IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SUE MERCIER, ELIZABETH J. ASH, ANGELA BELCASTER, JANET BOHN, JULIE CHAMBERLAIN, MAUREEN FREEDLAND, DAVID GOODE, BETTY HAMMOND, CURT LEITZ, CONSTANCE R. LONG, DAVID W. LONG, MYRNA D. PEACOCK, BECKY POST, JAMES L. REYNOLDS, ELLEN DODGE SEVERSON, ERIC SEVERSON, LESLIE SLAUENWHIT, HERMAN S. WIERSGALLA, HOWARD WIERSGALLA, JAMES E. WIFFLER, ROBERT WINGATE, HENYRY ZUMACH and FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs,

v.

CITY OF LA CROSSE,

Defendant.

OPINION AND ORDER

02-C-376-C

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Plaintiff Freedom from Religion Foundation and 22 residents of the La Crosse community brought this case under 42 U.S.C. § 1983, contending that defendant City of La Crosse violated the establishment clause of the First Amendment by displaying a

monument bearing the Ten Commandments in a public park. After plaintiffs filed the suit, defendant sold the monument and a 20' x 24' plot of land surrounding it to the Fraternal Order of the Eagles, the entity that originally donated the monument to the city. Plaintiffs then amended their complaint, contending that the sale itself was an endorsement of religion that violated the First Amendment. In an opinion and order dated July 14, 2003, I agreed with plaintiffs and ordered the return of the monument and parcel to defendant and the monument's removal from the park. See Mercier v. City of La Crosse — F. Supp. 2d —, 2003 WL 21955872 (W.D. Wis 2003). Judgment was entered in favor of plaintiffs on August 5, 2003.

Now before the court are motions by (1) the Fraternal Order of the Eagles to intervene under Fed. R. Civ. P. 24 and for the court to alter, amend or grant relief from the judgment under Fed. R. Civ. P. 59(e) and 60(b) and (2) plaintiffs for the court to award attorney fees and costs. With respect to the Order's motion to intervene, the Order argues that it should be permitted to intervene as of right because it was not aware that it had an interest in the case until after the July 14 opinion and order was issued and because the injunction issued in this case cannot be lawfully enforced unless the Order is joined as a defendant. With respect to its motion for reconsideration, the Order contends that this court's conclusion that the sale violated the establishment clause is "manifestly erroneous" and inconsistent with Freedom from Religion Foundation, Inc. v. City of Marshfield, 203

F.3d 487 (7th Cir. 2002). In addition, it argues that plaintiffs lack standing and that the court should not have considered the constitutionality of the monument's presence before the sale because that issue is moot. Finally, it argues that the suit may be barred by the doctrine of laches.

I conclude that the Order should have been joined as a party under Fed. R. Civ .P 19. I will grant the Order's motion to intervene, vacate the August 5 judgment and set up a new schedule. As a result, I will deny plaintiffs motion for fees and costs at this time. Plaintiffs may submit a new motion if they are successful the second time around.

OPINION

A preliminary issue that must be addressed is this court's jurisdiction to consider the Order's motions. Defendant filed a notice of appeal on August 20, 2003. Generally, the timely filing of a notice of appeal deprives the district court of jurisdiction over the case, Boyko v. Anderson, 185 F.3d 672, 674 (7th Cir. 1999), or at least over those aspects of it that are involved in the appeal, Union Oil Co. of California v. Leavell, 220 F.3d 562, 566 (7th Cir. 2000). As applied to this case, the rule identified in Leavell would prevent me from granting the Order's Rule 59 and Rule 60 motions. However, under Fed. R. App. P. 4(a)(4)(B)(i), a notice of appeal filed after a timely Rule 59 or Rule 60 motion does not become effective until after the order disposing of the posttrial motion is entered. The Order

filed its motions on August 11, 2003, which was less than ten days after the entry of judgment and nine days before defendant filed its notice of appeal. Therefore, I retain jurisdiction to consider the Order's motions.

In their briefs, plaintiffs and the Order focus on whether the Order has satisfied the requirements under Rule 24 for intervention as of right. However, I conclude that it is not necessary to consider the application of Rule 24 because the Order must be joined as a party under Fed. R. Civ. P. 19. Rule 19 provides: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter should be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties." The Order suggests that I could not order complete relief in this case because that would entail ordering it to surrender ownership of the parcel, when it was not a party to the case. As the Order points out, generally, a party may not be deprived of its property by the government without due process of law, United States v. James Daniel Good Real Property, 510 U.S. 43, 48 (1993); Connecticut v. Doehr, 501 U.S. 1 (1991), and one cannot be bound by a judgment unless he was designated as a party in the action, Martin v. Wilks, 490 U.S. 755 (1990). I agree with the Order that I could not order it to do anything if it was not a party to the case.

Plaintiffs suggest that it is unnecessary for the Order to "return" the property because it never actually owned the parcel in the first place. Plaintiffs write: "[T]he court has already

determined that the property was not lawfully acquired by the [Order] because the sale of the parcel violated the First Amendment. The sale was void *ab initio* [from the beginning], and the [Order] never acquired any property rights." Plts.' Br., dkt. # 94, at 5.

Plaintiffs cite no case law in support of their contention. My own research reveals that the effect of declaring an act unconstitutional is not as straightforward as plaintiffs suggest. At one time, the Supreme Court's rule regarding an unconstitutional statute was that it is "as inoperative as though it had never been passed." Norton v. Shelby County, 118 U.S. 425, 442 (1886). However, the Court has since abandoned the absolutist view espoused in Norton. See Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1940). In Lemon v. Kurtzman, 411 U.S. 192, 200 (1973), the Court held that the determination of the effect of a decision should be guided by "a special blend of what is necessary, what is fair, and what is workable." Courts should "look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." Id. at 201. Similarly, not all illegal contracts are treated as if they never existed. See, e.g., Laborers' Pension Fund v. A & C Environmental, Inc., 301 F.3d 768, 779 (7th Cir. 2002) (recognizing distinction between void and voidable contracts).

In this case, it is undisputed that the Fraternal Order of the Eagles paid defendant a sum of money to acquire the land. At the time of the purchase, the Order relied on

defendant's representations that the sale was legal; plaintiffs do not suggest that the Order purchased the land from defendant in bad faith. Under these circumstances, basic notions of fairness suggest that before the Order's property interest in the parcel could be destroyed, it would be entitled to notice and an opportunity to be heard. A buyer who purchases property in good faith should be included in the proceedings that will determine whether he may keep his property.

Moreover, there is something a bit circular about plaintiffs' logic. Plaintiffs say that the Order has no interest in the property, but this argument is necessarily dependent on the July 14 opinion and order. In essence, plaintiffs are saying that the Order should not be allowed to intervene in a case deciding whether its property interest has been destroyed because the court decided in that case that its property interest was destroyed. Perhaps this logic could apply in a case involving an agreement to gamble or for prostitution, in which it is clear to both parties that the underlying conduct is illegal. However, as with most issues of constitutional law, the invalidity of the sale is not obvious from the language of the First Amendment. Thus, even if my conclusion in the July 14 opinion and order means that the Order never lawfully acquired the property, it would be unfair to deny its right to intervene now on the basis of a decision in which it had no opportunity to be heard.

It is true that the Order had actual notice of the lawsuit against defendant; the organization's president even provided an affidavit in support of defendant's motion for

summary judgment. Further, regardless what it believed the law to be, it knew that plaintiffs were challenging the presence of the monument and wanted it to be moved to another location. This is shown by the Order's own offer to move the monument to another location in order to comply with the law. See July 14 Op. and Order, dkt. #79, at 6. One could argue that a rule denying intervention under these circumstances would prevent parties from sitting on their rights or allowing others to represent their interests until the decision does not go their way. See United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) (generally, post judgment motions to intervene should be granted only if proposed intervenor did not learn of circumstance calling for intervention until after judgment). However, this argument is contingent on a view that a court may void a sale without the presence of the purported buyer, even when the buyer acted in good faith. Plaintiffs have failed to cite any authority supporting this view. Rather, in other cases challenging the sale of land as an establishment clause violation, the buyer of the property has been a named defendant. See Paulson v. City of San Diego, 294 F.3d 1124 (9th Cir. 2002); Freedom from Religion Foundation v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000); Southside Fair Housing Commission v. City of New York, 928 F.2d 1336 (2d Cir. 1991); Annunziato v. New Haven Board of Aldermen, 555 F. Supp. 427 (D. Conn. 1982).

In short, I agree with the Fraternal Order of the Eagles that it should have been joined as a defendant after the city sold the parcel. I erred in ordering the return of the property

to defendant when the Order was not a party to the lawsuit. The motion to intervene will be granted.

The question is what to do now. The Order does not limit its challenge to only the legal conclusions of the July 14 opinion and order. Rather, it wishes to challenge plaintiffs' standing to sue, arguing that their claims of injury "are merely a contrivance." Order's Br., dkt. #86 at 10. Thus, it "insists on the opportunity to depose and investigate the plaintiffs' claims." Id. In addition, it wishes to engage in discovery regarding the issue of mootness, that is, whether there is any possibility that the city will reacquire the property it sold to the Order. Finally, the Order argues that it is entitled to conduct discovery to determine whether plaintiffs are barred by the doctrine of laches. Specifically, the Order argues that the plaintiffs may have waited too long bring their suit.

It is highly doubtful that any amount of discovery will enable the Order to have this case dismissed for lack of standing. Although I agree with the Order that some of plaintiffs' injuries appear far fetched, plaintiffs did not have to prove that they lost sleep or felt physical pain in order to demonstrate an injury in fact. It was sufficient to show that they had "undertaken a special burden or . . . altered [their] behavior to avoid the offensive object." Books v. City of Elkhart, Indiana, 235 F.3d 292, 299 (7th Cir. 2000). Thus, so long as one plaintiff avoids the park because of the monument, a "case or controversy" exists under Article III. I am reluctant to reopen this case for additional discovery when it is so

unlikely that further efforts will lead to a different finding. With respect to mootness, before I can consider new facts showing that the constitutionality of the monument's presence in the park before the sale is a moot issue, the Order would have to demonstrate that it has some legally protected interest in keeping the monument on city-owned property. Its ability to do so seems unlikely because its only apparent legal interest in this case is the property that it acquired as a result of the sale. The Order's argument regarding laches is even more tenuous. At most, it would apply to the claim that the monument's presence on public property violated the establishment clause. There would be no merit to any argument that plaintiffs waited too long to challenge the sale of monument and the parcel; plaintiffs amended their complaint to address this issue soon after the parcel was sold to the Order.

Although chances are slim that any of the Order's factual challenges will be successful, I will not deny it the opportunity to try. The general rule is that once a party is allowed to intervene as of right, it becomes a full participant in the suit and is treated as an original party. See Schneider v. Dumbarton Developers, 767 F.2d 1007 (D.C. Cir. 1985); League of United Latin American Citizens v. Wilson, 131 F.3d 1297 (9th Cir. 1997); Alvarado v. J.C. Penney Co., Inc., 997 F.2d 803 (10th Cir. 1993); Brown v. Demco, Inc., 792 F.2d 478 (5th Cir. 1986). Although some authority suggests that even one who intervenes as of right may be limited in what he can "undo" after he intervenes, Charles Alan Wright, et al., 7C Federal Practice & Procedure, § 1920, at 489 & n.8 (2d ed.1986), in this case, limiting the

Order's participation to what is convenient for plaintiffs or this court would be inconsistent with the conclusion that the Order should have been joined as a defendant as soon as the monument was sold to them. Although focusing on appeal or settlement would likely be the wisest use of the parties' resources at this point, to insure fairness to all parties involved, I will allow the Order an independent opportunity to defend the case.

Therefore, I will vacate the judgment and set up a new schedule. Because I am reopening the case to allow further factual development, it would be premature to address the Order' legal arguments regarding the correctness of the July 14 opinion and order.

The parties should observe the following schedule:

Discovery Cutoff: November 3, 2003

All discovery in this case must be completed not later than the date set forth above, absent written agreement of all parties to some other date. Absent written agreement of the parties or a court order to the contrary, all discovery must conform with the requirements of Rules 26 through 37.

Rule 26(a)(1) governs initial disclosures unless the parties agree in writing to the contrary.

The following discovery materials *shall not* be filed with the court unless they concern a motion or other matter under consideration by the court: interrogatories; responses to interrogatories; requests for documents; responses to requests for documents; requests for

admission; and responses to requests for admission.

Deposition transcripts *shall* be filed with the court promptly after preparation. All deposition transcripts must be in compressed format. The court will not accept duplicate transcripts. The parties must determine who will file each transcript.

A party may not file a motion regarding discovery until that party has made a good faith attempt to resolve the dispute. All efforts to resolve the dispute must be set forth in any subsequent discovery motion filed with this court. By this order, the court requires all parties to a discovery dispute to attempt to resolve it quickly and in good faith. Failure to do so could result in cost shifting and sanctions under Rules 37(a)(4) and 37(b)(2).

This court also expects the parties to file discovery motions promptly if self-help fails. Parties who fail to do so may not seek to change the schedule on the ground that discovery proceeded too slowly to meet the deadlines set in this order.

All discovery-related motions must be accompanied by a supporting brief, affidavit, or other document showing a *prima facie* entitlement to the relief requested. Any response to a discovery motion must be served and filed within five calendar days of service of the motion, which the court presumes is the date the motion is filed with this court. In the event that the fifth day falls on a weekend, the response is due by noon on the next day the court is open. Replies may not be filed unless requested by the court. A party is not entitled to additional response time under Rule 6(a) or Rule 6(e), beyond the five calendar days ordered

herein.

For all purposes in this case, Rule 6(e) shall apply only to documents mailed via the United States Postal Service. Use of any other courier or express service shall be deemed personal service as of the date of delivery for the purpose of computing time limits.

Deadline for Filing Dispositive Motions: November 17, 2003

Dispositive motions may be filed and served by any party on any date up to the deadline set above. All dispositive motions must be accompanied by supporting briefs. All responses to any dispositive motion must be filed and served within 21 calendar days of service of the motion, which the court presumes is the date the motion is filed with the court. Any reply by the movant must be filed and served within 10 calendar days of service of the response, which the court presumes to be the date the response is filed with the court. A party is not entitled to additional time under Rule 6(e) to file and serve documents related to a dispositive motion. The parties may not modify this schedule without leave of court.

If any party files a motion for summary judgment, all parties must follow this court's procedure governing such motions, a copy of which is attached to this order. The court will not consider any document that does not comply with its summary judgment procedure. A party may not file more than one motion for summary judgment in this case without leave of court.

Final Pretrial Conference: February 12, 2004 at 4:00 p.m.

Not later than 28 days before trial each party shall serve on all other parties all materials specified in Rule 26(a)(3)(A), (B) and (C).

Not later than seven calendar days before the final pretrial conference each party shall submit to the court its witness list and exhibit list, and shall file and serve all motions *in limine* (and any necessary briefs or documents in support), all proposed voir dire questions, proposed jury instructions, proposed verdict forms, and any objections to an opponent's designations under Rule 26(a)(3). The format for submitting proposed voir dire questions, jury instructions and verdict forms is set forth in the Order Governing Final Pretrial Conference, which is attached.

As noted earlier in this order, deposition transcripts are to be filed promptly with the Clerk of Court upon preparation; any deposition that has not been filed with the Clerk of Court by the date of the final pretrial conference shall not be used by any party for any purpose at trial.

Trial: February 17, 2004 at 9:00 a.m.

Trial shall be to a jury of seven. Absent further order of this court, the issues to be tried shall be limited to those identified by the parties in their pretrial conference report to

the court.

This case will be tried in an electronically equipped courtroom and the parties shall present their evidence using this equipment. A brochure explaining the court's system is included with this order. Counsel shall ensure the compatibility of any of their personal equipment with the court's system prior to the final pretrial conference or shall forfeit their right to use any personal equipment that is not compatible with the court's system.

ORDER

IT IS ORDERED that

1. The motion of the Fraternal Order of the Eagles to intervene is GRANTED.

2. The Order's motion to grant relief from the August 5, 2003 judgment under Fed. R. Civ. P. 60(b) is GRANTED and the judgment is VACATED.

3. Plaintiffs' motion for attorney fees and costs is DENIED.

Entered this 24th day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge