

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RONALD NEAL JOSEPH, SR. and JANE)	2:09-CV-00966-HDM-LRL
PITRE JOSEPH)	
)	
Plaintiffs,)	ORDER
)	
vs.)	
)	
LAS VEGAS METROPOLITAN POLICE)	
DEPARTMENT and SARA BRADSHAW,)	
)	
Defendants.	

Before the court is the defendants' Motion for Attorney's Fees. ECF No. 140. Plaintiffs have responded, ECF No. 130. The defendants argue that they are entitled to attorney's fees under 42 U.S.C. § 1988 and that the plaintiffs' attorney should be personally liable for fees under 28 U.S.C. § 1927.

A prevailing defendant in a § 1983 case may be entitled to "reasonable attorney's fees" under 42 U.S.C. § 1988 only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christainsburg Garment Co. v. EEOC*, 434 U.S. 412, 421

1 (1978); see also *Elks Nat'l Foundation v. Weber*, 942 F.2d 1480 (9
2 Cir. 1991) (attorney's fees may be awarded against unsuccessful
3 plaintiffs "only if the action is meritless in the sense it is
4 groundless or without foundation").

5 The Ninth Circuit has held that "a district court must avoid
6 post-hoc reasoning concluding that, because a plaintiff did not
7 ultimately prevail, his action must have been unreasonable or
8 without foundation." *Tutor-Salbia Corp. v. City of Hailey*, 452 F.3d
9 1055, 1060 (9th Cir. 2006); see also *Jensen v. City of San Jose*,
10 806 F.2d 899, 901 (9th Cir. 1986) (there is a "middle ground where
11 failing claims-non-frivolous and made in good faith-are not
12 entitled to attorney's fees").

13 Under 28 U.S.C. § 1927, if an attorney "unreasonably and
14 vexatiously" multiplies the proceedings the court may require them
15 to "satisfy personally the excess costs, expenses, and attorney's
16 fees reasonably incurred because of such conduct." In the Ninth
17 Circuit, the "imposition of sanctions under § 1927 requires a
18 finding that counsel acted recklessly or in bad faith." *U.S. v.*
19 *Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983) (quotations omitted).
20 Further, "sanctions should not be assessed lightly or without a
21 fair notice and an opportunity for a hearing on the record" *Id.* at
22 610 (citing *Roadway Express, Inc. V. Piper*, 447 U.S. 752 (1980));
23 see also *Munoz v. California Dept. Of Corrections*, 182 F.3d 926
24 (9th Cir. 1999).

25 On May 29, 2009 the plaintiffs filed their complaint. ECF No.
26 1. On April 6, 2010 the Magistrate Judge issued a discovery plan
27 and scheduling order. The discovery deadline was January 31, 2011.
28 ECF No. 23.

1 On July 13, 2010, approximately two and a half weeks before
2 the close of discovery, the defendants filed an emergency motion to
3 compel discovery. ECF No. 24, 8:6-17:12. On August 13, 2010, the
4 Magistrate Judge granted the defendants' motion to compel. ECF No.
5 29. On August 27, 2010 the plaintiffs filed a motion for
6 reconsideration of the Magistrate Judge's order to compel, ECF No.
7 31, which was denied on September 7, 2010. ECF No. 37. Defendants
8 filed a memorandum for \$2,280 in attorney's fees and costs
9 associated with the motion to compel that was granted by the
10 Magistrate Judge on November 1, 2010. ECF No. 51. On May 27, 2011,
11 defendants filed a motion for the court to enforce judgment of the
12 sanctions. ECF No. 102. On June 21, 2011, this court ordered the
13 plaintiffs to pay the sanctions on or before the court entered a
14 final judgment in the matter. ECF No. 111.

15 On October 7, 2010, the plaintiffs filed a motion for a
16 emergency protective order stating the plaintiffs did not have the
17 financial means to travel to Las Vegas for depositions on October
18 22, 2010 and that one of the plaintiffs was medically unable to
19 travel. ECF No. 41, ¶ 3. The Magistrate Judge denied the motion
20 finding the plaintiffs did not provide evidence to support their
21 assertions of financial hardship and medical inability to travel.
22 ECF No. 47. The plaintiffs moved to reconsider the Magistrate
23 Judge's order. ECF No. 48. At a hearing on the plaintiffs' motion
24 for a protective order, this Court vacated the scheduled
25 depositions and directed the defendants to file a certificate of
26 costs associated with the depositions at the close of the case. ECF
27 No. 50. Further, the court ordered that both plaintiffs were
28 required to appear for video depositions no later than November 23,

1 2010 and that the plaintiffs should bear the costs of the
2 depositions. ECF No. 50.

3 On September 14, 2010, the plaintiffs filed a motion to
4 compel. ECF No. 36. The plaintiffs alleged the defendants provided
5 incomplete responses to the plaintiffs' interrogatories and
6 requested the court to order the defendants to provide "non-
7 evasive" responses to their interrogatories. See Mem. Filed in
8 Support at 8, ECF No. 36. Defendants responded claiming that
9 "plaintiffs served discovery responses that exceeded the bounds of
10 permissible discovery." Order, 2:3-5, ECF No. 56. On December 10,
11 2010, the Magistrate Judge granted the plaintiff's motion in part
12 and denied it in part. ECF No. 56. The Magistrate Judge ordered
13 that the defendants respond more fully to three of the plaintiffs'
14 requests. ECF No. 56, 4:19-21; 5:24-26; 9:4. The court also found
15 that certain discovery the plaintiffs requested was not relevant or
16 did not exist. ECF No. 56, 6:8; 6:23. The Magistrate Judge further
17 ordered that the parties work together to draft and submit an
18 appropriate protective order for any sensitive or private
19 information by December 30, 2010. ECF No. 56, 8:6; 11:19; 12:22;
20 13:9. On December 27, 2010 the plaintiffs filed a motion for
21 reconsideration of the Magistrate Judge's ruling on the motion to
22 compel. ECF No. 59. On February 3, 2011 this court affirmed the
23 Magistrate Judge's order, with minor revisions. Order, ECF No. 74.

24 While the above issues concerning the plaintiffs' motion to
25 compel were ongoing, the parties began drafting a protective order
26 in accordance with the court's order. On December 30, 2010 the
27 plaintiffs sent the defendants an e-mail regarding the over breadth
28 of the defendant's proposed order. Defs.' Resp. 2:19-23, ECF No.

1 88. The defendants replied they were out of town and wouldn't be
2 able to respond until January 3, 2011. That day, December 30, the
3 plaintiffs submitted the motion for entry of a protective order.
4 ECF No. 60. On January 27, 2011, the Magistrate Judge denied the
5 plaintiffs' motion and ordered the defendants to submit their
6 proposed protective order. ECF No. 70. The defendant's submitted
7 the proposed order, ECF No. 71, and the Magistrate Judge entered
8 the order on February 2, 2011. ECF No. 72. Plaintiffs filed a
9 motion for reconsideration. ECF No. 77. This court affirmed the
10 Magistrate Judge's order on March 1, 2011. ECF No. 89.

11 On March 1, 2011 the plaintiffs filed a motion to extend time
12 for discovery and to impose sanctions on the defendant for the
13 defendant's failure to comply with discovery requests. ECF No. 88.
14 The Magistrate Judge denied the motion on April 25, 2011. ECF No.
15 99. The plaintiffs filed a motion for reconsideration which was
16 denied. ECF No. 106.

17 The defendants filed a motion for attorneys fees, ECF No. 121,
18 which the court denied without prejudice to renew pending the
19 plaintiffs' Ninth Circuit appeal. ECF No. 133. After the Ninth
20 Circuit affirmed the courts ruling on the defendants' motion for
21 summary judgment, ECF No. 138, the defendants filed their motion to
22 renew. ECF No. 143.

23 While the defendants prevailed on their motion for summary
24 judgment, the Court is not persuaded the lawsuit was "frivolous,
25 unreasonable, or without foundation." *Christainsburg Garment Co.*,
26 434 U.S. at 421 justifying an award of fees under 42 U.S.C. § 1988.

27 To the extent the plaintiff filed motions that were frivolous
28 or vexatious the court has previously awarded sanctions and costs

1 against the plaintiffs. Accordingly, no additional fees or
2 sanctions will be imposed.

3 The defendants motion for attorneys fees is denied.

4 **IT IS SO ORDERED.**

5 DATED: This 16th day of August, 2013.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


UNITED STATES DISTRICT JUDGE