

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THE CORNUCOPIA INSTITUTE,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

ORDER

06-C-0182-C

This case began as a dispute about withheld documents, but since plaintiff Cornucopia Institute filed its summary judgment motion, it has been about little more than attorney fees. The case was dismissed on February 21, 2007, after I concluded that plaintiff's claim under the Freedom of Information Act was moot because defendant United States Department of Agriculture produced unredacted versions of all of the documents plaintiff requested. In addition, I denied plaintiff's request for attorney fees because defendant was not a "prevailing party" within the meaning of Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598 (2001).

Plaintiff has filed two motions in which it asserts again that it is entitled to recover

attorney fees. First, plaintiff asks the court to reconsider its finding that the case was moot and that plaintiff was not entitled to attorney fees as a prevailing party under the Freedom of Information Act. Second, plaintiff argues that it is entitled to attorney fees under the Equal Access to Justice Act. Inexplicably, defendant did not file a response to either motion.

Despite defendant's failure to respond, I must still determine whether plaintiff is entitled to the relief it seeks. I conclude that it is not. First, the motion for reconsideration is untimely. Under Fed. R. Civ. P. 59, a motion to alter or amend the judgment must be filed within 10 days. As noted, the case was dismissed on February 21, 2007, but plaintiff did not file its motion until March 13, which was more than 10 days later, even if Saturdays and Sundays are excluded, Fed. R. Civ. P. 6(a), and three days are added for service by mail, Fed. R. Civ. P. 6(e). Accordingly, I cannot consider plaintiff's motion on the merits.

In plaintiff's second motion for attorney fees, it argues for the first time that the fee shifting provision in the Equal Access to Justice Act applies in this case and that the catalyst theory remains viable under that statute. This Act provides

Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against . . . any agency . . . of the United States acting in [its] official capacity.
...

28 U.S.C. § 2412(b). I need not address whether the interpretation of "prevailing party" in Buckhannon applies to the Equal Access to Justice Act, because that statute does not apply

at all in a case brought under the Freedom of Information Act. The Equal Access to Justice Act provides a default fee shifting provision for suits against the United States; it does not apply if the statute under which the suit was litigated has its own fee shifting provision. Equal Employment Opportunity Commission v. O & G Spring and Wire Forms Specialty Co., 38 F.3d 872, 881 (7th Cir. 1994); Kholyavskiy, No. 05-C-0671, 2007 U.S. Dist. LEXIS 9667, at *7 (E.D. Wis. 2007).

ORDER

IT IS ORDERED that

1. Plaintiff's Motion for Reconsideration is DENIED as untimely.
2. Plaintiff's Motion for Attorney's Fees Under the Equal Access to Justice Act is DENIED.

Entered this 24th day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge