

See notes

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 75-1996
	:	
U.S. DEPARTMENT OF JUSTICE,	:	
	:	
Defendant.	:	

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS

On July 13, 1981, plaintiff filed a Motion to Dismiss this case without prejudice. This follows by two and one half months plaintiff's earlier attempt to have this case dismissed without prejudice which initially resulted in a dismissal order being filed on May 29, 1981. Defendant Department of Justice filed a motion to reconsider that order on June 30, 1981. On August 5, 1981, this Court vacated its earlier order dismissing the action and reinstated this case.

Plaintiff's "fresh" motion to dismiss pursuant to Fed.R.Civ.P. 4(a)(2) is no different from his earlier unsuccessful attempt to have the case dismissed. As explained in defendant's June 30, 1981 memorandum, no order to dismiss without prejudice should be granted because such an order would waste five years of litigative efforts and expenses by the Court and the parties.

In addition, plaintiff's two "conditions" which he seeks to impose on the Court are improper and at variance with this Court's prior orders. These conditions are that he be permitted to (1) seek payment of consultation fees and (2) move for an award of attorney's fees and litigation costs, even though the case would be dismissed at his request.

This Court decided on July 6, 1979, that it would rule on the consultancy issue "pending disposition of the case." However, this case will not be disposed of if it is simply dismissed without prejudice and refiled again. Plaintiff and defendant agree on this, if for different reasons. Defendant believes that

all outstanding issues have either been adjudicated or are awaiting adjudication by this court. Plaintiff does not even believe that the outstanding issues have been adjudicated and brands defendant's suggestion that they have been as "ludicrous". Plaintiff's Response of July 13, 1981, pp. 1-2. Without a disposition or adjudication of the outstanding issues in the case, no motion for payment of consultation fees should be entertained by this Court under the Order of July 6, 1979.

Plaintiff's request to seek attorney's fees after a dismissal of the case by him is also improper. In this case, such an effort should fail both because any such dismissal would be a voluntary act by the plaintiff and because plaintiff has agreed only to a dismissal without prejudice. Such a dismissal leaves to plaintiff the right to refile his action anew at his convenience. Judging from Plaintiff's Response of July 13, 1981, plaintiff is virtually certain to refile his action promptly, forcing this court to continue to litigate and probably relitigate years of work. Consequently, an award of attorney's fees at this juncture would be an award of interim fees which is not permitted in this District.

In a recent FOIA case, Letelier v. U.S. Department of Justice, C.A. No. 79-1984 (D.D.C. Oct. 2, 1980) attached hereto, the Court noted that "the parties are still in disagreement concerning the applicability of the exemptions, and the court has yet to resolve these disputes." ^{1/} Id., p. 1. Saying that, the court declared that a request for fees without a final resolution of the issues was properly styled as a motion for interim attorney's fees. Citing another unreported D.C. case, Abramson v. FBI, C.A. No. 77-2206 (D.D.C. Nov. 30, 1979), Judge Flannery found that no interim attorney fees were permitted in this District. He added:

Furthermore, the court notes that a rule allowing interim attorneys' fees would likely result in duplication of effort, as fees might be requested at successive stages in this case, each time the agency releases some, but less than all, the requested

^{1/} Defendant claims, however, that the Court currently has all of these issues before it and, thus, could resolve those disputes by a final summary judgment.

documents. . . . Also, the resolution of such piecemeal motions would be highly speculative, because the proper evaluation and weighing of the relevant criteria could not be completed until the suit is complete.

Letelier v. U.S. Department of Justice, at 3.

The suit before this court is also clearly not "complete" until a final, dispositive ruling adjudicates the remaining issues in the case. At that time, plaintiff can properly come before this court to claim whatever fees he is entitled to.

For the reasons given, defendant U.S. Department of Justice urges that plaintiff's new Motion To Dismiss Pursuant to Rule 41(a)(2) be denied.

Respectfully submitted,

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FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG

Plaintiff,

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U.S. DEPARTMENT OF JUSTICE,

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Civil Action No. 75-1996

ORDER

Upon consideration of plaintiff's Motion to Dismiss and
defendant's opposition thereto, it is hereby
ORDERED that plaintiff's motion is denied.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Defendant's Memorandum of Points and Authorities In Opposition to Plaintiff's Motion to Dismiss was sent by mail, postage prepaid, on the 12th day of August, 1981 to:

James H. Lesar, Esq.
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WILLIAM G. COLE