

**UNITED STATES DISTRICT COURT
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.

Thomas Wieder (P33228)
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Office of the City Attorney
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**PLAINTIFF'S RESPONSE IN OPPOSITION TO
SECRETARY OF STATE RUTH JOHNSON'S MOTION TO INTERVENE**

For his Response, Plaintiff states:

1. The Secretary of State does not have a substantial interest relating to the subject matter of the present action, which, at this time, is limited to the issue of whether a number of "ballots" deemed by all parties to be defective, may be counted in this election contest.

2. The Secretary of State has identified no substantial interest that will be impaired if this Court grants the additional injunctive relief sought by Plaintiff in his Post-Judgment Motion.

3. Plaintiff denies that the Secretary of State has substantial interests in this matter which require adequate representation by any of the existing parties.

4. It is not clear what the Secretary of State's claims and defenses in this action are and whether they involve questions of law common to this action.

5. Intervention is likely to unduly delay a decision in this matter and may prejudice the rights of Plaintiff, as well as voters.

6. Plaintiff acknowledges that concurrence in this Motion was not provided to the Secretary of State.

7. No response required.

WHEREFORE, and as more fully set forth in Plaintiff's accompanying Brief in Opposition, Plaintiff respectfully asks the Court to deny the Secretary of State's Motion and to award him all costs and actual attorney's fees incurred in responding to the Motion.

/s/ Thomas F. Wieder
Thomas F. Wieder (P33228)
Attorney for Plaintiff

Dated: July 13, 2014

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**BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE IN OPPOSITION TO
SECRETARY OF STATE RUTH JOHNSON'S MOTION TO INTERVENE**

STATEMENT OF FACTS

Plaintiff relies primarily on the Statement of Facts contained in his Motion for Post-Judgment Relief. In addition to those facts, Plaintiff would add the following.

The Secretary of State (hereinafter “SOS”), has characterized the Plaintiff’s Motion as an “attack” on her authority and stated that Plaintiff introduced the issue of her authority initially, justifying intervention in this matter by her. Both of these statements are not correct.

On July 27, 2014, two days after Defendant Clerk mailed 392 defective ballots to absentee voters, Gisgie Davila Gendreau, Communications Director for the SOS, sent an email to Dave Askins, Editor of The Ann Arbor Chronicle. This was in response to Askins’s query about the handling of any defective ballots that might be returned. (Exhibit A, attached.) In that email, Gendreau stated: “If a voter were to return the first ballot, the ballot would be counted, except for the race in question.” This information was subsequently published in both The Chronicle and The Ann Arbor News/Mlive.com. This is precisely the relief sought in Plaintiff’s Post-Judgment Motion.

On the next business day, July 30, 2014, Christopher Thomas, Director of Elections for the SOS, sent his letter reversing “the prior direction” contained in Gendreau’s email, stating that Third Ward votes cast on defective ballots should be counted. He stated that the prior direction was based on a situation that was distinguishable from the instant matter. He cited no legal authority for the new position. (Exhibit B, attached.)

On the same day, Plaintiff’s counsel and City Attorney Postema had a conversation about the role of the SOS’s “directives” in determining the city’s action

with regard to these ballots. When informed by Plaintiff's counsel that the Washtenaw County Clerk had told him that the Clerk regarded such directives as advisory, rather than mandatory, Postema expressed extreme surprise and dismay that any clerk would view the directives in that manner, that they were clearly mandatory.

Based on this unequivocal position being taken by the City Attorney, Plaintiff's Attorney decided to address in his Motion for Post-Judgment Relief the question of the SOS's authority to decide on the counting of the disputed ballots under the particular, and peculiar, facts of this case.

DISCUSSION

The only open issue in this case is whether votes cast on admittedly defective ballots for the Third Ward Council Member contest should be counted. Unless the SOS can demonstrate a substantial interest in the resolution of that issue, she should not be permitted to intervene in this matter.

What this case is not about is the general authority of the SOS to direct specific actions of local clerks. The pending Motion can, and should, be decided without regard to that more general question.

This case is about the Equal Protection rights of Plaintiff Dascola. In violation of those rights, he was initially denied a spot on the August 5, 2014 Primary Ballot. This Court granted his requests for injunctive and mandamus relief designed to insure that he was treated equally and that his name was put before all voters in the Third Ward in the same manner as the other candidates.

This did not happen. Whether by intention, or inadvertence, Defendant Clerk failed to abide by this Court's Order and Judgment. Plaintiff's name was not, initially, printed on any ballots for the Third Ward contest, and 392 defective absent voter ballots, not containing Plaintiff's name, were delivered to Third Ward voters.

Plaintiff's Motion for Post Judgment Relief is designed to ensure compliance with this Court's federal constitutional rights-based commands. Whatever the SOS's general interest may be in protecting her authority, that authority surely stops at a violation of these constitutional rights. Plaintiff argues that the SOS has no interest, whatsoever, in preventing proper enforcement of this Court's Order and Judgment.

There can be no doubt that the implementation of the election laws of any state, whether done by independent local clerks, or as directed by a central state authority, may be overridden by this Court's authority to prescribe specific remedies for the violation of federal constitutional rights. A request by the Plaintiff that this Court so act is not an attack on the general authority of the SOS. Similarly, a decision by this Court that appropriate resolution of a constitutional rights claim, under particular circumstances, must supersede the authority of state officials, does not constitute a general determination of those officials' authority.

The SOS claims a right to intervene under F.R.C.P. 24(a)(2). Assuming *arguendo*, that the SOS can satisfy the requirements of timeliness, impairment of the applicant's position without intervention, and the inadequate protection of the applicant's position by the existing parties, it seems clear that the SOS does not possess "a substantial legal interest in the case."

The issue before this Court is whether enjoining the counting of votes cast on defective ballots is a proper and necessary form of relief, under the circumstances of this case, to protect Plaintiff's constitutional rights. The SOS fails to explain why she has a substantial interest in this matter of the proper enforcement of a federal court order.

The SOS claims that Plaintiff's request for additional injunctive relief constitutes "a direct attack on the authority of the Secretary of State..." It does nothing of the kind. All that Plaintiff has done is to contest in a brief the argument that the Defendants, notwithstanding the Order of this Court, are required by state law, as directed by the SOS, to count the defective ballots. Plaintiff does not seek to enjoin the actions of the SOS in any way. As noted above, and in Plaintiff's original Brief in Support of his Motion for Post-Judgment Relief, Plaintiff argues that the nature of the SOS's authority is irrelevant, because it is overridden by this Court's addressing of constitutional claims.

The SOS attempts to define its substantial legal interest as follows: "Plaintiff's motion for permanent injunction is a direct attack on the Secretary's authority under this act [MCL 168.32], and so the Secretary of State now has a substantial legal interest in the outcome of this case." (Secretary of State's Brief, at p. 5.)

Asking this Court to enjoin, not the SOS, but the Defendants, from taking actions which would continue the deprivation of Plaintiff's constitutional rights, is not an attack on, and seeks no relief regarding, the SOS's authority. It is almost impossible to see how this request for relief creates a substantial legal interest "in the outcome of the case" for the SOS. Ibid.

"[I]ntervention of right must be supported by a direct, substantial, legally protectable interest in the proceeding and the intervenor must at least be a real party in

interest in the transaction which is the subject of the proceeding.” Continental Cas. Co. v. ZHA, Inc., 154 F.R.D. 281,282 (1963)

“The primary essential element that must exist for an applicant to intervene in a pending action as of right under Rule 24(a) Fed.R.Civ.P. is that he have a direct personal or pecuniary interest in the subject of the litigation; in this, the mandatory provisions differ from the permissive under Rule 24(b) Fed.R.Civ.P.” Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564, 566 (1963).

The SOS has claimed an interest, but has not described one which meets this test.

The SOS also claims to be entitled to permissive intervention under F.R.C.P. 24(b)(1)(B) which allows intervention if the proposed intervenor “has a claim or defense that shares with the main action a common question of law or fact.”

“The test for permissive intervention under Rule 24(b)(2) of the Federal Rules of Civil Procedure involves an even stricter application of the standards for intervention as of right. EEOC v. United Airlines, 515 F.2d 946, 949 (7th Cir. 1975); United States v. Board of Education of the City of Chicago, *supra*, 88 F.R.D. 687; (Brookins v. South Bend Community School Corp., 95 F.R.D. 407,410 (D.C.Ind., 1982.))

Plaintiff’s claim in this action is that he was unconstitutionally denied placement on the Third Ward Council Member ballot. His claim in his Motion for Post-Judgment Relief is that Defendants failed to comply with this Court’s Order and Judgment granting relief on his initial claim. The SOS identifies no claim or defense that it has that shares with the main action a common question of law or fact.

Finally, the SOS seeks permissive intervention under F.R.C.P. 24(b)(2), but this is equally invalid. This section allows intervention:

“if a party’s claim or defense is based on:

- (A) a statute or executive order administered by the officer or agency; or
- (B) any regulation, order, requirement issued or made under the statute or executive order.

Plaintiff’s claim in this case is not based on any statute or executive order by the SOS or any action taken under any such statute or executive order. Plaintiff’s claim in this case is solely based the deprivation of his rights under the Equal Protection Clause of the U.S. Constitution. His claim in his Motion for Post-Judgment Relief is based on Defendants’ failure to comply with this Court’s Order and Judgment.

Defendant’s defense in this case is based on its theories that the provisions of the Ann Arbor City Charter previously found unconstitutional and void had acquired new life and could be enforced. Essentially, the Defendants have put forth no defense to Plaintiff’s Motion for Post-Judgment Relief.

In summary, none of the parties’ claims or defenses has its basis in anything done or not done by the SOS or any statute or executive order, and permissive intervention by a Government Officer or Agency does not apply.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Plaintiff asks this Court to deny the SOS’s Motion to Intervene and to award him all costs and reasonable attorney fees incurred in responding to the Motion.

/s/ Thomas F. Wieder
Thomas F. Wieder (P33228)
Attorney for Plaintiff

Dated: July 13, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 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: Stephen K. Postema and Abigail Elias.

/s/ Thomas F. Wieder
Attorney for Plaintiff

From: Gendreau, Gisgie (MDOS) <GendreauG@michigan.gov> Fri, Jun 27, 2014 at 4:32 PM
To: "dave.askins@annarborchronicle.com" <dave.askins@annarborchronicle.com>
Got your message, Dave.

Here's some information:

If a name is left off an absentee ballot, the clerk sends replacement ballots, informs affected voters of the error and asks that they only return the second ballot.

The clerk would have a way to track whether the second ballot is returned and have controls in place to ensure only one ballot per voter is counted.

If a voter were to return the first ballot, the ballot would be counted, except for the race in question.

Gisgie Dávila Gendreau
Communications Director
Michigan Department of State
P: 5173732520
C: 5179805938

EXHIBIT A



STATE OF MICHIGAN
BUREAU OF ELECTIONS
LANSING

June 30, 2014

Ms. Jacqueline Beaudry, Clerk
City of Ann Arbor
301 E. Huron St.
Ann Arbor MI 48107-8647

Dear Clerk Beaudry:

This letter serves to outline our discussions from earlier today regarding the tabulation of absent voter ballots for Ann Arbor's Ward 3 City Council candidates in the August 5, 2014 primary. The initial ballots you received from Washtenaw County omitted one candidate; upon discovery of the error, the county provided corrected replacement ballots, which are being re-issued today to the approximately 400 absent voters that had received the original ballot.

Regarding the impact of votes for Ward 3 City Council candidates when an absent voter returns only the original (incorrect) ballot and does not return the replacement ballot – those votes are valid and shall be counted. Voters who cast votes in Ward 3 and only return the original ballot cannot have their votes voided due to the ballot printing error. Each of the voters is being given an opportunity to cast a replacement ballot and every attempt should be made to encourage these voters to return the replacement ballot. However, there may be voters who would not change their vote in Ward 3 or will be out of town and unable to return the replacement ballot by Election Day. Neither situation can result in the disenfranchisement of these voters.

Regarding the Bureau of Elections' statement issued last Friday afternoon (June 27), indicating that votes would not be counted for any Ward 3 City Council candidate if a voter returned only the original (incorrect) ballot – this initial statement was based on a prior incident where replacement ballots were issued. Upon further review, the facts behind this prior case and the situation that has occurred with the primary ballots for Ann Arbor's Ward 3 ballot are distinguishable; the prior direction cannot be applied to this situation.

Please do not hesitate to contact this office if you have questions or need further clarification.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Thomas".

Christopher M. Thomas
Director of Elections

c: Lawrence Kestenbaum, Washtenaw County Clerk
Ed Golembiewski, Washtenaw County Elections Director

EXHIBIT B