United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5111 **September Term, 2018**

FILED ON: OCTOBER 17, 2018

ELOUISE PEPION COBELL, ET AL.,
APPELLANTS

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,
APPELLEES

Consolidated with 17-5125

Appeals from the United States District Court
for the District of Columbia
(No. 1:96-cv-01285)

Before: TATEL and PILLARD, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

These cases were considered on the record from the United States District Court for the District of Columbia and the briefs and arguments of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED AND ADJUDGED that the district court's decision be affirmed for the reasons set forth in the memorandum filed simultaneously herewith. It is

FURTHER ORDERED AND ADJUDGED that Appellant Clayton Creek's claim be **VACATED** and **REMANDED**. All parties agree that Clayton Creek's claim is now moot. *See United States v. Munsingwear*, 340 U.S. 36 (1950).

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

M E M O R A N D U M

In this unusual case, although the original plaintiffs are designated as appellants, the actual controversy on appeal is between attorneys for the plaintiffs and an attorney who is a former member of the litigation team. Hereinafter, "Appellants" will refer to the attorneys who constitute the final litigation team. Appellants appeal the district court's decision to award attorney's fees and prejudgment interest. They also assert that this Court lacks jurisdiction to hear an appeal on the fees awarded. The Appellee-Cross Appellant, attorney Mark Kester Brown ("Brown"), a former member of plaintiffs' legal team, appeals the district court's decision not to award the full amount of attorney's fees sought by him. *See Cobell v. Jewell*, 234 F. Supp. 3d 126 (D.D.C. 2017); *Cobell by & through Cobell v. Zinke*, No. 96-cv-1285, 2017 WL 6508186 (D.D.C. May 9, 2017).

Brown worked on the *Cobell* litigation for a number of years. Interpersonal issues arose among the lawyers, leading to a decrease in work assigned to Brown and to his eventual move to California. Appellants filed a motion for fees without including Brown's fee information. Brown intervened, filing his own petition for $5.5 million using the *Laffey* rate as his calculation. The *Laffey* rate is derived from a matrix created to calculate appropriate hourly rates for attorneys in fee-shifting cases. *Laffey v. Nw. Airlines, Inc.*, 572 F. Supp. 354, 371 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984). The district court placed $5.5 million of the fees awarded by the court into an escrow account pending resolution of Brown's action. Instead of using a *Laffey* rate, the district court used the $350/hour rate from Brown's

engagement letter and awarded Brown $2.88 million of the funds in escrow. Brown introduced no evidence to support his actual hourly rate other than the $350/hour rate specified in his engagement letter. The rate never changed despite various amendments to the engagement letters. Furthermore, the rate was his customary hourly rate in private practice at the time he joined the team. Brown filed a motion seeking prejudgment interest, which the district court awarded. The parties each filed notice of appeal.

This Court has jurisdiction to hear these appeals under 28 U.S.C. § 1291 and 28 U.S.C. § 636(c)(3). Counsel for plaintiffs contend that this court lacks jurisdiction over both their own and Brown's appeals because, they now assert, the relevant final order was the January 31, 2017 attorney's fee award, but the cross appeals were not filed until after the April 10, 2017 order awarding prejudgment interest. The trial judge did not appear to have intended the initial fee order to be a final judgment under 28 U.S.C. § 1291. The court expressly invited Brown to file a motion for prejudgment interest, which he did. Correctly measured from the date of the final order awarding prejudgment interest, the appeals were timely. Alternatively, even if the first order was final, the award of prejudgment interest here is fairly characterized as an order granting a Rule 59(e) motion. This Court "review[s district court] attorney's fees awards for abuse of discretion." *West v. Potter*, 717 F.3d 1030, 1033 (D.C. Cir. 2013). We also review grants of prejudgment interest for abuse of discretion. *See Bucheit v. Palestine Liberation Org.*, 388 F.3d 346, 351 (D.C. Cir. 2004). A "district court abuses its discretion if it did not apply the correct legal standard . . . or if it misapprehended the underlying substantive law." *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (internal quotation omitted).

Appellants argue that the district court erred in awarding attorney's fees to Brown, arguing that he violated his ethical duties by withdrawing from the case without informing his clients or the district court. Brown argues the district court should have used *Laffey* rates to calculate his fees.

Appellants further argue that the district court erred in awarding prejudgment interest under D.C. Code § 15-109. Section 15-109 of the Code allows a party to recover interest on a judgment for damages in contract actions in order to "fully compensate the plaintiff." D.C. Code § 15-109. Appellants argue that awarding prejudgment interest under § 15-109 was an abuse of discretion because the plain text of the Code applies only in breach of contract actions, and because awarding prejudgment interest is not appropriate when the disputed funds were held in an escrow account under terms set by the court.

We conclude that there was no abuse of discretion by the district court. Trial courts have broad discretion in determining attorney's fees, *Salazar ex rel. Salazar v. District of Columbia*, 809 F.3d 58, 63 (D.C. Cir. 2015), and in "awarding . . . prejudgment interest under § 15-109," *District of Columbia v. Pierce Assocs., Inc.*, 527 A.2d 306, 310 (D.C. 1987). The district court did not exceed that discretion in awarding attorney's fees, nor in declining to award *Laffey* rates. *Accord Salazar*, 809 F.3d at 63. It also was not an abuse of discretion for the district court to award prejudgment interest because the award originated from a claim based on contract, that is, his engagement letter. *Accord Pierce Assocs., Inc.*, 527 A.2d at 310.

Appellant Clayton Creek, a member of the *Cobell* class, asserted that the South Dakota Department of Corrections placed funds due to him as a result of the *Cobell* litigation into an account he was unable to access, violating the Claims Resolution Act and the *Cobell* settlement

agreement. Since the filing, the South Dakota Department of Corrections has released Creek's *Cobell* settlement funds. The court-assigned amicus curiae suggested, and all parties agree, that we should vacate the district court's order denying him relief and remand the case with instructions for the district court to dismiss the motion as moot under *United States v. Munsingwear*, 340 U.S. 36 (1950). We agree.

Therefore, we affirm the district court's decision regarding Brown, and we vacate and remand the district court's order regarding Creek, with instructions to dismiss the motion as moot.