

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	64 C 1878	DATE	8/8/2007
CASE TITLE	National Spiritual Assembly of the Baha'is vs. National Spiritual Assembly of the Baha'is		

DOCKET ENTRY TEXT

Status hearing held and continued to 8/23/2007 at 8:30 AM. Because issues of material fact remain, the parties are entitled to an evidentiary hearing as a matter of due process. Accordingly, the Court denies the NSA's motion for rule to show cause without prejudice and will allow the parties to submit post-hearing briefs that incorporate the evidence introduced at the hearing. The Court further directs the parties meet and confer to develop a joint plan and schedule for proceeding with the evidentiary hearing. The parties must submit their joint proposal no later than August 17, 2007.

■ [For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

On November 3, 2006, the National Spiritual Assembly of the Baha'is of the United States (the "NSA") filed a motion for rule to show cause why the following individuals and entities should not be held in contempt for violating a permanent injunction judgment entered on June 28, 1966: (1) Franklin D. Schlatter, (2) Joel B. Marangella, (3) The Provisional National Baha'i Council ("PNBC"), (4) the Second International Baha'i Council (d/b/a Baha'is Under the Provisions of the Covenant) ("SIBC"), and (5) Baha'i Publishers Under the Provisions of the Covenant ("BPUPC") (collectively, the "Alleged Contemnors"). (R. 1-1, NSA's Motion for Rule to Show Cause at 1.) Thereafter, the Court granted the parties the opportunity to conduct discovery, (R. 26-1, Order of Feb. 2, 2007; R. 42-1, Order of Mar. 22, 2007), and the parties have now completed briefing incorporating that discovery. For the reasons discussed below, however, material fact issues remain and, as a matter of due process, the parties are entitled to an evidentiary hearing to determine whether the Alleged Contemnors are bound by the original injunction. Accordingly, the Court denies the NSA's motion without prejudice because issues of material fact remain.

BACKGROUND

The Court already has described the background giving rise to the NSA's current motion and incorporates that background here. (R. 26-1, Order of Feb. 2, 2007.) In short, the NSA is seeking a finding of contempt based on a permanent injunction that enjoins the "The National Spiritual Assembly of the Baha'is of the United States of America Under the Hereditary Guardianship, Inc., its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, . . . from using in their activities [certain] designations . . ." (R. 1-1, NSA's Motion, Ex. A at 24-25.) The parties refer to the entity subject to the injunction variously as the "Remey Corporation" (R. 1-1, NSA Motion at 3), the "New Mexico NSA" (R. 45-1, BPUPC/SIBC Resp. at 3), and the "Remey NSA" (R. 54-1, PNBC Surreply at 1), but

STATEMENT

for clarity the Court will refer to that entity as the “Baha’is Under the Hereditary Guardianship.” The NSA contends that, even though the injunction does not specifically pertain to the Alleged Contemnors, they are nonetheless in privity with the Baha’is Under the Hereditary Guardianship and, thus, equally bound by it. (*Id.* at 7-13.)

ANALYSIS

As a general rule, “a court may not enter an injunction against a person who has not been made a party to the case before it.” *See Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1394 (Fed. Cir. 1996). As Judge Learned Hand describes the purpose and effect of this general rule:

[N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.

Alemite Mfg. Corporation v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930) (Hand, J.) (citation omitted), *cited with approval in Rockwell Graphic Sys. Inc. v. DEV Indus., Inc.*, 91 F.3d 914, 919 (7th Cir. 1996); *see also Additive Controls*, 96 F.3d at 1394 (“Courts do not write legislation for members of the public at large; they frame decrees and judgments binding on the parties before them.”). Yet there are certain exceptions to this principle, as Rule 65 itself suggests: “[e]very order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Fed. R. Civ. P. 65(d); *see also Rockwell Graphic Sys.*, 91 F.3d at 919 (the last clause of Rule 65(d) “is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in ‘privity’ with them, represented by them or subject to their control.” (quoting *Regal Knitwear Co. v. Nat’l Labor Relations Bd.*, 324 U.S. 9, 14, 65 S. Ct. 478, 481, 89 L. Ed. 661 (1945))). For example, consistent with Rule 65, an injunction against a corporation binds that corporation’s acting officers (even if not personally named in the injunction) because such an entity “as an incorporeal abstraction” acts only through its agents. *See Reich v. Sea Sprite Boat Co.*, 50 F.3d 413, 417 (7th Cir. 1995) (“An order issued to a corporation is identical to an order issued to its officers, for incorporeal abstractions act through agents.”).

An injunction also may bind those in “active concert or participation” with the party named in the injunction. Fed. R. Civ. P. 65(d). “The interpretation of ‘active concert or participation’ has engendered two lines of cases in which parties not named in an injunction are bound thereby:”

First, an injunction may bind nonparties who are successors in interest to parties named in the injunction with respect to the subject matter of the injunction. *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 179-80, 94 S. Ct. 414, 422-23, 38 L. Ed. 2d 388 (1973); *Herrlein v. Kanakis*, 526 F.2d 252, 253-54 (7th Cir. 1975); *Brunswick Corp. v. Chrysler Corp.*, 408 F.2d 335, 339 (7th Cir. 1969). Second, parties otherwise without an injunction's coverage may subject themselves to its proscriptions should they aid or abet the named parties in a concerted attempt to subvert those proscriptions. *Regal Knitwear*, 324 U.S. at 14, 65 S. Ct. at 481; *Chase Nat’l Bank v. City of Norwalk*,

STATEMENT

291 U.S. 431, 436-37, 54 S. Ct. 475, 477 (1934); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930). . . . These rules may also apply in somewhat hybrid fashion in a case where a successor corporation is formed essentially for the purpose of carrying on the enjoined activity. *Cf. Panther Pumps & Equip. v. Hydrocraft, Inc.*, 566 F.2d 8, 24-25 (7th Cir. 1977), *cert. denied*, 435 U.S. 1013, 98 S. Ct. 1887, 56 L. Ed. 2d 395 (1978). These constructions of the “active concert or participation” language of Rule 65(d) recognize that the objectives of an injunction may be thwarted by the conduct of parties not specifically named in its text.

Rockwell Graphic Sys., 91 F.3d at 919-20; *see also, e.g., Alemite*, 42 F.2d at 832-33 (“[A] person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt. This is well settled law. . . . [but] the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. This means that the respondent must either abet the defendant, or must be legally identified with him.”). As the authorities within the above-cited excerpt demonstrate, the two lines of cases rest on slightly different theories – *see, e.g., Golden State Bottling*, 414 U.S. at 179, 94 S. Ct. at 422-23 (Rule 65 “is not a bar to judicial enforcement of the Board order entered against the bona fide successor[s] . . . [because] [p]ersons acquiring an interest in property that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment, despite a lack of knowledge”); *cf. Regal Knitwear*, 324 U.S. at 14, 65 S. Ct. at 481 (regarding the last clause of Rule 65(d): “In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.”) – which likely will inform the ultimate analysis as to whether privity exists. *See Wright & Miller*, 11 FED. PRAC. & PROC. §2956 (“the best way to approach the question of ‘privity’ may be to analyze the facts of each case in order to determine whether the requisite relationship exists between those enjoined and those against whom a contempt proceeding has been brought to justify a finding that the latter are in privity with the former.”); *see also Rockwell Graphic Sys.*, 91 F.3d at 919-20 (“[a] court must consider the extent of the alleged ‘active concert or participation’ of third parties with those named in the injunction in determining whether the injunction’s prohibitions shall apply to those third parties”).

Accordingly, the critical threshold inquiry is whether the Alleged Contemnors (by whatever theory) are in privity with the Baha’is Under the Hereditary Guardianship. In this regard, material fact issues remain and, thus, due process requires an evidentiary hearing. *See Tranzact Tech., Inc. v. 1Source Worldsite*, 406 F.3d 851, 855-56 (7th Cir. 2005) (in civil contempt proceedings, “[d]ue process requires a district court to resolve relevant factual disputes – allowing discovery and holding an evidentiary hearing if necessary . . .” (citing *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 459 (7th Cir. 1993) and *In re Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881, 882-83 (7th Cir. 1989))); *see also Rockwell Graphic Sys.*, 91 F.3d at 920 (due process rights belong to both the alleged contemnor and the complainant and both are entitled to the resolution of genuine issues of material fact). Indeed, much of the factual background of this case is both complex and disputed, and the Court will not recount the relevant facts in detail here. It suffices for present purposes to note that, based on the current record, fact issues prevent the Court from determining whether privity exists. For example, although the parties apparently do not dispute that Leland Jensen was a founding member of the Baha’is Under the Hereditary Guardianship (R. 45-1, BPUPC/SIBC Resp. at 6) or that he formed the BPUPC and the SIBC (R. 45-14, Aff. of N. Chase at ¶¶10-11), they dispute the nature and extent of Jensen’s relationship to the Baha’is Under the Hereditary Guardianship during the underlying litigation. (*See, e.g., R. 45-1, BPUPC/SIBC Resp. at 6-7; R. 45-14, Aff. of N. Chase at ¶8; R. 50-1, NSA Reply at 7.*)

STATEMENT

Regarding the other Alleged Contemnors, similar fact issues exist (*see, e.g.*, R. 54-1, PNBC Reply at 3-4), and these issues are further complicated because the parties' submissions leave unclear whether an injunction continues to binds officers or agents not personally named therein if their relationship with the bound entity has effectively ended, as the Alleged Contemnors contend (*id.* at 4 (indicating that a different entity succeeded the Baha'is Under the Hereditary Guardianship)). *See Alemite*, 42 F.2d at 832-33 (finding former employee not bound by injunction even though employed by the bound party "[a]t the time of the suit" because "if the defendant is not involved in the contempt, the employee cannot be" "for it is not the act described which the decree may forbid, *but only that act when the defendant does it*" (emphasis added)); *cf. Walling*, 321 U.S. at 674, 64 S. Ct. at 828 (indicating that injunctions against a corporation may bind "agents and officers and those individuals associated with it in the conduct of its business" but not saying definitively whether that rule applies in all instances). These are only examples of the lingering fact issues – examples demonstrating that, consistent with due process, the parties are entitled to an evidentiary hearing.

CONCLUSION

Because issues of material fact remain, the parties are entitled to an evidentiary hearing as a matter of due process. Accordingly, the Court denies the NSA's motion for rule to show cause without prejudice and will allow the parties to submit post-hearing briefs that incorporate the evidence introduced at the hearing. The Court further directs the parties meet and confer to develop a joint plan and schedule for proceeding with the evidentiary hearing. The parties must submit their joint proposal no later than August 17, 2007.