TWENTY-SEVENTH JUDICIAL CIRCUIT OF VIRGINIA

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COMMONWEALTH OF VIRGINIA

CIRCUIT COURT FOR THE COUNTIES OF:
BLAND, CARROLL, FLOYD, GILES,
GRAYSON, MONTGOMERY, PULASKI, AND WYTHE
CIRCUIT COURT FOR THE CITIES OF:
GALAX AND RADFORD

April 26, 2011

(By facsimile only)

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RE: The Oracle Institute, et al. v. Board of Supervisors of Grayson County, et al.
Grayson County Circuit Court Case CL 10-101

Dear Counselors:

This matter recently came to be heard upon Defendant's several demurrers filed against the Plaintiff's Bill of Complaint and the objections thereto. I have reviewed the pleadings, the memoranda , authorities cited and your arguments presented.

This matter involves a Bill of Complaint filed by The Oracle Institute ("Oracle"), Amethyst Acres, LLC ("Amethyst") and Laura M. George ("George"), collectively the Plaintiffs against the Board of Supervisors of Grayson County ("Board"), Board of Zoning Appeals of Grayson County ("BZA"), Grayson County, Virginia ("County"), Thomas M. Maynard "(Maynard"), Larry K. Bartlett ("Bartlett"), Joe Vaughn ("Vaughn"), Douglas K. Carrico ("Carrico"), Brenda K. Sutherland ("Sutherland"), and Lisa Barker ("Barker"), collectively the Defendants.

The issues before this Court are the several demurrers filed by the Defendants to the several Counts filed by the Plaintiffs. This Court will address each demurrer as it relates the Defendants' motion.

I. Oracle Institute has no standing to assert claims in this action.

Defendants claim that Oracle has no standing to assert claims in actions arising

from Va. Code § 15.2-2232 because Oracle does not own the property for which the special use permit was denied. Plaintiffs' claim that their cause of action does not allege a violation of Va. Code § 15.2-2232, but is one which alleges violation of the Plaintiff's Right to Religious Freedom, Freedom of Speech, Equal Protection under the law of the First and Fourteenth Amendments to the United States Constitution, Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Virginia Constitution, Article 1, §§ 12 and 16, and the General Laws of the Commonwealth of Virginia. After reviewing the pleadings, I find that Counts I through VI clearly do not require that Oracle be property owner to assert various claims as plead. Count VII of the Bill of Complaint, however, does allege a violation of Va. Code § 15.2-2285(F), which is in fact an action challenging a denial of a Special Use Permit ("SUP"). Clearly any claim under Va. Code § 15.2-2232 would require property ownership to confer standing. However, claims under Va. Code § 15.2-2285(F) mention no property ownership requirement. Consequently, I find that Oracle has standing to assert the claims as plead in their Bill of Complaint. The demurrer is denied.

II. Cause of Actions under Va. Const. Art. I, §§ 12 and 16.

Plaintiffs allege independent claims in Counts V and VI of the Complaint, which allege violations under Va. Const. Art. I, §§ 12 and 16, which guarantee freedom of speech and religion. Plaintiffs and Defendants both cite Robb v. Shockoe Slip Foundation, 228 Va. 678, 324 S.E.2d 674 (1985). Clearly a cause of action under the Virginia Constitution depends upon whether that provision is "self-executing". In Robb, the Virginia Supreme Court found a private cause of action because it found that Article I § 11 to be self-executing. The Virginia Supreme Court also found that:

> A constitutional provision is self-executing when it expressly so declares. *See, e.g.*, Va. Const. Art. I, § 8. Even without benefit of such a declaration, constitutional provision in bills of rights and those merely declaratory of common law are usually considered self-executing. The same is true of provisions which specifically prohibit particular conduct. "Provisions of a Constitution of a negative character are generally, if not universally, construed to be self-executing." *Robertson v. Staunton*, 104 Va. 73, 77, 51 S.E. 178, 170 (1905).

In the present case, Counts V and VI are claims arising under the Va. Const. Art. I, §§ 12 and 16 dealing with freedom of speech and religion. Both §§ 12 and 16 are within the Virginia Bill of Rights and are negative in character, prohibiting actions by governments as they relate to freedoms of speech and religion. Consequently the demurrer is denied.

III. Declaratory Judgment.

Defendants claim that declaratory judgment is not proper in this matter and that Plaintiffs have failed to state a claim for declaratory judgment. The Virginia Supreme Court found in Miller v. Highland County, 274 Va. 355, S.E.2d 532, (2007), that:

> The purpose of the declaratory judgment statute is to provide a mechanism for resolving uncertainty in controversies over legal rights, without requiring one party to invade the asserted rights of another in order to permit an ordinary civil action for damages. Thus, the remedy that may be obtained in a declaratory judgment actions is preventive relief, upon assertion of an actual controversy. Id. at 650.

It is clear that issues relating to rights and obligations under written agreements are generally favored for declaratory judgments while the actual determination of disputed issues or facts to be determined at a future date in future litigation are not ripe for declaratory judgments. In the present case the Plaintiffs have alleged violations of both federal and state law and Constitutional claims as they relate to freedom of speech, religion and due process of law. Plaintiffs have likewise specifically allege facts and circumstances as to activities taken by the Grayson County Board of Supervisors, in which they allegedly violated rights of the Plaintiffs. In as much as the present controversy deals with disputed issues to be determined by future litigation, I find that the request declaratory judgment is not proper. Consequently, the demurrer is granted.

IV.

a.) Is the Grayson County Board of Supervisors a proper party under RLUIPA.

Under RLUIPA "government" is defined as "(i) a state, county, municipality, or other governmental entity created under the authority of a state; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other person acting under color of state law[.]" 42 U.S.C.A. § 20000 cc-5(4)(A). Defendants cite Miller, supra, as authority as to the difference between a government and a governing body. Miller, at 224 Va. At 364-65, 650 S.E.2d at 535-36. Although Miller dealt with the distinction between governments and governing bodies, it was within the context of a lawsuit implicating Va. Code § 15.2-2252(F), and not RLUIPA. No authorities have been cited regarding the interpretation of the definition under RLUIPA and the Court must look to the plain meaning of the statute. After reviewing the statutes, I am not convinced that the governing body of Grayson County would be a proper defendant. Clearly, Grayson County is a proper party and named as such. Had the statute referred to or defined government as "governing body" or "duly elected officials" then adding the Grayson County Board of Supervisors would be permissible.

Consequently, the demurrer is granted as to the Grayson County Board of Supervisors.

b.) Is the Grayson County Board of Supervisors a "person" pursuant to 42 U.S.C. § 1983?

Defendants argue that the Grayson County Board of Supervisors is not a "person" pursuant to 42 U.S.C. § 1983 and cite Veres v. Monroe County, 364 F. Supp. 1327, 1330-31 (E.D. Mich. 1973). Plaintiffs argue that the reliance of Veres is no longer proper having been specifically overruled by the holding in Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690 (1978). Although municipalities and local government entities previously were not considered "persons" subject to actions under § 1983, clearly that is no longer the case and such municipalities and local governments are considered "persons" under such actions. Even though there is a clear distinction between governing bodies and municipalities, clearly courts have recognized that actions under § 1983 may be brought against a local governing body of a county Skydiving Center of Greater Washington, D.C. v. St. Mary's County Airport Commn., 823 F. Supp. 1273, 1280 (D. Md. 1993). In discussing the actions of the Airport Commission and the County Commissioners, the court in Skydiving Center of Greater Washington, D.C. said "The Airport Commission and the County Commissioners spoke for the county in adopting the ban, and the county is therefore responsible for their actions under Section 1983". Id. at 1282.

V. Are the individual Defendants Maynard, Bartlett, Vaughn, Carrico, and Sutherland subject to individual liability?

(i) Legislative Immunity.

As you know, Plaintiffs are asserting claims under Federal Law such as § 1983 and RLUIPA. In deciding the issue of legislative immunity this Court must decide if the alleged actions of the individual defendants are either "legislative" or "administrative" in character. To that end, the determination is to be one interpreted under federal law. In Martinez v. State of Cal., 444 U.S. 277, 284 (1980), the Court specifically found that such immunity issues should be determined under federal Law. Id. at 444 U.S. at 284, n. 8. Therefore, this Court will decide such issues under federal law. In the case at bar, Plaintiffs allege that the actions of the individual defendants constitute "executive" or "administrative" actions and are not "legislative". Under federal law, the test is to focus on whether the actions by the board members are either general or specific as they relate to persons or entities. Generally speaking, actions which relate to the community generally are seen as "legislative" while actions relating specifically to one group or person are viewed mainly as "administrative". In the case at bar, Plaintiffs have alleged certain actions as they relate specifically to George and Oracle and because such actions plead are specific, I find that the demurrer for legislative immunity should be denied.

(ii) Qualified Immunity.

It is well settled that governmental officials enjoy qualified immunity from civil liability for actions regarding discretionary functions if those actions were objectively reasonable. As such, the issues regarding the facts and circumstances of such actions are a question of fact to be determined by the fact finder. Because this matter is presently scheduled for a two-day bench trial, this Court sill determine such questions of fact. Plaintiffs have alleged that the Defendants acted "with evil motive or intent" and knowingly based their decision upon opposition to the beliefs and expressions of the Plaintiffs (Complaint Paragraphs 62-63, 69, 75, 81). Because there are such outstanding questions of fact to be determined at trial, I find that the demurrer should be denied.

(iii) Statutory Immunity.

Pursuant to Va. Code § 15.2-1405, the individual Defendants in this matter enjoy immunity in the exercise of their discretionary authority. This immunity, however does not apply to conduct constituting intentional or willful misconduct or gross negligence. As noted before, Plaintiffs allege in their Bill of Complaint that Defendants' actions were willful and intentional. Again, the ultimate decision is a question of fact to be determined by the Court. Likewise, as noted before, actions under 42 U.S.C. § 1983 cannot be immunized under state legislation. Martinez, 444 U.S. at 284, n. 8. Consequently, the demurrer is denied.

VI.

(i) Is Grayson County a proper defendant to a cause of action under § 15.2-2285?

I find that Grayson County is a proper party under Va. Code § 15.2-2285(F). Although the Defendants cite the decision in Miller v Highland County, supra, that the only proper defendant is the governing body, there is actually no finding in that case that hold that the county is not a proper party in an action under § 15.2-2285(F). I find that for the purpose of this demurrer that such motion should be denied.

ii) Can the County of Grayson be held liable under the concept of the respondent superior for claim under 42 U.S.C. § 1983.

The Defendants cannot be held liable under a § 1983 cause of action on a strict theory of respondent superior. Liability under such actions only arise in the context of constitutional deprivations which are the result of governmental "policy". The Defendants' claim that the Plaintiffs have failed to plead such facts on the basis for a § 1983 clause of action regarding governmental "policy". Conversely, the Defendants claim that they have sufficiently plead such facts to constitute a basis for governmental

"policy". After reviewing the Bill of Complaint, paragraphs 41, 42, 68, 74, and 80, I find that the Plaintiffs have, for the purposes of this demurrer, plead facts which could form the basis for a "policy" cause of action under § 1983. Consequently, the demurrer is denied.

(iii) Is the County, if considered a party, entitled to legislative immunity?

Finally, Defendants' claim that Grayson County is entitled to legislative immunity for the same ground as members of its' governing body, the Board of Supervisors. Unlike governing bodies, governmental entities have no immunity from liability under § 1983 flowing from their constitutional deprivations. Owen v. City of Independence, 445 U.S. 622, 657 (1979). Defendant's demurrer is denied.

Mr. Donohue should draft the order to reflect this Court's rulings and forward it to Mr. McKusick and Mr. Guynn for their endorsements and objections thereto.

Sincerely yours,

Brett L. Geisler

BLG/slh

cc: Susan Herrington, Clerk