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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THOMAS S. TAORMINA,

Plaintiff,

vs.

STOREY COUNTY,

Defendant

Case No: 3: 09-CV-00021-LRH-VPC

NOTICE OF MOTION AND MOTION TO VACATE, ALTER OR AMEND THE JUDGMENT IN THIS ACTION

PLEASE TAKE NOTICE that Plaintiff Tom Taormina will, and does hereby, move the Court for an Order vacating, altering or amending the Judgment in this action entered on June 21, 2010.

This Motion is made pursuant to Rule 59(e) and Rule 60(b) of the Federal Rules of Civil Procedure and is made on the following grounds: (1) the Complaint in this case alleged that the Storey County ordinances relating to amateur radio support structures were contrary to, and therefore preempted by, federal law, both on their face *and* as applied to Plaintiff's proposed support structures; (2) Plaintiff's Motion for Summary Judgment necessarily sought judgment in his favor only as to the facial invalidity claim, inasmuch as he had not yet applied for a Special Use Permit or other County permission that would involve the County's application of its ordinances to his proposed support structures; (3) despite the fact that Plaintiff's "as applied" claim was not yet ripe for decision, a fact recognized by the Court in its Order of June 17, the Court directed the Clerk to enter judgment on the Complaint and Judgment was entered on June 21, 2010. As a result, Plaintiff's "as applied" claim, should it prove necessary to pursue that claim following the administrative proceedings with the County, may be barred by the doctrine of *res judicata* and, as a result, Plaintiff will denied a trial or other hearing on his "as applied" claim without due process of law.

This Motion does *not* challenge the Court's conclusions as stated in its Order dated June 17, 2010, denying Plaintiff's Motion for Summary Judgment, *i.e.*, this is not a motion for "reconsideration," but only seeks to set aside the Judgment entered on June 21, 2010.

This Motion is brought in good faith and is based upon this Notice of Motion and Motion, the Memorandum in Support of this Motion, the pleadings and other documents on file

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in this action, and such oral or documentary evidence as may be presented prior to or at the hearing, if any, on this Motion.

Respectfully submitted,

Dated: July 13th, 2010.

McMAHON LAW OFFICES, LTD.

FRED HOFENGARTEN

By _____

Brian M. McMahon
Attorneys for Plaintiff
Tom Taormina

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO VACATE, ALTER OR AMEND THE JUDGMENT IN THIS ACTION

I. FACTUAL BACKGROUND

Plaintiff Tom Taormina ("Plaintiff" or "Taormina") is an amateur radio operator licensed by the Federal Communications Commission. He applied for and Storey County granted building permits to erect antenna support structures at his residence. Before the installation was completed, the County took the first of many conflicting positions on whether the ordinances arguably directed to such structures applied and, if so, how. The County's first conflicting position, taken after it had issued the building permits and Taormina had begun construction, was to issue a Stop Work Order. Months of communications between lawyers for Taormina and the County followed, during which the County's position shifted several times. Frustrated with the administrative shifting sands and his inability to install antennas necessary for the amateur radio communications authorized by his license and federal law, Taormina filed a Complaint for Declaratory and Injunctive Relief on January 15, 2009. His Complaint sought a declaratory judgment that the County's ordinances, on their face and as applied to him and his proposed support structures, were contrary to federal law and thus preempted by the Supremacy Clause of the U.S. Constitution.

On October 19, 2009, Taormina filed a "Motion for Declaratory Judgment."[1] The Motion was necessarily directed only to Plaintiff's facial claim of preemption, inasmuch as he had not yet given in to the County's demands that he must apply for a "Special Use Permit" or a "variance," two different positions the County had taken. Taormina can hardly be faulted for first seeking the Court's declaration that the County's ordinances, *on their face*, were

[1] As the Court noted in its Order denying this Motion, the Motion was incorrectly labeled, and should have been described as a Motion for Summary Judgment. The Court reviewed the Motion as if it had been correctly described. June 17, 2010 Order ("Order") at 1 n. 2.

inconsistent with federal law, in light of the County's shifting "interpretations" of its laws and the expense and delay associated with the administrative proceedings that the County insisted were required. It had already been almost a year and a half since the County first granted the building permits, and meanwhile everything was "on hold" as a result of the County's Stop Work Order.[2]

The Court's Order of June 17, 2010 concluded that the County's ordinances, *on their face*, did not violate federal law, and specifically the requirements stated in the FCC's PRB-1 ruling, because (1) they did not entirely prohibit amateur radio antennas (Order at 7), and (2) the ordinances did not impose an "absolute height restriction" on antennas. Order at 7. As to the latter issue, the Court concluded that an amateur radio operator who seeks to construct an antenna support structure that exceeds 45 feet may seek from the County a Special Use Permit. Order at 8.[3] Thus, there was not an "absolute height restriction" for amateur radio support structures in Storey County in violation of PRB-1.

The Court then attributed to Taormina the contention that PRB-1 preempts the County's ordinances because the County "has failed to apply the ordinances in a manner that reasonably accommodates amateur communication." Order at 8-9. With all respect, Taormina's Motion (as opposed to the Complaint) made no such contention, *nor could it*: as noted earlier, Taormina had not yet given in to the County's insistence that he must apply for, and undergo the cost and delay associated with the County's procedures for, a Special Use Permit (or, perhaps, a variance). However, the Court correctly observed:

> Because the county has not had the opportunity to apply its zoning regulations, the court cannot determine whether the county has reasonably accommodated

[2] As the Court noted in its Order, "the court is sympathetic to Plaintiff's frustration with the county's inconsistent interpretations of its zoning ordinances." Order at 9.

[3] While Plaintiff does not, of course, agree with the Court's conclusions on his facial challenge to the County's ordinances interpreted as a whole by the Court, this Motion does not challenge those conclusions.

> Plaintiff's amateur communications. Thus, until Plaintiff's [sic] applies for a special use permit, and the county has the opportunity to review the request, the court must deny Plaintiff's as applied challenge to the zoning regulations.
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> Order at 9.

This was procedurally sound, at this point in the Order: Taormina's belief that that County's ordinances were invalid on their face had been rejected by the Court, leaving him to apply for a Special Use Permit (or a variance) and, if necessary, pursue his claim that the County's *application* of its ordinances to him and his individual facts violated federal law. However, the Court then directed the Clerk to enter judgment in favor of the County, stating that the Order "dispositively resolves the issues presented in this case." Order at 9. The problem is that Taormina's "as applied" claim had not yet been resolved, nor could it have been because Taormina had not yet applied for a Special Use Permit and had not yet found out how the County would treat and resolve that application. The entry of Judgment in favor of the County, however, presents for Taormina the very real risk that, having alleged in the Complaint both facial and "as applied" claims, and having had Judgment entered against him *on the Complaint*, any future "as applied" claim will be barred by the doctrine of *res judicata*. These facts form the basis for this Motion.

II. ARGUMENT

A. Rule 59(e) and Rule 60(b) of the Federal Rules of Civil Procedure Authorize the Court to Vacate and/or Amend the Judgment Entered in this Case.

Rule 59(e) provides that the Court, on motion filed no later than 28 days after the entry of a judgment, may "alter or amend" that judgment. While the Rule itself does not state the grounds for such a motion, case law provides that the prevention of manifest injustice and the correction of a legal error justify altering or amending the judgment. *United National Insurance Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009), citing *Zimmerman*

v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001). As shown in the next section, Taormina submits that both grounds exist here.

Rule 60(b) provides that the Court may relieve a party from a final judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect." Taormina submits that the "surprise" ground applies here, inasmuch as the County had not made a cross-motion for summary judgment and he had no notice (or even suspicion) that the Court would enter judgment against him in the event it denied his motion.

B. The Court's *Sua Sponte* Entry of Judgment Against Taormina Upon the Denial of His Summary Judgment Motion Did Not Conform to Ninth Circuit Law.

Taormina moved for summary judgment on his facial invalidity claim, and no cross-motion for summary judgment was filed by the County. The Court, however, directed the Clerk to enter judgment in favor of the County and against Taormina in the belief that its resolution of Taormina's motion left no further issues to be resolved.

The Ninth Circuit has dealt with the *sua sponte* entry of judgment following a ruling on the losing party's summary judgment on a number of occasions. As a general matter, the practice is not prohibited but, as the Ninth Circuit's cases make clear, certain conditions must exist. Those conditions have been variously stated by the Ninth Circuit, but they all center on the presence of notice to the losing party that an adverse judgment on all of his claims may result.

Thus, in *United States v. 14.02 Acres of Land*, 530 F.3d 883 (9th Cir. 2008), the court stated that "Sua sponte grants of summary judgment are only appropriate if the losing party has 'reasonable notice that the sufficiency of his or her claim will be in issue.'" 530 F.3d at 894 (citations omitted). In *Gospel Missions of America v. Wagner*, 328 F.3d 548 (9th Cir. 2003), the

court held that "Even where there has been no cross-motion for summary judgment, a district court may enter summary judgment *sua sponte* against a moving party if the losing party has had a 'full and fair opportunity to ventilate the issues involved in the matter.'" 328 F.3d at 553, citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982). *See also Corales v. Bennett*, 567 F.3d 554, 570 (9th Cir. 2009) ("if the losing party was on notice to come forward with its evidence"); *Koninklijke Philips Electronics N.V. v. Cardiac Science Operating Co.*, 590 F.3d 1326, 1332 (9th Cir. 2010) ("if the losing party has had a 'full and fair opportunity to ventilate the issues involved in the motion'"); *Greene v. Solano County Jail*, 513 F.3d 982, 990 (9th Cir. 2008) ("reasonable notice that the sufficiency of his or her claim will be in issue").

Here, of course, Taormina could not have been on notice that his "as applied" claim was at issue on his motion because, as the Court observed, he had not yet sought a Special Use Permit or otherwise invoked the County's application of its ordinances to his application. Thus, neither he nor the County had briefed this issue for the simple reason that the facts supporting and opposing that claim had not yet occurred.

Whether characterized as the prevention of manifest injustice, legal error or surprise, Taormina respectfully submits that these facts justify relief under Rule 59(e) and Rule 60(b).

C. Unless the Judgment is Vacated, Taormina's As Applied Claim May Be Barred by the Doctrine of *Res Judicata* and, in any Event, Will Result in Multiple Appeals.

The doctrine of *res judicata* precludes a party from relitigating (1) the same claim, (2) against the same party, (3) when that claim proceeded to a final judgment on the merits in a prior action. *Adams Brothers Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1148-49 (9th Cir. 2010) (California law); *Carmona v. Carmona*, 603 F.3d 1041, 1052 (9th Cir. 2010)

(Nevada law). The doctrine bars not only claims that were actually litigated, but also claims that could have been litigated. *Adams Brothers, supra*, 604 F.3d at 1150.

Taormina does not concede that *res judicata* would bar his later attempt to litigate his "as applied" claim, once the facts are established, but believes that there is a substantial risk that a court would so find. The claims and the parties are identical and, by virtue of the Clerk's entry of judgment, there has been a judgment on the merits.

To prevent that judgment from becoming "final," Taormina will be forced to file a notice of appeal. Then, once his "as applied" claim has become ripe, he will be forced to file a second appeal if the *res judicata* doctrine is found to bar that claim—and perhaps the County would appeal if its *res judicata* defense is rejected. Vacating the judgment will avoid these piecemeal appeals and will permit the parties and the Court to deal with both claims in a single action, with one appeal if either party is unhappy with the result.

D. The Court Should Vacate the Judgment and Stay the Case Pending the Result of the Special Use Permit Proceedings.

Taormina respectfully submits that the Court should vacate the judgment and enter a stay of the case pending the result of the Special Use Permit proceedings with the County. If the County takes seriously its obligations under PRB-1 and federal law in those proceedings, that may well be the end of the matter. In any event, doing so will protect the legitimate interests of both parties and will further the efficient use of judicial resources.

III. CONCLUSION

For the foregoing reasons, Taormina respectfully submits that the Court should vacate the

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judgment entered in this case and stay the case pending further proceedings between Taormina and the County.

Respectfully submitted,

Dated: July 13th, 2010.

McMAHON LAW OFFICES, LTD.
FRED HOPENGARTEN

By _____
Brian M. McMahon
Attorneys for Plaintiff
Tom Taormina

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I hereby certify that I am an employee of McMahon Law Offices, Ltd., and that on the 13th day of July, 2010, I served a true and correct copy of the attached foregoing document by:

X Depositing for mailing, in a sealed envelope, U.S. Postage prepaid, at Reno, Nevada

___ Personal Delivery

___ Facsimile

___ Federal Express/Airborne Express/Other Overnight Delivery

___ Reno-Carson Messenger Service

addressed as follows:

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