2009 WL 2135250 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.

Arthur SMELT and Christopher Hammer, Plaintiff,
v.
UNITED STATES OF AMERICA, State of California and Does 1 through 1,000, Inclusive, Defendant.

No. SACV-09-286 DOC (MLGx).
July 10, 2009.

Reply Memorandum in Support of Motion to Dismiss Action Against Defendant State of California for Failure to State A Claim

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Judge: The Hon. David O. Carter.

Date: July 13, 2009

Time: 8:30 a.m.

Ctrm: 9D

Trial Date: None

INTRODUCTION

Filed just two court days before the hearing on the motion to dismiss, Plaintiffs' opposition is untimely under the local rules of court. Given the prejudice caused by the late filing, the Court may properly disregard the opposition and grant the motion without leave to amend.

Moreover, none of Plaintiffs' arguments defeat the motion. The United States Supreme Court decisions on sovereign immunity cited by Plaintiffs have no bearing on their standing to sue. Nor is standing available under the private attorney general doctrine. Finally, Plaintiffs' apparent justifications for standing are contrary to the California Supreme Court's decision in *Strauss v. Horton* (2009) 46 Cal.4th 364.

In the course of their opposition, Plaintiffs fail to cite any pertinent authority on the subject of standing or meaningfully address the standing arguments presented in the moving papers. The untimely opposition is tantamount to a concession that these particular plaintiffs have no legitimate basis to assert standing in this litigation. Therefore, the motion to dismiss under Rule 12(b)(6) should be granted.

ARGUMENT

I. PLAINTIFFS' OPPOSITION TO THE MOTION TO DISMISS IS UNTIMELY AND VIOLATES THE LOCAL RULES OF COURT.

Plaintiffs filed their opposition to the motion to dismiss on Thursday, July 9, 2009, two court days before the scheduled hearing on the motion. Under the local rules, the opposition was due "not later than fourteen (14) days before the date designated for the hearing of the motion," in this case, by no later than June 29, 2009. (L.R. 7-9.)

The Court may decline to consider the late opposition or deem it as consent to granting the motion:

> The Court may decline to consider any memorandum or other paper not filed within the deadline set by order or local rule. The failure to file any required paper, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion.

(L.R. 7-12.)

Further, the proof of service attached to the amended opposition shows that the pleading was served *by mail* on the Attorney General's Office on July 9, 2009. The Central District local rules require a party opposing the motion to "serve upon all other parties and file with the Clerk" the evidence and memorandum in opposition. (L.R. 7-9.) The date and form of mailing made it unlikely that the Attorney General would receive the opposition before the hearing and, at a minimum, did not comply with the spirit of the local rules.1

Footnotes

Plaintiffs' time of filing and method of service have made it impossible for the State to file a reply brief within the time limit specified by the local rules. They have also left the State with little time to prepare a reply brief and respond to the cases and arguments presented in the brief.

The Court may appropriately consider these factors in deciding whether to consider the Plaintiffs' opposition or the weight to be given to the arguments made therein. Because of the extremely late filing, and the presumptive prejudice caused to the State from the late filing, the Court is respectfully requested to disregard the opposition on this basis and grant the motion to dismiss.

II. PLAINTIFFS' RELIANCE ON SUPREME COURT SOVEREIGN IMMUNITY CASES DOES NOT ADDRESS THE STANDING ISSUES RAISED BY THE MOTION.

In their brief, Plaintiffs rely heavily on a series of Supreme Court decisions that they characterize as addressing the doctrine of sovereign immunity. (Opp., pp. 1-4.) These citations miss the mark because the motion to dismiss is not based on sovereign immunity but on Plaintiffs' lack of standing to bring suit against the State.

For example, in *United States v. Georgia* (2006) 543 U.S. 151, the Supreme Court addressed whether a state prison inmate may sue the State for damages under Title II of the Americans with Disabilities Act. Relying on Congress's enforcement powers under section 5 of the Fourteenth Amendment, the Court held that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." *Id.* at p. 159 (original emphasis).

Plaintiffs cite *United States v. Georgia* as unqualifiedly asserting that "Congress is expressly granted authority to enforce the substantive provisions of the Fourteenth Amendment" and assert that the decision "clearly says that state governments may be sued for violating the Constitution so far as it is reasonably practical."2 (Opp., p. 3:17-20.) But the full passage in *United States v. Georgia* actually states: " 'In [§ 5] Congress is expressly granted authority to enforce ... the *substantive provisions* of the Fourteenth Amendment' by providing actions for money damages against the States." *United States v. Georgia,* 543 U.S. at p. 158, quoting *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 456.

1 The Attorney General's Office obtained a copy of the motion only by checking the Court's docket to see if one had been filed.

Thus, *United States v. Georgia* is easily distinguishable from the Plaintiffs' lawsuit because the Plaintiffs are not presenting a claim derived from Congress's section 5 enforcement power. Nor are the Plaintiffs, unlike the petitioner in *United States v. Georgia,* bringing suit to enforce rights under a federal statute.

Similarly, the Supreme Court's decision in *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank* (1999) 527 U.S. 627 addressed Congress's section 5 enforcement power to implement a legislative solution, not the particular petitioner's standing to sue. There, the Court held that the abrogation of the States' sovereign immunity in the Patent and Plant Variety Protection Remedy Clarification Act was invalid because it could not be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's Due Process Clause. *(See, id.* at pp. 633-648.)

The same is true of the other cases cited by Plaintiffs. *See Tennessee v. Lane* (2004) 541 U.S. 509 [holding that Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress's enforcement power under the Fourteenth Amendment]; *Nevada Dept. of Human Resources v. Hibbs* (2003) 538 U.S. 721 [recognizing power of Congress to abrogate Eleventh Amendment immunity from suit and enable employees to recover damages against State for violation of Family Medical Leave Act]; *City of Boerne v. Flores* (1997) 521 U.S. 507 [holding that Religious Freedom Restoration Act exceeded Congress's power under section 5 of the Fourteenth Amendment].

None of these decisions bear on the question of whether these particular Plaintiffs have sufficient standing to sue California in federal court to obtain a declaratory judgment holding that a duly enacted state initiative violates the United States Constitution. Since Plaintiffs are not seeking to validate rights recognized by Congress acting under its Fourteenth Amendment enforcement power, this line of authority does not counter or even address the arguments made in the motion to dismiss. Therefore, this portion of Plaintiffs' opposition should be disregarded.

III. THE CALIFORNIA PRIVATE ATTORNEY GENERAL STATUTE DOES NOT CONFER STANDING ON PLAINTIFFS TO BRING SUIT IN FEDERAL COURT.

In the heading that begins their brief and in one short paragraph, Plaintiffs, without citation to any authority whatsoever, assert that California's private attorney general law confers standing on Plaintiffs to challenge the constitutionality of Proposition 8. (Opp., pp. 1, 4.) No such authorization can be inferred from this doctrine.

"The 'private attorney general' concept 'seeks to encourage suits effectuating a strong congressional or national policy by awarding substantial attorney's fees, regardless of defendants' conduct, to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens.' " 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 256, p. 836, quoting *D'Amico v. Board of Med. Examiners* (1974) 11 Cal.3d 1, 27. In California, the doctrine has been codified to define the circumstances authorizing a fee award. Cal. Code Civ. Proc., § 1021.5.

Unmentioned by Plaintiffs is the federal Civil Rights Attorney's Fees Awards Act of 1976, which "gives the district courts discretion to award reasonable attorneys' fees to the prevailing party (other than the United States) in an action or proceeding to enforce provisions of various [federal] statutes ...." 7 Witkin, § 242, p. 816.

Plaintiffs cite no authority suggesting that these attorney fee provisions independently confer standing to bring the claims sought in this case. Absent supporting authority, Plaintiffs may not bootstrap their way to subject matter jurisdiction in this matter.

IV. PLAINTIFFS HAVE NOT ESTABLISHED ANY BASIS FOR STANDING.

Near the end of their brief, Plaintiffs, again without any citation to authority, suggest that they have standing on grounds that their marriage is a "second class marriage." This assertion is not consistent with the California Supreme Court's holding in *Strauss v. Horton.*

As noted in the motion to dismiss, *Strauss* held that Proposition 8 was not retroactive and did not apply to the approximately 18,000 same-sex marriages occurring before passage of Proposition 8. Because Plaintiffs allege that they were married in July 2008, before the November election in which the voters adopted the measure, they are among the same-sex couples whose marriages were recognized as valid under California law by the Supreme Court.

Nor can their marriage be pejoratively characterized as "second-class" under California law consistently with the holding in *Strauss.* There, the California Supreme Court held that the pre-election marriages, which would include Plaintiffs' marriage, "remain valid in all respects." *Strauss v. Horton,* 46 Cal.4th at p. 474.

Alternatively, plaintiffs appear to argue that they may bring suit because other couples are being denied fundamental constitutional rights. But this is clearly not a basis for these plaintiffs, whose marriage is unaffected by Proposition 8, to assert standing to challenge the measure's constitutionality. "The claim must be for injury to *plaintiff's own* legal rights and interests, rather than the legal or interests of third parties." Schwarzer, et. al., Federal Civ. Pro. Before Trial (The Rutter Group 2009) § 2:1207, p. 2E-3 (original emphasis).)

Further, Plaintiffs mischaracterize the outcome of their prior lawsuit. (Opp., p. 5:14-19.) The district court ultimately dismissed their lawsuit against the State as moot because they had been lawfully married. *(See* Request for Judicial Notice.) The same result should be reached here.

Finally, it bears noting that Plaintiffs completely mischaracterize the Attorney General's argument regarding Proposition 8 and the reasons why Plaintiffs lack standing. (Opp., pp. 4:22-5:19.) Needless to say, this mischaracterization does not establish any basis for standing.

CONCLUSION

Plaintiffs' untimely opposition should be disregarded as in violation of the local district court rules. Further, Plaintiffs have failed to meet their burden to establish sufficient basis for standing to challenge the constitutionality of Proposition 8 in federal court. Because standing is a fundamental element of subject matter jurisdiction, the motion to dismiss under Rule 12(b)(6) should be granted without leave to amend.

Dated: July 10, 2009

Respectfully submitted,

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2 Plaintiffs do not provide any citation at this point in their brief, but their reference to Goodman, the petitioner in *United States v. Georgia,* and the quoted material in the accompanying paragraph is clearly referencing that decision. *(See* Opp., p. 3:11-20.)