

FILED
08-14-2023
CIRCUIT COURT
DANE COUNTY, WI
2022CV002446

BY THE COURT:

DATE SIGNED: August 14, 2023

Electronically signed by Ryan D. Nilsestuen
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

BRANCH 10

Rise, Inc. and Jason Rivera,
Plaintiffs

Decision on Motion to Dismiss

vs.

Wisconsin Elections Commission, et al.,
Defendants

Case No. 2022CV2446

INTRODUCTION

Section 6.87 of the Wisconsin Statutes provides for absentee voting procedures. Among other requirements, an elector completing an absentee ballot must do so in front of a witness. Wis. Stat. § 6.87(4)(b)1. The witness must then complete and sign a written verification. Wis. Stat. § 6.87(2), (4)(b)1. An absentee ballot may not be counted if the certification is missing the witness's "address." Wis. Stat. § 6.87(6d). These related provisions are called the "Witness Address Requirement." State law does not define "address."

Plaintiffs Rise, Inc. and Jason Rivera ("Plaintiffs") seek a declaratory judgment and corresponding injunctive relief regarding the meaning of "address of a witness." The Intervenor Defendant, the Wisconsin State Legislature ("Intervenor"), moved to dismiss the Plaintiff's first amended complaint. Dkt. 181. The other defendants – the Wisconsin Elections Commission ("WEC") and the city clerks for Green Bay, Madison, and Racine – take no position on the motion. Dkt. 186-189.

LEGAL STANDARD

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis.2d 665, 676 (quoting *John Doe I v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 12, 303 Wis.2d 34). When considering a motion to dismiss, the court accepts "as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Id.* (citing *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 11, 283 Wis.2d 555). A complaint must plead "facts, which if true, would entitle the plaintiff to relief." *Id.* ¶ 20. The court does not need to accept legal conclusions or unreasonable inferences as true. *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979).

The Plaintiffs' first amended complaint seeks declaratory judgment and injunctive relief. Declaratory judgment "provides a remedy which is primarily anticipatory or preventative in nature." *PRN Assocs. LLC v. State, Dep't of Admin.*, 2009 WI 53, ¶ 53, 317 Wis. 2d 656, 684, 766 N.W.2d 559, 573 (quoting *Lister v. Bd. of Regents*, 72 Wis.2d 282, 291, 240 N.W.2d 610 (1976)). A complaint seeking declaratory judgment states a claim if it presents a justiciable controversy. See *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶ 37, 244 Wis. 2d 333, 627 N.W.2d 866. Justiciability has four elements:

1. A controversy in which a claim of right is asserted against one who has an interest in contesting it.
2. The controversy must be between persons whose interests are adverse.
3. The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest.
4. The issue involved in the controversy must be ripe for judicial determination.

Id.; see also, *Miller Brands-Milwaukee v. Case*, 162 Wis.2d 684, 694, 470 N.W.2d 290 (1991). Dismissal of a complaint seeking declaratory judgment based on a contention that it fails to state a claim is improper when the elements of justiciability are met. *Iowa Nat. Mut. Ins. Co. v. Liberty Mut. Ins. Co.*, 43 Wis.2d 280, 285, 168 N.W.2d 610, 613 (1969).

DISCUSSION

The Intervenor asks me, pursuant to Wis. Stat. § 802.06(2)(a), to dismiss the Plaintiffs' first amended complaint for failure to state a claim because the "Plaintiffs' claims...rest on a legally incorrect construction of Wisconsin's absentee-voting laws..." Dkt. 183:3. Citing *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶ 42, 387 Wis.2d 511, the Intervenor argues that this "failure of the complaint's core legal theory, as a matter of law, provides a mandatory basis for dismissal." Dkt 183:9. This argument fails for several reasons.

As mentioned above, a motion to dismiss for failure to state a claim is improper when a controversy is justiciable. A case is justiciable if four factors are met: a controversy in which a claim of right is asserted against one who has an interest in contesting it; the controversy must be between persons whose interests are adverse; the party seeking declaratory relief must have a legally protectable interest; and the issue involved in the controversy must be ripe for judicial determination. *Miller Brands-Milwaukee*, 162 Wis.2d at 694. The Intervenor does not argue that the Plaintiff's first amended complaint fails to meet these factors.

Rather than arguing that the case is not justiciable, the Intervenor argues the merits of the case, given that its argument rests on whose definition of "address of a witness" is correct. Even if I agreed that the Plaintiffs' claims fails on the merits – and I take no position at this stage in the litigation – the proper course of action would not be dismissal. See *Iowa Nat. Mut. Ins. Co.*, 43 Wis.2d 280 at 285 (holding that dismissal of a justiciable suit for declaratory relief is improper "whether the adjudication is in favor of or adverse to the plaintiff"); *Wisconsin's Env't Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis.2d 161, 171, 255 N.W.2d 917, 924 (1977) ("...the matters

raised by a motion to dismiss, unlike those raised by a motion for summary judgment, do not go to the merits of the case.”).

The Intervenor’s reliance on *League of Women Voters of Wisconsin* does not save its motion to dismiss. The Supreme Court in *League of Women Voters of Wisconsin* did not hold, as the Intervenor claims, that “failure of [a] complaint’s core legal theory, as a matter of law, provides a mandatory basis for dismissal.” The paragraph cited by the Intervenor reads in full:

The December 2018 extraordinary session of the Wisconsin Legislature was constitutional. The text of Article IV, Section 11 of the Wisconsin Constitution directs the Legislature to meet at a time provided by law. Wisconsin Stat. § 13.02(3) constitutes the law authorizing the Legislature to set its own biennial work schedule. The extraordinary session comports with the constitution because it occurred as provided by law. The terminology the Legislature chooses to accomplish the legislative process is squarely the prerogative of the Legislature. The Wisconsin Constitution itself affords the Legislature absolute discretion to determine the rules of its own proceedings. Wis. Const. art. IV, § 8. Recognizing the Legislature's rules and procedures reside solely within the legislative domain, we review only whether the Legislature acted in accordance with the Wisconsin Constitution. Having so concluded, this court's jurisdiction ends.

League of Women Voters of Wisconsin, 2019 WI 75 at ¶ 42. In other words, the Supreme Court held that the Legislature’s ability to set its rules and proceedings is a core legislative function which courts can only review for compliance with the state constitution. Doing otherwise would violate the separation of powers doctrine. The Supreme Court said nothing related to standards for granting a motion to dismiss.¹

ORDER

The Intervenor’s motion for dismissal is DENIED.

¹ The Wisconsin Supreme Court decided the *League of Women Voters* case on the merits based on the League’s petition for bypass which requested expedited review and a “final resolution” of the case. *League of Women Voters of Wisconsin*, 2019 WI 75 at ¶ 12. The sole issue was “whether the Legislature convened its December 2018 extraordinary session in accordance with the Wisconsin Constitution.” *Id.* at ¶ 13. The case did not discuss standards for a motion to dismiss. The court specifically noted in footnote 4 that it “need not specifically address the circuit court’s action” on the motion to dismiss. *Id.* at ft. 4. The Intervenor’s citation to this case is misleading.