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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES ROTHERY, Esq.; ANDREA
HOFFMAN,

Plaintiffs,

v.

Former Sheriff LOU BLANAS;
SHERIFF JOHN MCGINNISS;
Detective TIM SHEEHAN;
SACRAMENTO COUNTY SHERIFF'S
DEPARTMENT, an independent
branch of government of the
COUNTY OF SACRAMENTO; COUNTY OF
SACRAMENTO; STATE OF CALIFORNIA
ATTORNEY GENERAL JERRY BROWN;
DOES 1 through 25, unknown co-
conspirators; ATTORNEY GENERAL
MICHAEL B. MUKASEY

Defendants.

_____ /

Case No. 2:08-cv-02064-JAM-KJM

ORDER DENYING DEFENDANTS'
MOTION FOR ATTORNEYS' FEES AND
FOR SANCTIONS

This matter is before the Court on Defendants former
Sheriff Lou Blanas, Sheriff John McGinness, Detective Tim
Sheehan and County of Sacramento's (collectively "County

1 Defendants") motion for attorneys' fees pursuant to 42 U.S.C. §
2 1988 and 28 U.S.C. § 1927. (Doc. # 46.) Plaintiffs James
3 Rothery and Andrea Hoffman (collectively "Plaintiffs") oppose
4 the motion. (Doc. # 52.) For the reasons set forth below¹,
5 County Defendants' motion is DENIED.
6

7 I. FACTUAL AND PROCEDURAL BACKGROUND

8 This case was brought by Plaintiffs based upon the
9 purported improper denial of their Carry Concealed Weapon
10 ("CCW") permit applications. Plaintiffs alleged they were
11 denied CCW permits by the Sacramento County Sheriff's Department
12 because they had not contributed to the Sheriff's election
13 campaign, and that if they had contributed to the campaign, they
14 would have been granted CCW permits. Defs' Mot. at 1.
15 Plaintiffs also claimed that County Defendants were involved in
16 RICO activities which affected their rights. Id. The complaint
17 was dismissed against Sacramento County Defendants by motion
18 pursuant to FRCP 12(b)(6) by Court order on July 27, 2009.
19 (Doc. # 44.) Defendants, State of California and Attorney
20 General Edmund G. Brown were dismissed by motion pursuant to
21 FRCP 12(b)(6) by Court order on July 29, 2009. (Doc. # 45.)
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28 ¹ Because oral argument will not be of material assistance,
the court orders this matter submitted on the briefs. E.D. Cal.
L.R. 78-230(h).

1 The instant matter before the Court is County Defendants' motion
2 for attorneys' fees and for sanctions. (Doc. # 46.)

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4 II. LEGAL STANDARD

5 A. 42 U.S.C. § 1988

6 Section 1988(b) states in relevant part:

7 In any action or proceeding to enforce a provision of . . . [42
8 U.S.C. § 1983] . . . the court, in its discretion, may allow the
9 prevailing party, other than the United States, a reasonable
attorney's fee as part of the costs . . .

10 42 U.S.C. § 1988(b). Under § 1988 jurisprudence, a prevailing
11 defendant is treated differently from a prevailing plaintiff and
12 fees are not awarded routinely or simply because defendant
13 succeeds. See Patton v. County of Kings, 857 F.2d 1379, 1381
14 (9th Cir. 1988). To be awarded fees, a prevailing defendant
15 must demonstrate "plaintiff's action was frivolous, unreasonable
16 or without foundation, even though not brought in subjective bad
17 faith." Christiansburg Garment Co. v. Equal Empl. Opp. Comm'n,
18 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978). This
19 standard is "stringent," Hughes v. Rowe, 449 U.S. 5, 14, 101 S.
20 Ct. 173, 66 L. Ed. 2d 163 (1980), and the Ninth Circuit
21 repeatedly has recognized that attorneys' fees in civil rights
22 cases "should only be awarded to a defendant in exceptional
23 circumstances.'" Saman v. Robbins, 173 F.3d 1150, 1157 (9th
24 Cir. 1999) (quoting Barry v. Fowler, 902 F.2d 770, 773 (9th Cir.
25 1990)).
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1 In assessing whether to award attorneys' fees, the Ninth
2 Circuit instructs courts to "consider the financial resources of
3 the plaintiff in awarding fees to a prevailing defendant"
4 because "the award should not subject the plaintiff to financial
5 ruin." Miller v. Los Angeles County Bd. of Educ., 827 F.2d 617,
6 621 (9th Cir. 1987); see also Patton v. County of Kings, 857
7 F.2d 1379 (9th Cir. 1988) (applying the Miller standard to a
8 case in which plaintiff was represented by counsel).

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11 B. 28 U.S.C. § 1927

12 Section 1927 allows the court to award fees against "any
13 attorney . . . who so multiplies the proceedings in any case
14 unreasonably and vexatiously." This section is not specific to
15 any statute, but applies to any civil suit in federal court.
16 Hyde v. Midland Credit Mgmt., Inc., 567 F.3d 1137, 1141 (9th
17 Cir. 2009). Further, the statute "explicitly provides for
18 remedies against offending attorneys." Id.; F.T.C. v. Alaska
19 Land Leasing, Inc., 799 F.2d 507, 510 (9th Cir. 1986) (noting
20 that § 1927 does not authorize recovery from a party, but "only
21 from an attorney or otherwise admitted representative of a
22 party") (emphasis in original) (internal quotations and
23 citations omitted).

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26 Attorneys' fees under § 1927 are appropriate if an
27 attorney's conduct is in bad faith; recklessness satisfies this
28 standard. B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1107 (9th

1 Cir. 2002); Barber v. Miller, 146 F.3d 707, 711 (9th Cir. 1998)
2 ("An award of sanctions under 28 U.S.C. § 1927 or the district
3 court's inherent authority requires a finding of recklessness or
4 bad faith."). The Ninth Circuit has also required a finding of
5 subjective bad faith, "which is present when an attorney
6 knowingly or recklessly raises a frivolous argument, or argues a
7 meritorious claim for the purpose of harassing an opponent."
8 Id. (emphasis in original) (quoting In re Keegan Mgmt. Co., Sec.
9 Lit., 78 F.3d 431, 436 (9th Cir. 1996)). Moreover, the Ninth
10 Circuit has cautioned that "[s]anctions should be reserved for
11 the 'rare and exceptional case where the action is clearly
12 frivolous, legally unreasonable or without legal foundation, or
13 brought for an improper purpose.'" Primus Auto. Fin. Servs.,
14 Inc. v. Batarse, 115 F.3d 644, 649 (9th Cir. 1997) (quoting
15 Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1344
16 (9th Cir. 1988)).

20 III. COUNTY DEFENDANTS' MOTION FOR ATTORNEYS' FEES

21 County Defendants argue Plaintiffs' claims against them
22 were unreasonable, meritless, frivolous, or vexatious, and
23 brought in bad faith, entitling County Defendants to attorneys'
24 fees. Defs' Mot. at 4. County Defendants assert that
25 Plaintiffs' counsel knew or should have known that Plaintiffs' §
26 1983 claims lacked any merit based upon the decision in Mehl v.
27 Blanas, 2008 U.S. Dist. LEXIS 8394 (E.D. Cal. Feb. 5, 2008). In
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1 light of the "stringent" standard in awarding attorneys' fees to
2 prevailing defendants in § 1983 cases and the Ninth Circuit's
3 jurisprudence that attorneys' fees in civil rights cases "should
4 only be awarded to a defendant in exceptional circumstances,"
5 Saman v. Robbins, 173 F.3d 1150, 1157 (9th Cir. 1999) (quoting
6 Barry v. Fowler, 902 F.2d 770, 773 (9th Cir. 1990)), this Court
7 finds that County Defendants have not met their burden of
8 demonstrating that they are entitled to attorneys' fees.
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11 Here, Plaintiffs and their attorneys did not act in an
12 unreasonable, frivolous, meritless or vexatious manner. The
13 Mehl case was dismissed for a lack of standing. In Mehl, the
14 Court did not find that the underlying claim regarding the
15 issuance of CCWs lacked merit, but rather dismissed the case for
16 lack of standing based on factors that were personal to the
17 individual plaintiffs in the that case. See Mehl, p. 10. In
18 the present case, unlike Mehl, both Plaintiffs submitted
19 completed applications. Additionally, unlike Mehl, neither
20 Plaintiff has any issues pertaining to their mental fitness or
21 procedures for applying which may affect their eligibility for a
22 CCW permit. As such, County Defendants' assertion that based on
23 the dismissal of the Mehl case that Plaintiffs and their
24 attorneys should have recognized the objectively baseless nature
25 of the claims, is without merit.
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1 Following the Mehl case, Plaintiffs and their attorneys
2 acted reasonably in filing another case challenging County
3 Defendants alleged practice of denying CCW permits to applicants
4 who do not contribute to the Sheriff's election campaign.
5 Plaintiffs followed Judge Morrison England's orders in Mehl and
6 took steps to ensure that the standing issues which came forth
7 in that case would not be applicable to the Plaintiffs in this
8 action.
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10 Accordingly, this Court finds that County Defendants are
11 not entitled to attorneys' fees pursuant to 42 U.S.C. § 1988 or
12 28 U.S.C. § 1927. Given the lack of standing in Mehl, the Court
13 declined to address the additional substantive grounds
14 identified in the complaint. Thus, Plaintiffs and their
15 attorneys were unlikely to know that their claims lacked merit.
16 The burden of prevailing defendants in civil rights cases to
17 collect attorneys' fees is high. Here, County Defendants have
18 not shown that Plaintiffs or their attorneys acted in an
19 unreasonable, frivolous, meritless or vexatious manner. Nor
20 have County Defendants shown that Plaintiffs' attorneys
21 multiplied the proceedings in this case unreasonably and
22 vexatiously. As such, County Defendants' motion for attorneys'
23 fees and sanctions is DENIED.
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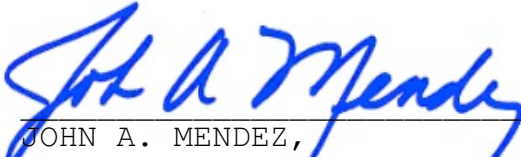
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IV. ORDER

For the reasons stated above, County Defendants' motion for attorneys' fees and sanctions is DENIED.

IT IS SO ORDERED.

Dated: November 19, 2009



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE