

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

THE EXECUTIVE BOARD OF)
THE MISSOURI BAPTIST CONVENTION, et al.,)
)
Plaintiffs,)
vs.)
ROBIN CARNAHAN, et al.,)
)
Defendants.)

Case No: 02 CV 325096-02

Judge Frank Conley

FINAL JUDGMENT

On December 31, 2010, Judge Paul Wilson entered partial summary judgment in favor of Plaintiff The Executive Board for the Missouri Baptist Convention (“MBC”) restoring Convention control over the Missouri Baptist Foundation (“MBF”) and awarding legal fees and costs for the decade-long effort to recover its breakaway foundation.¹ Judge Wilson said his judgment was “partial” as to Count VII only in that two aspects of this Court’s remedy will require further proceedings as set forth below.” Senior Judge Byron Kinder adopted the reasoning of the Wilson opinion as his own in a series of amended judgments, dated January 26, March 22, and May 13, 2011. The Foundation appealed.

On September 12, 2012, the Missouri Court of Appeals, Western District, dismissed the appeal for lack of finality, stating the partial summary judgment was ineligible for interlocutory appeal under Rule 74.01(b) because the judgment did not resolve all the remedies or legal issues in Count VII, and because Counts VIII and IX arose out of the same transactions as Count VII, and thus were part of the same “judicial unit.” “The trial

court's language indicated it believed not all issues were resolved.”² The appeals panel issued its mandate on October 12, 2012, directing this court to take “further proceedings consistent with this opinion.”

This Court has taken all “further proceedings” contemplated in the Amended Judgment, and mandated by the Court of Appeals. The case is ready for full and final judgment, and not just partial summary judgment.

This Court has complied fully with the requirements of the mandate and opinion of the appellate court, but has not gone beyond what was mandated. The mandate *did not* reverse any finding of fact or conclusion of law. It *did not* direct that plaintiff should not regain control of its foundation, or that its trustees should not be seated, or that plaintiff's attorneys' fees should not be recovered. It *did not* direct the trial court to reopen the summary judgment proceedings, to re-litigate any issues, or to reconsider any rulings. It *did* direct that the trial court must state clearly that all factual and legal issues in the judicial unit comprised by Count VII (and perhaps by Counts VIII and IX) are resolved by the judgment, without need for future proceedings to resolve them. The Court is prepared to, and does hereby make such a declaration.

A primary goal of the judicial system is finality. *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883, 886 (Mo., 1987). The fortuity of a change in trial judge is not a reason to reopen a judgment which two prior judges intended to be final. Over three years after Judge Wilson sought to restore the foundation to the Convention, “further proceedings” are over. The time for re-litigating old motions or filing new motions has passed. The Court is

² See Appeals Opinion, 9/12/12, page 11, citing *Bakewell v. Breitenstein*, 363 SW3d 353, 357 (Mo App W.D. 2012)
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committed to finality in its judgment so that the parties may get finality in the resolution of this decade-old dispute.

ISSUES RAISED IN MANDATE OF APPEALS COURT

I. The partial summary judgment did not fully resolve the remedies sought within Count VII.

The Appeals Opinion said the Amended Judgment did not fully resolve all the issues about remedies sought in Count VII, but explicitly called for “further proceedings” before the court regarding two aspects of the Court’s remedy: a) to determine the amount of attorneys’ fees and costs; and b) to determine issues surrounding Golden Parachutes alleged in Count VII.

A. Attorneys’ Fees.

The Amended Judgment ordered the Foundation to pay the Convention’s attorneys’ fees but said the amount could be determined in “further proceedings” after an appeal. Such further proceedings are now concluded. On November 22, 2013, the Court heard evidence and argument from both parties. By separate order, the Court has awarded an amount of fees and costs to be paid by MBF to Plaintiff. The Appeals Opinion also questioned whether the trial court made findings of intentional misconduct to support the fee award. This Court believes that the Amended Judgment made adequate findings, but the separate fee order makes those findings explicit. The secretive, bad faith scheme to cheat the Convention out of its rights, as Judge Wilson described it, constitutes “special circumstances” justifying an award of attorney fees in this declaratory judgment action.³

³ In footnote 12, the appeals opinion says: “In the instant case, the legal basis for an attorney fees award requires a finding of intentional misconduct by the Foundation and both parties challenge whether such a showing was made; this necessarily requires an adjudication of the factual and legal issues remaining between the parties.” The Plaintiff does not challenge whether such a showing was made. Neither does this court.

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B. Golden Parachutes.

The Amended Judgment contained the following language under “Remedies:”

THAT the Foundation shall not make any payments pursuant to any “Golden Parachutes” allegedly agreed to by the Foundation in order to “protect and compensate its management employees in the event [Convention-elected] trustees regain control of [the] Foundation.,” (see Fifth Amended Petition, ¶¶ 131, 308.16) until additional proceedings can be held so that this Court can determine whether such agreements, if any are valid and not unenforceable or void as against public policy, and whether such contracts may have given rise to any personal liability on the part of any individuals involved.” (See Amended Judgment, p. 31.)

While this case was last on appeal, Plaintiff dismissed its golden parachute claims, based on assurances by defense counsel that there had been no such payments. Because the appeals court was still concerned, this Court has now entered judgment dismissing the golden parachute claims with prejudice. To avoid confusion, the Court expressly strikes and sets aside from the Amended Judgment the paragraph above. The Court dismisses for mootness ¶308.16 in the Fifth Amended Petition seeking recovery of any payments made under “golden parachute agreements,” inasmuch as the Plaintiff has filed a voluntary dismissal and the Defendant’s counsel has stated in open court that there have been no such payments.

Therefore, both remedial issues which were of concern to the Appeals Court are now finally resolved and are no barrier to the finality of this judgment on appeal.

II. The Amended Judgment did not fully dispose of the legal issues that the Plaintiff raised in Count VII.

The Appeals Opinion noted that Counts VII and VIII specifically asserted contract claims in reference to the charter. Judge Wilson ruled that Plaintiff had rights under the

Charter to approve amendments and to sue to enforce these rights, but the Appellate Opinion suggested that he sought to distinguish this ruling from contractual claims. The Appellate Court summarized Judge Wilson by stating that the origin of Convention's rights are in some sense contractual and the convention may be entitled to pursue a contractual theory of relief and obtain contractual remedies in addition to the relief granted ... but it has not been necessary...to evaluate Count VII under a contract analysis.”

A. Whether the charter gave the Board contractual rights was a central legal issue in both Counts VII and VIII; the court's partial summary judgment did not reach these issues yet asserted that contract remedies were still pending based on this issue.

The Appeals Opinion said a central question was whether the charter gave the Board contractual rights. Defendant Foundation wants to read into this question a dispositive answer that simply is not there: that Plaintiff must prove the existence of a contract right or it can have no rights at all in the Foundation charter. The Appeals Opinion does not reach the conclusion that the Foundation wants to reach

By calling it “a” central issue, the Appeals Opinion allows that there are other central issues, and other bases on which a right may exist. The Appeals Opinion also notes that the petition alleges other bases for rights in the Articles, such as rights conferred by statute or by court decree. See p. 4-5.

The Amended Judgment, at footnote 4, rejected the Defendant's argument that the Plaintiff's rights in the MBF charter could only be analyzed as “contract” claims. The Amended Judgment found that Plaintiff had rights in the 1994 Charter as approved by *pro forma* decree by this court. It clearly explained that the right was based on the charter language, the court decree approving it, and state statutes protecting it. Plaintiff had rights

grounded in Chapter 352 before the attempted amendment, and in Chapter 355, after the attempted amendment. See pp. 21-22 including footnote 4.

Even the Court of Appeals referred to “the substantive rights of the Convention expressed in the 1994 Charter, including the consent provision.” (See Appeals Opinion, p. 4) (emphasis added)

“Moreover, if **the Convention** had actually intended to preserve certain alleged rights, it **could have used section 355.606 to preserve those rights**. The Convention's agents drafted and filed Windermere's original articles of incorporation, and the Convention's messengers ratified the original articles. Under section 355.606, **the Convention had means available to it to protect any interests it may have had** in Windermere, but it did not take advantage of those means.” (emphasis added)

See *Exec. Bd. V. Windermere*, 280 SW3d 678, 692 (Mo. App. W.D. 2009)

On August 7, 2007, Judge Richard Callahan entered an interlocutory order which ultimately denied defense motions for summary judgment based on §355.141. Judge Callahan’s ruling was due to the fact that plaintiff was not challenging the validity of the charter amendments on the ground that MBF (or others) lacked “power” to act. Rather, Plaintiff challenged the validity of amendments because of Defendant’s illegal acts, in violation of charter rights in a court-approved charter, as protected by Chapters 352 and 355, including 355.606.

Defendant MBF now argues that this August 2007 order means that Plaintiff has waived any non-contract rights, including those rights derived from the court decree approving charter language under Chapter 352, or the right expressed in 355.606, protecting the right to approve charter amendments.

This Court does not read the Callahan order so broadly. In any event, it was an interlocutory decree which denied summary judgment to the Foundation. In order to avoid

confusion, this Court sets aside all of the interlocutory order except for the first paragraph and the last paragraph.

Furthermore, the Court adopts and re-affirms the portion of the Amended Judgment which rejects Defendant's interpretation of §355.141, and rejects the argument that the Convention somehow lacks standing due to this statute. Plaintiff has standing to bring these claims that the Foundation violated the MBC's rights when it changed the charter unilaterally.

The Amended Judgment, Footnote 4, also said

“The Convention may be entitled to pursue a contractual theory of relief and obtain contractual remedies in addition to the relief granted herein. The Convention has additional Counts to be litigated in which those issues can be explored. ”

To avoid confusion, this Court strikes and sets aside the above quoted words in Amended Judgment, footnote 4. This Court would note that the deleted sections are now moot, as they seem to pertain to the attorneys' fees and golden parachutes issues in Count VII, and other claims in Count VIII and IX, all of which are otherwise disposed of herein.

Footnote 4 in the Amended Judgment also states:

“It has not been necessary for the court to evaluate Count VII under a contract analysis, though the Court would have reached the same conclusions and granted the same relief if it had done so. For these reasons, the Court perceives no conflict between this Judgment and the Court's Judgment dated August 7, 2007, or the statements of Convention's counsel in response to this “false choice” argument as it related to Defendants other than the Foundation.”

As to the Amended Judgment, this Court hereby strikes and sets aside the above phrase “evaluate Count VII” and substitutes the phrase “explain its holding regarding Count VII...”. It seems clear that Judges Wilson and Kinder engaged in an analysis involving contract law principles in reaching a conclusion, but the Amended Judgment does not depend upon “contract analysis” alone to explain or justify its holding. Defendants are

strategic in trying to force this case into a contract corner in order to try to preclude declaratory relief or to litigate affirmative defenses endlessly. Defendant's strategy, however, must fail.

III. The partial summary judgment on Count VII failed to resolve a "distinct judicial unit," because the remaining Counts VIII and IX concern the same overlapping facts and transactions.

The Appeals Opinion says that, even if the partial summary judgment were final as to Count VII, Count VII could not be a distinct judicial unit, because the remaining Counts VIII and IX concern the same overlapping facts and transactions.

This problem has been solved by this Court dismissing Counts VIII and IX as moot. Count VIII was an alternative pleading seeking rescission of a 20-year rent-free lease to MBF, and restitution of about \$200,000 in support which MBC gave to MBF in the year of the breakaway. Count IX alleged that Chapter 352 was unconstitutional in failing to provide due process when MBF filed court papers to cut off MBC's rights, and no one had to give notice to MBC about process. Both of these were alternative theories which would have been reached only if the Court had ruled against MBC on Count VII. Since the trial court has ruled in favor of MBC on Count VII, the Court finds that Counts' VIII and IX are moot, and are hereby dismissed with prejudice.

ISSUES RAISED IN DEFENSE MOTIONS

IV. Defendant's 2012 Motion for Summary Judgment.

On October 15, 2012, Defendant filed a Motion for Summary Judgment asking the Court to enter judgment in favor of the Foundation and against Plaintiff on all claims brought by Plaintiff pursuant to Counts VII, VII and IX of the Fifth Amended Petition.

Defendant also filed at the same time a Motion to Clarify Issues, which asked the Court to vacate the Amended Judgment. Defendant's Summary Judgment could only be granted after vacating the Amended Judgment – which the Court has already declined to do. For the reasons set forth in the Plaintiff's suggestions in opposition, the Court has overruled this motion.

V. Defendant's 2013 Motion to Set Aside or Amend Order dated May 13, 2011.

On October 25, 2013, Defendant filed a Motion to Set Aside or Amend Order dated May 13, 2011. The motion again asks the Court to set aside the Amended Judgment due to a variety of alleged deficiencies, including lack of Plaintiff's standing, lack of notice that the Court would grant such broad relief, and lack of authority to remove the current trustees and replace them with MBC-elected trustees.

Defendant raises some of the procedural arguments, such as the absence of indispensable parties, for the first time after over a decade of litigation. The Court has overruled and hereby again overrules the Defendant's motion for the same reasons it overruled the 2012 motion to clarify issues, and for the reasons set forth in Plaintiff's suggestions in opposition to this motion.

VI. Defendant's 2013 Motion to Dismiss for failure to join indispensable parties.

On October 28, 2013, Defendant filed a motion to dismiss for failure to join necessary and indispensable parties, namely the current trustees. Defendant or its individual trustees have had a decade within which to move to intervene, or otherwise file motions asserting the need for additional parties, but they have failed to do so.

The motion has been and is hereby overruled because the corporation Missouri Baptist Foundation is the only necessary party for the plaintiff's claims. Individual trustees

are not necessary to the claims of plaintiff of the relief awarded by the Court. The interests of the individual trustees, if any, are adequately represented by the Corporation. The corporation may be directed by the Court to recognize the MBC elected trustees in stead of the current trustees.

VII. Defendant's 2014 Motion For Summary Judgment for Mootness.

On or about February 4, 2014, Defendant Foundation's filed another Motion for Summary Judgment, this time asserting grounds of mootness because Defendant has amended its articles since the date of the 2001 amendment cited in Plaintiff's petition.

The fact that the Defendant has changed its articles one time or many times since the breakaway change in 2001 is immaterial.

The Court has voided the amendments adopted in 2001 without MBC approval and has restored the 1994 articles under Chapter 352. This has the effect of voiding every other change to the articles which has been attempted by the Defendant.

Defendant has not previously pled this defense, and the Court holds that the raising it at this late date, after multiple trips to the appeals court, without explanation or justification, is untimely and unavailing. Allowing such a claim would be unfairly prejudicial to Plaintiff and futile because it will not change the undisputed material facts set out in the Amended Judgment and this Supplemental Judgment. For all the reasons set forth by Plaintiff's Suggestions in Opposition to this motion, Defendant's motion for summary judgment is overruled.

NOW THEREFORE, it is ORDERED, ADJUDGED AND DECREED:

1. That Plaintiff The Executive Board of the Missouri Baptist Convention's Application for fees and costs is sustained for the reasons set forth in the Motion and Suggestions, and in the separate Order by this Court.
2. That Defendant's 2012 Motion for Summary Judgment is overruled for the reasons set forth in Plaintiff's suggestions in opposition.
3. That Defendant's 2013 Motion to Set Aside or Amend the Order of May 13, 2011 is overruled, for the reasons set forth in the Plaintiff's suggestions in opposition.
4. That Defendant's 2013 Motion to Dismiss for failure to join indispensable parties is over-ruled for the reasons set forth above, and for the reasons set forth in Plaintiff's suggestions in opposition.
5. That Defendant Foundation's 2014 Motion for Summary Judgment on grounds of mootness is overruled for the reasons set forth above and for the reasons set forth in Plaintiff's suggestions in opposition.
6. That any and all other motions, requests, or suggestions filed by Defendant are hereby overruled as moot, untimely or not properly before the Court.
7. That any other pending motions are hereby denied to the extent not otherwise addressed in this order.

SO ORDERED this 10th day of JUNE, 2014.



Frank Conley
Circuit Court Judge