

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

THE BARNES FOUNDATION,	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 96-372
v.	:	
	:	
THE TOWNSHIP OF LOWER MERION,	:	
et al.,	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

November 24, 1999

Before the court is the motion for award of attorney's fees and costs filed on behalf of defendants, Ina Asher, Steven Asher, Beth Ginsburg, Leonard Ginsburg, Nancy Herman, Walter Herman, Toby Marmon and Robert Marmon, as prevailing parties under 42 U.S.C. § 1988.

Plaintiff, The Barnes Foundation, opposes the motion.

The parties agree on the applicable law expressed in this circuit in Brown v. Borough of Chambersburg, 903 F.2d 274. *Citing* Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422 98 S.Ct. 694, 701 (1978), the court stated:

A plaintiff may be liable for attorneys fees under § 1988 when “a court finds that his claim was frivolous, unreasonable, or groundless. . . .”

The Brown court went on to say that a plaintiff's subjective bad faith is not a necessary prerequisite to an award of fees against him and that implicit in this approach as to whether fees should be awarded is the premise that plaintiff knew or should have known the legal or evidentiary deficiencies of his claim.

Instantly, it is clear that the complaint filed in this case by plaintiff was not frivolous; that is, the pleading is not insufficient on its face. The next inquiry is, was the complaint unreasonable or groundless? To answer that question, I attempted to determine whether plaintiff knew or should have known that its complaint was legally or evidentiary deficient. If the complaint was clearly insufficient in its legal theory, then certainly it was unreasonable for plaintiff to file it. Even if legally sufficient in terms of the legal theory underlying the complaint, if there was no reasonable factual foundation, it follows that the complaint would be groundless.

Defendants are adamant in their argument that plaintiff knew or certainly should have known that the *Noerr-Pennington* doctrine protected their conduct and no liability could be imposed upon them. I agree that plaintiff knew or should have known that *Noerr-Pennington* may impose a significant hurdle¹ in its claim against defendants. Nonetheless, the plaintiffs could in good faith argue that it is not applicable to the case it

1. Affidavit of Jordana Cooper, Esquire, hereafter referred to makes a plausible argument that plaintiff should not have necessarily even recognized that *Noerr-Pennington* was a hurdle at the time this suit was filed on January 19, 1996.

is bringing. I reject defendants' argument that plaintiffs knew or should have known that no liability could have been imposed upon defendants.

By far the most vexatious question raised by defendants' petition is, did the complaint lack a factual foundation?

In support of its contention that there was a factual basis for the complaint, plaintiff cites its own background beginning with its creation in 1922 by Dr. Alfred C. Barnes, up to 1995 with particular reference to the leadership of Richard Glanton, an African-American between 1990 and 1995. Under Glanton, plans were made to renovate the Barnes main building, gallery and physical plant, as well as to increase public access to the gallery. This anticipated increase in visitors also led to plaintiffs seeking in 1995 to construct a parking lot for students and visitors on its nearly 14 acre property.

According to plaintiff, the neighbors, all of whom are white residents owning homes near plaintiff's property, began voicing "their purported fears about traffic noise and pollution." (Pl's brief, p. 5). The neighbors formed an association led by Robert Marmon and Steven Asher to coordinate efforts in opposition to plaintiff's plans. These efforts included seeking the support of Lower Merion Township officials.

Plaintiff cannot point to the proverbial smoking gun to show evidentiary support for its complaint of discriminatory treatment. Instead, it points, for example, to such things as:

(1) Affidavit of Thomas Massaro, a consultant with extensive experience in land use in general and land use in particular in Lower Merion Township, who opined that the neighbors were so irrationally and firmly opposed to Barnes' proposal that it suggested to him that the neighbors' concerns were a pretext for racial prejudice.

(2) Massaro's opinion that neighbors' concerns about traffic problems that would result were inconsistent with the realities of this neighborhood because of the proximity of such institutions as Episcopal Academy and St. Joseph's University.

(3) Affidavit of Peter Kelsen, attorney engaged by defendant to act as land use counsel to secure permit for parking lot which included:

(a) Opinion that Township should have allowed parking lot as matter of right without zoning board approval.

(b) Opinion that Township representatives and neighbors expressed high level of animosity toward plaintiff and Glanton in particular and that as meetings continued, the neighbors' "tone and position regarding the Barnes' application became increasingly caustic and confrontational."

(c) Opinion that meeting with neighborhood residents including Merion Civil Association "were quite contentious with a great deal of animus expressed against the Barnes and Mr. Glanton specifically."

(d) Opinion that comments of individual neighbors and officials were of an “overly discriminatory nature.”

(4) Affidavit of Ann B. Laupheimer, partner at Blank, Rome, Comisky & McCauley who discussed with other lawyers the possibility of a lawsuit against the township and certain neighbors and who began an investigation into the facts and the law and determined that they had gathered sufficient evidence to warrant proceeding.

(5) Affidavit of Jordana Cooper, associate at Blank, Rome, who, though claiming not to have anticipated the *Noerr-Pennington* defense of neighbor defendants, opined that there “was little reason to anticipate that particular defense because it was a novel one in the civil rights context in the Third Circuit at that time. . . .”

(6) Examples of unequal treatment by the township with regard to traffic and parking such as permitting parking on the lawns of St. Joseph’s University, Episcopal Academy and Akiba Academy, but ticketing those who parked on the Barnes lawn.

(7) President Woten’s (Township Commissioner) alleged statement that the commissioners are outraged and behind the neighbors and are going to help.

(8) The use of code words; i.e., plaintiff refers to a phrase used by Robert Marmon; namely, “Mr. Glanton and his people”, as well as the words “carpetbaggers” and “outsiders” used by Mr. Marmon in describing plaintiff.

The above eight examples do not represent all of the plaintiff’s arguments, but are representative of them. It is fair to conclude, I believe, as previously alluded to,

that plaintiff never uncovered any direct evidence of racial hostility. Instead, it strikes me that plaintiff's suit against defendants was based substantially on the theory enunciated by then Judge Lewis, explaining, in plaintiff's words, "the intricacies of modern prejudice" as follows:

Anti-discrimination laws and lawsuits have "educated" would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial "smoking gun" behind. As one court has recognized, "[d]efendants of even minimal sophistication will neither admit discriminatory animus or leave a paper trail demonstrating it." Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987). But regardless of the form that discrimination takes, the impermissible impact remains the same, and the law's prohibition remains unchanged. . . . *The sophisticated would-be violator* has made our job a little more difficult. Courts today must be increasingly vigilant in their efforts to ensure that prohibited discrimination is not approved under the auspices of legitimate conduct, and "a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled . . . because of crabbed notions of relevance or excessive mistrust of juries."

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081-82 (3d Cir. 1996) (Lewis, J.)

(citing Riordan, 831 F.2d at 698) (emphasis added).

To buttress the argument that discrimination still exists but is “masked in more subtle forms,” the plaintiff has reviewed this country’s racial history from the Declaration of Independence to the 1997 presidential appointment of a commission to study race relations. In further explaining what I believe to be plaintiff’s theory behind its lawsuit, a quote from p. 49 of its brief concerning that commission is helpful:

John Hope Franklin, the Chairman of the new presidential commission, said one of the major issues concerning race is that many people feel there is no racism. “A vast number of people are in denial. They think we don’t have problems,” he said. “They want to leave it alone and let it go away.” A general consensus is that many white Americans believe race is now a non-issue and that the general institution of racism no longer exists. “In our hearts, each of us knows racism still exists, and each of us know it on a different level,” Duke Professor Holloway said. “There is not a thoughtful or intelligent white person in America who can say that it doesn’t exist.”

Thus, in deciding the groundless issue, the key questions are: Can this complaint be said to have a factual foundation for its allegations of discriminatory treatment based on race when those allegations are based upon a theory that defendants’ conduct, though not found by direct evidence to be racially motivated, was actually a sophisticated cover-up for racial discrimination. That is, can a reasonable factual foundation be established to support plaintiff’s theory by drawing inferences from certain objective facts which are generally not in dispute? It seems to me that the answer to that question is yes, provided that the inference drawn is a reasonable one.

Clearly, in the absence of direct evidence, basing a complaint on circumstantial evidence alone should be done with great care and caution by any plaintiff.

Thus, merely because one knows in his heart that racism exists would surely not support a complaint. Even a strong suspicion of racial discrimination is insufficient.

A plaintiff must be able to point to a factual pattern which fairly implies racial discrimination, going beyond a mere suggestion that in today's world, subtle conduct masks racism.

In addition to calling my attention to the modern day subtleties of race discrimination, plaintiff has argued that factored into my consideration of the ultimate resolution should also be a concern about the potential chilling effect on § 1983 plaintiffs, citing the following quote from a Second Circuit opinion (Rounseville v. Zahl, 13 F.3d 625 (2nd Cir. 1994)):

Concerned about the potential chilling effect on section 1983 plaintiffs -- who are “‘the chosen instrument of Congress to vindicate’ a policy of the highest national priority” -- we are hesitant to award attorney’s fees to victorious defendants in section 1983 actions. *See Santiago v. Victim Services Agency of Metropolitan Assistance Corp.*, 753 F.2d 219, 221 (2d Cir. 1985) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418, 98 S.Ct. 694, 698, 54 L.Ed.2d 648 (1978)).

The Supreme Court in Christiansburg Garment did not actually refer to a chilling effect.² The court simply affirmed the lower court’s observation that policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant. Those two considerations are:

2. I acknowledge that numerous courts have referred to the chilling effect as a consideration in petitions of this nature.

(1) The plaintiff is the chosen instrument of Congress to vindicate “a policy that Congress considered of the highest priority”; and

(2) When a court awards fees to a prevailing plaintiff, it is awarding them against a violator of the federal law.

I frankly do not believe that the argument about a “chilling effect” is necessarily supported by Christiansburg Garment. Even though the plaintiff was the chosen instrument of Congress, in the context of this civil rights action, it still could not file a complaint which was frivolous, unreasonable or groundless. As previously stated, I find the complaint to be neither frivolous nor unreasonable (legally insufficient). It does come close to being groundless. I suspect that defendants’ anguish brought on by what they consider false allegations of racism is real. Their sense of outrage at being sued over something that from their perspective is totally devoid of any racial animus is understandable.³

This case, however, is a very unique one. The history of plaintiff cannot be totally ignored. I believe that the background of the plaintiff must be viewed, but not as

3. The depth of that outrage is best expressed, I believe, from the following quote from the first page of defendant’s reply brief:

The entire premise of The Barnes’s Opposition argument is that the criticism by white people of conduct by certain African-Americans is presumed to be racist. Thus, in view of The Barnes, its subjective belief about the racial motivation of that criticism -- manifested by nothing more than free and robust public debate about The Barnes’s conduct -- suffices to show that this lawsuit was not frivolous. Furthermore, The Barnes implicitly argues, by its relentless and inflammatory resort to the murderous and racist acts of some unidentified, temporally distant whites, that the actions of all white people must be prejudged through the lens of those racist atrocities. That argument by The Barnes is shamefully racist to its core and should be rejected by the Court in uncompromising terms.

plaintiff would urge by a consideration of race relations from the beginning of this nation. Instead, I do believe it is of some importance to at least consider the plaintiff's history from its inception in 1922 until the time of the filing of the complaint as part of the totality of the circumstances. Then, when viewed with current facts which surrounded plaintiffs' efforts to increase public access, I believe that the inferences drawn were reasonable, at least, for purposes of establishing grounds for filing the complaint.

An order follows.

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	:	
THE TOWNSHIP OF LOWER MERION,	:	
et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 24th day of November, 1999, it is hereby ORDERED that Defendants' Motion for Attorneys' Fees and Costs (Docket No. 372) is DENIED.

BY THE COURT:

RONALD L. BUCKWALTER, J.