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Bankruptcy: "Superpriority" Lien Securing Post-Bankruptcy Financing does not Reach Assets which Debtor Previously Contracted Away

Banco Panamericano, Inc. v. City of Peoria, No. 17-1019 (7th Cir. Jan. 11, 2018).

Despite having obtained a "superpriority" lien securing its post-bankruptcy lending to the debtor, the plaintiff could not reach infrastructure assets which transferred to the defendant under the parties' prior lease agreement.

In 1995 Peoria, Illinois (Peoria) signed a lease with Resource Technology Corporation (RTC) allowing the company to construct and operate a gas conversion project at Peoria's landfill that, in simple terms, used gasses from the landfill to generate electricity. The lease included at least a couple provisions addressing termination and abandonment, under either of which Peoria had the right "to retain, at no cost, the structures and below-grade installations and/or improvements that RTC installed at [Peoria's] landfill."

Several years later, RTC entered bankruptcy, at which time Banco Panamericano, Inc. (Banco) provided post-bankruptcy-petition financing, taking liens and security interests in all of RTC's

assets. Peoria notified RTC that it was electing to retain the structures and installations as set forth in the lease. Banco then sued Peoria, alleging unjust enrichment, saying its claim to the property was superior to Peoria's "because its loan was secured by a lien on all of RTC's assets and the bankruptcy court had given its loan 'superpriority' status." The district court ruled in Peoria's favor, as did the Seventh Circuit on appeal.

The federal case hinged on the standard for unjust enrichment under Illinois law, namely that "a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." The Circuit agreed with the lower court's determination that the 90-day abandonment provision in the lease was triggered and that the property thus transferred from RTC to Peoria at that time (before bankruptcy), meaning Banco had no claim to the property since it had no interest in Peoria's property (only RTC's). However, the Circuit identified another elegant answer: lease provision 5(b), which directly addressed the three types of property at the landfill and specifically provides that RTC had *no* post-termination rights in the "structures and below-grade installations and/or improvements" - e.g. the ones at issue. Since the termination happened years before this suit was filed, the property was to go to Peoria and under no circumstances was RTC permitted to keep it without Peoria's consent (which was not given and which was not in dispute). The lower court was affirmed.

LINK

Due Process: Missouri Hair-Braiding Certification Requirements are Rationally Related to Legitimate Governmental Interest

Niang v. Carroll, No. 16-3968 (8th Cir. Jan. 11, 2018).

Although imposing significant requirements before applicants can qualify for certification, Missouri's hair-braiding licensing laws are rationally related to a legitimate governmental interest in public health and safety.

In Missouri, African-style hair braiders must be licensed as barbers or cosmetologists. To obtain the certification requires (1) completing a costly and time-intensive training course-1,000-hours for barbering and 1,500-hours for hairdressing, (2) disclosing criminal, citizenship, and limited character background, and (3) passing a licensing exam. These certifications apply to those in Missouri that "cut and dress hair for the general public or perform arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work upon the hair of any person by any means." Ndioba Niang (Niang) and another African-style braider challenged the Missouri law, arguing it violated the Fourteenth Amendment, but the district court granted summary judgment to the state, provoking an appeal.

The Eighth Circuit agreed that no fundamental right was at issue in the case, meaning the Missouri law need only be rationally related to a legitimate government interest. The rational basis analysis also demands courts give a strong presumption of validity to the state law and "be reluctant" to closely scrutinize the legislature's choices of whether, how, and to what extent states' legitimate interests should be pursued. Against this backdrop, Niang faced an uphill battle and did not win. Missouri stated its interest as protecting consumers and ensuring public health and safety, citing health risks associated with braiding that include hair loss, inflammation, and scalp infection. The district court added two more bases for the law - stimulating more education on African-style braiding and incentivizing braiders to offer more comprehensive hair care. Niang took issue with the court adding justifications for the law, arguing the district court could not do so, but the Circuit disagreed on this first appellate issue, noting courts need not rely solely on the state's proffered reasons, but that plaintiffs also have the burden to negate "every conceivable

basis which might support [the law]."

The braiders conceded the licensure rule did further a legitimate state interest in health and safety, but next took issue with whether the means fit the purpose, pointing out the state excepted from the licensure braiding without chemicals and when done with a licensed professional for entertainment purposes. But the Circuit noted the fit need only be "arguable and rational, not perfect," and here the minor exception lead to imperfection--but not unconstitutionality. The lower court was affirmed.

LINK

Due Process: Prostitution does not Involve Protected Liberty Interests; Laws Criminalizing Prostitution Pass Rational Basis Review

Erotic Services Provider Legal Education & Research Project v. Gascon, No. 16-15927 (9th Cir. Jan 17, 2018).

Despite the Supreme Court's 2003 finding that intimate human conduct is protected from governmental interference, that protection does not extend to prostitution, and state prohibitions need only be justified under rational basis-for which ample grounds exist.

In 2015, Erotic Services Provider Legal Education & Research Project (ESP), acting on behalf of plaintiffs who wished to conduct prostitution in California, challenged the constitutionality of Section 647(b) of the California Penal Code, both on its face and as applied, for criminalizing the commercial exchange of consensual, adult sexual activity.

Section 647(b) provided that:

> [E]very person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
>
> (b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

The district court granted California's motion to dismiss, resulting in ESP's appeal.

ESP fared no better at the Ninth Circuit. ESP's primary argument was that *Lawrence v. Texas*, 539 U.S. 558 (2003 -- the Supreme Court case which struck down Texas laws prohibiting homosexual sodomy -- prohibits a state from criminalizing prostitution engaged in by adults. In support, ESP contended: (1) *Lawrence* guarantees to consenting adults a fundamental liberty interest to engage in private sexual activity; and (2) the State cannot wholly outlaw a commercial exchange related to the exercise of such a liberty interest.

ESP was relying on language in *Lawrence* which might have opened the door to constitutionally-protected prostitution by finding that the Due Process Clause protected intimate contact:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and *certain intimate conduct*. 539 U.S. 558, 562 (2003).

But as the Circuit noted, *Lawrence* had declined to include prostitution within the Fourteenth Amendment's protected ambit. And subsequent cases relied upon by ESP, although dealing with personal sexual freedoms, had not created the clearly-defined constitutional prerogatives for prostitution that ESP distilled.

The Circuit held that Section 647(b) does not violate the Fourteenth Amendment freedom of intimate or expressive association. It noted that its own precedent in *IDK, Inc. v. Clark County, 836 F.2d 1185* (9th Cir. 1998)had previously ruled that the relationship between a prostitute and a client is not protected by a right of association. The panel further rejected ESP's assertion that Section 647(b) violates a prostitute's substantive due process right to earn a living--there is no constitutional right to engage in illegal employment. Finally, the Circuit Court held that Section 647(b) does not violate the First Amendment freedom of speech because prostitution is not protected commercial speech and therefore does not warrant such protection.

Because the Supreme Court's result in *Lawrence* had not overruled the Circuit's prior holding in *IDK*, California's position--that there were no fundamental liberty interests at stake--applied, and rational basis review was appropriate. Although ESP argued (1) there was no important governmental interest behind Section 647(b); and (2) Section 647(b) did not significantly further any such interest, the Circuit found ample support for the law. "Section 647(b) has a legitimate purpose, as the State proffers specific and legitimate reasons for criminalizing prostitution in California, which include discouraging human trafficking and violence against women, discouraging illegal drug use, and preventing contagious and infectious diseases." Affirmed.

LINK

Jails: Policy Requiring Postcard-Only Mail to Inmates Supports Compelling Governmental Interest in Safety

Simpson v. County of Cape Girardeau, No. 16-3682 (8th Cir. Jan. 2, 2018).

The fact that an inmate's mother could point to other prisons which permitted multi-page letters to be sent to inmates was irrelevant; the institution housing her son could impose a postcard-only restriction in the interests of safety without implicating First Amendment rights.

Trey Simpson was an inmate Cape Girardeau, Missouri County Jail (Jail), during which time Cheryl Simpson (Simpson), his mother, learned she could only communicate with him with postcards, not larger than 5" by 7", per Jail policy. The policy also only allowed inmates to have up to 10 postcards in their possession at one time. She wanted to write lengthy letters to her son and had to number the postcards, some of which arrived out of sequence. Her messages were all read by many sets of eyes and her son could not keep the cards. She suit under §1983 alleging the Jail's postcard-only incoming-mail policy for non-privileged mail violated her First and Fourteenth Amendment rights, by impermissibly restricting her ability to communicate with her son. She lost at trial and appealed.

The Eighth Circuit began by stating that the Supreme Court's 1987 *Turner* case controlled, specifically that a prison regulation or action that restricts a prisoner's constitutional rights "is valid if it is reasonably related to legitimate penological interests . . ." and that four factors are weighed in the analysis: (1) "whether there is a valid rational connection between the prison regulation and the government interest justifying it; (2) whether there is an alternative means available to the prison inmates to exercise the right; (3) whether an accommodation would have a significant ripple effect on the guards, other inmates, and prison resources; and (4) whether there is an alternative that fully accommodates the prisoner at *de minimis* cost to valid penological interests." Cape Girardeau argued the policy is neutral and "rationally related to the jail's legitimate penological interests in limiting the amount of contraband entering the jail and in maintaining an efficiently run institution." On the other hand, Simpson argued the policy suppresses expression and is thus not neutral, that the County did not provide sufficient evidence showing the policy significantly improved safety, and that alternative policies exist that would have a *de minimis* implementation cost.

The Court found the first factor in favor of the prison, noting the jail applied the rule across the board to all non-privileged mail for security reasons and thus finding it neutral "in the technical sense in which that term was meant and used in *Turner*." The Court also easily agreed with the Jail that there is a logical, common sense connection between the postcard-only incoming-mail policy and the goal of limiting contraband coming into the jail since it is a "rational concept" that contraband would be received through the mail and reasonable that postcard-only mail would limit that potentiality. The Court pointed out that it was irrelevant whether there had been previous incidents of contraband getting into the jail under the Jail's previous incoming letter policy (as Simpson had argued) because "that is not the test" and because the Jail did "not even have to show that its interests w[ould] actually be furthered by the policy, only that there is a rational relationship between the policy and the objectives."

As for alternative means of communication, the Circuit Court held Simpson's "ability to communicate with her son has not been completely foreclosed" and that that was enough: she could write, and her son could receive, an unlimited number of postcards, she could receive collect calls from him, and she could see him Saturdays. As for the impact of accommodating Simpson's demand that inmates be able to receive letters, the Circuit held in favor of the prison officials, who testified without providing any records that the postcard-only policy made the mail process more efficient and freed up time for other security needs. The Circuit thus found that the "threatened impact to the Jail's institutional efficiency and security is sufficient to convince us that returning to a letter mail policy would have a significant ripple effect on the inmates and jail staff."

Finally, since the Circuit recognized that alternatives existed - including the Jail's previous letter policy and others Simpson had offered from other jails - the issue became whether the cost of returning to a letter mail policy would have a greater than *de minimis* cost to the Jail. The Circuit found that such a return would cause a greater cost (in terms of security), and reemphasized that "institutional security is the most compelling legitimate government interest in a prison setting." The lower court was affirmed.

LINK

Speech: Airport is a Nonpublic Forum; Reliance on Public Forum Precedents to Enjoin Airport's Prior Notice Policy for Demonstrations is Reversible Error

McDonnell v. City and County of Denver, No. 17-1071 (10th Cir. Jan. 4, 2018).

Reversing the decision below, the Tenth Circuit has found that the district court inappropriately applied public forum review standards to Denver International Airport's requirements for advance notice of planned demonstration activities.

Denver International Airport (DIA) was established and is regulated by the City and County of Denver (Denver). This includes protest and demonstration regulations, which are codified in the municipal code. At issue in this recent case is the portion of the municipal code requiring a permit be acquired before any "person or organization [] engag[es] in speech-related activity at DIA for religious, charitable, or political purposes" and that said be permit be applied for "at least seven (7) days prior to the commencement of the activity for which the permit is sought."

An unpermitted, spontaneous protest took place in the airport on January 28, 2017 in response to Executive Order 13769 (which temporarily suspended entry into the United States of nationals from seven predominantly Muslim countries). No arrests took place, but parties to the protest filed suit in the district court challenging the permitting process and seeking a preliminary injunction. The district court held a one-day hearing in the case and granted the preliminary injunction in part and denied it in part. Specifically, as to ruling in the plaintiff's favor, the district court concluded they "showed a strong likelihood of success on the merits of their claim that [Municipal Code] Regulation 50.03's lack of a formal process for expediting permit applications in exigent circumstances is unreasonable . . . ." Denver appealed so far as the district court granted the plaintiff's request for a preliminary injunction with regard to an expedited permit process.

On Denver's appeal, the Tenth Circuit reversed the lower court on this issue, finding it abused its discretion. The primary problem identified with the lower court opinion was its reliance on public forum cases and doctrine, rather than *nonpublic* forum cases and doctrine, as airports have unequivocally been deemed nonpublic forums by the Supreme Court. Neither the parties nor the lower court found precedent holding that *nonpublic* forums must accommodate short-notice demonstrations, leading the lower court to public forum cases. With this standard set forth the lower then identified a separate portion of Denver's municipal code allowing for twenty-four hour permit applications for *parades in public streets* and the concluded that, since this twenty-four hour permit process existed for this public forum, the City/County should provide the same exigent applications for spontaneous airport protests.

This issue of applying the incorrect standard was compounded by the lower court's inconsistent use of testimony from the hearing. On one hand the lower court grounded part of its holding on the testimony of three former airport administrators, but, on the other hand, when it came to the issue of exigent applications for permits the lower court "ignored that same testimony . . . ." The Circuit summed up the lower court's reasoning as "erroneously rel[ying] on principles applicable only to public forums" and erroneously shortening "the permit period to twenty-four hours in exigent circumstances . . . because that is all the notice Denver needs to prepare for a street parade." The Circuit then directed that the proper test was to "analyz[e] the reasonableness of the restriction in light of the purpose of the forum," and in doing that itself, held that "there [wa]s no record support for the district court's finding that Defendants c[ould] adequately prepare for a protest at [the airport] with only twenty-four hours advance notice every time an exigent circumstance arises." It reversed the lower court.

LINK

Trials: Collateral Estoppel Applies where Counsel Raised Possibility of Unjust Enrichment Scenario, Constituting "Litigation" of the Issue

***Collier County v. Holiday CVS, LLC*, No. 17-12108 (11th Cir. Jan. 12,**

2018).

Applying Florida law, the Eleventh has upheld a lower court determination that when the defendant County counsel raised a question to a jury about the possibility of the plaintiff being unjustly enriched in the future, that issue had been "litigated" for purposes of collateral estoppel-even though the unjust enrichment actually occurred long after the jury trial.

Collier County, Florida (County) saw the need to expand an intersection and, to do so, needed to acquire an additional right-of-way. It exercised eminent domain to acquire parcels owned by RTG, LLC (RTG). RTG leased one of the parcels to Holiday CVS, LLC (CVS), which stated that it would lose eleven parking spaces that were critical to CVS's survival. Upon the County's filing the eminent domain petition, both RTG and CVS answered, the former claiming it was entitled to full compensation and severance damages and the latter claiming it was entitled to full compensation as well as business interruption damages and/or relocation damages. A jury trial followed in 2013. CVS claimed it would be forced to close on January 1, 2015 and RTG claimed it would not be able to attract a new pharmacy or convenient store lessee to the smaller space. CVS was awarded $1.9 million in business damages, while RTG was awarded $3.1 million in severance damages. The County paid in full. On January 1, 2015 however, CVS did not close; it continued to operate. The County filed suit, alleging unjust enrichment. The district court determined *res judicata* barred the County's unjust enrichment claim and the County appealed.

The doctrine of collateral estoppel was at issue in this case, which the Eleventh Circuit reminded readers "precludes the re-adjudication of an issue actually litigated and decided in a previous adjudication, even if it arises in the context of a different cause of action." It requires federal circuit courts to apply the applicable law of the state at issue. In Florida, "collateral estoppel applies if: (1) the identical issue was presented in a prior proceeding; (2) the issue was a critical and necessary part of the prior determination; (3) there was a full and fair opportunity to litigate the issue; (4) the parties to the prior action and the present action are the same; and (5) the issue was actually litigated during the prior action."

The County's argument was that the issue could not have been "presented" in the trial because the unjust enrichment did not start until a year after the trial took place - e.g. when CVS did not move out as stated at the trial, but continued leasing from RTG. The Circuit Court disagreed, pointing to the trial transcript wherein the County's attorney urged the jury to consider such a possibility in their damages calculation, specifically asking the jury "[W]hat if they don't move out? . . . [A]t least as long as they are profitable, why would anyone leave? . . . I don't know whether they are going to shut down or not. Maybe you can come up with some opinions on that." As a result of this exchange, the Circuit held that the County directed the jury to consider the exact issue in its current unjust enrichment claim and therefore the issue *had been presented* and could not be re-litigated. It affirmed the lower court.

LINK

Trials: Court May Disregard Affidavit which Contradicts Affiant's Prior Testimony in Order to Create Faux Issue of Fact

Bell v. City of Auburn, No. 17-11597 (11th Cir. Jan. 12, 2018).

Affidavits which contract the affiant's own prior testimony are not necessarily discredited-but where the evidence strongly suggests that the subsequent document is being generated retroactively to create a justiciable issue of material fact, the court may disregard the affidavit.

Shawn Bell (Bell) filed suit against Auburn, Alabama (Auburn) alleging employment discrimination, specifically that he was fired in retaliation for reporting race discrimination. A primary argument on appeal was that the district court abused its discretion by disregarding a sworn declaration he submitted in opposition to summary judgment.

The Circuit Court highlighted the rule that, in limited circumstances, "a district court can disregard an affidavit as a matter of law when, without explanation, it flatly contradicts the affiant's own prior deposition testimony for the transparent purpose of creating a genuine issue of fact where none existed previously." The standard is that the affiant provided clear answers to unambiguous questions and that his answer negated any genuine issue of material fact. As for the previous testimony, Bell's deposition explored the basis for his employment discrimination claim, specifically that his supervisor had called him "boy" and that he felt this "discredited his manhood, that he was a man, that he did not think a man should talk to another man like that . . . ." When specifically asked by Auburn's attorney in the deposition whether this supervisor was "being racial" by calling him "boy," Bell answered "no."

Post-deposition, Bell then submitted an affidavit stating that the "'boy' comment was racially discriminatory and degrading," and that he complained to HR specifically of "racial discrimination on that basis." On this record the Circuit Court found that this contradiction did note simply create an issue of credibility or affect the weight of the evidence in the case, but rather amounted to a transparent effort to create a genuine issue of fact. It affirmed the lower court's decision to discredit the affidavit and upheld the summary judgment ruling.

LINK

THIS JUST IN:

Ledgeview, Wisconsin and the Eternal "Van Lawn Ornament"

De Pere Ledgeview Municipal Court v. Knaus, No. 2016CV99 (Wis. Ct. App. Jan. 17, 2018).

Yesterday, Wisconsin's Court of Appeals handed down a decision affirming a lower court determination that John Knaus (Knaus), a resident of the Town of Ledgeview (Town), has violated a Town junked property ordinance. Knaus insists on keeping a rusted vehicle in his yard. He has been fighting this battle since 2008 and has paid more than $6,800 in fines to avoid removing the relic.

Herewith is some of the flavor of the dispute, including testimony by Mark Roberts, the Town Code Enforcement Officer:

> It was undisputed that the registration of Knaus's vehicle had expired in early 2011 and had not been renewed since. The evidence also showed the vehicle was nonoperational" and could not be "self-propelled" in its then-existing state. According to Roberts, the vehicle was "rusted out" and had not moved from its position since at least 2009. Knaus claimed he could still drive the vehicle, but he admitted that it was on its second engine, that it had traveled a total of 440,000 miles, that he painted over the side windows, that he last started the vehicle "probably[] a year" before the citation, and that he now desired to use the vehicle solely as a "lawn ornament." Finally, Knaus testified he bought the van in 1979, and Roberts testified the vehicle appeared to be worth less than $500. Accordingly, the van satisfied all of the definitions of a "junked motor vehicle" under § 121-3, and the evidence showed Knaus violated § 121-5.

LINK

Waze and Means

Leonia NJ, joining a growing number of municipalities nationwide, is taking action to combat streams of traffic being re-routed to the town's narrow side streets by traffic-mapping apps like Waze. When congestion slows traffic on major thoroughfares leading to nearby George Washington Bridge, the apps direct commuters through Leonia's residential streets. Homeowners complain that they cannot even back out of their own driveways.

The town is fighting back. It has re-classified those streets as "residential use only" during peak hours, imposing a $200 fine for scofflaws. The hope is that Waze et al will now reflect that change and no longer show the residential roads as available alternatives.

LINK

Day of Reckoning--First State Court Opioid Trial Date Set

Oklahoma has become the first state in the nation to set a trial date in the opioid litigation. The suit, which names manufacturers Purdue Pharma, Janssen, Teva, Endo, Actavis and others, is now scheduled to begin on May 28, 2019.

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