UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DASCOLA,

Plaintiff,

vs.

Case No. 2:14-cv-11296-LPZ-RSW
Hon. Lawrence P. Zatkoff
Magistrate Judge R. Steven Whalen

CITY OF ANN ARBOR and JACQUELINE BEAUDRY, ANN ARBOR CITY CLERK,

Defendants.

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PLAINTIFF'S REPLY BRIEF IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

ARGUMENT

The central issue in this case is whether the City of Ann Arbor must abide by two final judgments issued by this Court which have never been overruled. The City would simply prefer not to do so and somewhat arrogantly asserts its supposed right to follow another path which is not legally supported.

Key to resolving this question is determining the current status of the portions of the Ann Arbor Charter declared by this Court to be "unconstitutional and void" in Daniel J. Feld, et al v. City of Ann Arbor and Harold Saunders, File No. 37342 (E.D. Mich. 1972) and Human Rights Party, David F. Black and Mark Dickman v. City of Ann Arbor and Harold Saunders, City Clerk of Ann Arbor, File No. 37852 (E.D. Mich. 1972).

The City's assertion of its right to ignore the prior Orders of this Court rests on two legal positions, neither of which is supported. First, the City brushes aside the substantial and clear precedents which hold that laws which are declared "unconstitutional and void" should be regarded "as if never written." Second, the City relies on some unexplained, almost magical, process. This process allows the City to decide, on its own, when there have been a sufficient number of cases decided in a manner differently from Feld and HRP that it is free to ignore those two cases and resume enforcement of the voided Charter provisions.

The City's arrogant stance about this Court's prior Orders is coupled with a curiously personal, irrelevant and inappropriate attack on Plaintiff's counsel in this case for actions he took as an attorney in a different case.

The City places great reliance on the Washtenaw Circuit Court decision in Wojack v. City of Ann Arbor, Washtenaw County Circuit Court case No. 01-1142). For

many reasons, this reliance is misplaced. First, it must be remembered that the former Section 12.2 of the Ann Arbor City Charter set forth two separate and distinct qualifications for seeking office: 1) That all candidates must be registered voters in the City for one year prior to the election; and 2) Candidates for City Council must be residents of the ward from which they seek election for one year prior to the election. Mr. Wojack had been a registered voter of the City for the required time, and the City did not contest that he met the first eligibility requirement, asserting only that he failed to meet the second.

In their Response, Defendants note that, for the purposes of their Motion to Dismiss, the City assumes that Plaintiff Dascola meets the one-year ward residency requirement. For purposes of this Motion, the City suggests that this may be an issue of fact, which cannot be decided here. Of course, a decision by this Court that the one-year ward residency requirement remains unenforceable, based on Feld, would eliminate the need for any factual determination regarding Plaintiff's residency status.

Since the voter registration requirement is the issue in the two Motions presently before this Court, Wojack, in addition to its other infirmities, is totally irrelevant to these Motions. The voter registration requirement was never an issue in Wojack, and the court's opinion does not address it in any manner. The City asked the Circuit Court to issue a declaratory ruling that the final Order of this Court in the Feld case "is no longer of any force and effect." The City received that relief. No relief regarding the voter residency requirement was sought or given.

Of greater importance is the jurisdiction and authority, or lack thereof, of a Michigan trial court to overrule a decision of this Court, which is what the Wojack court

purported to do. Plaintiff is unaware of any such authority, and Defendants cite none. Defendants suggest that because Mr. Wojack went to the Circuit Court to seek compliance by the City with his Constitutional rights, he was acknowledging that court's authority to overrule Feld. This is not a valid assumption. Even if it were, it is irrelevant. The belief that one or more parties may have about the authority of a court to act in a matter doesn't make it so. Defendants also suggest that Plaintiff Wojack asked for a declaratory ruling from the Circuit Court on the continuing force and effect of the Feld ruling. This is untrue. Plaintiff Wojack specifically argued that the Circuit Court had no authority to rule on that issue.

There is also a question of mootness hanging over the Wojack decision. The City agreed to place Mr. Wojack's name on the ballot, which was done, the election was held, and his votes were counted. All the relief he sought was granted. The City filed a Counterclaim for Declaratory relief regarding the status of the one-year ward residency requirement, but there was, at the point that the court considered it, no actual controversy between the parties.

Defendants spend considerable time challenging what they say is Plaintiff's reliance on United States v. United Mine Workers of America, 330 US 258 (1947) to challenge the authority of the Circuit Court. In fact, Plaintiff cites that case to make the simple and rather unremarkable point that a court order must be obeyed by the parties until it is reversed by orderly and proper proceedings. The Feld and HRP orders have not been reversed and still bind the City. The City seems to have its own approach to complying with court orders. It will do so until it unilaterally decides that there's been a change in the law that allows it to ignore orders binding it.

Defendants also place great reliance on Socialist Workers Party v. Secretary of State, 412 Mich 571 (1982), but this case has no relevance to the present one. Socialist Workers Party dealt with an issue of *res judicata.* The SWP had challenged the constitutionality of a part of Michigan election law regarding ballot access. It was unsuccessful. Several years later, it brought a new action, challenging the ballot access statute on essentially the same grounds. The Michigan Supreme Court decided that the new action was not barred by *res judicata* because a portion of the Plaintiff's original claim was not, and could not be, decided in the original action. The plaintiff was entitled to pursue a new action to resolve that claim. In the second case, the Plaintiff prevailed.

There is nothing remarkable in this result. A statute may face multiple challenges to its constitutionality, based on new law or different legal theories, but this says nothing about the instant case. In Socialist Workers Party, the challenged statute was not declared unconstitutional and void. In this case, the Charter provisions were. What Defendants want to do in this case is resurrect a voided law, not challenge a law previously found to be constitutional. Socialist Workers Party says nothing about the issue of reviving a voided law.

Defendants present a discussion about whether the City would have to re-enact the voided provisions and state that Plaintiff takes the position that it would. Plaintiff has no position on that issue, as it has nothing to do with the present case. Defendants state that re-enactment would not be required, but provide no support for that position.

Defendants look for support in the "revival principle" regarding laws found to be unconstitutional, but it really isn't there. Virtually all of the cases they cite share certain common elements, which are absent here. In the cited cases, a law has been held

unconstitutional by a court of last resort, either a state supreme court or the U.S. Supreme Court ("the invalidating decision"). The supreme court subsequently decides another case on a similar issue and, as part of its decision, it specifically overrules all or part of the earlier decision that invalidated the law ("the overruling decision").

In the instant case, there has been no overruling of the earlier decision. (Defendants would disagree with Plaintiff's analysis of the Wojack decision and assert that its purported overruling of this Court was effective. Even if this were true, the Wojack decision would only overrule the Feld decision, and not the HRP decision, which invalidated the voter registration requirement, the issue central to these Motions.

Virtually every case cited by Defendants follows the pattern described above. In Legal Tender Cases, 79 U.S. (12 Wall) 457 (1870), the U.S. Supreme Court reversed its earlier decision invalidating certain acts of Congress. In its decision, it specifically overruled the previous decision, Hepburn v. Griswold (8Wallace, 603). The court stated: "And it is no unprecedented thing in courts of last resort…to overrule decisions previously made." (at. p. 554).

As Defendants noted, the U.S. Supreme Court in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) specifically overturned its decision in Adkins v.Children's Hospital, 261 U.S. 525 (1923) which had invalidated a minimum wage law, which then became enforceable.

Defendants present Wilkerson v Rahrer, 140 U.S. 545 (1891) as supporting the notion that laws found unconstitutional and void should not be viewed as never existing. That is not the import of this case, which deals with conflicts between state and federal powers to regulate commerce. The state had enacted laws regulating intoxicating liquors,

including those imported into the state. In the earlier case, the court found that the state law invaded the exclusive power of Congress to regulate interstate commerce. The court did not find the law unconstitutional and void, because the law could be enforced in all other respects. A subsequent act of Congress allowed the state to enforce the provisions regarding imported liquor. The court found that the act of Congress simply removed an obstacle to application of the law to imported property which had been operating on domestic property, so there was no need to re-enact the law.

Defendants cite Eastway v. Eisenga, 420 Mich 410 (1984) as another "revival" case. Once again, this involved the Michigan Supreme Court explicitly overruling those parts of a previous case which had found a section of a statute unconstitutional.

Do these cases contradict the position that a ruling by a court that a law is unconstitutional and void render it "as if never written?" No. There is no difficulty in reconciling the two, and it is provided in a case cited by Defendants.

Defendants quote extensively from Jawish v. Morlet, 86A.2d 96 (D.C. 1952) and describe it as "a common sense interpretation of the revival principle." (Defendants' Response Brief, p. 12.) Unfortunately, Defendants left out some important language:

> [A] decision of a court of appellate jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. Ruppert v. Ruppert, 77 U.S.App.D.C 65, 68, 134 F.2d 497,500.
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> If the effect of the West Coast Hotel decision is that the decision in the Adkins case never was the law, it follows that the District of Columbia Minimum Wage law never was unconstitutional. And since the Adkins case never was the law, its only effect, to use the language of Justice Vinson in the Warring case, was "that just about everybody was fooled." Jawish, p. 97.

In other words, when a ruling that a law is unconstitutional is reversed, the original ruling of unconstitutionality becomes a nullity, and the law in question retains its validity and constitutionality.

Defendants' attempt to apply the revival scenarios discussed above to this case is not convincing. If, as Plaintiff asserts, the Washtenaw Circuit Court had no authority to reverse this Court, then no reversal has taken place as to either of the two rulings from 1972. If, as Defendants assert, the Washtenaw Circuit Court has such authority, there has only been a reversal of the Feld decision and not the HRP decision. This would mean that the voter registration requirement in Section 12.2 remains unconstitutional and void and should be treated as if never written.

Defendants insist that there exists a principal of "the revival of a statute previously declared unconstitutional due to a material change in the law." (Defendants' Response Brief, p. 13.) It provides no examples of this or explains how this might work. All of the revival cases discussed in these Briefs involved a reversal, overruling or vacating of the original decision voiding the law.

Defendants note that court decisions may not be made retroactive because of reliance factors. It then presumes what Plaintiff Dascola did or didn't rely on. Mr. Dascola consulted counsel about the eligibility requirements, their voiding many years ago and the position that he met all existing and enforceable requirements.

Defendants seem to have no real answer to the strong body of Michigan case law holding that a law declared unconstitutional and void is *void ab initio.* They dismiss the cases affirming this principle as simply dealing with issues of retroactivity, but the decisions are far more comprehensive than that and make clear pronouncements of the

principle as controlling Michigan law. Defendants' cursory treatment of this fundamental issue in this case and failure to attempt to distinguish those cases from this one betray a severe weakness in their arguments.

_/s/ Thomas F. Wieder_____
Thomas F. Wieder (P33228)
Attorney for Plaintiff

Dated: April 18, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Stephen K. Postema and Abigail Elias.

/s/ Thomas F. Wieder
Attorney for Plaintiff