

14-1441

Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Thurgood Marshall United
3 States Courthouse, 40 Foley Square, in the City of New York,
4 on the 6th day of January, two thousand fifteen.

5
6 **PRESENT: DENNIS JACOBS,**
7 **REENA RAGGI,**
8 **DEBRA ANN LIVINGSTON,**
9 **Circuit Judges.**

10
11 - - - - -X
12 **Jewish People for the Betterment of**
13 **Westhampton Beach, Arnold Sheiffer,**
14 **Estelle Lubliner,**
15 **Plaintiffs-Appellants,**

16
17 **-v.-** **14-1441**

18
19 **The Village of Westhampton Beach, East**
20 **End Eruv Association, Inc., Verizon**
21 **New York, Inc., and the Long Island**
22 **Lighting Company, d/b/a LIPA,**
23 **Defendants-Appellees.**

24 - - - - -X
25
26 **FOR APPELLANTS:** **JONATHAN SINNREICH, with Timothy**
27 **F. Hill, Sinnreich Kosakoff &**
28 **Messina LLP, Central Islip, New**
29 **York.**

1 **FOR APPELLEES:**

2 YEHUDAH L. BUCHWEITZ, with
3 Robert G. Sugarman, Weil,
4 Gotshal & Manges LLP, New York,
5 New York, for East End Eruv
6 Association, Inc.

7 ERICA S. WEISGERBER, with
8 Michael E. Wiles, Debevoise &
9 Plimpton LLP, New York, New
10 York, for Verizon New York, Inc.

11
12 ZACHARY MURDOCK, with David
13 Lazer, Lazer Aptheker Rosella &
14 Yedid PC, Melville, New York,
15 for Long Island Lighting Company
16 d/b/a LIPA.

17
18 Appeal from judgments of the United States District
19 Court for the Eastern District of New York (Wexler, J.).
20

21 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
22 **AND DECREED** that the judgment of the district court be
23 **AFFIRMED.**
24

25 Arnold Sheiffer, Estelle Lubliner, and Jewish People
26 for the Betterment of Westhampton Beach (collectively
27 "plaintiffs") appeal from judgments of the United States
28 District Court for the Eastern District of New York (Wexler,
29 J.), dismissing their complaint. We assume the parties'
30 familiarity with the underlying facts, the procedural
31 history, and the issues presented for review.
32

33 Plaintiffs allege violations of 42 U.S.C. § 1983 in
34 connection with the installation in Westhampton Beach, New
35 York of inconspicuous strips attached to utility poles.
36 Because the strips delineate an "eruv," which is significant
37 to some as a matter of Jewish law, plaintiffs allege an
38 unconstitutional establishment of religion. We affirm.
39

40 **1.** Defendants raise two jurisdictional challenges,
41 neither of them persuasive.
42

43 **a.** Defendants argue that the order appealed from was
44 not a final judgment under 28 U.S.C. § 1291, because a
45 stipulation filed by plaintiffs dismissed their claims
46 *without prejudice* against defendant Village of Westhampton
47 Beach. But in this Circuit, a plaintiff may cure such a

1 defect in appellate jurisdiction by disclaiming an intent to
2 revive the dismissed claim (effectively, converting it to a
3 dismissal *with prejudice*, for reasons of estoppel). See
4 Leung v. N.Y. Univ., 495 F. App'x 124, 125 (2d Cir. 2012)
5 (citing Slayton v. Am. Exp. Co., 460 F.3d 215, 225 (2d Cir.
6 2006)). Plaintiffs' reply brief disclaims any intent to
7 revive their dismissed claim against the Village of
8 Westhampton Beach. So that potential obstacle to appellate
9 jurisdiction is removed.

10
11 **b.** Defendants also argue that plaintiffs lack standing
12 under Article III, which limits the judicial power of the
13 United States to the resolution of cases and controversies.
14 U.S. Const. art. III, § 2. To satisfy this jurisdictional
15 requirement, "(1) the plaintiff must have suffered an
16 injury-in-fact; (2) there must be a causal connection
17 between the injury and the conduct at issue; and (3) the
18 injury must be likely to be redressed by a favorable
19 decision." Cooper v. U.S. Postal Serv., 577 F.3d 479, 489
20 (2d Cir. 2009) (internal quotation marks omitted).

21
22 We have found standing in the Establishment Clause
23 context for a plaintiff who alleged that he "was made
24 uncomfortable by direct contact with religious displays."
25 Id. at 491. Plaintiffs here allege that "[t]he eruv . . .
26 will not go unnoticed; rather, it will be a constant and
27 ever-present symbol, message and reminder to the community
28 at large, that the secular public spaces of the Village have
29 been transformed for religious use and identity." Compl.
30 ¶ 1. Plaintiffs, in particular, allege that they "will be
31 confronted with the . . . religious display on a daily
32 basis." Id. ¶ 5. Those allegations, such as they are,
33 suffice under our precedents.

34
35 Defendants seek to distinguish the eruv from the
36 religious displays at issue in Cooper on the ground (*inter*
37 *alia*) that the eruv is far less obtrusive, and that--
38 contrary to plaintiffs' allegations--the eruv does not
39 convey any message to the uninitiated. But those fact-based
40 arguments are insufficient at the pleadings stage, in which
41 we must assume the truth of plaintiffs' well-pleaded factual
42 allegations.¹ Other courts have found no standing problem

¹ The parties submitted (extensive) factual material outside the pleadings. While the district court did not explicitly exclude this material, its decisions dismissing

1 in challenges to government involvement in the construction
2 of an eruv. See ACLU of N.J. v. City of Long Branch, 670 F.
3 Supp. 1293, 1294 (D.N.J. 1987).
4

5 **2.** On the merits, however, plaintiffs have failed to
6 state a claim for a violation of the Establishment Clause
7 against any of defendants-appellees.
8

9 **a.** Two of the remaining three defendants--Verizon New
10 York, Inc., and the East End Eruv Association, Inc.--are
11 plainly not state actors. See Compl. ¶ 11 ("EEEE is a not-
12 for-profit-corporation"); id. ¶ 13 ("Verizon New York Inc.
13 is a . . . subsidiary of Verizon Communications, Inc., a
14 publicly held corporation."). The Establishment Clause is a
15 check on the power of our government. See, e.g., Cooper,
16 577 F.3d at 491. So all claims against these defendants
17 must be dismissed for lack of state action.
18

19 **b.** The remaining defendant, LIPA, does not dispute
20 that, as "a political subdivision of the State of New York,"
21 Compl. ¶ 12, it is a state actor. So we turn to the merits
22 of plaintiffs' Establishment Clause claims against LIPA.
23

24 Although "much criticized," the Lemon test still
25 governs cases alleging violations of the Establishment
26 Clause. Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.,
27 760 F.3d 227, 238 n.12 (2d Cir. 2014). Under Lemon, for
28 "government action to satisfy the neutrality principle of
29 the Establishment Clause, it must (1) 'have a secular
30 purpose,' (2) have a 'principal or primary effect that
31 neither advances nor inhibits religion,' and (3) 'not foster
32 an excessive government entanglement with religion.'" Id.
33 at 238 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13
34 (1971)) (internal ellipses omitted).
35

36 An eruv is a "demarcation of a defined geographic area
37 within which adherents subscribing to a certain
38 interpretation of Jewish law believe that they may perform
39 certain activities that are otherwise prohibited on the
40 Jewish Sabbath and Yom Kippur." Compl. ¶ 19. It is

plaintiffs' claims give us no "reason to believe that the
extrinsic evidence actually affected [its] decision[s]" and
we accordingly conclude that the extrinsic material was
"implicitly excluded." See Amaker v. Weiner, 179 F.3d 48,
50 (2d Cir. 1999).

1 undisputed that the Westhampton eruv was delineated by
2 "nearly invisible" staves and wires attached to utility
3 poles. Compl. ¶¶ 1, 20. Plaintiffs do not allege that
4 these staves contain any overtly religious features that
5 would distinguish them to a casual observer as any different
6 from strips of material that might be attached to utility
7 poles for secular purposes.

8
9 Plaintiffs have not plausibly pleaded that there was no
10 secular purpose to the governmental action here--LIPA's
11 entry into a paid licensing agreement allowing the
12 installation of items of religious significance on utility
13 poles. While plaintiffs repeatedly state in their complaint
14 that the *establishment of an eruv* serves no secular purpose,
15 the complaint does not contain similar allegations with
16 regard to LIPA's action of permitting the EEEA to attach
17 lechis to its utility poles, and does not allege that LIPA
18 granted access to its utility poles in a non-neutral manner.
19 Neutral accommodation of religious practice qualifies as a
20 secular purpose under Lemon. See, e.g., Good News Club v.
21 Milford Cent. School, 533 U.S. 98, 114 (2001). And other
22 courts have held that absent evidence that the erection of
23 an eruv is facilitated in a non-neutral manner, permitting
24 an organization to attach lechis to utility poles serves the
25 secular purpose of accommodation. See, e.g., Long Branch,
26 670 F. Supp. at 1295-96.

27
28 In religious display cases, Lemon's second
29 consideration collapses into the question whether a
30 "reasonable observer of the display in its particular
31 context [would] perceive a message of governmental
32 endorsement or sponsorship of religion." Skoros v. City of
33 New York, 437 F.3d 1, 29 (2d Cir. 2006). No reasonable
34 observer who notices the strips on LIPA utility poles would
35 draw the conclusion that a state actor is thereby endorsing
36 religion, even assuming that a reasonable observer was aware
37 that a state actor (LIPA) was the entity that contracted
38 with a private party to lease the space.

39
40 Finally, it is undisputed that private parties will
41 finance, install, and maintain the strips; so there is no
42 risk of "excessive" government entanglement with religion.²

² The license agreement between LIPA and EEEA permitting the EEEA to affix lechis to LIPA's utility poles is referenced in the complaint and is integral to its

1 Compared with many government actions that have
2 survived the Lemon test, LIPA's accommodation of the eruv
3 has more of a secular purpose, causes less of an advancement
4 of religion, and fosters less church-and-state entanglement.
5 See, e.g., Good News Club, 533 U.S. at 103-04 (allowing a
6 "private Christian organization for children" to hold
7 meetings at a public school "for the purpose of conducting
8 religious instruction and Bible study"); Lynch v. Donnelly,
9 465 U.S. 668, 671 (1984) (allowing a Christmas nativity
10 scene display, on public property, that included "the Infant
11 Jesus, Mary and Joseph, angels, shepherds, kings, and
12 animals," up to five feet tall); Newdow v. Peterson, 753
13 F.3d 105, 107-08 (2d Cir. 2014) (upholding federal statutes
14 requiring the motto "in God We Trust" to appear on all U.S.
15 currency, reasoning that the motto's "secular purpose" is a
16 "reference to our religious heritage"). A fortiori, LIPA's
17 action permitting the EEEA to erect the eruv is not an
18 unconstitutional establishment of religion.
19

20 Every court to have considered whether similar
21 government actions violate the Establishment Clause has
22 agreed that they do not. See Long Branch, 670 F. Supp. at
23 1295 ("The city allowed the eruv to be created to enable
24 observant Jews to engage in secular activities on the
25 Sabbath. This action does not impose any religion on the
26 other residents of Long Branch."); Smith v. Community Bd.
27 No. 14, 491 N.Y.S.2d 584, 586 (N.Y. Sup. Ct. 1985) (allowing
28 private parties to construct an eruv on public property "did
29 not establish religion but [was] a valid accommodation to
30 religious practice"); see also Tenafly Eruv Ass'n v. Borough
31 of Tenafly, 309 F.3d 144, 176 (3d Cir. 2002) (explaining
32 that a "reasonable, informed observer" of an eruv "would not
33 perceive an endorsement of Orthodox Judaism").

allegations. See Compl. ¶ 42; L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 422 (2d Cir. 2011) (a document is "integral" to a complaint where the complaint "relie[s] heavily upon its terms and effect") (internal quotation marks omitted). This agreement establishes (and plaintiffs do not contest) that the EEEA will finance, install, and maintain the strips. See License Agreement between Long Island Lighting Company D/B/A LIPA Through Its Agent National Grid Electric Services LLC and East End Eruv Association, Inc., Article V, § 1, Verizon Compl. Ex. B, Verizon N.Y., Inc. v. Vill. of Westhampton Beach, No. 11-252-cv (E.D.N.Y. Jan. 18, 2011), ECF No. 1.

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For the foregoing reasons, and finding no merit in plaintiffs' other arguments, we hereby **AFFIRM** the judgments of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK




**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: January 06, 2015
Docket #: 14-1441cv
Short Title: Jewish People for the Betterme v. The
Village of Westhampton Bea

DC Docket #: 12-cv-3760
DC Court: EDNY (CENTRAL ISLIP)
DC Judge: Wexler
DC Judge: Lindsay

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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DC Judge: Wexler
DC Judge: Lindsay

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature

