2017 IL App (1st) 162475-U

SECOND DIVISION
July 18, 2017

No. 1-16-2475

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TIFFANY HENYARD, STANLEY H. BROWN, and ROBERT G. HUNT, JR.,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	
v.	)	No. 15 CH 14094
VILLAGE OF DOLTON, ILLINOIS, an Illinois Municipality, RILEY H. ROGERS, in his official capacity as Mayor, and MARY KAY DUGGAN, in her official capacity as Village Clerk,	)	Honorable Celia Gamrath, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE MASON delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in denying plaintiffs' petition for attorney's fees where plaintiffs' federal claims were not substantial and the federal and state law claims did not arise out of a common core of operative facts.

¶ 2 We revisit this case following remand directing the trial court to enter summary judgment in favor of plaintiffs, Tiffany Henyard, Stanley Brown and Robert Hunt, because defendants Village of Dolton, Illinois, Riley Rogers, in his official capacity as Mayor, and Mary Kay

Duggan, in her official capacity as Village Clerk, adopted a recall ordinance[1] that was not first approved by voter referendum. Following the trial court's entry of summary judgment in plaintiffs' favor, plaintiffs filed a petition for attorney's fees[2] under the Civil Rights Attorney's Fees Award Act of 1976 (Section 1988) (42 U.S.C. § 1988 (2000)) asserting they were a prevailing party in an action seeking to enforce equal protection of the law and due process. The trial court denied plaintiffs' petition for attorney's fees, finding: (1) plaintiffs would not have prevailed on the federal claims because they lacked merit and (2) the federal and state claims were distinct and not part of a common core of operative facts. Finding no basis for an award of attorney's fees, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiffs filed this declaratory action seeking to invalidate an ordinance (Village of Dolton Ordinance No. 15-022 – "Recall of Elected Officials," (approved June 1, 2015)) providing for the recall of elected officials. Plaintiffs raised a number of legal challenges to the ordinance, including that the Village, as a home rule unit, was required to submit the recall issue to a voter referendum before enacting the ordinance. Plaintiffs, who were elected trustees of the Village and currently serving a four-year term, were subject to recall under the ordinance and sought injunctive relief against the ordinance's enforcement. Plaintiffs' complaint included both state law claims (violation of home rule powers and a limitation on the right to vote) and federal law claims (equal protection and due process violations). Following the trial court's order

[1] The ordinance authorized the recall of elected officials except during the first year in office or last eight months in office. Village of Dolton Ordinance No. 15-022, § 1-14-4 (approved June 1, 2015).

[2] "Attorney's fees" is the prevalent form as noted in Garner, A Dictionary of Modern Legal Usage 91 (2d ed. 1995).

granting defendants judgment on the pleadings and denying plaintiffs' motion for summary judgment, plaintiffs appealed.

¶ 5 In an opinion dated January 11, 2016 (*Heynard v. Village of Dolton*, 2016 IL App (1st) 153374, ¶ 29), this court found the recall ordinance invalid because the Village failed to obtain prior voter approval via referendum before adopting it. Accordingly, we remanded the case and directed the trial court to enter summary judgment in plaintiffs' favor. *Id*. On March 7, 2016, shortly after this court's opinion and before the trial court complied with the mandate, the Village adopted Ordinance No. 16-009 "An Ordinance Repealing Chapter 14 of Title 1 of the Village of Dolton Municipal Code, 'Recall of Elected Officials,' " which repealed the recall ordinance.

¶ 6 On remand, plaintiffs filed a motion for summary judgment. Defendants opposed plaintiffs' motion given the recent repeal of the ordinance, which they argued rendered the case moot. On June 9, 2016, the trial court entered an order granting plaintiffs' motion for summary judgment and declared the ordinance unconstitutional as exceeding the Village's home rule powers as provided in Article VII, Section 6(f) of the Illinois Constitution (Ill. Const. 1970, art. VII, § 6(f)).[3]

¶ 7 On July 12, 2016, plaintiffs filed a petition for attorney's fees and costs totaling $51,093 asserting that they, as prevailing parties, were entitled to reasonable attorney's fees under section 1988 relating to their constitutional civil rights claims, which alleged that the ordinance violated both equal protection of the law and due process. Section 1988 allows a court in any action under section 1983 (42 U.S.C. § 1983) to award the prevailing party reasonable attorney's fees as

[3] Section 6(f) provides: "A home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law." Ill. Const. 1970, art. VII, § 6(f).

part of the costs. Plaintiffs asserted that they were prevailing parties because they successfully obtained a judicial order invalidating the ordinance and that the federal (fee-shifting) claims were substantial and derived from a common core of operative facts with the successful state (non-fee-shifting) claims.

¶ 8 The trial court rejected plaintiffs' contentions, finding that their federal and state claims were distinct claims based on different facts and legal theories. The trial court explained that plaintiffs prevailed only on the state claims and their inclusion of federal claims, which remained undecided, provided an insufficient basis to award attorney's fees under section 1988. Plaintiffs now appeal the trial court's ruling denying their petition for attorney's fees.

¶ 9 ANALYSIS

¶ 10 As a threshold matter, the parties disagree on the applicable standard of review with plaintiffs advocating for *de novo* review and defendants urging an abuse of discretion standard. Plaintiffs acknowledge that we generally review orders granting or denying attorney's fees for an abuse of discretion, but contend that *de novo* review applies here because the decision whether to award attorney's fees requires statutory interpretation presenting a pure legal question. On the other hand, defendants claim that section 1988 mandates that we review for abuse of discretion since it specifically provides that a court "in its discretion" may award fees. 42 U.S.C. § 1988 (b) (2000).

¶ 11 The question whether plaintiffs meet the statutory definition of "prevailing party" involves a legal issue and thus *de novo* standard of review. See *Melton v. Frigidaire*, 346 Ill. App. 3d 331, 334 (2004) (whether a litigant is a prevailing party for fee-shifting purposes is subject to *de novo* review); *Zessar v. Keith*, 536 F. 3d 788, 795 (7th Cir. 2008) (*de novo* standard applies to the legal question of how broadly to construe the statutory term prevailing party); *Palmetto Properties, Inc. v. County of DuPage*, 375 F. 3d 542, 547 (7th Cir. 2004) (review of a

party's classification as a prevailing party for purposes of awarding attorney's fees under section 1988 is reviewed *de novo*).

¶ 12 At the outset, we reject defendants' argument that plaintiffs failed to present a sufficiently complete record because the record does not include a report of proceedings of the fee hearing or a bystander's report. Although a complete record aids this court in its review of the lower court's findings and rulings, our review is not impeded by the incomplete record as the issues presented for our analysis are legal and not fact based.

¶ 13 On the merits, plaintiffs claim entitlement to attorney's fees based on (i) the judicial ruling in their favor invalidating the ordinance on state law grounds and (ii) the lack of any adverse ruling on the federal law claims, which remained undecided. Citing *Maher v. Gagne*, 448 U.S. 122, 132, n. 15 (1980), plaintiffs contend they satisfy the criteria for a fee award under section 1988: (1) the plaintiff must be a prevailing party; (2) the federal claim must be substantial; and (3) the state and federal law claims must arise out of a common core of operative facts. We find the test articulated in *Caputo v. City of Chicago*, 113 Ill. App. 3d 45, 48 (1983),[4] relied on by defendants, not relevant because in *Caputo* the trial court actually entered a finding against the plaintiffs on the federal claims, whereas here, the federal claims remain undecided. Consequently, we adopt the three-part *Gagne* test to determine whether attorney's fees should be awarded.

[4] The *Caputo* test provides that attorney's fees should be awarded *only* where the litigant prevails on a federal statutory or constitutional law claim or the federal claim remains intimately involved in the case until the parties enter into a settlement or consent decree. *Caputo*, 113 Ill. App. 3d at 48. But the *Caputo* test has been criticized for rejecting federal law standards and formulating a new test to determine whether attorney's fees should be awarded where the plaintiff prevailed on claims other than the federal claims. *County Executive of Prince George's County v. Doe*, 300 Md. 445, 459, n. 12 (1984).

¶ 14 Regarding the first requirement of *Gagne*, plaintiffs assert they were prevailing parties because a judicial decree invalidated the ordinance on state law grounds, which provided the relief requested and resolved a significant issue in their favor.

¶ 15 Under section 1988, a court may exercise its discretion and award reasonable attorney's fees to a prevailing party in any action or proceeding to enforce section 1983. *Dupuy v. Samuels*, 423 F. 3d 714, 719 (7th Cir. 2005). A plaintiff seeking attorney's fees under section 1988 must initially establish that he or she is a prevailing party. *Tampam, Inc. v. Property Tax Appeal Board*, 208 Ill. App. 3d 127, 132 (1991). To be considered a prevailing party under section 1988, a litigant must have "prevailed on the merits of at least some of his claims." *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980). More specifically, a litigant is a prevailing party after obtaining: (1) a judgment on the merits; (2) a settlement agreement enforced through a consent decree; or (3) some other "judicially sanctioned change in the legal relationship of the parties." *Zessar*, 536 F. 3d at 795; *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 604 (2001); *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 326 F. 3d 924, 932 (7th Cir. 2003). At a minimum, the plaintiff must demonstrate the resolution of a dispute that changes the legal relationship between the parties, *i.e.*, some relief on the merits of his claim. *Dupuy*, 423 F. 3d at 719; *Zessar*, 536 F. 3d at 795. Importantly, to be considered a prevailing party, there must be a judicial *imprimatur* that brings about a change in the parties' legal relationship. *Zessar*, 536 F. 3d at 796.

¶ 16 We doubt that plaintiffs can be deemed prevailing parties. The most they can argue, because their federal claims were never addressed on the merits, is that their lawsuit was a "catalyst" for repeal of the ordinance. But this theory, as a basis for a fee award has been rejected. *Buckhannon*, 532 U.S. at 610. In any event, we need not decide this issue given plaintiffs' inability to satisfy the other two *Gagne* criteria.

¶ 17 Regarding the second *Gagne* requirement, plaintiffs failed to demonstrate that their federal claims were substantial. A claim is not considered substantial if " 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' " *Hagans v. Lavine*, 415 U.S. 528, 538 (1974) (quoting *Ex parte Poresky*, 290 U.S. 30, 32 (1933)). An insubstantial claim has also been equated with concepts such as "essentially fictitious," "wholly insubstantial," "obviously frivolous," and "obviously without merit." *Id*. at 537.

¶ 18 Plaintiffs contend that their equal protection claim was substantial because the ordinance, without a rational basis, created a disparity in treatment among the Village's elected trustees, *i.e.*, those who were subject to the ordinance (the Mayor's political opponents) and those who were not subject to the ordinance (the Mayor's political allies). Plaintiffs similarly contend that their due process claim was substantial because the ordinance had no rational basis and plaintiffs had a protected property interest in their elected office that could not be curtailed without proper notice. Plaintiffs also assert that both federal claims were substantial because the ordinance's purpose was to harm the Mayor's political opponents, which cannot be rationally related to a legitimate government interest.

¶ 19 Here, plaintiffs' federal claims attack the validity of recall ordinances in general, which necessarily requires a finding that the claims were not substantial. Plaintiffs contend that the ordinance violated equal protection of the law because it targeted the trustees who were the Mayor's political opponents, but given that the Mayor was also subject to the ordinance, plaintiffs' contention that the purpose of the ordinance was to harm the Mayor's opponents–"a politically unpopular group"–lacks merit. See *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (equal protection of the law cannot exist where there is a

desire to harm a politically unpopular group as there can be no legitimate governmental interest in doing so).

¶ 20 Also, because the recall of public officers is a right afforded to voters as a means to remove an official whom they no longer want to remain in office (*In re: petition for removal of Bower*, 41 Ill. 2d 277, 282 (1968)), recall ordinances have a rational relationship to the purpose they are designed to serve. See *In re: petition for removal of Struck*, 41 Ill. 2d 574, 579 (1969) (the public's right to recall an elected official was part of the political reform advanced during the "progressive movement" after the turn of the century aimed at bringing political control closer to the people and to provide for a greater democratic government.) Likewise, temporal limitations in a recall ordinance subjecting an elected official to recall after a specified time in office are proper because such limitations further advance the purpose of recall and allow voters to remove an elected official regardless of any wrongdoing. *Bower*, 41 Ill. 2d at 281. Consequently, plaintiffs' equal protection claim was not substantial and the ordinance did not irrationally discriminate against plaintiffs on the basis that they were the Mayor's political opponents.

¶ 21 Similarly, the Village's adoption of the ordinance while plaintiffs were currently serving their terms did not give rise to a due process claim because the trustee's right to serve their full term is not absolute. *East St. Louis Federation of Teachers, Local 1220, American Federation of Teachers, AFL-CIO v. East St. Louis School District No. 189 Financial Oversight Panel*, 178 Ill. 2d 399, 418 (1997). Plaintiffs contend that they were deprived of substantive due process because plaintiffs received no notice when they were elected that the Village would later adopt a recall ordinance curtailing their four-year elected term for being the Mayor's political opponents. Plaintiffs also claim that the asserted equal protection violation necessarily supports a due process violation. But, as stated, no equal protection violation exists because the recall of elected

officials advances a legitimate government interest and provides voters with the long-established right to remove an elected official from office. See *In re: petition for removal of Struck*, 41 Ill. 2d at 579. Adopting plaintiffs' due process claim would potentially preclude the adoption of any recall ordinance given the Village's staggered election of trustees (three of the six trustees are elected every two years–plaintiffs were elected in 2013 and the other three trustees were elected in 2015). Based on the timing of the trustee elections, the passage of a recall ordinance would necessarily occur during a trustee's current term and likely without advance notice. Because the Village adopted an ordinance that was rationally related to a legitimate government interest, plaintiffs' due process claim cannot be considered substantial.

¶ 22 Regarding the last *Gagne* requirement, the state and federal claims did not arise out of a common core of operative facts. A plaintiff may be entitled to recover attorney's fees relating to an unsuccessful civil rights claim if that claim shares a common core of facts or is based on related legal theories to a claim on which plaintiff prevailed. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); see *Zabkowicz v. The West Bend Co.*, 789 F. 2d 540, 551 (1986) (separating claims arising out of a common factual core or that are based on related legal theories would be an exercise in futility, and instead, factually or legally related claims should be treated as one action for purposes of section 1988). To determine if claims are related, emphasis should be placed on whether the claims seek relief for essentially the same course of conduct. *Zabkowicz*, 789 F. 2d at 551.

¶ 23 Here, the state claim sought to invalidate the ordinance because the Village enacted it without adhering to the proper procedure requiring prior voter approval. One of plaintiffs' federal claims asserted that the ordinance allegedly exempted the Mayor's political allies, but not plaintiffs, resulting in a denial of equal protection. Plaintiffs' other related federal claim alleged that they were denied substantive due process because, when they were elected, plaintiffs had no

notice that their statutory four-year term as trustee could be curtailed by an ordinance, particularly an ordinance that created a disparity in treatment among the trustees. Contrary to plaintiffs' position, the state and federal claims did not arise out of a common core of operative facts because, although the subject matter—the ordinance—was the same, the facts and legal theories underlying the claims were different. Specifically, the state claim asserted that the ordinance was invalid because it was passed without a referendum whereas the manner of adoption of the ordinance was irrelevant to the federal claims, which focused exclusively on the ordinance's alleged discriminatory effect. Because the state and federal claims did not share a common core of operative facts, plaintiffs inclusion of the federal claims in their complaint filed in state court did not warrant an award of attorney's fees under section 1988. See *D.C., Inc. v. State of Missouri*, 627 F. 3d 698, 702 (2010) (a plaintiff cannot recover attorney's fees on a state law claim by simply appending it to a facially flawed constitutional claim.)

¶ 24 Because we conclude that plaintiffs cannot satisfy the *Gagne* criteria, plaintiffs are not entitled to attorney's fees under section 1988, and we affirm the trial court's denial of plaintiffs' petition for attorney's fees. Likewise, plaintiffs are not entitled to additional attorney's fees incurred in litigating their fee petition.

¶ 25 Affirmed.