UNITED STATES DISTRICT COURT
IN THE 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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DEFENDANTS' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATEMENT OF ISSUES PRESENTED

Should Plaintiff's Motion for Summary Judgment and his requests for relief be denied when Plaintiff seeks to be placed on the City of Ann Arbor election ballot when he does not meet, at least, the City Charter's one-year voter registration requirement?

The City Answers: Yes
This Court Should Answer: Yes

Should this Court grant Summary Judgment for the Defendants and declare that two prior federal court decisions from the 1970's holding the City Charter's eligibility requirements unconstitutional are no longer binding law when these eligibility requirements have been held constitutional since 1980 by both state and federal courts?

The City Answers: Yes
This Court Should Answer: Yes

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I. INTRODUCTION

The Plaintiff has filed this complaint requesting that the Court order the Ann Arbor City Clerk to place Plaintiff's name on the August primary ballot as a Democratic candidate for Third Ware City Councilmember in the City of Arbor, even though he does not meet at least one of the durational requirements of the City Charter.

Michigan law provides that a City's charter governs qualifications for persons seeking election to office. MCL 168.321(1). Section 12.2 of the Ann Arbor City Charter provides that a person seeking election as Councilmember must meet two requirements:

> Except as otherwise provided in this charter, a person is eligible to hold a City office if the person has been **a registered elector of the City**, … , **and, in the case of a Council Member, a resident of the ward from which elected, for at least one year immediately preceding election or appointment** (emphasis added).

Plaintiff admits that he was not a registered elector (voter) in Ann Arbor until January 15, 2014. (Exh. 3 Plaintiff's complaint at Para. 2.) Failure to meet this requirement alone makes him ineligible under the Charter. Plaintiff admits that he was informed by the City Clerk's Office that he was ineligible based on the Charter requirement. For the purposes of the City's Motion to Dismiss, the City assumed that Plaintiff met the one year residency requirement and that he has been a resident since September 15, 2012, as stated in his complaint (Plaintiff's

complaint at Para 1.) However, for the purposes of this motion, the City notes that the Plaintiff has merely restated his allegation of residency and has provided no proof. While now claiming third ward residency since September 2012, it is important to note that Plaintiff changed both his voter registration and driver's license to an Ann Arbor address on January 15, 2014. (Ex.9) Moreover, when filing an application on December 1, 2013 to be on a City Board or Commission, he gave a City of Grass Lake address as his home address and he **specifically marked "No" in response to a question whether he was a City of Ann Arbor resident.** (Ex.10) Nevertheless, the failure to meet the voter registration requirement alone still makes Plaintiff ineligible, so final resolution of the residency issue may not be necessary -- but Plaintiff still has not satisfied his burden of proof of that fact for summary judgment.

As set forth in the City's Brief in Support of Motion to Dismiss, it cannot be seriously disputed that one year durational election requirements are constitutional in Michigan under both federal and state law. The City incorporates the full analysis and argument from its Brief in Support of Motion to Dismiss. But basically, it cannot be disputed that the federal law relied upon in *Human Rights Party v. City of Ann Arbor*, C.A. No. 37852 (ED Mich, 1972) and *Feld v. City of Ann Arbor*, CA No. 37342 (ED Mich, 1971) is no longer controlling law. The constitutionality of the Charter's residency requirement, and the effect of these

prior federal decisions, was raised, litigated, and decided in *Wojack v. City of Ann Arbor*, Washtenaw County Circuit Court case no. 01-1142 (Pleadings and order attached as Exs. 3 -8 to the City Brief in Support of Motion to Dismiss.)[1] In addition, the Michigan Court of Appeals in *Barrow v. City of Detroit*, 301 Mich. App. 404 (2013) reviewed the history of the applicable Michigan and federal law and held that Detroit's one year voter registration requirement was constitutional under Michigan law. In fact, the *Barrow* Court held that a City has a substantial interest in prescribing and upholding candidate eligibility requirements.

The further arguments and cases set forth by Plaintiff in their Brief in Support of Summary Judgment are without merit or applicability as set forth below.

For all of the reasons provided, Plaintiff's Motion for Summary Judgment on should be denied and instead Summary Judgment for the Defendants only should be granted and the City Charter Section 12.2 should be upheld and declared constitutional, despite the prior *Feld* and *Human Rights Party* cases.

[1] The *Wojack* case was initially appealed, but the appeal was dropped by Mr. Wieder. Mr. Wieder requested Ann Arbor City Council to place on the ballot a Charter Amendment to Section 12.2 that would have established that Councilmembers would only have to be registered electors of the City and reside in the wards **on the date of the election.** This Charter Amendment was defeated by the voters on November 4, 2003.

II. ARGUMENT

A. Standard of Review

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). Fed. R. Civ. P. 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

Summary judgment is appropriate on behalf of the Defendants in this case because Plaintiff has failed to plead a valid cause of action, has admitted that he does not meet the voter registration requirement, and both the one year residency and voter registration are constitutional under Michigan and federal law.

B. The 1972 Order in the *Human Rights Party* Case Does Not Bar the City From Asserting the Validity of Ann Arbor City Charter Section 12.2

Plaintiff 's position appears to be that the 1972 order in the *Human Rights Party* case binds the City forever, no matter the change in law, and no matter a subsequent state court determination of constitutionality.

First, Plaintiff argues that "no court has addressed the validity" of the prior federal cases (Plaintiff's Brief at p. 9) and that the state Court ruling was made by a court that was not "empowered to do so." (Plaintiff's Brief at p. 9). The Circuit Court decision in *Wojack* came about because Attorney Wieder brought that case seeking an enforcement of the *Feld* and *Human Rights Party* orders in state court. Attorney Wieder believed that the state court had jurisdiction to do so. On behalf of the current Plaintiff, he now evidently maintains that the Circuit Court in *Wojack* only had authority to uphold the federal court orders, but had no authority to review the federal and state constitutional issues and relevant law or determine that the prior federal court orders were no longer applicable. This would be an odd position for the Circuit Court, and such a view of the state Circuit Court is difficult to justify, given that the state courts have concurrent jurisdiction to determine federal constitutional issues. *In re Request For Advisory* Opinion *Regarding Constitutionality of 2005 PA 71*,479 Mich. 1 (Michigan Supreme Court reviewed both state and federal constitutional issues and held that state election statute was constitutional under both state and federal constitutions.)

Second, Plaintiff relies on the United States Supreme Court decision in *United States v. United Mine Workers of America*, 330 US 258 (1947) to support the argument that the 1972 orders in *Feld* and *Human Rights Party* could not have been properly challenged in state court. (Plaintiff's Brief at p. 6). This reliance is

ill-founded. *United Mine Workers* involved a suit brought by the United States against the United Mine Workers Union under the Declaratory Judgment Act. The United States sought judgment that the union could not unilaterally terminate employment agreements with respect to mines the government possessed. The Court issued a Temporary Restraining Order to maintain the status quo until a decision could be made on the merits. Defendants violated the TRO, and were found guilty of civil and criminal contempt. They filed notices of appeal to the contempt order.

Plaintiff cites the Court's statement in *United Mine Workers* that, "We find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United Mine Workers* at 293.(Plaintiff's Brief at p. 6). In making this statement, the Court relied upon a number of prior decisions including *Howat v. State of Kansas*, 258 U.S. 181 (1922), *Locke v. United States*, 75 F 2d 157 (5th Cir. 1935), *O'Hearne v. U.S.*, 62 App. D.C. 285 (1933), and *Schwartz v. U.S.*, 217 F 866 (4th Cir 1914).

These cases are all distinguishable from the issue at hand. *Howat*, *O'Hearne*, and *Schwartz* each address whether or not the validity of an underlying order issued in the case can be reviewed on an appeal for contempt, a collateral proceeding. The Court in *Howat* held, "It is for the court of first instance to

determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." *Howat* at 190. The Court here is not saying that **an order can only be reviewed or reversed by the same court or by a higher court**, but instead that the validity of the underlying law cannot be decided by a court hearing an appeal for contempt for disobeying an order from the court considering the law itself. Also, *Locke* and *United Mine Workers* involve injunctions to maintain the status quo until the court can rule on the validity of the law in question.

The present case is distinguishable from *United Mine Workers* and related cases. There is no injunction pending a decision on the constitutionality of the Charter provisions at issue. There is also no collateral contempt appeal in which the Court is attempting to rule on those issues the court which issued the order should be ruling on. The present case involves different parties and a long span of time from the prior rulings. This case also involves a state Circuit court order based upon a material change in the applicable law outlined in *Wojack* as well as a state Court of Appeals upholding an identical voter registration provision in *Barrow*.

As stated in the City's Brief in Support of Motion to Dismiss, the present case is more analogous to the case of *Socialist Workers Party v. Secretary of State*, 412 Mich 571, 584 (1982). In *Socialist Workers Party*, the plaintiff contested the constitutionality of a Michigan statute that acted to restrict access to the ballot. The federal district court held that the statute was constitutional, and the United States Supreme Court summarily affirmed. Three years later, the same plaintiff again challenged the statute on identical equal protection grounds, and the Circuit Court granted the defendant accelerated judgment citing res judicata. The Michigan Supreme Court reversed, focusing on the fact that there had been an intervening change in the applicable legal standard, and holding that res judicata did not bar the subsequent action under such circumstances. The Court held,

> "A rule of law declared in an action between two parties should not be binding on them when other litigants are free to urge that the rule should be rejected. **Such preclusion might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognize for other litigants in the same position**." 412 Mich at 584, quoting *Restatement Judgments, 2d* (Tentative Draft No. 1, 1973) § 68.1, pp. 170-171. (emphases added).

Third, Plaintiff argues that, following the Court decisions in *Feld* and *Human Rights Party*, City Charter Section 12.2 became void *ab initio* and could not be revived by a subsequent decision declaring the provisions constitutional. But the Charter provisions were never repealed by the voters, they were simply held unconstitutional under the law at the time. The Plaintiff somehow believes

that these same Charter provision would have to now be readopted, that the requirements would have to voted into the Charter by Charter Amendment although they already exist in the Charter. Moreover, the City Charter makes clear that the City of Ann Arbor claims for itself the full power that a City can have: "The City shall have all powers possible for a city to have under the Constitution and laws of Michigan as fully and completely as though they were specifically mentioned in the Charter." City Charter Section 3.1.

There is no requirement that the Charter requirements need to be revived in this manner. The United States Supreme Court has given only cursory consideration to the issue of revival – that is, whether or not a statute declared unconstitutional is automatically revived after a subsequent change in the law has made that statute constitutional again. Instead, the Court has employed the revival principle almost automatically without significant analysis. *See* 93 Colum. L. Rev. 1902 (1993); 20 Cumb. L. Rev. 71 (1989/1990).

Older cases such as the *Legal Tender Cases*, 79 U.S. (12 Wall) 457 (1870) and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) illustrate the Court's treatment of statutory revival. In *Legal Tender*, the Supreme Court applied a statute previously held unconstitutional, without even addressing reenactment. Considering the constitutional validity of Washington state's minimum wage law in *West Coast Hotel*, the Court overturned its earlier decision in *Adkins v.*

Children's Hospital, 261 U.S. 525 (1923) which had invalidated a substantially similar minimum wage law in the District of Columbia. Washington's minimum wage statute, unenforceable under *Adkins*, became enforceable with the change of law in *West Coast Hotel*.

The Supreme Court's decision in *Wilkerson v. Rahrer*, 140 U.S. 545 (1891) provides further insight into revival. Although the Court refused to adopt the revival principle as a rule in the case, it applied the practice to the statute before it. Defendant Rahrer was prosecuted under a Kansas statute, very similar to a statute held unconstitutional by the Supreme Court in another state. Defendant Rahrer then argued that the previous decision had rendered the Kansas statute null and void, and the statute would have to be repassed by the legislature to be enforceable. The Court rejected the proposition that the Kansas law should be considered void as if it had never been enacted. *Wilkerson v. Rahrer* at 562-563.

Subsequent Circuit Court decisions have applied the same revival principle. The Ninth Circuit in *Gibson by Gibson v. County of Riverside*, 132 F.3d 1311 (9th Cir. 1997) considered enforceability of the county's zoning ordinances which had been declared invalid by statute. A later amendment to that same statute excluded these zoning ordinances, leading to the question of their enforceability. The Court reasoned that, "No principle of law required the County formally to reenact its zoning laws to bring them back to life when the ban was lifted." *Gibson* at 1313.

See also *Eddings on Behalf of Eddings v. Volkswagenwerk, A.G.* 835 F 2d 1369, 1373-1374 (11th Cir.), *cert. denied sub nom. Griffin v. Ford Motor Co.*, 109 S Ct 68 (1988).

Unlike the Supreme Court, state courts have explicitly addressed the revival principle have enforced such statutes.[2] The Michigan Court of Appeals addressed the issue of revival in *Sellers v. Hauch*, 183 Mich.App. 1(1990). In that case, the Court retroactively applied the decision in *Eastway v. Eisenga*, 420 Mich. 410, 362 N.W.2d 684 (1984). *Eastway* revived a section of the Workers' Disability Compensation Act by overruling the Court's decision in *Gallegos v. Glaser Crandell Co.*, 388 Mich. 654, 202 N.W.2d 786 (1972) which had deemed that same section unconstitutional. In doing so, the Court stated, "Aside from the constitutional and jurisprudential theories implicated by this judicial reinvigoration of a statutory nullity, we believe that the bench and bar, as a practical matter, viewed the *Eastway* decision as the onset of a new rule of law. One day the statute was a dead letter; the next day the statute was valid and controlling. Viewed in this light, the application of *Eastway* presents a question no different than any other change in the law effected by judicial pronouncement." *Sellers* at 9.

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[2] *See Home Utilities Co. v Revere Copper and Brass, Inc.*, 209 Md. 610 (Md. Ct. of App. 1956); *Pierce v Pierce*, 46 Ind 86 (1874); *State ex rel. Badgett v Lee*, 22 So. 2d 804 (Fla. 1945); *Christopher v Mungen*, 55 So. 273 (Fla. 1911); *Jawish v Morlet*, 86 A.2d 96 (D.C. 1952). Cf. *State of Ohio v. Hodge*, 128 Ohio St. 3d 1 (2010) which presents a contrary view.

Another state court, in *Jawish*, *supra*, specifically addressed the meaning of the term void. In employing the revival principle and the enforceability of the law, the Court stated,

> "There are comparatively few cases dealing squarely with the question before us, but they are unanimous in holding that a law once declared unconstitutional and later held to be constitutional does not require re-enactment by the legislature in order to restore its operative force. They proceed on the principle that a statute declared unconstitutional is **void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished; that so long as the decision stands the statute is dormant but not dead; and that if the decision is reversed the statute is valid from its first effective date."**[3] *Jawish* at 97.

This common sense interpretation of the revival principle certainly applies to Ann Arbor Charter Section 12.2. The Court's opinion in *Wojack*, upholding the constitutionality of the Section 12.2 as the result of an intervening change in law, effectively recognized the revival of Charter Section 12.2. It is true that the provisions were unenforceable, immediately following the *Feld* and *Human Rights Party* decisions, but neither was expressly repealed. Plaintiff is therefore mistaken in his argument that the provisions should be treated as if they never existed. They remained in existence at all times.

[3] The Court in *Jawish* addressed the D.C. minimum wage law at issue in the federal *Adkins* and *West Coast Hotel* cases. The employer in that case argued both that the statute was unenforceable because it had not been reenacted after the Supreme Court in *Adkins* declared the law unconstitutional, and it was not automatically revived by the decision in *West Coast Hotel* overturning *Adkins*.

Michigan state courts have discussed the interpretation that an unconstitutional statute is void *ab initio* in the cases cited by Plaintiff, including *Sturak v. Ozomaro*, 238 Mich. App. 549 (2000) and *Stanton v. Lloyd Hammond Produce Farms*, 400 Mich 135 (1977), but those cases address the concept in relation to the retroactive application of the unconstitutional statute at issue. These decisions have no bearing on this case because they do not address the revival of a statute previously declared unconstitutional due to a material change in the law.

Furthermore, in *Barrow* the Court stated that court decisions are almost always applied retroactively, and when they are not it is because of reliance factors. *Barrow*, *supra*, at 421, n. 10. In this case, Plaintiff did not rely upon the prior federal order in the *Human Rights Party* case when determining when to change his voter registration. The *Wojack* decision was a matter of public record in 2002.The City Charter Section 12.2 has not been changed since 1956 and it is available for public review on-line. Finally, the City Clerk immediately told Plaintiff of his ineligibility.

Plaintiff's reliance on *Compton v. Lepak*, 154 Mich. App. 360 (1986) is likewise misplaced. *Compton* again involved the issue of whether a new statute had retroactive effect. The Court held that it did not. 154 Mich. App. at 370-372. In other words, because the new statute was not remedial, there was an explicit preservation of different statutory requirements and rights for the prior period of

time. That is far different from the instant case, in which the same Charter provision has been in place since 1956, and a state Court held it constitutional in 2002.

Finally, Plaintiff cites *Hanger v. State*, 64 Mich. App. 572 (1975). Although the court in *Hanger* in passing refers to a change in a law that had been declared unconstitutional, it is apparent from a careful reading of the case that the change in the statute did not address substantively what the prior decision had determined to be the factor that had made the statute unconstitutional. Thus, *Hanger* also has no bearing on this case.

CONCLUSION

For all of the reasons provided in this brief as well as those incorporated from Defendants' Brief in Support of Motion to Dismiss, Plaintiff's Motion for Summary Judgment should be denied and instead Summary Judgment for the Defendants should be granted and the City Charter Section 12.2 should be upheld and declared constitutional, despite the prior *Feld* and *Human Rights Party* cases.

Dated April 14, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 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: Thomas Wieder and I hereby certify that I have mailed by US Mail the document to the following non-ECF participant: None.

/s/ Jane Allen
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