Bank of New York Mellon v. City of Richmond, California et al Doc. 30

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THE BANK OF NEW YORK MELLON (f/k/a The Bank of New York) and THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A. (f/k/a The Bank of New York Trust Company, N.A.) as Trustees; U.S. BANK NATIONAL ASSOCIATION, as Trustee; WILMINGTON TRUST COMPANY and WILMINGTON TRUST NATIONAL ASSOCIATION, as Trustees

Plaintiffs,

v.

CITY OF RICHMOND, CALIFORNIA, a municipality; RICHMOND CITY COUNCIL; MORTGAGE RESOLUTION PARTNERS L.L.C., a Delaware limited liability company; and GORDIAN SWORD LLC, a Delaware limited liability company

Defendants.

Case No.: 13-CV-3664-CRB

OPPOSITION OF TRUSTEE PLAINTIFFS TO DEFENDANTS' *EX PARTE* MOTION TO SHORTEN TIME AND FORGO HEARING ON MOTION TO DISMISS

HONORABLE CHARLES R. BREYER

Dockets.Justia.com

I. INTRODUCTION

Defendants identify no basis that would warrant granting their *ex parte* request for an order requiring Plaintiffs to oppose Defendants' motion to dismiss tomorrow—just three court days after that motion was filed—and for the Court to rule on that dismissal motion without the benefit of oral argument. To obtain an order shortening time, a party must show a "substantial harm or prejudice that would occur if the Court did not change the time." Local Rule 6-3(a)(3); *see also Caldwell v. Wells Fargo Bank, N.A.*, 2013 WL 3789808, *1 (N.D. Cal. Jul. 16, 2013) (stating that a party "must show two things to justify ex parte relief: first, that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures; and second, 'that the moving party is without fault in creating the crisis that requires ex parte relief. . .'").

Here, Defendants don't come close to meeting this standard. First, Defendants cannot rely on their *ipse dixit* proclamation that because of their belief that they are entitled to dismissal, any contrary argument by Plaintiffs *must* be frivolous. Second, Defendants incorrectly assert that this lawsuit seeks to chill the political process in the City of Richmond and that that is the only reason why Plaintiffs have not voluntarily dismissed their claims. Both arguments fail. This is a different lawsuit and includes different claims and allegations than those set forth in *Wells Fargo Bank, National Association, et al. v. The City of Richmond, et al.*, CV13 3663 (the "*Wells Fargo Action*"). Plaintiffs are entitled to fully respond to Defendants' motion by demonstrating, among other things, that their claims arise from a sufficiently immediate controversy to support a declaratory judgment, including in particular their claim for declaratory relief regarding tortious interference with contract, a claim not asserted in the *Wells Fargo Action*.

Moreover, even if chilling a political process could somehow be a proper basis for shortening time under Rule 6-3 (it plainly is not), there can be no reasonable dispute that this action has not impeded any political process. At the September 10 Richmond City Council meeting, while this action was pending, the City Council reaffirmed that it was proceeding

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with the program, and, by a separate supermajority vote, rejected a resolution to withdraw the City's offer letters.

Plaintiffs should be allowed their day in court and the right afforded all litigants to brief the viability of their claims. Defendants have demonstrated no cognizable basis warranting a finding of substantial harm or prejudice in the absence of a shortened briefing schedule, and their *Ex Parte* Motion should be denied.

II. NO HARM OR PREJUDICE WILL OCCUR IF THE COURT HEARS DEFENDANTS' MOTION TO DISMISS ON THE NORMAL SCHEDULE

The Court should deny the *Ex Parte* Motion because Defendants have not satisfied—and cannot satisfy—Local Rule 6-3. Defendants identify no "substantial harm or prejudice that would occur if the Court did not change the time" for Plaintiffs to respond to the dismissal motion to tomorrow, a mere three court days after that motion was filed. Nor can Defendants demonstrate, as they must, that they are "without fault in creating the [purported] crisis that requires ex parte relief." *Caldwell*, 2013 WL 3789808, at *1. Defendants could have moved to dismiss this action any time after it was commenced more than six weeks ago on August 9, 2013. They were not obligated to wait to file their motion until they received a favorable ruling in the *Wells Fargo Action*, which they now seek to apply with preclusive effect here. Thus, any purported current exigency is solely the result of Defendants' litigation strategy, not any conduct of Plaintiffs. And, Defendants cannot identify a valid basis for depriving Plaintiffs the opportunity to be heard at oral argument. The *Ex Parte* Motion should be denied.

A. Plaintiffs' Stipulation To Extend Defendants' Time To Respond To The Complaint To October 1 Confirms That Defendants' *Ex Parte* Motion Lacks Merit.

Even before the Court issued its ruling in the *Wells Fargo Action*, Defendants demanded that Plaintiffs dismiss their Complaint. *See* Declaration of Eric P. Brown, ¶ 4 (Dkt. 29). Because Defendants' response to the Complaint was due on September 16—the same date the Court indicated it would issue a ruling in the other case—Plaintiffs proposed a two-

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week extension to Defendants, which they accepted, to give the parties time to consider the impact of the Court's ruling.[1]

Despite the stipulation to continue the response date to October 1, Defendants renewed their request that the Trustees immediately dismiss this action when the Court dismissed the *Wells Fargo Action* on September 16. The Trustees refused to agree to Defendants' unreasonable demand, because the substance of their causes of action are different than those asserted in the *Wells Fargo Action*. Trustees further explained: "[n]or is there any exigency or other reason for the Court to expedite the briefing schedule applicable to any such motion or to forgo oral argument as [Defendants] suggest, and [Defendants] have provided no basis for such requests." *See* September 20, 2013, letter from Bronwyn F. Pollock to Eric Brown; attached as Exhibit A to the accompanying Declaration of Kurt Osenbaugh. As any other litigant, the Trustees deserve a full opportunity to oppose Defendants' Motion to Dismiss and to be heard by this Court.

Defendants' assertion that this lawsuit seeks to chill the political process is misguided and fails to demonstrate the "substantial harm or prejudice" required by Local Rule 6-3. Plaintiffs do not seek to stop the City from taking any political or legislative action, nor is there any evidence suggesting that the existence of this action would do so. Indeed, while this action was pending, the Richmond City Council considered whether to withdraw the offers to purchase the notes and rejected that proposition by a supermajority vote, and separately *reaffirmed* that it is not only moving forward with the seizure program, but is seeking to enlist additional municipalities in an expanded program.

[1] Mr. Brown's Declaration notably fails to disclose that the Trustee Plaintiffs proposed this extension and that Defendants agreed to the continuance of their response date to October 1. (*See* Stipulation to Extend Time, Dkt. 23.) Of course, that extension further demonstrates that there is no need to expedite briefing or engage in the fire drill requested by Defendants here.

B. Defendants' Request For Expedited Briefing Appears To Be Part Of A Broader Litigation Strategy Designed To Deprive Plaintiffs Of Federal Court Review Of Their Constitutional Claims.

Defendants cannot demonstrate a legitimate basis justifying the need for an expedited briefing schedule. Defendants previously argued that the *Wells Fargo* Plaintiffs' motion for preliminary injunction was not ripe because the City had not yet passed the resolution of necessity. *See, e.g.,* Defs' Mot. to Dismiss for Lack of Subject Matter Jurisdiction; Mem. of Points and Auths. in Support, *Wells Fargo Bank, Nat'l Ass'n, et al. v. City of Richmond, et al.*, 13-cv-3663, ECF Dkt. No. 38 at 3:15-26 (N.D. Cal. Aug 23, 2013) ("a resolution of necessity might never be proposed"); *see also id.* at 1:10-20 (stating "the City Manager is still exploring the possibility of acquiring loans through negotiations").

Given Defendants' prior representations to the Court regarding the timing of their seizure program, they cannot credibly argue that substantial harm or prejudice would occur if the Court hears their motion to dismiss this action on the normal schedule. There is no basis to deprive the Trustees of the normal opportunity afforded litigants to oppose a motion to dismiss, and certainly no basis to give the Trustees a mere three court days to oppose Defendants' motion. Indeed, Defendants' conduct suggests that they are simply attempting to dispose of the remaining federal action as quickly as possible so they can proceed with state court condemnation actions using the quick take procedure while depriving Plaintiffs of a federal forum for their constitutional claims. The Court should not permit Defendants to

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misuse the shortening time procedure in this manner and should allow the motion to dismiss to be heard and argued in the normal course.

DATED: September 24, 2013

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