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STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF RICE THIRD JUDICIAL DISTRICT
Case Type: Other Civil

Benda for Common-sense, a Minnesota Non-Profit Corporation, and Kathleen Hagen,

Plaintiffs,

vs.

Denise Anderson, Director of Rice County Property and Tax Elections,

Defendant.

and

Minnesota Secretary of State

Proposed Intervenor- Defendant

Court File No. 66-CV-22-2022
Assigned to: The Honorable Carol M. Hanks

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT III

On September 29, 2022, Defendant, Denise Anderson, submitted a Motion to Dismiss Plaintiffs Petition for Correction of Errors and Omissions – Count III of Plaintiffs' Complaint. This Memorandum is submitted in opposition to this motion to dismiss.

ARGUMENT

I. DEFENDANT'S MOTION TO DISMISS IS UNTIMELY AND SHOULD BE STRUCK.

At the previous hearing in this matter, which was held on September 8, 2022, the Court set a hearing date of October 26, 2022 for matters relating to Plaintiffs Count III – Petition to Correct Errors & Omissions. Despite this abundance of notice, Defendant did not timely file their motion to dismiss Count III of Plaintiffs' Complaint.

A "Dispositive Motion" is defined as motions "which seek to dispose of all or part of the claims or parties…" Minn. Gen. R. Prac. 115.01(a)(1). All Dispositive Motions are required to

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be served and filed with the court administrator "at least 28 days before the hearing." Minn. Gen. R. Prac. 115.03(a).

On September 29th – 27 days before the hearing – Defendant served and filed her Dispositive Motion to dismiss Count III of Plaintiffs' Complaint. Despite having 20 days advance notice of the hearing date, Defendants' Dispositive Motion to dismiss was untimely. For a Dispositive Motion in which the moving party fails to comply with the rules, the court, in its discretion, "may refuse to permit oral argument by the party not filing the required documents, may allow reasonable attorney's fee, or may take other appropriate action." Minn. Gen. R. Prac. 115.06.

In the instant case, Defendants have offered no explanation for the untimely submission of their motion papers and have not requested relief from the Court for its late filings. In these circumstances, the Court would be justified in striking Defendants motion from the record and not hearing arguments on their motion to dismiss. Further, Defendant failed to include the required statement identifying all documents which comprise the record and a recital of the material facts. Gen. R. Prac. 115.03 (d).

II. DEFENDANT'S MOTION FOR DISMISSAL BASED UPON FAILURE TO STATE CLAIM IN PLAINTIFFS' COUNT III SHOULD BE DENIED.

i) DEFENDENTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM SHOULD BE TREATED A MOTION FOR SUMMARY JUDGMENT.

Defendant asserts what appears to be a Motion for Judgment on the Pleadings under Rule 12 Minn.R.Civ..P. While not citing Rule 12, Defendant advocates this rules' legal standard for use by the Court. See Defendant's Memorandum of Law in Support of Respondent's Motion to Dismiss at page 2. Further, as primary authority for the use of this standard, Defendant cites the case of Bodah v. Lakeville Motor Express, Inc ("Bodah Case"). 663 N.W.2d 550, 553 (Minn. 2003) (note the correct citation is underlined). In the Bodah Case, the court is reviewing a

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motion for relief under Minn. R. Civ. P. 12.02 (e). This Rule 12 standard, however, is not appropriate for use in this matter as Defendant has already served and filed her answer. As required by the rules, a Rule 12 motion to dismiss for failure to state a claim, "shall be made before pleading." Minn. R. Civ. P. 12.02.

Instead, as clearly required by Rule 12, this matter is now governed by Rule 56 Minn. R. Civ. P. As stated in both Minn. R. Civ. P. 12.02 and 12.03, "the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Such procedural treatment is further supported by Defendants own authority Butler v. City of St. Paul, 936 N.W.2d 478 (Minn. 2019). In the Butler case, the Minnesota Supreme Court is reviewing a district court ruling on summary judgment under Minn. R. Civ. P. 56.

Likewise, Defendants argument that somehow the Court should not consider the merits of this matter because the Court did not "immediately set a time for hearing on this matter" should be disregarded. Under the standard governance of a "Civil Action," rule-based motion practice under the Minnesota Rules should be followed. Minn. R. Civ. P. 2. Defendants' attempt to side-step the Minnesota Rules of Civil Procedure [1] should be ignored and the Court should consider the merits of this claim.

ii) PLAINTIFFS HAVE MET THEIR BURDEN OF PROOF ON THEIR PETITION FOR AN ORDER FOR CORRECTION OF ERRORS AND OMISSIONS

Under a petition for relief under Minn. Stat. 204B.44, the petitioners have the burden to show by a preponderance of the evidence that the relief under section 204B.44 is required. Weiler v. Ritchie, 788 N.W.2d 879, 882-83 (Minn. 2010). Defendant continues to present its

[1] In their Memorandum of Law, Defendant asserts that "motion practice for an order to correct is outside the scope of section 204B.44." See page 3.

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argument that the court should only review the face of the complaint in making its ruling. As argued above, the opportunity for Defendant to request a ruling on "failure to state a claim" has long passed.

Plaintiffs have made multiple attempts to obtain the cooperation of Defendant in disclosing any information that she has confirming that the Rice County Electronic Voting Systems are properly certified. This action was served and filed on August 23, 2022. That same afternoon, the attorney for the Plaintiffs sent a pre-emptive letter to the Rice County Attorney requesting that the parties discuss the process of addressing the "timing" of the procedures and process relating to this action. See Affidavit of Matthew L. Benda in Support of Motion to Suspend the Destruction of Election Materials dated August 25, 2022 ("**Benda 8.25 Aff**."). Attached as Exhibit A to the **Benda 8.25 Aff**. was a proposed Stipulated Joint Discovery Plan which proposed in part:

> "The parties agree to cooperate to obtain supplemental responses to the ***Benda Request***, ***Hagen Hardware and Software Request*** and the ***Hagen CVR Request*** on or before September 9, 2022."

As a follow-up to this letter, Plaintiff's attorney made phone calls and inquiries to the Rice County Attorney and the opposing attorney, Ann Goering, to reach consensus on an appropriate scheduling order. See 1st Amended Notice of Motion and Motion to Suspend the Destruction of Election Materials and Other Relief. At the initial hearing on September 8th, attorney Ann Goering stated on the record that Defendant would not be voluntarily participating in any discovery or supplemental disclosure of documents.

Instead of receiving the cooperation expected, Defendant has taken the incredible position, "Rice County has provided all data responsive to the data requests referenced in the complaint." See Affidavit of Sean R. McCarthy at paragraph 3. Under this set of facts,

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Defendant would ask the court to believe that Rice County has no documents disclosing the existence of modems in their **EVS** and that they have taken no efforts to confirm whether their **EVS** are properly certified as required by state law and as verified by the Rice County Commissioners. With no cooperation or supplemental disclosures on the horizon, Plaintiffs quickly obtained substantial information from alternate sources to establish that Rice County indeed has modems imbedded in their **EVS** and that such modems are not properly certified. See Notice of Motion and Motion for an Order to Correct Errors and Omissions – Count III and supporting affidavits.

To date, Defendant has presented no facts or documents disputing these basic facts. Plaintiffs have submitted clear evidence that Rice County has modems in their **EVS** and that these modems are not properly "certified." Defendant's failure to offer contradictory factual submissions in support of their motion to dismiss is to their own detriment.

In the instant case, Plaintiffs have presented a clear record of facts to establish that Rice County utilizes **Electronic Voting Systems** with modems imbedded in them and that such modems are not properly certified as required by the Rice County Board of Commissioners and Minnesota Law. Any remaining factual disputes are either not "material" to prevent such an order or are the result of Defendant's on-going refusal to disclose requested "Government data" under the Minnesota Government Data Practices Act. Minn. Stat. 13.01 et seq.

III. DEFENDANT'S MOTION FOR DISMISSAL BASED UPON PROCEDURAL AND JURISDICTIONAL DEFECTS SHOULD BE DENIED.

Despite their own case law to the contrary, Defendant continues to argue that the district Court does not have jurisdiction to even hear a Civil Action under 204B.44. See Butler v. City of St. Paul, 936 N.W.2d 478 (Minn. 2019) (appeal following motion for summary judgment in district court). As further confirmed by case law, Minn. Stat. 204B.44 provides the court with broad discretion in determining how to proceed. See Weiler v. Ritchie. 788 N.W.2d 879 (Minn.

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2010) (referencing the parties right to request an evidentiary hearing to resolve any issues of material fact); Lindquist v. Leonard, 652 N.W.2d 33 (Minn. 2002) (referring case to a referee to take and receive evidence and make findings of fact).

The Minnesota Supreme Court has determined the existence of jurisdiction under 204B.44 for "any duty concerning an election." Begin v. Richie, 836 N.W.2d 545 (Minn. 2013). Defendant Anderson has admitted that her duties include, "administering federal, state and local elections in Rice County." **Anderson Aff.** at paragraph 2. Such role gives her responsibility over the **EVS** and vote tabulation systems in Rice County. On June 28, 2022, Defendant Anderson appears to have affirmed to the Rice County Commissioners that their **EVS** is "certified and approved" by "test labs accredited by the Election Assistance Commission and undergo additional testing by the Office of the Minnesota Secretary of State." **Hagen Aff.** Exhibit 3 at _0019. From the facts presented, either Defendant Anderson has ignored her duty to confirm that the voting equipment is "certified and approved" or she is aware of the lack of certification for the modems imbedded in the DS200s and is hoping the Office of the Secretary of State will defend her position. Either way, a dismissal for lack of jurisdiction over the local administration of elections should be denied.

Further, Defendant argues that all candidates on the ballot are required to be served as Defendants in this action. This even though they have not presented a single case that has implemented or imposed such a requirement. If the Defendant feels that additional parties are necessary to this action, they are certainly able to make such a request to the court, as it is specifically within the scope of this Court's authority to require service, "on any other party as required by the court." 204B.44 (b).

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IV. DEFENDANT'S MOTION FOR DISMISSAL BASED UPON LACHES SHOULD BE DENIED.

In a creative twisting of the facts, Defendant has asserted that Plaintiffs claims should be dismissed based upon the equitable doctrine of laches. Under this alternate reality, since Plaintiffs had "suspicions relating to the election systems dating back to the 2020 general election" that the current motion to prohibit use of uncertified modems should be dismissed. Does Defendant really assert that she is immune from scrutiny and court jurisdiction based upon Plaintiffs not bringing a legal action sooner when Defendant has failed to provide even basic public data disclosures? Ironically, in the same memorandum, Defendant berates Plaintiffs for its pleading, "Upon information and belief" relating to the uncertified **EVS** used by Rice County. See Memorandum of Law in Support of Respondent's Motion to Dismiss Petition for Correction of Error and Omissions at page 3. Plaintiffs' pled Count III in coordination with an action to compel disclosure of documents under the Minnesota Government Data Practices Act. **Complaint**, Count I.

The facts show that Plaintiffs "followed the rules" by first making public data requests, then reporting concerns to the Defendant, then to the Rice County Board of Commissioners, a follow-up request for data and eventually the instant legal action. Now, Defendant insincerely chides Plaintiffs for not having enough information at the time of serving and filing the complaint.

In general, "Laches is an equitable doctrine intended to prevent one who has not been diligent in asserting a known right from recovery at the expense of one who has been prejudiced by the delay." Pirsig on Pleadings, section 8.199. In this matter, the "known right," or the existence of uncertified modems, was not confirmed by Defendant until a July 29, 2022, Public Accuracy Test where she stated that Rice County DS200 **EVS** have modems installed in them.

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Complaint at paragraph 13. [2] Despite the submission of the ***Hagen Hardware and Software Request*** on October 23, 2021, and the ***Benda Request*** on May 24, 2022, Defendant has never provided to Plaintiffs any Public Data confirming that the Rice County DS200 **EVS** have modems installed in them. See **Complaint** at paragraphs 7 and 17. This, even though on August 8th, 2022, the following specific MDPA supplemental requests were made to the Defendant,

> "In addition, the Rice County's Election Voting System Plan that you disclosed does not contain any reference to the Rice County participating in any optional election night reporting feature. Please provide all documentation that discusses, contracts or agrees that Rice County is participating in this program.
>
> Further, at the most recent presentation, Denise Anderson confirmed that most, if not all, of the DS200 Machines used by Rice County contain modems. Please supplement your inventory to identify which machines contain modems (and provide description of the same) and include all DS&S manuals, marketing materials, letters and security updates relating to all DS&S machines that contain modems or other wireless connectivity."

Complaint, Exhibit C at _0026. In case Defendant attempts to claim any ambiguity in this matter, the supplemental request goes on,

> "To further clarify, this request also includes all documents that Rice County claims support the certification of the Rice County Election equipment that includes optional election night reporting and any modems or other wireless connectivity.
>
> To clarify, this request also includes any emails or communication with any representative of Election Systems & Software ("ES&S") representative from January 1, 2019 through July 31, 2022 regarding the County's election equipment, including but not limited to the topics of optional election night reporting, modems or wireless connections and any Cast Vote Record reporting capabilities."

Id. Rather than responding to a proper MGDPA request, the Rice County Attorney's Office takes the questionable position that they have, "provided all data responsive to the data requests referenced in the complaint." **McCarthy Aff.** at paragraph 3. While Plaintiffs are being stonewalled by Defendant, and a mere 9 days after being served with this action, she pens a letter

[2] It is significant to note that even in Defendants Answer, she does not outright admit that there are modems, but seems to explain the process of operating the EVS. See Defendant's Answer at paragraph 5.

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to an unrelated third party laying out in detail many of the modem and certification details being requested by Plaintiffs. **Peterson Aff.** at _0044.

It has long been the position of the Minnesota Supreme Court that the preservation of the integrity of the court system is always an overriding consideration in considering a laches claim. Halloran v. Blue & White Liberty Cab. Co., 92 N.W.2d 794 (Minn. 1958). Further, as articulated by the historical maxim, "He who seeks equity must do equity" requires a party seeking equity needs to act with equity and fairness to their adversary. Black's Law Dictionary, 2nd Ed. Where a party is at fault concerning the delay, they cannot assert that the other party is guilty of laches. Lemmer v. Batzli Elec. Co. 125 N.W.2d 434 (Minn. 1963). Further, under the Minnesota Doctrine of "unclean hands" he who seeks equity, and he who comes into equity must come with clean hands." Hruska V. Chandler Associated, Inc., 372 N.W.2d 709 (Minn. 1985).

Defendant should not be rewarded for her failure to be timely, open, and transparent in responding to public data requests. Rewarding her delay and outright refusal to disclose data with an equitable dismissal and no review of the merits of this claim would violate the very definition of "unclean hands".

Finally, Defendant has made no showing of hardship or prejudice in response to the relief requested. See generally, Pirsig on Pleadings, section 8.199. In the primary authority relied upon by Defendants, the then Rice County Auditor/Treasurer submitted an affidavit explaining the impracticality of complying with the relief requested. Clark v. Pawlenty, 755 N.W.2d 293, 314 (Minn. 2008). No such sworn attestation has been presented in this case. Instead, what we know about the uncertified modems from Defendant is as follows, "Rice County is one of the six counties in Minnesota that utilizes ES&S voting equipment with ***the option to use a modem to transmit unofficial election results*** after the polls are officially closed and all voting has ended." **Peterson Aff.** Exhibit 4 at _0044 (emphasis added). Defendant has submitted no claim that the

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election process will be impacted by her inability to "turn-on" the modems after the voting has closed. In fact, under the undisputed facts presented, such modem process only serves the purpose of providing "early, unofficial results [to] help the news media report results quickly on election night." **Peterson Aff.** Exhibit 4 at _0046.

CONCLUSION

For the reasons set forth above, Plaintiffs respectively request an Order of the Court denying Defendant's request for dismissal as untimely and without merit. Defendant's continued insistence on using uncertified modems for the simple convenience of early election results is a high-risk, low-reward proposal that merits close court scrutiny.

PETERSON, KOLKER, HAEDT & BENDA, LTD.

Dated: October 12, 2022

By:/s/ Matthew L. Benda

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