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

WILLIAM MARR,

No. C 09-05978 WHA

Plaintiff,

v.

**ORDER DENYING  
DEFENDANT'S MOTION FOR  
ATTORNEY'S FEES AND  
VACATING HEARING**

BANK OF AMERICA NATIONAL  
ASSOCIATION,

Defendant.

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**INTRODUCTION**

In this settled-and-closed case concerning employment expenses and disability benefits, Bank of America National Association moves to recover attorney's fees incurred while defending against plaintiff William Marr's wage-related claims. For the following reasons, the motion is **DENIED.**

**STATEMENT**

Plaintiff William Marr was a mortgage-loan officer for Bank of America. After going on disability in 2009, he filed this action for, among other things, (1) failure to reimburse business expenses (Section 2802 of the California Labor Code), (2) unlawful wage deductions (Section 221 of the California Labor Code), and (3) failure to pay wages (Section 200 *et seq.* of the California Labor Code). These wage-related claims are the ones at issue in defendant's fees motion.

1 Earlier this year, plaintiff moved for summary judgment as to all three claims, and  
2 defendant moved for summary judgment as to the second claim and part of the third. On March  
3 8, an order granted in part and denied in part cross-motions for partial summary judgment. Of the  
4 three aforementioned claims, each included multiple theories for why plaintiff should recover. In  
5 the order on the summary judgment motions, many of the theories were resolved, but none of the  
6 *claims* was fully resolved.

7 *First*, for the alleged violation of Section 2802, plaintiff’s motion for summary judgment  
8 was denied, and the alleged failure to reimburse business expenses (at least those incurred after  
9 August 20, 2005) was not fully resolved by the order (Dkt. No. 95 at 2–3, 17).

10 *Second*, plaintiff’s claim of violation of Section 221 concerning wage deductions was  
11 broken into two categories: non-assistant expenses and assistant expenses. As a result of the  
12 order, plaintiff’s motion for summary judgment as to the claim for non-assistant expenses (closing  
13 costs, loan-processing fees, extension fees, underage charges, uncollected/waived fee charges,  
14 misquote and rate-lock failure charges, and curtailment charges) was denied, and defendant’s  
15 motion was granted (*id.* at 4–8). Concerning wage deductions for both of plaintiff’s assistants’  
16 bonuses and one of his assistant’s salary, the record was not clear on the issues and both parties’  
17 motions for summary judgment were denied (*id.* at 9). Thus, the claim for unlawful deductions  
18 from plaintiff’s salary was not fully resolved by the order.

19 *Third*, plaintiff claimed that Bank of America failed to pay him earned wages, namely the  
20 full extent of long-term disability benefits and bonuses for “over 40 referrals” (*id.* at 9).  
21 Plaintiff’s claim for payment of disability benefits was dismissed. The order did not, however,  
22 resolve the theory of recovery for failure to pay bonuses. So, the claim for failure to pay wages  
23 was not fully resolved by the order.

24 These claims were trial-ready. Instead, the parties settled. This does not change the fact  
25 that the claims were not fully resolved on the merits at the time of settlement.

26 On April 26, the parties filed a voluntary dismissal. The parties also included a proposed  
27 form of judgment, listing some claims to be dismissed with prejudice and others without  
28 prejudice. This stipulation was problematic because its terms were dictated by the parties rather

1 than the summary judgment order, and because it provided for plaintiff to pursue an appeal, even  
2 though a plaintiff may not appeal following a voluntary dismissal pursuant to a settlement  
3 agreement (Dkt. No. 102 (citing *Concha v. London*, 62 F.3d 1493, 1507 (9th Cir. 1995))).

4 Therefore, an order specifically noted these issues, but given that the parties had filed a voluntary  
5 dismissal, the file was closed and no final judgment was entered. The parties filed another  
6 stipulated request for entry of judgment, but this second request was also denied. Fourteen days  
7 later, defendant filed this motion to recover attorney’s fees pursuant to Section 218.5 of the  
8 California Labor Code.

9 **ANALYSIS**

10 In an action involving state-law claims, a court applies “the law of the forum state to  
11 determine whether a party is entitled to attorney[’s] fees, unless it conflicts with a valid federal  
12 statute or procedural rule.” *MRO Commc’ns, Inc. v. AT & T Co.*, 197 F.3d 1276, 1282 (9th Cir.  
13 1999). Section 218.5 of the California Labor Code dictates that in “[a]ny action brought for the  
14 nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the  
15 court shall award reasonable attorney’s fees and costs to the prevailing party” upon request, if, as  
16 is the case here, the party requested that relief at the start of the case. FRCP 54(d) states that,  
17 unless otherwise ordered, a party must move for attorney’s fees no later than 14 days after the  
18 entry of judgment. So, in order to recover attorney’s fees for wage claims, a party must have  
19 requested that fee recovery at the initiation of the suit and moved for those fees within 14 days of  
20 judgment.

21 The awarding of attorney’s fees to a prevailing party for unpaid wage claims is  
22 mandatory. *Earley v. Superior Court*, 79 Cal. App. 4th 1420, 1427 (2000). Whether a party  
23 prevailed, however, is for courts to determine. *Donner Mgmt. Co. v. Schaffer*, 142 Cal. App. 4th  
24 1296, 1310 (2006) (citations omitted). Here, defendant moves to recover attorney’s fees in  
25 relation to the wage claims upon which they “prevailed.”

26 In evaluating whether a party prevailed, a court makes a determination “on a practical  
27 level.” *Donner Mgmt. Co.*, 142 Cal. App. 4th at 1310 (citations omitted). This practical decision  
28 focuses “on the extent to which the party realized its litigation objectives by judgment, settlement,

1 or otherwise.” *Castro v. Superior Court*, 116 Cal. App. 4th 1010, 1019 (2004) (citation omitted).  
2 A movant need not prevail on all of his claims in order to be deemed a prevailing party. *Lyons v.*  
3 *Chinese Hosp. Ass’n*, 136 Cal. App. 4th 1331, 1345 (2006) (granting plaintiff attorney’s fees for  
4 prevailing on one of six claims because that one claim granting plaintiff a comprehensive  
5 injunction made plaintiff a “prevailing” party on that issue). Still, a party that succeeds as to one  
6 part of an action is not automatically labeled a prevailing party. *See Galan v. Wolfriver Holding*  
7 *Corp.*, 80 Cal. App. 4th 1124, 1129 (2000).

8 The parties cite numerous decisions that apply this standard, resolved on various  
9 procedural postures. Although defendant tries to distinguish those decisions that denied  
10 attorney’s fees, they are in fact much closer to our situation than the decisions cited that awarded  
11 fees. For instance, California courts have repeatedly held that a plaintiff’s voluntary dismissal  
12 does not necessarily make a defendant a prevailing party. In *Galan*, part of the settlement  
13 agreement included a voluntary dismissal of claims against Wolfriver. Nevertheless, “the merits  
14 of the dispute against Wolfriver were never resolved.” *Id.* at 1129. So, “at the practical level[,]”  
15 the court concluded that there was no prevailing party.” *Id.* at 1130. Likewise, in *Gilbert v. Nat’l*  
16 *Enquirer, Inc.*, 55 Cal. App. 4th 1273, 1277 (1997), the court held that after voluntarily  
17 dismissing some claims in order to expedite others, it was not possible to determine “whether  
18 either side had prevailed on a practical level.” *Id.* at 1277–78.

19 So too here. Plaintiff’s voluntary dismissal did not confer prevailing party status on  
20 defendant. The settlement did not resolve the merits of the case or the claims. Defendant tries to  
21 distinguish the above actions from ours in that there was a “judgment” made in the instant action.  
22 While in the aforementioned decisions the voluntary dismissals occurred without judgments on  
23 the merits — whereas here the order for partial summary judgment was a decision on the merits  
24 and defendant prevailed over many of plaintiff’s theories — in the present action defendant  
25 obtained a ruling against plaintiff only on several *parts* of the claims. Defendant did not fully  
26 prevail over any wage-related *claim* after partial summary judgment. Plaintiff sought lost wages  
27 on myriad different theories. Some of those theories were adjudicated and dismissed. Still, real  
28 material issues remained to be adjudicated at trial — including unpaid reimbursements (relating

1 to various expenses), unlawful wage deductions (relating to salary and bonuses of assistants), and  
2 unpaid wages (relating to bonuses for referrals). As such, there was no clear winner as to *any* of  
3 these three claims after the order for partial summary judgment.

4 Defendant argues that it “mostly” prevailed and that “mostly” prevailing entitles it to  
5 recover attorney’s fees. Not so. Although defendant is right that prevailing on one claim and not  
6 another does not limit its right to attorney’s fees, *see Akins v. Enterprise Rent-A-Car Co.*, 79 Cal.  
7 App. 4th 1127, 1133 (2000), it has not fully prevailed on any of the claims relating to unpaid  
8 wages and fringe benefits. Thus, defendant is not the prevailing party as to any of those claims.  
9 Defendant cites *no* decisions where a party is said to have prevailed on a whole claim after  
10 succeeding on only some theories within that claim.

11 Moreover, even if the voluntary dismissal makes defendant a prevailing party — which it  
12 does not — defendant’s litigation goals were not achieved. After the settlement, plaintiff  
13 requested a final judgment and is attempting to appeal. The settlement may have ended the  
14 litigation but many of the issues remain still unresolved on the merits because no trial ever  
15 occurred.

16 \* \* \*

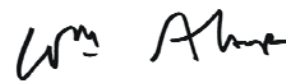
17 Plaintiff asserts that even if defendant did prevail, the motion for attorney’s fees is time-  
18 barred. As there is no prevailing party, the issue of timeliness is moot.

19 **CONCLUSION**

20 For these reasons, defendant’s motion for attorney’s fees is **DENIED**. The Court asks  
21 counsel to consider privately whether this motion was worthwhile and whether, in settling the  
22 case in the first place, issues like this should have been included. The hearing scheduled for July  
23 28 is **VACATED**.

24 **IT IS SO ORDERED.**

25  
26 Dated: July 20, 2011.



27 **WILLIAM ALSUP**  
28 **UNITED STATES DISTRICT JUDGE**