

POLOVCHAK v. SMITH

United States District Court for the Northern District of Illinois Eastern Division

August 2, 1984

No. 80 C 5595

Reporter: 1984 U.S. Dist. LEXIS 24601

ANNA POLOVCHAK and MICHAEL POLOVCHAK, Plaintiffs, v. WILLIAM FRENCH SMITH, et al., Defendants, WALTER POLOVCHAK, Defendant-Intervenor by his next friends, Walter Polowczak and Natalie Polovchak.

Opinion by: [*1] McMILLEN

Opinion

DECISION

Plaintiffs, parents of the Intervenor Walter Polovchak, have filed a motion to dismiss the Counterclaim of the Intervenor, their son. This Counterclaim requests a declaratory judgment that his status as a political refugee and/or permanent resident in the United States bars any claim of the plaintiffs to remove him to the Soviet Union. Several subsequent motions filed by other parties are pending in their rather protracted but unusual litigation but have not been reached for decision. We do not find that they will be affected by a decision on the pending motion which is directed only against the pleading filed on behalf of the minor Intervenor.

It should be noted at the outset that the young Intervenor is not yet sui generis. The Illinois Supreme Court has ruled that he is not beyond parental control and that the plaintiffs are entitled to his custody if and when they return to the United States. In re Walter Polovchak, 97 Ill. 2d 212 (1983). Nevertheless, he is suing by his next friends, a sister and a cousin, who are adults. He is also a third party defendant to the government's complaint.

The Counterclaim contains an argumentative discourse [*2] on the struggle between plaintiffs as parents and the Intervenor, by his sister and cousin, over whether he should remain in the United States or be returned to his parents in the Soviet Union. The Counterclaim seeks to invoke various amendments of the Constitutions of the United States, and of Illinois, as well as certain Federal statutes. This pleading is best evaluated by examining its three "Claims for Relief" beginning at P31.

The First Claim for Relief relies on the actions of the Immigration and Naturalization Service. Plaintiffs properly point out that the grant of asylum or permanent residency by I.N.S. does not supersede their rights as

parents. The Illinois Supreme Court has confirmed those rights, and the only thing which the I.N.S. has done is to give the Intervenor a conditional right to stay in this country, subject to the parents' right to remove him. This particular issue does not constitute an existing controversy so far as we know, but if the rights of the child and of the parents cannot be reconciled, then it is our opinion that the rights of the parents prevail over the status conveyed upon the Intervenor Walter by I.N.S. cf. Wisconsin v. Yoder, 406 U.S. [*3] 205 (1972); see also Bellotti v. Baird, 443 U.S. 622, 635-36 (1979).

The Immigration and Naturalization Service has also entered an order purporting to prohibit the Intervenor's departure from this country. We do not constitute this to be an order conflicting with his parents' right of custody. The I.N.S. apparently relies on § 215 of the Immigration and Naturalization Act (8 U.S.C. § 1185) as authority to order an absolute bar to the removal of the Intervenor from the United States. Such an order is authorized under the foregoing statute only during periods of war or national emergency. The government has not shown that these preconditions to the I.N.S. order have been satisfied, but we will dismiss this portion of the Intervenor's Counterclaim for the above reasons.

Intervenor's second claim for relief is based on alleged violations of various constitutional and civil rights, included and beyond those protected by 42 U.S.C. § 1983. Specifically, Intervenor alleges that his right to religious freedom, to free speech, and not to be punished for the desire to live in the United States would be irreparably damaged by removal of him to his parents' custody in the Soviet Union. [*4] Plaintiffs are not subject to § 1983, however, because they are not acting under color of state law.

Although the Intervenor has not been damaged by any of these alleged acts up to this time, he does seek injunctive relief as well as a declaratory judgment. We find no actual case or controversy which would support a declaratory judgment between these parties, other than the case and controversy involved in the complaint. A declaratory judgment is therefore unnecessary and superfluous in order to resolve the controversy in the complaint, since the Intervenor is now also a defendant.

Much the same can be said as to the prayer for injunctive relief. If plaintiffs are successful in their complaint,

injunctive relief against removal would of course be inconsistent. If plaintiffs fail in their complaint, injunctive relief would be unnecessary. At least it would be superfluous because a decision as to the Federal defendants could be accompanied by whatever remedial order is necessary to enforce the judgment. Therefore, the Intervenor's second claim for relief should be dismissed.

The mere filing of a lawsuit by plaintiffs is not a violation of § 1983. Bloomer Shippers Association [*5] v. Illinois Central Gulf Railroad Co., 655 F.2d 772 (7th Cir. 1981). Despite his protestations to the contrary, Intervenor is really seeking a declaratory judgment under § 1983 contrary to the ruling of the Illinois Supreme Court. He is bound by that ruling, and the Illinois Supreme Court is immune from any action for damages or other relief under Pierson v. Ray, 386 U.S. 547 (1967). Whatever other Federal constitutional right may be possessed by the

Intervenor arise from the grant of asylum by the I.N.S., a validity of which is at issue in the original complaint.

Intervenor's third claim for relief is substantially the same as the second, except that it is based upon alleged violations of the Constitution of the State of Illinois, rather than the federal constitution. For the reasons stated under Count II and for the further reasons that the Intervenor has not advanced any argument in his brief to distinguish the third claim from the second claim, it will likewise be dismissed.

Since all of the three claims alleged in the Counterclaim filed by the Intervenor on November 21, 1983 have no legal significance, and since the other allegations of the Counterclaim are superfluous, [*6] the motion of the plaintiffs to dismiss is granted. The Intervenor's answer and numerous affirmative defenses suffice to protect his interests.