

NOT DESIGNATED FOR PUBLICATION

**NEW ORLEANS BLACK
BOARD OF TRADE AND
COMMERCE, INC.**

*

NO. 2002-CA-1353

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**SEWERAGE AND WATER
BOARD OF NEW ORLEANS**

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-7670, DIVISION "J"
Honorable Nadine M. Ramsey, Judge

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Judge Patricia Rivet Murray

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(Court composed of Chief Judge William H. Byrnes, III, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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AFFIRMED

This appeal arises from a mandamus suit to enforce a request for public records pursuant to La. R.S. 44:35. The public entity voluntarily provided the information request, which rendered the mandamus moot. This plaintiff appeals the trial court's judgment denying its request for attorney's fees, costs, and penalties. Because we find that the plaintiff was not a "prevailing party," we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On May 7, 2001, New Orleans Black Board of Trade and Commerce ("BBTC"), filed a petition for writ of mandamus against the Sewerage and Water Board of New Orleans ("S&WB") for failure to respond to a public records request. BBTC contends that the S&WB failed to honor either a prior oral request for records or a written request that was faxed to it on April 24, 2001. On May 22, 2001, the S&WB fully satisfied the request for records, rendering the mandamus moot. At BBTC's request, a hearing was held on the issue of its entitlement to attorney's fees, costs and penalties. At that hearing, BBTC's executive director, Clarence Hunt, testified and evidence was submitted. On February 25, 2002, the trial court rendered a

judgment denying BBTC's claim for attorney's fees, costs and penalties without providing any reasons. This appeal followed.

DISCUSSION

BBTC argues that an award of attorney's fees to a prevailing party in a suit to enforce a public records request is mandatory, citing La. R.S. 44:35 (D), which provides:

If a person seeking the right to inspect or to receive a copy of a public record *prevails in such suit*, he shall be awarded reasonable attorney's fees and other costs of litigation. If such person prevails in part, the court may in its discretion award him reasonable attorney's fees or an appropriate portion thereof. (Emphasis supplied).

BBTC argues that the jurisprudence has construed this statute as mandating an award of attorney's fees and costs when the records request is fully successful. *Association for Rights of Citizens, Inc. v. Parish of St. Bernard*, 557 So. 2d 714, 717 (La. App. 4 Cir. 1990) (on *reh'g*). Moreover, BBTC submits that the good faith of the records custodian does not preclude an award of attorney's fees and costs to the prevailing party. *Ferguson v. Stephens*, 623 So. 2d 711, 716 (La. App. 4 Cir. 1993).

In this case, BBTC contends that it satisfied all the requirements necessary to be a prevailing party entitled to attorney's fees and costs. BBTC summarized the testimony by Mr. Hunt and the written evidence submitted at the hearing as revealing the following: (1) that Mr. Hunt made an oral

request of S&WB to provide a list of names, addresses and fax numbers for the members of the S&WB; (2) that after no response was received to the oral request, Mr. Hunt caused a written request to be faxed to S&WB on April 24, 2001; (3) that after no response was received to the faxed request, BBTC filed a petition for mandamus against S&WB on May 7, 2001; (4) that S&WB was served with the petition for mandamus on May 14, 2001; and (5) that BBTC prevailed when the records request was fully satisfied on May 22, 2001.

BBTC additionally argues that the fact that S&WB did provide the response to its request within the time frame provided in La. R.S. 44:35(A) mandates an award of attorney's fees and costs. BBTC notes that the records request was not honored within five business days of the faxed records request. It further notes that, even discounting the faxed request, more than five business days passed from the date the mandamus petition was served and the date the records request was satisfied.

Countering, S&WB contends that Mr. Hunt's testimony was confusing and misleading and that BBTC failed to establish that either the oral or faxed records requests were received by S&WB. Specifically, S&WB stresses that Mr. Hunt could not recall the name of the person he spoke to when he orally requested the records and that he could only

produce a photocopy of an unconfirmed fax sheet. Accordingly, S&WB contends that BBTC provided no real proof at trial that the oral or faxed requests were ever received by it. S&WB contends that, not having received notice of the records requests, it was not arbitrary and capricious, and that the trial court properly denied the request for attorney's fees, costs, and penalties. We agree.

First, BBTC's reliance on La. R.S. 44:35(A) as entitling it to attorney's fees and costs based on S&WB's untimely response to its public records request is misplaced. That statute provides:

Any person who has been denied the right to inspect or copy a record under the provisions of this Chapter, either by final determination of the custodian or by the passage of five days, exclusive of Saturdays, Sundays and legal public holidays, from the date of his request without receiving a final determination in writing by the custodian, may institute proceedings for the issuance of a writ of mandamus, injunctive relief or declaratory relief, together with attorney's fees, costs and damages as provided for by this Section.

La. R.S. 44:35(A). The above statutory provision sets a five-business day period for complying with a pre-suit request and allows a mandamus suit (in which attorney's fees and costs are authorized) to be commenced if no response is received during that five-day period. As the S&WB points out, BBTC failed to establish that the five-day, pre-suit period commenced running in this case; it failed to establish the S&WB actually received either

the oral or faxed pre-suit requests that it alleges preceded filing of this suit. That statutory period is thus inapposite.

Second, although we agree with BBTC that La. R.S. 44:35(D) mandates an award of attorney's fees and costs to the prevailing party, we disagree with BBTC's characterization of itself as a "prevailing party." Recently, that term was construed by the United States Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed. 2d 855 (2001).

In *Buckhannon*, the Supreme Court construed that term as presuming the presence of a judicial ruling changing the legal relationship between the parties. The Court reasoned that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Buckhannon*, 532 U.S. at 605. It does not apply to a "nonjudicial 'alteration of actual circumstances.'" *Buckhannon*, 532 U.S. at 606. In so finding, the Court cited *Black's Law Dictionary*, 1145 (7th ed. 1999), which defines the term as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded. . . . Also termed *successful party*." *Buckhannon*, 532 U.S. at 603. Finally, the Court cited the policy reason of avoiding an attorney's fees request from resulting in a "second

major litigation” between the parties. *Buckhannon*, 532 U.S. at 609.

Although BBTC succeeded in obtaining all the relief it sought, it did so because of S&WB’s voluntary action in providing the information, which obviated the need for any judicial action. Applying the definition enunciated in *Buckhannon*, we find that BBTC was not a “prevailing party.” Because BBTC was not a “prevailing party” the trial court did not err in refusing to award attorney’s fees and costs.

Likewise, we find BBTC’s second argument that the trial court erred in refusing to award penalties pursuant to La. R.S. 44:35(E)(1) unpersuasive. Indeed, the penalty provision arguably is not applicable given that the mandamus action was rendered moot by S&WB’s voluntary action in providing the information. Regardless, such an award of penalties is discretionary, and we cannot say, under the facts of this case, that the trial court abused its discretion in refusing to award penalties.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED