

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-054320

07/01/2024

HONORABLE SCOTT A. BLANEY

CLERK OF THE COURT
P. McKinley
Deputy

ABRAHAM HAMADEH, et al.

RYAN L HEATH

v.

STEPHEN RICHER, et al.

BRETT W JOHNSON

MARICOPA COUNTY
301 W JEFFERSON FL 10
PHOENIX AZ 85003
CRAIG A MORGAN
MARICOPA COUNTY RECORDERS
OFFICE, THE
301 W JEFFERSON FL 10
PHOENIX AZ 85003
ERIC H SPENCER
COLIN PATRICK AHLER
IAN R JOYCE
SHAYNA G STUART
JAKE TYLER RAPP
JUDGE BLANEY

UNDER ADVISEMENT RULING

The Court has reviewed and considered the following:

1. Maricopa County Defendants' *Motion to Dismiss First Amended Complaint in Special Action*;

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2. Maricopa County Defendants' *Notice of Errata Re: Motion to Dismiss First Amended Complaint in Special Action*;
3. Arizona Secretary of State's *Motion to Dismiss Plaintiffs' First Amended Complaint*;
4. Plaintiffs' *Consolidated Response to Defendants' Motions to Dismiss*;
5. Maricopa County Defendants' *Reply in Support of Motion to Dismiss First Amended Complaint in Special Action*;
6. Arizona Secretary of State's *Reply in Support of Motion to Dismiss Plaintiffs' First Amended Complaint*;
7. Maricopa County Defendants' *Motion for Judicial Notice*;
8. The limited record in this case; and
9. The arguments received at the May 1, 2024 oral argument.

This special action arises out of the 2022 general election. Plaintiffs argue that issues with ballot printers and election day procedures caused long lines that deterred voters from casting their votes, in violation of Plaintiffs' rights to due process and equal protection found in the Arizona Constitution. Plaintiffs seek declaratory relief, as well as an order setting aside the results of the Attorney General election and ordering a re-vote for Attorney General.

Defendants move to dismiss Plaintiffs' special action pursuant to Rule 12(b)(1) & (6), Ariz.R.Civ.P. Defendants argue that Plaintiffs' failure to timely bring this election contest deprives the Court of subject matter jurisdiction over the dispute. Defendants also argue that Plaintiffs have failed to state a claim on which relief may be granted.

Subject matter jurisdiction refers to the Court's statutory or constitutional power to hear and determine a particular type of case. *Sheets v. Mead*, 238 Ariz. 55, 57 ¶ 9 (App. 2015). If the Court lacks subject matter jurisdiction, it lacks the legal authority to adjudicate the case on the merits.

As a general policy matter, "motions to dismiss for failure to state a claim are not favored under Arizona law." *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983). When considering a motion to dismiss under Rule 12(b)(6), the Court will look only to the pleading itself and consider the well-pleaded factual allegations contained therein. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008). The Court must assume the truth of the well-pleaded factual allegations and indulge all reasonable inferences therefrom, "but mere conclusory statements are insufficient." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 (2012) (quoting *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224 (1998)). "Dismissal is appropriate under Rule 12(b)(6) only if as a matter of law a plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof." *Id.*

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The Court assumes the truth of the following allegations from Plaintiffs' *First Amended Complaint* for purposes of Defendants' motions. Although the filings contain a multitude of additional facts, the Court limits the following list for the sake of brevity to only those facts necessary to determine the present Rule 12(b)(1) and 12(b)(6) motions.

1. Plaintiff Abraham Hamadeh was the Republican candidate for Attorney General of the State of Arizona for the 2022 general election. After final counts and certification of the ballots cast, he lost his race against candidate Kris Mayes by only 280 votes.
2. Plaintiff, AZ Voters Rights is an Arizona public interest corporation. Its mission is to promote social welfare by advocating for free and fair elections in Arizona—including funding litigation to enhance and safeguard election security for the benefit of Arizona voters.
3. Defendant Maricopa County is a political subdivision of the State of Arizona. Maricopa County is charged by law with conducting elections within its jurisdictional boundaries, including through its Board of Supervisors. The various Maricopa County individual Defendants were named in their official capacities.
4. Defendant Adrian Fontes is Arizona's Secretary of State.
5. The election day voting for the 2022 general election in Maricopa County was plagued by printer issues, including, *inter alia*, an inability to sufficiently print and/or scan ballots for voters. Plaintiffs allege that approximately 60% of the voting centers in Maricopa County had such issues on Election Day.
6. Long lines with excessive wait times formed at multiple voting centers on election day because of the issues with the printers. Election officials at the voting centers failed to properly inform those waiting in line about how they could cast their votes elsewhere.
7. Plaintiffs argue that approximately 20% of the voters who had been waiting in long lines left without casting their ballots, while many other voters who learned of the chaos were likely dissuaded entirely from trying to vote.
8. The overwhelming majority of Maricopa County voters on election day were Republicans and conservative-leaning independent voters. The long lines therefore had a disproportionate impact upon election day results and, according to Plaintiffs, plausibly changed the outcome of the election and cost Plaintiff Hamadeh his race.

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9. The long lines on election day also resulted in depressed voter turnout in Maricopa County.
10. Maricopa County subsequently retained former Arizona Supreme Court Chief Justice Ruth McGregor to investigate and report on the election day issues. Former Chief Justice McGregor issued her report on April 10, 2023 and confirmed, among many other findings, that a substantial number of voting centers experienced problems with their printers and were not able to tabulate some ballots on site.
11. Plaintiff Hamadeh has filed two previous election contests – one on November 22, 2022 and another on December 9, 2022.

THE COURT FINDS that although Plaintiffs have styled their special action as one seeking redress for a denial of Plaintiffs’ equal protection and due process rights, this case is actually an untimely election contest. Any action contesting a state election must be filed “within five days after completion of the canvass of the election and declaration of the result thereof by the secretary of state or by the governor[.]” A.R.S. § 16-673(A); *Hunsaker v. Deal*, 135 Ariz. 616, 617 (App. 1983) (“The jurisdictional time limit for bringing an election contest in county elections is within five days after completion of the canvass of the election and declaration of the result[.]”). Plaintiffs argue that the present case is not an election contest; instead, they argue that “it is a constitutional action based on Plaintiffs’ fundamental rights[.]” *Consolidated Response* at pg. 1. But the Court is able to determine that the case is in fact an election contest based upon the specific relief Plaintiffs seek. *See, e.g., Jones v. Paniagua*, 221 Ariz. 441, 447-48 (App. 2009) (looking to the specific relief sought to determine whether the plaintiff’s special action was one seeking mandamus or certiorari review).

Here, Plaintiffs ask the Court, *inter alia*, to issue an order setting aside the certified results of the contested race and order Defendants to re-conduct the election. Both forms of relief are organic to an election contest. *See* A.R.S. § 16-676(B) (requiring the court in an election contest to “pronounce judgment, either confirming or annulling and setting aside the election.”) and (C) (mandating “[i]f in an election contest it appears that a person other than the contestee has the highest number of legal votes, the court shall declare that person elected and that the certificate of election of the person whose office is contested is of no further legal force or effect.”). The fact that Plaintiffs bring the present action on constitutional grounds does not alter the reality that, in the end, they are contesting the 2022 election – asking the Court to both declare the election invalid and to order a do-over. To find otherwise would require the Court to improperly elevate form over substance. *See Brown v. State*, 117 Ariz. 476, 478 (1978) (courts may grant appropriate relief even when a filing is not correctly titled because “[w]e look to substance, not to form.”); *see also Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978) (“In applying this doctrine of substance over

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form, the Court has looked to the objective economic realities of a transaction rather than to the particular form the parties employed.”).

During the oral argument, the Court asked counsel whether the discovery rule applied to election challenges. “Under the ‘discovery rule,’ a plaintiff’s cause of action does not accrue until the plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause.” *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of America*, 182 Ariz. 586, 588 (1995). Counsel was unable to cite to any authority for or against the rule’s application in this case and the Court has not subsequently found any such authority. But even if the discovery rule did apply in this case to toll the five-day limitations period in A.R.S. § 16-673(A), that five-day period began to run, at the very latest, when former Chief Justice McGregor issued her report on April 10, 2023. Plaintiffs cannot reasonably argue that they were unaware of the facts underlying the present case after issuance of that report. But Plaintiffs still waited another seven months before filing this special action.

THE COURT THEREFORE FINDS that this election contest is untimely, and the Court lacks subject matter jurisdiction to adjudicate its merits. “[R]equirements as to the time within which the contest must be brought are regarded as mandatory, and unless strictly complied with, the court is without jurisdiction to proceed.” *Donaghey v. Attorney General*, 120 Ariz. 93, 95 (1978) (citation omitted); *see also Hunsaker*, 135 Ariz. at 617 (“Time elements in election statutes are jurisdictional and the time requirements for filing an election contest will be strictly construed.”).

Good cause appearing, and in the Court’s discretion:

IT IS THEREFORE ORDERED granting the Maricopa County Defendants’ *Motion to Dismiss First Amended Complaint in Special Action* and the Arizona Secretary of State’s *Motion to Dismiss Plaintiffs’ First Amended Complaint*. Plaintiffs’ *First Amended Complaint in Special Action* is dismissed with prejudice.

IT IS FURTHER ORDERED, because the Court has determined that it lacks subject matter jurisdiction over Plaintiffs’ claims, declining to address the parties’ remaining arguments for and against dismissal.

IT IS FURTHER ORDERED Defendants may, consistent with their request in the briefing and at oral argument, file their respective motions for sanctions pursuant to A.R.S. § 12-349 and Rule 11, Ariz.R.Civ.P. by **July 19, 2024**. The motions shall be limited to five (5) pages, excluding the caption and signature block. Plaintiffs may file any response or objections within **twenty (20) calendar days** thereafter. No replies shall be filed. The Court informs the parties, however, that the Court is initially reluctant to award sanctions in this case. Plaintiffs’

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constitutional claims were novel and although unsuccessful, appear to have not been groundless. Moreover, this Court is mindful of our Supreme Court's recent admonition in such cases:

Our courts should be cautious that, in their zeal to ensure that election challenges are properly grounded in fact and law under the guise of defending an "election's legitimacy," they do not inadvertently inflict real damage to our republic by slamming the courthouse door on citizens and their counsel legitimately seeking to vindicate rights, which is also important to maintaining public confidence in elections.

Arizona Republican Party v. Richer, 547 P.3d 356, 369 ¶ 44 (2024). The Court will withhold decision on the propriety of sanctions until after it has reviewed Defendants' motions for sanctions, if Defendants choose to file such a motion.

IT IS FURTHER ORDERED directing Defendants to prepare and lodge a proposed form of Judgment at the time of filing any motion for sanctions or, if no such motion is filed, by **July 19, 2024**. Plaintiffs shall file any objections or responses to the form of judgment within **twenty (20) calendar days** thereafter. No replies shall be filed.