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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

OCEAN AVENUE ASSOCIATES,
LLC et al.

Plaintiffs and Appellants,

v.

CITY OF INDIO et al.,

Defendants and Respondents.

E052522

(Super.Ct.No. INC060471)

OPINION

APPEAL from the Superior Court of Riverside County. Harold W. Hopp, Judge.

Reversed with directions.

Greenberg Glusker Fields Claman & Machtinger and Garrett L. Hanken for
Plaintiffs and Appellants.

Woodruff Spradlin & Smart and Steven L. Rader for Defendants and Respondents.

Plaintiffs Ocean Avenue Associates, LLC and Bermuda Palms, LLC (collectively
Ocean) filed this proceeding against defendants City of Indio, City Council of the City of
Indio, and Planning Commission of the City of Indio (collectively the City) to invalidate

city ordinances rezoning their property for use as a mobile home park. Ocean alleged, among other things, that the ordinances constituted illegal spot zoning, that they did not bear a reasonable relationship to a legitimate government interest, and that they violated equal protection. The trial court agreed that the ordinances were “arbitrary, capricious and discriminatory,” and on that ground, it entered judgment invalidating them.

Until the entry of judgment, Ocean had never cited 42 United States Code section 1983 (section 1983). Moreover, even though it had alleged that it was entitled to attorney fees under state law, it had never cited 42 United States Code section 1988 (section 1988). Nevertheless, Ocean filed a motion for attorney fees under section 1988. The trial court denied the motion, finding that Ocean’s delay in asserting a section 1988 claim had unfairly surprised and prejudiced the City.

Ocean appeals. We will reverse. Under a plethora of federal and California authority, Ocean was entitled to attorney fees under section 1988, because it was claiming that the City had violated the federal Constitution under color of state law; moreover, the trial court upheld this claim. It was irrelevant that Ocean had not cited section 1983 or section 1988. The City did not introduce any evidence that it was, in fact, surprised or prejudiced. Thus, the trial court’s finding of surprise was speculative and not supported by substantial evidence.

I

FACTUAL AND PROCEDURAL BACKGROUND

Ocean filed a petition for writ of mandate, which was also a complaint for declaratory relief. Ocean's petition alleged that the City's ordinances rezoning Ocean's land were invalid because, among other things:

“ . . . The Ordinances do not bear a rational relationship to a legitimate governmental purpose.”

“ . . . The Ordinances are arbitrary, capricious, and confiscatory.

“ . . . The Ordinances unreasonably and unfairly discriminate

“ . . . The Ordinances constitute illegal spot zoning.

“ . . . The Ordinances deny Petitioners equal protection of the law. . . .”

The petition further alleged that Ocean was entitled to recover its attorney fees “under the provisions of California Code of Civil Procedure § 1021.5 and/or Government Code § 800.”

The petition never specifically cited either section 1983 or section 1988. Ocean's briefs on the merits likewise did not cite section 1983 or section 1988. However, Ocean did argue that the Ordinances were arbitrary, capricious, and discriminatory because they constituted “spot zoning.” It explained: “Sometimes articulated in terms of substantive due process, and sometimes articulated in terms of equal protection of the laws, the Constitution requires that there be a rational relationship between a governmental enactment and a valid governmental purpose.”

Specifically, Ocean argued, “the Ordinances are arbitrary, capricious, and discriminatory [because] (1) The Ordinances target a single parcel of land, owned by a single landowner; and (2) the legislative purposes of the Ordinances are (a) to deter changes in ownership of the Land by discouraging investment backed expectations for alternative uses of the Land and (b) to force [Ocean] to devote [its] Land to fulfilling the City’s low income housing obligations.” (Fn. omitted.) “Both of these purposes effect an unconstitutional taking.”

In opposition, the City argued that “there is no evidence of improper spot zoning or discrimination”

The trial court ruled that the ordinances were invalid because they were “arbitrary, capricious and discriminatory.” It therefore entered judgment in favor of Ocean. The City did not appeal.

Ocean then filed a motion for \$196,359.58 in attorney fees under section 1988.

In opposition to the motion, the City argued, “A section 1983 claim . . . was never litigated in this action.” It also argued that “substantial issues remain adjudicated regarding [Ocean’s] . . . federal claims.” It asserted that Ocean’s “dilatatory invocation of section 1988 has surprised and unduly prejudiced the City.” However, it did not submit any declarations or other evidence.

The trial court denied the motion. It explained: “[F]ees may be denied where the post-judgment motion ‘unfairly surprises or prejudices the affected party.’ The Court finds that the post-judgment fee motion unfairly surprised [the City], to [its] detriment

and to the detriment of resolving the case by a settlement. The hearing of the petition was repeatedly continued while the parties held settlement discussions Had [Ocean] from the start notified [the City] that [it] believed [it] would be entitled to fees under section 1988, those settlement discussions might well have been different and resulted in an amicable resolution of the matter. Instead, [Ocean], apparently as a litigation strategy, kept [its] intention to seek fees under section 1988 to [itself] until after judgment was entered in [its] favor.”

II

OCEAN IS ENTITLED TO ATTORNEY FEES UNDER SECTION 1988

Section 1983 provides: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”

“By the plain terms of § 1983, two — and only two — allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. [Citation.]” (*Gomez v. Toledo* (1980) 446 U.S. 635, 640 [100 S.Ct. 1920, 64 L.Ed.2d 572].)

Section 1988, as relevant here, then provides: “In any action or proceeding to enforce . . . section[] . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee” (§ 1988(b).)

Section 1988 “states that the court ‘in its discretion’ may allow a fee, but that discretion is not without limit: the prevailing party ‘should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.’ [Citations.]” (*Blanchard v. Bergeron* (1989) 489 U.S. 87, 89, fn. 1 [109 S.Ct. 939, 103 L.Ed.2d 67].) A trial court does have discretion to deny fees under section 1988 “in cases in which a postjudgment motion unfairly surprises or prejudices the affected party.” (*White v. New Hampshire Dept. of Employment Sec.* (1982) 455 U.S. 445, 454 [102 S.Ct. 1162, 71 L.Ed.2d 325].) However, “[a] [trial] court’s discretion to deny a fee award to a prevailing plaintiff is narrow,’ [citation], and a denial of fees on the basis of ‘special circumstances’ is ‘extremely rare.’ [Citation.]” (*Resurrection Bay Conservation v. Seward, Alaska* (9th Cir. 2011) 640 F.3d 1087, 1092.)

A plaintiff is entitled to fees under section 1988 even if it did not prevail on federal grounds, as long as it prevailed on a state law claim that was “closely interconnected” to a substantial federal claim. (*Williams v. Hanover Housing Auth.* (1st Cir. 1997) 113 F.3d 1294, 1298-1299; see also *McFadden v. Villa* (2001) 93 Cal.App.4th 235, 238 [“a plaintiff may be deemed a prevailing party under section 1988 if he succeeds on a pendent state law claim, based on the same legal theory or a core of common facts as a nonfrivolous federal constitutional claim”] [Fourth Dist., Div. Two].)

Ocean argues that it was entitled to attorney fees under *Green v. Obledo* (1984) 161 Cal.App.3d 678. In *Green*, the plaintiffs sued the state, alleging that a state welfare regulation violated federal law. (*Id.* at p. 682.) The trial court agreed. It then awarded the plaintiffs attorney fees under state statutes, including Code of Civil Procedure section 1021.5. Subsequently, to overcome state statutory limitations on the payment of the fee award, the plaintiffs sought an order compelling the state to pay based on section 1988. The trial court denied the motion. (*Id.* at p. 681.)

The appellate court reversed, holding that the plaintiffs were entitled to attorney fees under section 1988: “Whether the plaintiffs tendered a section 1983 claim in the underlying action is measured by their pleadings. They alleged [the state] adopted and enforced a regulation which violated a federal statute . . . resulting in the improper denial of federal benefits to plaintiffs. This pleads a section 1983 claim. Under our code pleading system [citation] the complaint need only contain a ‘statement of the facts constituting the cause of action, in ordinary and concise language.’ [Citations.] No label is required.” (*Green v. Obledo, supra*, 161 Cal.App.3d at p. 682.)

It continued: “But, say the defendants, section 1988 cannot support the enforcement of the attorney fees award since section 1988 was not explicitly tendered as a ground of the award. This argument sounds in estoppel. It is not persuasive. . . . The state was not disadvantaged in the measurement of fees by the subsequent reliance on section 1988 as a ground justifying enforcement of the award.” (*Green v. Obledo, supra*, 161 Cal.App.3d at p. 683.)

Here, Ocean alleged that the City's ordinances violated due process and equal protection. As in *Green*, this was sufficient to plead a section 1983 claim; the petition did not have to cite either section 1983 or section 1988. In its briefs on the merits, Ocean again specifically argued that the ordinances violated due process and equal protection. Moreover, the trial court found that the challenged ordinances were "arbitrary, capricious and discriminatory." Thus, we do not need to resort to the authority, cited above, that a plaintiff who prevails on exclusively state law grounds may still be entitled to fees under section 1988. Ocean not only pleaded but actually prevailed on a federal constitutional claim under section 1983.

The City argues that *Green* is "directly counter" to the United States Supreme Court's statement that "[u]nder the plain language and legislative history of [section] 1988 . . . only a court in an action to enforce one of the civil rights laws listed in [section] 1988 may award attorney's fees," in *North Carolina Dept. of Transp. v. Crest Street* (1986) 479 U.S. 6, 12 [107 S.Ct. 336, 93 L.Ed.2d 188]. The issue in *North Carolina*, however, was whether the plaintiff could file an action to recover attorney fees incurred in litigating a separate administrative proceeding. (*Id.* at pp. 9-15.) *Green* essentially held that, under our code pleading system, an action may be "an action to enforce one of the civil rights laws listed in § 1988" within the meaning of *North Carolina* even if the plaintiff does not cite section 1983 or section 1988. *Green* is not in conflict with *North Carolina*.

The City also argues that *Green* applies only when the plaintiff is also entitled to attorney fees under Code of Civil Procedure section 1021.5, because then the defendant is not prejudiced if the plaintiff also seeks attorney fees under section 1988. In *Green* itself, however, the defendant was prejudiced — it could have avoided paying fees awarded under Code of Civil Procedure section 1021.5, but due to the supremacy clause, it could not avoid paying fees awarded under section 1988. Admittedly, the court did say, “The state was not disadvantaged *in the measurement of fees* by the subsequent reliance on section 1988 as a ground justifying enforcement of the award. The state points to no issue concerning the section 1988 award not subsumed in the prior adjudication.” (*Green v. Obledo, supra*, 161 Cal.App.3d at p. 683, italics added, fn. omitted.) Its point, however, was that even if the state had known that the plaintiff was relying on section 1988, there was nothing it could or would have done differently. In other words, there was no detrimental reliance, and hence no estoppel.

Finally, the City argues: “[Ocean] ha[s] failed to cite to one case where the plaintiff was awarded Section 1988 attorneys’ fees for un-pleaded Section 1983 claims” Technically, this is true. The plaintiffs in *Green* had already been awarded fees under Code of Civil Procedure section 1021.5; the court merely held that section 1988 was an alternative basis for the award. Ocean’s incomplete research notwithstanding, however, there is actually a plethora of cases holding that a plaintiff’s failure to expressly cite section 1983 is not fatal to a fee award under section 1988. (*Rural Water Dist. No. 1 v. City of Wilson, Kan.* (10th Cir. 2001) 243 F.3d 1263, 1273;

Goss v. City of Little Rock, Ark. (8th Cir. 1998) 151 F.3d 861, 864-866; *Haley v. Pataki* (2d Cir. 1997) 106 F.3d 478, 481-482; *Thorstenn v. Barnard* (3d Cir. 1989) 883 F.2d 217, 218; *Am. U. for Sep. of Church & St. v. Sch. Dist., etc.* (6th Cir. 1987) 835 F.2d 627, 629-631, 633-634; *Jones v. Flowers* (2008) 373 Ark. 213, 215-216 [283 S.W.3d 551]; *L.K. v. Gregg* (Minn. 1988) 425 N.W.2d 813, 818-820.)

The City understandably relies on *Board of Administration v. Wilson* (1997) 57 Cal.App.4th 967 (*Wilson*). There, the trial court ruled in favor of the plaintiffs, finding that the challenged pension funding practice “was an unconstitutional impairment of contract.” (*Id.* at pp. 969-970.) The trial court nevertheless refused to award attorney fees under section 1988, due to “special circumstances.” (*Wilson*, at p. 971.) It explained: “[T]his case was neither pled nor litigated as a section 1983 case. The parties did not request, and the Court did not make, findings peculiar to a 1983 claim. . . . Until the issue of attorney fees and the motions before the Court, no aspect of section 1983 was argued by the parties.” (*Id.* at p. 972.) It concluded: ““Notwithstanding that in retrospect the pleadings in the case can be read as technically supporting a 1983 claim, the Court finds that it would be prejudicial to respondents and unfairly surprise them (and the Court) to belatedly invoke this one remedial aspect of section 1983.”” (*Ibid.*, fn. omitted.)

The appellate court held: “[T]he [trial] court did not abuse its discretion in denying attorney’s fees under section 1988.” (*Wilson, supra*, 57 Cal.App.4th at p. 974, fn. omitted.) “A trial court retains discretion under section 1988 to deny fees where ‘a

postjudgment motion unfairly surprises or prejudices the affected party.’ [Citation.] Here the trial court correctly relied on this rule to deny section 1988 fees.” (*Id.* at p. 974.)

The appellate court found it significant that there was a substantial issue, which had never been adjudicated, as to whether the plaintiff even had standing to recover under section 1983. (*Wilson, supra*, 57 Cal.App.4th at pp. 974-975.) It explained:

“California’s courts should not be in the business of adjudicating the merits of a plaintiff’s entitlement to judgment by way of a postjudgment motion for attorney’s fees. Here, defendant had no reason to contest [the plaintiff]’s standing under section 1983 until [the plaintiff] tendered a section 1983 claim in its postjudgment motion for fees. The trial court properly exercised its discretion to deny fees on the ground that [the plaintiff]’s postjudgment assertion of a section 1983 claim surprised and prejudiced defendants. [Citation.]” (*Id.* at p. 975.)

Finally, the *Wilson* court distinguished *Green* on the ground that there, “the case presented ‘a classic section 1983 claim,’ and ‘[t]he state point[ed] to no issue concerning the section 1988 award not subsumed in the prior adjudication.’ [Citation.]” (*Wilson, supra*, 57 Cal.App.4th at pp. 975-976.)

In sum, then, in *Wilson*, it was crucial that there were unadjudicated issues with regard to the plaintiff’s standing under section 1983. Here, by contrast, there are no unadjudicated issues regarding Ocean’s federal constitutional claims. Once again, the trial court did, in fact, enter judgment in favor of Ocean on those claims.

The City complains, “Is the . . . City . . . now to respond to a claim that the . . . ordinances . . . violated substantive due process? Or[] equal protection? Or[] constituted, somehow, an uncompensated ‘taking’ of [Ocean]’s property?” No — it is too late for that. Ocean` raised each of these theories explicitly below. If the City believed that they were insufficiently fleshed out, or that some necessary element was lacking, it could and should have said so in its opposition to the petition.

The City argues that Ocean’s federal claims were not “substantial.” The trial court ruled otherwise, however, by entering judgment in favor of Ocean. The City did not appeal from that judgment, which is now *res judicata*.

The City also relies on *City of Hawaiian Gardens v. City of Long Beach* (1998) 61 Cal.App.4th 1100. There, however, the parties *stipulated* to try the plaintiff’s mandate claim — which was premised exclusively on state statutory law — separately from its section 1983 claim. Then, after the trial court ruled in favor of the plaintiff on its mandate claim, the parties *stipulated* to the *dismissal* of the section 1983 claim. (*Hawaiian Gardens*, at p. 1106.) The Court of Appeal concluded that the plaintiff was not entitled to attorney fees under section 1983. (*Hawaiian Gardens*, at pp. 1113-1114.) It explained that “although [the plaintiff] pled a cause of action under . . . section 1983, the case was tried on the mandate theories only.” (*Id.* at p. 1114.) Here, needless to say, Ocean never agreed to have its constitutional claims resolved separately and never agreed to dismiss its constitutional claims. Moreover, the trial court resolved those constitutional claims on the merits in favor of Ocean. Thus, *Hawaiian Gardens* is not controlling.

The trial court understood that it was bound by *Green*, and it rejected the City's arguments to the contrary. It ruled, however, that *Green* did not apply, because Ocean's belated invocation of section 1988 had surprised and prejudiced the City. *Green* did acknowledge that equitable estoppel might defeat a fee award under section 1988. The City, however, presented no *evidence* to support estoppel. No *witness testified* that the City was ignorant that Ocean's constitutional claims sounded under section 1983. Likewise, no *witness testified* that the City had in any way relied on any mistaken belief that Ocean was not raising any section 1983 claim. (See *City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279 [elements of estoppel include ignorance of the truth and detrimental reliance].)

The trial court specifically found that the City was prejudiced because the parties' "settlement discussions might well have been different and resulted in an amicable resolution of the matter." In its opposition, the City had not even argued that there had been any effect on settlement discussions; a fortiori, it had presented no evidence of this. If it had, Ocean might have been able to come forward with evidence that section 1983 and section 1988 had actually come up in the settlement discussions. Thus, the trial court's finding on this point was not only speculative, it sandbagged Ocean.

We therefore conclude that the trial court erred and that Ocean is entitled to an award of attorney fees against the City.

III

DISPOSITION

The order denying Ocean's motion for attorney fees is reversed. Ocean is awarded costs on appeal, including attorney fees. On remand, the trial court is directed to award Ocean reasonable trial and appellate attorney fees against the City.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

KING
J.