IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEOFFREY CALHOUN, et al.,

Plaintiffs,

v.

RICHARD PENNINGTON, et al.,

Defendants.

CIVIL ACTION FILE

NO. 1:09-cv-3286-TCB

O R D E R

This case comes before the Court on Special Master Joe Whitley's report and recommendation (the "R&R") [386] regarding the parties' post-consent-decree fee dispute, as well as Defendant City of Atlanta's objections [352] to an earlier special master proposal on the same issue. While no objections to the R&R have been filed, the Court considers the City's objections [352] applicable to the recently issued R&R [386]. For the reasons stated below, the Court adopts the R&R [386] to the extent it is consistent with this Order and overrules the City's objections [352].

I. Background

The facts giving rise to this case are more thoroughly set forth in this Court's order [398] denying the City's motion to reassign matters from the special master to the district court. The specific events as they pertain to this Order are as follows.

In December 2010, the parties entered into a consent order (the "2010 Order") settling a lawsuit regarding the Atlanta Police Department's ("APD") unconstitutional search of an Atlanta nightclub. The 2010 Order set forth a number of reforms the City was required to undertake in order to remediate the unlawful practices of its police force. *See* [265]. In 2011, the City consented to the entry of another order (the "2011 Order") due to its noncompliance with the 2010 Order. *See* [280]. The City was later held in contempt of the Court's prior orders in 2015 (the "2015 Order"). *See* [289]. The Court refers to the aforementioned orders as the "*Calhoun* judgments," and the related proceedings as the "*Calhoun* proceedings."

The 2015 Order required that the "City of Atlanta shall reimburse Plaintiffs' counsel for any reasonable fees and costs they expend in

ensuring compliance with the Orders of this Court," which included specific tasks for which Plaintiffs' counsel would be reimbursed, though reimbursement was not limited solely to those tasks. [289] ¶ 12. One of the Plaintiffs' primary tasks was to serve as a monitor of the City's compliance with the *Calhoun* judgments. *See generally id.*

The parties subsequently agreed to the appointment of Joe Whitley, Esq., as special master, who has been coordinating, presiding over, and monitoring this action and the City's compliance with the *Calhoun* judgments. *See* [308, as modified by 309]. The special master has assumed the role of assisting the Court with the resolution of the growing number of disputes between the Plaintiffs and the City during the course of the *Calhoun* proceedings.

The question now before the Court is whether the City of Atlanta is obligated to pay Plaintiffs' counsel's fees expended in defending against an emergency petition for relief filed by the City on January 17, 2017. The emergency petition sought to disqualify certain of Plaintiffs' counsel in various suits against the City, including the *Calhoun* proceedings. As a new civil action, it was assigned to Judge Richard W.

Story, who dismissed it as "procedurally improper." *Calhoun v. City of Atlanta*, No. 1:17-cv-530-RWS, at *8 (N.D. Ga. Mar. 3, 2017), ECF No. 15.

The R&R recommends that the Court hold that Plaintiffs are entitled to reasonable attorneys' fees as a prevailing party under 42 U.S.C. § 1988. The City objects, asserting that it is under no obligation to pay Plaintiffs' attorneys' fees in connection with the emergency petition.

II. Standard of Review of a Special Master's R&R

The standard of review for a special master's report is set forth in Federal Rule of Civil Procedure 53, unless the Court or parties have agreed otherwise. Here, they have not.

When reviewing a special master's factual conclusions, a "court must decide de novo all objections to findings of fact made or recommended by a master." FED. R. CIV. P. 53(f)(3). Factual findings not objected to will be reviewed for clear error. *See Martin v. Univ. of S. Ala.*, 911 F.2d 604, 608 (11th Cir. 1990) ("[F]indings of fact made by a Special Master must be accepted by the district court unless clearly

erroneous."). Similarly, "[t]he court must decide de novo all objections to conclusions of law made or recommended by a master." FED. R. CIV. P. 53(f)(4).

After reviewing the special master's factual and legal conclusions under the appropriate standard, the Court "may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit [them] to the master with instructions." *Id.* at 53(f)(1).

III. Discussion

The special master concluded that Plaintiffs were entitled to fees incurred by defending against the City's emergency petition. The Court first reviews the law applicable to the recoverability of fees in a § 1983 case and post-judgment proceedings. It then deals with the City's objections to the R&R.

A. The Standard for Awarding Attorneys' Fees in a § 1983 Action

The special master correctly concluded that in civil rights cases brought under 42 U.S.C. § 1983, an award of attorneys' fees is governed by 42 U.S.C. § 1988. Section 1988(b) provides that "the court, in its discretion, may allow the prevailing party . . . a reasonably attorney's

fee as part of the costs . . . ." In order for Plaintiffs to be considered a prevailing party, there must be a "court-ordered . . . 'material alteration of the legal relationship of the parties.'" *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Tex. Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 792–93 (1989)). Because the *Calhoun* judgments altered the legal relationship between Plaintiffs and the City, there is no dispute that Plaintiffs are entitled to attorneys' fees for their efforts related to the *Calhoun* judgments.

B. Recovery for Post-Judgment Attorneys' Fees

Plaintiffs are undoubtedly entitled to fees for their efforts in obtaining the *Calhoun* judgments. But the *Calhoun* judgments do not automatically grant fees for every proceeding between the City and Plaintiffs after the judgments were entered. Therefore, to determine whether a fee award for the emergency petition proceedings is appropriate, the Court must resolve first whether fees related to post-judgment proceedings are recoverable, and then, whether the emergency petition proceedings fall within that category of proceedings.

The Eleventh Circuit has permitted fees to be recovered without obtaining another victory on the merits in a later proceeding in the same action. In *Turner v. Orr*, 785 F.2d 1498 (11th Cir. 1986), post-judgment fees were recoverable if incurred to monitor or enforce the other (losing) party's compliance with the underlying judgment because such efforts were considered to flow from the underlying decree. *See also Adams v. Mathis*, 752 F.2d 553, 554 (11th Cir. 1985) ("[A] party who 'vindicates important rights [including post-trial vindication] "prevails" for purposes of [42 U.S.C.A.] § 1988 even though he or she does so without obtaining a formal judicial order.'" (some alterations in original)). Moreover, as in *Turner*, 785 F.2d at 1503, the City has already agreed to pay such fees "by contract," *see* [289 ¶ 12].

Although *Buckhannon*, decided after *Turner*, requires a legal alteration in the parties' relationship in order to be considered a prevailing party in the original action, the Court agrees with the special master and its sister court that *Buckhannon* did not disturb the Eleventh Circuit's precedent regarding post-judgment fee awards. That

is, after obtaining a favorable outcome in the underlying suit, a party engaged in post-judgment proceedings does not have to show that the later proceedings "yield[ed] additional court-ordered relief" to be awarded fees under § 1988. *Laube v. Allen*, 506 F. Supp. 2d 969, 998 (M.D. Ala. 2007) (citing *Miller v. Carson*, 628 F.2d 346, 348–49 (5th Cir. 1980)). However, the post-judgment fees are still required to be "reasonably related to the claims upon which plaintiffs were definitely successful [and] . . . no doubt ha[ve] the effect of maintaining compliance with the Court's [order]." *Turner*, 752 F.2d at 1504 (some alterations in original) (quoting *Miller*, 628 F.2d at 348).

Accordingly, to qualify as a post-judgment proceeding for fee-award purposes, Plaintiffs must show that their efforts related to the emergency petition (1) were reasonably related to the *Calhoun* judgments, and (2) had the effect of maintaining compliance with the *Calhoun* judgments. The Court finds that both elements are met.

First, the emergency petition proceedings were not only related to the *Calhoun* judgments, they were in large part based upon them. The City filed its emergency petition in order to address the Plaintiffs'

behavior in a number of lawsuits, including *Calhoun*. Judge Story recognized the petition's relation to *Calhoun* when he dismissed it on the grounds that the relief requested is more appropriately addressed here, rather than in a separate petition.

Second, by responding and appearing in the emergency petition proceedings, Plaintiffs' effort also had the effect of maintaining compliance with the *Calhoun* judgments. As part of the *Calhoun* judgments, this Court appointed Plaintiffs as monitors of the City's compliance. The City's emergency petition sought to undermine their role as monitor. In order to protect this role, Plaintiffs necessarily had to respond to the emergency petition.

1. The City's First Objection: The Emergency Petition Was a Separate Action

The Court is not convinced by the City's objections that a fee award for the emergency petition proceedings is improper because the emergency petition was an entirely separate action from the *Calhoun* proceedings.

As a matter of form, the emergency petition was, of course, a separate action from the instant case. To hold otherwise would defy

reality. The emergency petition had a different judge, different schedule, and its own case number. But to say that this technical distinctiveness is dispositive as to whether attorneys' fees should be awarded would elevate form over substance.

As Judge Story noted, the City's petition for relief was not properly before him; rather, it should have been raised with the presiding judge. *Calhoun*, No. 1:17-cv-530-RWS, at *4–5. In this case, the presiding judge is the undersigned. If the emergency petition had been properly raised, it would have been in this case, before this judge. In other words, if the petition were properly raised, the City's objection that the petition is separate from the *Calhoun* proceedings would have little merit, and Plaintiffs' claim to fees would be clear.

The City cannot escape its obligation to pay Plaintiffs' attorneys' fees simply by filing collateral actions like the emergency petition. This would create a perverse incentive to file a new action whenever a losing party in an underlying judgment is on the hook for the other party's fees. Such gamesmanship would foster inefficiency and stall the Court's

docket. Thus, the Court rejects the City's argument that the emergency petition is rightly considered a separate action from this case.

2. The City's Remaining Objections

The City cites *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6 (1986), for the proposition that fees related to the emergency petition are unavailable because it was not a civil rights action. But this is a red herring. *Crest Street* held that "only a court in an action to enforce one of the civil rights laws listed in § 1988 may award fees." *Id.* at 15. The question here is whether *this* Court can award fees in *this* case, not the emergency petition. This case was based on § 1983, one of the civil rights law listed in § 1988. Thus, this Court has the power to award fees.

Similarly, the Court rejects the City's contention that because Judge Story did not reach the merits of the emergency petition, attorneys' fees are unavailable. This misses the point: the authority to award attorneys' fees in this case is based on the *Calhoun* judgments, not the emergency petition. The *Calhoun* judgments have already

opened the font of attorneys' fees as between Plaintiffs and the City. *See Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992) ("[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." (citations omitted)). The only question now is whether the fee-waters flow all the way down the course of the post-judgment proceedings to the emergency petition. As discussed above, the Court holds that they do.

The City also objects on the basis that Judge Story finally decided the issue of Plaintiffs' fees with respect to the emergency petition by ruling against them on their Rule 11 motion for sanctions. That decision, however, has no bearing on entitlement to attorneys' fees pursuant to the *Calhoun* judgments and § 1988.

Finally, the Court rejects the City's objection that the special master lacks the authority to determine whether Plaintiffs are entitled to a fee award. The special master did not overstep his jurisdiction, as he made recommendations regarding the propriety of a fee award in

this case, over which he has jurisdiction. *Cf. generally* [377, 398]. He did not purport to decide a matter in Judge Story's case, nor did he effectively overrule a sitting district court judge, as the City intimates. The authority to award attorneys' fees stems from the *Calhoun* judgments, not the emergency petition. Thus, the special master properly considered and made a report and recommendation to this Court on issues properly before him.

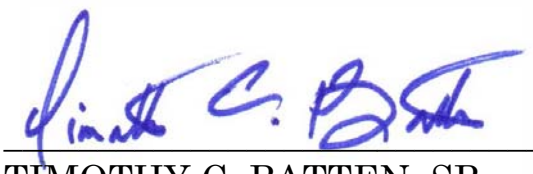
IV. Conclusion

The Court adopts as its Order the R&R [386] to the extent consistent with the foregoing and overrules the City's objections [352]. Plaintiffs are entitled to reasonable attorneys' fees incurred by responding to the City's emergency petition and related filings.

The Court orders the special master to facilitate briefing and issue a report and recommendation on the issue of whether the attorneys' fees sought by Plaintiff are appropriate under *Hensley v. Eckerhart*, 461 U.S. 424 (1983). To the extent possible, the parties should coordinate with each other and the special master to determine the amount of fees due to Plaintiffs in concert with the upcoming the show cause

proceedings, outlined in the Court's November 28, 2017 Order. *See* [398] at 20–23.

IT IS SO ORDERED this 12th day of February, 2018.



TIMOTHY C. BATTEN, SR.
UNITED STATES DISTRICT JUDGE