

United States Courts Southern

District of Texas

FILED

May 5, 2021

Nathan Ochsner, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

John J. Dierlam

Plaintiff

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CIVIL ACTION NO. 4:16-cv-00307

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Defendants

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Opposed Motion to remove Judge Palermo from any further role in this case

Government's Position: On October 16, 2017, this Court referred to United States Magistrate Judge Dena Hanovice Palermo the Government's motion to dismiss for a report and recommendation in accordance with 28 U.S.C. § 636(b)(1)(B). See ECF No. 65. Neither party has consented to a magistrate judge exercising jurisdiction in this case pursuant to 28 U.S.C. 636(c)(1); however, the Government opposes Mr. Dierlam's motion to preclude Judge Palermo from participating in this case and does not oppose the continued involvement of Judge Palermo or the referral of the Government's forthcoming response to Mr. Dierlam's Second Amended Complaint to Judge Palermo for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

Issues Presented

As the issue of the involvement of Judge Palermo was raised by Judge Ellison in the Status Hearing of 4/29/2021, I believe it is necessary to file this motion. Sufficient evidence exists Judge Palermo is biased against myself and or my viewpoint. This bias has significantly colored and will continue to color Judge Palermo's judgment in this case.

Background

On February 4, 2016, I, John J. Dierlam, a citizen of Texas, the United States, and a life long Catholic, filed a complaint in the Southern District Court of Texas against the government, which includes the President of the U.S. and departments of Treasury, Labor, HHS, and their Secretaries. I challenged the constitutionality of defendant's implementation of provisions of the Patient Protection and Affordable Care Act (ACA). In other claims, I challenged the constitutionality of the minimum essential coverage provision, shared responsibility payment provision, and the ACA in general. In the final claim, I request clarification of the term direct taxes so that the principle of the Consent of the Governed is preserved.

On Dec. 8, 2016 motions for Partial Summary Judgment on the first RFRA claim and for a Preliminary Injunction were filed. On Dec. 19, 2016 the government filed a Motion to Stay Briefing. I filed to Appeal the Stay, which was denied by the Appeals Court and later the Supreme Court. I filed an unsuccessful Motion to Reassign the District Court Judge which was denied. On 10/3/2017, Judge Hoyt recused himself and the case was reassigned to Judge Ellison. Judge Ellison appointed Magistrate Judge Palermo for a Report and Recommendation. Judge Ellison accepted the R&R and dismissed the case on 6/14/2018. I appealed. On 10/15/2020 the Appeals Court vacated and remanded the case. I was not successful in an Appeal to the Supreme Court, which denied Certiorari on 2/22/2021. The case is now back in District court.

Argument

It appears events have come full circle. Little if any progress has occurred retrospectively or prospectively. With the new administration and Congress, it is likely the TCJA of 2017 will be mostly reversed and the Individual Mandate Penalty will again be raised above \$0. The Individual Mandate was never removed from the Law. Once the penalty is raised, any Supreme

Court decision in *California et. al. v. Texas et. al.*, Supreme Court No. 19-840 is irrelevant. In addition, President Biden has indicated he will roll back the religious exemption to the HHS Mandate. See <https://www.nbcnews.com/politics/white-house/biden-readies-sweeping-rollback-trump-era-abortion-crackdown-n1254552> and <https://www.catholicnewsagency.com/news/45106/biden-plans-to-end-contraception-exemption-for-little-sisters> My fears were very well grounded in reality. Events seem to have unfolded in alignment with my earlier filings. Religious freedom is under unceasing attack. As I have stated before, the HHS individual religious exemption President Trump inspired is very much inadequate in general and even more so in the instant case. It is quite possible the government will change its position yet again. Inalienable rights should not depend on the party or person in power, yet it appears to be the current reality. Regardless, the need for any mootness analysis is almost laughable at this point.

Judge Ellison ruled to dismiss the case with prejudice, which was the Recommendation of Judge Palermo's R&R. Judge Ellison has the responsibility of this final decision. The issues I presented in my brief to the Appeals Court were in regard to specific errors of the presiding Judge. However, the Appeals court chose not to directly address the issues presented regarding these errors. The Appeals Court on p.11 of their decision did appear to go out of their way to note in regard to at least some of Judge Palermo's conclusions, "These are merits issues, not mootness issues." The Original Complaint contains eight claims or counts with several of these containing sub-claims. Judge Palermo disposed of three claims in footnotes in a manner which did not properly reflect the substance of the claims. She focused the rest of the R&R on an RFRA claim, actually there are three RFRA claims contained along with other Constitutional violations in

three of the major claims. She failed to address the remainder of the claims whatsoever. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). My understanding is merit issues are not decided in the Pleading phase which would encompass a MTD. Merit issues and the probability of success on the merits are explored at a later phase of a case. If much of the "factual matter" is simply ignored and/or not "view[ed]...in the light most favorable to the plaintiff,"¹ a burden is placed upon me much higher than required by this standard. Therefore, as indicated by the decision of the Appeals court the raising of these issues by Judge Palermo at this point was inappropriate and certainly Judge Palermo did not view the facts in "the light most favorable to the plaintiff." Judge Palermo's comment on the bottom of p.23 of the R&R and her reasoning to dismiss with prejudice on the next page, I find factually flawed and displays a personal animus which is also inappropriate. Although the government changed its position during Judge Palermo's R&R, the problems with her analysis go far beyond this fact. Recent events as mentioned above as well as the Appeals Court decision underscore not only how wrongheaded was Judge Palermo's legal analysis, but I see too much evidence to make any other conclusion than this judge holds such great malice to purposely misrepresent the facts and the law and thereby tip the scales of justice against my case.

Conclusion

Given the past history of this case and the degradation of the rule of law in this country, I greatly doubt this case will ever receive a fair hearing. Much of what I write in Briefs, Motions, and Responses appears to be ignored as if it never existed by all courts. However, I am currently

¹ *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012)

determined to persevere. It is very possible another Magistrate justice will be as biased or show even more policy advocacy than Judge Palermo especially given the increasing corruption of the judiciary. The available evidence indicates Judge Palermo's continued involvement will cost both parties needless time and effort to correct the Judge's misstatements of law and fact. Judge Palermo appears determined to pursue the advocacy of a particular policy agenda. I expect this behavior from a defendant or other party to a proceeding, not a Judge. I made similar arguments in my response to the R&R several years ago and mentioned any reliance upon the R&R would lead to erroneous conclusions, which obviously had no effect or impact. (See Dkt.#69 and #74; Dkt#73 and #75 are the Government's Response and my Reply) For the reasons above, I oppose Judge Palermo's continued involvement in this case.

/s John J. Dierlam

Certificate of Service

I certify I have on May 4, 2021 mailed a copy of the above document to the clerk of the court at:

United States District Clerk
Southern District of Texas
515 Rusk, Room 5300
Houston, TX 77002

as I do not have access to the Court's electronic filing system. I have also mailed a copy to Defendant's Counsel at:

Emily S. Newton
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Room 7132
Washington, DC 20530

I have emailed a courtesy copy to the Defendant's counsel at Emily.S.Newton@usdoj.gov as well as the Case Manager for Judge Ellison at Arturo_Rivera@txs.uscourts.gov.

Date: 5/4/2021
s/ John J. Dierlam
5802 Redell Road
Baytown, TX 77521
Phone: 281-424-2266

Certificate of Conference

I certify I have on May 3, 2021 conferred with Emily S. Newton via email. The government opposes this motion and requested the paragraph starting with "Government's Position" be added to this Motion.

Date: 5/4/2021
s/ John J. Dierlam
5802 Redell Road
Baytown, TX 77521
Phone: 281-424-2266

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

John J. Dierlam	§	
	§	
Plaintiff	§	
	§	
versus	§	
	§	CIVIL ACTION NO. 4:16-cv-00307
	§	
Joseph R. Biden, in his official capacity	§	
as President of the United States et. al.	§	
	§	
Defendants	§	

[Proposed] Order

After due consideration, it has been decided Judge Palermo will have no further role in this case.

The Honorable Keith P. Ellison
United States District Judge