

CAUSE NO. 16-04-19,991-CV

CITY OF HEARNE,

Plaintiff,

vs.

MILTON JOHNSON,

Defendant, Counter-Plaintiff,
and Cross-Claimant

vs.

**CITY OF HEARNE and BRYAN F. RUSS,
JR.**

Counter-Defendant and
Cross-Defendant

**82nd District Court
Robertson County, Texas**

MOTION TO DISMISS and MOTION FOR SANCTIONS

NOW COMES Milton Johnson, the Defendant, and moves the Court to dismiss the claims of the City of Hearne and sanction both the city and its attorney, Bryan F. “Rusty” Russ, Jr., for the reasons set forth below:

After the undersigned learned about the lawsuit captioned above on April 6, 2016, he sent a letter to Bryan F. “Rusty” Russ, Jr. demanding the dismissal of this case on the grounds that it is legally frivolous. *See* Declaration of Ty Clevenger (Exh. 1) and April 6, 2016 Letter from Ty Clevenger to Bryan F. “Rusty” Russ, Jr. (Exh. 2). The letter included a copy of *Coalson v. City Council of Victoria*, 610 S.W.2d 744 (Tex. 1980)(Exh. 2), wherein the Texas Supreme Court expressly held that a lawsuit such as this one is improper. The letter also noted that this case was subject to dismissal under Chapter 27 of the Texas Civil Practices and Remedies Code. Mr. Russ

ignored the letter. Worse, he did not share the letter or its contents with his client, the Hearne City Council. *See* Declaration of Shirley Harris (Exh. 3). According to Chapter 27, “a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association.” Tex. Civ. Prac. & Rem. Code §27.005(b). This legal action is “based on, relates to, [and] is in response to” Mr. Johnson's exercise of the right to petition. The City of Hearne's own pleadings make that quite clear.

According to Section 27.005(c), “[t]he court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.” As a matter of law, the City of Hearne cannot establish a prima facie case. Thirty-six years ago in *Coalson*, the Texas Supreme Court held that the City of Victoria's “declaratory judgment action was prematurely filed” when it sought a pre-election ruling on the legality of a proposed initiative ordinance. 610 S.W.2d 744, 747 (Tex. 1980). “The election process had been lawfully put in motion and the declaratory judgment action was improperly used as a vehicle to frustrate the process.” That is *exactly* what has happened in the present case, and the Defendant defies the City of Hearne to explain how this lawsuit is not foreclosed by the holding of *Coalson*.

By statute, a hearing must be held on this motion not later than 60 days from the time of its service, unless the Court's docket prevents such a hearing. *See* Tex. Civ. Prac. & Rem. Code §27.004. If Mr. Johnson prevails on his motion to dismiss, he is entitled to an award of costs and attorney's fees from the City of Hearne. *See* Tex. Civ. Prac. & Rem. Code §27.009 and *Avila v. Larrea*, --- S.W.3d ---, 2015 WL 3866778, at *4 (Tex. App.—Dallas June 23, 2015, *pet. denied*)

(fees mandatory if movant is successful). He is further entitled to an award of sanctions against the City of Hearne to deter it from filing another frivolous case such as this one. *See* Tex. Civ. Prac. & Rem. Code §27.009 and *Sullivan v. Abraham*, 472 S.W.3d 677, 683 (Tex. App.—Amarillo 2014), *reversed on other grounds*, --- S.W.3d ---, 2016 WL 1513674 (Tex. Apr. 15, 2016).

As noted above, Mr. Russ did not share the April 6, 2016 letter from the undersigned with his client. Nor did he inform his client that it might be held liable for sanctions or attorney's fees if it pursued this case further. Mr. Russ has previously filed claims on behalf of the City of Hearne without authorization from its city council, *see* Affidavit of Shirley Harris (Exh. 3), even though city council authorization is mandatory. *DeSoto Wildwood Development, Inc. v. City of Lewisville*, 184 S.W.3d 814, 826 (Tex.App. – Ft. Worth 2006), quoting *Central Power & Light Co. v. City of San Juan*, 962 S.W.2d 602, 612–13 (Tex.App.-Corpus Christi 1998, *pet. dismiss'd w.o.j.*).¹ Under such circumstances, where an attorney keeps his client “in the dark” to further his own agenda, he should bear greater responsibility for the frivolous claims filed in his client's name. Accordingly, Mr. Johnson moves the Court to sanction Mr. Russ pursuant to Tex. R. Civ. P. 13 and Tex. Civ. Prac. & Rem. Code §10.002 in an amount sufficient to deter him from filing additional frivolous pleadings.

All discovery in this case is automatically stayed “until the court has ruled on the motion to dismiss.” Tex. Civ. Prac. & Rem. Code §27.003. Mr. Johnson requests findings “regarding whether the legal action was brought to deter or prevent the moving party from exercising

¹ Mr. Johnson requests that the Court take judicial notice of the pleadings in *Hearne Citizens Oversight Council, et al. v. City of Hearne, Texas*, Cause No. 14-08-19,607 (82nd District Court of Robertson County, Texas), particularly the *Motion to Disqualify Counsel*, *Motion to Strike Pleadings*, *Motion for Sanctions*, *Motion for Referral*, and *Request for Injunctive Relief* filed on or about December 22, 2015 and attached as Exhibit 4. Mr. Russ has shown flagrant disregard for the standards of professional conduct, particularly as they apply to a city attorney.

constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.” Tex. Civ. Prac. & Rem. Code §27.007.

Such findings are due within 30 days of the Court's ruling on this motion. *Id.*

PRAYER

Mr. Johnson moves the Court to dismiss the claims of the City of Hearne, sanction the City of Hearne and Mr. Russ, award attorney fees and costs, and make findings pursuant to Tex. Civ. Prac. & Rem. Code §27.007.

Respectfully submitted,

/s/ Ty Clevenger

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CERTIFICATE OF SERVICE

I certify that on April 21, 2016 a copy of the foregoing document was provided to the following attorneys via facsimile and email attachment:

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/s/ Ty Clevenger
Ty Clevenger