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

TSEGAI HAILE,

No. 08-4149 MMC

Plaintiff,

**ORDER DENYING MOTION FOR
ATTORNEY'S FEES**

v.

SANTA ROSA MEMORIAL HOSPITAL,
et al.,

Defendants

On February 24, 2010, following a jury trial, judgment was entered in favor of defendant Santa Rosa Memorial Hospital ("SRMH") and against plaintiff Tsegai Haile ("Haile"). Now before the Court is SRMH's Motion for Attorney's Fees, filed April 9, 2010 ("Motion").¹ No opposition has been filed. Rather, on April 16, 2010, Haile filed a Notice of Appeal from the judgment. Although the appeal remains pending, the Court has jurisdiction to address SRMH's motion for fees, see Masalosalo by Masalosalo v. Stonewall Ins. Co., 718 F.2d 955, 957 (9th Cir. 1983) (holding district court retains jurisdiction to award attorney's fees after notice of appeal from decision on merits filed), and, having read and

¹Ordinarily, a motion for attorney's fees must be brought within 14 days of entry of judgment. See Fed. R. Civ. P. 54(d)(2)(B)(i); Civil L.R. 54-5(a). By order filed March 10, 2010, the Court approved the parties' stipulation to extend the deadline to April 9, 2010. (See Doc. No. 170.)

1 considered the papers submitted in support thereof, rules as follows.

2 **LEGAL STANDARD**

3 By the instant action, Haile, a former employee of SRMH, brought claims for both
4 pre-termination and post-termination discrimination and retaliation under, inter alia, Title VII
5 of the Civil Rights Act, 42 U.S.C. § 2000, et seq. (“Title VII”), and the California Fair
6 Housing and Employment Act (“FEHA”), Cal. Gov’t Code § 12940, et seq.² Under both
7 Title VII and FEHA, a district court has discretion to award attorney’s fees to a prevailing
8 defendant, provided the plaintiff’s claim was “frivolous, unreasonable, or without
9 foundation,” or the plaintiff “continued to litigate after it clearly became so.” See
10 Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978) (setting forth predicate
11 for fees award; holding “subjective bad faith” not required); Moss v. Associated Press, 956
12 F. Supp. 891, 893 (C.D. Cal. 1996) (holding court’s discretion in granting attorney’s fees to
13 prevailing defendant under FEHA “is governed by the Supreme Court’s decision in
14 Christiansburg”).

15 **PROCEDURAL BACKGROUND**

16 On May 23, 2008, Haile filed the instant complaint in state court, and, on
17 September 2, 2008, SRMH removed the action to district court. On February 4, 2009,
18 SRMH moved for summary judgment on all of Haile’s pre-termination claims, on the ground
19 said claims were time-barred, in that they were brought two years after Haile had received
20 a right-to-sue notice from the Equal Employment Opportunity Commission (“EEOC”). See
21 42 U.S.C. § 2000e-5(f)(1) (providing action under Title VII must be brought “within ninety
22 days after the giving of [notice of right to sue]”); Cal. Gov’t Code § 12965(b) (providing
23 action under FEHA must be brought “within one year from the date of [notice of right to
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27 ²Haile’s complaint alleged discrimination and retaliation on the basis of race, national
28 origin, gender and age.

1 sue]”).³ The Court denied summary judgment, finding Haile had raised a triable issue as to
2 whether he was entitled to equitable tolling of the limitations period, based on statements
3 assertedly made to him by an EEOC investigator and on which he relied in delaying filing
4 his complaint in district court. See Rodriguez v. Airborne Express, 265 F.3d 890, 902 (9th
5 Cir. 2001) (holding “[t]he equities favor a discrimination plaintiff who (1) diligently pursued
6 his claim; (2) was misinformed or misled by the administrative agency responsible for
7 processing his charge; (3) relied in fact on the misinformation or misrepresentations of that
8 agency, causing him to fail to exhaust his administrative remedies; and (4) was acting pro
9 se at the time”). Thereafter, on February 9, 2010, the Court conducted a bench trial on the
10 equitable issue and found Haile’s pre-termination claims were time-barred for the reason
11 they were not brought within the applicable statutes of limitation; in particular, the Court
12 found Haile was not entitled to equitable tolling. (See Doc. No.153.) The case then
13 proceeded to trial solely on Haile’s post-termination claims.

14 **DISCUSSION**

15 The instant motion for attorney’s fees is based primarily on SRMH’s contention that
16 Haile’s pre-termination claims were “indisputably time-barred at the time they were filed”
17 (Mot. at 3:6-7) and that Haile “avoided judgment by misleading the Court with false
18 statements signed under penalty of perjury” (Mot. at 3:13-14).⁴ SRMH predicates such
19 argument on Haile’s assertedly knowing misrepresentations to the Court in opposition to
20 SRMH’s motion for summary judgment, specifically, his declaration that (1) Eric Darius

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22 ³Haile received two separate right-to-sue letters. The first was issued on his charge
23 of pre-termination discrimination/retaliation and the second was issued on his separately
24 filed charge that he was terminated for reasons of discrimination/retaliation. The instant
action was filed within two and a half months of the latter notice.

25 ⁴Although SRMH also argues Haile unreasonably pursued until a late stage of the
26 litigation his post-termination claims for age and sex discrimination under Title VII and
27 FEHA, as well as a state common law claim for intentional infliction of emotional distress
28 and a claim under the California Health & Safety Code, SRMH has not attributed an
identifiable amount of time to its counsel’s work on any of such claims. (See Mot. at 6-7
(identifying pre-termination claims), 9 (noting “well over 70% of SRMH’s counsel’s time was
devoted to understanding [those claims] and preparing to defend against them”).)

1 (“Darius”), an EEOC investigator assigned to his case, had told him the limitations period
2 for his pre-termination claims would be “tolled” during the time the EEOC was investigating
3 his termination claims and (2) at the time such statement was made to him, he “was not
4 represented by legal counsel.” (See Haile Decl. in Opp. to Def’s Mot. for Summ. J. ¶ 8;
5 Haile Suppl. Decl. in Supp. of Sur-Reply Re Opp. to Def’s Mot. for Summ. J. (“Haile Suppl.
6 Decl.”) ¶ 2);

7 According to SRMH, Haile thereafter admitted at trial that (1) “no one at the EEOC
8 ever told him the applicable limitations period would be ‘tolled’” and (2) “he was receiving
9 significant assistance from a local attorney.” (Mot. at 3:22-4:3.) Further, according to
10 SRMH, had Haile “not purposefully misled” SRMH and the Court, “the scope of this case for
11 trial could have been substantially pared down as far back as March of 2009.” (Mot. at
12 6:12-18.) As discussed below, although the Court agrees that Haile’s testimony differed
13 from his declarations, the Court is not persuaded either that Haile’s trial testimony
14 constituted a change in the evidence sufficient to have altered the course of the
15 proceedings or that the differences reflect a conscious effort by Haile to mislead.

16 First, although Haile, in testifying at the bench trial, did admit that Darius hadn’t used
17 the word “tolled,” Haile further testified that Darius had informed him that he didn’t need to
18 file an action within the ninety days “as long as we are investigating,” and that Haile
19 understood such statement to mean the limitations period was “tolled” during such time.⁵

20 Had Haile so attested in his declaration in opposition to SRMH’s motion for summary
21 judgment, the Court’s ruling on that motion would not have changed. See Rodriguez, 265
22 F.3d at 902 (holding, for equitable tolling, claimant must show, inter alia, misinformation
23 provided by administrative agency and claimant’s reasonable reliance thereon). Further,
24 although the Court, in finding Haile was not entitled to equitable tolling, ultimately accepted
25 Darius’s testimony as to the information he provided to Haile, and although the Court did

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27 ⁵Neither party has requested a transcript of the bench trial be prepared for purposes
28 of the instant motion or the appeal. To the extent portions of the record are quoted herein,
the Court has relied on its notes taken at the time of the subject proceedings.

1 not accept Haile's interpretation of those remarks, the Court expressly noted that it did not
2 find Haile's testimony to be knowingly false.⁶

3 Second, although Haile, in his declaration, stated, in conclusory fashion, that he was
4 "not represented by legal counsel" during the EEOC's investigation (see Haile Suppl.
5 Decl.), his testimony thereafter is not clearly inconsistent with such statement. In particular,
6 Haile testified that after he received the right-to-sue letter on his pre-termination claims, he
7 endeavored to retain Thomas Kelly ("Kelly"), an attorney who had represented him in an
8 earlier matter, but that Kelly said he could not represent Haile in the current matter as there
9 was a potential conflict and, in any event, he was too busy to take the case. As described
10 by Haile in his testimony, Kelly, at Haile's repeated urging, agreed to send two letters on
11 Haile's behalf, the first to SRMH, requesting Haile's personnel file (see Bench Tr. Ex. II),
12 and the second to the EEOC, requesting exhibits submitted to the EEOC by SRMH and
13 also noting, "in passing," that SRMH had not relied on the correct case authority as to
14 retaliation (Bench Tr. Ex. K). According to Haile's testimony, he did not receive any legal
15 advice from Kelly nor was he charged for any work by Kelly, and that he asked Kelly to
16 send the letters in order to assist whomever Haile ultimately did retain to represent him.

17 Based on Haile's trial testimony, the Court found Haile was represented at the time
18 of his conversation with Darius and thus, for that additional reason, was not entitled to
19 equitable tolling. See Rodriguez, 265 F.3d at 902 (holding equitable tolling available only if
20 claimant proceeding pro se). In so finding, however, the Court acknowledged the limited
21 assistance provided by Kelly arguably did not constitute representation.

22 Further, although SRMH cites no authority addressing the issue of representation in
23 the context of equitable tolling, and the Court is aware of none, cases arising in other
24 contexts suggest Haile's characterization of his relationship with Kelly, as set forth in his

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26 ⁶SRMH's reliance on Haile's post-trial submissions, setting forth his trial counsel's
27 advice with respect to settlement (see Haile Decl., filed Mar. 9, 2010), is unavailing. Advice
28 of such nature is not the equivalent of a legal opinion that Haile's recollection, if credited,
would not constitute a basis for equitable estoppel, let alone an opinion that Haile
knowingly gave false evidence.

1 declaration, was neither knowingly false nor necessarily unreasonable. See, e.g., People
2 v. Gionis, 9 Cal.4th 1196, 1212 (1995) (holding defendant’s incriminating remarks to
3 counsel, from whom he sought but did not receive advice, not protected by attorney-client
4 privilege; noting attorney’s “unequivocal refusal to represent defendant . . . detracts
5 significantly from defendant’s claim of privilege”); Strasbourgger Pearson Tulcin Wolff Inc. v.
6 WIZ Technology, Inc., 69 Cal. App. 4th 1399, 1406-07 (Cal. Ct. App. 1999) (reversing order
7 disqualifying plaintiff’s counsel, where prior advice to defendant “limited to perfunctory
8 instructions” necessary for compliance with states’ “blue sky” laws in connection with stock
9 offering); Kane, Kane, and Kritzer, Inc. v. Altagen, 107 Cal. App. 3d 36, 41-42 (Cal. Ct.
10 App. 1980) (holding, in action for legal malpractice, attorney’s agreement to send collection
11 letter constituted “limited employment” that, absent express request by client, did not
12 impose on attorney duty to file complaint).


13 In sum, although SRMH has shown Haile did not have a strong case on many of the
14 factual and legal issues raised by his complaint, SRMH has not made a sufficient showing
15 to warrant an award of attorney’s fees and non-taxable costs.

16 **CONCLUSION**

17 For the reasons stated above, the Motion for Attorney’s Fees is hereby DENIED.

18 **IT IS SO ORDERED.**

19 Dated: March 1, 2011

20 
21 MAXINE M. CHESNEY
22 United States District Judge