

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED

December 17, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE, ex rel.) LOUDON COUNTY
JOHN A. ROBERTS, et al.) 03A01-9606-CH-00194
)
Plaintiffs - Appellants)
)
v.) HON. FRANK V. WILLIAMS, III,
) CHANCELLOR
)
)
I. D. "BABE" CONNER, et al.)
)
Defendants - Appellees) AFFIRMED AND REMANDED

HUBERT D. PATTY OF MARYVILLE FOR APPELLANTS

DAVID E. RODGERS OF OAK RIDGE FOR APPELLEES

O P I N I O N

Goddard, P. J.

John A. Roberts and the other Plaintiffs in this cause appeal dismissal of their suit styled "COMPLAINT OF OUSTER" against a number of Defendants. On the date the present suit was filed¹ the original Defendants, other than those denominated ex officio Defendants--the District Attorney General, City Attorneys

¹ A previous virtually identical suit was filed and non-suited.

for the City of Lenoir City, and the Attorney General of Tennessee--were either former members or present members of the City Commission. By amendment, two additional present members of the Commission were added as parties Defendant. All of the Defendants who are present members of the Commission have been elected or re-elected since commission of the improper acts alleged.

No issues are presented for review. However, the brief of the Defendants succinctly and accurately sets out the allegations of misconduct and the Court's disposition thereof. (See Appendix.)

Our reading of the record and the parties' briefs persuades us that this is an appropriate case for affirmance under Rule 10(a) of this Court.

The judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against the Plaintiffs and their surety.

Houston M Goddard, P. J.

CONCUR:

Don T. McMuray, J.

Charles D. Susano, Jr., J.

A. Ouster

The only relief available under a Complaint for ouster is removal from office. This relief is moot, and the Complaint must be dismissed, as to any Defendant who is no longer in office or who has been re-elected to a new term subsequent to the occurrence of the act complained of. *State v. Murley*, 308 S.W2d 405 (Tenn. Sup. Ct. 1957). Attached to this Brief as Exhibit 1 is an affidavit of Deborah L. Cook, Recorder of the City of Lenoir City pertaining to the dates that the various Defendant Aldermen left office or were most recently elected or re-elected to new terms in office.² Defendants Johnson and Luttrell had left the Board prior to the filing of suit, and ouster as to them was dismissed by Order. Defendants Pace and Hines were elected Aldermen subsequent to the acts complained of, and ouster was dismissed as to them by Order. Defendants Cheatham and McNabb left the Board during the pendency of the suit, and ouster was dismissed as to them by Order. Defendants Conner and Hanby were re-elected after the acts complained of, and ouster as to them was dismissed by Order.

B. Violation of T. C. A. § 6-2-302

The above referenced statute was repealed in 1991. Acts claimed to be violative of said statute could not be the basis of ouster in 1996 as to any Defendants.

C. Dual Service as Alderman and Director of Lenoir City Utilities Board

Plaintiffs asserted that serving in the above referenced dual capacity was a violation of State law and the City Charter without citing any authority in the Complaint. Amendment number 6 of the 1988 amendments to the Charter of Lenoir City, a home rule municipality, specifically requires that the Board of Mayor and Aldermen constitute the Board of Directors of the Utility Board. This issue was addressed by the Chancellor, and dismissed by Order.

D. *Quo warranto* - T. C. A. § 12-4-101 - Private interest in public contracts

Pursuit of this issue requires participation or consent by the District Attorney General, *State v. Parker*, 315 S.W2d 396 (Tenn. Sup. Ct. 1958), or a finding that the District Attorney

² Although the affidavit of Deborah L. Cook attached as Exhibit 1 to this Brief was not filed as evidence, the information contained therein was of public knowledge and public record and when asserted no dispute by Plaintiffs with respect to such assertions was made, and Plaintiff approved the entry of the various Orders pertaining thereto.

General has abused his discretion in failing to pursue the matter or consent to it being pursued. *Bennett v. Stutts*, 521 S.W2d 575 (Tenn. Sup. Ct. 1975). The District Attorney General refused to pursue it and would not consent to it being continued. The Trial Judge held an evidentiary hearing to determine whether or

not the District Attorney General had abused his discretion, the transcript of proceedings being contained in Vol. II of the technical record. The Judge found no abuse of discretion.

E. Other issues

i. Payment of private attorney's fees with public funds.

Plaintiffs asserted that the Aldermen had been improper beneficiaries of payment of private attorneys' fees with public funds. This issue originally arose in connection with the attorney's fees for the preceding litigation. Although not reflected in the pleadings, Plaintiffs seemed to complain that such was occurring in the instant suit. Defendants addressed these issues at the District Attorney General's abuse of discretion evidentiary hearing. The Trial Judge found such allegations without merit and dismissed them.

ii. Violation of T. C. A. § 8-44-103, the Tennessee Open Meetings Act (Sunshine Law).

In the Complaint, Plaintiffs asserted general, vague and non-specific violations of the Tennessee Open Meetings Act. The Trial Court, at the conclusion of the District Attorney General's abuse of discretion evidentiary hearing stated to the Plaintiffs' attorney that there were other portions of the Complaint yet to be dealt with, including Open Meeting Act violations. Defendants indicated to the Court their understanding that all acts complained of had occurred during prior terms in office of Defendants. It was indicated that discovery was scheduled for the next week. Subsequently, Plaintiffs' counsel represented that there were no further issues to litigate, and that an Order of Dismissal should be entered so that an appeal could be taken. Any unresolved issues were thus voluntarily waived by Plaintiffs.