

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

JAN 24 2012

Stephan Harris, Clerk
Cheyenne

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WYWATCH FAMILY ACTION, INC.,

Plaintiff,

vs.

RICH CATHCART et al.,

Defendants.

Case No. 12-CV-01-F

ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiff WyWatch Family Action, Inc.'s (WyFA) Motion for Preliminary Injunction. WyFA seeks a preliminary injunction against Rich Cathcart, individually, and in his official capacity as Executive Secretary of the State Building Commission of Wyoming, Matthew Mead, Max Maxfield, Cynthia Cloud, Joseph Meyer and Cindy Hill in their official capacity as members of the State Building Commission of Wyoming (collectively referred to as "SBC"), to enjoin them from preventing WyFA and other speakers from engaging in protected expression in the Herschler Gallery. The Court has reviewed the pleadings in this case, heard oral argument and is fully informed in the premise. The Court FINDS and ORDERS as follows:

BACKGROUND

This case arises from events during the 2011 Wyoming Legislative session in which WyFA sought, and received, permission from Rich Cathcart, the executive secretary for the State Building Commission of Wyoming to put up a display in the Herschler Gallery. However, after receiving a number of complaints, Mr. Cathcart removed WyFA's display. Plaintiff now seeks an injunction from the Court to enjoin the SBC from applying its display policy in such a manner that it prevents WyFA and others from putting displays in the Herschler Gallery.

The Herschler Gallery is a subsurface corridor connecting the Wyoming Capitol and Herschler Building. Many legislators, state employees, lobbyists, and citizens pass through this area. Traditionally, many organizations, including state, county, local governments and the public have erected displays in the Herschler Gallery in support of various messages. SBC controls access to the Gallery, in regulating displays, SBC in 2011 enforced a Display Policy (hereinafter "2011 Rules").

WyFA claims that it was denied an unique opportunity to share its message. After the events in 2011, WyFA wrote to SBC officials and sought to insure it would be able to use the Herschler Gallery in the future. WyFA claims that it never received a response and has been perpetually deterred from erecting its pro-life display in the Herschler Gallery.

After WyFA filed and served its response, and prior to the preliminary injunction hearing set by the Court, the SBC adopted a new Building-Use Policy (hereinafter "2012 Rules"), closing the Herschler Gallery to the public for demonstrations or displays. The SBC claims that WyFA's

Motion for Preliminary Injunction is moot, based on the adoption of the 2012 Rules, making a determination of the 2011 Rules moot. WyFA claims that this is still a live controversy because the SBC appears to be defending the prior policy and there is some chance that it could be reinstated after this litigation.

1. Mootness

The first issue before the Court is whether the SBC's voluntary cessation of the old policy renders this issue moot. "[A]s a general rule, voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979)(citation and quotation marks omitted). "But jurisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* (citation and quotation marks omitted). "The burden of demonstrating mootness is a heavy one." *Id.* (citations and quotation marks omitted).

The 2012 Rules were enacted by a vote of the SBC on January 18, 2012. During the hearing in this matter, counsel for SBC recognized that there were problems with the 2011 Rules, but stated that the SBC had not yet determined the position it would take in this litigation regarding the 2011 Rules, given the recent filing of this case. WyFA directs the Court to two cases it believes are instructive on this issue, *DeJohn v. Temple University*, 537 F.3d 301 (3rd Cir. 2008) and *Sasnett v.*

Litscher, 197 F.3d 290 (7th Cir. 1999). The courts in both those cases had facts that indicated there was a high likelihood that the state actor would revert to the old, challenged regulations, unless those regulations were enjoined. The Court does not believe that there is a high likelihood that the SBC will return to the 2011 Rules. However, the Court also does not believe the SBC has met its “heavy burden” to establish that this issue is moot. Therefore, the Court finds that WyFA’s challenge to the 2011 Rules did not become moot when the SBC adopted the 2012 Rules.

2. Preliminary Injunction

Finding that this case is not moot, the current issue before the Court is WyFA’s Motion for Preliminary Injunction. To succeed on a motion for a preliminary injunction, a plaintiff must demonstrate: “(1) a likelihood of success on the merits; (2) a likelihood that plaintiff will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the plaintiff’s favor; and (4) that the injunction is in the public interest.” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). A preliminary injunction’s purpose is to maintain the status quo, so a court should be cautious when the injunction would require affirmative action before a decision on the merits is reached. *Id.* at 1208-09. Accordingly, a party seeking to alter the status quo must make a heightened showing of these four factors. *Id.* at 1209. In considering these factors, the Court does not believe that WyFA can meet its burden to establish it is entitled to a preliminary injunction because WyFA cannot establish that failure to grant the injunction will cause irreparable harm in the absence of preliminary relief.

A. Irreparable Harm

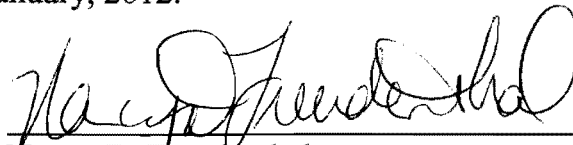
“To constitute irreparable harm, an injury must be certain, great, actual and not theoretical.” *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). In this case, WyFA cannot establish that it will suffer irreparable harm by the Court’s failure to grant a preliminary injunction. The SBC has issued new rules for the use of the Herschler Gallery for the 2012 legislative session, which prohibits all public demonstrations and displays. At the hearing in this matter, WyFA stated that it was asking the Court to only enjoin the 2011 Rules, because that was the policy that it was injured under and was the focus of WyFA’s request. The determination of displays in the Herschler Gallery for the 2012 legislative session will be governed by the 2012 Rules, not the 2011 Rules. Even if the Court were to provide WyFA with the relief it requests and enjoin the SBC from enforcing the 2011 Rules, it would be inconsequential, because the SBC will make determinations on applications for access pursuant to the 2012 Rules. Therefore, WyFA is in the same position regardless of the Court’s action on the preliminary injunction. Under the 2012 Rules, its right to access the Herschler Gallery to engage in protected expression will be the same as the right of any other member of the general public. Therefore, the Court finds that WyFA has failed to establish that it will be irreparably harmed if the Court does not issue a preliminary injunction. Having found that WyFA failed to establish that it will suffer irreparable harm, the Court does not need to consider the other factors to determine whether a preliminary injunction is appropriate in this case.

CONCLUSION

For all of the above stated reasons, the Court finds that WyFA's Motion for Preliminary Injunction is DENIED. WyFA failed to establish that it will be subject to irreparable harm if the injunction does not issue, because WyFA's access to the Herschler Gallery is now subject to the 2012 Rules, not the 2011 Rules, and that access is the same as that of any other member of the general public.

Once the SBC has answered, the Court will set this matter for a briefing schedule to resolve WyFA's underlying Complaint against the 2011 Rule.

Dated this 24 day of January, 2012.



Nancy D. Freudenthal
Chief United States District Judge