FILED
United States Court of Appeals
Tenth Circuit

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ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

INDIAN COUNTRY, U.S.A., INC., a South Dakota Corporation,

Plaintiff,

THE MUSCOGEE (CREEK) NATION, a Federally Recognized Indian Tribe,

Plaintiff-Appellant,

v.

THE STATE OF OKLAHOMA ex rel. The Oklahoma Tax Commission, and The District Attorney for Tulsa County; and STATE OF OKLAHOMA ex rel. David Moss, District Attorney,

Defendants-Appellees.

No. 87-1940
(D.C. No. 85-C-643-E)
(N.D. Oklahoma)

ORDER AND JUDGMENT

Before **MOORE**, **ANDERSON**, and **BALDOCK**, Circuit Judges.

This is an appeal from the denial of an application for attorney fees. In effect, the district court refused to grant the application of plaintiff, The Muscogee (Creek) Nation, on the grounds that plaintiff was not a prevailing party within the context of 42 U.S.C. § 1988 and that counsel for the adverse party did not act in bad faith. The court also determined plaintiff was not entitled to fees pursuant to Fed. R. Civ. P. 37(c). We agree with the conclusions of the trial court and therefore affirm.

We have examined the briefs and record and conclude the disposition of this case requires little in addition to the analysis employed by the district court. We therefore adopt substantially the trial court's reasoning with additional comments for the sake of clarity.

Central to plaintiff's request for attorney fees pursuant to 42 U.S.C. § 1988 is whether it was a prevailing party within the context of the statute. The pertinent question is, was the action in which the plaintiff succeeded one for the enforcement of 42 U.S.C. § 1983?[1] The trial court concluded it was not, holding the basis of the plaintiff's success in the underlying action was the Commerce Clause and the Supremacy Clause of the United States Constitution; hence, § 1988 was inapplicable. The trial court reached that conclusion before our determination of the merits of the underlying case. After entry of the trial court's dispositional order on attorney fees, our decision was published. On the merits, we held federal law preempted Oklahoma from imposing its regulatory power upon the plaintiff. Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n, 829 F.2d 967, 974-76 (10th Cir. 1987), cert. denied, 108 S. Ct. 2870 (1988). We also held that tribal sovereignty prevented Oklahoma from exercising regulatory power in Indian Territory. Id. at 976-81.

[1]Section 1988 states: "In any action . . . to enforce a provision of section[] . . . 1983 . . . of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

None of our analysis involved application of § 1983, nor was plaintiff's success predicated upon a vindication of any right secured by the Civil Rights Act of 1964. Accordingly, the trial court correctly relied upon J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985). We have considered the authority which the plaintiff suggests undercuts this reasoning, but we find it inapposite. Because this action did not involve the deprivation of individual rights secured by the Constitution and laws of the United States, but rather involved the allocation of regulatory power between governmental entities, the plaintiff simply did not prevail within the context of § 1988. See also Yakima Indian Nation v. Whiteside, 617 F. Supp. 735 (E.D. Wash. 1985), aff'd sub nom. Confederated Tribes and Bands of Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987), cert. granted, 108 S. Ct. 2843 (1988); White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1984), cert. denied, 107 S. Ct. 940 (1987).

The trial court also denied fees based upon the "bad faith" exception to the "American Rule." We agree with its analysis. United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481 (10th Cir.), (award of attorney fees under "bad faith" exception committed to trial court's discretion), cert. denied, 469 U.S. 825 (1984). Because of the status of Oklahoma law at the time of the filing of this action, Oklahoma's claims were more than colorable.

Even though the trial court did not directly address the request founded upon Fed. R. Civ. P. 11, the same analysis would apply. Plaintiff now argues, however, that the trial court decided the issue without the benefit of discovery, and summary disposition of its request was consequently improper.

We note the application for attorney fees was totally bereft of factual support for the plaintiff's contention that certain actions of the State's counsel were subject to sanction under Rule 11 and 28 U.S.C. § 1927. Indeed, the application was at best conclusory, stating only that: "said attorneys have filed and asserted many unfounded and unsupported positions and have unreasonably and vexatiously multiplied the proceeding herein." For plaintiff to now assert the need for discovery to flesh out the nature of its claim is itself suggestive of a failure to comply with Rule 11.

Yet, given that the defendants' responded to the application for attorney fees by filing a motion for summary judgment, plaintiff was required to come forth with the assertion of material facts to show the defendants were not entitled to relief. A party resisting summary judgment upon the ground that further discovery is required cannot simply stand upon the pleadings. Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 832-33 (10th Cir. 1986). That party must either establish existence of triable issues of fact or file an affidavit under Fed. R. Civ. P. 56(f) showing why the party cannot present facts to oppose summary judgment. Id. Failure to present such an affidavit is a sufficient ground for affirmance of a motion for summary judgment over the opposing party's claim of a need for additional discovery. Dreiling v. Peugeot Motors of Am., Inc., 850 F.2d 1373, 1376 (10th Cir. 1988). See also Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264 (10th Cir. 1984).

Plaintiff filed no Rule 56(f) motion. Prior to the filing of defendants' motions for summary judgment, plaintiff moved for additional discovery asserting the need to depose Assistant District Attorney Denise Graham "in order to determine the nature and extent of the bad faith practices of said defendant [sic] in the conduct of this litigation." It is noteworthy that even the request for discovery merely suggests the possibility of, or plaintiff's counsel's belief in, the "bad faith" of Ms. Graham. Nevertheless, relying upon National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982), plaintiff contends this motion entitled it to discovery prior to judgment. That contention overlooks the very language of the case upon which plaintiff depends.

In connection with discovery motions filed in response to attorney fee requests, the D.C. Circuit stated: "Discovery requests should be precisely framed . . . . Unfocused requests to initiate discovery without indicating its nature or extent serve no purpose, and the District Court has full discretion to deny such requests." National Ass'n, 675 F.2d at 1329. In this instance, the plaintiff's assertion of a need to "determine the nature and extent of the bad faith practices" is just such an unfocused request. From the record, we can perceive no legitimate assertion of any disputed issue of fact which required the district court to permit discovery or to hold an evidentiary hearing.

Finally, the district court denied attorney fees predicated upon Fed. R. Civ. P. 37(c). The motion requesting the fees stated: "Attorney fees should also be awarded to plaintiff . . . in that defendants failed to admit numerous matters proponded [sic] to them under FRCP 36 and plaintiff was required to prove the truth of these matters."

Fed. R. Civ. P. 37(c) states:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees.

It is immediately observable that plaintiff's motion failed to inform the court what documents or what truths plaintiff proved at trial which subjected defendants to Rule 37(c) sanctions. More importantly, the motion failed to identify what expenses or attorney fees resulted as a consequence. Indeed, this motion has the precision of a broadside, fired only to shift the burden of all the plaintiff's attorney fees to the defendants. The district court denied the motion on the grounds of waiver, however, and plaintiff contends on appeal that waiver should not have been applied.

That argument notwithstanding, we find the motion wanting and therefore properly denied. The generality of plaintiff's motion is fatal to the cause it asserts. Without the specific allegation of which facts or documents plaintiff was required to prove over defendants' refusal to admit, the defendants were deprived of the opportunity to assert the defenses Rule 37(c) provides. Moreover, Rule 37(c) is not intended to be a vehicle by which general attorney fees are shifted between parties.

The focus of the rule is upon promoting discovery and assuring its effectiveness. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2281 (1970). To compel the admissions required by Rule 36, Rule 37(c) provides for expense shifting as a sanction. Nothing within Rule 37(c) suggests, however, that the price of failing to make a proper admission is the payment of all the opposite party's attorney fees. Only those fees directly linked to the process of proving what was not admitted are provided for in the rule. Since plaintiff failed to particularize those fees, its application was properly denied.

AFFIRMED.

Entered for the Court

John P. Moore
Circuit Judge