STATE OF MICHIGAN

COURT OF APPEALS

ROBERT DAVIS, Plaintiff-Appellee,	UNPUBLISHED December 18, 2012
v	No. 310653 Ingham Circuit Court
CITY OF DETROIT FINANCIAL REVIEW TEAM, STATE TREASURER, STATE OF MICHIGAN, GOVERNOR OF MICHIGAN, and DEPARTMENT OF TREASURY, Defendants-Appellants.	LC No. 12-000363-CZ

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

In this interlocutory appeal, defendants appeal by delayed leave granted from an order of the circuit court denying plaintiff's motion for an evidentiary hearing, granting defendants' motion to quash subpoenas, authorizing discovery including the taking of three depositions by plaintiff, and adjourning plaintiff's motion for declaratory judgment and injunctive relief. We reverse the portion of the order authorizing limited discovery, and remand this case to the trial court for further proceedings not inconsistent with this opinion.

I. FACTS

On December 6, 2011, the Department of Treasury began a preliminary review of the finances of the City of Detroit under the Local Government and School District Fiscal

Accountability Act,[1] to determine whether a financial problem existed. On December 21, 2011, the State Treasurer filed a preliminary review with the Governor, finding that probable financial stress existed, and recommending that a financial review team be appointed. On December 27, 2011, the Governor appointed a financial review team. On March 26, 2012, the review team submitted its recommendations to the Governor.

On April 4, 2012, the review team and Detroit City Council voted to approve a consent agreement titled the Financial Stability Agreement. On April 5, 2012, the Governor determined that the City was in a condition of severe financial stress, and signed the Financial Stability Agreement.

On April 5, 2012, plaintiff filed a complaint, seeking a declaratory judgment and injunctive relief. Plaintiff asserted that the Financial Stability Agreement violates the prohibition of unfunded mandates clause of the Headlee Amendment, Mich Const 1963, art 9, § 29, by creating an unfunded mandate. The same day, plaintiff also filed an emergency motion for declaratory judgment and injunctive relief, raising the same issue.[2]

On April 13, 2012, defendants responded to the motion, asserting that they were entitled to summary disposition under MCR 2.116(I)(2). Defendants filed an answer on April 26, 2012. The same day, plaintiff moved for an evidentiary hearing to properly make a record, and subpoenaed eight witnesses to appear for a May 9, 2012 motion hearing. Defendants argued that an expedited evidentiary hearing was unwarranted, and that if further fact finding was necessary for plaintiff's claims, the normal course would be to conduct discovery pursuant to MCR 2.300 and 2.401.

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[1] The version of this legislation then in effect, MCL 141.1501 *et seq*.; 2011 PA 4, was repealed with the rejection of Proposal 1 in the November 2012 election. We do not deem the repeal of 2011 PA 4, however, as rendering this case moot. The latter enactment repealed and replaced MCL 141.1201 *et seq*.; 1990 PA 72. This Court decreed in an order involving the instant plaintiff that the repeal by referendum of 2011 PA 4 caused it to have no effect, and thus that 1990 PA 72 remains in effect. *Davis v Roberts*, unpublished order of the Court of Appeals, issued November 16, 2012 (Docket No. 313297). The provisions of 1990 PA 72 for appointment of a review team, with authority to enter consent agreements, fairly parallels the pertinent provisions of 2011 PA 4, such that the review team and consent agreement here at issue may now be deemed to have come about under the authority of the former version of the Local Government and School District Fiscal Accountability Act. Compare 2011 PA 4, §§ 12(3), 13(1)(c) with 1990 PA 72, §§ 13(1)(b), 14(1)(c).

[2] Plaintiff's emergency motion for declaratory relief was scheduled to be heard on April 18, 2012. The trial court adjourned the motion, and rescheduled the hearing for May 16, 2012.

The court heard argument on plaintiff's motion for an evidentiary hearing, and defendants' motion to quash, on May 9, 2012.[3] Plaintiff stated that he intended "to try to take testimony as to some of the issues in this Headlee complaint on the Detroit consent agreement," and that he wanted discovery to determine "whether [the City] intended to waive Headlee and whether [the City] voluntarily entered into the consent agreement." Defendants responded that Headlee was a legal issue, summary disposition was appropriate, and discovery unnecessary. The court stated that it would give plaintiff the opportunity to take two or three depositions, and if that was not sufficient, plaintiff could ask for more. The court adjourned the hearing that was set for May 16, 2012, and stated that defendants' motion would be heard later. The court stated that it would allow plaintiff the opportunity to make a full record, and invited the parties to file supplemental briefs before the hearing on plaintiff's emergency motion for declaratory relief, after the completion of discovery. The order reflecting what was decided at the May 9, 2012 hearing was entered on May 29, 2012. On the following day the trial court granted defendants' motion for stay pending appeal.

On June 8, 2012, defendants filed an emergency application for leave to appeal from the May 29, 2012 order. This Court granted the motion on June 26, 2012, and ordered that the case be expedited.

II. STANDARD OF REVIEW

"This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion." *Shinkle v Shinkle* (*On Rehearing*), 255 Mich App 221, 224; 663 NW2d 481 (2003).

III. ANALYSIS

Defendants argue that the trial court failed to consider their response to plaintiff's motion "without delay" pursuant to MCR 2.116(I)(1), that plaintiff failed to comply with MCR 2.116(H), and that the trial court erred when it did not address their response to plaintiff's motion before allowing limited discovery. Defendants frame the alleged error in terms of the trial court being required to hear and decide defendants' motion before deciding whether to allow limited discovery. However, it appears that the crux of the issue is whether the trial court had the authority to permit the limited discovery, not whether the court was obligated to address defendants' motion first.

"Michigan has long espoused a liberal discovery policy that permits the discovery of any matter, not privileged, that is relevant to the subject matter involved in a pending case." *Hamed v Wayne Co*, 271 Mich App 106, 109; 719 NW2d 612 (2006), citing MCR 2.302(B)(1). MCR 2.302(B)(1) sets forth the general scope of permissible discovery:

[3] Defendants report that the trial court had informed the parties by letter that the subpoenaed witnesses would not be required to appear at this proceeding, although a copy of no such letter appears in the lower court record.

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Relevant means "Logically connected and tending to prove or disprove a matter in issue; having appreciable probative value—that is, rationally tending to persuade people of the probability or possibility of some alleged fact." Black's Law Dictionary (9th ed), p 1404.

Here, plaintiff has failed to establish that the depositions sought were relevant. Accordingly, the trial court abused its discretion in authorizing the discovery.

Plaintiff's Headlee claim

The Headlee Amendment was passed by voters in 1978. The first sentence addresses existing service or activity. Claims under this sentence are known as "maintenance of support" or "MOS" claims. The second sentence addresses future service or activity. Claims under this sentence are known as "prohibition of unfunded mandates" or "POUM" claims. *Adair v Michigan*, 486 Mich 468, 478; 785 NW2d 119 (2010).

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. [Const 1963, art 9, § 29.]

According to MCL 21.232(1),

> "Activity" means a specific and identifiable administrative action of a local unit of government. The provision of a benefit for, or the protection of, public employees of a local unit of government is not an administrative action.

And according to MCL 21.234(1),

> "Service" means a specific and identifiable program of a local unit of government which is available to the general public or is provided for the citizens of the local unit of government. The provision of a benefit for, or the protection of, public employees of a local unit of government is not a program.

Plaintiff's complaint states that three portions of the Financial Stability Agreement violate the provision prohibiting unfunded mandates. Pursuant to the first portion of the

agreement, the City would pay half the annual compensation of each of the nine members on the Financial Advisory Board,[4] which adds up to $112,500 a year. Under the second portion, the City would pay $13,500 a year to cover the reimbursable expenses of the Financial Advisory Board members. Under the third, the City would pay the salary of a Chief Financial Officer and a Program Management Director, which are new "Director" positions under the City's charter. The Mayor of Detroit and the State Treasurer set the salary for these positions. According to plaintiff, these three obligations are new "activities" or "services" under the Headlee amendment, arguing as follows:

> Plaintiff alleges herein the "increased costs" that are "necessary" to fulfill the Defendants' mandates for the "new" or "increased activity or service" with the appointment and creation of 9-member Financial Advisory Board and the creation of the positions of Chief Financial Officer and Program Management Director, which requires the City of Detroit to pay increased costs that exceed well over $500,000.

Plaintiff asserted below that the depositions were necessary to elicit testimony "whether [the City] intended to waive Headlee and whether [the City] voluntarily entered into the consent agreement." In his brief on appeal, plaintiff elaborates:

> Plaintiff . . . seeks to determine whether certain monetary terms and commitments contained in the Consent Agreement/Financial Stability Agreement, were 1, *required* by the Defendants, or rather, 2, did the City of Detroit voluntarily propose the monetary undertakings contained therein. Also, 3, will discovery testimony indicate that the City of Detroit discussed, considered and decided to implicitly waive its "Headlee" claims against the state's imposition of costs for this new service? [Emphasis retained.]

The trial court provided little reasoning for its decision, stating, "I am going to make the same kind of ruling I made before and that is that you need to do some discovery." It also sought to provide a "full record" for "whoever wishes to review this."

Even assuming, without deciding, that the City of Detroit's obligations under the Financial Stability Agreement are properly characterized as "activity" or "service," plaintiff's POUM claim is fundamentally flawed because none of the obligations he identifies is "required by the legislature or any state agency." Const 1963, art 9, § 29. On the contrary, they are required by the terms of the Financial Stability Agreement, an agreement that the City voluntarily entered into when the Detroit City Council voted and approved it. Accordingly, the information plaintiff "seeks to determine" via the depositions is not "relevant to the subject matter involved in the pending action," MCR 2.302(B)(1), because it would not help him prove or disprove a matter in issue. What occurred during the course of negotiations, and who proposed the "monetary undertakings," are irrelevant to any alleged Headlee violation. Even assuming plaintiff's best-case scenario—that defendants insisted (or "required" as plaintiff puts

[4] The Financial Advisory Board administers and executes the Financial Stability Agreement.

it) that these provisions be in the Financial Stability Agreement—the Detroit City Council nonetheless agreed to undertake these obligations and abide by the provisions. In sum, the discovery is not relevant to the subject matter involved because it would not help plaintiff prove or disprove a matter at issue. Accordingly, the trial court abused its discretion in authorizing the discovery.

We reverse the portion of the order authorizing limited discovery and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio