

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-053785

12/02/2022

HONORABLE ALISON BACHUS

CLERK OF THE COURT
C. Lett
Deputy

JOSH BARNETT

JOSH BARNETT
27613 N 25TH AVE
PHOENIX AZ 85085

v.

KATIE HOBBS, et al.

DAVID ANDREW GAONA

JOSEPH EUGENE LA RUE
KAREN HARTMAN-TELLEZ
SAMBO DUL
COURT ADMIN-CIVIL-ARB DESK
DOCKET CV TX
JUDGE BACHUS

MINUTE ENTRY

Note: Please see ruling issued in the “LATER” at the end of this minute entry.

Courtroom 111 - NER

4:00 p.m. This is the time set for Oral Argument regarding the oral Motion to Dismiss. Plaintiff Josh Barnett is present on his own behalf. Defendant Katie Hobbs (in her official capacity as Arizona Secretary of State) is represented by counsel David A. Gaona and Sambo “Bo” Dul. Defendants Jack Sellers, Thomas Galvin, Bill Gates, Clint Hickman, and Steve Gallardo (in their official capacities as members of the Board of Supervisors for Maricopa County) (collectively, the “Maricopa County Defendants”) are represented by counsel Karen Hartman-Tellez and Rosa Aguilar. All participants appear virtually via the Court Connect platform.

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A record of the proceedings is made digitally in lieu of a court reporter.

The Court has received and reviewed the following briefs/requests by email prior to the hearing:

- Plaintiff's Pre-Hearing Memorandum – two copies;
- Defendant Secretary of State Katie Hobbs' Brief Regarding Prematurity of Plaintiff's Action;
- Brief of Maricopa County Defendants;
- Email from Plaintiff regarding request for *pro hac vice*.

Defendants state they have not been provided with a copy of Plaintiff's Pre-Hearing Memorandum.

IT IS THEREFORE ORDERED directing Plaintiff to email a copy of his Pre-Hearing Memorandum to counsel for Defendants **no later than 5:00 p.m. today**.

Discussion is held regarding the request for Leo Donofrio to appear *pro hac vice* on behalf of Plaintiff.

For the reasons set forth on the record,

IT IS ORDERED denying the request for Leo Donofrio to appear *pro hac vice* on behalf of Plaintiff in this matter.

Arguments are presented to the Court.

IT IS ORDERED taking this matter under advisement.

4:40 p.m. Matter concludes.

FILED: Email

LATER:

Ripe for disposition is Defendants' motion to dismiss this matter. On November 29, 2022, Plaintiff filed his Complaint and an application for a temporary order without notice and preliminary injunction. The Court denied *ex parte* relief and set a return hearing. At the return hearing, Defendants orally moved to dismiss the Complaint. Plaintiff responded orally but also

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requested the opportunity to brief the issue. The request was granted, and the Court permitted simultaneous briefing and set oral argument. All parties submitted briefs, and oral argument occurred. After considering the parties' filings, oral argument presentations, and applicable rules and law, the Court issues the following Order.

Plaintiff is Josh Barnett, an elector in the State of Arizona. He brought suit against Secretary of State Katie Hobbs, as well as each member of the Maricopa County Board of Supervisors. The Complaint listed the following general allegations: (a) Maricopa County Board of Supervisors Chair Bill Gates admitted responsibility for "chaos" in the November 8, 2022 General Election (hereinafter "General Election"); (b) the Arizona Attorney General's Office is conducting an investigation into the General Election; (c) Maricopa County responded to the Attorney General's Office in a letter that made various admissions; (d) procedures used at General Election location options "had no basis in law"; (e) the Maricopa County Poll Training Manual continued an error regarding ballot spoliation and there were "illegal provisional ballots"; and (f) there was an "abnormal increase" in inactive voters on the voter registration rolls in the run-up to the General Election. Compl. at 2-11. Plaintiff concluded his general allegations with the following: "As such, plaintiff contends that the results of the November 8th General Election are cast into incurable certainty due to election maladministration." *Id.* at 11.

Plaintiff continued with legal allegations. Compl. at 11. First, he alleged that the General Election results were "incurably uncertain," and in support, he cited "[t]he controlling precedent concerning election contests," *Findley v. Sorenson*, 35 Ariz. 265 (1929). *Id.* Next, Plaintiff cited A.R.S. §§ 16-672 and -676, Arizona's election contest statutes, and A.R.S. § 16-574, which concerns repairs and substitutions of voting machines and use of paper ballots. *Id.* at 12-14. Plaintiff then asserted that he had standing under A.R.S. § 16-672 as an elector in this State, but recognized that "he cannot bring his contest action until a winner is declared." *Id.* at 14. Thus, Plaintiff asserted standing under A.R.S. § 12-1831 and requested injunctive relief. *Id.* at 14-16. His enumerated counts were for declaratory and injunctive relief, and his prayer for relief was as follows:

Declare that the outcome of the General Election of November 8, 2022, as to races for Governor; Secretary of State; Attorney General; and United States Senator, has been rendered incurably uncertain due to misconduct of the Election Boards and/or officers making or participating in the canvass;

Enter an injunction enjoining the defendant, Secretary of State Katie Hobbs, from canvassing the statewide results of the General Election on November 8, 2022, as to the races for Governor; Secretary of State; Attorney General; and United States Senator;

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Enter an injunction enjoining the defendant, Secretary of State Katie Hobbs, from declaring any winners of the General Election of November 8, 2022, as to the races for Governor; Secretary of State; and Attorney General;

Enter other injunctive relief that is necessary and appropriate to ensure compliance with the foregoing constitutional and statutory provisions;

Award such other relief as the Court deems proper.

Id. at 16-17.

Defendants moved to dismiss the Complaint as premature by operation of A.R.S. § 16-672(A) and A.R.S. § 16-673. A.R.S. § 16-672(A) provides, in pertinent part, "Any elector of the state may contest the election of any person declared elected to a state office." A.R.S. § 16-673 states that such an election contest shall be filed "within five days after completion of the canvass of the election and declaration of the result thereof by the secretary of state." As Plaintiff conceded in his Complaint, no candidate has been "declared elected." Compl. at 14. This is because the statewide canvass for the General Election has not yet occurred. However, in his brief and during the hearings in this case, Plaintiff emphasized that he did not bring this matter as an election contest under A.R.S. §§ 16-672 or -674. Rather, Plaintiff has sought declaratory and injunctive relief under A.R.S. § 12-1831.

In *Donaghey v. Attorney General*, the Arizona Supreme Court considered the propriety of a petition for writ of mandamus in the context of challenging an incorporation election two months after the election had concluded. 120 Ariz. 93 (1978). In *Donaghey*, the elector alleged she had been unlawfully denied the opportunity to vote. *Id.* at 93-94. Although the remedy sought in *Donaghey* (mandamus) is different from that sought in the case at bar (declaratory/injunctive relief), and different provisions of Title 16 of the Arizona Revised Statutes applied to the type of election being challenged in *Donaghey*, the *Donaghey* court's reasoning and holding are applicable to the case at bar. The Supreme Court observed in *Donaghey*, "It is commonly stated that election contests are purely statutory and dependent upon statutory provisions for their conduct. The failure of a contestant to an election to strictly comply with the statutory requirements is fatal to his right to have the election contested." 120 Ariz. at 95 (internal citations omitted). The court held that the elector's failure to timely file her challenge under A.R.S. §§ 16-1202 and -04 did not permit her to later file a petition for mandamus. *Id.* In reaching that conclusion, the Supreme Court found that "the gravamen" of the elector's complaint was that the incorporation election had been "improperly conducted," and therefore the elector "was required to structure her challenge in conformity with the provisions of" the applicable election challenge statutes (A.R.S. §§ 16-1202 and -04). *Id.*

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At oral argument, Plaintiff attempted to distinguish the *Donaghey* case by pointing out that time had passed after the election in *Donaghey*, and the election has not been certified in the case at bar. The Court concludes that argument missed the mark. In *Donaghey*, the Supreme Court made clear that strict compliance with election contest statutes is mandatory. The fatal flaw in the *Donaghey* elector's contest happened to be timeliness, but it could have been lack of strict compliance with any provision of the statutory scheme. *See id.* ("The failure of a contestant to an election to strictly comply with the statutory requirements is fatal to his right to have the election contested.") The Court concludes that *Donaghey* controls.

Against that backdrop, this Court returns to Plaintiff's Complaint. As summarized above, Plaintiff detailed in his Complaint the many ways in which he alleged the General Election suffered from "maladministration" in violation of Arizona election law. Due to those alleged violations of Arizona's election statutes, Plaintiff requested injunctive and declaratory relief. Although Plaintiff's Complaint ultimately concluded with a prayer for relief under A.R.S. § 12-1831, the Court finds that prayer for relief was rooted in Plaintiff's allegations that Arizona's election statutes were violated. Indeed, when asked by the Court at oral argument what the "heart" of his Complaint was, Plaintiff responded that the General Election had been illegally run and everything was broken. Plaintiff's response was consistent with his Complaint and overarching argument throughout this case, which is that the election was improperly administered and the outcome is uncertain. As in *Donaghey*, the "gravamen" of the Complaint at bar is that an election was "improperly conducted." *See* 120 Ariz. at 95. Consequently, Plaintiff is "required to structure [his] challenge in conformity with the provisions of" Arizona's election contest statutes. *See id.* The election contest statutes are the remedy an elector must use to challenge an election. *See id.* (holding that the elector's "failure to avail herself of th[e] remedy, provided by the Legislature, precludes the issuance of" an alternate remedy). As Plaintiff has conceded, he has not brought this action under A.R.S. § 16-672, and even if he had, such a lawsuit would be premature at this time because no candidate has been "declared elected." *See* A.R.S. § 16-672(A). Because Arizona's election statutes preclude Plaintiff from employing another remedy to contest the General Election, *see Donaghey*, 120 Ariz. at 95, the motion to dismiss must be granted.

Finally, the Court acknowledges that Plaintiff drew the Court's attention to A.R.S. § 16-650, which states:

The secretary of state shall declare elected the person receiving the highest number of votes cast for each office for which the nominees filed nominating petitions and papers with the secretary of state pursuant to section 16-311, subsection B and shall, unless enjoined from so doing by an order of court, deliver to each such person, upon compliance with the provisions imposed by law upon candidates for office as

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conditions precedent to the issuance of the certificates, a certificate of election, signed by the secretary of state and authenticated with the great seal of the state.

Plaintiff contended that the phrase “unless enjoined” supports his request for injunctive relief. The statute, however, must be read and interpreted in its larger statutory scheme. The statute is contained in Title 16 of the Arizona Revised Statutes, “Elections and Electors,” Chapter 4, “Conduct of Elections,” Article 11, “Official Canvass.” Within the same Chapter is Article 13, “Contest of Elections.” It is that Article, and that Article alone, that addresses the manner, timing, method, and potential remedies for a contest of the General Election. See A.R.S. §§ 16-672 through -678. The vehicle for contesting elections is laid out in Article 13 and remains available to Plaintiff. Moreover, as Plaintiff passionately argued, the heart of his Complaint is that the election was improperly conducted. Under *Donaghey*, Plaintiff must avail himself of the remedy provided to him by the Arizona Legislature: Title 16 of the Arizona Revised Statutes, Chapter 4, Article 13.

Therefore, based on the foregoing,

IT IS ORDERED granting Defendants’ Motion to Dismiss. This matter is dismissed in its entirety, without prejudice. This Order is signed as a final, appealable Order, as no further matters remain pending. Ariz. R. Civ. P. 54(c).



HONORABLE ALISON S. BACHUS
JUDGE OF THE SUPERIOR COURT

LET THE RECORD REFLECT that due to the immediate, same day distribution to the parties and the public, this minute entry may be found at:
www.clerkofcourt.maricopa.gov/records/election-2022