

CAUSE NO. 2018-06750

FREE AND SOVEREIGN STATE OF
VERACRUZ DE IGNACIO DE LA LLAVE

Plaintiff,

vs.

JULIO ANTIMO, DENMARK PROPERTIES,
LLC, LEQUATRI PROPERTIES, LLC,
ANTIMO FAMILY LIVING TRUST
and JAVIER DUARTE DE OCHOA

Defendants.

§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

151ST JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

JURY TRIAL DEMANDED

TRADITIONAL MOTION FOR SUMMARY JUDGMENT

Plaintiff files this Traditional Motion for Summary Judgment, and would respectfully show the court the following:

BACKGROUND

The State of Veracruz is a state in Mexico. It previously had a corrupt governor that stole billions of dollars acting in concert with legions of business associates, family, and friends. These individuals acted in concert with one another in a single, massive global conspiracy – much of it based right here in Houston. Plaintiff sued some of these Defendants and a host of properties under the Texas Theft Liability Act, amongst other claims. Plaintiff non-suited its claims and added those same defendants into another ongoing case in this County. Before the non-suit, and in its answer, Defendants made a claim for attorney fees based on the belief those Defendants were ‘prevailing parties’ under the Texas Theft Liability Act. Defendants maintain those claims, and intends to try those claims to verdict in this Court, based on the reasoning that it is the ‘prevailing party’ under the statute because Plaintiff non-suited. However, Defendants’ position is wrong. Only dismissing a case *with prejudice* would translate to Defendants being considered the “prevailing party” – and thus being entitled to attorney fees. Defendants’ claims

properly belong in the court in which the live Texas Theft Liability Act claim are being prosecuted. Defendants' claims for attorney fees should be dismissed.

ARGUMENT

To obtain relief through a traditional motion for summary judgment, the movant must establish that no issue of material fact exists and that it is entitled to judgment as a matter of law. TEX R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *SAS Inst., Inc. v. Breitenfeld*, 167 S.W.3d 840, 841 (Tex. 2005) (per curiam); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). In the instant case, Defendants' claims should be dismissed because they cannot be maintained as a matter of law.

A. Attorney Fees under the Texas Theft Liability Act.

Section 134.005(b) of the TTLA provides that "[e]ach person who prevails in a suit under this chapter shall be awarded court costs and reasonable and necessary attorney's fees." TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b).

The TTLA statute does not contain a definition of "prevails" to assist in determining who qualifies as a prevailing party. Courts have looked to the term's "ordinary" meaning to determine its scope for both statutory and contractual claims. *See, e.g., Epps v. Fowler*, 351 S.W.3d 862, 866 (Tex. 2011) (construing written contract to give meaning to undefined term "prevailed" while noting that phrase "prevailing party" is given its ordinary meaning and has been explicated through statutory interpretation by many courts).

B. Clear Texas case law provides that when a plaintiff dismisses without prejudice, the defendant does NOT become the 'prevailing party.'

Courts have held that the phrase "prevailing party" in section 134.005(b) of the TTLA includes both a plaintiff successfully prosecuting a theft suit and a defendant successfully defending against one. *Peoples v. Genco Fed. Credit Union*, No. 10-09-00032-CV, 2010 WL

1797266, at *7 (Tex.App.-Waco May 5, 2010, no pet.) (mem. op.); *Brown v. Kleerekoper*, No. 01-11-00972-CV, 2013 WL 816393, *5 (Tex.App.-Houston [1st Dist.] March 5, 2013, pet. filed) (mem. op.). A prevailing defendant is entitled to attorney's fees "without any prerequisite that the claim is found to be groundless, frivolous, or brought in bad faith." *Air Routing Int'l Corp. (Canada) v. Britannia Airways, Ltd.*, 150 S.W.3d 682, 686 (Tex.App.-Houston [14th Dist.] 2004, no pet.).

A party prevails if he "successfully prosecutes the action or successfully defends against it...." *Johns v. Ram-Forwarding, Inc.*, 29 S.W.3d 635, 637-38 (Tex.App.-Houston [1st Dist.] 2000, no pet.). **However, a defendant who has the claims against it resolved by voluntary dismissal without prejudice generally is not considered a prevailing party or entitled to an award of attorney's fees.** *Arrow Marble, LLC v. Estate of Killion*, 441 S.W.3d 702, 706-707 (Tex. App.-Houston [1st Dist.] 2014, no pet.); *citing to Cricket Commc'ns, Inc. v. Trillium Indus., Inc.*, 235 S.W.3d 298, 311 (Tex.App.-Dallas 2007, no pet.); *Travel Music of San Antonio, Inc. v. Douglas*, No. 04-00-00757-CV, 2002 WL 1058527, at *3 (Tex.App.-San Antonio May 29, 2002, pet. denied) (mem. op., not designated for publication). This is because a dismissal without prejudice does not materially alter the plaintiff's legal relationship with the defendant; the plaintiff is free to reassert his claims and may prevail against the defendant at a later date. *See Epps*, 351 S.W.3d at 869.

The legal relationship between a plaintiff and defendant does change, however, when the plaintiff's claims are dismissed *with* prejudice. *Epps*, 351 S.W.3d at 866-69. When a plaintiff's claims are dismissed with prejudice, the doctrine of res judicata prohibits the plaintiff from re-asserting his claims against that defendant in a later suit. *Epps*, 351 S.W.3d at 867; *see Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex.1991) (holding that dismissal with prejudice functions as

final determination on merits); *see also Williams v. TDCJ–Inst. Div.*, 176 S.W.3d 590, 594 (Tex.App.-Tyler 2005, pet. denied) (holding that dismissal with prejudice has full res judicata and collateral estoppel effect).

C. Defendants are not the ‘prevailing parties.’

In this case, Plaintiffs’ claims have not been successfully defended. In fact, they are still being prosecuted in another Court.¹ Those claims are still live and pending. As such, to contend that Defendants are the ‘prevailing parties’ borders on the frivolous. The only way Defendants could be considered the prevailing parties is if Plaintiff non-suited its claims with prejudice. Which it most certainly did not. Plaintiff non-suited *without* prejudice and recently refiled those same claims against those same parties (and more) in another case.² Importantly, the relationship between Plaintiff and Defendants has not changed. The parties are still opposed in a lawsuit in this County. There has been no final adjudication of the merits of Plaintiff’s claims. Neither side has yet prevailed on the merits of the case. The attorney fee claim is derivative of the underlying TTLA claims – which are not yet resolved. As such, the Defendants cannot maintain an attorney fee claim *in this case*. It can only properly be brought (and is being brought) in the case in which the live TTLA claims are pending. Defendants current claims must be dismissed.

CONCLUSION

WHEREFORE, Plaintiff prays that this Court grant Intervenors’ Motion for Summary Judgment, and find that Defendants can only maintain their attorney fee claims in the court in which the claims are pending. Further, Plaintiff prays that this Court award any and all other relief to which it may be justly entitled.

¹ See Exhibit A - First Amended Petition against Defendants.

² See Exhibit B - Non-suit without prejudice.

Respectfully submitted,

THE BUZBEE LAW FIRM

By: /s/ Anthony G. Buzbee
Anthony G. Buzbee
State Bar No. 24001820
tbuzbee@txattorneys.com
Christopher J. Leavitt
cleavitt@txattorneys.com
JP Morgan Chase Tower
600 Travis, Ste. 7300
Houston, Texas 77002
Telephone: (713) 223-5393
Facsimile: (713) 223-5909

ATTORNEYS FOR INTERVENORS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document has been duly served on all known counsel of record and pro se parties via E-Service in accordance with the Texas Rules of Civil Procedure on June 8, 2018:

/s/ Christopher J. Leavitt
Christopher J. Leavitt