

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ELAINE BLANCHARD, KEEDRAN FRANKLIN,
PAUL GARNER and BRADLEY WATKINS,

Plaintiffs,

and

Civil Action No. 2:17-cv-02120-JPM-dkv

ACLU OF TENNESSEE, INC.

Intervenor-Plaintiff,

v.

THE CITY OF MEMPHIS,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

COME NOW the Plaintiffs, Elaine Blanchard, Keedran Franklin, Paul Garner and Bradley Watkins, by and through undersigned counsel, and in response to the Motion to Dismiss filed by the City of Memphis, state as follows:

STANDARD OF REVIEW

It is settled law that a court may not grant a defendant's Rule 12(b)(6) motion to dismiss unless it appears beyond doubt that the claimant can prove no set of facts supporting its claim which would entitle it to relief. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989); Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983). The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. See Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993).

In considering a Rule 12(b)(6) motion to dismiss, the Court must assume as true all well-pleaded facts, and must draw all reasonable inferences in favor of the non-movant. Murphy v. Sofamor Danek Group, Inc., 123 F.3d 394, 400 (6th Cir. 1997).

LAW AND ARGUMENT

The Motion to Dismiss filed by the Defendant raises two issues for this Court to resolve, standing and subject matter jurisdiction.

I. STANDING

Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' and "[t]he doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). The Supreme Court has explained that "the 'irreducible constitutional minimum' of standing consists of three elements." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (quoting Lujan, 504 U.S. at 560). A plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of a defendant, and (3) that is likely to be redressed by a favorable judicial decision." Id.

The original Complaint filed in this matter was styled, Chan Kendrick, Mike Honey, John Doe and the American Civil Liberties Union in West Tennessee, Inc. v. Wyeth Chandler, et al. John Doe was included in the Complaint as a named plaintiff for the purpose of representing citizens of the City of Memphis at large.

Section L., Binding Effect, states that the Decree provides "prospective relief..." The Decree further states that it has "no binding effect upon any claim for damages that ... might in the future be asserted, by any other individual." (Decree p. 6). Clearly the parties to the Decree

foresaw the potential need to provide relief to individuals who might have their rights violated by the failure of the Defendant to abide by the constraints of the Decree.

Consent decrees are essentially contractual agreements that are given the status of a judicial decree. Contract principles are generally applicable in our analysis of consent decrees, provided contract analysis does not undermine the judicial character of the decree. See, e.g., Thompson v. Enomoto, 915 F.2d 1383, 1388 (9th Cir. 1990), cert. denied, 112 S. Ct. 965, 117 L. Ed. 2d 131 (1992).

Therefore, enforcement of consent decrees is governed by the established contract principle that non-parties, as intended third party beneficiaries, may enforce an agreement. See Restatement (Second) of Contracts § 304 & cmt. a-b (1981) (parties to an agreement have the power to create enforcement rights in non-parties). This principle is consistent with the Federal Rules of Civil Procedure: "When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party. . . ." Fed. R. Civ. P. 71; see Berger v. Heckler, 771 F.2d 1556, 1565-66 (2d Cir. 1985); Lavapies v. Bowen, 687 F. Supp. 1193, 1207 (S.D. Ohio 1988) ("Under Rule 71, a non-party who establishes standing to proceed as a third-party beneficiary of a settlement agreement or consent decree may pursue enforcement of that agreement or decree.") (citations omitted). In short, intended third party beneficiaries of a consent decree have standing to enforce the decree.

The Defendant asserts that that intended third party beneficiaries have no standing to enforce a consent decree, based on a broad reading of Supreme Court language on standing that would prohibit all third party beneficiaries of a consent decree, even intended beneficiaries: "[A] well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were

intended to be benefited by it." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975).

However, a more thorough analysis reveals that the standing rule from Blue Chip Stamps prohibits only incidental third party beneficiaries from suing to enforce a consent decree. In Blue Chip Stamps, the government had been the plaintiff that compelled the earlier consent decree, and the private beneficiaries of the decree later sought to bring an action under the decree. At the time the government entered into the consent decree, it was well-settled that "only the Government can seek enforcement of its consent decrees." Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 20 (9th Cir. 1971). Because the Government knew at the time it entered the consent decree that the private beneficiaries it intended to benefit would be unable to bring actions to enforce the consent decree, the private beneficiaries were only incidental third party beneficiaries.

This reading of Blue Chip Stamps is consistent with the principle that "in construing consent decrees, courts use contract principles." Thompson v. Enomoto, 915 F.2d at 1388. In contract law, third party beneficiaries of the government's rights under a contract are normally assumed to be only incidental beneficiaries and are precluded from enforcing the contract absent a clear expression of a different intent. See Restatement (Second) of Contracts § 313(2) cmt. a (1981) ("Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested."). Under contract principles, the private parties seeking to enforce the government's rights in Blue Chip Stamps were incidental third party beneficiaries. The holding in Blue Chip Stamps is thus limited to incidental beneficiaries or beneficiaries of consent decrees where the government was the plaintiff; it does not apply to intended third party beneficiaries.

Moreover, if Blue Chip Stamps were read broadly to preclude even intended third party beneficiaries from enforcing a consent decree, it would create a direct conflict with Rule 71. Rule

71 clearly allows intended third party beneficiaries to enforce consent decrees, and Blue Chip Stamps should be read to avoid eviscerating Rule 71. See Berger v. Heckler, 771 F.2d at 1565-66 (discussing Lasky v. Quinlan, 558 F.2d 1133, 1136-37 (2d Cir. 1977)).

In this case, as alleged in the Complaint, the Plaintiffs had their constitutional rights violated by the Defendant, in direct violation of the Decree. The Defendant willfully engaged in activities designed to deprive the citizens of Memphis generally, and these Plaintiffs specifically, of rights guaranteed by the Constitution of the United States of America. The injury suffered by the Plaintiffs is the exact type of injury that the Decree was designed to prevent.

The injuries sustained by the Plaintiffs are fairly traceable to the conduct of the Defendant and would likely be redressed by a favorable judicial decision. As such, all of the elements necessary for standing are met.

II. JURISDICTION

The plaintiff carries the burden of establishing that jurisdiction exists. Serras v. First Tennessee Bank Nat'l Association, 875 F.2d 1212, 1214 (6th Cir. 1989); American Greetings Corp. v. Cohn, 839 F.2d 1164, 1168 (6th Cir. 1988). There should be no question that this Court retains jurisdiction concerning the Order, Judgment and Decree. Section M., Retention of Jurisdiction, of the Order states that the "Court will retain jurisdiction of this action ... for the purpose of issuing any additional order required to effectuate this Decree." (Decree p. 6).

The brazen activities of the Defendant used to harass and intimidate the citizens of Memphis generally, and these Plaintiffs specifically, are an affront to the Constitution and this Court, as the Decree signed by this Court has been willfully and wantonly violated by the conduct of the Defendant as alleged in the Complaint.

Federal courts are tribunals of limited subject matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). They may only

hear cases that invoke an independent basis of federal subject matter jurisdiction. Federal courts are also permitted to entertain claims or incidental proceedings that do not satisfy the requirements of an independent basis of subject matter jurisdiction. "Supplemental" or "pendant" jurisdiction applies to claims asserted in a pending federal-court case. "Ancillary" jurisdiction applies to related proceedings that are technically separate from the initial case that invoked federal subject-matter jurisdiction. See generally 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3523, at 154 (3d ed. 2008) ("Wright & Miller"). Whereas "supplemental" or "pendant" jurisdiction is treated under 28 U.S.C. § 1367, "ancillary" jurisdiction is governed by case law. Kokkonen provides the guiding framework:

Generally speaking we have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, . . . and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees 511 U.S. at 379-80 (internal citations omitted); see also Local Loan Co. v. Hunt, 292 U.S. 234, 239, 54 S. Ct. 695, 78 L. Ed. 1230 (1934).

A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. Ladner v. Siegel, 298 Pa. St. 487, 494, 495; 148 Atl. 699; Emergency Hospital v. Stevens, 146 Md. 159; 126 Atl. 101; Larson v. Minn. N. Electric Ry. Co., 136 Minn. 423; 162 N. W. 523; Lowe v. Prospect Hill Cemetery Assn., 75 Neb. 85; 106 N. W. 429; 108 N. W. 978. The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. Ladner v. Siegel, supra. The result is all one whether the decree has been entered after

litigation or by consent. American Press Assn. v. United States, 245 Fed. 91. In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. This Court has jurisdiction over the claims made by the Plaintiffs in their Complaint and this Court can and should vindicate its authority and demand accountability from this Defendant concerning violations of the Decree.

CONCLUSION

For the foregoing reasons, this Court should find that the Plaintiff has established that the Plaintiffs have standing to bring their action against the City of Memphis and that this Court has jurisdiction over this matter and enter an Order denying the Defendant's Motion to Dismiss.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading is being served via the Court's ECF system, upon the following counsel of record this the 29th day of March, 2017:

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