IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BETHANY ANN PAZICNI, Plaintiff, v. RUSSELL P. MILLER, JR., ALLEN CLARKE, and SOUTH CONNELLSVILLE BOROUGH, Defendants.	)	Civil Action No. 17-117 Judge Nora Barry Fischer

MEMORANDUM ORDER

This is a civil rights action brought by Plaintiff Bethany Ann Pazicni, ("Plaintiff"), which was dismissed by the Court in a Memorandum Opinion and Order issued on June 5, 2017, granting motions to dismiss filed by Defendants Russell P. Miller, Jr., Allen Clarke, and South Connellsville Borough, ("Defendants"). (Docket Nos. 43; 44). Presently before the Court are contested motions filed by Defendants seeking an award of their attorneys' fees as prevailing parties under 42 U.S.C. § 1988. (Docket Nos. 45; 48). The motions have been fully briefed and are now ripe for disposition. (Docket Nos. 45-46; 48-49; 51-54). After careful consideration of the parties' positions, in light of the relevant legal authority outlined below, Defendants' Motions [45] [48] will be denied.

The Court initially turns to the relevant legal standard.[1] It is well settled that under the "American rule," litigants generally pay their own attorneys' fees and costs, absent a specific legislative or contractual authorization for same. *See e.g., Equal Employment Opportunity Comm. v. Grane Healthcare Co.*, 2016 WL 3349344, at *5 (W.D. Pa. Jun. 15, 2016) (discussing

[1] As the parties are aware of the factual circumstances of this litigation and the same is otherwise set forth in the Court's June 5, 2017 Memorandum Opinion, the Court declines to fully restate the facts here. (*See* Docket No. 43).

statutory exceptions to American rule); *Rosser Intern., Inc. v. Walter P. Moore & Assoc., Inc.*, 2013 WL 3989437, at *14 (W.D. Pa. Aug. 2, 2013) (discussing contractual agreements shifting fees as exceptions to American rule). One such exception is 42 U.S.C. § 1988, pursuant to which "a court has discretion to 'allow the prevailing party, other than the United States, a reasonable attorney's fee' in a civil rights lawsuit filed under 42 U.S.C. § 1983." *James v. City of Boise, Idaho*, 136 S. Ct. 685, 686, 193 L. Ed. 2d 694 (2016) (quoting 42 U.S.C. § 1988). While either plaintiffs or defendants may qualify as prevailing parties, the Supreme Court of the United States has "interpreted § 1988 to permit a prevailing defendant in such a suit to recover fees only if 'the plaintiff's action was frivolous, unreasonable, or without foundation.'" *Id.* (quoting *Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (per curiam)). The United States Court of Appeals for the Third Circuit noted that this is a "stringent" standard and that "[a]ttorney's fees for prevailing defendants under this standard are 'not routine, but are to be only sparingly awarded.'" *Raab v. City of Ocean City, New Jersey*, 833 F.3d 286, 297 (3d Cir. 2016) (quoting *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 503 (3d Cir. 1991)). The Court of Appeals also:

> identified several factors relevant to determining whether an award of attorneys' fees is appropriate, including: whether the plaintiff established a prima facie case; whether the defendant offered to settle; whether the trial court dismissed the case prior to trial; whether the case involved an issue of first impression; whether the controversy was based sufficiently upon a real threat of injury to the plaintiff; and whether the trial court found that the suit was frivolous.

Ullman v. Superior Court of Pennsylvania, 603 F. App'x 77, 80 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 180, 193 L. Ed. 2d 144 (2015) (citing *Barnes Found. v. Twp. of Lower Merion*, 242 F.3d 151, 158 (3d Cir. 2001)). These factors are to be viewed as "merely guidelines, not strict rules" and the ultimate determination of whether to award fees to a prevailing defendant must be made on a case-by-case basis. *Barnes Found.*, 242 F.3d at 158.

In this Court's estimation, a fair weighing of the aforementioned factors demonstrates that Defendants have not met their burden to justify the imposition of attorneys' fees pursuant to § 1988. *Barnes Found.*, 242 F.3d at 158. With that said, several of those factors weigh in Defendants' favor. To this end, Plaintiff's federal claims were all dismissed, with prejudice, and the entire case was dismissed prior to trial on the merits. (Docket Nos. 43, 44). However, "[t]he fact that a plaintiff may ultimately lose [her] case is not in itself a sufficient justification for the assessment of fees," *Raab*, 833 F.3d at 297 (quoting *Hughes*, 449 U.S. at 14, 101 S.Ct. 173)), and Plaintiff's state law claim of intentional infliction of emotional distress was dismissed, without prejudice, to be refiled in state court. (*See* Docket Nos. 43, 44). Defendants also did not make a settlement offer which supports their pursuit of attorneys' fees. *Barnes Found.*, 242 F.3d at 158. Perhaps, the same is tempered by the fact that they did not have a formal opportunity to do so because the case was dismissed prior to the case being referred to mandatory ADR; however, once a claim is made parties are free to negotiate a resolution without resort to litigation.

Beyond those considerations, all of the remaining factors strongly weigh in favor of Plaintiff and counsel the Court to deny the defense motions for attorneys' fees. *See Barnes Found.*, 242 F.3d at 158. In this regard, Plaintiff made serious allegations that a local police chief, Miller, and her ex-boyfriend, Clarke, fabricated evidence against her in citations for summary offenses which were filed with a local magistrate judge, making her claim "sufficiently based on upon a real threat of injury." *Id.* As the Court's former colleague, the Honorable Terrence F. McVerry previously explained "[w]hen a citizen reasonably believes that [her] constitutional rights […] have been violated, that citizen is entitled to pursue a federal lawsuit to effectuate those rights. Indeed, upholding the constitutional rights of citizens is one of the most

important tasks of the federal judiciary." *Yurisic v. Carter*, No. 2:08-CV-971, 2010 WL 3811455, at *3 (W.D. Pa. Sept. 21, 2010). Although this Court held that Plaintiff failed to sufficiently allege that she sustained a sufficient deprivation of liberty to permit her claim to move into discovery, such result was reached only after the Court noted a lack of binding authority from our Court of Appeals which was directly on point, (Docket No. 43 at 12-14, n.3), reviewed caselaw from outside this Circuit and gave careful consideration to all of the parties' arguments. *See e.g., Solomen v. Redwood Advisory Co.*, 223 F. Supp. 2d 681, 685 (E.D. Pa. 2002) ("The serious consideration that I gave to this question precludes my finding either that the answer was obvious or that the claim was therefore frivolous or unreasonable"); *Musila v. Lock Haven Univ.*, 970 F. Supp. 2d 384, 395 (M.D. Pa. 2013) ("It took the Court considerable time and effort to research the nuances of [Plaintiff]'s claim, and it concludes that it was not unreasonable for [Plaintiff] to believe that he may have had a viable claim"). The Court did not rule on the merits of whether the Defendants fabricated evidence or not. (Docket No. 43 at 12-14). Rather, the Court concluded that Plaintiff could not sustain a § 1983 claim because the underlying citations were dismissed at a preliminary hearing that she attended and it appears that those citations were dismissed only due to the fact that the chief of police did not himself appear at the proceeding. (*Id.*). It was simply not unreasonable for Plaintiff to assert claims based on this factual scenario and she may still have a viable claim against Defendants in another forum. *See Raab*, 833 F.3d at 298; *see also Musila*, 970 F. Supp. 2d at 395. Overall, the Court cannot conclude on this record that Plaintiff's suit was "frivolous, unreasonable, or without foundation.'" *See Raab*, 833 F.3d at 298 (quoting *Hughes*, 449 U.S. at 14) ("Even if a plaintiff's allegations are ultimately 'legally insufficient to require a trial,' that alone is not enough to

render the plaintiff's cause of action 'groundless' or 'without foundation.'"). Accordingly, the Court exercises its discretion to deny the Defendants' motions for attorneys' fees under § 1988.

For all of these reasons,

IT IS HEREBY ORDERED that Defendants' Motions [45] [48] are DENIED.

s/Nora Barry Fischer
Nora Barry Fischer
U.S. District Court

Date: July 20, 2017

cc/ecf: All counsel of record