

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

THE CITY OF CHATTANOOGA and  
ex rel. DON LEPARD, Qui Tam,

Plaintiff,

vs.

ELECTRIC POWER BOARD OF  
CHATTANOOGA,

Defendant.

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DIVISION II

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MEMORANDUM OPINION AND ORDER

This is a Qui Tam action, in which Don Lepard, on behalf of the City of Chattanooga (“the City”), accuses the Electric Power Board (“EPB”) of violating the Tennessee False Claims Act. The allegation is that, over many years, EPB overcharged the City millions of dollars for the supply of electricity and other services related to the City’s street lights.

EPB filed a motion to dismiss the complaint, arguing three separate, but related, grounds. First, EPB cites the long held legal rule that a party cannot sue itself. EPB argues that it is a part of the City, and the City suing EPB is no different than the City suing itself. According to EPB, payment of any money damages awarded would result in money being transferred from one bank account controlled by the City to another bank account controlled by the City. In other words, according to this argument, nothing would be accomplished<sup>1</sup>.

Second, EPB points out that the Plaintiff’s lawsuit is based on the alleged violation of the False Claims Act, T.C.A. § 48-18-101-108. The False Claims Act allows governmental agencies to sue to recover money which has allegedly been taken from the government by way of false or

<sup>1</sup> Lepard brings the suit on behalf of the City, which legally is the proper party Plaintiff. If successful, Lepard would share in any monetary judgment obtained by the City.

fraudulent claims by “persons” who supply or sell goods and services to the government. A person is defined in T.C.A. § 4-18-103(3) as:

“...any natural person, corporation, firm, association, organization, partnership, limited liability company, business or trust...”

EPB argues it is an independent board of the City, the type of governmental agency which does not fit the definition of a “person” as set forth above. As EPB points out in its pleadings, the legislature has, in several other statutes, specifically included municipalities and governmental agencies in the definition of “persons” who may be sued under those acts. The legislature has the authority to do that and knows how to make it happen. However, in the False Claims Act, it did not do so.

In its response to EPB’s motion, the Plaintiff relies on some legal claims made in the Amended Complaint it filed on June 23, 2015. This Court mentioned those additional claims in its Order of July 23, 2015. Rule 15 of the *Rules of Civil Procedure* states that a party may amend its pleadings “...as a matter of course at any time before a responsive pleading is served...”. After that, consent must be obtained from the other side or from the Court. The Amended Complaint was filed after October 2, 2014 when the motion to dismiss, which is a responsive pleading, was filed. The Plaintiff did not file a motion to amend or obtain the consent of EPB. No Order was issued by this Court allowing the amendment. Therefore, the Amended Complaint is null and without effect. The only claim properly made against EPB is the alleged violation of the False Claims Act.

Finally, EPB argues that, as a governmental agency, it is immune from this type of lawsuit. From the days of English common law, it has been held that the sovereign, i.e. the

government, cannot be sued without its consent. That concept is referred to as sovereign immunity. That concept is preserved in the Tennessee Constitution. In Tennessee, the legislature has passed laws in which the sovereign immunity of the State of Tennessee and its political subdivisions has been waived. The most significant example of that type of law is the Governmental Tort Liability Act (“GTLA”), in which the legislature granted citizens the right to sue the state and its various political subdivisions for negligent acts which cause damage to the citizens. Only when the legislature has clearly waived sovereign immunity of the State and its political subdivisions can they be sued. EPB argues that the legislature has not given permission to sue governmental entities, such as EPB, under the False Claims Act.

In opposition to the motion, the Plaintiff argues that, while EPB may have started out as a part of the City, it has, over the years, operated independent of the City and has, in effect, separated itself. In particular, the Plaintiff points to the filing of documents with the Secretary of State in 2009 and the issuance of documents by the Secretary of State describing EPB as a nonprofit corporation. The Plaintiff argues that, because EPB is a corporation, this is not a lawsuit in which the City is suing itself. Also, corporations fit within the definition of “persons” who may be sued under the False Claims Act.

As noted earlier, EPB filed a motion to dismiss the complaint under Rule 12 of the *Rules of Civil Procedure*. Rule 12 states that, if documents other than the pleadings are considered by the court in reaching a decision, the court should treat the motion as one for summary judgment which is governed by Rule 56 of the *Rules of Civil Procedure*. Summary judgment motions are more complicated than Rule 12 motions to dismiss. However, the basic question in the summary judgment motion is whether all the material facts are undisputed. If so, the only thing left to

decide is a question of law, which is a question for the Court. As set forth below, the facts are undisputed. The only question to be resolved is the effect of EPB filing documents with the Secretary of State. The question is whether that filing and other events have changed EPB from an independent board of the City into something separate, something which can be sued by the City under the False Claims Act.

On July 23, 2015, this Court issued an Order stating that the only issue to be resolved was whether the city and EPB were still one and the same or that EPB had, in some way, separated itself from the City. It was ruled that the “incorporation” of EPB created an issue of fact, which would defeat the motion for summary judgment and necessitate a trial on that issue. EPB filed a motion to reconsider that Order, which should have been titled a motion to alter or amend. In reviewing the materials for the motion to alter or amend, the Court came to a realization it probably should have come to earlier. The facts on the incorporation issue are not disputed. EPB filed documents with the Secretary of State in 2009. In response, the Secretary of State issued a document listing EPB as a non-profit corporation. Those facts are not and cannot be disputed. The question to be answered is “what is the legal effect of those documents?” Has EPB, by filing the documents, changed its legal identity from a part of the City of Chattanooga to an independent corporation, subject to suit under the False Claims Act? That is a question of law, which this Court must resolve. For the reasons set forth below, the Court finds that the City and EPB are, in effect, one and the same. EPB’s motion for summary judgment will be granted.

In order to explain the Court’s decision, it is necessary to lay out a summary of the history of the City and EPB. This is because it has not and cannot be disputed that EPB was created as part of the City of Chattanooga. As noted earlier, the question is whether that fact has changed

due to events which have occurred since that creation.

In 1935, the Tennessee legislature passed the Municipal Electric Plant Law of 1935, T.C.A. § 7-52-101-611. It was passed in conjunction with the establishment of the Tennessee Valley Authority (“TVA”), which was to provide electrical service to this part of the country to promote development and growth. The 1935 Act allowed municipalities, such as the City, to acquire, operate and maintain “...an electric plant and to provide electric services to any person, firm...or consumer of electric power and energy and charge for the electric service.” T.C.A. § 7-52-103(a)(1). Other aspects of that Act affect this decision.

- In the 1935 Act, the term “electric plant” is defined as the “...generating, transmission or distribution systems...for the furnishing of electric power and energy for lighting, heating, power...” etc. T.C.A. § 7-52-102(3). In order for municipalities to operate and maintain their electric plants, they were authorized to acquire “...transmission lines and... to contract debt and issue bonds to finance the construction and operation of the electric plants.” T.C.A. § 7-52-103(a).
- Under the 1935 Act, the municipalities are authorized to use eminent domain to acquire land for the operation of the electric plant. Title to the land, however, is required to be in the name of the municipality which, of course, in this case, would be the City of Chattanooga.
- The state law also requires the utility to charge the municipality which owns it for any power it provides to that municipality. T.C.A. § 7-52-116
- The electric plant, in this case, EPB, cannot be sold or liquidated without the permission of the governing body of the municipality, which in this case is the

City Council of Chattanooga. In addition, the voters of the City must approve the disposal or liquidation of EPB. T.C.A. § 7-52-132.

- The Act has been amended to allow municipally owned utilities to engage in providing telecommunications, internet, cable and related services. T.C.A. § 7-52-601-611.

Also in 1935, a private act of the legislature was passed which amended the City Charter of Chattanooga to create EPB. This was done in compliance with the 1935 Act. EPB and the City are still subject to these statutes. Section 10.1 of the City's Charter states that "the City of Chattanooga...is hereby authorized to purchase, construct...to maintain, operate and regulate an electric light and power company." (emphasis added) It is clear from these laws that EPB exists, only because the City of Chattanooga, operating under authority granted it by the legislature, created it.

In addition, there are numerous other facts which the parties agree or the Court finds are not in dispute in this case. They are as follows:

1. The creation of EPB as an independent board of the City, by amendment to the City's Charter, has been recognized by courts and regulatory agencies in the State of Tennessee. (SOF Nos. 6, 7, 9, 27, 28,29, 34, 35 and 37)
2. The City has recognized that EPB is part of the City government when it has applied for bonds or issued financial statements. (SOF Nos. 10, 12, 13, 14 and 19)
3. The City Council appoints members of the board which govern EPB. (SOF Nos. 23, 24 and 25)

4. While it is true that EPB is empowered to perform many of its business functions independently, that freedom is granted to it by provisions in the City of Chattanooga's Charter. (SOF Nos. 72, 73, 74, 75, 76, 77, 78, 105 and 106)
5. EPB is required to file financial statements with the City. (SOF Nos. 78 and 80)
6. The City of Chattanooga's charter dictates how many members are on EPB's board and how those members are appointed. It also dictates how those members may be removed. (SOF Nos. 81 through 87)
7. In numerous Court decisions, EPB has been granted the sovereign immunity protections provided by the GTLA. (SOF Nos. 175 and 176)

With all of these undisputed facts, the only way this Court could find that EPB is not a part of the City of Chattanooga is to find that its "incorporation" in 2009 changed its legal status.

In 2009, EPB made what it refers to as a "record filing" with the Secretary of State. The filing consisted of a copy of the charter provisions which authorized the creation and operation of EPB. In response, the Secretary of State issued a Filing Acknowledgment, which noted that the "Filing Type" was "Corporation Non Profit - Domestic." The business type listed on the Acknowledgment is "Public Benefit." The document goes on to state that EPB must file annual reports and designate an agent for service of process.

EPB argues that the filing does not transform it from a public entity to a private corporation separate from the City. In support on its position, EPB produced similar acknowledgments from the Secretary of State for numerous municipalities such as the cities of Pigeon Forge, Oak Ridge, Cleveland and Athens. In addition, there are acknowledgments for governmental agencies, such as the Chattanooga Metropolitan Airport Authority. All of these cities and

authorities are listed as non-profit corporations. EPB argues that it certainly cannot be held that all of those cities and agencies are no longer governmental entities but rather private corporations. To boil down EPB's argument, it says the filing was an administrative matter, for which the Secretary of State had "ill-fitting forms." Whatever the effect, EPB argues, it is not that EPB is now a private corporation, separate from the City.

The Plaintiff looks at the acknowledgment issued by the Secretary of State and says "a corporation is a corporation is a corporation." Plaintiff's argument is that EPB applied for corporate status and received corporate status. Now, Plaintiff argues, EPB must suffer the consequences of that status. In support of its argument, the Plaintiff cites the decision of the Tennessee Supreme Court in Applewhite v. Memphis State University, 495 S.W.2d 190 (Tenn. 1973). In Applewhite, the facts showed that Memphis State (the University) owned a publishing company which published scholarly and historical books and papers. Mr. Applewhite, the plaintiff in that case, felt he was libeled in one of those publications. He sued the publishing company and the University for libel. The trial judge dismissed the suit, stating that the University and the publishing company were governmental entities, entitled to sovereign immunity. On appeal, the Supreme Court agreed that the University was subject to sovereign immunity, but held that the publishing company was not. The court ruled that the publishing company was a corporation and the fact that it was a corporation wholly owned by the University did not change that fact. Mr. Applewhite's suit against the publishing company was allowed to go to trial.

The Plaintiff argues that this case is the same as Applewhite. It is not. In Applewhite, a third party was suing the publishing company. The Supreme Court said the fact that the



publishing company was wholly owned by University did not protect it from suit. In this case, however, it is the City of Chattanooga which is suing EPB, the corporation which it owns in its entirety<sup>2</sup>.

Even if EPB could be classified as a corporation, that does not change the following facts.

1. The members of EPB Board of Directors are appointed by and may be removed only by the City.
2. EPB is still required to file financial reports with the City.
3. Any money EPB derives from its operations is deposited in bank accounts in the name of the City.
4. Any land acquired by EPB for its operations is titled in the name of the City.
5. EPB cannot be sold or liquidated without the consent of the City and the approval of the City's voters.
6. No court has found that EPB and the City are separate. All judicial decisions have held that they are one and the same.

There are other facts which show the connection between the City and EPB.

After much time, several hearings and thousands of pages of pleadings, we circle back to the first point made by EPB in its motion to dismiss. It is found that EPB, whatever its status, is an entity that is wholly owned by the City of Chattanooga. The City of Chattanooga suing EPB is a case of the City suing itself. If a money judgment were rendered, Mr. Lepard and his attorneys would get part of that recovery. The rest of the money would merely be transferred

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<sup>2</sup> This Court does not find that EPB is a corporation. Neither does it find that it is not a corporation. It is not necessary for the Court to make that finding to resolve the issue before it in this case and, therefore, does not do so.


from one account of the City to another account of the City. As a matter of law, such an exercise in futility cannot be allowed.

Finally, Plaintiff also argued that even if the parties are both governmental entities, this case presents what is known as a justiciable issue, which the Court needs to resolve. For the same reasons expressed in this Court's Order of July 23, 2015, that argument is also found to be without merit.

Therefore, EPB's motion for summary judgment is GRANTED and all claims asserted against it in this case are DISMISSED with prejudice.

Court costs are assessed against the Plaintiff for which execution may issue.

ENTERED this 11<sup>th</sup> day of September, 2015.



W. Jeffrey Hollingsworth

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed, via U.S. Post Office, first class, postage pre-paid, or has been hand delivered to:

Wilson C. Von Kessler, II, Esq.  
735 Broad Street, Suite 402  
Chattanooga, TN 37402

Tom Greenholtz, Esq.  
Frederick L. Hitchcock, Esq.  
Chambliss, Bahner & Stophel, PC  
605 Chestnut Street, Suite 1700  
Chattanooga, TN 37450

Allen S. C. Willingham, Esq.  
Jay Michael Barber, Esq.  
1600 Parkwood Circle, Suite 400  
Atlanta, GA 30339

This 11<sup>th</sup> day of September, 2015.

LARRY L. HENRY, CLERK

By: Hunderwood DC.  
Deputy Clerk