

**THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION No.: 1:15-CV-559**

THE CITY OF GREENSBORO,)
 LEWIS A. BRANDON III, JOYCE)
 JOHNSON, NELSON JOHNSON,)
 RICHARD ALAN KORITZ,)
 SANDRA SELF KORITZ, AND)
 CHARLI MAE SYKES,)
)
 Plaintiffs,)
)
 vs.)
)
 GUILFORD COUNTY BOARD OF)
 ELECTIONS,)
)
 Defendant.)

**REPLY BRIEF TO:
PLAINTIFFS’ RESPONSE TO
DEFENDANT’S MOTION TO
EXTEND APPEAL DEADLINES**

Defendant Guilford County Board of Elections (hereinafter, “GC Board of Elections”), by and through its counsel of record, pursuant to Rule 7.3 of the Local Rules of Civil Practice for the Middle District of North Carolina, submits this reply brief to Plaintiffs’ Response to Defendant’s Motion to Extend Appeal Deadlines. In support of this reply brief, GC Board of Elections shows unto the Court the following:

STATEMENT OF THE CASE AND MATERIAL FACTS

On July 13, 2015, the Plaintiffs filed a Complaint and Motions for Temporary Restraining Order and Preliminary Injunction (Docs. 1, 3, and 7) regarding the North Carolina General Assembly’s passing of a local act (“the Greensboro Act”) on July 2, 2015 affecting the City of Greensboro’s self-governance and redrawing city council district lines. On July 23, 2015, this Court heard arguments of counsel for both parties regarding the Plaintiffs’ motions. During the hearing, the presiding Judge cautioned the Plaintiffs that

while an injunction could issue against the current Defendant, that the Court would be unable to address some of the other causes of action without additional and more appropriate Defendants. A Memorandum Opinion and Preliminary Injunction were entered by this Court on the same day due to the necessity of a decision pursuant to the upcoming 2015 primaries for the 2016 elections. (Docs. 35 and 36).

Although the Plaintiffs amended their Complaint on February 13, 2016 (Doc. 65) and December 8, 2016 (Doc. 104), neither Amended Complaint reflected any additional defendant-actors responsible for the passage of the Greensboro Act. At this point, any action against and regarding the GC Board of Elections was complete once the restraining order and injunctive relief issued. On February 6, 2017, the trial of this matter initiated and completed on February 7, 2017. (Doc. 131). During the trial, counsel for GC Board of Elections, at the close of Plaintiffs' evidence, moved for a directed verdict regarding the lack of any actions taken by GC Board of Elections in passing any legislation that was the subject of the litigation, which the Court denied. On March 3, 2017, the Plaintiffs submitted Proposed Findings of Fact and Conclusions of Law (Doc. 132) in which the North Carolina General Assembly and specific members of the legislature are the only named actors.

On April 3, 2017, this Court issued a Memorandum and Opinion (Doc. 135) in response to the Plaintiff's Motion for Judgment on the Pleadings and which outlined the legislative history of the Greensboro Act and declared that the state had no legitimate governmental purpose in passing the portions of that act affecting Greensboro. (Doc. 135, p. 20). On April 3, 2017, this Court issued another Memorandum and Opinion which declared that the GC Board of Elections "had nothing to do with passing the [Greensboro] Act and possess no evidence about the redistricting process." (Doc. 136, p. 5). In fact, the

Court stated that “The appropriate remedy for a law that violates the one-person, one-vote principle is an injunction against elections conducted under the Act’s unconstitutional redistricting.” (Doc. 136, p. 23). The Court thereafter reiterated enjoining GC Board of Elections until the State lawfully changed those district lines. *Id.* On April 13, 2017, the Court entered a Judgment for permanent injunction regarding the Greensboro Act. (Doc. 137) directing GC Board of Elections to conduct elections for Greensboro City Council using the methods in place prior to the passing of the Greensboro Act. During this entire process, GC Board of Elections has not been named as an actor with any authority, or intent, to pass legislation regarding the Greensboro Act or any other act or statute.

On June 5, 2017, the Plaintiffs indicated their intent to pursue attorney’s fees against GC Board of Elections by filing a Motion for Extension of Time to file their Motion for Attorney’s Fees (Doc. 138) which the Court granted (Doc. 139). In response to that Motion and upon being informed that the Plaintiffs intended to burden the taxpayers of Guilford County with a bill which may exceed \$500,000 for attorney’s fees, on June 12, 2017, GC Board of Elections filed a Motion to Extend the Appeal Deadline and brief in an abundance of caution and for judicial efficiency to address the Court’s denial of its Motion for Directed Verdict which would combine with any appeal of attorney’s fees should those fees be awarded. (Docs. 140 and 141).¹ The fact that GC Board of Elections was a non-actor in the passing of the Greensboro Act is directly related to its motion to the Court to enjoin the

¹ Plaintiffs declare in their brief (Doc. 143, p. 8) that the GC Board of Elections fails to demonstrate an act of good cause or excusable neglect as it relates to Fed. R. App. P. Rule 4(a)(5); however, judicial efficiency has been determined by this Court to meet the good cause requirement as long as bad faith has not been exercised. *Nasser v. White Pages, Inc.*, WL 3058570 *13 (W.D.Va July 2, 2014). Additionally, the effect on judicial efficiency and a showing of good cause weighs in favor of an extension of time. *Id.*

actual actors as well as the attorney's fees now being sought by the Plaintiffs against the Guilford County taxpayers who are members of only a single county out of the one hundred North Carolina counties whom participated in statewide election of the members of the North Carolina General Assembly.

ARGUMENT

The issue set forth in GC Board of Election's Motion to extend the appeal deadline is a relatively simple matter of rule interpretation. Plaintiff asserts that the language of Federal Rule of Appellate Procedure 4(a)(1)(A) (hereinafter, the "Rule") should be given a strict and inflexible reading. Under such a reading, GC Board of Elections is given an inflexible deadline of thirty (30) days from the entry of judgment; defendant did not do so within thirty (30) days and that, according to Plaintiffs, should be the end of it. A more careful and diligent reading of the Rule, however, presents an alternative, more appropriate, and more flexible interpretation. The Rule reads, in full, as follows:

In a civil case, *except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c)*, the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

Fed. R. App. P. Rule 4(a)(1)(A). (Emphasis added).

The plain language of the Rule includes an exception for matters where Plaintiffs are seeking the recovery of attorney fees pursuant to Federal Rule of Appellate Procedure 4(a)(4)(A)(iii).² The Rule further clarifies the exception in paragraph 4(a)(4)(B(i)) stating:

² Plaintiff City of Greensboro has not sought and is not seeking reimbursement of attorney's fees. (Doc 143, p. 2, FN 1). Arguably, the City of Greensboro has achieved its objective of the litigation, and the public interest, in obtaining restoration of the previous districting lines and its self-governance on behalf of the citizens of Greensboro.

If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

Fed. R. App. P. Rule 4(a)(4)(Bi).

Here, the Rule makes it clear that if, as is the case here, a matter is “after the court ... enters a judgment – but before it disposes of any motion under Rule 4(a)(4)(A)”, i.e., a Motion for attorney fees, then a Notice of Appeal of a “judgment or order, in whole or in part” is effective. In addition, although, Plaintiffs assert the strict and inflexible interpretation of the Rule, they do acknowledge and concede that allowing GC Board of Elections an appeal of, at least some, finding of the underlying matter is within the discretion of the court when it argues that the “Court should not exercise *its discretion*” and allow additional time to file notice of appeal. (Pl.’s Brief, p. 5). (Emphasis added)

The need to protect at least some limited avenues for appeal in the underlying matter is, in defendant’s opinion, obvious and compelling. In order to fully demonstrate this fact, it is necessary at this point to note the underlying matters GC Board of Elections seeks to be allowed to appeal. Defendant’s intent is to limit any appeal subject matter to the following:

- The Court’s denial of GC Board of Elections’ motion to dismiss for failure to name a necessary party with respect to Plaintiffs’ Second Cause of Action (one-person, one-vote) and Third Causes of Action (racial gerrymandering) as it pertains to the lack of any actions taken by GC Board of Elections. (See Pl.’s 2d Amend. Compl., pp. 24-26)

- The Court's denial of GC Board of Elections' Motion for Directed Verdict with respect to Plaintiffs' Second Cause of Action (one-person, one-vote) and Third Causes of Action (racial gerrymandering) as it pertains to the lack of any actions taken by GC Board of Elections. (See Pl.'s 2d Amend. Compl., pp. 24-26)

It is important to note at this point GC Board of Election's intentions regarding appeal for a number of reasons. First, it is clear that GC Board of Elections intends to appeal only those matters related to a single over-arching issue: whether the North Carolina General Assembly, or some other State institution, should be a party to this action. This issue is based upon the uncontroverted fact that the State actors were, in fact, and as asserted by Plaintiffs, the party responsible for violating Plaintiffs' rights in the first place, that GC Board of Elections could neither negotiate a settlement, devise a remedy, or change the challenged form of election. This very fact is central to the Court's consideration of a Motion on the part of the Plaintiffs to have the GC Board of Elections pay for their attorney fees. Thus, the underlying issue of whether Guilford County Board of Elections should be the sole defendant in this matter is inextricably intertwined with the merits of charging that sole defendant, who is not identified as an actor in any findings of fact issued by this Court in its final order, with attorney fees. Preservation of appeal rights relating to this issue, as presented in the underlying case, as well as in a ruling on a motion for attorney fees, is clearly in the interest of justice in this case, including the public interest, in not charging the taxpayers of a single county for the actions taken by state actors elected at large in this State.

It is also important to note GC Board of Elections does not intend to appeal any matter related to the substantive matter of any of the Plaintiffs' claims regarding the injunctive relief granted in preventing GC Board of Elections from carrying out the Greensboro Act. Plaintiffs argue that allowing an appeal would come at "significant cost" to Plaintiffs since it would jeopardize the final ruling on the merits they achieved. This concern, in light of the above, is misplaced. The Plaintiffs' argument simply highlights that *any* appeal, timely or extended, would be a matter of inconvenience.

Defendant has no intention of appealing the Court's ruling on the Plaintiffs' First Cause of Action nor the Court's issuance of injunctive relief. Since the Court remedy in this matter was based upon all causes of action presented, GC Board of Elections' appeal of the matters set out hereinabove will *not* negatively impact the Plaintiffs in any way. The injunctive relief obtained by Plaintiffs will remain in place no matter what ruling is made regarding the limited appeal issues sought to be presented to the Appellate Court. Please note that the GC Board of Elections is ready to take whatever measures are necessary to provide assurances to the Court and to the Plaintiffs that it will limit its appeal to the issues set out herein.

CONCLUSION

Wherefore, GC Board of Elections respectfully submits its Reply Brief in response to Plaintiff's Response to Defendant's Motion to Extend Appeal Deadlines, and requests that this Honorable Court issue an Order granting the Defendant an extension of the appeal deadlines effective after the Plaintiffs' filing and upon the Court's ruling on the Plaintiffs' Motion for Attorney's Fees.

This the 30 day of June, 2017.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that this day he has electronically filed the foregoing *Reply Brief To: Plaintiff's Response to Defendant's Motion to Extend Appeal Deadlines* in the above-titled action with the Clerk of Court using the CM/ECF system, which provided notice of such filing to:

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This the 30 day of June, 2017.

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