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FEATURED CASE:

Homelessness: Reversal of Injunction against Denver's Encampments Policies

Denver Homeless Out Loud v. Denver, no. 21-1025 (10th Cir. May 3, 2022).

Reversing the court below, the Tenth Circuit accepts the City's argument that a prior settlement agreement precludes the grant of injunctive relief and due process claim sought by a homeless organization.

Denver's Unauthorized Camping Regulations: Denver has banned unauthorized camping on public or private property as follows:

> **It shall be unlawful for any person to camp upon any private property** without the express written consent of the property owner or the owner's agent, and only in such locations where camping may be conducted in accordance with any other applicable city law.Denver, Colo., Code § 38-86.2(a).

Various Denver entities enforce the ban. The Denver Department of Public Health and Environment ("DDPHE") can issue an "area restriction," which "temporarily restricts activities that could occur in a specified area" to allow officials to remediate public health hazards. The Department of Transportation and Infrastructure ("DOTI") assists DDPHE in "cleaning locations that are subject to . . . area restrictions." DOTI can also independently conduct large-scale "encumbrance removals," where it clears and cleans an area "to make sure that the public right-of-way is accessible to all Denver residents."

The Prior Litigation and Settlement: In 2016, people affected by these homeless sweeps filed a class action against Denver and certain city officials (Denver Defendants) in federal court, alleging that Denver's "policies, practices and conduct violate [p]laintiffs' right to due process of law under the Fourteenth Amendment." The "*Lyall*" plaintiffs claimed the sweeps "are conducted without notice or with inadequate notice and in a manner that prevents [p]laintiffs and [p]laintiff [c]lass from retrieving their property." The parties in *Lyall* settled in February 2019, signing a settlement agreement setting forth detailed protocols for Denver's future enforcement of the camping ban and releasing a broad range of city parties from present and future liabilities.

The Subsequent Sweeps: Homeless encampments continued in Denver, resulting in more sweeps. One occurred in Lincoln Park on July 29, 2020. The park was littered with large amounts of trash, food waste, and improperly discarded syringes and suffered from a significant rat infestation. DOTI had not cleaned the park because of concerns for safety of its staff. Denver Park Rangers had witnessed the "wide-spread and open use and trade of drugs in the park." And Colorado State Patrol was not able to maintain security in the park due to "[t]he volume of people [who] were in and out of the park and the harassment and threats of violence that were taking place in the park." All the security cameras in the park had been destroyed. Gunshots were heard at least eight to ten times in the weeks leading up to July 29, and there was a murder in the park on July 23.

On July 29, 2020, the Denver Defendants conducted a sweep of Lincoln Park. DOTI swept the park after DDPHE restricted the area for public health reasons. The Denver Defendants planned the sweep in advance but did not provide prior notice to campers because in earlier sweeps, advance notice had resulted in organized resistance which prevented the clean-up. The Denver Defendants claim "people who were present (or returned to [Lincoln Park]) were given over four hours to pack up their belongings (or choose voluntary, free storage) and leave." In contrast, Denver Homeless Out Loud (DHOL) plaintiffs claim that the Denver Defendants took and destroyed their property, and that virtually nothing was stored for future repossession.

The Current Litigation: In October 2020, DHOL brought an action, seeking among other things injunctive relief. They argued that the Denver Defendants violated their procedural due process rights in three ways: "(1) Defendants provided no (or deficient) notice prior to seizing their property, (2) Defendants summarily discarded (and destroyed) Plaintiffs' property without any process for challenging the destruction, and (3) post-deprivation, Defendants did not provide an adequate process for Plaintiffs to challenge the seizure of their property or retrieve their property."

In their response, the Denver Defendants did not argue the preclusive effects of the *Lyall* settlement. Accordingly, the district court analyzed whether the procedural due process claim was likely to succeed on the merits, without considering if the *Lyall* settlement agreement barred the claim. It then granted a preliminary injunction based solely on its finding that the procedural due process claim was likely to succeed, requiring the Denver Defendants to satisfy notice requirements beyond those included in the *Lyall* agreement.

In January 2021, the Denver Defendants filed an interlocutory appeal with the Tenth Circuit claiming the preliminary injunction was improperly granted. The Circuit reversed.

Preclusion: The Circuit found that the lower court should have considered the *Lyall* settlement's preclusive effect, sua sponte:

> Although the district court correctly noted it lacked jurisdiction to enforce the *Lyall* settlement agreement, we conclude it improperly failed to consider sua sponte the preclusive effect of that agreement. In reaching this conclusion, we explain why we raise the preclusive effect of the *Lyall* settlement agreement sua sponte, despite the Denver Defendants' failure to raise it as a defense to the preliminary injunction motion or to reassert preclusion on appeal. We then conclude that the preclusive effect of the agreement makes it unlikely the DHOL Plaintiffs will succeed on the merits of their procedural due process claim. **Specifically, the *Lyall* settlement agreement includes a broad release that unequivocally prevents the DHOL Plaintiffs from asserting this specific procedural due process claim against the Denver Defendants**. The district court's omission of a preclusion analysis is understandable in light of the Denver Defendant's failure to reassert preclusion after the district court struck their motion to dismiss. **Because the Supreme Court urges sua sponte consideration of preclusion in situations like the present, however, we conclude the district court's finding that a precluded procedural due process claim was likely to succeed on the merits is an error of law**, and the failure to consider the release provision of the *Lyall* settlement agreement means the district court's decision lacks a rational evidentiary basis.

Jurisdiction: Although enforcement of the terms of the *Lyall* settlement was a matter for state courts, the Circuit Court had jurisdiction to consider its preclusive effect:

> **However, an absence of jurisdiction to enforce the *Lyall* settlement agreement does not prevent this court from determining its preclusive effect. Although the DHOL Plaintiffs framed this case as an action to enforce the *Lyall* settlement agreement, it is a new action separate from *Lyall*. The DHOL Plaintiffs brought the relevant procedural due process claim under 42 U.S.C. § 1983. We need not retain jurisdiction over *Lyall* or its attendant settlement agreement to exercise subject matter jurisdiction over the federal question raised in this new suit**. See *Rural Water Dist. No. 2 v. City of Glenpool*, 698 F.3d 1270, 1273–74 (10th Cir. 2012) (holding that a lack of jurisdiction to enforce a settlement "does not relate to our subject matter jurisdiction" over "a violation of a [federal] statutory right" like those protected by § 1983). And the success of that claim depends, in part, on the preclusive effect of the district court's dismissal of the *Lyall* action, which is a proper question for this court.

Preservation: The Court of Appeals considered the preclusion issue even though the Denver Defendants had not initially raised it on appeal, applying the doctrine of preservation:

> The Denver Defendants' appellate briefs provide multiple reasons why the district court abused its discretion, but the preclusion defense is not among them. Indeed, the preclusion issue was not raised before the district court until after the parties had fully litigated the preliminary injunction. We ordinarily decline to consider arguments not raised in an opening brief. . . . "Waiver, however, binds only the party, not the court," and "it is well-settled that courts have discretion to raise and decide issues sua sponte, even for the purpose of reversing a lower-court judgment." *Planned Parenthood of Kan. & Mid-Missouri v. Moser*, 747 F.3d 814, 837 (10th Cir. 2014). . . . [T]he Supreme Court has suggested courts should consider "an issue antecedent to and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief" on appeal. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am*., Inc., 508 U.S. 439, 447 (1993). The preclusion defense satisfies these criteria. If the *Lyall* settlement agreement forecloses the procedural due process claim, that claim will necessarily fail on the merits and cannot serve as the basis for a preliminary injunction.

Effect of *Lyall* Settlement: Turning to the text of the *Lyall* settlement, it was evident to the Tenth Circuit that the DHOL action was foreclosed:

> **All persons in the City and County of Denver whose personal belongings may in the future be taken or destroyed without due process** on account of the City and County of Denver's alleged custom or practice (written or unwritten) of sending ten or more employees or agents to clear away an encampment of multiple homeless persons by immediately seizing and discarding the property found there . . . . . **hereby release, acquit, and forever discharge the City and County of Denver**, and any [and] all other related persons and entities, both past and present, including but not limited to all departments, divisions, principals, attorneys, agents, employees, employers, successors, servants, elected officials, officers, and directors (the "Released Parties"), of and from any and all liabilities, claims, demands, rights, controversies, agreements, damages, actions, causes of actions, expenses, attorney fees, interest, compensation, judgment and any and all consequential and punitive damages, of whatsoever kind and nature, either in law or in equity, which might exist or might be in any way related to or giving rise to the above referenced Lawsuit, including, but not limited to, any and all claims arising out of the City's alleged custom or practice (written or unwritten) of sending ten or more employees or agents to clear away an encampment of multiple homeless persons by immediately seizing and discarding the property found there.

Given that DHOL had brought its original claim as a class action, and the class bound by the *Lyall* agreement includes "[a]ll persons in the City and County of Denver whose personal belongings may in the future be taken or destroyed without due process" during a sweep, that agreement reached any current DHOL class member. "It is well settled that prior class-action judgments bind 'absent class members' that were 'adequately represented in the first case. *Pelt v. Utah*, 539 F.3d 1271, 1284 (10th Cir. 2008)."

DISSENT: Judge Rossman authored a 23-page dissent, arguing that claim preclusion is an affirmative defense that is waived if not timely raised, and pointing out that the lower court was still considering that issue. He faults his colleagues for an unwarranted exercise of discretion:

> My colleagues take the extraordinary step of raising the affirmative defense of claim preclusion sua sponte on behalf of the Denver Defendants to reverse the district court. I see no basis for this unwarranted exercise of appellate discretion. The Denver Defendants did not raise claim preclusion in the preliminary injunction litigation. The majority overlooks this failure of preservation and instead faults the district court for entering the preliminary injunction "without considering if the *Lyall* settlement agreement barred the [procedural due process] claim." (Maj. Op. at 13). Recall, this is the very constitutional claim that, after a three-day evidentiary hearing, the district court determined was likely to succeed on the merits. And that likelihood-of-success determination was made by the same judge who approved the *Lyall* settlement agreement—and therefore presumably knew something about its scope. As the majority acknowledges, the Denver Defendants raised preclusion in a motion to dismiss two months after they appealed from the district court's preliminary injunction order. See Mot. to Dismiss, *Denver Homeless Out Loud v. Denver, Colo*., 514 F. Supp. 3d 1278 (D. Colo. 2021) (No. 1:20-cv-02985), ECF No. Appellate Case: 21-1025 Document: 010110679283 Date Filed: 05/03/2022 Page: 37 2 176. **In that motion, the Denver Defendants for the first time asserted, among other contentions, that the *Lyall* settlement agreement had a preclusive effect on this lawsuit. The district court has yet to rule on that pending motion, which is not part of the appellate record. . . .**

Waiver of fundamental rights: He also challenges the majority's conclusion that DHOL clearly intended to concede its rights to future due process claims:

> The majority concludes with certainty the DHOL Plaintiffs intended to give up the instant procedural due process claim in settling *Lyall*. **But an ambiguous release cannot operate as a prospective waiver of civil rights liability. The Supreme Court has made clear that we "do not presume acquiescence in the loss of fundamental rights" and "courts indulge every reasonable presumption against waiver."** *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (citations omitted). On this record, the majority's sua sponte determination is particularly troubling, as it could "preclude a wider range of matters than those specified in the [*Lyall* settlement agreement that] would frustrate the parties' expressed intent and bestow upon [the Denver Defendants] a windfall of immunity from litigation."

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