

STATE OF CONNECTICUT

SUPREME COURT

S.C. 18132

NEW ENGLAND ESTATES, LLC

VS.

TOWN OF BRANFORD, ET AL.

SUPPLEMENTAL BRIEF and APPENDIX
OF DEFENDANT-APPELLANT, TOWN OF BRANFORD

TO BE ARGUED BY:

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SUPPLEMENTAL STATEMENT OF ISSUES

1. If the Town prevails on its main appeal, should the award of attorney's fees and costs be reversed as well? (pp. 1-2)

2. Where there is no basis under 42 U.S.C. §1988 to allow attorney's fees and costs for prosecuting the just compensation case, should New England Estates, LLC, have been awarded its fees and costs for that case? (pp. 2-5)

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NATURE OF PROCEEDINGS AND FACTS OF CASE

Following the 42 U.S.C. §1983 judgment against the Town of Branford (now S.C. 18132), the plaintiff, New England Estates, LLC (NEE), and the cross claimants (Owners) separately moved for attorney's fees and costs pursuant to 42 U.S.C. §1988 (Supplemental Record [S.R.] ____, ____). The court awarded NEE \$1,488,587 (S.R. __), which comprises most of its fees and costs for the period from October 2, 2006 through December 31, 2007 (Town's Supplemental Appendix [S. App.] A17), and awarded the Owners \$275,979 (S.R. __), which comprises to the dollar their fees for the period from August 6, 2007 through November 19, 2007 (S. App. A19, A26-A38). Included in NEE's time sheets for 2007, filed as a 149-page annex (tab 6) to its motion, are entries totaling well into six-figures for the just compensation case (now S.C. 18189, 18191), in which no federal claim was made. See, e.g., S. App. A5-A14, which includes the entries for the dates immediately preceding and during the just compensation trial, which was held on June 25, 26, 27, July 2, and 5, 2007. On the other hand, the court awarded the Owners *no* fees or costs for the just compensation case. Compare S.R. __ with S. App. A19-A25.

The Town filed an amended appeal. The Owners (but not NEE) have cross appealed from the Town's amended appeal, claiming entitlement to fees and costs for the just compensation case.¹

ARGUMENT

I. If the Main Judgment Falls, the Supplemental Judgment Falls with it.

Standard of Review: Pure issue of law. Review is plenary.

If the Town prevails on any of its six issues as to NEE, or on any one of issues I, II, III or V as to the Owners, the Town will be entitled either to judgment or to a new trial because NEE and the Owners will no longer be prevailing parties.

¹/ The Town has moved to dismiss the Owners' cross appeal as improperly filed. That motion is pending as of November 21, 2008.

42 U.S.C. §1988(b) states in relevant part: "In any action or proceeding to enforce [§1983 and other federal statutes], the court, in its discretion, may allow *the prevailing party* . . . a reasonable attorney's fee . . ." (emphasis added.)² The unanimous view of the federal appellate courts that have ruled on §1988 claims is typified by the Second Circuit holding that "given our reversal of the district court's rulings in favor of plaintiffs on their First Amendment claims, the district court's award of attorneys' fees to them as 'prevailing parties' must also be reversed." *Altman v. Bedford Central School District*, 245 F.3d 49, 81, cert. denied, 534 U.S. 827 (2d Cir. 2001).

If the underlying judgment falls, the §1988 awards necessarily fall with it.

II. NEE is Not Entitled to Fees and Costs for the Just Compensation Case in Any Event.

Standard of Review: Pure issue of law. Review is plenary.

Under the American rule, the prevailing party is not entitled to recover attorney's fees from the losing party. An exception to the American rule is 42 U.S.C. §1988. Section 1988 was enacted to ensure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Acts. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

Section 1988 allows compensation for attorney's fees for the time that is reasonably expended "[i]n any action or proceeding to enforce a provision of . . . [various federal

²/ 42 U.S.C. §1988 states: (b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. §2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. §2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

statutes, including § 1983].” As such, it allows for fee shifting *only* in those proceedings which enforce identified federal actions. NEE filed its §1983 action in July 2003, which was prior to the filing of the just compensation case. Although improper in the several ways addressed in the Town’s main brief, NEE’s §1983 action nonetheless stood independent of the just compensation action. There is no basis under §1988 to allow attorney’s fees and costs for the compensation case. Since the trial court awarded NEE substantially all of its fees and costs from October 2, 2006 through the completion of trial court proceedings for both the §1983 action and the just compensation action, its award to NEE is improper. On the other hand, the court properly disallowed fees and costs to the Owners for work in the just compensation action.

Arguing that the just compensation case fits into the line of cases about administrative proceedings is like arguing that a square peg fits into a round hole. The U.S. Supreme Court has allowed compensable attorney’s fees for *administrative proceedings that Congress has mandated take place before plaintiff may file a claim in federal court*, which hardly describes the just compensation case. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (administrative proceedings are compensable because they are mandated under Title VII). The Second Circuit has followed with *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565, 580-81 (2d Cir. 2003) (administrative proceeding required under FHAA and ADA prior to bringing federal claim compensable), and *Counsel v. Dow*, 849 F.2d 731, 740-41, cert. denied, 488 U.S. 955 (2d Cir. 1988) (administrative hearings required under the Education of the Handicapped Act compensable under that Act).

These cases are inapplicable to the present §1983 action. Actions pursuant to §1983 have no such administrative prerequisite “[b]ecause §1983 stands ‘as an independent avenue of relief’ and petitioner ‘could go straight to court to assert it.’” *Webb v. Board of Educ. of Dyer County, Tenn.*, 471 U.S. 234, 241 (1985). In cases involving mandatory administrative proceedings, the plaintiffs could not pursue their civil rights actions without first exhausting their administrative remedies.

The *Webb* court noted that time expended on optional administrative proceedings may be included, but the work must be “both useful and of a type ordinarily necessary” to advance the litigation. *Id.* at 243. If NEE and the Owners’ novel theory of recovery under §1983 is to be believed, the just compensation case was entirely distinct legally from that proceeding.³

Following *Webb*, the Supreme Court approved an attorney’s fee award for optional prior administrative proceedings, but only for the discrete portion of the work product qualifying under the *Webb* test. *Pennsylvania v. Delaware Valley Citizen’s Council*, 478 U.S. 546, 556 (1986) (federal administrative proceeding). See also *Cullen v. Fliegner*, 18

³ / The Town has argued that the §1983 claim is unripe until (1) state just compensation procedures have been pursued and found inadequate (the Town’s argument is based on the *Daniels* line of cases), or (2) state injunction procedures have been pursued and found inadequate (the Town’s argument is an issue of first impression). See Town’s brief filed April 23, 2008, p. 14. If this Court agrees with either point, the §1983 judgment will fall and the §1988 award with it. If this Court disagrees with both points, then there is no mandate that NEE and the Owners pursue and succeed on a state law valuation claim prior to pursuing the §1983 claim. In that event, the “necessary” argument fails.

In addition, while the Town believes that collateral estoppel should have prevented NEE from relitigating the issue of a remedy for the taking, see Town’s brief, pp. 7-10, NEE convinced the trial court that it could relitigate the issue, and it did so, using new experts in the §1983 case. Because NEE chose to relitigate the issue of remedy from scratch, it cannot contend that its work in the compensation case was “necessary” to its work in the §1983 case. “Useful” is not a synonym for “necessary.”

F.3d 96, 105-06, cert. denied, 513 U.S. 985 (2d Cir. 1994) (applying the *Webb* optional administrative proceedings test to state administrative proceedings). NEE made no claim at trial that *any* portion of the just compensation action – discrete or otherwise – was “of a type ordinarily necessary” to prosecute the §1983 action. In any event, the trial court did not award NEE some discrete part of its work on the just compensation action – it awarded NEE virtually all of its fees at the trial level for both actions from October 2, 2006 forward.

In addition, the U.S. Supreme Court has not extended the *Webb* test to prior state *court* proceedings. Other jurisdictions that have examined the issue have held “that attorney’s fees resulting from state court litigation that does not seek to enforce federal constitutional rights, but which does precede a successful §1983 suit, are not attorneys’ fees contemplated by §1988.” *Simi Investment Co. v. Harris County*, 236 F.3d 240, 255 (5th Cir. 2000), cert. denied, 534 U.S. 1022 (2001); *Williams v. Commonwealth of Kentucky*, 124 F.3d 201 (6th Cir. 1997); *Brantley v. Surles*, 804 F.2d 321, 325 (5th Cir. 1986).⁴

The award of attorney’s fees and costs for work expended in the just compensation case was improper under 42 U.S.C. § 1988.

⁴/ Nor does *Maine v. Thiboutot*, 448 U.S. 1 (1980), relied on below by the Owners, apply to allow attorney’s fees for the just compensation case. All *Thiboutot* holds is that §1988 applies to purely statutory violations of federal law. But the just compensation case makes no federal claims *at all*, either statutory or constitutional.

CONCLUSION

If the Town prevails on the main appeal, the supplemental judgment should be reversed and the matter remanded consistent with the remand on the main appeal. Alternatively, the supplemental judgment as to NEE should be reversed and the case remanded for further proceedings to exclude all time spent and costs incurred on the just compensation case.

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