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.
_____/

Thomas Wieder (P33228)
Attorney for Plaintiff
2445 Newport Rd.
Ann Arbor, MI 48103
(734)769-6100
wiedert@aol.com

Office of the City Attorney
Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendants
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107
(734) 794-6170
spostema@a2gov.org
aelias@a2gov.org

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DEFENDANTS' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

In a procedurally odd filing, Plaintiff has moved to amend his complaint to add a claim under the Equal Protection Clause of the 14th Amendment and 42 U.S.C. § 1983, and a claim for attorney fees under 42 U.S.C. § 1988 (paragraph 16 and claim for relief C in Plaintiff's proposed amended complaint, respectively). Plaintiff's motion should be denied because the proposed amendments would not survive a motion to dismiss and are therefore futile, and Plaintiff did not exercise due diligence in filing his motion to amend.

The Sixth Circuit has addressed the issue of "futility" in the context of motions to amend, holding that where a proposed amendment would not survive a motion to dismiss, the court may deny the amendment. *Thiokol Corp. v. Dep't of Treasury, State of Mich., Revenue Div.*, 987 F.2d 376, 383 (6th Cir. 1993) (citing *Neighborhood Development Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21, 23 (6th Cir.1980)). Plaintiff appears to base his proposed amendments on his prior claim that Charter provision 12.2 was "repealed" by the federal district court through the orders issued in *Feld* and *Human Rights Party* and must be reenacted by the City prior to enforcement. As discussed in Defendants' prior briefs, Plaintiff still has not presented any binding law for this contention, but continues to point to inapplicable cases that are factually distinct. Plaintiff's proposed amendment does not save his complaint from the flaws of his basic argument or from dismissal.

Plaintiff's amended complaint continues to rely on his assertion that a Charter provision declared unconstitutional and void must be reenacted prior to being enforced again after a clarification in the law. However, even the case cited by Plaintiff in his most recent brief, *Fenn v Kinsey*, 45 Mich. 446 (1881), does not stand for this proposition – certainly not in the Sixth Circuit and not even in Michigan. *Fenn* is a contract and real property case that applies to a specific act of the legislature authorizing a specific land conveyance that the legislature had no power to grant due to a contractual deed restriction imposed by the U.S. Congress.

Previously, in the related case of *Bowes v. Haywood*, 35 Mich. 241, 245 (1877), the Michigan Supreme Court had found that the legislature's attempt to convey the land to William Bowes in violation of the deed restriction was invalid. *Bowes*, 35 Mich. at 245. In the intervening years, the U.S. Congress removed the deed restriction and Bowes' successor sought to enforce the conveyance. *Fenn*, 45 Mich. at 448. The *Fenn* court stated that the invalidated conveyance violated the U.S. Constitution's prohibition on impairing the obligation of contracts. *Fenn*, 45 Mich. at 450. Once the deed restriction was lifted, the *Fenn* Court found that the conveyance would have to be reenacted to be valid.

Fenn does not deal with a Charter provision or law of general application and in 150 years has never been cited in Michigan for the proposition that a Charter provision or generally applicable law must be reenacted after a change in a

higher court's interpretation of its constitutionality. With respect to reenactment, it has only been cited for its real property holding, i.e. "that an unauthorized grant could not attach to a title subsequently released to the state unconditionally, without new action." *Sparrow v. State Land Office Com'r*, 56 Mich. 567, 578 (1885) (dissent).

Plaintiff's confusion regarding this case arises from the fact that a grant of land from the legislature in these circumstances is "both a grant and a law." *Jackson, L. & S.R. Co. v. Davison*, 65 Mich. 416, 430 (1887) (*rev'd on other grounds*, 65 Mich. 437, 37 N.W. 537 (1888)). The lands at issue were conveyed to the state by the U.S. Congress "'subject to the disposal of the legislature of the state,' and if not lawfully disposed of pursuant to state legislation they are not disposed of at all." *Bowes*, 35 Mich. 241, 245 (1877). To convey the lands, the Michigan legislature had to act by passing a law, however the law was only to effect a conveyance of land as required by the grant from Congress. This type of "law" constitutes a discrete, contractual act by the legislature, which is why the constitutional provision at issue in *Fenn* was the Contract Clause of the U.S. Constitution regarding impairment of the obligations of contracts. The reenactment therefore would only affect that one particular land transaction. This is very different from the 14th Amendment equal protection challenge that Plaintiff now seeks to assert against a Charter provision of general application.

If *Fenn* still applies at all (it has not been cited by any court since 1920), it would apply only to require reenactment of legislative grants of land that are invalid at the time of their enactment due to violation of a contract and the Contract Clause.[1] In contrast, Charter provision 12.2 was validly enacted pursuant to Michigan state law and the City's lawful ability to regulate access to the ballot. U.S. Const. Art. I, § 2, 4; Art. II, § 1. See also *Joseph v. City of Birmingham*, 510 F.Supp. 1319, 1325-1326 (E.D. Mich. 1981). Only later was Charter provision 12.2 found unconstitutional, which, as discussed in Defendants' prior briefs, was an incorrect interpretation of law that was subsequently corrected by higher courts. It was therefore unenforceable only as to the plaintiffs in *Feld* and *Human Rights Party*. The prior federal declaratory orders are not effective as to a subsequent plaintiff, as previously discussed.

Neither *Fein* nor the other cases relied on by Plaintiff save his proposed equal protection claim from dismissal for the reasons discussed here and in Defendants' prior briefs. Plaintiff's proposed amendments are therefore futile and his motion for leave to amend should be denied.

[1] The other state cases Plaintiff cites are similarly distinguishable because the legislative acts in question were also contrary to law when enacted (*State v. Miller*, 66 W.Va. 436, 66 S.E. 522 (1909), *Grayson-Robinson Stores, Inc. v. Oneida, Limited*, 209 Ga. 613 (1953)), *State ex rel. Stevenson v. Tufly*, 20 Nev. 427 (1890)). Like *Fenn*, those state court decisions also would not bind this Court.

Although a finding of futility makes further review unnecessary, the Sixth Circuit also permits denial of a motion to amend for "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [or] undue prejudice to the opposing party by virtue of allowance of the amendment." *Thiokol*, 987 F.2d at 382-83 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Plaintiff, despite having filed a motion for expedited consideration (thereby recognizing the need for an expedited decision), waited until over a month after the initial complaint to propose these amendments, which would open the door for additional argument and the delay that would necessarily come with it. Plaintiff does not present any good reason to excuse his failure to include in his original complaint the claims he now seeks to add. Given the need for an expedited decision so that ballots can be printed in time for the election, so that both Plaintiff and the two existing candidates for the Ward 3 Councilmember position, as well as possible donors and supporters of each can know who is and is not on the ballot, and so the August primary election can move forward with certainty, Plaintiff's attempt to amend his complaint after the parties' motions have been fully briefed and submitted to this Court is untimely.

It is unclear why Plaintiff would want to litigate additional issues at this time in a way that delays a resolution. The claims that Plaintiff seeks to add do not serve

to provide any additional relief to the claims he already asserted; there is no basis for granting leave to amend that would outweigh the prejudice and harm.

Although delay alone does not justify denial of a motion brought pursuant to Rule 15(a) (*Security Ins. Co. of Hartford v. Kevin Tucker & Assocs., Inc.*, 64 F.3d 1001, 1009 (6th Cir.1995)), the party seeking to amend should "act with due diligence if it wants to take advantage of the Rule's liberality." *Parry v. Mohawk Motors of Michigan, Inc*., 236 F.3d 299, 306 (6th Cir.2000).

Defendants submit that Plaintiff has not acted with due diligence in proposing these amendments at this late date in a matter that the Court has set for expedited consideration. Plaintiff's lack of due diligence, the prejudice to Defendants, the candidates, their supporters, and the public resulting from delay, and the futility of the proposed amendments warrant denial of Plaintiff's motion to amend.

Dated May 9, 2014

Respectfully submitted,

By: /s/ Stephen K. Postema
Stephen K. Postema (P38871)
Attorneys for Defendants
OFFICE OF THE CITY ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 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
Legal Assistant
Ann Arbor City Attorney's Office
City of Ann Arbor
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107-8647
(734) 794-6180