

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

KENNETH HALL : **CIVIL ACTION NO. 3:12-CV-0657**

VERSUS : **CHIEF JUDGE BRIAN A. JACKSON**

STATE OF LOUISIANA, ET AL. : **MAGISTRATE JUDGE**
RICHARD L. BOURGEOIS, JR.

OPPOSITION TO PLAINTIFFS’ MOTION FOR RELIEF FROM JUDGMENT

NOW INTO COURT, through undersigned counsel, come James D. “Buddy” Caldwell, Attorney General, Bobby Jindal, Governor, and the State of Louisiana, (hereinafter “Defendants”) who oppose the Plaintiffs’ Motion for the reasons set forth below.

I. BACKGROUND

Instead of seeking appellate review, the Plaintiffs take the position that they are unable to appeal this Honorable Court’s judgment of June 9, 2015, (Rec. Doc. 562) due to the subsequent passage of legislation (“Act 609,” “HB 76” of the 2015 Regular Session). Plaintiffs claim that a modification to the 1993 Judicial Election Plan came as a result of the Defendants’ unilateral actions and that the case and controversy is now moot. For purposes of their motion, the Plaintiffs narrowly characterize the claims raised in this case as merely seeking declaratory and injunctive relief with regard to the 1993 Judicial Election Plan. A reading of their numerous Complaints, as well as a review of the statements made by their attorneys at trial and in trial pleadings, do not support this new position adopted by the Plaintiffs. (See Rec. Docs. 1, 13, 74, 76, 128, 133, 180, 181) The Complaints show that the Plaintiffs asked the Court to remedy, enjoin, find and declare violations of the following: First Amendment (Rec. Doc. 74, p. 1. ¶ 1);

the Fourteenth Amendment (Rec. Doc. 1, p. 1, ¶ 1; Rec. Doc. 74, p. 1. ¶ 1); the Fifteenth Amendment (Rec. Doc. 1, p. 1, ¶ 1; Rec. Doc. 74, p. 1. ¶ 1); the United States Constitution’s majority rule principle (Rec. Doc. 74, p. 1, ¶ 1); and Sections 2 and 5 of the Voting Rights Act of 1965. (Rec. Docs. 1, p. 1; Rec. Doc.74, p. 1. ¶ 1)

Additionally, the Plaintiffs asked that the Court grant class action status (Rec. Doc. 1, p. 22, ¶ 88); make a determination that the Plaintiffs’ procedural and substantive due process rights were violated due to the failure to incorporate regular intervals for redistricting/reapportionment (Rec. Doc. 1, p. 25, ¶ f.); and convene a three judge panel pursuant to 28 U.S.C. § 2284 to challenge the apportionment of the City Court. (Rec. Doc. 74, p. 12, ¶ 35) The Plaintiffs further alleged that the constitutional and statutory complaints raised an action to “enjoin, declare, and find liability, and remedy past, present, ongoing, and future state and local governmental officials voluminous, repeated, and unlawful actions.” (Rec. Doc. 76, p. 2, ¶ 3)

[V]iolations exhibited by the separate and at times concerted and combined conduct of varied and various Louisiana state officials and municipal officers of the United States Constitution’s majority rule principle and the First, Fourteenth, and Fifteenth Amendments to the United States Constitution.

(Rec. Doc. 76, p. 2, ¶ 3)

The Plaintiffs characterized this action as one to find liability under 1871 of the Civil Rights Act, as amended, 42 U.S.C. §§ 1983 and 1986. (Rec. Doc. 76, p. 2, ¶ 4) The Plaintiffs prayed that the Court “bail-in” the State of Louisiana under Sections 3(c) of the voting Rights Act of 1965, 42 U.S.C. § 1973a(c). The Plaintiffs went on to pray that the Court make a declaration that the Judicial Election Plan as enforced in City Court elections held in 2006 and in 2012 violated the Fifteenth Amendment’s Right to Vote, Equal Protection Clause of the Fourteenth Amendment, Due Process Clause of the Fourteenth Amendment and Privileges and Immunities Clause of the Fourteenth Amendment; the Bill of Rights and/or the Due Process

Clause of the Constitution of the United States. (Rec. Doc. 128, pp. 22-23, ¶¶ 91(1)-(6)) The Plaintiffs asked for an injunction, enjoining and directing Defendants to ensure that all future elections for City Court comply in all respects with the “one person, one vote” principle of the Fourteenth Amendment. (Rec. Doc. 128, p. 23, ¶ 91(10)) The Plaintiffs asked for a declaration that the Judicial Election Plan as enforced in City Court elections in 2006 and 2012 violated Section 2 of the 1965 Voting Rights Act. (Rec. Doc. 128, p. 23, ¶ 91(7)) The Plaintiffs asked for an order enjoining and directing the Defendants to reapportion the City Court for all Divisions of Court once after each decennial census. (Rec. Doc. 128, p. 24, ¶ 91(12)) The Plaintiffs prayed for attorneys’ fees, costs, expert fees and other reasonable litigation expenses in maintaining the action under 42 U.S.C. §§ 1983 and 1986. (Rec. Doc. 128, p. 25, ¶ 91(14))

With the exception of the First Amendment claim, the Plaintiffs included the claims discussed above in the pretrial order and maintained that the claims should be decided by the Court at trial. (Rec. Doc. 315, pp. 3-24) At the conclusion of the trial, the Plaintiffs’ counsel re-urged that they were not waiving their constitutional claims. (*See attached* Exhibit A, excerpt of trial transcript, Vol. 6, pp. 202-203.

The Court found that the Plaintiffs abandoned the claims under the privileges and immunities clause (Rec. Doc. 562, fn. 1), and the Plaintiffs failed to prove denial of due process and discriminatory intent. (Rec. Doc. 562, pp. 29, 31-32) The Court entered judgment in favor of the Defendants and against the Plaintiffs as to the alleged violations of Section 2, the Fourteenth and Fifteenth Amendments, and 42. U.S.C. §§ 1983, 1986. (Rec. Doc. 562, p. 45)

II. LAW AND ARGUMENT

The Plaintiffs move that the Court vacate the judgment pursuant to Federal Rules of Civil Procedure Rule 60(b). Rule 60 provides for relief from a Judgment or Order as follows:

Rule 60. Relief from a Judgment or Order

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously caused intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Rule 60(b)(6) is a catchall provision that only applies if another section of Rule 60 does not provide relief. The rule provides justice in those unusual cases where substantial justice has been denied. LITPRAC § 30:9.8. Examples of successful motions under this section have involved misconduct by the court, egregious blunders by counsel, incarceration, incompetency, and other factors preventing the party from taking earlier action.

Relief under Rule 60(b)(6) is an “extraordinary remedy,” and the burden of proof remains with the mover. In order to prevail, the Plaintiffs must demonstrate that “extreme” and “unexpected” hardship will result absent such relief. Here, the Plaintiffs cannot and have not satisfied this heavy burden of proof.

A. THE DEFENDANTS TOOK NO UNILATERAL ACTION TO CHANGE THE 1993 JUDICIAL ELECTION PLAN

The Plaintiffs argue that a subsequent change to the 1993 Judicial Election Plan came as a result of the Defendants’ unilateral action. There is no support that the change in the 1993 Judicial Election Plan occurred due to any action of the Defendants.

The legislative record shows that Plaintiffs’ attorneys and Plaintiffs’ witnesses supported and advocated for the passage of Act 609, which changed the 1993 Judicial Election Plan. (*See attached* Exhibit B, Minutes for Committee for May 27, 2015 (citing for position that individuals appearing as witnesses on Plaintiffs’ witness list and/or testifying for the Plaintiffs at trial, spoke

in favor of the House Bill 76 - Representative Alfred Williams, Judge Don Johnson, Judge Trudy White); *See also* Exhibit C, House Witness Affirmation cards (citing for position that affirmation cards were submitted by Plaintiffs' attorney Ronald Johnson and individuals appearing as witnesses on Plaintiffs' witness list and/or testifying for the Plaintiffs at trial including but not limited to, Judge Yvette M. Alexander; Councilwoman Denise Marcelle).

The Defendants did not create the 1993 Judicial Election Plan. The Legislature was the proper authority to change or amend the geographic boundaries of the City Court election districts. *See* La. Const. art. III, § 1. The Legislature, which ultimately passed House Bill 76, is not a Defendant in this case. Therefore, there is no support for the Plaintiffs' argument that the change in the law came as result of unilateral action by the Defendants. Additionally, there can be no argument of injustice by the Defendants as a result of the change when it was persons aligned with the Plaintiffs that advocated for the change in legislation.

B. A CHANGE IN THE 1993 JUDICIAL ELECTION PLAN WAS NOT AN UNFORESEEN CIRCUMSTANCE

The principle purpose of Rule 60 (b) (6) is to cover unforeseen circumstances, giving the trial court authority to grant relief from judgment whenever, after considering all relevant circumstances, such action is deemed appropriate in the furtherance of justice. Rule 60 (b)(6); *Re Smith*, 3 B.R. 224 (Va. 1980); *Klapprott v. United States*, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949). A change in the 1993 Judicial Election Plan subsequent to this trial was not an unforeseen or extraordinary circumstance. Nor does the change in the method of electing judges for Baton Rouge City Court create injustice as discussed above. This Honorable Court encouraged a change in the law throughout the duration of this judicial proceeding. This Court also noted that “at this particular time, the prerogative lies with the legislature, not with the Court, to redistrict the City Court of Baton Rouge” (Rec. Doc. 562, p. 43) The legislation

that passed was pre-filed with the Legislature months prior to this Court's judgment, and the legislation was sponsored by Plaintiffs' own witness. This is not a situation where the Defendants scrambled to have legislation passed immediately following the issuance of this Court's judgment to purposely moot out the case. Indicative of the fact that the Plaintiffs were aware that a change in the Judicial Election Plan was imminent, is their recent filing with the Honorable Court, wherein they requested that the Court enjoin an October election based on possible changes in legislation. (Rec. Doc. 559) As such, a change to the 1993 Judicial Election Plan was not an unforeseen or extraordinary circumstance that would warrant the judgment to be vacated. To the contrary, a subsequent change to the 1993 Judicial Election Plan was arguably envisioned by the Court and all parties to this action.

C. THERE HAS BEEN NO CHANGE IN DECISIONAL LAW THAT WOULD RENDER THE COURT'S DETERMINATION THAT THERE WAS NO VIOLATION UNDER THE VOTING RIGHTS ACT MOOT

Generally, a change in a rule of law is not enough to warrant reopening a final judgment under the residual catchall provision of relief, Rule 60 (b)(6). Even a change in decisional law after entry of judgment does not constitute exceptional circumstances by itself to be grounds for relief under Rule 60(b)(6). *Picco v. Global Marine Drilling Co.*, 900 F.2d 846 (5th Cir. 1990). *Hess v. Cockrell*, 281 F.3d 212 (5th Cir. 2002); *Garibaldi v. Orleans Parish School Bd.*, 397 F.3d 334 (5th Cir. 2005).

The decisional law set forth in *Gingles* guided the Court in deciding this case. There has been no change in the decisional law that would render the Court's determination moot. Whether or not the Plaintiffs proved a violation of the Voting Rights Act, and are therefore entitled to relief, including attorneys' fees and costs under *Gingles* and 42. U.S.C. § 1983, remains a case and controversy that exists for a Court of Appeal to review. For example,

whether or not the Defendants are entitled to costs or attorney fees as a prevailing party, the determination that the Plaintiffs did not prove a prong under *Gingles* and the determination that the Plaintiffs did not prove intentional discrimination are all viable interests for appeal.

The United States Supreme Court discussed the standard for determining whether or not a case is moot in *Chafin v. Chafin*, 133 S.Ct. 1017, 1024, 185 L.Ed.2d 1 (2013).

Article III restricts the power of federal courts to “Cases” and “Controversies.” But a case “becomes moot only when it is impossible for a court to grant any effectual relief whatsoever to the **prevailing party**.” *Knox v. Service Employees*, 567 U.S.____, ____, 132 S.Ct. 2277, 2287, 183 L.Ed.2d 281 (2012). . . (“if an event occurs while a case is pending on appeal that makes it impossible for the court to grant ‘any effectual relief whatever’ to a prevailing party, the appeal must be dismissed”(quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132 (1895))). “**As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.**” *Knox*, supra, at 1019, 132 S.Ct., at 2287. (Emphasis added.)

This dispute is still very much alive. The parties maintain an interest in the case and the appeal. While the Plaintiffs claim in their brief that there is no remaining relief that the Plaintiffs can be granted, the standard articulated by the Supreme Court in *Chafin* is not whether there is any remaining relief available to the Plaintiff. (Rec. Doc. 563-1) Rather it is whether there is any remaining relief available to the prevailing party. The Defendants not the Plaintiffs are the prevailing party in this case. Even with the change to the 1993 Judicial Election Plan, the relief granted to the Defendants is still available to them. Therefore, the case is not moot.

D. THE CASES CITED BY THE PLAINTIFFS DO NOT SUPPORT THEIR POSITION THAT THE FINAL JUDGMENT MUST BE VACATED

The Plaintiffs cite to the case of *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25, 115 S.Ct. 386 (1994) to support their position that the judgment should be vacated. In *U.S. Bancorp*, the Supreme Court concluded that if mootness results from the **losing party’s voluntary actions**, that party has forfeited his legal remedy by the ordinary process of

appeal and surrendered his claim to the remedy of vacatur. The Court went on to state that to allow a party “to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any consideration of fairness to the parties – disturb the orderly operation of the federal judicial system.” *Id.* at 27, 115 S.Ct. 386.

The *US Bancorp* rule involves a situation where the losing party changes the law to purposely moot out liability. The *US Bancorp* rule is not applicable to the Defendants who were the prevailing party and who were not responsible for changing the law.

E. THE RECENT LEGISLATION, WHILE SUPPORTED BY PERSONS ALIGNED WITH THE PLAINTIFFS, WAS NOT THE SPECIFIC RELIEF REQUESTED BY PLAINTIFFS AND THERE IS NOTHING PROHIBITING THE PLAINTIFFS FROM RELITIGATING THESE SAME ISSUES TO THE DETRIMENT OF THE DEFENDANTS

The Plaintiffs in their motion did not state that they were satisfied with the changes to the 1993 Judicial Election Plan which occurred as a result of Act 609. The Plaintiffs’ position on what would be a lawful method of electing judges for the City Court has shifted throughout the trial. For example, in Plaintiffs’ Original Complaint, the Plaintiffs prayed that the Election Sections 1 and 2 be eliminated completely and that there be a return to the former plurality election territorial system citywide for all five divisions of the City Court. (Rec. Doc. 1, p. 24, ¶ v.) The Plaintiffs later opposed the creation of five at-large districts, even though they originally prayed for this relief. (See Plaintiffs’ Trial Exhibits 14 and 165, attached hereto for ease of reference as Exhibit E *in globo*) The Plaintiffs also argued against at-large districts at trial, when the Court asked for a suggested remedy. (See attached Exhibit A at p. 176-177)

The recent legislation does not create five at-large districts as originally prayed for by the Plaintiffs. Further, it maintains Election Sections 1 and 2, which the Plaintiffs initially prayed should be eliminated. Thus, to conclude that the subsequent change in legislation mooted out

their claims is inaccurate to the extent that it did not provide the specific relief that the Plaintiffs considered would cure the alleged unlawful method of electing judges in City Court.

Furthermore, the Plaintiffs presented evidence at trial that the creation of a 2-2-1 Election Plan for City Court, such as the one contained in House Bill 76, would not satisfy their claims of vote dilution under Section 2. On direct examination, Representative Alfred Williams testified that he lobbied to defeat a bill in the 2014 Legislative Session that would have created a 2-2-1 Election Plan for the Baton Rouge City Court. Representative Williams testified at trial that he opposed the 2014 legislation that would have created a 2-2-1 election plan, which was an amendment to a bill offered by Representative Erich Ponti. Representative Williams further testified that he was not in favor of city-wide elections for Baton Rouge City Court because African-American candidates had a disadvantage in city-wide elections due to “turnout, and ability to finance a city-wide election.” TR. II, 286:1-286:5. Former City Court Judge Trudy White and candidate Tiffany Foxworth testified about the inability of African American candidates to raise money. See TR. I, 257:2 – 257:22 and TR. II, 56:6 – 56:21.

The Plaintiffs admit in their brief that both the Supreme Court and Fifth Circuit have recognized exceptions to the general rule that a revision to the offending statute will not moot a case. One exception is whether the revisions are trivial so that the offending action in the original statute persists in the revised statute. (Rec. Doc. 563-1, p. 6). Based on the arguments advanced by the Plaintiffs which are discussed above herein, one could easily infer that the Plaintiffs could view the changes to the 1993 Judicial Election Plan as trivial and that the offending action persists.

The Defendants have undergone the time and expense of defending a case which alleged that the 1993 Judicial Election Plan was unlawful and that the Defendants intentionally

