Circuit Court for Baltimore City
Case No.: 24-C-10-004437

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2090

September Term, 2017

CHARLES MUSKIN

v.

STATE DEPARTMENT OF ASSESSMENTS AND TAXATION

Kehoe,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: April 10, 2019

In 2010, Charles Muskin, appellant, acting as trustee of two trusts that owned ground rent leases in Baltimore City, challenged the constitutionality of a Maryland statute that required ground rent holders to complete and submit a form and pay a registration fee to the State Department of Assessments and Taxation (SDAT). After the Circuit Court for Baltimore City declared the statute constitutional, Muskin appealed. The Court of Appeals ultimately reversed, holding that the statute violated Maryland's Declaration of Rights and Constitution. *Muskin v. State Dept. of Assessments and Taxation*, 422 Md. 544, 553-54 (2011). Shortly thereafter, Muskin filed a motion in the circuit court seeking a declaratory judgment pursuant to the Court of Appeals' holding. In addition, Muskin filed a "Motion for Costs," seeking, among other things, "out-of-pocket expenses" incurred as a result of the litigation. The court granted Muskin's request for a declaratory judgment but denied his request for costs. In this appeal, Muskin presents the following question for our review, which we have rephrased as[1]:

Did the circuit court err in denying Muskin's motion for costs?

For reasons to follow, we answer that question in the negative and affirm the judgment of the circuit court.

[1] Muskin phrased the question as: "Did the circuit court err in holding that Appellant was not entitled to an award of attorneys' fees, trustee's fees and/or costs after Appellant's successful challenge to the Ground Rent Registry Statute's constitutionality?"

BACKGROUND

As noted, Muskin was the trustee of two trusts that owned multiple ground rent leases in Baltimore City.[2] *Muskin*, 422 Md. at 550. In 2007, the Maryland General Assembly passed Chapter 290 of the Laws of 2007 ("Chapter 290"), which stated, among other things, that ground rent holders were required to submit a form and registration fee to SDAT for all ground rent leases. *Id.* at 551-52. Chapter 290 also stated that, if a ground rent holder failed to register a ground rent lease in a timely fashion, the lease would be extinguished and title would be transferred to the leasehold tenant. *Id.* Following the enactment of that statute, Muskin chose not to register the trusts' ground rent leases but instead filed an action in the Circuit Court for Anne Arundel County seeking a declaratory judgment that Chapter 290 was unconstitutional. *Id.* at 552. In addition, Muskin sought an injunction prohibiting SDAT from extinguishing or transferring any ground leases. *Id.* at 552. After the case was transferred to the Circuit Court for Baltimore City, the court held a hearing and issued a declaratory judgment stating that Chapter 290 was constitutional. *Id.* Muskin thereafter noted an appeal in this Court. *Id.* at 553. Around the same time, Muskin filed a petition for writ of certiorari in the Court of Appeals. *Id.* The Court of Appeals granted Muskin's petition. *Id.*

[2] A ground rent lease "is a renewable 99 year lease where the fee simple owner of a property receives an annual or semi-annual payment ('ground rent') and retains the right to re-enter the property and terminate the lease if the leaseholder fails to pay." *Muskin*, 422 Md. at 550.

The Court of Appeals ultimately reversed the circuit court's judgment and held that the extinguishment and transfer provisions of Chapter 290 were unconstitutional under Maryland's Declaration of Rights and Constitution. *Id.* In so doing, the Court also held that the registration requirements were constitutional under federal and Maryland constitutional principles. *Id.* at 553-54. The Court then remanded the case to the circuit court for entry of a declaratory judgment consistent with the Court's holdings. *Id.* at 554.

Following the Court of Appeals' decision, Muskin filed a "Motion for Entry of Judgment Pursuant to Mandate" and a "Motion for Costs." In his Motion for Costs, Muskin claimed that, in prosecuting his case, he had incurred $7,106.16 in attorneys' fees and other "costs." Muskin argued that he was entitled to recover those attorneys' fees and costs from SDAT pursuant to Sections 1983 and 1988 of Title 42 of the United States Code ("42 U.S.C."). Muskin also claimed that he had accrued, as trustee for the trusts, commissions in the amount of $50,000.00 and that he was entitled to recover those commissions from SDAT pursuant to Section 14-103 of the Estates and Trusts ("Est. & Trusts") Article of the Maryland Code. Finally, Muskin argued that, because the matter "involved a challenge to the condemnation of Plaintiff's real property," he was entitled to recover "all costs incurred by the property owner" pursuant to Section 12-106 of the Real Property ("Real Prop.") Article of the Maryland Code.

Although the circuit court eventually granted Muskin's request for a declaratory judgment pursuant to the Court of Appeals' mandate, the court, following a hearing, denied his request for costs. In so doing, the court found that Muskin could not recover fees and

costs pursuant to 42 U.S.C. § 1988 because he had not prevailed on a federal claim and because he "did not sue an appropriate 42 U.S.C. § 1983 defendant." The court also found that Muskin could not recover pursuant to § 12-106 of the Real Prop. Article because the matter was "not a condemnation proceeding under the power of eminent domain" and because that section only allows named defendants, not named plaintiffs, to recover. Finally, the court found that, even if Muskin were eligible, he could not recover any costs or fees because "he did not provide a clear record of the time he spent working on the case" and "did not provide documentation or evidence supporting his alleged expenses."

DISCUSSION

Muskin argues that the circuit court erred in denying his motion for costs. He maintains that under 42 U.S.C. §§ 1983 and 1988, a prevailing litigant in a civil rights' case is entitled to "attorneys' fees and costs." Appellant further maintains that, when the Court of Appeals issued its holding in *Muskin*, *supra*, which, according to Muskin, was a "civil rights case," he was "victorious on all issues." Muskin contends, therefore, that he was entitled to recover from SDAT any attorneys' fees and costs he accrued in conjunction with the lawsuit.

The State asserts that Muskin is not entitled to recover either attorneys' fees or costs under 42 U.S.C. §§ 1983 and 1988 because SDAT, the only entity named in Muskin's lawsuit, was not an "appropriate § 1983 defendant" from whom attorneys' fees and costs can be recovered. The State also maintains that, even if SDAT were a "proper" defendant, Muskin would not be eligible to recover any attorneys' fees or costs because he was not

the "prevailing party," as the Court of Appeals decided Muskin's federal claims against him.

Ordinarily, "[w]e review a trial court's decision to award attorneys' fees and costs for abuse of discretion." *Pinnacle Group, LLC v. Kelly*, 235 Md. App. 436, 476, *cert. denied*, 459 Md. 188 (2018). The trial court's conclusions of law and application of law to facts, however, are reviewed *de novo*. *Tribbitt v. State*, 403 Md. 638, 644 (2008). Thus, "while a decision whether to award attorneys' fees is reviewed under an abuse of discretion standard, 'the *standard* that a trial court applies in evaluating whether to award attorneys' fees and costs is a legal decision' that [an appellate court reviews] without deference." *Lockett v. Blue Ocean Bristol, LLC*, 446 Md. 397, 414 (2016) (citations omitted).

"In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975); *see also Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group Limited Partnership, LLLP*, 454 Md. 475, 486 (2017) ("Maryland follows the common law American Rule, which states that, generally, a prevailing party is not awarded attorney's fees."). There are, however, several exceptions to that rule, one of which is when "there is a statute that allows the imposition of such fees[.]" *Bainbridge*, 454 Md. at 487 (citations and quotation marks omitted).

The two statutes at issue here are Sections 1983 and 1988 of Title 42 of the United States Code. Section 1983 states, in relevant part, that "[e]very 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 … to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured[.]" 42 U.S.C. § 1983. Section 1988 states, in relevant part, that "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, … the court, in its discretion, may allow the prevailing party … a reasonable attorney's fee as part of the costs[.]" 42 U.S.C. §1988(b).

The applicability of § 1983 in lawsuits where the State is a named defendant was decided by the Supreme Court in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). In that case, the plaintiff filed in the Michigan Circuit Court a lawsuit against the Department of State Police and the Director of State Police in the Director's official capacity, alleging that the defendants had violated § 1983. *Id.* at 60. After the claim was challenged, the Michigan Circuit Court determined that the plaintiff's action could proceed because the defendants "were persons for purposes of § 1983." *Id.* at 60-61. That judgment was appealed to the Michigan Supreme Court, which ultimately disagreed with the Michigan Circuit Court and held that the State was not a "person" under § 1983. *Id.* at 61. The Supreme Court of the United States later granted certiorari because the Michigan Supreme Court's holding conflicted "with a number of state- and federal-court decisions to the contrary." *Id.* (footnote omitted).

In the end, the Supreme Court of the United States agreed with the Michigan Supreme Court and held that "a State is not a person within the meaning of § 1983." *Id.* at 64. The Court explained that, in common usage, the term "person" did not include the

State. *Id.* The Supreme Court further explained that such an interpretation was consistent with Congress's purpose in enacting § 1983 and the statute's legislative history. *Id.* at 65-69.

More recently, this Court, in *State v. Braverman*, 228 Md. App. 239 (2016), decided, under facts similar to those presented here, whether an award of attorneys' fees and costs against the State pursuant to 42 U.S.C. §1988 was permissible. There, Maryland landowners brought a class action against the State, alleging that certain provisions of the 2007 legislative modifications to the "ground lease" system in Maryland, of which Chapter 290 was a part, violated the Maryland Constitution. *Id.* at 246-49. After years of protracted litigation, the Maryland landowners won, and the Circuit Court for Anne Arundel County ordered the State to pay $5 million in fees. *Id.* at 248-51. The court based its decision in part on 42 U.S.C. § 1988. *Id.*

After the State appealed, this Court reversed and held that the circuit court lacked statutory authority to award fees against the State. *Id.* at 254. We explained that, although the plaintiffs had alleged that the legislation at issue violated the federal Constitution, "they did not expressly or even implicitly set forth a claim for relief under § 1983 – i.e., a claim that a 'person' acting 'under color of' Maryland law had deprived them 'of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Id.* at 253. We further explained that, even had the plaintiffs set forth a claim for relief under § 1983, they "had no viable § 1983 claim against the sole named defendant in the case – the State of Maryland – because the United States Supreme Court has held that a State is

not a 'person' under § 1983." *Id.* (citing *Will*, 491 U.S. at 71). As a result, we held that, as a matter of law, the court "had no authority to award fees against the State under § 1988." *Id.* at 254 (footnote omitted).

Turning back to the instant case, we conclude that *Will* and *Braverman* are dispositive. The sole defendant here – SDAT – is, for all intents and purposes, "the State." *See* Md. Code, Tax-Prop. § 2-101 (establishing SDAT as "a department of the State government."). As a result, Muskin was not entitled to recover attorneys' fees and costs pursuant to §§ 1983 and 1988 because SDAT is not a "person" within the meaning of the statutes.

Muskin attempts to sidestep our holding in *Braverman* and the Supreme Court's holding in *Will* by arguing that, in those cases, the plaintiffs "sought 'retroactive' relief in the form of damages," whereas he "sought and obtained 'prospective relief in the form of declaratory and injunctive relief." According to Muskin, that distinction tips the scales in his favor because the Supreme Court, in *Hutto v. Finney*, 437 U.S. 678 (1978), held that an award of attorneys' fees against the State pursuant to § 1988 was permissible under certain circumstances. *Id.* at 700. In support of his position, appellant also cites *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 278-79 (1989).

Muskin is mistaken. *Hutto*, which was decided ten years prior to *Will*, involved the question of whether an award of attorneys' fees pursuant to § 1988 was barred by the immunity protections given to the States by the Eleventh Amendment to the United States

Constitution.[3] *Hutto*, 437 U.S. at 693-700; *see also Missouri*, 491 U.S. at 279 ("After *Hutto*, therefore, it must be accepted as settled that an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment."). In *Will* and *Braverman*, by contrast, the issue was one of statutory interpretation, i.e., whether the State qualified as a "person" under the statute. Moreover, the claims in *Hutto* originated in United States District Court, whereas the claims in *Braverman* and *Will*, like the claims in the instant case, originated in state court. That distinction is important because "the Eleventh Amendment does not apply in state courts." *Will*, 491 U.S. at 63-64. Finally, the Supreme Court in *Will* rejected, albeit in a footnote, the argument that its holding in *Hutto* permitted the inference that it had previously held that the State was a person within the meaning of § 1983. *Id.* at 63 n.4. In so doing, the Supreme Court stated that *Hutto*, as well as several other similar cases, were inapposite because "the Court did not address the meaning of person in any of those cases, and in none of the cases was resolution of that issue necessary to the decision." *Will*, 491 U.S. at 63 n.4. Thus, under the facts of the instant case, the Supreme Court's holding in *Will* and our holding in *Braverman* control.

To be sure, Muskin is correct that prayers for "prospective relief" may, in limited circumstances, be treated differently than prayers for "retroactive relief" when determining whether §§ 1983 and 1988 are applicable. As both this Court in *Braverman* and the

[3] The Eleventh Amendment to the United States Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Supreme Court in *Will* noted, when a state official in his or her official capacity is sued for injunctive relief, that individual would be a "person" under § 1983 and, as a result, may be subject to an award of attorneys' fees pursuant to § 1988. *Will*, 491 U.S. at 71 n.10; *Braverman*, 228 Md. App. at 254.

Nevertheless, that distinction is irrelevant here because Muskin did not sue a state official in his or her official capacity; rather, Muskin sued only the State. Under those circumstances, any claim pursuant to § 1983 is not viable because, as previously discussed, the State is not a person within the meaning of the statute.

Muskin argues that he could have named SDAT's director as "an official-capacity defendant" but was not required to do so because SDAT, not its director, was the "real party in interest." Muskin maintains that naming SDAT's director as a defendant "would have been [] utterly meaningless" because the director "would not have been personally liable or responsible for any award or judgment."

Muskin's arguments are unavailing. SDAT is not a "person" within the meaning of § 1983, even when sued for "prospective" relief. Whether SDAT was "the real party in interest" or whether its director was personally responsible for any award or judgment is immaterial. As the case law makes clear, if Muskin wanted to bring a claim against SDAT pursuant to § 1983 and then recover attorneys' fees pursuant to § 1988, he was required to name SDAT's director (or some other state official in his or her official capacity) as a defendant.

Assuming, for the sake of argument, that SDAT was a "person" within the meaning of § 1983, Muskin's claim for attorneys' fees and costs pursuant to § 1988 would still fail. Ordinarily, a plaintiff who brings a lawsuit pursuant to § 1983 may not recover attorneys' fees under § 1988 unless the plaintiff prevailed on his § 1983 claim. *Maryland Green Party v. State Bd. of Elections*, 165 Md. App. 113, 124 (2005). The plaintiff may, however, recover attorneys' fees "when he has asserted federal and state law claims for the same relief; has prevailed solely on the state claim, and the federal claim is undecided." *Id.* at 125.

Here, Muskin never expressly raised a § 1983 claim. Nevertheless, the majority in the Court of Appeals' *Muskin* decision stated that it assumed that "Chapter 290 would pass analytical muster according to the United States Constitution[.]" *Muskin*, 422 Md. at 550. As can be seen, the majority in *Muskin* did not explicitly decide that the statute was constitutional under the United States Constitution. It simply assumed it was constitutional. Nevertheless, we are convinced that had the issue been decided by the majority, the Court would have ruled against Muskin on this issue. Judge Sally Adkins, in her *Muskin* dissent, carefully addressed this issue and concluded that the statute did not violate the United States Constitution. *See id.* at 568-581 (Adkins, J., dissenting). The logic of her conclusion is unimpeachable. Accordingly, the exception to the "prevailing party" rule does not apply here.

Finally, Muskin presents several alternative theories as to why he was entitled to attorneys' fees. First, Muskin argues that attorneys' fees are "costs" as defined by § 1988

and thus are recoverable under Maryland Rule 2-603. Second, Muskin argues that the passage of Chapter 290 was "a form of inverse condemnation" and that, as a result, he was entitled to "all costs" under § 12-106 of the Real Prop. Article of the Maryland Code. Third, Muskin argues that, under § 14.5-708(a)(1)(iii) of the Est. & Trusts Article of the Maryland Code, he was "entitled to remuneration for time spent as a self-represented trustee."

None of these last mentioned arguments have merit even though Maryland Rule 2-603(a) provides that, "[u]nless otherwise provided by rule, law, or order of court, the prevailing party is entitled to costs." "But, 'costs,' under Md. Rule 2-603, do not include either attorney's fees or expert witness fees." *Bahena v. Foster*, 164 Md. App. 275, 291 (2005). Because Muskin's "costs" were actually "attorneys' fees," Muskin is not entitled to recover under Rule 2-603. Moreover, although Muskin argues that his "attorneys' fees" were in fact "costs" and thus recoverable pursuant to Rule 2-603, he does so by citing to the definition of costs provided in § 1988. Therefore, even if we accepted Muskin's argument that his attorneys' fees were "costs" pursuant to § 1988, he would not be entitled to recover those costs because, as previously discussed, the State is not a person within the meaning of § 1983.

Muskin's reliance on § 12-106 of the Real Prop. Article is equally misplaced. That section states, in relevant part, that, in a condemnation proceeding, "[t]he plaintiff shall pay all the costs[,]" which include "the reasonable legal, appraisal, and engineering fees actually incurred by the defendant because of the condemnation proceeding, if the

judgment is for the defendant on the right to condemn." Md. Code, Real Prop. §§ 12-106(a) and (b)(5). Here, SDAT was not a "plaintiff" in a condemnation proceeding, and none of the attorneys' fees sought by Muskin were incurred "by the defendant because of the condemnation proceeding." Rather, Muskin was the plaintiff in an action seeking declaratory relief against SDAT, the defendant, and all of the "costs" incurred by Muskin were a direct result of that action. Moreover, even if SDAT's actions were a form of "inverse condemnation," as Muskin claims, he would still not be entitled to relief under § 12-106 "because, by definition, [inverse condemnation claims] do not involve the power of eminent domain." *Braverman*, 228 Md. App. at 258.

Regarding § 14.5-708 of the Est. & Trusts Article, nothing in that statute states, or even suggests, that SDAT would be responsible for paying Muskin's trust commissions. That statute provides, in relevant part, that "[a] testamentary trustee and trustee of any other trust whose duties comprise the collection and distribution of income from property held under a trust agreement or the preservation and distribution of the property are entitled to commissions provided for in this section for services in administering the trusts." Md. Code, Est. & Trusts § 14.5-708(a)(1)(i). The statute goes on to provide various types of commissions to which a trustee may be entitled, none of which include "remuneration for time spent as a self-represented trustee." *See* Md. Code, Est. & Trusts §§ 14.5-708(b) through (j). Moreover, there is nothing in the statute to suggest that those commissions should be paid by a third-party, SDAT, which is not privy to the trust agreement and has no contractual obligation to pay Muskin's commissions in administering the trust. *See*

Bunn v. Kuta, 109 Md. App. 53, 62 (1996) (noting that "a trustee's commission is subject to agreement between the parties[.]"); *see also* Md. Code, Est. & Trusts § 14.5-708(a)(ii) ("The amount and source of payment of commissions are subject to the provisions of any valid agreement."). Lastly, although the statute provides that "[a] court having jurisdiction over the administration of the trust … may allow special commissions or compensation for services of an unusual nature," (Md. Code, Est. & Trusts § 14.5-708(a)(1)(iii)), there is nothing in the statute to suggest that a trustee is therefore *entitled* to such special commissions or compensation, nor is there anything in the statute to suggest that a third-party, SDAT, is required to pay such fees to the trustee. *See Bunn*, 109 Md. App. at 60-61 ("[C]ourts have the inherent power to review compensation paid to trustees *from trust assets*[.]") (emphasis added).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.