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.

Thomas Wieder (P33228)
Attorney for Plaintiff
2445 Newport Rd.
Ann Arbor, MI 48103
(734) 994-6647
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

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

ARGUMENT

In responding to a simple and innocuous Motion for Leave to Amend, Defendants have taken the opportunity to do all of the following: 1) Misrepresent the nature of the proposed Amendment; 2) Misrepresent authority on the issue of futility and its applicability to this case; 3) Continue its fabricated argument that Plaintiff claims Charter Section 12.2 was "repealed" by the Feld and HRP decisions; 4) Produce and present to the Court what is, essentially, a Response Brief to Plaintiff's Supplemental Brief, although none was called for by the Court's Order; and 5) Present a fanciful "parade of horribles" that will befall the Court, the candidates, "possible donors and supporters," the public and the Defendants if the Amendment is allowed. Plaintiff hesitates to burden the Court with still another brief at this time, but feels that these inappropriate arguments by Defendants require a response.

The Amendments

The proposed Amended Complaint makes two small changes to the original. In the original Complaint, Paragraph 15 alleges that Defendants' refusal to place Plaintiff on the ballot, based on two Charter provisions found "unconstitutional and void" by this Court, violates his constitutional rights. The Amended Complaint simply adds Paragraph 16, which makes explicit the sources of the rights which Plaintiff seeks to have this Court enforce – the Equal Protection Clause of the 14th Amendment and 42 U.S.C. §1983. It does not "add" a 14th Amendment and 42 U.S.C. §1983" claim, as Defendants suggest; it merely clarifies the legal basis for the claim recited in Paragraph 15. The second change occurs in relief Paragraph C, wherein Plaintiff amends his request for attorney fees and costs from "as provided by statute" to "pursuant to 42 U.S.C. §1988."

Defendants say that in proposing the amendments, Plaintiff wants to "litigate additional issues…in a way that delays a resolution," and refers to "claims that Plaintiff seeks to add." Defendants' Brief, p. 5. Plaintiff seeks to add no new claims, and Defendants seem to agree, stating: "The claims that Plaintiff seeks to add do not serve to provide any additional relief to the claims he already asserted." Ibid., pp.5-6. The assertion that no new relief is sought is consistent with the fact that no new claims have been added.

No Prejudice or Harm

Defendants speak of the "prejudice and harm" (Ibid., p. 6.) that the Amendment would cause, if allowed, but they identify none, whatsoever. They identify no additional briefing or proceedings before the Court that the Amendment would require that would delay resolution of this matter. If the Amendment would not delay resolution, then the harms of delay that would allegedly befall the public, the candidates, etc. will not occur. They also identify no prejudice to themselves.

The "Repeal" Distraction

Defendants claim that the proposed amendments are based on Plaintiff's "claim that Charter provision 12.2 was "repealed" by the federal district court..." Ibid., p. 1. Defendants have repeatedly stated that Plaintiff asserts that the Charter section was "repealed," when he has never done so. Perhaps, Defendants like to continually present this distortion so that they can ignore that the operative word in this case is "void" and the implications of that word. Defendants claim that "Plaintiff still has not provided any binding law" for the contention that the Charter section was repealed. This is true,

because that is not his contention. He has provided voluminous authority on the issue of what happens to a statute that is found unconstitutional and void.

The Futility Non-Argument

Defendants argue that the Amendment should not be allowed because of the "futility" doctrine, which simply does not apply to this situation. The authorities they cite do not support their argument. Defendants rely on two cases, neither of which is on point: Thiokol Corp. v. Dep't of Treasury, State of Mich., Revenue Div., 987 F.2d 376, (6th Cir. 1993) and Neighborhood Development Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21 (6th Cir.1980).

In Thiokol, plaintiffs sought to add a claim under 42 U.S.C. § 1983 against part of the State of Michigan for violation of the Commerce Clause. The district court dismissed the motion to amend, and the Court of Appeals affirmed. The simple reason for the dismissal was that the State of Michigan has sovereign immunity from such suits pursuant to the 11th Amendment to the U.S. Constitution.

> The proposed claim for refund of taxes paid would not be able to withstand a motion to dismiss by the Department of Treasury since as part of the state it is immune under the Eleventh Amendment, and it is not a "person" within the meaning of section 1983. Thiokol, p. 383.

In this case, Defendants give no reason why the amendments would be dismissed, and there is nothing similar to the constitutional barrier in Thiokol. Defendants seem to be saying nothing more than they expect to win their Motion to Dismiss, and the proposed amendments wouldn't change that outcome.

Defendants' citation of Neighborhood Development Corp., supra, is rather strange. In that case the district court had denied plaintiffs' motion for leave to amend for two reasons – the complaint could not survive a motion to dismiss because the

plaintiffs lacked standing, and the tendered second amended complaint failed to join several "indispensable" parties. The Sixth Circuit reversed the district court's denial of the motion to amend, finding that the district court had abused its discretion in denying the motion.

Delay and Due Diligence

In addition to alleging prejudice, but identifying none, and futility, which they cannot demonstrate or provide authority applicable to this case, Defendants assert that lack of due diligence on the part of Plaintiff supports denial of the Motion. The lack of due diligence supposedly comes from the alleged undue delay in filing the Motion to Amend. It should be noted that the Motion for Leave was filed exactly forty-two days after the Complaint was filed. The authorities Defendants cite contradict their own assertion on the issue of due diligence.

Defendants cite Security Ins. Co. of Hartford v. Kevin Tucker & Assocs., Inc., 64 F.3d 1001 (6th Cir.1995), while admitting that the case provides that delay alone is not a reason for denial of the Motion.

> Delay alone, however, does not justify the denial of leave to amend. Rather, the party opposing a motion to amend must make some significant showing of prejudice to prevail. "Delay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself to disallow an amendment of a pleading [.]" Moore v.City of Paducah, 790 F.2d 557 (6th Cir.1986). Security Ins., supra, p.1009. (Emphasis added.)

Defendants have made no showing of any prejudice to them if the Motion is granted, let alone a "significant showing of prejudice."

Defendants cite as a benchmark of what a lack of "due diligence" is the case of Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299 (6th Cir.2000). In upholding the trial court's denial of a motion for leave to amend, the Sixth Circuit said:

> At the outset, we note that Plaintiff's June 8, 1999 motion to amend his complaint came almost nine months after he filed his first amended complaint and well over a year after he filed his original complaint. Moreover, at the time Plaintiff filed his motion to amend, the district court had granted summary judgment to Defendants two and one-half months earlier as well as denied Plaintiff's motion for reconsideration…. Plaintiff is effectively attempting to add a new legal theory after the grant of summary judgment and denial of his motion for reconsideration. Parry, pp. 306, 307.

There simply is nothing similar about the Parry case and the instant one. Defendants cite no authority for the position that filing a motion for leave to amend just forty-two days after the complaint was filed is grounds for denying leave, which is to be "freely given."

The Re-enactment Issue

Under the guise of discussing the issue of "futility," Defendants decided to slip into their response to this Motion what is, in reality, a Response Brief to Plaintiff's Supplemental Brief, addressing the substance of the re-enactment issue, which has nothing to do with this Motion.

Defendants go to great efforts to distinguish away Fenn v. Kinsey, 45 Mich 446 (1881) and its very clear holding that a state statute which is void must be re-enacted to once again have any force and effect. Defendants tie themselves in knots trying to avoid calling the act of the legislature of 1877 a "law," given the Supreme Court's clear pronouncement about the status of voided laws. Instead, they keep referring only to the validity of the "conveyance" which the law effectuated.

Defendants get caught in their own word games blaming "Plaintiff's confusion" on the fact that the grant of land in question is "both a grant and a law." Defendants' Brief, p. 3. Laws are used for many purposes – to appropriate funds to departments and agencies of the government, to make certain acts criminal, to provide grants of money to

state and local governments, and, in times past, make many grants of government lands to private individuals. Congress also has enacted thousands of "private bills," laws that affect only a single individual, small groups of people or a corporate entity. A "law" may be a law and something else, but it is still a law.

Using their own language and logic, Defendants try to make the law which was void in Fenn different from other laws. They call this law "a discrete, contractual act by the legislature." Defendants' Brief, p. 3. Is this language, and the alleged significance of it, found in any legal authority, or just in the imagination of the Defendants? Are such laws subject to different rules regarding challenging their constitutionality in court, being subject to being found to be "unconstitutional and void" and being subject to the principles regarding re-enactment and enforcement? Defendants offer no support for this notion. Certainly, the Fenn court didn't identify anything particular about the 1877 law that suggested that its voidness should be treated any differently from any other law's.

Defendants further attempt to distinguish Fenn by saying that it doesn't deal with a charter provision or "law of general application." Defendants' Brief, p. 2. Defendants don't even suggest how this supposed difference affects to need to re-enact a void law before it can be enforced again.

Here is a prime example of Defendants' distorted analysis of Fenn. From the Fenn opinion, at p. 450: "[T]he act of 1877 was in direct violation of that clause of the constitution of the United States which declares that no state shall pass any law violating the obligation of contracts." (emphasis added) From Defendants' Brief (at p. 2): "The Fenn court stated that the invalidated conveyance violated the U.S. Constitution's prohibition on impairing the obligation of contracts." (emphasis added) In Defendants'

telling, a law, an act of the legislature, has become a mere conveyance. Quoting further from Fenn:

> Congress did not attempt to bind the state to carry out its illegal action, and could not have done so. Any state legislature, after 1877, had a right to treat that legislation as if it had never been passed, and a mere release from the obligations of the original contract by congress could not operate to ratify the illegal action of the state legislature. It is for the state itself, now that it has plenary power, to act as if there had been nothing done before. (at p. 450.)

Defendants make one last attempt to distinguish Fenn (as well as State v. Miller, 66 W.Va. 436, 66 S.E. 522 (1909), Grayson-Robinson Stores, Inc. v. Oneida, Limited, 209 Ga. 613 (1953), and State ex rel. Stevenson v. Tufly, 20 Nev. 427 (1890)) from the instant case. They claim that those legislative acts were contrary to law when enacted, while Charter Section 12.2 was "validly enacted pursuant to Michigan state law…" Defendants' Brief, p. 4. The fact that Section 12.2 may have been enacted in accordance with the applicable city charter adoption procedures in Michigan law, does not mean that the substance of the subsequently voided section was constitutional when enacted.

Defendants also claim that the voiding of Section 12.2 "was an incorrect interpretation of law that was subsequently corrected by higher courts." Ibid. This is contrary to Defendants' entire theory of this case – that the Feld and HRP decisions were valid when made, but subsequent changes in case law meant that they were no longer good law. The phrase "corrected by higher courts" falsely implies appellate action in those two cases, which did not happen.

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

Dated: May 11, 2014

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 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