

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GREEN VALLEY CORPORATION, a
California corporation, dba Barry Swenson
Builder,

Plaintiff,

v.

CALDO OIL COMPANY, a California
corporation; VICTOR J. LOBUE, an individual
and as trustee of the Victor J. LoBue Trust; THE
VICTOR J. LOBUE TRUST; NELLA OIL
COMPANY, LLC, a California limited liability
company; and DOES 1 through 100,

Defendants.

Case No.: 09-CV-04028-LHK

ORDER DENYING NELLA OIL
COMPANY, LLC'S MOTION TO FIX
ATTORNEYS' FEES AS AN ITEM OF
COST PURSUANT TO 42 U.S.C. §
6972(e)

On September 24, 2010, Defendant Nella Oil Company, LLC moved to fix attorneys' fees as an item of cost pursuant to 42 U.S.C. § 6972(e). Dkt. No. 49 ("Mot."). Plaintiff Green Valley Corporation opposes the motion. Dkt. No. 58 ("Opp'n"). Nella Oil did not file a reply brief. Pursuant to Civ. L.R. 7-1(b), the Court deems this motion suitable for decision without oral argument. After considering the parties' submissions, this Court DENIES Nella Oil's motion.

I. BACKGROUND

Green Valley, the current owner of a contaminated property, brought this suit against the former owners of the property, the former owners and operators of the bulk fueling and gasoline

1 service station located on the property, and Nella Oil, the current owner of a gasoline service
2 station on an adjacent parcel. Opp'n 1. Green Valley seeks recovery of costs, damages, and
3 injunctive relief to address the contamination under federal and state law causes of action. *Id.* One
4 of Green Valley's causes of action against Nella Oil arose under the Resource Conservation and
5 Recovery Act ("RCRA"), RCRA § 7002(e), 42 U.S.C. § 6972(a)(1)(B).

6 On September 10, 2010, Green Valley and Nella Oil stipulated to the voluntary dismissal of
7 Nella Oil pursuant to FED. R. CIV. P. 41(a)(1). Dkt. No. 47. Nella Oil then filed this motion
8 claiming that it is entitled to reasonable attorneys' fees as costs pursuant to 42 U.S.C. §
9 6972(a)(1)(B) because Green Valley's claim was unreasonable and groundless and because Green
10 Valley continued to litigate this case with knowledge that the claim was groundless and
11 unreasonable as against Nella Oil. Mot. 1.

12 II. ANALYSIS

13 Nella Oil argues that RCRA's fee-shifting provision, 42 U.S.C. § 6972(e), allows this Court
14 to award reasonable attorneys' fees and costs to a prevailing party and further claims that such costs
15 can be awarded to prevailing defendants upon a finding that the plaintiff's action was frivolous,
16 unreasonable, or without foundation. Mot. 7. Nella Oil argues that under this standard, this Court
17 should award it attorneys' fees. *Id.* Green Valley contends that Nella Oil does not qualify for
18 attorneys' fees because it is not a prevailing party and because Green Valley's case against Nella
19 Oil was not frivolous, unreasonable, or without foundation. Opp'n 6-7. Even though Nella Oil's
20 characterization of the applicable legal standard is correct, Nella Oil is not a prevailing party, and
21 therefore, cannot recover attorneys' fees under § 6972(e).

22 Under 42 U.S.C. § 6972(e), "[t]he court . . . may award costs of litigation (including
23 reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party,
24 whenever the court determines such an award is appropriate." 42 U.S.C. § 6972(e) (brackets in
25 original). The Ninth Circuit has held that prevailing defendants can be awarded costs under the
26 RCRA when "the plaintiff's action was frivolous, unreasonable, or without foundation, even though
27 not brought in subjective bad faith." *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th
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1 Cir. 1995) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 700,
2 54 L. Ed. 2d 648 (1978)).

3 Nevertheless, Nella Oil does not qualify for attorneys' fees under the statute because it is
4 not a prevailing party. The Court reaches this conclusion for two reasons. First, Nella Oil's only
5 argument that it is a prevailing party misreads the law. Nella Oil claims that under FED. R. CIV. P.
6 41, a voluntarily stipulated dismissal without prejudice acts as an adjudication on the merits. Mot.
7 7. A dismissal under Rule 41(a)(1) only acts as an adjudication on the merits, however, "if the
8 plaintiff previously dismissed any federal- or state-court action based on or including the same
9 claim." FED. R. CIV. P. 41(a)(1)(B). Nella Oil provides no evidence that Green Valley previously
10 dismissed a similar claim against it. Thus, Rule 41 does not make Nella Oil a prevailing party.

11 Second, recent Ninth Circuit holdings clearly support Green Valley's argument that Nella
12 Oil is not a prevailing party. "The term 'prevailing party' . . . is a term of art that courts must
13 interpret consistently throughout the United States Code." *Klamath Siskiyou Wildlands Ctr. v.*
14 *United States Bureau of Land Mgmt.*, 589 F.3d 1027, 1030 (9th Cir. 2009) (citing *Buckhannon Bd.*
15 *v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 603, 121 S. Ct. 1835, 149 L. Ed.
16 2d 855 (2001)). The definition set forth by the United States Supreme Court in *Buckhannon*
17 requires a prevailing party "to have achieved 'a material alteration in the legal relationship of the
18 parties' that is 'judicially sanctioned.'" *Id.* (quoting *Buckhannon*, 532 U.S. at 604-05, 121 S. Ct.
19 1835). The Ninth Circuit applied this definition of prevailing party to the RCRA statute even
20 though RCRA also includes the term "substantially prevailing party." *See Kasza v. Whitman*, 325
21 F.3d 1178, 1180 (9th Cir. 2003).

22 As Green Valley correctly points out, Opp'n 6-7, the Ninth Circuit has repeatedly held that
23 a party voluntarily dismissed without prejudice does not qualify as a prevailing party, *see e.g.*,
24 *United States v. Milner*, 583 F.3d 1174, 1196-97 (9th Cir. 2009) ("[A] dismissal without prejudice
25 does not materially alter the legal relationship of the parties[] because the defendant remains
26 subject to the risk of re-filing.") (citing *Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978,
27 981 (9th Cir. 2008)); *Cadkin v. Loose*, 569 F.3d 1142, 1145 (9th Cir. 2009) ("Because the plaintiffs
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1 in this lawsuit remained free to refile their copyright claims against the defendants in federal court
2 following their voluntary dismissal of the complaint, we hold the defendants are not prevailing
3 parties and thus not entitled to the attorney's fees the district court awarded them."). Here, Green
4 Valley is free to refile its complaint against Nella Oil. As a result, Nella Oil is not a prevailing
5 party and cannot recover attorneys' fees under RCRA.

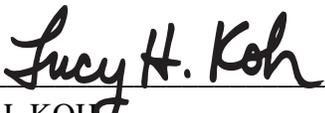
6 Because Nella Oil is not a prevailing party, the Court need not consider the other arguments
7 made by the parties.

8 **III. CONCLUSION**

9 For the foregoing reasons, Nella Oil's motion to fix attorneys' fees as an item of cost
10 pursuant to 42 U.S.C. § 6972(e) is DENIED.

11 **IT IS SO ORDERED.**

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13 Dated: December 9, 2010



LUCY H. KOH
United States District Judge