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E-FILED in the TRIAL COURTS
State of Alaska Fourth District

MAY 04 2020

Clerk of the Trial Courts

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STANLEY ALLEN VEZEY ,)
)
) Plaintiff,
) vs.
)
BRYCE EDGMON, Speaker of the)
Alaska State House of Representatives,)
and CATHERINE A. GIESSEL,)
President of the Alaska State Senate,)
individually,)
) Defendants.) CASE NO. 4FA-19-02233CI
_____)

PLAINTIFF'S OPPOSITION TO DEFENDANTS'
MOTION FOR ATTORNEY'S FEES AND COSTS

On April 6, 2020, the court summarily dismissed Plaintiff's suit with the Decision and Order Granting Defendants' Motion to Dismiss [Decision]. Absent appellate review and a remand, Defendants are currently the prevailing parties.

Defendants' Motion for Attorney's Fees and Costs [Motion] argues for the award of attorney's fees, contending that (1) Plaintiff has not stated a constitutional claim; (2) the fee shifting provisions AS 09.60.010(c) should be denied because Plaintiff's claims are frivolous; and (3) Defendants should be

awarded extraordinary fees under Rule 82 for various asserted reasons. Plaintiff opposes Defendants' Motion as follows:

I. Plaintiff asserted and litigated constitutional claims.

Defendants' argument regarding Plaintiff's constitutional claims essentially rests on two bases: (1) Plaintiff's allegations that Defendants disregarded the governor's authority as set forth in AS 24.05.100(b) somehow preempts Plaintiff's constitutional claims, and (2) the Decision declaring that Plaintiff's claims are nonjusticiable exempts Plaintiff from the cost-sharing provisions of AS 09.60.010(c).

That Plaintiff's claims sought to establish, protect, or enforce constitutional rights is initially indicated in Plaintiff's Complaint at Paragraph 2 where it recites that Plaintiff is a constitutional claimant. In addition, Plaintiff's lawsuit advanced constitutional claims, calling upon the court to uphold the Alaska Constitution Art. 2 §§ 9, 10, and 14; and Art. 3 § 17. The parties extensively litigated Plaintiff's allegations that Defendants' violated the Constitution. Thus, although Plaintiff did not prevail in the trial court, Plaintiff is entitled to the fee-shifting provisions in AS 09.60.010.

The record shows that Plaintiff argued that Art. 2 § 9 of the Alaska Constitution, Special Sessions, deliberately blends and does not separate the power of the executive and the legislative branches to call special sessions. Plaintiff furthermore argued that Art. 2 § 9 implicitly gives the executive the authority to select the date, time, and location of the special session. To deny the executive the authority to set the date and place would be to allow recalcitrant legislators the

power to postpone and relocate the special session indefinitely. Apparently, the Alaska Legislature also understood that clear implication when it enacted AS 24.05.100(b):

A special session may be held at any location in the state. If a special session called under (a)(1) of this section is to be convened at a location other than at the capital, **the governor shall designate the location** in the proclamation. If a special session called under (a)(2) of this section is to be convened at a location other than at the capital, the presiding officers shall agree to and designate the location in the poll conducted of the members of both houses. (emphasis added).

In that connection, Plaintiff also charged Defendants with violating AS 24.05.100(b), which establishes the procedures for carrying out Art. 2 § 9 when the executive branch calls a special session. That allegation in no way preempts Plaintiff's constitutional claims as Defendants' Motion contends. Rather, it is submitted, AS 24.05.100(b) reinforces Plaintiff's constitutional claim. Nevertheless, Defendants argued to the contrary, asserting that AS 24.05.100(b) unconstitutionally violates the separation of powers doctrine.¹ It is apparent, however, that Defendants' argument in that regard also implicates the Constitution, demonstrating that Plaintiff did indeed raise constitutional claims.

Defendants' 27-page Motion to Dismiss Pursuant to: Legislative Immunity; Civil Rule 12(b)(2); Nonjusticiability; and Civil Rule 1(b)(6), filed August 20, 2019, [Case Motion #5] actively litigated in opposition to Plaintiff's constitutional claims. Also, Defendants' Reply addressed Plaintiff's numerous constitutional

¹ Separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision. However, the Alaska Constitution, Art. 2 § 9, expressly blends the power of the executive and the legislative branches. See *Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976).

claims and repeated Defendants' contention that AS 24.05.100 is unconstitutional.

Plaintiff's claims seek to establish, protect, and enforce the citizens' expectations that Defendants are constitutionally bound to attend a special session at the date and location so designated. That the trial court dismissed the case does not mean Plaintiff is not a constitutional claimant. Indeed, AS 09.60.010(c) specifically provides an attorney's fees exemption for non-prevailing parties. It is respectfully submitted that the trial court erred when it decided that the main issue was nonjusticiable. Rather, the Alaska Supreme Court stated, under Alaska's constitutional structure of government, the judicial branch has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature.²

The Motion cites to *Musser v. Wells Fargo Home Mortg., Inc.*³ to lend support to Defendants' contention that Plaintiff is merely attempting to "constitutionalize" his claims. *Musser* does not offer any persuasive value to this matter whatsoever.

The *pro se* litigant/borrower, Robert Musser, sued the mortgagee for having paid Musser's delinquent property taxes and subsequently having invoiced Musser for repayment. When the court awarded Rule 82 attorney's fees to Wells Fargo as the prevailing party, Musser argued that he was a constitutional claimant and was exempt from paying Rule 82 fees. The appellate Court explained, however, that the loan agreement provided that the public interest litigant fee shifting rule would contractually be unavailable. Moreover, Musser clearly had an economic interest

² *State, Dept. of Health & Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001).

³ *Musser v. Wells Fargo Home Mortg., Inc.* 2008WL1914375.

sufficient to disqualify him as a public interest litigant. The Court stated, “While Musser frames many of his claims in constitutional terms—commonly alleging due process violations—these constitutional claims are not independent from his other claims for relief.”⁴

This case bears no resemblance to *Musser* whatsoever. Plaintiff’s interests are not sufficiently economic. Rather, Plaintiff sought a preliminary injunction on an expedited basis and pursued declaratory relief due to Defendants’ stubborn refusal to obey the constitutional authority of the governor to call a special session at a location that the governor decreed. Plaintiff argued that the governor’s designation of the date and location of a governor-called special session is implicit in Art. 2 § 9. Defendants argued to the contrary, i.e. that Art. 2 § 9 does not specifically provide such authority. Although the trial court declined to directly decide the issue, the question is still alive and being debated, and it will continue to be litigated until the Alaska Supreme Court eventually provides its opinion.⁵

Alaska Statute 09.60.010(c) creates a constitutional litigant exception to the usual rules governing awards of attorney’s fees to the prevailing party, specifically, here, to the benefit of the non-prevailing clamant. The court should not award Rule 82 fees to Defendants. Defendants’ Motion for Attorney’s Fees and Costs should be denied.

II. Plaintiff’s claims are not frivolous.

Defendants’ Motion does not offer any reasoning to support the characterization of Plaintiff’s claims as being frivolous other than one comment at

⁴ *Musser v. Wells Fargo Home Mortg., Inc.* at 4.

⁵ The very same issue is currently being litigated in *McCoy et al. v. Dunleavy*, Case No. 3AN-19-08301CI.

page 5 of the Motion. The comment alludes to Plaintiff's Reply to Defendants' Opposition to Motion for Declaratory Relief and Preliminary Injunction, at page 2, where a factual matter is stated, i.e. "Alaska's Constitution is silent as to where the Legislature shall meet." This one factual statement does not render Plaintiff's well-reasoned constitutional claims frivolous and the Motion does not explain how it could.

Because the Motion makes no argument at all, the "frivolous claims" allegation should be disregarded.⁶ Under Alaska law, a "frivolous claim" is not an empty phrase, as the Court in *Manning v. State Dept. Fish and Game*⁷ explained.

To assess whether each of Manning's claims is frivolous requires first defining the parameters of the term "frivolous." The statute does not define this term, and we have not previously defined its meaning in the specific context of the constitutional litigant exception. But we find instructive our interpretation of this term in the context of Alaska Civil Rule 11 sanctions, which can be imposed on a party whose filings contain frivolous arguments. We have explained that Rule 11 imposes an objective standard of reasonableness and "should not be used to 'stifle creative advocacy' or 'chill [a litigant's] enthusiasm in pursuing factual or legal theories.'" **In most cases, then, a claim should not be considered frivolous unless the litigant has "abused the judicial process" or "exhibited an improper or abusive purpose.** (emphasis added).

In arguing that Plaintiff, as a constitutional claimant, should not be exempt from Rule 82 fees, the Motion makes no argument and can give no instance where Plaintiff either abused the judicial process or exhibited an improper or abusive purpose.

Plaintiff's constitutional claims are not frivolous. Defendants' Motion

⁶ *State v. O'Neill Investigations, Inc.*, 600 P.2d 520, 528 (Alaska 1980).

⁷ *Manning v. State Dept. Fish and Game*, 420 P.3d 1270, 1283-84 (Alaska 2018).

should be denied.

III. Defendants should not be awarded extraordinary fees.

Defendants seek extraordinary attorney's fees, alleging vexatious conduct; reasonableness of Plaintiff's claims; relationship between the amount of work and the significance of claims; and, the complexity of the litigation. However, the reasons underpinning Defendants' Motion boil down to a difference of constitutional interpretation, requiring Plaintiff to, in good faith, apply to the court for the court to intervene and provide relief. Defendants argue for extraordinary fees based solely on the content of Judge MacDonald's Decision, whose legal conclusions differ significantly from Judge Garton's, although both judges were well-advised of the same facts and the law.⁸

Simply because Defendants differ with Plaintiff on the legitimacy of the Governor's designation of location ,and also on the legitimacy of Defendants' reaction to that designation is no reason for the court to award extraordinary attorney's fees, particularly because it is not the purpose of Rule 82 to penalize a party for litigating a good faith claim.⁹ Moreover, fee awards against good faith civil litigants can deter access to the courts.¹⁰ The record in this matter does not warrant a increase in attorney's fees award pursuant to Rule 82 (b)(3).

a. Plaintiff's conduct was not vexatious. Defendants essentially argue that Plaintiff's conduct was vexatious because Plaintiff, being knowledgeable of

⁸ In *McCoy et al. v. Dunleavy*, Case No. 3AN-19-08301CI, Judge Garton's Order Regarding Defendant's Motion to Dismiss decided, upon the exact same facts, that the public interest exception did not render the constitutional issues moot and that the two private citizen plaintiffs did have citizen-taxpayer standing to bring suit, which is the polar opposite of Judge MacDonald's Decision.

⁹ *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974), *superseded by statute on other grounds as stated in State v. Native Village of Nunapitchuk*, 156 P.3d 389, 391 n.1 (Alaska 2007).

¹⁰ *Reid v. Williams*, 964 P.2d 453, 462 (Alaska 1998).

the Alaska Constitution, as well as the statutes and legislative Rules that control the conduct of the legislators, applied to the court for relief and served papers on Defendants in Juneau, where Defendants were present because Defendants opted to not attend the second special session in Wasilla.

In contrast to the above-captioned matter is *Garrison v. Dixon*,¹¹ a case involving vexatious litigation. In *Garrison*, real estate buyer's agents and their company brought an action against their competitors, alleging that the competitor's advertisements violated the Unfair Trade Practices and Consumer Protection Act. The Court's Opinion stated that the evidence supported the trial court's findings that the action was frivolous and was filed to harass the competitors, justifying an award of full attorney fees. The *Garrison* Court explained:

[A] review of the factual support for these claims provides a strong basis for the superior court's finding that the action was "frivolous and brought to harass the defendants." The Garrisons and AARI never produced credible evidence that the central theme of the ads—that dual agency brokers were superior to buyer's agency brokers—was unfair or deceptive. They did not produce even one person who had read the ads and could testify to any confusion. They did not show that the ads—which did not mention either the Garrisons or AARI—would be read by anyone as referring to them. They produced no evidence that they had suffered any monetary damage.

Moreover, consideration of the second issue—how the Garrisons and AARI prosecuted their action—strongly supports the trial court's factual findings that the case was litigated in bad faith. The Garrisons litigated vigorously for two and one-half years before attempting to leave the lawsuit as individual plaintiffs, ultimately conceding that they had no individual claims.

¹¹ *Garrison v. Dixon*, 19 P.3d 1229 (Alaska 2001).

Then AARI's remaining claims were all dismissed, on summary judgment, because plaintiffs could not even show that material facts were in dispute.¹²

Here, there is no similar indication whatsoever that Plaintiff had any bad-faith motive to harass Defendants. Plaintiff had no underlying improper reason to sue Defendants. Plaintiff did not change his position after years of litigation. Rather, here, the valid constitutional issues were briefed at the outset and the court issued its Decision.

It is not vexatious conduct that Plaintiff used the Civil Rule 77(g) provision of asking the court to decide a matter on shortened notice. A special session is, by law, limited to 30 days. Plaintiff sought the court's expedited intervention to declare that Defendants were bound by law to travel to Wasilla for the special session. However, the trial court denied Plaintiff's expedited motion on procedural grounds only, necessitating a second Motion for Expedited Consideration, which was also subsequently denied.¹³ Not only was Plaintiff's request for expedited consideration warranted by the press of time, it is a legitimate provision under the Civil Rules for exactly the purpose employed by Plaintiff. Moreover, the expedited motions did not require any substantive response from Defendants.

b. Reasonableness of claims and defenses. It was entirely reasonable for Plaintiff to litigate the legal position that the Alaska Constitution gives the governor the authority to call a special session at a time and location of the governor's choosing. It was also reasonable to request the court's intervention on an expedited basis because special sessions by law last only 30 days. And, it also

¹² *Garrison v. Dixon*, 19 P.3d at 1235.

¹³ The Order denying the second Motion for Expedited Consideration stated that it is not reasonable to serve an expedited motion by mail. The court's Order apparently did not take any notice of the accompanying affidavits that testified to email and personal service on Defendants.

was reasonable for Plaintiff to continue to litigate this issue of high constitutional import even after the special session concluded. Plaintiff's claims were legitimate and do not warrant an enhanced fees award to Defendants.¹⁴

The fact that the special session concluded did not, as Defendants contend, actually resolve the issue. Rather, the issue will continue to repeat itself every time legislators who oppose the policies of the executive want to separate the legislative body and halt the government.

If anything, it was unreasonable for Defendants to defend their actions by arguing that AS 24.05.100 is unconstitutional, which militates against awarding extraordinary attorney's fees to Defendants.

c. **The relationship between work performed and significance of matters at stake.** The governor's authority to call a special session at a date and location that the governor designates is not an insignificant matter. However, the issue was briefed and decided in a relatively short time. The work performed did not involve taking depositions, conducting discovery, enlisting experts, or preparing for trial. The Complaint was filed on July 11, 2019. There were only two substantive motions filed and the last of the briefing in this case was filed on November 29, 2019, approximately four months from the inception of the suit.

The significant constitutional issue here is still being litigated in the Third

¹⁴ See *Marathon Oil Co. v. ARCO Alaska, Inc.*, 972 P.2d 595, 605 (Alaska 1999) (nonprevailing party's challenge to an arbitration award "raised a legitimate issue" so factor (F) could not be used to justify an

Judicia District. As for this case, however, the time expended does not warrant a high return to Defendants.

d. **The complexity of the litigation.** Defendants' Motion states that the legal theories in this case were numerous and dense. Plaintiff disagrees. Rather, the parties adequately briefed a number of legal issues that have already been considered by the Alaska's appellate court in a few well-reasoned Opinions. Although the governor's constitutional authority to designate the location of a special session has not yet been decided on appeal, and it will be a case of first impression when it is decided, the arguments were neither dense, nor technical, nor complicated. Also, complexity alone does not warrant an extraordinary award of attorney's fees.¹⁵

IV. Conclusion.

The Alaska appellate court has reviewed enhanced attorney's fees awards for unreasonableness and bad faith when, for example, claims lacked any evidentiary support, were fraudulent from inception, or were clearly brought with the intent to harass. *See, e.g., Kollander v. Kollander*, 400 P.3d 91, 96-97 (Alaska 2017) (affirming 60% attorney's fees award because losing party relitigated claims already disproved by credible testimony and barred by laches); *Crittell v. Bingo*, 83 P.3d 532, 534, 537 (Alaska 2004) (affirming enhanced attorney's fees award

enhanced fee award).

against party who brought fraudulent claim based on fabricated documents and fraudulent will of their creation); *Garrison v. Dixon*, 19 P.3d 1229, 1235 (Alaska 2001) (affirming full attorney's fees award because plaintiffs never introduced credible evidence, conceded after two years they had no individual claims, and appeared to have brought suit to harass and chill activity of business competitor); *Keen v. Ruddy*, 784 P.2d 653, 657 (Alaska 1989) (finding no abuse of discretion where claim "was not supported by law or fact" and clearly brought to hinder litigation of different suit).

This case does not present any such factors.

However, Defendants presented attorney's fees of nearly \$60,000, explaining the high fees by reciting that four attorneys and one paralegal worked on this case. As noted in subpart (c), *supra*, however, rather than file an Answer, Defendants filed one joint Motion to Dismiss, and jointly opposed Plaintiff's Motion for Declaratory Judgment and Preliminary Injunction. Defendants' request for extraordinary Rule 82 attorney's fees is unconscionable because, on its face, Defendants' have grossly overcharged for its services. *See Demoski v. New*, 737 P.2d 780, 787 (Alaska 1987) (The court found that one of the attorneys for the News had impermissibly overcharged them . . . The court concluded that the sum awarded pursuant to Alaska Civil Rule 82 was a reasonable partial fee.)

¹⁵ See *Moses v. McGarvey*, 614 P.2d 1363, 1370 (Alaska 1980) (stating that complexity is only one factor, which alone does not justify full attorney's fees).

