UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DASCOLA,

Plaintiff,

vs.

Case No. 2:14-cv-11296-LPZ-RSW
Hon. Lawrence P. Zatkoff
Magistrate Judge R. Steven Whalen

CITY OF ANN ARBOR and
JACQUELINE BEAUDRY,
ANN ARBOR CITY CLERK,

Defendants.
_____/

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DEFENDANTS' REPLY BRIEF TO PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

In this reply brief, the Defendants incorporate the legal arguments presented in their Response to Plaintiff's Motion for Summary Judgment. (Doc 13) Plaintiff asserts in his Response Brief that Defendants' Motion to Dismiss is defective, "but that a Motion for Summary Judgment might have been appropriate." Defendants agree Summary Judgment is appropriate; they have outlined and requested Summary Judgment and Declaratory Judgment in their favor in their Response to Plaintiff's Motion for Summary Judgment (Doc 13). However, because Plaintiff's complaint fails for the same legal reasons to state a claim on its face, Defendants' Motion to Dismiss is appropriate as their initial pleading.[1]

Plaintiff's claim centers on the belief that two prior decisions of the federal

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[1] It is only for Defendants' Motion to Dismiss under 12(b)(6) that Defendants assume that the one year residency requirement has been met because that is what was pleaded in the complaint.

Plaintiff claims in his Reply Brief in Support of Summary Judgment (Doc 15 p. 3) that this assumption is also true for the Motion for Summary Judgment. That is incorrect. As Defendants stated in their Response Brief (Doc 13, p 2): "…Plaintiff has merely **restated this allegation of residency and has provided no proof."** As required in a Summary Judgment Motion, Defendants provided specific evidence of lack of residency for the year prior to the election (Doc 13, p.2): "Moreover, when filing an application on December 1, 2013 to be on a City Board or Commission, he gave a City of Grass Lake address as his home address and **specifically marked "No" in response to a question whether he was a City of Ann Arbor resident."** (Ex 10 to Doc 13) Defendants specifically argued (Doc 13, p. 2) that "[b]ecause the failure to meet the voter registration requirement alone still makes Plaintiff ineligible, final resolution of the residency issue may not be necessary, **but Plaintiff still has not satisfied his burden of proof of that fact for summary judgment."** Plaintiff then provided no proof in his Reply brief**.**

court in the 1970s continue to bind the Defendants because they were not appealed. Plaintiff's argument ignores the practical reality that those cases cannot be appealed at this point in time.

What can be done is to have a court determine if those cases remain applicable. Since at least 2001, the City Clerk has carefully applied the Charter eligibility requirements when the issue arose. Prior to 2001, it is unclear whether the issue actually arose.[2] In *Wojak*, the City reviewed the requirements and the prior and current law. As the prior cases did not repeal the Charter requirements; they were still in place. The City did not, as Plaintiff has suggested, do nothing. As the plaintiff's counsel in that case had sought a ruling about the viability of the Charter residency requirement, the City properly sought a declaratory relief from the state Circuit Court. The Circuit Court did not find that the Charter provisions were void; instead it found that there was a material change in the law since the *Feld* and *Human Rights Party* cases were decided.[3] The court held that the residency requirement of the Charter was constitutional.[4]

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[2] Plaintiff cites an example of an individual in 1998 who allegedly was allowed to run despite not meeting the residency requirements, but provides no evidence that the City was aware at the time that the requirements were not met.

[3] The Court also noted that those decisions were never published in any reporter; even today they are not available.

[4] Plaintiff wrongly claims that allowing Plaintiff Wojak on the ballot at that time was an admission by the City that Plaintiff's legal position was correct. The issue arose close in time close to the November election. The Court needed additional time to make its decision. The then City Attorney recognized that Mr. Wojak had

Plaintiff disagrees with the court's ruling in *Wojak*, but that ruling (and the obvious material change in the federal law on residency requirements) revived the Charter requirements (at least as to residency), which had never been repealed. The Charter's residency provision may have become dormant when it was held unenforceable, but it was not dead and needed no re-enactment. Moreover, the Charter itself was amended in 1990 to allow the City to automatically claim all power a city could have: "The City shall have all powers possible for a city to have under the Constitution and laws of Michigan as fully and completely as though they were specifically mentioned in the Charter." City Charter Section 3.1.

In addition to obtaining an order of constitutionality in *Wojak*,[5] the City

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no likelihood of election, and that the validity of his candidacy could be decided if he were to win.

[5] Plaintiff claims that *Wojak* is irrelevant for this Motion and the Motion for Summary Judgment. This is absurd, as it demonstrates that a subsequent court has the authority to rule on the continued applicability of a prior case. And, for the purposes of Plaintiff's Motion for Summary Judgment, **the only evidence in the record is that Plaintiff admits he was not a resident of Ann Arbor on December 1, 2013**. Under Fed. R. Civ. P. 56(c)(1), a party must support its assertions by: (A) citing to admissible evidence in the record, or (B) showing that the materials cited do not establish the absence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support a material fact. Plaintiff has not provided in his initial or reply pleadings **any evidence** supporting his conclusory assertion that he meets the one year residency requirement and has not met the burden of showing the absence of any genuine dispute as to this material fact of residency. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Therefore, for purposes of Plaintiff's Summary Judgment Motion and Defendants' responsive request for Summary Judgment on the evidence presented, the Court must find that Plaintiff has not provided any proof on the issue of his residency. While Defendants suggested that

agreed in 2003 to put to a vote whether the Charter provisions should be replaced with no pre-election requirements – that Councilmembers would only have to be registered electors of the City and reside in their wards on the date of the election. It is undisputed that this Amendment was defeated by the voters on Nov. 4, 2003.

Defendants have submitted the applicable law concerning the material change doctrine and the revival doctrine. Under the revival doctrine, the Charter's voter registration requirement, while dormant but never repealed, has been revived by a material change in law. The Michigan Court of Appeals in *Barrow v. City of Detroit*, 301 Mich. App. 404 (2013) held that a one year voter registration requirement is constitutional. Again, the City's Charter allows the City to claim all powers available to it – including a valid one year voter registration requirement.

Despite this, Plaintiff spends much of his Response brief arguing that *Barrow* has "no effect" on the current case. (Doc 14, p. 14) Plaintiff claims that *Barrow* cited "no interest which is furthered by the addition of a voter registration requirement." (Doc 14, p. 13). But in *Barrow*, there was both a residency requirement (evidently met) and a voter registration requirement. However, the Court in *Barrow* specifically identified the significant governmental interests appropriate to the voter registration requirement: "These justifications [cited on p.

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the voter registration issue was not met, the lack of any proof of residency makes that issue also dispositive without any further determination because Plaintiff has not met his burden of proof.

424] … **support the charter's requirement that candidates must be registered voters for one year when filing for office**." The Court held that being a registered voter in the City for at least a year furthers those listed interests. *Id.* at p. 424. The fact that the same interests overlap, as in *Barrow*, with being a resident of a particular ward for a year does not diminish the governmental interests.

Plaintiff then claims that a one-year voter registration requirement raises right to vote, First Amendment, and equal protection claims. (Doc 14 at p. 12.) These issues are easily dealt with. As *Barrow* held: *"*. . . there is no constitutional right to vote for an individual who did not meet the eligibility requirements to have their name placed on the ballot." *Id.* at p.425 . The Court emphasized that "voters have the right to expect that the candidates appearing on ballots have met the requirements set by the citizens in the charter." Furthermore, there is no fundamental right to be a candidate. *Id*. at p. 425 and 426.

As to Plaintiff's general equal protection claims, there is no suspect classification and no fundamental right to be a candidate, and strict scrutiny does not apply. Plaintiff implies the law would impact newly naturalized citizens differently as they would have to wait a year to run for office after they then register to vote.[6] But that same year applies to all. The fact that they cannot register

[6] Likewise, a delay in ability to be a candidate does not implicate a fundamental right. Plaintiff claims possible age discrimination against 18 year olds. (Doc 14, p. 13). However, that is not the case for Plaintiff. In any event, even a minimum

pre-citizenship is simply a function of naturalization and, in other contexts, has not been grounds for a finding of discrimination. See, e.g., *United States v. Kairys*, 782 F.2d 1374, 1383 (7th Cir. 1986), "[b]ecause there are no analogous pre-citizenship requirements for native-born individuals, naturalized citizens are not being treated any differently than their intrinsic differences require."

Declaratory relief for Defendants is appropriate here within the Motion to Dismiss and the Defendants' request for Summary Judgment. Provided there is "a case of actual controversy," 28 U.S.C. §2201(a) provides that a court "may declare the rights and legal relations of any interested party seeking a declaration." As a practical matter, a party opposing the result of a request for declaratory relief by another party, also is requesting declaratory relief. A declaratory judgment necessarily impacts both parties, regardless of which party requests it or which party prevails; that impact is inherent in the nature of declaratory relief.

In *Grand Trunk W. R. Co. v. Consol. Rail Corp.*, 746 F.2d 323 (6th Cir. 1984), the Court of Appeals for the Sixth Circuit enumerated five factors to be considered, three of which are relevant here: "(1) whether the declaratory action

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candidacy age restriction itself is only judged under the rational basis test and is supported by governmental interest. For example, the constitutionality of minimum age of 25 for Detroit city council was judged under rational basis test. *Manson v. Edwards*, 482 F.2d 1076, 1078-79 (6th Cir. 1973). The Michigan Constitution sanctions age and voter registration (four years) requirements for governor. Const. 1963, Art. 5, §22.

would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; . . . and (5) whether there is an alternative remedy which is better or more effective." 746 F.2d at 326. Grand Trunk has been followed consistently in the Sixth Circuit.[7] The City need not have made a formal counterclaim for declaratory relief, as Plaintiff suggests, to obtain such relief; this Court's ruling on Plaintiff's request for relief will necessarily have to address the declaratory relief.

CONCLUSION

For all of the above reasons as well as those incorporated from Defendants' *Brief in Support of* Motion to Dismiss, Plaintiff's Motion to Dismiss should be granted and/or Defendant's Request for Summary Judgment should be granted. In either case the Charter Section 12.2 should be upheld and declared constitutional, despite the prior *Feld* and *Human Rights Party* cases.

Dated April 24, 2014

Respectfully submitted,

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[7] See, *Aetna Cas. & Sur. Co. v. Sunshine Corp.*, 74 F.3d 685, 687 (6th Cir.1996). In *Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 557* (6th Cir. 2008). See also *The Hipage Co., Inc. v. Access2Go, Inc.*, 589 F Supp 2d 602, 615 (E.D. Va. 2008) (the underlying purpose of declaratory relief is to guide parties' conduct in the future so as to avoid litigation).

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Thomas Wieder; and I hereby certify that I have mailed by US Mail the document to the following non-ECF participant: None.

/s/ Jane Allen
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