IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED, a Colorado corporation, et al.,
Plaintiffs,
v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity, et al.,
Defendants.

STATE OFFICIALS' MOTION FOR PARTIAL RECONSIDERATION OF THE ORDER DENYING MOTION TO DISMISS [DOC. 94] PURSUANT TO FED.R.CIV.P. 59(e) AND 60(b)(1)

State Officials move for partial reconsideration of the Order [Doc. 94] denying State Officials' Rule 12(b)(1) Motion to Dismiss [Doc. 64], pursuant to Fed. R. Civ. P. 59(e) and 60(b)(1). Specifically, State Officials seek reconsideration of the Court's ruling that Plaintiffs' claims against the Attorney General are not barred by the Eleventh Amendment and that he is a proper defendant. As grounds, State Officials state as follows.

D.C. COLO. Civ. R. 7.1(a) CERTIFICATION

Undersigned counsel conferred in good faith with counsel for Plaintiffs about the relief requested by this Motion and is authorized to represent that Plaintiffs oppose the same.

INTRODUCTION

Plaintiffs' First Amended Verified Complaint [Doc. 51] names the Colorado Attorney General as a defendant in his[1] official capacity because he "has authority to enforce Colo. Rev. Stat. § 24-34-601(2)(a). Colo. Rev. Stat. § 24-34-306." Doc. 51, ¶ 23. The Court's Order on the State Officials' Motion to Dismiss states that the Attorney General "has a duty to enforce C.R.S. § 24-34-601(2)(a) and has a demonstrated willingness to exercise that duty against Phillips." Doc. 94, p. 44. The Order cited § 24-34-306(8), C.R.S. and its language stating that "[t]he case in support of the complaint shall be presented at the hearing by one of the commission's attorneys or agents." *Id.* The Order reasoned that "[b]ecause the Attorney General represents the Commission in proceedings to enforce C.R.S. § 24-36-601(2)(a), and Phillips claims this enforcement is currently violating his constitutional rights," the Attorney General is a proper party. Doc. 94, p. 45. Notably, the First Amended Verified Complaint [Doc. 51] contained no reference to or allegations about § 24-34-306(8), C.R.S., as the basis for Plaintiffs' claims against the Attorney General.

The Colorado Attorney General has statutory and professional obligations to represent all state agencies, officials, and employees, including prosecuting matters referred by state agency clients. With respect to the underlying administrative enforcement action at issue here, the Attorney General has no discretion whether to prosecute the complaint filed by the Commission against Mr. Phillips and the bakery. Since Plaintiffs never alleged that the Attorney General's role as mandatory legal counsel demonstrates a "willingness" to prosecute the underlying

[1] On January 8, 2019, Philip J. Weiser was sworn in as Colorado Attorney General, replacing Cynthia H. Coffman.

administrative charge, and because there are no allegations that the Attorney General had any discretion whether to prosecute the underlying administrative charge, the Attorney General is not a proper defendant in this case. Because the First Amended Verified Complaint did not provide any notice that § 24-34-306(8), C.R.S. was the basis of Plaintiffs' claims against the Attorney General, this issue was not addressed by the parties in briefing on the Rule 12(b)(1) Motion to Dismiss. For this reason, State Officials respectfully request that the Court reconsider its decision to maintain the Attorney General as a defendant in this case.

STANDARD OF REVIEW

Rules 59(e)

A motion filed after the entry of judgment that questions the correctness of the judgment is properly treated as a motion to alter or amend the judgment. Fed. R. Civ. P. 59(e); *see also Phelps v. Hamilton*, 122 F.3d 1309, 1323 (10th Cir. 1997). A motion to alter or amend judgment pursuant to Rule 59(e) may be granted if the moving party establishes the need to correct clear error or prevent manifest injustice. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). For a Rule 59(e) motion to prevail, it must seek either to correct a manifest error of law or to present other evidence that has been newly discovered. *Loughridge v. Chiles Power Supply Co., Inc.*, 431 F.3d 1268, 1274-75 (10th Cir. 2005). The Court has broad discretion whether to grant or deny a Rule 59(e) motion. *Phelps*, 122 F.3d at 1324.

The Tenth Circuit has not precisely defined "manifest injustice" within the meaning of Rule 59(e), however that term is commonly defined as "[a] direct, obvious, and observable error in a trial court ...." Black's Law Dictionary 1048 (9th ed. 2009); *Grynberg v. Ivanhoe Energy*, Inc., Civil Action No. 08-cv-2528, 2010 WL 2802649 (D. Colo. July 15, 2010). "Where

reconsideration is sought due to manifest injustice, the moving party can only prevail if it demonstrates that the injustice from the case is 'apparent to the point of being indisputable.' " *Shirlington Limousine & Transp., Inc. v. United States*, 78 Fed.Cl. 27, 31 (2007) (quoting *Pacific Gas & Electric Co. v. United States*, 74 Fed.Cl. 779, 785 (2006), *aff'd in part, rev'd in part on other grounds*, 536 F.3d 1282 (Fed.Cir. 2008)).

Rule 60(b)(1)

Rule 60(b)(1) provides for relief from judgment for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Under this rule, the movant has the burden of pleading and proving the grounds for relief. *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990). Whether to grant a Rule 60(b) motion rests within the trial court's discretion. *See Beugler v. Burlington N. & Santa Fe Ry. Co.*, 490 F.3d 1224, 1229 (10th Cir. 2007). The Tenth Circuit "has recognized that in some instances relief may be granted under Rule 60(b)(1) on a theory of mistake of law, when, as here, the Rule 60(b) motion is filed before the time to file a notice of appeal has expired." *Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991) (citing *Morris v. Adams–Millis Corp.*, 758 F.2d 1352, 1358 (10th Cir. 1985)). "However, such relief is available only for obvious errors of law, apparent on the record." *Van Skiver*, 952 F.2d at 1244 (citing *Alvestad v. Monsanto Co.*, 671 F.2d 908, 912–13 (5th Cir. 1982)). When deciding a Rule 60(b) motion, courts should generally resolve all factual doubts in favor of the party seeking relief. *Cessna Fin. Corp. v. Bielenberg Masonry Contracting, Inc.*, 715 F.2d 1442, 1445 (10th Cir. 1983).

ARGUMENT

The Colorado Attorney General's Office has statutory and professional obligations to act as legal counsel for state agencies. The office's provision of legal counsel to prosecute the *Commission's* administrative charge challenged by Plaintiffs in this case does not show a "willingness" on the Attorney General's part to independently enforce the Colorado Anti-Discrimination Act, §§ 24-34-301 to –804, C.R.S. (2018) ("CADA"). Indeed, Plaintiffs made no allegation that the Attorney General demonstrated such willingness by filing an administrative charge on "[his] own motion" as permitted by § 24-34-306(1)(b), or exercising any independent discretion or judgment about whether to prosecute the charge filed by the Commission against Mr. Phillips and the bakery.

If the reasoning for requiring the Attorney General to remain a defendant to this matter were to stand, then the Attorney General arguably would be a necessary party to every state or federal court challenge to the legality of an administrative enforcement action referred for prosecution by a state agency, and he would be subject to the burdens and expense of litigation in which the referring state agency is the real party in interest to defend the plaintiff's claims. That outcome would constitute a mistake of law and manifest injustice that must be avoided.

I. The Attorney General's legal and professional obligations.

The Colorado Attorney General possesses only those powers expressly granted by the General Assembly. *State of Colo. v. ASARCO, Inc.*, 616 F.Supp. 822, 828 (D. Colo. 1985). Under § 24-31-101(1)(a), C.R.S., "the attorney general of the state shall be the legal counsel and advisor of each department, division, board, bureau, and agency of the state government other than the legislative branch." When the Colorado Civil Rights Commission notices a charge of

discrimination for hearing, the case "shall be presented at hearing by one of the *commission's* attorneys …." § 24-34-306(8), C.R.S. (emphasis added). Assistant attorneys general from the Attorney General's office act as counsel in support of the complaint in these matters and prosecute the Commission's complaint. *See* Civil Rights Commission Rule 10.8(A)(3), 3 Code Colo. Reg. 708-1 ("[t]he case in support of the complaint shall be presented at the hearing by the attorney general's office as counsel in support of the complaint, pursuant to §24-34-306(8), C.R.S."). As a result, the Attorney General's only involvement in Colorado Office of Administrative Courts Case No. CR2018-0012, *Scardina v. Masterpiece Cakeshop Inc., et al*., is as statutory counsel for the *Commission's* complaint against Mr. Phillips and the bakery.

Colorado Rule of Professional Conduct ("RPC Rule") 1.2(a) states in part that "a lawyer shall abide by a client's decisions concerning the objectives of representation", and RPC Rule 1.2(b) provides that "[a] lawyer's representation of a client does not constitute an endorsement of the client's political, economic, social or moral views or activities." In the underlying administrative enforcement action, assistant attorneys general from the Attorney General's Office were assigned to prosecute the Commission's complaint and must do so consistent with their legal and professional obligations under § 24-31-101(1)(a), § 24-34-306(8), and RPC Rule 1.2. In these circumstances, Colorado law does not provide any grounds for the Attorney General to decline to prosecute the Commission's administrative enforcement action against Mr. Phillips and the bakery. If the Attorney General declined to prosecute an administrative charge referred by a state agency client in contravention of his duty, he could be in violation of his legal and professional obligations, and subject to mandamus and disciplinary actions. Because allowing Plaintiffs to maintain their claims against the Attorney General based solely on his non-

discretionary duty under § 24-34-306(8) puts the Attorney General in an untenable position as a lawyer to his state agency clients, this Court should grant reconsideration and dismiss the Attorney General as a defendant.

II. The Attorney General has not shown a "willingness" to prosecute the charge.

Under *Ex parte Young*, 209 U.S. 123 (1908), when a state Attorney General has a duty under state law to cause proceedings to be instituted against a corporation for a violation of state law, the Attorney General is a proper party to a suit to enjoin the enforcement of the law. *Id*. at 159-60. The Court cautioned against reading the Eleventh Amendment immunity exception too broadly, however, to allow plaintiffs to test the constitutionality of statutes against state attorneys general merely because of their status as a state officer. *Id.* at 157. In order to allow the Attorney General to remain a party defendant in a suit to enjoin the enforcement of an allegedly unconstitutional statute, there must be some connection with the enforcement of the statute. *Id.* While the Tenth Circuit has held that a "special connection" to the allegedly unconstitutional act or conduct is not necessary, the state official must nonetheless have a "particular duty to enforce the statute in question ***and*** a demonstrated willingness to exercise that duty." *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2016) (emphasis added; internal quotations omitted). Such a connection "must be fairly direct; a generalized duty to enforce state law ... will not subject an official to suit." *Los Angeles Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992).

While for the reasons discussed above the Attorney General has a duty to prosecute administrative complaints filed by the Commission, the Attorney General has shown no willingness to independently enforce CADA against Mr. Phillips and the bakery by filing an administrative charge with the Colorado Civil Rights Division ("Division") on "[his] own

motion." § 24-34-306(1)(b), C.R.S. Nor does the Attorney General have any authority, much less any duty, to directly commence a civil action against Mr. Phillips and the bakery for alleged violations of CADA's public accommodation provisions. *Compare* § 24-34-306(1)(b), C.R.S. (authorizing the Attorney General to file a discrimination charge with the Division for potential prosecution by the Commission), *with* §§ 24-34-505.5(2) and (3), C.R.S. (authorizing the Attorney General to commence a district court civil action to enforce CADA's housing practices provisions). Indeed, Plaintiffs admit that the willingness to exercise discretion to enforce CADA's public accommodation provisions has been demonstrated only by the Commission, not the Attorney General. Specifically, the First Amended Verified Complaint alleges that *the Commission* voted to notice the administrative charge of discrimination filed by third-party Autumn Scardina for a hearing and to commence a civil enforcement action, Doc. 51 ¶ 228, and it states that *the Commission* filed the Notice of Hearing and Formal Complaint on October 9, 2018. Doc. 51 ¶ 230. The Complaint was silent on the Attorney General's "willingness" to enforce CADA because there was no discretionary decision by the Attorney General to file an administrative charge separate and apart from Ms. Scardina's, or to commence and prosecute a civil action separate and apart from the Commission's. As a result, the Eleventh Amendment bars Plaintiffs' claims against the Attorney General.

III. It would cause a manifest injustice and mistake of law for the Attorney General to be subject to the Court's jurisdiction absent an affirmative action by the Attorney General.

Plaintiffs have not articulated why the Attorney General is a proper defendant in light of the Commission's ongoing exercise of its authority and discretion to enforce CADA against them by filing a Notice of Hearing and Formal Complaint on October 9, 2018. Doc. 51 ¶ 230.

And for the above reasons, the Attorney General's involvement in the pending administrative enforcement action is not separate and apart from the Commission's, but rather is solely in furtherance of statutory duties to the Commission. This Court's reasoning for dismissing the Governor from this case based on Eleventh Amendment immunity is equally applicable and therefore should be extended to the Attorney General: "[A]ny claim by Phillips that the Commission members' [pending administrative enforcement action against] him violates his [constitutional] rights in an ongoing manner is attributable to the individual Commission members and not [the Attorney General]." Doc. 94, pp. 45-46. As a result, it is not necessary for the Attorney General to be a defendant in this matter for Plaintiffs to obtain all of the relief they seek.

If the Attorney General were to remain in the litigation as a defendant, it would endorse the strategy to name the Attorney General in every other state or federal court challenge to a pending administrative enforcement action that is being prosecuted by the Attorney General's office at the direction of a state agency client. The Attorney General prosecutes numerous other administrative enforcement actions similar to the underlying action at issue here for which he could be named as a defendant based on non-discretionary prosecutions undertaken at the direction of state agency clients. In addition to § 24-31-101(1)(a), C.R.S., which is the general statute mandating that the Attorney General be legal counsel for all state agencies, there are numerous specific statutes for various state boards that require the Attorney General to prosecute alleged professional licensing and practice violations. *C.f.* §§ 12-25-205(6) & 12-25-305(3) (state board of licensure for architects, professional engineers and professional land surveyors); § 12-35-136 (dental board); § 12-40-123(2) (state board of optometry); §§ 12-36-118(4)(c) & (h)

(medical board); §§ 12-38-116.5(3)(c) & (d) (state board of nursing); § 12-2-125(5) (state board of accountancy); § 12-58-116.5(4)(c) (state plumbing board).

If the Order [Doc. 94] were to stand, the Attorney General could be named as a defendant in state and federal court challenges to the constitutionality of these statutes or the legality of administrative enforcement actions commenced under them. In such event, the Attorney General or his employees would potentially be subject to discovery into prosecutions commenced by the Commission or other agency clients and for which the Attorney General and his employees maintain prosecutorial work product. It would also require that the Attorney General expend significant resources to defend the legality of administrative enforcement actions for which he exercised no discretion about whether to prosecute. Because that result would amount to both a manifest injustice and mistake of law, this Court should reconsider its Order maintaining the Attorney General as a defendant.

CONCLUSION

State Officials respectfully request that the Court reconsider its Order denying their motion to dismiss Plaintiff's claims against the Attorney General [Doc. 94], and dismiss the Attorney General from this matter.

DATED: February 1, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2019, I served a true and complete copy of the foregoing **STATE OFFICIALS' MOTION FOR PARTIAL RECONSIDERATION OF THE ORDER DENYING MOTION TO DISMISS [DOC. 94] PURSUANT TO FED.R.CIV.P. 59(e) AND 60(b)(1)** upon counsel of record in this matter through ECF or as otherwise indicated below:

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