10/16/80

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff,	)	
v.	)	Civil Action No. 75-1448
GENERAL SERVICE ADMINISTRATION, Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON PLAINTIFF'S MOTION FOR RECONSIDERATION

The defendant has asked the Court to reinstate its July 14, 1980, Order denying attorneys' fees and other litigation costs to the plaintiff on the basis that the plaintiff is not a prevailing party. */ After the Court denied attorneys' fees on July 14, 1980, plaintiff requested reconsideration on July 24, 1980. The defendant through excusable neglect and oversight failed to oppose the plaintiff's motion. The Court on September 3, 1980 rescinded its July 14, 1980 order and that of October 17, 1979 staying discovery.

The defendant responded, asking the Court to reconsider the September 3, 1980 ruling because (1) the defendant has not changed its position that plaintiff has not prevailed and is therefore not entitled to fees, 5 U.S.C. §552(a)(4)(E); (2) the Order denying fees was a correct ruling; and (3) plaintiff advanced no new arguments in asking for reconsideration on July 24, 1980 which in any way undermine the Court's denial of attorneys' fees. **/ In opposing defendant's motion, plaintiff admitted no new arguments were raised. ***/ Plaintiff's Opposition

*/ Motion for Reconsideration of the Court's Ruling on Plaintiff's Motion for Reconsideration, filed September 11, 1980.

**/ Id.

***/ Opposition to Defendant's Motion for Reconsideration of the Court's Ruling on Plaintiff's Motion for Reconsideration ("Plaintiff's Opposition"), served September 24, 1980, at 6.

not only CIA!

was based on his unsubstantiated allegations: (1) that he is always compelled to file suit to obtain information; (2) that Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978) is the CIA's real reason for releasing the transcripts at issue and not those contained in the sworn affidavits on file which establish that the transcripts were released for reasons unrelated to this litigation; and (3) that the Court's July 14, 1980 Order denying attorneys' fees was clearly erroneous. The defendant responds to each point follow:

1. Plaintiff's Claim That He Is Compelled To File Suit To Obtain Any Information is Unfounded.

On the question of whether plaintiff has substantially prevailed in this litigation, the plaintiff has the burden of demonstrating that (1) the prosecution of the action could reasonably be regarded as necessary and (2) that the action had substantial causative effect on the delivery of the information.*/ Considering the issues raised, there can be no doubt that plaintiff's success or failure to obtain information in response to other Freedom of Information Act requests is irrelevant and immaterial to the issues raised in connection with whether plaintiff is a prevailing party for purposes of this action. The issues to be resolved relate solely to the release and the reasons for the release of the transcripts in contention in this case. **/

It cannot be inferred that the CIA is recalcitrant, or acting in bad faith from plaintiff's statement, even if true, that he has only received information from the CIA after filing suit. The fact standing alone that the CIA may have, in some instances,

*/ These arguments and points and authorities were fully briefed by the defendant for the first time at pages 5-10 of the defendant's August 10, 1979 Opposition to Plaintiff's Motion for An Award of Attorneys' Fees and other Litigation Costs ("Defendant's August 10, 1979 Opposition").

**/ Id.

processed requests and released information after the filing of suit is not necessarily indicative of an untoward motive. Although the CIA does in good faith attempt to comply with the time limits imposed by the FOIA, it has in several other cases filed extensive affidavits explaining its system for processing FOIA requests and the reasons it cannot always comply with the rigid statutory limits for processing such requests. The affidavits have demonstrated the exceptional circumstances which the CIA faces and have described the due diligence exercised in processing FOIA requests in the order they are received. */ Most recently, this Court remanded a FOIA request to the CIA for processing while retaining jurisdiction under 5 U.S.C. §552(a)(6)(C) because of exceptional circumstances and due diligence shown even though in that case "plaintiff made multiple unsucessful requests for action and waited over two years from his initial request prior to instituting this action...." **/ Consequently, there may be valid reasons for the release of documents subsequent to the filing of suit. Plaintiff's argument is absurd that the agency should be required to defend its treatment of other unrelated FOIA requests in connection with his application for attorneys' fees in this case.

Finally, plaintiff's statement under oath that he only gets information from the CIA "under compulsion" after bringing suit is not true. ***/ As previously pointed out, ****/ plaintiff

*/ See e.g. the affidavit of Frank C. Carlucci, Deputy Director, Central Intelligence Agency which was filed on September 17, 1980, in Center for Nat'l Security Studies v. CIA, Civil Action No. 80-1235. See also, the affidavits on file in Shaw v. Department of State, Civil Action No. 80-1056; Dickstein, Shapiro & Morin v. Turner, Civil Action No. 80-2077.

**/ Shaw v. Department of State, supra (Order filed July 31, 1980 at 2).

***/ Weisberg Affidavit, dated July 21, 1980, ¶4, attached to Plaintiff's July 24, 1980 Motion for Reconsideration.

****/ Defendant's Memorandum, filed September 11, 1980, at 4.

overlooked the thousands of pages of documents which he obtained from the CIA without compulsion in connection with requests for information relating to the Kennedy assassination and certain drug experiments. His bill for unpaid duplication fees is over $1400. Plaintiff does not deny that he has failed to pay his bill. */ Plaintiff admits it. **/

2. Ray v. Turner did not Precipitate the Release of the Transcripts at Issue.

Plaintiff steadfastly adheres to the argument that Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978), which was decided just before the release of the two transcripts at issue, caused the CIA to make the release and moot the appeal. ***/ Nothing could be farther from the truth.

The plaintiff overlooks the facts. The decision of the district court with respect to the two transcripts was favorable to the government. Moreover, the decision in Ray v. Turner merely refined the way in which the CIA had to justify the withholding of information. Nothing in Ray suggests the CIA improperly withheld information in this case. At most, all plaintiff could have hoped for was a remand by this Circuit for the purpose of justifying in more detail the basis for the CIA's withholding of the two transcripts.

Plaintiff suggests that he would have substantially prevailed if the appellate court determined the affidavits in this case were

*/ The CIA's FOIA regulations preclude release of information to those who have failed to pay their bills. 45 Fed. Reg. 144 (July 24, 1980).

**/ Plaintiff's Opposition, at 7-8. Plaintiff attempts to deflect the admission by noting that he had requested a waiver of duplication fees by letter dated March 1, 1978. In that letter which is Attachment 2 to Plaintiff's Opposition, plaintiff promised a check after the CIA made a decision on his waiver request. Plaintiff conveniently failed to recall that the CIA denied his waiver request within three weeks after its receipt in March of 1978. See, letter to Harold Weisberg from Gene F. Wilson, dated March 20, 1978 and attached as Exhibit 1. Over two and a half years later plaintiff's balance is still outstanding.

***/ This argument was first raised in reply to the defendant's opposition to his request for fees filed September 12, 1979.

inadequate by Ray v. Turner standards, if it overturned the district court ruling, and if on remand the CIA was unable to justify the withholding of the transcripts. The speculative nature of plaintiff's claim is clear from the "ifs" necessary to describe it.

3. The Court's July 14, 1980 Order Denying Attorneys' Fees was Correct and Did Not Amount to An Abuse of Discretion.

The last slim thread of plaintiff's claim is that the denial of attorneys' fees is a de facto summary judgment. The argument reaches further: in that it is "in essence" a summary judgment, an application for fees can only be granted in the absence of issues of material fact. */ Plaintiff suggests that he has created a disputed factual issue regarding the cause of the release of the transcripts.

Plaintiff's assertion that the denial of fees is tantamount to a grant of summary judgment is tenuous at best. Nevertheless, it will be accepted for the purpose of showing that plaintiff has been unable to comply with the standards he sets for himself.

A party moving for summary judgment has the burden to establish the absence of material factual issues, even though that party would not necessarily have the burden of proof at trial. Lee v. Flintkote, 593 F.2d 1275, 1281 (D.C. Cir. 1979); Smith v. Saxbe, 562 F.2d 729, 733 (D.C. Cir. 1977). The burden then shifts, however, to the party opposing summary judgment to come forward with evidentiary affidavits to demonstrate that specific material facts are genuinely in dispute. Exxon Corp. v. FTC, App. Dkt. No. 79-1995 (D.C. Cir. October 3, 1980). The opposing party cannot rest on mere allegations or speculation. First Nat'l Bank v. Cities Services, 391 U.S. 253, 288-90 (1968); Smith v. Saxbe, supra at 733-34; Fleischhaker v. Adams, 481 F.Supp. 285

*/ Plaintiff's Opposition at 4-5.

(D.D.C. 1979). The duty of the opposing party is to expose the existence of genuine issues which would prevent a trial from becoming a useless formality. Doff v. Brunswick Corp. 372 F.2d 801, 805 (9th Cir.) cert. denied, 389 U.S. 820 (1967).

Where it is clear from the evidence submitted that the movant would be entitled to a directed verdict if the case proceeded to trial, summary judgment may be properly granted. Neely v. St. Paul Fire and Marine Insur. Co., 584 F.2d 341, 344 (9th Cir. 1979); accord Ruffin v. County of Los Angeles, 607 F.2d 1276 (9th Cir. 1979) cert. denied, __ U.S. __, 100 S. Ct. 1600 (1980). The test is whether, viewing the evidence in the light most favorable to the plaintiff, the evidence would rationally support a verdict for the plaintiff. Neely v. St Paul Fire And Marine Insur. Co., supra at 345. The Court in Neely found that summary judgment was appropriate because the "meager evidence presented by the plaintiff would not 'rationally support' a verdict in his favor." Id. at 346. There, in order to draw one of two necessary inferences to a finding of liability, a jury would have had to rely in large measure on surmise and speculation. Even assuming the credibility of the witnesses, the Court found insufficient evidence from which a fair-minded juror could logically infer that plaintiff's theory of why the defendants were liable was more likely to have occurred than not to have occurred. Id. Consequently, because the proffered evidence and the conclusions urged were too tenuous to permit a jury to make them, the Ninth Circuit upheld the district court's grant of summary judgment.

In this case, the defendant through the two affidavits of Robert E. Owen, Information Review Officer, Directorate of Operations, CIA, established an absence of issues of material facts. */

*/ The Owen Affidavits are dated July 26, 1979 (attached to Defendant's August 10, 1979 Opposition) and November 26, 1979 (attached to a Notice of Filing on December 3, 1979.)

Mr. Owen stated unequivocably that the sole basis for his determination to release the transcripts was "the decision of the Director of Central Intelligence to declassify information requested by the House Committee on Assassinations." */ Furthermore, Mr. Owen stated under oath the instant "litigation played no role" in his determination. **/ In the second affidavit, Mr. Owen gave a detailed explanation of why and how the CIA determined on its own initiative, unprompted by plaintiff, that the two transcripts could no longer be withheld after certain information was declassified and public testimony was given by officials before the House Committee on Assassinations on September 15, 1979. In short, the affidavits establish that the reasons for the release of information, after judgment was entered in favor of the government and while the case was on appeal, were unrelated to this litigation.

The burden then switched to the plaintiff to create a genuine issue of fact by the submission of evidentiary materials to demonstrate that a trial would not be a useless formality. Plaintiff failed to meet his burden.

As early as September 24, 1979, the defendant in seeking a protective order pointed out that no material facts were in issue; that plaintiff in a typical reckless and wanton fashion accused the government of providing a false affidavit without a scintilla of evidence to substantiate his accusations; that plaintiff was making an ad hominem argument that he believes the release to be because of Ray v. Turner. Defendant further pointed out the startling absence of evidence to refute that Mr. Owen did declassify information for testimony in September 1978 for the House Committee; that Mr. Owen compared the testimony before the

*/ July 26, 1979 Owen Affidavit, ¶4.

**/ Id.

House Committee with the transcripts; that the comparison was undertaken on the CIA's initiative; and that Mr. Owen did conclude that considering the declassified information the continued withholding of the transcripts was no longer tenable.*/

Plaintiff cannot establish a genuine issue of fact by disbelieving the defendant's affidavits. He must do so by proffering evidence, not conclusions or bald allegations which are unsubstantiated. The evidence profferred must comply with the rules of evidence: it cannot be based on hearsay and personal knowledge must be established. Cf. Rule 56, Federal Rules of Civil Procedure; also Exxon Corp. v. FTC, supra.

Having failed to establish a genuine factual issue properly supported, the plaintiff has not met his burden. This Court's July 14, 1980 Order denying attorneys' fees was correct and should be reinstated.

* * * * * *

For the foregoing reasons and those contained in all of defendant's memoranda cited herein, the defendant respectfully requests the Court to reinstate its July 14, 1980 Order.

Respectfully submitted,

Charles F.C. Ruff

CHARLES F.C. RUFF
United States Attorney

Royce C. Lamberth

ROYCE C. LAMBERTH
Assistant United States Attorney

Patricia J. Kenney

PATRICIA J. KENNEY
Assistant United States Attorney

*/ Defendant's September 24, 1979 Memorandum at 2-4.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Reconsideration of The Court's Ruling on Plaintiff's Motion for Reconsideration with attachment has been made upon plaintiff by mailing a copy thereof to plaintiff's counsel, James H. Lesar, Esquire, 910 16th Street, NW., #600, Washington, D. C. 20006, on this 16th day of October, 1980.

Patricia J. Kenney

PATRICIA J. KENNEY
Assistant United States Attorney
U.S. Courthouse
3rd & Constitution Avenue, NW.
Room 2804B
Washington, D. C. 20001
(202) 633-5064

Exhibit 1
C.A. 75-1448

20 MAR 1978

Mr. Harold Weisberg
Route 12
Frederick, MD 21701

Dear Mr. Weisberg:

This is in response to your letters, dated 13 February and 1 March 1978, wherein you "request a waiver of all fees and costs with regard to all my requests and a refund of those charges I have already paid." You claim also that your expertise, impaired health, straitened financial status, as well as your decision to donate these records to a college, are sufficient grounds for granting such a waiver.

Please be advised that our records indicate that, despite the scope of your current requests, this Agency has not charged you search fees for any of them. We have asked, admittedly, and received your deposit for processing your request concerning Dr. Martin Luther King and James Earl Ray, but, in response to this and your earlier queries, we are waiving search fees in that case also. Your deposit, accordingly, will be used to defray the costs of copying charges in that case, or you can apply it against the copying charges for the drug and related materials sent to you in response to that request. Thus, in that latter case, as in all of the others that we have been processing over the past few years, the only charges you have paid, or will be expected to pay, are the costs of providing you with your own, personal, retention copies of the materials which were or will be released.

I - OGC (Deposit)

We have, further, considered the matter of waiving these charges also, but have determined that we cannot do so. They are the same costs that our other requesters for released material are expected, and do, pay. It would be unfair to the other requesters were we to provide them free of charge to you.

Sincerely,

Gene F. Wilson
Information and Privacy Coordinator