IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DANTAN SALDAÑA,
Plaintiff/Appellant,

v.

CHARLES RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS;
MARLENE COFFEY, ASSOCIATE DEPUTY WARDEN,
ARIZONA DEPARTMENT OF CORRECTIONS,
Defendants/Appellees.

No. 2 CA-CV 2016-0204
Filed July 21, 2017

Appeal from the Superior Court in Pima County
No. C20160898
The Honorable Catherine M. Woods, Judge

AFFIRMED

COUNSEL

The Law Office of Stacy Scheff, Tucson
By Stacy Scheff
Counsel for Plaintiff/Appellant

Mark Brnovich, Arizona Attorney General
By Paul E. Carter, Assistant Attorney General, Tucson
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Kelly[1] concurred.

E S P I N O S A, Judge:

¶1 Dantan Saldaña appeals from the trial court's order denying his request for attorney fees brought under 42 U.S.C. § 1988. Saldaña argues the trial court erred by finding he was not the prevailing party below for the purpose of a fee award. For the following reasons, we affirm.

Factual and Procedural Background

¶2 On February 24, 2016, Saldaña, at the time an Arizona Department of Corrections (ADOC) inmate, filed a complaint and motion for preliminary injunction under 42 U.S.C. § 1983[2] against ADOC Director Charles Ryan, ADOC Associate Deputy Warden Marlene Coffey, and a number of unnamed defendants. Saldaña also filed a motion for an order to show cause "why a preliminary injunction should not issue" and the trial court set a hearing on that motion for March 7. The day after the complaint was filed, the court held a hearing and granted a temporary restraining order barring Saldaña's reassignment to the general prison population until after

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]At Saldaña's request, the trial court ordered the complaint and motion for preliminary injunction filed under seal. Although the documents are not part of the appellate record, Saldaña stated in his opening brief, "All documents filed under seal can be provided for inspection on request," and both parties agree § 1983 formed the basis of Saldaña's claim.

the March hearing. At the temporary restraining order hearing, counsel for the state informed the court that Saldaña was already "being reviewed for protective custody and . . . remain[ed] in administrative detention during that review process." The record indicates Ryan and Coffey were not served with the temporary restraining order before the March 7 hearing date.[3]

¶3 On March 2, before both the hearing and service on Ryan and Coffey, the state moved to dismiss the complaint pursuant to Rule 12, Ariz. R. Civ. P., alleging the trial court lacked jurisdiction over the named defendants "due to insufficiency of process and of service of process"; the complaint did not name the state as a defendant; Saldaña had not filed a Notice of Claim pursuant to A.R.S. § 12-821.01(A); A.R.S. § 12-820.02(A)(4) barred Saldaña's negligence claim; the Eleventh Amendment barred Saldaña's Eighth Amendment claim; and the complaint failed "to state a claim for injunctive relief."

¶4 On March 3, the state also filed a motion to continue the preliminary injunction hearing, arguing Saldaña had been placed in protective custody pursuant to ADOC "administrative channels" and his complaint was therefore moot. On March 7, after a hearing on the motion to continue, the trial court vacated the preliminary injunction hearing. Three months later, on June 13, the court heard oral argument on the pending motion to dismiss and granted the motion "[f]or the reasons stated on the record."[4]

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[3]The affidavits of service state the defendants were served with "a copy of . . . [the] Motion for Emergency Temporary Restraining Order," not the restraining order itself, but nevertheless establish March 7 is the earliest date on which the order was served on the defendants.

[4]Saldaña has not provided this court with the transcript of this, or any other, hearing.

¶5 In July 2016,[5] Saldaña filed a motion for attorney fees pursuant to 42 U.S.C. § 1988, arguing he had received the relief requested and was thus the prevailing party. The trial court denied the motion, noting Saldaña had "not prevailed on the merits of any of his claims." Saldaña timely appealed and we have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1).

Attorney Fees

¶6 The sole matter Saldaña raises on appeal is the denial of his request for attorney fees. Saldaña contends the trial court erred in finding he was not the prevailing party because despite the dismissal of his claim, ADOC provided him the relief he sought. Under 42 U.S.C. § 1988(b), a trial court "may" grant reasonable attorney fees to a party prevailing in a § 1983 action. Although courts have some discretion to deny § 1988 attorney fees, that "discretion essentially is limited to determining whether the plaintiff was the prevailing party, whether § 1983 was an appropriate basis for relief, and whether there are any special circumstances that would render an award unjust." *Thomas v. City of Phoenix*, 171 Ariz. 69, 73, 828 P.2d 1210, 1214 (App. 1991).

¶7 "To qualify as the prevailing party under § 1988, the plaintiff must establish a clear, causal relationship between the litigation and the practical outcome realized, showing that (1) the action was causally linked to the relief obtained, and (2) the defendant's conduct in response to the lawsuit was required by § 1983." *Id.* at 72-73, 828 P.2d at 1213-14 (citation omitted). In *Thomas*, we reversed a trial court's denial of attorney fees because the plaintiffs obtained reinstatement of a zoning decision after the court "remanded the matter to the [city] council for rehearing" under conditions set by the court. *Id.* at 71, 74, 828 P.2d at 1212, 1215. In that

[5] It appears the order granting the motion to dismiss, even if otherwise final, was not appealable at the time it was entered because it lacked language pursuant to Rule 54(c), Ariz. R. Civ. P. After ruling on the motion for attorney fees, the trial court issued an order certifying that no issues remained pending and the matter as final pursuant to Rule 54(c).

case, we concluded the plaintiffs were the prevailing party because "[t]here [wa]s no reason to believe that the city council would have reconsidered the appeal if the court had not ordered it to do so." *Id.* at 73, 828 P.2d at 1214.

¶8 Here, Saldaña argues he was the prevailing party because he received the relief he requested—placement in protective custody. He concedes this relief was not granted by court order but instead contends it resulted from the mere fact of litigation. He further argues his complaint was dismissed as moot because the state "voluntarily acquiesced to his demand" to be placed in protective custody and stated at a hearing it was unlikely Saldaña would be removed from protective custody.

¶9 Saldaña has the burden of showing he was the prevailing party by demonstrating, first, a causal connection between the litigation and the relief he received and, second, that the relief obtained was mandated by § 1983. *Id.* at 72-73, 828 P.2d at 1213-14. "To demonstrate [a] causal connection, the plaintiff must demonstrate that his suit was 'a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior.' This means more, however, than merely showing that the event occurred after suit was filed." *Hennigan v. Ouachita Parish Sch. Bd.*, 749 F.2d 1148, 1152 (5th Cir. 1985), *quoting Garcia v. Guerra*, 744 F.2d 1159, 1162 (5th Cir. 1984). Saldaña filed his complaint and motion for preliminary injunction on February 24, 2016. The following day, counsel for the state indicated at the temporary restraining order hearing that ADOC was already considering Saldaña for protective custody.

¶10 Although it is possible that ADOC began considering Saldaña for protective custody the day he filed suit or the following day, finding a causal connection here requires speculation that was not required in *Thomas*, where the plaintiffs received the relief they sought after the court had ordered a rehearing and set the conditions for that hearing. *See Thomas*, 171 Ariz. at 71-73, 828 P.2d at 1212-14. Furthermore, other courts have found the granting of a temporary restraining order alone, without consideration of the merits of the actions, insufficient to make a plaintiff the prevailing party in a § 1983 action. *See, e.g.*, *Bisciglia v. Kenosha Unified Sch. Dist. No. 1*, 45 F.3d 223,

231 (7th Cir. 1995) (plaintiff who received temporary restraining order but no relief when merits considered not prevailing party under § 1988); *Libby v. Ill. High Sch. Ass'n*, 921 F.2d 96, 99 (7th Cir. 1990) ("A plaintiff who obtains provisional relief, such as a TRO, becomes a prevailing party only if that relief was a determination on the merits or acted as a catalyst to obtain concessions from the appellee, but not where the grant of provisional relief merely preserves the status quo.") (citation omitted).

¶11 And even were we persuaded of Saldaña's asserted causal connection between the litigation and his protective custody, he has not established that § 1983 entitled him to the relief he obtained. In a minute entry dated June 13, 2016, the trial court granted the state's motion to dismiss "[f]or the reasons stated on the record." The appellant has the "burden to see that all documents necessary to his arguments on appeal were made part of the record on appeal," *Plattner v. State Farm Mut. Auto. Ins. Co.*, 168 Ariz. 311, 319, 812 P.2d 1129, 1137 (App. 1991); *see also* Ariz. R. Civ. App. P. 11(c)(1)(A), but Saldaña has not provided the transcript of the hearing on the motion to dismiss. "[W]here an incomplete record is presented to an appellate court, the missing portions of that record are to be presumed to support the action of the trial court." *Cullison v. City of Peoria*, 120 Ariz. 165, 168 n.2, 584 P.2d 1156, 1159 n.2 (1978); *accord Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶12 Contrary to Saldaña's suggestion, the case was not dismissed as "mooted by the [state]'s voluntary action" to place Saldaña in protective custody. Mootness was the state's reason for continuing the preliminary injunction hearing but not one of its numerous grounds for dismissal. In an order setting the date for oral argument on the motion to dismiss, the trial court noted that oral argument would be useful in helping "resolv[e] at least one of the issues presented" in the motion to dismiss. Specifically, the court directed "counsel for the parties [to] be prepared to argue whether the Complaint properly assert[ed] a cause of action against Defendants Ryan and Coffey pursuant to 42 U.S.C. § 1983."

¶13 Although the trial court could have dismissed Saldaña's complaint as moot because the state voluntarily placed him in protective custody, the court also could have dismissed it for any of

the state's six reasons actually stated in the motion to dismiss. Three of those reasons would have involved ruling against Saldaña on the merits of his claims. Under these circumstances, and with the presumption the undisclosed record supports the actions of the trial court, *Cullison*, 120 Ariz. at 168 n.2, 584 P.2d at 1159 n.2, we cannot say Saldaña met his burden of showing he was the prevailing party within the meaning of § 1988. *See Roberts v. City of Phoenix*, 225 Ariz. 112, ¶ 34, 235 P.3d 265, 274-75 (App. 2010).

Attorney Fees on Appeal

¶14 Saldaña has requested attorney fees on appeal pursuant to Rule 21, Ariz. R. Civ. App. P., *Love v. Mayor, City of Cheyenne*, 620 F.2d 235 (10th Cir. 1980), and *Hernandez v. Kalinowski*, 146 F.3d 196 (3rd Cir. 1998). But he is not the prevailing party on appeal and we therefore deny his request.

Disposition

¶15 For the foregoing reasons, the trial court's judgment is affirmed.