well settled that counsel fees may be awarded only in those cases in which such an award is expressly authorized by R. 4:42-9(a)." Carmel v. Borough of Hillsdale, 178 N.J. Super. 185, 188 (App. Div. 1981); see also Time Mechanisms, Inc. v. Qonarr Corp., 422 F. Supp. 905 (D.N.J. 1976); Jersey City Sewerage Authority v. Housing Authority of Jersey City, 70 N.J. Super. 576 (Law Div. 1961). The rationale behind this rule is the general principle that:

> sound judicial administration is best advanced if litigants bear their own counsel fees. Right to Choose v. Byrne, 91 N.J. 287, 316, 450, A.2d 925 (1982). Consistent with this policy, legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable absent express authorization by statute, court rule, or contract.

State of New Jersey, Department of Environmental Protection v. Ventron Corp., 94 N.J. 473, 504 (1983).

Rule 4:42-9 was specifically adopted to prevent abuses regarding the allowance of counsel fees:

> [I]t is well settled that the rule is to be scrupulously applied and is limited to awarding counsel fees in the few specified situations. Sunset Beach Amusement Corp. v. Belk, supra, at 167, 162 A.2d 834; Sarner v. Sarner, 38 N.J. 463, 185 A.2d 851 (1962); Gerhardt v. Continental Ins. Cos., 48 N.J. 291, 301, 225 A.2d 328 (1966). Virtually all counsel are aware of this general rule, and the briefs submitted on behalf of the applicants reflect their groping to fit the instant situation into one of R. 4:42-9's niches.

Bergen County Sewer Authority v. Borough of Bergenfield, 142 N.J. Super. 438, 450 (Law Div. 1976). Plaintiffs in the present action are similarly groping to fit their situation into one of R. 4:42-9's niches, but their efforts will be shown to be futile. Recognizing that R. 4:42-9 requires a statute on which to base a claim of attorneys' fees, Plaintiffs have chosen 42 U.S.C.A. § 3612(c) (West 1977) which provides as follows:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

While § 3612(c) authorizes an award of attorneys' fees to a prevailing plaintiff in a Fair Housing Act action, Plaintiffs' reliance on it is clearly misplaced. Plaintiffs have not achieved the status of prevailing plaintiffs in a Fair Housing Act Action, and thus, an award of attorneys' fees based on

§ 3612(c) will not stand.

Plaintiffs rely on Bung's Bar & Grille v. Florence Township, 206 N.J. Super. 432 (Law Div. 1985), to suggest that, although their federal claims were not even addressed by the court, they, nonetheless, are entitled to attorneys' fees. In Bung's, property owners challenged local improvement assessments on both state and federal grounds. Although plaintiffs had not received a favorable ruling on their federal § 1983 claim, they were held still entitled to recover costs and attorneys' fees under 42 U.S.C. § 1988. The court reasoned that an award of fees was justified as the state and federal grounds which plaintiffs asserted were based on related legal theories and the constitutional claim itself was substantial. In Bung's the court relied for its decision on the merits of a New Jersey statute rather than addressing the plaintiffs' civil rights claims under 42 U.S.C. § 1983. Both the federal and the nonfederal grounds, however, were based on due proven analysis; both were governed by the same legal theories and both provided the same avenues of relief. Similarly, in Brown v. City of Newark, 202 N.J. Super. 1 (App. Div. 1985), an award of attorneys' fees was warranted where there was a common nexus of fact between the state and federal constitutional claims. In Brown, the plaintiffs alleged denial of equal protection of the law under both the state and federal constitutions, as well as violations of the federal Civil Rights Act, 42 U.S.C.A. § 1983 in regard to an ordinance regulating

peddling. In Brown a common nexus was apparent in that the state claim mirrored its federal counterpart. The same does not hold true in the present action. Plaintiffs contend that they are the prevailing party in this matter under South Burlington County N.A.A.C.P. v. Mt. Laurel Township, 92 N.J. 158 (1983), and thus are entitled to attorneys' fees based on their alternate Fair Housing Act claim. Clearly, however, Plaintiffs' state equal protection claims under the Mt. Laurel decision are separate and distinct from their claim under the Fair Housing Act. Unlike in Bung's, the two claims, one federal and one nonfederal, are not based on related legal theories. Having prevailed solely on the nonfederal claims, Plaintiffs are precluded from obtaining an award of attorneys' fees based solely on the conceptually distinct federal claim. Whereas in Bung's, plaintiffs' state and federal due proven claims were close and analytically the same, the same does not hold true in the present action.

The Mt. Laurel doctrine on which Plaintiffs rely is an exclusionary zoning doctrine. What has been called the Mt. Laurel obligation requires that "municipalities' land use regulations provide a realistic opportunity for low and moderate income housing." South Burlington County N.A.A.C.P. v. Mt. Laurel Township, supra, 92 N.J. at 198. The Mt. Laurel decision was grounded on claims of discrimination based on wealth and income, not on race. Nowhere in its 120 pages does the case refer to race. Rather, Mt. Laurel is aimed at protecting the

rights of low to moderate income people, regardless of their race. By contrast, the Fair Housing Act, 42 U.S.C.A. §§ 3601 et seq., is based by necessity on other forms of discrimination. The general purpose of the FHA is to forbid conduct that consists of a refusal to rent or sell property to a person because of his race, color, religion, sex, or national origin after a bona fide offer has been made. See 42 U.S.C.A. § 3604(a); see also Fort v. White, 38 F. Supp. 949 (D. Conn. 1974); Jeanty v. Mckey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974); (racial discrimination in renting an apartment); Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973). Clearly, Plaintiffs' federal and nonfederal claims are not based on sufficiently related legal theories, but rather, unlike those in Bung's, are separate and distinct. An award of attorneys' fees based on Plaintiffs' Fair Housing claim is not warranted where that claim is clearly diverse from Plaintiffs' nonfederal grounds on which the liability determination was ultimately based. Taken to its extreme, Plaintiffs' reasoning suggests that any time a federal statute authorizing attorneys' fees is in some fashion appended to a non-fee-qualifying claim, an award of fees may still be allowed if the plaintiff prevails only on the non-fee-qualifying claim. Clearly, this violates the rationale underlying R. 4:42-9(a)(8) which, as previously noted, requires express authorization for such awards. In Right to Choose v. Byrne, 91 N.J. 287 (1982) it was held that the plaintiffs must prevail on

at least some of their federal claims to be prevailing parties and, thus, to be entitled to attorneys' fees under 42 U.S.C.A. § 1988. Similarly, in the present action Plaintiffs have clearly not prevailed on their federal Fair Housing Acts claim, and therefore, are not entitled to an award of attorneys' fees based on that claim.

An analogous situation is presented in Latino Project, Inc. v. City of Camden, 701 F.2d 262 (3d Cir. 1983). In Latino, the court held that no attorneys' fees could be awarded where counsel had not filed a civil action with regard to the Title VII claims of its clients, on which such an award could be based. Similarly, in the present action, it is as if no Fair Housing Act claim had been raised as it was not even considered in making the final determination.

It is undisputed that R. 4:42-9(a)(8) includes federal as well as state statutes which permit recovery of counsel fees. In Carmel v. Borough of Hillsdale, supra, plaintiffs appealed the denial of their application for an award of counsel fees pursuant to 42 U.S.C.A. § 1988 following their successful challenge to the validity of a local anti-pornography ordinance. Their challenge was based on both alleged violations of § 1983 and on the state grounds of preemption of the ordinance's subject matter. Carmel v. Borough of Hillsdale, supra, 178 N.J. Super. at 188. In reviewing the case, the court recognized that, while the trial

judge had authority to award fees under § 1988, that authority was subject to the court's discretion. Id. The court noted that:

> an award of counsel fees was not here precluded by reason of the alternative state grounds relied on by the trial judge in invalidating the challenged ordinance. The fact remains that the trial judge expressly relied as well on his conclusion that the ordinance did constitute a violation of 42 U.S.C.A. § 1983. We are satisfied that where a party prevails on both state and fee-qualifying federal issues, an apportionment may be made in respect of the legal services involved in each and an award allowed pursuant to 42 U.S.C.A. § 1983 for the services attributable to the federal issue.

Id. at 190. (emphasis added). Unlike in Carmel, Plaintiffs have not prevailed on both their state and fee-qualifying federal issues. In Carmel, only those fees attributable to the federal issue were allowed. It follows that, since Plaintiffs' case was resolved solely on state constitutional issues, no award of fees is warranted.

II. PLAINTIFFS ARE NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES OR COSTS BECAUSE OF THE UNTIMELINESS OF THEIR CLAIMS.

It is significant to note that an award of attorneys' fees, like that of costs, is within the discretion of the court. In referring to an award of attorneys' fees, the court in Winer Motors, Inc. v. Jaguar Rover Triumph, Inc., 208 N.J. Super. 666, 678-79 (App. Div. 1986) stated as follows: "The fact that such a fee is authorized does not mean that the court is obliged to

award it." Similarly, with regard to costs, New Jersey Statutes Annotated provide: "Except as otherwise provided by law, costs may be allowed or disallowed in the discretion of the court to any party in any action, motion, appeal or proceeding, whether or not he be successful therein; and where allowed, they may be taxed according to law." N.J.S.A. 2A:15-59 (West 1952). This discretion, however, is limited by N.J.S.A. 2A:15-65, which provides as follows:

> If costs are not taxed within 6 months next after the entry of a judgment or order or, where the judgment or order becomes the subject of review or further litigation, within 6 months after such judgment or order is finally disposed of, no costs shall thereafter be allowed or taxed, unless the court, upon good cause shown, orders allowance and taxation thereafter.

Plaintiffs assert their claim of entitlement to costs under R. 4:42-8(a), which provides for the allowance of costs to a prevailing party. See Helton v. Prudential Property & Casualty Insurance Co., 205 N.J. Super. 196 (App. Div. 1985) (allowance and amount of attorneys' fees as well as costs are discretionary with the trial court). In denying an award of attorneys' fees, the court in In re Katz' Estate, 40 N.J. Super. 103 (Ch. Div. 1956) stated: "Costs were not recoverable at common law co nomine. They were awarded only by virtue of statutory or rule authority. Counsel fees are deemed analogous to costs and as such, in New Jersey, may be awarded only by virtue of a provision of the rules." Id. at 107.

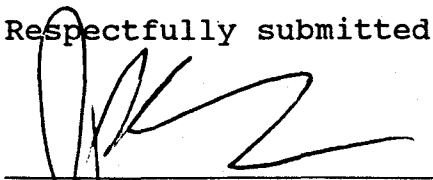
Having raised the issue of costs and fees for the first time

two years after this case was resolved rather than within six months after entry of a judgment or order as required, Plaintiffs must show good cause for their delay or their request must be disallowed (N.J.S.A. 2A:15-65). The directive of 2A:15-65, providing that, unless good cause is shown, no costs shall be allowed, is mandatory, not permissive. Thus, Plaintiffs must establish good cause for their delay. Untimeliness in petitioning for costs and fees may be grounds for denial. See Matter of Grandy, 52 Or. App. 15, 627 P.2d 895 (1981) (petition for costs denied where it was made only two days after deadline and no extraordinary circumstances beyond counsel's control were shown). Plaintiffs have neither acknowledged the lateness of their petition nor offered any explanation for it. It is hard to conceive of any plausible justifiable reason for their two-year delay in petitioning for costs. Such delay is clearly unreasonable and is, by itself, a sufficient basis for denial of Plaintiffs' claim for attorneys' fees, as well as costs. Absent an extraordinarily good excuse, it would be unfair and unjust to hold the Defendants liable for costs in light of the Plaintiffs' excessive delay.

CONCLUSION

Given both the lack of statutory authority on which to base Plaintiffs' claim for attorneys' fees and the extreme untimeliness of Plaintiffs' claim for costs and fees, Defendants respectfully request that the Court deny Plaintiffs' application for attorneys' fees and costs.

Respectfully submitted,



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