

STATE OF INDIANA )  
 ) SS:  
ST. JOSEPH COUNTY )

ST. JOSEPH CIRCUIT COURT  
CAUSE NO. 71DO7-1209-MI-000159

SOUTH BEND COMMON COUNCIL )  
 )  
Petitioner, )  
 )  
v. )  
 )  
SOUTH BEND CITY ADMINISTRATION )  
 )  
Respondent. )

- FILED -

JAN 29 2018

Clerk  
St. Joseph Superior Court

ORDER ON SOUTH BEND COMMON COUNCIL'S MOTION TO DISMISS  
INTERPLEADERS' COMPLAINT

This cause came on for hearing on December 18, 2017, on the Motion to Dismiss Intervenor's Complaint for Declaratory Judgment for Lack of Subject Matter Jurisdiction (the "Motion to Dismiss") filed by Plaintiff, South Bend Common Council (the "Council") on October 27, 2017. By its Motion to Dismiss, the Council seeks the dismissal of the Complaint for Declaratory Judgment filed on September 25, 2017 (the "Intervenor's State Court Complaint") filed by the Intervenor herein, Tim Corbett, Dave Wells, Steve Richmond, Brian Young and Sandy Young (collectively, the "Intervenor's").

The Council appeared at the hearing by its counsel, Attorney Robert J. Palmer. Defendant, South Bend City Administration (the "Administration") appeared by its counsel, Attorney Ryan G. Milligan and Attorney A. Scott Chin. The Intervenor appeared by their counsel, Attorney Daniel H. Pfeifer. Following the hearing on December 18, 2017, the parties filed supplemental briefs on the issue of the effect of the dismissal with prejudice of Intervenor's Complaint in Federal Case No. 532 (as defined below). With the filing of those post-hearing briefs, the issues raised by the Motion to Dismiss have been fully briefed and argued.

## FACTUAL BACKGROUND

This case involves the production of some audio recordings (the “Recordings”) in the possession of the Administration. The parties seem to be in agreement that the Recordings involve recorded telephone conversations in which the Intervenors were participants. The crux of the dispute in this case is whether or not the Recordings were illegally made and/or whether or not production of the Recordings pursuant to a subpoena issued by the Council would violate Indiana or Federal law.

## PROCEDURAL BACKGROUND

The chronology of the relevant procedural history of this matter may be summarized as follows:

1. On August 14, 2012, the Council issued a subpoena pursuant to I.C. §36-4-6-21(b)(2), demanding that the Administration produce certain of the Recordings to the Council (the “Original Subpoena”). A second Subpoena was issued by the Council on January 23, 2015 (the “Second Subpoena”). The Second Subpoena requested the same recordings as the Original Subpoena, plus some additional recordings.
2. On August 30, 2012, the Administration filed a lawsuit in the United States District Court for the Northern District of Indiana, seeking a declaratory judgment as to the Recordings. That lawsuit is identified as Cause No. 3:12-cv-475 (“Federal Case No. 475”).
3. On September 14, 2012, the Council filed in this Court its Motion to Compel Compliance with the Subpoena. It was that Motion that initiated the above-captioned cause.
4. On October 2, 2012, this Court entered its order staying this case pending the outcome of the Federal lawsuits.
5. On October 25, 2012, the Intervenors filed an “Amended Complaint for Damages, Declaratory Judgment and Permanent Injunction” in another Federal lawsuit in the United States District Court for the Northern District of Indiana. That lawsuit is identified as Cause No. 3:12-cv-532 (“Federal Case No. 532”).

6. On January 17, 2013, Federal Case No. 475 and Federal Case No. 532 were consolidated by the United States District Court for the Northern District of Indiana.
7. On or about November 12-13, 2013, the Administration and the Intervenors entered into a Release and Settlement Agreement (hereinafter referred to as the "Settlement Agreement").
8. On December 17, 2013, the Administration and the Intervenors (along with former South Bend Police Chief Darryl Boykins) filed their Stipulation of Dismissal with Prejudice, whereby those parties stipulated to the dismissal of Federal Case No. 532 (the Federal lawsuit initiated by Intervenors).
9. On April 10, 2014, the United States District Court approved the Stipulation of Dismissal over the objection of another party to that lawsuit, Karen DePaepe, and Federal Case No. 532 was dismissed with prejudice.
10. On July 14, 2015, following a bench trial, the United States District Court entered a decision and final judgment in Federal Case No. 475 (the "Federal Court Judgment").
11. On February 6, 2015, this Court (by Hon. Michael Gotsch) entered its order authorizing the Intervenors to intervene in this case.
12. The Federal Court Judgment was appealed. On August 1, 2017, the 7<sup>th</sup> Circuit Court of Appeals vacated the Federal Court Judgment on the basis that (1) the Administration lacked standing to bring an action in federal court against the Council, and (2) that the United States District Court abused its discretion in entering a declaratory judgment.
13. On September 25, 2017, Intervenors filed their Complaint for Declaratory Judgment in this case ("Intervenors' State Court Complaint").
14. On October 27, 2017, the Administration filed its Answer to Intervenor's Complaint for Declaratory Judgment (the "Administration's Answer"). Included in the Administration's Answer was a Counterclaim and Crossclaim for Interpleader (the "Administration's Counterclaim").
15. As noted above, on October 27, 2017, the Council filed the Motion to Dismiss, requesting that Intervenors' State Court Complaint be dismissed for lack of subject matter jurisdiction pursuant to Trial Rule 12(B)(1) of the Indiana Rules of Trial Procedure.

## ANALYSIS AND DISCUSSION

Ind. Trial Rule 12(B)(1) provides for the dismissal of a lawsuit based on a court's "lack of jurisdiction over the subject matter." "[A] motion to dismiss for lack of subject matter jurisdiction presents a threshold question concerning the court's power to act." *Perry v. Stitzer Buick GMC*, 637 N.E.2d 1282, 1286-87 (Ind. 1994). "In ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court may consider not only the complaint and the motion but also any affidavits or evidence submitted in support." *GKN Co. v. Magness*, 744 N.E.2d 397, 400 (Ind. 2001). *See also Perry*, 637 N.E.2d 1286-87, which held that, "[t]he court has considerable latitude in devising procedures to ferret out the facts pertinent to jurisdiction, and it is well established that in doing so it may consider not only the Complaint and motion but any affidavits or other evidence submitted." A claim that is moot should be dismissed under Rule 12(B)(1) for lack of subject matter jurisdiction. *St. John's United Church of Christ v City of Chicago*, 502 F.3d 616, 626 (7<sup>th</sup> Cir. 2007); and *Stevens v. Hous. Auth. of S. Bend*, 720 F.Supp. 2d 1013, 1023 (N.D. Ind. 2010).

Indiana Courts have held that, "Under the Uniform Declaratory Judgment Act, cases which may be considered by the courts ... [must] not [be] moot and ... [must] not call for merely advisory opinions." *Saylor v. State*, 81 N.E.3d 228, 232 (Ind.Ct.App. 2017) citing *City of Hammond v. Board of Zoning Appeals*, 284 N.E.2d 119, 126 (Ind.Ct.App. 1972) (brackets in original). "Mootness arises when the primary issue within the case has been ended or settled, or in some manner disposed of, so as to render it unnecessary to decide the question involved." *In Re: Custody of M.B.*, 51 N.E.3d 230, 233 (Ind. 2016). "When the concrete controversy at issue in a case has been ended or

settled, or in some manner disposed of, so as to render it unnecessary to decide the question involved, the case will be dismissed.”. *Indiana Gas Co. v. Indiana. Fin. Auth.*, 999 N.E.2d 63, 67 (Ind. 2013)

As indicated above, the Administration, on behalf of the City of South Bend, together with the Intervenors, entered into the Settlement Agreement in November of 2013. The Settlement Agreement states (in relevant part):

(From Preamble on Page 1 of Settlement Agreement)

\* \* \*

C. The parties now desire that the Disputes which now exist, had previously existed or may have existed between them regarding the Recordings and/or alleged use of Recordings (which Disputes have been the subject of respective lawsuits described above and are now collectively referred to as the “Lawsuits”) be immediately settled and that the Parties be spared the trouble and expense of further litigation.

(From Paragraph 1 on Page 2 of Settlement Agreement)

- A. The City will pay to Tim Corbett, Steve Richmond, David Wells, Brian Young and Sandy Young the total sum of \$500,000.00 made payable to each Plaintiff and Pfeifer, Morgan & Stesiak.
- B. The Parties acknowledge that the Recordings and the tape cassettes (the “Cassettes”) which contain portions of the Recordings and which were made by Karen DePaepe and given to Darryl Boykins remain the subject of a subpoena by the common Council of South Bend (the “Subpoena”). The Plaintiffs will continue to pursue their declaratory judgment action seeking to quash the Subpoena. The City will comply with any ruling on the validity of the Subpoena. However, if the Plaintiffs prevail, the city will deliver the Cassettes to legal counsel for the Plaintiffs.

\* \* \*

(Paragraph 2 on Page 3 of Settlement Agreement)

2. Release. Upon the filing of the dismissal called for above, the Parties for themselves, their agents, attorneys, predecessors, heirs, executors, administrators, successors, assigns, parent companies and/or subsidiaries ; hereby

RELEASE and FOREVER DISCHARGE each other Party and its (or his/her) agents, attorneys, predecessors, heirs, executors, administrators, successors, assigns, parent companies and/or subsidiaries, both individually and in their representative capacities, from any and all rights, claims, demands, damages, actions, causes of action, judgments, or liabilities of whatever nature, whether known or unknown, disclosed or undisclosed, that each party had, now has, or may have had arising out of, related to, or connected with the Disputes and Lawsuits in which each party made claims. This Release is meant to be construed as broadly and comprehensively as possible.

In considering the Council's Motion to Dismiss, the Court is faced with something of a logical (or perhaps illogical) conundrum. The Council adopts as its argument the analysis made by the 7<sup>th</sup> Circuit Court of Appeals that the Council and the Administration cannot sue each other, as they are the same entity. Yet, one arm of that entity is arguing that the Intervenor's State Court Complaint should be dismissed, and the other arm argues that the Intervenor's State Court Complaint should not be dismissed. Hence, the same party (through different branches of government and by separate teams of attorneys) is asking the Court to reach opposite conclusions. This confusion is compounded by the fact that part of the Council's argument relies on the theory that the Council and the Administration are, in fact, the same entity. However, the Court need not address that issue at this time. The Motion to Dismiss can be decided without having to decide the "same entity" issue.

Counts II and III of Intervenor's Federal Court Complaint (in Federal Case No. 532) seeks essentially the same relief as Intervenor's are seeking by their State Court Complaint in this lawsuit. Count I of that Complaint sought monetary damages. As Federal Case No. 532 was dismissed with prejudice, the Council contends that Intervenor's are therefore prohibited from seeking the same relief in this lawsuit. They cite the decisions in *Afolabi v. Atl. Mortg. & Inv. Corp.*, 849 N.E.2d 1170, 1173

(Ind.Ct.App. 2006); and *Richter v. Asbestos Insulating & Roofing*, 790 N.E.2d 1000, 1003 (Ind.Ct.App. 2003).

Intervenors and the Administration disagree. They rely on the case of *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535 (5<sup>th</sup> Cir. 1978). In essence, *Kaspar Wire* provides that when a federal lawsuit that seeks declaratory relief is dismissed (even “with prejudice”), the party is not precluded from seeking further declaratory relief.

However, as noted above, in Federal Case No. 532, the intervenors sought both declaratory relief and money damages. Therefore, the intervenors are precluded from seeking the same relief they sought in Federal Case No. 532. See *ASARCO, L.L.C. v. Montana Res. Inc.*, 858 F.3d 949 (5<sup>th</sup> Cir. 2017). Hence, the Court lacks subject matter jurisdiction over Intervenors’ State Court Complaint.

The second reason why this Court lacks subject matter jurisdiction over the Intervenors and their State Court Complaint is that the relief sought by Intervenors in Intervenors’ State Court Complaint has become moot. As Judge Easterbrook of the 7<sup>th</sup> Circuit Court of Appeals wrote in the appellate decision in Federal Case No. 475:

Equitable relief – injunctions and declaratory judgments alike - depends on a conclusion that legal relief such as damages is inadequate to protect injured parties. By settling their claims, the five individual litigants have shown that financial relief is adequate. To seek a declaratory judgment is to request an advisory opinion on top of the settlement.

*City of South Bend v. South Bend Common Council*, 865 F.3d 889, 893 (7<sup>th</sup> Cir. 2017).

This Court cannot express that principle any clearer. However, the Intervenors insist that the Seventh Circuit Court of Appeals was incorrect in that analysis. They contend that the Settlement Agreement does not preclude the possibility of the

Intervenors having future monetary claims against the City of South Bend if the recordings are ever published. They specifically point to the language in paragraph 2, whereby the City and the Intervenors released each other from all claims “that each party had, now has, or may have had arising out of, related to, or connected with the Disputes and the Lawsuits in which each party made claims.”

The Intervenors emphasized that this language covers “had, now has or may have had,” but says nothing about claims that may arise in the future. Intervenors then argue that a future publication of the Recordings would create a new claim against the City that is not covered by the Settlement Agreement. They analogize the situation to a release of liability arising from an automobile collision that would not cover a later collision involving the same parties.

However, that analogy does not quite fit. As the Seventh Circuit Court of Appeals recognized, the actions which gave rise to the Intervenors’ alleged claims against the City for monetary damages were both the act of recording and the act of disclosing. Paragraphs 49 and 50 of Intervenors’ Complaint in Federal Case No. 532, filed October 25, 2012, seeks damages for “actions in intercepting, recording, and disclosing” the Recordings. The Intervenors’ Federal Court Amended Complaint filed in Federal Case No. 532 seeks damages for those alleged disclosures. The Settlement Agreement that settled that lawsuit settles all claims against the City asserted in that lawsuit and the Intervenors’ Complaint was dismissed with prejudice.

The Settlement Agreement states in paragraph 2 that “[t]his Release is meant to be construed as broadly and comprehensively as possible.” Second, the Settlement Agreement does not require the City to pursue any further litigation to stop the



publication of the Recordings. In fact, the Settlement Agreement expressly requires the parties to dismiss “the lawsuits” with prejudice (see subsection D of section 1 of the Settlement Agreement.) The parties in preamble paragraph C, on page 1 of the Settlement Agreement, said that all parties to the Settlement Agreement desired that they “be spared the trouble and expense of further litigation.” That hardly sounds like a reservation of the right to sue for additional monetary damages.

Nevertheless, the Council agrees that the dismissal of Federal Case No. 532 does not bar future claims for damages that did not exist at the time that case was dismissed. The Court accepts that stipulation for purposes of the pending Motion to Dismiss. But the Court also agrees with the Council that Intervenors cannot seek declaratory relief in this action. Therefore, this Court lacks subject matter jurisdiction to grant the relief sought by Intervenors’ State Court Complaint. That Complaint must be dismissed.

The Court recognizes that Judge Gotsch previously stated in his Order entered on February 6, 2015, that:

9. The putative intervenors have an interest separate and distinct from either of the parties, and their privacy and due process rights may only be adequately protected by allowing their intervention in this proceeding.

However, a court always retains the responsibility to consider its own jurisdiction and avoid deciding cases and controversies over which it lacks jurisdiction. Besides, when the Court granted Intervenor’s leave to intervene, it likely could not have been known that Intervenors would file a complaint seeking essentially the same relief as Counts II and III of Intervenors’ Federal Case Complaint, which has now been dismissed with prejudice. Now that the nature of the relief being sought by Intervenors is known, it is

clear that such relief is precluded by the dismissal of the Intervenor's Federal Court Complaint with prejudice.

The Court appreciates that a dismissal for lack of subject matter is somewhat unusual. However, the outcome would have been the same if the issues had been presented in a motion to dismiss under Trial Rule 12(B)(6) or in a motion for summary judgment under Trial Rule 56. The precise procedural posture is not, and really should not (at least in this case), be determinative.

Deciding that the Intervenor's Complaint should be dismissed does not end the analysis. As mentioned above, the Intervenor is also a party to this lawsuit because they were named as counterclaim defendants in the Administration's Counterclaim filed on October 27, 2017. That Counterclaim seeks interpleader authority and injunctive relief against the Intervenor.

There is nothing in the Settlement Agreement that would prohibit the Administration from seeking such relief. In fact, Federal Case No. 475, the case in which the Administration sought declaratory relief in federal court, was never dismissed on the merits and proceeded to trial with the participation of the Intervenor. That would clearly indicate that the parties to the Settlement Agreement intended that the Intervenor would be allowed to participate in an equitable proceeding initiated by the Administration.

In light of this Order, it would seem that the Administration might want to amend its pleadings to expressly seek in this case the kind of equitable relief it was seeking in Federal Case No. 475. If so, the Court hereby grants the Administration thirty (30) days following the date of this Order to so amend. But even if the Administration does not


supplement its pleadings in that respect, the Intervenor remain parties to this lawsuit as counterclaim defendants.

ORDER AND JUDGMENT

Based on the above and foregoing analysis, the Court hereby dismisses pursuant to Trial Rule 12(B)(1) the Complaint for Declaratory Judgment filed by the Intervenor on September 25, 2017. However, the Intervenor remain parties to this lawsuit as counterclaim defendants.

Copies of this Order and Notice sent to Attorneys Robert J. Palmer, E. Spencer Walton, Jr., Daniel H. Pfeifer, A. Scott Chinn, and Ryan G. Milligan, all by E-Notice.

All of which is ordered this 29<sup>th</sup> day of January, 2018.

  
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Steven L. Hostetler, Special Judge  
St. Joseph Circuit Court

Distribution:  
Clerk  
R. Palmer/E. Walton  
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