UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

KENNETH HALL
Plaintiff,
and

BYRON SHARPER
Plaintiff-Intervenor,

CIVIL ACTION NO.: 3:12-cv-657
v. **BAJ/RLB**

STATE OF LOUISIANA, et al

Defendants.

REPLY TO OPPOSITIONS (Docs. 307, 309) TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

Plaintiff, Kenneth Hall, and Plaintiff-Intervenor, Byron Sharper (hereinafter referred to as "Plaintiffs"), for the reasons set forth below, submit the following Reply to Defendants' Attorney General, James D. "Buddy" Caldwell, Bobby Jindal, Governor, State of Louisiana, the City of Baton Rouge, the Parish of East Baton Rouge and Melvin "Kip" Holden (Doc. 307) and Defendant Secretary of State (Doc. 309) Opposition to Plaintiffs' Partial Motion for Summary Judgment, and respectfully requests the Court grant Plaintiffs' request for partial summary judgment.

I. INTRODUCTION

Defendants are wrong in their assertion that Plaintiffs' motion for partial summary judgment is lacking both procedurally and materially. The material used to support Plaintiffs' arguments does not contain inadmissible evidence. Further, the affidavits of Judge Donald R. Johnson, Judge Trudy White, Judge Yvette Alexander, and Ernest Johnson conform with Fed. R.

Civ. P. 56(c)(4). Plaintiffs' have adequately established that Defendants' acted with discriminatory intent in failing to amend Act 609 of the 1993 Regular Session.

II. ARGUMENT

A. Plaintiffs Have Met the Burden Required by Fed. R. Civ. P. 56

Plaintiffs' have presented sufficient evidence to show they are entitled to prevail as a matter of law. Fed. R. Civ. P. 56. Defendant Secretary of State contends that Plaintiffs' in discovery responses indicated the Secretary of State did not intentionally discriminate against Plaintiffs. Defendants Attorney General, James D. "Buddy" Caldwell, Bobby Jindal, Governor, State of Louisiana, the City of Baton Rouge, the Parish of East Baton Rouge and Melvin "Kip" Holden (hereinafter referred to as the "State and City Defendants") allege the evidence Plaintiffs' attached to their motion for partial summary judgment is insufficient.

In response to Defendant Secretary of State's allegations, Plaintiffs have consistently maintained that the Secretary of State failed to adhere to his statutory and constitutional duties to report voting rights violations to the Governor and the Legislature. For the sake of brevity, these arguments are more fully detailed in the Plaintiffs' oppositions to the Secretary of State's motions for summary judgment (Doc. 304 and 305) and the oppositions to the Secretary of State's motions to strike (Doc. 344 and 355), which are incorporated fully herein as if stated herein.

The State and City Defendants contend the evidence would not be admissible at trial and give a recitation of Plaintiffs' exhibits. They also allege the affidavits of Judge Donald R. Johnson, Judge Trudy White and Judge Yvette Alexander do not contain admissible evidence as they address matters not before the court or they pontificate on matters which the affiants are not offered as experts on. They have, as a part of their opposition, moved to strike certain aspects of

these affidavits and other attachments. The motion to strike is improper as the appropriate procedure to address an objectionable affidavit used in support or opposition to a summary judgment motion. The appropriate procedure is to object to the evidence. FRCP Rule 56 (c)(2). The objection, however, is that a fact is not supported by admissible evidence. An affidavit may establish facts even if it also contains statements that do not legally establish facts.

While an affidavit must show that it is based on personal knowledge, it does not need to contain magic words and the personal knowledge may be inferred. *Hellia Tec Resources, Inc. v. GE & F Co., LTD*, 2013 WL 3157534 (S.D. Tex.). The affidavit of Judge Donald Johnson shows that he was personally involved in the advocacy of the creation of majority minority subdistricts of the Baton Rouge City Court and thereafter instrumental in the introduction of several legislative attempts to accomplish and further that purpose. Judge Johnson obviously has personal knowledge of his reasons for asking that these legislative items be introduced and personal knowledge as to whether those legislators that he requested to act did what he requested. Judge Johnson also clearly has personal knowledge of the legislative history of each of these items. Furthermore, the legislative history of each of these acts is a joint trial exhibit so this is truly a phantom issue. The Defendants obtained the certified copies to serve as the joint exhibits and the legislative items attached to the motion for summary judgment are identical to the joint exhibits.

The State and City Defendants included Exhibits 1, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 13 of Judge Johnson's affidavit in their Motion to Strike because the documents are not certified copies of records of the Louisiana Legislature and in the case of Exhibit 7, the Baton Rouge City Court. Federal Code of Evidence Rule 1005 provides an alternate process for the certification of official records. The records can be authenticated by the testimony of someone who has

compared the record to the original. Judge Johnson affirms in his affidavit that these documents are in fact copies of what they state that that they are, thereby complying with FCE 1005.

Judge Johnson has also attached an email from former State Senator Louis "Woody" Jenkins to which there is objection. The purpose for which the email is offered is not to establish either the demographic facts or history argued by Mr. Jenkins, but to infer from the substance of the communication the legislative reason for which HB 1151 of 2014 did not pass. The fact of the communication is not hearsay. FCE 801(c)(2).

Furthermore, the statements in Mr. Jenkins' email concerning the original adoption of Act 609 of 1993 reflect reputation as to general history in which Mr. Jenkins was personally involved and are admissible hearsay under FCE 803 (20) as showing reputation about general history of an historic event. The statements are also admissible under FCE 807, as the statements of Mr. Jenkins express his reasons for a position that he indisputably took during an historic event and thereby have a circumstantial guarantee of trustworthiness.

The State and City Defendants also seek to strike the affidavit of Judge Yvette Alexander and Judge Trudy White. The threshold objection to both affidavits is relevance. Specifically that the affidavits contain statements which are not relevant. Their objection is misplaced. Neither the text of Rule 56 nor the text of Rule 12(f) authorizes the use of a Motion to Strike for this purpose. *A Slice of Pie Productions, LLC v. Wayans Bros. Entertainment*, 487 F. Supp. 2d 33 (D.C. Conn. 2007) p. 36. Irrelevant statements do not support summary judgment but such statements, if present, do not form a basis to strike the entire affidavit.

Statements of Judges Yvette and White about the internal operations of the City Court demonstrate the subtle ways that the African American community is damaged by the dilution of their vote in Baton Rouge City Court elections. The Fifth *Gingles* factor is the extent to which

members of the minority group in the state or political subdivision bear the effects of discrimination in areas such as employment. The affidavits of Judges Alexander and White show that in addition to the racial polarization of voting in city court elections, the administrative votes of the judges themselves are polarized along racial lines to the exclusion of minority individuals from employment with the court. The statements cited in the affidavits directly support Plaintiffs' position on the Fifth *Gingles* factor and is both relevant and personally known to each affiant.

The State and City Defendants also object to a bulletin issued by Defendant City of Baton Rouge detailing population changes in the city of Baton Rouge on grounds of being unauthenticated hearsay. The bulletin is available online from a Baton Rouge City website: http://brgov.com/dept/planning/pfd/bulletins/Bull76.pdf. The bulletin is an admission by a defendant, the City of Baton Rouge. The document is also a business record of the City of Baton Rouge and is also admissible for that reason. Finally, the document is an official publication of the City of Baton Rouge and is authenticated under FRE 902(5), and it has circumstantial guarantees of trustworthiness and therefore the residual hearsay exception in FRE 807 is applicable.

The State and City Defendants also object to Plaintiffs' use of handwritten notes of former First Assistant Attorney General Kenneth DeJean on the grounds that it is unauthenticated hearsay. They, however, acknowledge that these notes were produced by the State pursuant to a public records request. As such, the document is a public record and not hearsay. FRE 803(8). Furthermore, the notes are authenticated by Mr. DeJean's affidavit, (Doc. 307-2) which the defendants attached as evidence in support of their opposition. Mr. DeJean, by his own admission, does not know the circumstances under which these notes were produced in a

public records request so his testimony does not support any claim of privilege. Furthermore, while he states that the notes were prepared for internal use, this fact alone does not make the notes subject to an attorney client privilege or make the notes work product in connection with this case.

Finally, the State and City Defendants object to the affidavit of Attorney Ernest Johnson on the grounds that his affidavit contains opinion testimony. Lay witnesses may provide opinions that are "rationally based on the witness's perception; helpful to clearly understanding the witness's testimony or to determining a fact in issue; and not based on scientific, technical, or other specialized knowledge." Rule 701. Mr. Johnson affirms facts in his affidavit are personally known to him. By virtue of his background recited in the affidavit, he was in a position to acquire personal knowledge of the events as they occurred. As lead counsel in the *Clark* litigation, Mr. Johnson is certainly in a position to know of the events that led to the settlement. Additionally, because of his vast knowledge in the area of voting rights, he is capable of opining on the failure to amend Act 609 (1993).

As has been shown, all of the evidence attached to Plaintiffs' Partial Motion for Summary Judgment is admissible evidence.

B. Plaintiffs' Memorandum Contains Sufficient Material to Meet Their Initial Burden.

The State and City Defendants' assertion that Plaintiffs have not proved discriminatory intent is at best laughable. Plaintiffs have relied on circumstantial evidence to show all the Defendants purposefully discriminated against the Plaintiffs on the basis of race. *Arlington Heights* sets forth the criteria for determining discriminatory intent under the Fourteenth Amendment. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-67 (1977). Plaintiffs must prove that Act 609 is "operated as a purposeful device to further racial

discrimination,"[1] and that Act 609's continued use "invidiously to minimize or cancel out the voting potential of racial minorities."[2]

Plaintiffs must also prove that the constitutional and statutory deprivation was intentional or due to deliberate indifference and not the result of mere negligence. *See Farmer v. Brennan*, 511 U.S. 825, 828, 114 S.Ct. 1971, 128 L.Ed.2d.811 (1944). A showing of Defendants' unresponsiveness to particularized minority needs and polarized voting can combine to demonstrate intentional exploitation of electorate's bias for purpose of challenge to the electoral system under the Voting Rights Act. *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *cert denied*, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980). "Denying includes inaction, as well as, action. And denying the equal protection of the laws include the omission to protect, as well as the omission to pass laws for protection." *Bell v. Maryland*, 378 U.S. 226, 84, S.Ct. 1814, 12 L.Ed.2d. 822, 845-46 (1964). "These views are fully consonant with [the Supreme] Court's recognition that state conduct which might be described as 'inaction' can nevertheless constitute responsible 'state action' within the meaning of the Fourteenth Amendment." *Bell v. Maryland*, 12 L.Ed.2d at 46.

The Plaintiffs have shown the following facts and the Defendants do not dispute these facts:

- There has been a long history of racial discrimination against African Americans in the State of Louisiana and the City of Baton Rouge.
- There has been a finding of racial polarization in the City of Baton Rouge ***precincts*** as articulated by Judge Parker in the *Clark* litigation (emphasis added).

[1] *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 1499, 64 L.Ed.2d. 47 (1980).
[2] *See White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

- Act 609 of the 1993 Regular Session was enacted to create a minority subdistrict based on the City of Baton Rouge's African American population as reported in the 1990 United States Census.
- In 1990, the City of Baton Rouge had a White population of 118,429 or 53.95%.
- In 1990, the City of Baton Rouge had an African American population of 96,346 or 43.89%.
- The 2000 United States Census showed the City of Baton Rouge's population had changed.
- In 2000, the City of Baton Rouge had an African American population of 113,953 or 50.2%.
- In 2000, the City of Baton Rouge had a White population of 104,117 or 45.7%.
- After the 2000 Census, African American citizens requested the Governor of Louisiana, the Attorney General, the Secretary of State, the Louisiana Legislature, the City of Baton Rouge and the Parish of East Baton Rouge to amend Act 609 of the 1993 Regular Session to amend Act 609 to reflect the 2000 Census demographics of the City of Baton Rouge.
- House Bill 1501 was filed in 2001 to amend Act 609 to reflect the demographics as reported in the 2000 United States Census but was not adopted by the Legislature.
- House Bill 1505 was filed in 2001 to amend Act 609 to reflect the demographics as reported in the 2000 United States Census but was not adopted by the Legislature.
- House Bill 1013 was filed in 2004 to amend Act 609 to reflect the demographics as reported in the 2000 United States Census but was not adopted by the Legislature.
- Senate Bill 849 was filed in 2004 to amend Act 609 to reflect the demographics as reported in the 2000 United States Census but was not adopted by the Legislature.

- House Bill 945 was filed in 2006 to amend Act 609 to reflect the demographics as reported in the 2000 United States Census but was not adopted by the Legislature.
- A lawsuit was filed in the spring of 2006 against the State of Louisiana, the Governor, the Attorney General and the Secretary of State, in the matter of *Reverend Jerry Johnson v. State of Louisiana, et al*., Civil Action No. 541,528, Div. 25, 19th Judicial District Court, East Baton Rouge Parish, State of Louisiana, challenging the validity of Act 609.
- The 2010 United States Census showed the City of Baton Rouge's population had changed.
- In 2010, the City of Baton Rouge had an African American population of 125,155 or 53.4%.
- In 2000, the City of Baton Rouge had a White population of 86,938 or 38.67%.
- After the 2010 Census, African American citizens requested the Governor of Louisiana, the Attorney General, the Secretary of State, the Louisiana Legislature, the City of Baton Rouge and the Parish of East Baton Rouge to amend Act 609 of the 1993 Regular Session to reflect the 2010 Census demographics of the City of Baton Rouge.
- House Bill 318 was filed in 2013 to amend Act 609 to reflect the demographics as reported in the 2010 United States Census but was not adopted by the Legislature.
- House Bill 198 was filed in 2014 to amend Act 609 to reflect the demographics as reported in the 2010 United States Census but was not adopted by the Legislature.
- None of the House or Senate Bills were passed by the Louisiana Legislature.
- When asked to hold public hearings relative to amending Act 609, the Governor failed to respond.

- When asked to hold public hearings relative to amending Act 609, the Attorney General failed to respond.
- When asked to hold public hearings relative to amending Act 609, the City of Baton Rouge and the Parish of East Baton Rouge failed to respond.

All of these facts show a pattern of racial discrimination. Of importance is the fact that none of the Defendants dispute any of these facts. Further, they do not offer any reason for maintaining Act 609 (1993) in light of the change in demographics. Their entire argument is premised on Plaintiffs' exhibits allegedly not conforming with the Federal Rules of Evidence.

The Plaintiffs concede there have been improvements in voting rights in Louisiana, but that fact alone does not negate that the Defendants have intentionally discriminated against Plaintiffs and all other similarly situated African Americans in the City of Baton Rouge by failing to amend Act 609 (1993) when the United States Census data showed changes in the city's population. Summary judgment is appropriate in this matter.

C. Plaintiffs Are Entitled to Summary Judgment as a Matter of Law.

The State and City Defendants' assertion that "intent" is at issue is totally absurd. Doc. 307, p. 19. Every action taken and every failure to act have been to preserve the status quo and to deny Plaintiffs and other similarly situated African Americans constitutionally protected rights, that is the right to the equal protection of the laws and the right to vote.

The State and City Defendants also allege the Court has disposed of Plaintiffs' Equal Protection Clause claim. This is a misstatement of the Court's ruling. The Court dismissed only Plaintiff-Intervenor Sharper's Equal Protection "one-person, one-vote" claim. The Court stated, "[t]he court's ruling, however, shall not be construed as a dismissal of Sharper's Voting Rights Claims on the basis of vote dilution." Doc. 214, pp. 17-18. Plaintiffs' claims for violations of the

Equal Protection Clause – equality in voting – are properly before the Court and are ripe for summary judgment.

Further, Defendants have alleged Plaintiffs admitted in discovery responses that they had no evidence of personal intentional discrimination by the Secretary of State, the Attorney General or the Governor. This argument is without merit. Plaintiffs stated they had ***no documents*** evidencing intentional discrimination; (emphasis added) they continued to contend the Secretary of State, the Governor and the Attorney General failed to amend Act 609. It has been held that a failure to act is evidence of intentional discrimination. *Bell v. Maryland*, 378 U.S. 226, 84, S.Ct. 1814, 12 L.Ed.2d. 822, 845-46 (1964).

The Plaintiffs are entitled to summary judgment in this matter. Their Equal Protection claims are still viable as the Court only dismissed Plaintiff-Intervenor Sharper's "one-person, one-vote" claim. Additionally, Plaintiffs have not admitted they possess no evidence of discriminatory intent as articulated in their oppositions to Defendants' motions for summary judgment. (Docs. 304, 305, and 310).

D. There are No Material Facts That are Genuinely Disputed.

There are no genuine issues of material fact contrary to the Defendants' assertions. The Defendants offered no contrary arguments that the City of Baton Rouge and the Parish of East Baton Rouge do not have the power to amend Act 609 (1993). Moreover, they have failed to recognize statutory law that allows the Secretary of State, the Governor and the Attorney General to provide Plaintiffs a remedy in this case.

The Secretary of State is designated as the Chief Elections Officer of the State of Louisiana. La. Const. art. 4 § 7. His statutory duties include a duty to make reports and recommendations to the legislature on election issues and investigate election irregularities of

which he has failed to do in the matter before this court. The Secretary of State's election duties are substantive, not ministerial or ceremonial. Further, the Attorney General of Louisiana has advised the Secretary of State that he has authority to refuse to accept qualification papers for candidates where there is no valid apportionment plan as is the case of elections for the Baton Rouge City Court. The failure of the Secretary of State to report or investigate voting rights violations is a substantial factor in the failure of the legislature to respond to these violations.

While the primary duty of enforcing election laws is constitutionally and statutorily given to the Secretary of State, as the state's Chief Elections Officer, the Governor also has this responsibility. The Governor cannot reapportion the districts of the Baton Rouge City Court as that is a function given by the constitution to the Louisiana Legislature. The Governor can, however, as a part of his duty to see that the laws of the State of Louisiana and of the United States are carried out, report to the Legislature the malfeasance of local government. He can also bring suit against the City of Baton Rouge to force compliance with the statutory mandate to timely reapportion local election districts.

Constitutionally, the Governor reports to each and every legislative session. While there have been efforts to legislatively reapportion the Baton Rouge City Court subdistricts these efforts have arisen from individual legislators and not as a result of any report from the Governor. The failure of the Governor to report the violation of state and federal election law is a substantial factor in the failure of the legislature to respond to the violation. In fact, the Legislature has yet to hear that a problem exists from any executive branch official.

Among the statutory duties of the Attorney General, he is an *ex officio* member of the State Board of Election Supervisors. The State Board of Election Supervisors, a statutory legal entity, housed in the Secretary of State's Office is created by La. R.S. § 18:23. The Board of

Election Supervisors has the statutory duty to address the exact issue pending before this Court. As an *ex officio* member of the State Board of Election Supervisors, the Attorney General has the authority to hold hearings, issue subpoenas and employ legal counsel. La. R.S. §18:24 A (2), (4). In spite of this duty, the Attorney General, as a member of the Board of Election Supervisors, has not investigated the Baton Rouge City Court subdistricts and has not reported to the Legislature that a violation of the Voting Rights Act exists with regard to the apportionment of the election districts for the Baton Rouge City Court.

The State of Louisiana has an interest in its laws being carried out and an interest in complying with the requirements of federal laws. The Attorney General may not be able to force the Louisiana Legislature to adopt a law reapportioning the subdistricts of the Baton Rouge City Court, but he can bring suit himself to force the City of Baton Rouge to comply with the Legislative policy requiring reapportionment of local election districts within one year of each census. He has not done so.

III. CONCLUSION

In conclusion, the Plaintiffs' Motion for Partial Summary Judgment is properly before this Court. The Plaintiffs have provided the necessary evidentiary support to meet their burden. And further, Plaintiffs are entitled to a judgment as a matter of law as there are no material facts that are in dispute.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day July, 2014, a true and correct copy of the foregoing Reply to Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record.

Baton Rouge, Louisiana, this 8th day of July, 2014.

/s/ *Ronald R. Johnson*
RONALD R. JOHNSON