

1 **UNITED STATES COURT OF APPEALS**
2
3 **FOR THE SECOND CIRCUIT**

4
5 August Term, 2013
6

7
8 (Argued: April 11, 2014 Decided: July 21, 2014)
9

10 Docket No. 13-815-cv
11

12 -----x

13 EDWARD CARTER, FRANK FIORILLO, KEVIN
14 LAMM, JOSEPH NOFI, THOMAS SNYDER,

15
16 Plaintiffs-Appellants,

17
18 - v.-
19

20 INCORPORATED VILLAGE OF OCEAN BEACH;
21 JOSEPH C. LOEFFLER, JR., Mayor,
22 individually and in his official
23 capacity; NATALIE K. ROGERS, Former
24 Mayor, individually and in her official capacity;
25 OCEAN BEACH POLICE DEPARTMENT; GEORGE B.
26 HESSE, Acting Deputy Police Chief, individually and
27 in his official capacity,

28
29 Defendants,

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31 SUFFOLK COUNTY; SUFFOLK COUNTY POLICE
32 DEPARTMENT; SUFFOLK COUNTY DEPARTMENT
33 OF CIVIL SERVICE; ALISON SANCHEZ,
34

1 individually and in her official
2 capacity,

3
4 Defendants-Appellees.*

5 -----x
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7 Before: JACOBS, CALABRESI, and LIVINGSTON, Circuit
8 Judges.
9

10 Plaintiffs appeal from an order of the United States District Court for the
11 Eastern District of New York (Feuerstein, L.), granting attorney's fees and costs to
12 the Defendants-Appellees pursuant to Federal Rule of Civil Procedure 54(d) and
13 42 U.S.C. § 1988(b). Plaintiffs argue that (1) their claims were not frivolous; (2)
14 they should not be liable for fees and costs associated with voluntarily dismissed
15 claims, state law claims, and claims not enumerated in § 1988; and (3) the district
16 court incorrectly calculated the fees award. We affirm.

17 DOUGLAS HOLDEN WIGDOR, Wigdor
18 LLP, New York, NY, for Plaintiffs-
19 Appellants.
20

21 ARLENE S. ZWILLING, Assistant County
22 Attorney, for Dennis M. Brown, Suffolk
23 County Attorney, Hauppauge, NY, for
24 Defendants-Appellees.

* The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

1 DENNIS JACOBS, Circuit Judge:

2 Plaintiffs appeal from an order of the United States District Court for the
3 Eastern District of New York (Feuerstein, L.), granting attorney's fees and costs to
4 the Defendants-Appellees pursuant to Federal Rule of Civil Procedure 54(d) and
5 42 U.S.C. § 1988(b). Plaintiffs argue that (1) their claims were not frivolous; (2)
6 they should not be liable for fees and costs associated with voluntarily dismissed
7 claims, state law claims, and claims not enumerated in § 1988; and (3) the district
8 court incorrectly calculated the fee award. We affirm.

9 Plaintiffs, five former seasonal and part-time police officers of the
10 Incorporated Village of Ocean Beach ("Village"), pursued a variety of wrongful
11 termination and defamation claims against (1) the Village, its current and former
12 mayors, the Village police department ("OBPD"), and the acting OBPD deputy
13 police chief (collectively, the "Village Defendants"); and (2) Suffolk County
14 ("County"), the County Police Department, the County Department of Civil
15 Service, and Alison Sanchez, a mid-level County Department of Civil Service
16 employee (collectively, the "County Defendants"). The district court granted
17 summary judgment to all Defendants and, after this Court affirmed, awarded
18 attorney's fees and costs to the County Defendants only. This appeal followed.

As the district court recognized, Plaintiffs' claims against the County Defendants were frivolous from the outset, warranting an award of costs and fees pursuant to Federal Rule of Civil Procedure 54 and 42 U.S.C. § 1988. The County Defendants, who did not employ or supervise Plaintiffs, had no meaningful role in any alleged wrongs.

Plaintiffs argue that they should not be liable for fees and costs associated with claims that, frivolous or not, were voluntarily dismissed before summary judgment; or claims over which the district court declined to exercise supplemental jurisdiction; or claims that are not enumerated in § 1988.

I

Plaintiffs were employed as OBPD police officers on a seasonal or part-time basis between 2002 and 2006. They had complained to superiors about George Hesse, an OBPD sergeant who allegedly encouraged on-the-job drinking and other unprofessional behaviors. Hesse was eventually designated acting police chief, though Plaintiffs allege that he was never properly certified for the position under New York Civil Service Law. Soon after his promotion, on the eve of the summer 2006 season, Hesse told Plaintiffs that they would not be

1 invited back to work. He allegedly told other officers that Plaintiffs were “rats,”
2 made crude comments about them on an Internet blog frequented by Village
3 officers and residents, and gave negative references to potential employers.

4 Plaintiffs linked the County Defendants to this local squabble through
5 Alison Sanchez, a personnel analyst in the County’s Civil Service Department,
6 which is generally in charge of administering civil service examinations and
7 monitoring municipal compliance with the Civil Service Law. However, that
8 Department has no power to hire, discipline, or fire police officers of individual
9 municipalities, and no power to require municipalities to do any of these things.
10 The Department may only inform and advise the municipalities about failures to
11 meet civil service requirements. Sanchez was a mid-level employee in the
12 Department: her work was subject to three levels of supervisory review.

13 In April 2006, three of the Plaintiffs met with Sanchez to discuss the
14 Village’s decision not to rehire them. Plaintiffs allege that Sanchez was biased by
15 her purported sexual relationship with Hesse, that she defended his decision to
16 terminate their employment, and that she relayed the substance of the
17 conversation to Hesse despite a promise to keep it confidential. After Plaintiffs’
18 termination, they or their supporters (or both) posted complaints about Hesse on

1 an Internet blog frequented by OBPD officers, to which Sanchez allegedly
2 responded (anonymously), telling the posters to stop complaining and labeling
3 their “revenge posting” as “crap.” See J.A. 1967-69, 2006.

4 Plaintiffs brought suit in March 2007. The complaint asserted myriad
5 claims, largely undifferentiated as between the various Village Defendants and
6 County Defendants, including (in no particular order): First Amendment
7 retaliation; deprivation without procedural due process of property and liberty
8 interests in “[Plaintiffs’] employment with the OBPD, their reputation, and their
9 status”; conspiracy to infringe state and federal constitutional rights; equal
10 protection; improper termination under New York Civil Service Law; improper
11 retaliation under New York Labor Law; defamation per se; termination in
12 violation of public state policy; negligent retention of an unfit employee;
13 racketeering; and tortious interference with a prospective business relationship.
14 See Compl. ¶¶ 116-192.

15 Plaintiffs later withdrew their equal protection, racketeering, and New
16 York Labor Law claims. See Carter v. Inc. Vill. of Ocean Beach, 693 F. Supp. 2d
17 203, 207 n.2 (E.D.N.Y. 2010). In February 2010, after motions for summary
18 judgment had been briefed--and only thirteen days before jury selection was

1 slated to begin--Plaintiffs withdrew many other claims, leaving claims against
2 the Village, Hesse, the County, and Sanchez, premised on theories of First
3 Amendment retaliation, deprivation of procedural due process, improper
4 termination under New York Civil Service Law, defamation per se, and
5 negligent retention of an unfit employee. See J.A. 6027-28.

6 On February 19, 2010, a few days before trial was set to start, the district
7 court granted summary judgment in favor of all Defendants. See 693 F. Supp. 2d
8 at 216. The court explained that the First Amendment retaliation claims were
9 barred by Weintraub v. Board of Education, 593 F.3d 196 (2d Cir. 2010), decided
10 about three weeks prior, because all of Plaintiffs' complaints were made
11 pursuant only to their official duties and were therefore constitutionally
12 unprotected. See 693 F. Supp. 2d at 210-12. The procedural due process claims
13 were dismissed because (1) the breaks in Plaintiffs' employment defeated any
14 property right under New York Civil Service Law; and (2) the availability of a
15 meaningful post-deprivation state law remedy defeated any liberty-based,
16 "stigma-plus" claim. See id. at 212-16. The court declined to exercise
17 supplemental jurisdiction over the state law claims. Id. at 216.

18 In March 2011, this Court affirmed. See Carter v. Inc. Vill. of Ocean Beach,

1 415 F. App'x 290, 292-94 (2d Cir. 2011) (summary order). Meanwhile, Plaintiffs
2 brought their state law claims in state court, which dismissed all claims against
3 the County Defendants at the pleadings stage. See Carter v. Inc. Vill. of Ocean
4 Beach, No. 07 Civ. 1215 (SJF)(ETB), 2013 WL 816257, at *2 (E.D.N.Y. Mar. 4, 2013).

5 Defendants subsequently moved for attorney's fees and costs in the federal
6 action. In March 2013, Judge Feuerstein denied fees and costs to the Village
7 Defendants because they had not prevailed on the state law claims, which were
8 as yet live in state court. See id. at *1-4. The County Defendants, however,
9 "ultimately prevailed upon all of plaintiffs' claims against them, i.e., plaintiffs
10 voluntarily dismissed some of the claims, summary judgment was granted
11 dismissing the federal claims that were not voluntarily dismissed and plaintiffs'
12 state law claims against the County defendants . . . were dismissed at the
13 pleadings stage in the state court." Id. at *2. Moreover, "all of plaintiffs' claims
14 against the County defendants, who did not employ plaintiffs, or have any legal
15 authority to hire, retain, fire or control employees of the Village or OBPD, were
16 frivolous from the outset of this litigation." Id. at *4.

17 Fees and costs were awarded to the County Defendants. The time claimed
18 by the County Attorneys' Office was discounted by a third because "some of the

1 hours expended appear[ed] redundant, duplicative or unnecessary.” Id. at *5-7.

2 An hourly rate of \$150 was found to be consistent with prevailing local rates. Id.

3 The total fee award was \$63,990.00. Id. This appeal followed.

5 II

6 As a general matter, “costs--other than attorney’s fees--should be allowed
7 to the prevailing party.” Fed. R. Civ. P. 54(d)(1). The Rule “codifies a venerable
8 presumption that prevailing parties are entitled to costs.” Marx v. Gen. Revenue
9 Corp., 133 S. Ct. 1166, 1172 (2013).

10 Though Rule 54(d)(1) excludes attorney’s fees from costs presumed to be
11 recoverable by the prevailing party, “[i]n any action or proceeding to enforce a
12 provision of . . . [42 U.S.C. §§] 1983, 1985, and 1986 . . ., the court, in its discretion,
13 may allow the prevailing party . . . a reasonable attorney’s fee as part of the
14 costs.” 42 U.S.C. § 1988(b).

15 A party who “secure[s] a judgment on the merits or a court-ordered
16 consent decree” is a “prevailing party”; but a “voluntary change in the [other
17 party’s] conduct” is not enough. Buckhannon Bd. & Care Home, Inc. v. W. Va.
18 Dep’t of Health & Human Res., 532 U.S. 598, 600 (2001).

1 Under fee-shifting statutes such as § 1988,¹ “a prevailing *plaintiff* ordinarily
2 is to be awarded attorney’s fees in all but special circumstances.” Christiansburg
3 Garment Co. v. EEOC, 434 U.S. 412, 417 (1978). By contrast, “a district court may
4 in its discretion award attorney’s fees to a prevailing *defendant*” only “upon a
5 finding that the plaintiff’s action was *frivolous, unreasonable, or without foundation*,
6 even though not [necessarily] brought in subjective bad faith.” Id. at 421
7 (emphases added).

8 If a “plaintiff assert[s] both frivolous and non-frivolous claims,” then a
9 court may grant to a defendant only those fees “that the defendant would not
10 have incurred but for the frivolous claims.” Fox v. Vice, 131 S. Ct. 2205, 2211
11 (2011).

13 III

14 “We review a district court’s award of attorneys’ fees under § 1988 for
15 abuse of discretion, mindful that abuse of discretion--already one of the most
16 deferential standards of review--takes on special significance when reviewing fee

¹ “Numerous federal statutes allow courts to award attorney’s fees and costs to the ‘prevailing party.’” Buckhannon, 532 U.S. at 600. These various “fee-shifting provisions” are to be interpreted consistently. Id. at 603 n.4.

1 decisions because the district court, which is intimately familiar with the nuances
2 of the case, is in a far better position to make such decisions than is an appellate
3 court, which must work from a cold record.” Lore v. City of Syracuse, 670 F.3d
4 127, 175 (2d Cir. 2012) (citations, internal quotation marks, and brackets omitted).
5 Similarly, the decision to award costs under Rule 54(d)(1) “is committed to the
6 sound discretion of the district court, and is accordingly reviewed for abuse of
7 discretion.” ARP Films, Inc. v. Marvel Entm’t Grp., Inc., 952 F.2d 643, 651 (2d
8 Cir. 1991).

9 However, “[w]hether a litigant is a ‘prevailing party’” under a fee-shifting
10 provision “constitutes a question of law warranting de novo review.” Dattner v.
11 Conagra Foods, Inc., 458 F.3d 98, 100 (2d Cir. 2006) (per curiam).

13 IV

14 As the district court recognized, all of Plaintiffs’ claims against the County
15 Defendants were, from the beginning, “frivolous, unreasonable, or without
16 foundation.” Christiansburg Garment, 434 U.S. at 421.²

² The district court emphasized that it had expressed doubts about the claims against the County Defendants “during a pretrial conference early in the litigation.” Carter, 2013 WL 816257, at *4. We hesitate to assign much

1 Allegations against all four County Defendants center on Sanchez. But the
2 factual allegations regarding her role are immaterial to Plaintiffs' legal theories:
3 *After* Plaintiffs had already been terminated by the Village Defendants, Sanchez
4 allegedly (1) listened to Plaintiffs' complaints, defended Hesse, and told him
5 about the conversation; and (2) posted on an Internet board, without naming
6 anyone, that the posts complaining about Hesse were "revenge posting" and
7 "crap." This is not the stuff of litigation. All of Plaintiffs' claims center around
8 two basic wrongs, improper termination and (to a lesser degree) defamation;
9 Sanchez had no meaningful role in either.

10 None of the municipal liability claims lie against the County, because
11 Plaintiffs made no effort to establish: (1) that the County's failure to train its
12 employees amounted to deliberate indifference to constitutional rights, see City
13 of Canton v. Harris, 489 U.S. 378, 392 (1989); (2) that there was a persistent and
14 widespread unconstitutional governmental policy or custom, see Monell v. Dep't

importance to such warnings, given the common technique of fostering
settlement by reminding parties of their vulnerabilities, not to mention the risk
that such warning may coerce a party to withdraw even a meritorious claim if it
might result in the award of attorney's fees to the opposing party. In this case,
however, the district court's statement confirms that Plaintiffs' claims against the
County Defendants were unmistakably frivolous throughout the entire course of
litigation.

1 of Soc. Servs., 436 U.S. 658, 691 (1978); or (3) that a County policymaker
2 approved any constitutional violation, see Roe v. City of Waterbury, 542 F.3d 31,
3 37 (2d Cir. 2008).

4 As for the constitutional conspiracy theories, Plaintiffs themselves
5 dismissed these claims voluntarily before summary judgment. No wonder they
6 did: Sanchez and the County had no appreciable role in any alleged conspiracy
7 to terminate or defame Plaintiffs. Moreover, “[42 U.S.C.] §§ 1985 and 1986
8 require some racial, or perhaps otherwise class-based, invidiously discriminatory
9 animus behind the conspirators’ action,” Reynolds v. Barrett, 685 F.3d 193, 201-
10 02 (2d Cir. 2012) (footnotes and internal quotation marks omitted), and there is
11 no hint of such animus here.

12 Plaintiffs argue that the substance and complexity of their cause is
13 conceded in a January 2010 letter from the County Defendants to the district
14 court, joining the Village Defendants’ request to postpone trial pending decision
15 on the summary judgment motions:

16 Given that there are a significant number of complex legal issues
17 raised upon the summary judgment motions which must necessarily
18 be decided in plaintiff’s favor for this case to go to the jury,
19 including the involved question of whether plaintiffs had any
20 constitutionally protected interest in their employment, we believe

that the resources of counsel and the Court will best be served by the motions being disposed of prior to trial.

J.A. 5825. The letter adverted to one legal “complexity”: whether Plaintiffs could cobble together their part-time and seasonal jobs to accumulate five years of continuous employment for purposes of establishing a protected property interest. The only complexity in the issues regarding the County Defendants’ involvement (or lack thereof) arose from the jumbled pleading. In any event, a party’s acknowledgment of complexity cannot bind the district court (or us) to find complexity, let alone merit.

V

Plaintiffs argue that, frivolousness aside, they should not be held accountable for fees that would have been incurred by the County Defendants anyway in defending against (A) voluntarily dismissed claims; (B) state law claims; and (C) claims not enumerated in § 1988. We address each category in turn.

1 and contrary to the decisions of most other courts. See Cantrell v. Int’l Bhd. of
2 Elec. Workers, 69 F.3d 456, 456 (10th Cir. 1995) (en banc).

3 Nemeroff is also in tension with subsequent case law from the Supreme
4 Court. In Buckhannon, the Supreme Court held that, to “prevail[]” for purposes
5 of attorney’s fees, a party (the plaintiff in that case) must have gained through the
6 litigation a “material alteration of the legal relationship of the parties.” 532 U.S.
7 at 604 (internal quotation marks omitted). A voluntary dismissal of an action
8 with prejudice works such alteration, because it constitutes “an adjudication on
9 the merits for purposes of res judicata,” Chase Manhattan Bank, N.A. v. Celotex
10 Corp., 56 F.3d 343, 345 (2d Cir. 1995), and any action so dismissed could not be
11 brought again. Because the Nemeroff dictum suggests to the contrary, and has
12 no redeeming justification, we reject it.

13 Unencumbered by Nemeroff, we consider whether the voluntary dismissal
14 of some claims, coupled with the grant of summary judgment dismissing the
15 claims that remain, makes the County Defendants prevailing parties. The answer
16 here is obvious: the victory for the County Defendants was total. The merits of
17 this case were adjudicated by the district court, this Court summarily affirmed,
18 and no petition for certiorari was filed. All the claims arose from the same

1 transaction or occurrence. Plaintiffs are barred by res judicata from relitigating
2 any of them. Because Plaintiffs cannot refile, the judgment has materially altered
3 the parties' legal relationship. See Buckhannon, 532 U.S. at 604. The County
4 Defendants have, in every sense of the word, "prevail[ed]" as to all claims,
5 whether dismissed or otherwise.

6 **B**

7 As to their state law claims, Plaintiffs argue that they are not liable for fees
8 and costs because the district court declined to exercise supplemental
9 jurisdiction. Other courts have ruled that a declination to exercise supplemental
10 jurisdiction is insufficient to confer prevailing party status on a defendant, since
11 those claims could later be refiled. See Avery v. First Resolution Mgmt. Corp.,
12 568 F.3d 1018, 1024 (9th Cir. 2009). In the circumstances of this case, however, a
13 state court had dismissed the state law claims on the pleadings before the district
14 court resolved the motion for attorney's fees in the federal case. Accordingly,
15 there was no chance that these claims would be refiled, and the defendants are
16 properly considered prevailing parties on these claims.

17 Moreover, the state law claims against the County Defendants were
18 frivolous for the same reason that the federal claims were frivolous: the County

1 Defendants had nothing to do with the alleged improper termination and the
2 defamation underlying Plaintiffs' complaint.

3 Plaintiffs argue that even if the state law claims were frivolous, fees cannot
4 be imposed without adjudication of these claims by the federal court. This
5 argument is implicitly at odds with Fox, in which the district court granted
6 summary judgment on the federal claims (which were frivolous) and remanded
7 the state claims (which were not). 131 S. Ct. at 2211-12. The issue was how to
8 allocate between work associated with the former and work associated with the
9 latter; the Supreme Court held that plaintiffs could be liable only for costs and
10 fees "that the defendant would not have incurred but for the frivolous claims."
11 Id. at 2211.

12 If Plaintiffs were correct, there would have been no need in Fox to draw a
13 line between claims that were frivolous and those that were not: claims
14 remanded to state court would *never* be subject to fee-shifting.

15 C

16 Plaintiffs contend that § 1988 contemplates only violations of federal civil
17 rights statutes (e.g., §§ 1983, 1985, and 1986) and that no fees should have been
18 awarded as to all their other assorted claims.

Once again, this argument runs counter to Fox. The state claims in Fox were not specifically listed in § 1988. Under Plaintiffs' logic, the Court would have disposed of the appeal by explaining that fees associated with those claims were unavailable, without reference to frivolousness.

More importantly, Plaintiffs’ argument distorts the text of § 1988, which provides that “[i]n *any action or proceeding* to enforce a” federal civil rights provision, “the prevailing party” may be entitled to fees. Plaintiffs’ action sought to enforce (inter alia) federal civil rights provisions, and the County Defendants prevailed.

VI

Plaintiffs dispute the fee calculation on procedural and substantive grounds.

A

Plaintiffs protest that they were improperly denied an opportunity to challenge the County Defendants' billing records. We disagree.

The Village Defendants and the County Defendants moved for fees and costs in separate submissions. Only the County Defendants submitted billing

1 records; the Village defendants suggested that the court first decide the issue of
2 liability for fees and take submissions afterward on the value of services. See
3 Fed. R. Civ. P. 54(d)(2)(C) (“The court may decide issues of liability for fees
4 before receiving submissions on the value of services.”).

5 Plaintiffs responded to both motions in a single omnibus submission, and
6 agreed with the Village Defendants that the court should decide liability before
7 calculating fees. Plaintiffs thereby elected not to respond to the County
8 Defendants’ fee calculations, presumably hoping that they would prevail on
9 liability, or that further briefing would be sought. The district court, however,
10 proceeded to grant fees to the County Defendants and used their records as a
11 starting point for calculating the proper award. The court did not give Plaintiffs
12 a second opportunity to challenge the County Defendants’ records.

13 There was nothing improper about this. Rule 54(d)(2)(C) is permissive; the
14 court “may” decide liability for fees first, but need not. Plaintiffs left
15 unanswered the County Defendants’ submission on the fee calculation, and that
16 choice is binding.

1 **B**

2 Plaintiffs also argue that the district court improperly calculated the fee
3 award.

4 The district court recognized that “some of the hours expended” by the
5 County Attorney’s Office “appear redundant, duplicative or unnecessary.”
6 Carter, 2013 WL 816257, at *5. The court accordingly scrutinized the billing
7 records closely. The one-third discount was a reasonable response to the flaws
8 identified in those records. See, e.g., Kirsch v. Fleet St., Ltd., 148 F.3d 149, 173 (2d
9 Cir. 1998) (“[W]e see no abuse of discretion in . . . the 20% reduction for
10 vagueness, inconsistencies, and other deficiencies in the billing records.”); U.S.
11 Football League v. Nat’l Football League, 887 F.2d 408, 411, 415 (2d Cir. 1989)
12 (affirming reduction for vagueness because, “[a]s the amount of an award is
13 within the discretion of the district court, so is the amount of any reduction”).

14 Fox, the Supreme Court’s latest word on § 1988 fee-shifting, reiterates that
15 “[a] trial court has wide discretion” in deciding an appropriate fee award. 131 S.
16 Ct. at 2211. The Court explained:

17 We emphasize, as we have before, that the determination of fees
18 should not result in a second major litigation. The fee applicant
19 (whether a plaintiff or a defendant) must, of course, submit

1 appropriate documentation to meet the burden of establishing
2 entitlement to an award. But trial courts need not, and indeed
3 should not, become green-eyeshade accountants. The essential goal
4 in shifting fees (to either party) is to do rough justice, not to achieve
5 auditing perfection. So trial courts may take into account their
6 overall sense of a suit, and may use estimates in calculating and
7 allocating an attorney's time. And appellate courts must give
8 substantial deference to these determinations, in light of the district
9 court's superior understanding of the litigation. We can hardly
10 think of a sphere of judicial decisionmaking in which appellate
11 micromanagement has less to recommend it.

12 Id. at 2216 (citations and internal quotation marks omitted).

13 Plaintiffs' claims were frivolous from the outset, and required the County
14 Defendants to litigate continuously (at taxpayer expense) since March 2007. The
15 award was within the district court's discretion.

16 17 CONCLUSION

18 For the foregoing reasons, the order of the district court is affirmed.