2001

West Gallery Corporation, a Utah Corproation, dba Gallery I Theater, Don Walls and Linda Tolliver v. Salt Lake City Board of Commissioners : Brief of Respondent

Utah Supreme Court

Roger Cutler; City Attorney; Ray L. Montgomery; Assistant Salt Lake City Attorney; Attorneys for Appellant.
Bruce C. Lubeck; Attorneys for Respondents.

OF THE STATE OF UTAH

WEST GALLERY CORPORATION, a Utah corporation, dba GALLERY I THEATER, DON WALLS and LINDA TOLLIVER,
Plaintiffs-Respondents,

vs.

SALT LAKE CITY BOARD OF COMMISSIONERS,
Defendant-Appellant.

Case No. 13963

BRIEF OF RESPONDENTS

Appeal from a judgment of the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, presiding.

BRUCE C. LUBECK
Twelve Exchange Place
Salt Lake City, Utah
Attorneys for Respondents

ROGER CUTLER
City Attorney
RAY L. MONTGOMERY
Assistant Salt Lake City Attorney
Room 101, City and County Building
Salt Lake City, Utah 84111
Attorneys for Appellant

TABLE OF CONTENTS

Page

CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

WEST GALLERY CORPORATION, a Utah corporation, dba GALLERY I THEATER, DON WALLS and LINDA TOLLIVER,
Plaintiffs-Respondents,

vs.

SALT LAKE CITY BOARD OF COMMISSIONERS,
Defendant-Appellant.

Case No. 13963

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from an order of the court below granting respondents' motion to enjoin appellant from having a hearing without following its own ordinances and until the related criminal case had been resolved.

DISPOSITION IN THE LOWER COURT

Resposlents sought injunctive relief against appellant and obtained an order enjoining the hearing appellant sought.

RELIEF SOUGHT ON APPEAL

Respondents seeks the dismissal of the instant appeal or, in the alternative, the affirmance of the court's order.

STATEMENTS OF FACTS

On November 19, 1974, appellant caused to be served a notice of violation against respondents for showing an allegedly obscene movie, to wit: "Marriage and Other Four Letter Words". (R.19) An Order to Show Cause was issued by appellant on November 20, 1974, (R.18) requiring respondents to appear and show cause why their business revenue and regulatory licenses should not be revoked. Thereafter, on November 22, 1974, respondents sought and obtained a Temporary Restraining Order restraining the hearing by appellant. (R. 21, 31) On that date an Order to Show Cause was set for December 2, 1974, requiring appellant to show cause why it should not be enjoined from holding a hearing. On December 2, 1974, respondents Motion for a Preliminary Injunction *pendente lite* was granted. (R. 34). That is reflected in the lower court's order of December 17, 1974, (R. 35) from which this appeal is sought.

The Record on Appeal contains the Salt Lake City Ordinance allegedly violated and the procedures set up to revoke a license for violating an Ordinance. (R. 5-17) The procedures set up by appellant for revoking a license are set forth in Section 20-20-18 et. seq. (R. 12-17) Basically, an advisory council was set up and that council was empowered to hold hearings and make findings as to whether or not a violation of the Ordinance had been committed. Those findings were to be forwarded to appellant Commissioners who then determined if a license should be revokel. (R. 13-15)

In this case the record reveals those procedures were not followed. In fact, on January 14, 1975, those procedures were repealed. (R. 39)

After the Order of December 17, 1974, (R. 35) which, when carefully read, simply says that appellant had to follow its ows ordinances in trying to revoke a license, respondents stood trial in Salt Lake City Court on a charge of violating a City Ordinance by showing an allegedly obscene movie, "Marriage and Other Four Letter Words". The criminal charge was filed before appellant's order to show cause. This is the same alleged conduct that resulted in appellant's original Order to Show Cause. (R. 18-19) That trial resulted in a verdict of not guilty as to respondent Walls and a dismissal of the case as to respondent Tolliver. (Exhibit "B", Affidavit) Therefore, the Salt Lake City Court case referred to in the Order appealed from (R. 35, 36) has been concluded, favorably to respondents.

ARGUMENT

POINT I

THE INSTANT APPEAL SHOULD BE DISMISSED BECAUSE THERE ARE NO ISSUES IN THIS CASE AND THE APPEAL IS MOOT.

It is beyond dispute that this court will not decide abstract or moot questions to esablish a precedent or to guide future litigation. See e.g., *Mikkelsen v. Utah State Tax Commission*, 22 Utah 2d 438, 455 P.2d 27 (1969).

In this case any issue raised by the Order appealed from (R. 35-36) is now moot because the Salt Lake City Court criminal litigation has now terminated. The Order itself refers in Paragraphs 2 and 3 to the criminal proceedings and simply says that no action can be taken by appellant while the criminal case is pending. It is not now pending, and the Order of the court below has expired, and so this court has no issue facing it.

The issues in the Order do not now rest upon existing facts, and an event has occurred (conclusion of the criminal case) which changes the Order in essence and Paragraphs 2 and 3 of the Order do not have any effect.

It is true that the injunction still needs to be dissolved but the dispute that brought the case here (can appellant hold a hearing to see if respondents violated

an Ordinance when the same question is pending in a criminal case involving the same alleged perpetrators) has ceased to exist. How could there be a question as to that if there is now no criminal case? What decision could this court render that would do more than guide future litigation. If this court reversed the lower court that would have no effect because appellant could not now have a hearing while the other case is pending because it is not pending. To affirm the lower court would also be an empty gesture because it would be to say the appellant could not in the past have held a hearing while a criminal case was pending. That would be a guide to future litigation, but this court has often held it does not hear and decide cases for that reason.

Further, the court's Order in Paragraph 1 said that appellant must follow its own procedures, which have since been repealed. (R. 39) This clearly makes the issues of Paragraph 1 moot. See, e.g., *Mikkelsen, supra,* for a case becoming moot "by reason of new legislation, or by reason of the expiration or the superceding of existing litigation". 22 Utah 2d at 27.

Thus, as this court's decision would be no more than an advisory opinion on moot issues, respondents pray that the appeal be dismissed.

POINT II

THE COURT BELOW DID NOT ACT PREMATURELY OR ABUSE ITS DISCRE-

TION IN ORDERING APPELLANT TO ABIDE BY ITS OWN ORDINANCES AND ENJOINING A HEARING TO DETERMINE THE ALLEGED OBSCENITY OF A FILM WHEN THAT IDENTICAL ISSUE WAS PENDING IN A CRIMINAL CASE.

Appellant's brief seems to be couched in terms of asking this court to overturn action of a lower court which engaged in a raw abuse of power and interfered with a municipal governing body's license revocation powers totally without cause and in a setting of a normal license revocation hearing. This simply is not such a case. The events of this case are completely unique and must be examined in detail to see what the court below actually ruled.

Salt Lake City enacted ordinances (R. 12-17) which set forth in detail the procedures appellant Board of Commissioners was to follow to determine whether or not a license should be revoked or suspended because of a violation of Section 20-20-18.1 of the ordinances. (R. 12) In this case those procedures were not followed by appellant but instead appellant chose to have a hearing on its own initative to determine if a violation existed and hence a license should be revoked. The court below simply ruled appellant could not proceed in such a manner. The court below did not "interfere" with appellant in its everyday practice of holding some sort of hearing. The court below "interfered" with appellant by ruling that it must follow the very procedures it enacted.

Respondents contend that this factual background entirely negates appellant's argument in Points I and II of its brief. The cases cited by appellant for the proposition that the court abused its discretion are simply not in point nor persuasive. For example, in *Aircraft and D. Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947), which appellant cites for the proposition that a court cannot take jurisdiction before a final administrative act, the Supreme Cour was dealing with a case where Congress had set up administrative procedures for the correction of abuses and so the court could not hear the matter until those procedures had been complied with. In *Myers v. Bethlehem Shipbuilding Corp.*, 503 U.S. 41, cited by appellant, the Supreme Court actually held as it did because the order of the N.L.R.B. was unenforceable until said order had been affirmed by the Circuit Court of appeals, and so an action to enjoin the N.L.R.B. in federal district court would not lie.

Appellant also cites an opinion of this court, *Shelton v. Lees*, 8 Utah 2d 88, 326 P.2d 386 (1958). That case is not in point in the slightest. *Shelton* dealt only with the statute, Utah Code Annotated, 58-22-19 (1953), which set forth what is to be reviewed and provided that the Department of Registration was to be either affirmed or reversed on review by the district court but a trial de novo was not to be held by the district court. Such a ruling by the court does not support appellant's position in this case.

The lower court's ruling was based on the rationale that appellant had to follow its own ordinances. The ruling went on, however, to say that even if appellant could deviate from its own orlinances it could not hold a hearing during the pendency of a criminal case involving the same issue (obscenity or non-obscenity of a movie entitled "Marriage and Other Four Letter Words") and basically the same parties. (Salt Lake City, a Municipal corporation, v. Don Walls, James Piepenberg, and Linda Tolliver). The court's ruling on this issue is correct because the issues involve First Amendment claims.

Appellant cites cases dealing with liquor licenses, child care homes, tax matters, food purveyors licenses, anl so on. None of the cases deal with the issues of free speech as does this case. That distinction is critical. The United States Supreme Court has often dealt with procelures used by various governmental bodies in attempting to deal with allegedly pornographic materials and their operation on protected free speech.

The starting point is *Freedman v. Maryland*, 380 U.S. 51 (1965). In that case Maryland had a rather elaborate system dealing with the submission of movies to a Board of Censors before a movie could be shown. The film exhibitor did not submit the movie in question and challenged the statutory scheme's constitutionality on its face. The Maryland scheme fell short in several areas. The exhibitor had the burden of instituting jud-

icial proceedings persuading the court that material was protected by the First Amendment. The second infirmity was that the exhibition was barred until judicial review was completed. Thirdly, the scheme was held to be invalid because it provided no assurance of prompt judicial determination.

More recently and in light of *Freedom* the United States Supreme Court struck down Chicago's censorship ordinance. In *Tietel Film Corp v. Cusack*, 360 U.S. 139 (1968), Chicago had an administrative procedure which, by its terms, could take from 50 to 57 days to complete before judicial proceedings could be instituted. That was one reason for the invalidity of the scheme under the dictates of *Freedman.* The court also held the Chicago ordinances violative of the constitution because there were no provisions for a prompt judicial decision.

The above cases represent a much more specific attempt at proper regulation than does the one in this case. Here, there are absolutely no provisions existing that appellant was to follow. At least in *Cusack* there were some guidelines, even though invalid. Here, appellant on its own, not even following its own ordinances, just seemingly devised a system whereby it ordered an order to show cause for responlents to come in and show cause why their licenses should not be revoked.

Such a "scheme" magnifies each and every one of the three evils that the Court struck down in *Freedman*. First, the Court made it clear that the burden must rest on the censor to prove the material is not protected, i.e., the censor must show the material obscene. In this case while there is no censor's board, the effect is the same in that if the license was revoked that would amount to a final restraint.

Secondly, if the license were revoked clearly no showing of the material could exist while judicial review was sought. That exact feature was declared invalid in *Freedman* but at least there the ordinances specified the exhibitor could seek judicial review. As mentioned here, there is nothing setting forth any procedures to secure review and seemingly the exhibitor is left to his own imagination as to how to secure judicial review.

The third failure of the ordinances *Freedman* and *Cusack* decried was that there was no assurance of prompt judicial review. In *Cusack* times were specified but they were too lengthy. This requirement exists so that the decision of some board will not amount, in practical effect, to a final restraint without a judicial proceeding. Again, here there is no such procedure set up. Seemingly, if the license was revoked, respondents would somehow have to find their way through the local courts in a time consuming procedure to see if a court agreed with appellant's decision that the material was not protected.

Those evils are precisely what the Court in *Freedman* and *Cusack* held may not exist. Only after an adversary judicial proceeding can a valid final restraint exist. This "scheme" or impromptu procedure attempted by appellants illustrates the dangers the court ten years ago sought to eliminate.

Appellant has suggested that respondents could not get a court to interfere because maybe they would have nothing to complain about because appellant may not have revoked their license. Aside from real life practicalities in this case that argument totally fails in light of *Freedman*. There too, the exhibitor did not know if his movie could have "passed" the censor's board or not as he did not even submit it. The exhibitor there went to court before the censor acted and got a court to say, by declaratory judgment, the scheme was invalid. Here respondents sought the same thing in effect though via an injunction rather than declaratory judgment. Therefore, the argument that respondent was "premature" in going to court is totally rejected in *Freedman*.

For these reasons respondents submit that the court below was correct and that its judgment should be affirmed.

CONCLUSION

For the reasons above stated, that the appeal is moot, respondents respectfully submit that the appeal should be dismissed. In the alternative, for the reasons above stated, the judgment and order of the court below should be affirmed.

Respectfully submitted,

BRUCE C| LUBECK

Attorney for Respondents