UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

****

ROBERT SCHULZ, *et al*, Plaintiffs	*	
v.	*	CASE NO: 1:07-CV-0943 LEK/DRH
STATE OF NEW YORK, *et al,* Defendants	*	

****

Notice of New Hampshire Defendants' Motion to Dismiss Plaintiffs' Amended Complaint

NOW COMES the State of New Hampshire and William M. Gardner, New Hampshire Secretary of State ("New Hampshire Defendants"), by and through counsel, the Office of the Attorney General for the State of New Hampshire, and hereby move this Court to dismiss the Plaintiffs' amended complaint against the New Hampshire Defendants on **December 21, 2007 at 9:30 am**, or as soon as thereafter as is convenient for this Court. In support of this motion, the New Hampshire Defendants state the following:

1. Pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(2), this Court does not have personal jurisdiction over the New Hampshire Defendants, and therefore, this Court should dismiss this action against the New Hampshire Defendants.

2. Pursuant to FRCP 12(b)(3), this Court is not the proper venue to sue the New Hampshire Defendants, and therefore, this Court should dismiss this action against the New Hampshire Defendants.

3. The New Hampshire Secretary of State does not have the statutory authority to control what, if any, type of voting machine is used in local, state and federal elections held in New Hampshire. Therefore, pursuant to FRCP 12(b)(6), Plaintiffs have failed to state a claim upon which relief may be granted and this action must be dismissed.

4. The New Hampshire Secretary of State does not have the statutory authority to require New Hampshire towns and cities to use or not use voting machines at their polling places for any local, state and federal elections. Such responsibility resides with the 225 towns and 13 cities in New Hampshire. Therefore, pursuant to FRCP 12(b)(6), Plaintiffs have failed to state a claim upon which relief may be granted and this action must be dismissed.

5. Pursuant to the 11th Amendment of the United State Constitution, the State of New Hampshire is immune from suit, and therefore, Plaintiffs' claim against the State of New Hampshire must be dismissed.

6. A memorandum of law in support of this motion is filed concurrently herewith.

7. This is a dispositive motion. Therefore, there is no requirement that concurrence be sought.

8. Attached to this NOTICE of Motion, please find the New Hampshire Defendants' Memorandum of Law in Support of Motion to Dismiss.

WHEREFORE, it is respectfully requested that this Court order as follows:

A. Grant the New Hampshire Defendants' Motion to Dismiss Plaintiffs' amended complaint; and

B. For such other and further relief as is necessary.

Respectfully submitted,

NEW HAMPSHIRE DEFENDANTS

By their attorneys,

Kelly A. Ayotte
ATTORNEY GENERAL

/s/ James W. Kennedy
James W. Kennedy, N.H. Bar # 15849
Assistant Attorney General
Civil Bureau
33 Capitol Street
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(603) 271-3658
Admitted *Pro Hac Vice*

November 14, 2007

I hereby certify that a copy of the foregoing was mailed this day, postage prepaid to, Robert L. Schulz, pro se, 2458 Ridge Road, Queensbury, NY 12804

/s/ James W. Kennedy
James W. Kennedy

229698

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

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************************************
                                   *
ROBERT L. SCHULZ (New York), et al.,  *
                                   *
          Plaintiffs               *
                                   *
     v.                            *     Case No. 07-CV-0943 LEK/DRH
                                   *
STATE OF NEW YORK, et al.,         *
                                   *
          Defendants               *
                                   *
************************************
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Department of Justice
33 Capitol Street
Concord, NH 03301
(603) 271-3650

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT SCHULZ, *et al*, Plaintiffs	*	
v.	*	CASE NO: 1:07-CV-0943 LEK/DRH
STATE OF NEW YORK, *et al,* Defendants	*	

MEMORANDUM IN SUPPORT OF NEW HAMPSHIRE DEFENDANTS' MOTION TO DISMISS

NOW COME the State of New Hampshire and William M. Gardner, New Hampshire Secretary of State ("New Hampshire Defendants"), by and through counsel, the Office of the Attorney General for the State of New Hampshire, and hereby move to dismiss the Plaintiffs' amended complaint on the grounds that: (1) pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(2), this Court does not have personal jurisdiction over the New Hampshire Defendants; (2) pursuant to FRCP 12(b)(3), this Court constitutes improper venue as to the New Hampshire Defendants; (3) pursuant to FRCP 12(B)(6), Plaintiffs have failed to state a claim upon which relief may be granted against the New Hampshire Secretary of State because the New Hampshire Secretary of State does not have the statutory authority to approve voting machines in New Hampshire; (4) pursuant to FRCP 12(B)(6), Plaintiffs have failed to state a claim upon which relief may be granted because the New Hampshire Secretary of State does not have the statutory authority to require or otherwise approve voting districts in New Hampshire to use or not use voting machines; and (5) pursuant to the Eleventh Amendment, the State

of New Hampshire is immune from suit. In support of this motion, the New Hampshire Defendants state the following:

I. BRIEF FACTUAL BACKGROUND

Plaintiffs filed this amended complaint alleging three causes of action against State Defendants, including the New Hampshire Defendants. The allegations against each of the Defendants relate to Plaintiffs' objection to the Defendants' use of certain voting machines in elections held in the States of each of the named Defendants.

Plaintiffs request that this Court permanently enjoin the Defendants from conducting elections: (1) which are not "open, verifiable, transparent, machine-free, computer-free," Pls' Amended Complt. at ¶ 268(a); (2) which do not "rely exclusively on paper ballots, hand marked and hand-counted," id. at ¶ 268(b); and (3) which do not keep paper ballots in "full public view until the results of the hand counting is publicly announced at that vote station." Id. at ¶ 268(c).

II. ARGUMENT IN SUPPORT OF DISMISSAL

A. Plaintiffs lack personal jurisdiction to bring this action against the New Hampshire Defendants

The party seeking to invoke the court's jurisdiction bears the burden of establishing by competent proof that jurisdiction exists. See Computer Associates Intern., Inc. v. Altai, 126 F.3d 365, 370-71 (2nd Cir. 1997). "It has long been the rule that the standard to be applied in determining whether a federal district court has jurisdiction over the person in diversity cases is the law of the state where the court sits." Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 40 (2d Cir.1989). "The exercise of jurisdiction is proper if the defendant has sufficient contacts to satisfy both the state long arm statute and the Due Process clause of the Fourteenth Amendment."

Computer Associates Intern., Inc., 126 F.3d at 370 (citing Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1025-26 (2d Cir.1997).

(1) Plaintiffs' amended complaint fails to establish jurisdiction under New York's long-arm statute.

New York's long arm statute provides in pertinent part:

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> . . .
>
> 4. owns, uses or possesses any real property situated within the state.
>
> . . .
>
> (c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

N.Y. C.P.L.R. § 302(a).

Plaintiffs' amended complaint fails to show that this federal court has jurisdiction over the New Hampshire Defendants under New York's long arm statute, N.Y. C.P.L.R. § 302(a). The New Hampshire Defendants do not transact business or contract anywhere to supply goods or services in New York. Further, the New Hampshire Defendants do not own, use or possess any real property in New York.

(2) Plaintiffs' amended complaint fails to establish jurisdiction under the Due Process clause of the Fourteenth Amendment.

The Due Process clause of the Fourteenth Amendment limits the exercise of personal jurisdiction to persons having certain "minimum contacts" with the forum state.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). "A court may exercise personal jurisdiction only over a defendant whose 'conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" Computer Associates Intern., Inc., 126 F.3d at 370-71 (quoting Burger King Corp., 471 U.S. at 474 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). "Essential to the exercise of personal jurisdiction in each case is 'some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" Id. at 371 (quoting Burger King Corp., 471 U.S. at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

In this case, the New Hampshire Defendants do not reside in New York. Moreover, none of the allegations contained in the amended complaint relate to the New Hampshire Defendants performing any action in New York. The New Hampshire Defendants could not reasonably have anticipated litigation in New York as a result of the Plaintiffs' allegations. Therefore, this Court lacks personal jurisdiction over the New Hampshire Defendants. Accordingly, the Plaintiffs' amended complaint against the New Hampshire Defendants must be dismissed.

B. This Court is not the proper venue to bring this action against the New Hampshire Defendants

This Court should grant the New Hampshire Defendants' motion to dismiss because this Court is not the proper venue for this action. "The purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." Leroy v. Great Western United Corporation, 443 U.S. 173, 184 (1979). "The requirement of venue is specific and unambiguous; it is not

one of those vague principles which, in the interest of some overriding policy is to be given a liberal construction." Olberding v. Illinois Central R. Co., 346 US 338, 340 (1953). Therefore, courts are required to strictly construe the venue statue. Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 357 (2nd Cir. 2005) (citing to Olberding, 346 U.S. at 340).

Because the Plaintiffs' claim apparently "arises under" federal law, venue must be determined under 28 U.S.C. §1391(b), which provides in pertinent part:

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in
>
> > (1) a judicial district where any defendant resides, if all defendants reside in the same State,
> > (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or
> > (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. §1391(b)

The Plaintiffs have failed to show that they meet the requirements under 28 U.S.C. §1391(b). Subsection (1) does not apply because all of the named Defendants reside in different states. Under subsection (2), with respect to the Plaintiffs' claim against the New Hampshire Defendants, no part of the underlying events took place in New York and no part of any New Hampshire property subject to the action is situated in New York. See Gulf Ins.Co., 417 F.3d at 357 ("district courts to take seriously the adjective 'substantial.'").

Finally, the Plaintiffs have failed to show that subsection (3) provides them with proper venue. Although one of the Defendants, i.e., the New York State Board of Elections, see Pls' Amended Complt. at ¶160, can "be found" in New York, New York is not the proper venue for the New Hampshire Defendants because the Plaintiffs have

failed to show that there "is no district in which the action may otherwise be brought." See 28 U.S.C. §1391(b)(3); H.R. Rep. No. 101-734 at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875; see generally, McDonald v. General Accident Insurance Co., 1996 WL 590722 (N.D.N.Y. 1996).

Here, because three named Plaintiffs and the New Hampshire Defendants reside in New Hampshire, and because the alleged events giving rise to the Plaintiffs' claim against the New Hampshire Defendants allegedly occurred, or will allegedly occur in New Hampshire, to the extent that venue is proper in any federal court for adjudicating Plaintiffs' claims against the New Hampshire Defendants, it must be the United States District Court in New Hampshire.[1] Therefore, pursuant to 28 U.S.C. §1391(b), Plaintiffs claim against the New Hampshire Defendants cannot be brought in this Court. Accordingly, this Court should grant the New Hampshire Defendants' motion to dismiss.

C. Motion to Dismiss on the basis that the Secretary of State of New Hampshire has no authority to control what type of voting machines are used in New Hampshire

Plaintiffs request injunctive relief against the New Hampshire Secretary of State. See Pls' Amended Compl. at ¶¶ 268 (a), (b), and (c). This request is misplaced.

The New Hampshire Secretary of State does not have the authority under New Hampshire law to approve or otherwise select what type of voting machines the municipalities in New Hampshire use in counting and/or processing votes for local, state or federal elections. See N.H.RSA 656:41. New Hampshire RSA 656:41 provides that

[1] This action has not been, and could not be brought as a class action as the parties are individual pro se plaintiffs acting without counsel and therefore cannot act as counsel for a class. The plaintiffs have also not complied with the requirements for obtaining designation as multidistrict litigation under 28 USC § 1407. See Frank v. Aaronson, 120 F.3d 10 (2nd Cir. 1997); see also Phillips v. Tobin, 548 F.2d 408, 412 (2nd Cir. 1976).

New Hampshire's Ballot Law Commission, is the responsible State entity for approving voting machines used in New Hampshire. N.H. RSA 656:41 provides:

> The ballot law commission shall act as a board to examine voting machines and devices for computerized casting and counting of ballots. The commission shall, whenever requested, examine any voting machine or device which may be capable of meeting the requirements for elections held in this state. **The commission shall approve such voting machine or device in its discretion, and no voting machine or device shall be used in any election in this state unless it reads the voter's choice on a paper ballot and is of a type so approved by the ballot law commission**. Any voting machine or device that is altered must be re-approved before it is used in any election in this state. For the purposes of this section, a machine shall be considered altered if any mechanical or electronic part, hardware, software, or programming has been altered.

(Emphasis added).

Because the New Hampshire Secretary of State does not have authority to approve voting machines in New Hampshire, Plaintiffs have inappropriately named him as a Defendant. Therefore, Plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief. See Chapman v. New York State Div. for Youth, 2005 WL 2407548 (2nd Cir. 2005) (citing Conley, 355 U.S. at 45-46 (1957)); Gebhardt v. Allspect, Inc., 96 F. Supp. 2d 331, 333 (S.D.N.Y. 2000) (In order to avoid dismissal, Plaintiffs must do more than plead mere "conclusory allegations or legal conclusions masquerading as factual conclusions."). Accordingly, this Court should dismiss, Plaintiffs' amended complaint against New Hampshire's Secretary of State.[2]

D. Motion to Dismiss on the basis that the individual New Hampshire towns and cities independently determine whether they are going to use voting machines at their polling places for all local, state and federal elections.

[2] Even if Plaintiffs' named New Hampshire's Ballot Law Commission as a defendant in this case, Plaintiffs' claim would fail under the jurisdictional and venue arguments set forth above.

New Hampshire is comprised of 225 towns and 13 cities. Pursuant to N.H. RSA 656:40, these individual towns and cities may authorize "the use of one or more voting machines or devices for computerized casting and counting of ballots . . . ." While New Hampshire's Ballot Law Commission, *supra*, is charged with determining what type of voting machines may be used in New Hampshire, the individual towns and cities in New Hampshire are authorized to determine whether they will use such voting machines in conducting elections, or whether they will engage in hand-counting ballots.

Because the New Hampshire Secretary of State does not regulate or otherwise control which voting machines are permitted for use in New Hampshire, and does not regulate or control whether a New Hampshire town or city opts to use or not use a voting machine in conducting local, state and federal elections, Plaintiffs have inappropriately named the New Hampshire Secretary of State as a Defendant. Accordingly, Plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief. See Chapman, 2005 WL 2407548.

E. Defendant State of New Hampshire is immune from suit under the Eleventh Amendment.

The Eleventh Amendment to the United States Constitution generally bars claims in federal court against the states and their agencies. See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Under Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), "a plaintiff may sue a state official acting in his official capacity – notwithstanding the Eleventh Amendment – for prospective, injunctive relief from violations of federal law." In re Deposit Ins. Agency, 482 F.3d 612, 617 (2d Cir. 2007) (internal quotation marks omitted). Importantly, however, the ruling in Ex Parte Young does not allow injunctive action

against a state, as opposed to state officers. Ashe v. Board of Elections, 1988 U.S. Dist. LEXIS 10067 (E.D.N.Y. 1988); see also NAACP v. California, 511 F.Supp. 1244, 1250 (E.D. Cal. 1981), aff'd. 711 F.2d 121 (9th Cir. 1982).

In this case, Plaintiffs have named the State of New Hampshire as a defendant. Because the State of New Hampshire is immune from suit under the Eleventh Amendment, the claims against the State of New Hampshire should be dismissed.

III. CONCLUSION

The New Hampshire Defendants respectfully request that this Honorable Court:

(1) Dismiss the Plaintiffs' amended complaint as against the New Hampshire Defendants; and

(2) Grant such further relief as it may deem just and equitable.

Respectfully submitted,

NEW HAMPSHIRE DEFENDANTS

By their attorneys,

Kelly A. Ayotte
ATTORNEY GENERAL

/s/ James W. Kennedy
James W. Kennedy, N.H. Bar # 15849
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Admitted *Pro Hac Vice*

November 14, 2007

I hereby certify that a copy of the foregoing was mailed this day, postage prepaid to, Robert L. Schulz, pro se, 2458 Ridge Road, Queensbury, NY 12804.

/s/ James W. Kennedy
James W. Kennedy

230608

Westlaw.

C
McDonald v. General Acc. Ins. Co.
N.D.N.Y.,1996.

United States District Court, N.D. New York.
William McDONALD, Stacey McDonald, and Donna Rondyke, Plaintiffs,
v.
GENERAL ACCIDENT INSURANCE CO., Linda D. Olivera, Commonwealth of Massachusetts, Massachusetts Worcester Superior Court, Massachusetts Fall River Superior Court, Patrick Rogers, Massachusetts Department of Transitional Assistance f/k/a Department of Public Welfare, Massachusetts Milford District Trial Court, Debra Perkins, VNA/Milford-Northbridge, Jacob Oppewal, Shannon (Chalmers) Delba, Commerce Insurance Co., James E. Vaida, Pawtucket Mutual Insurance Co., State of Connecticut, Speiser Dabran Management Company of New York, Massachusetts South Middlesex Opportunity Council, County of Albany New York Department of Social Services, Massachusetts Division of Medical Assistance, Massachusetts Department of Revenue, Webster Credit Union, Massachusetts Department of Industrial Accidents, Maine Department of Health and Human Services SSI Division, Massachusetts Department of Health and Human Services SSI Division, Defendants.
No. 96-CV-326.

Oct. 7, 1996.

MEMORANDUM DECISION AND ORDER
McAVOY, Chief Judge.

I. BACKGROUND

***1** This is an action alleging violations under the Civil Rights Act of 1964, 42 U.S.C. § 1982 et seq., the federal Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq., the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Civil Rights Restoration Act of 1988, P.L. 100-259 § 1, 102 Stat. 28, and the Americans With Disabilities Act, 42 U.S.C. § 12134 .

Plaintiff William McDonald [FN1] was a Massachusetts resident from 1985 through some point in 1995. Mr. McDonald apparently suffered injuries in an accident on the job in Massachusetts, in October 1985.[FN2] As a result, McDonald was permanently disabled and requires in-home nursing care.

FN1. The plaintiffs in this action claim that they constitute a protected class and that therefore this action is a class action. However, no formal class certification has been made nor have Plaintiffs met their burden of showing they meet the requirements of a class action under Federal Rule of Civil Procedure 23.

FN2. Because Plaintiffs' complaint is almost unintelligible, this statement of facts is drawn from the complaint as well as from the decisions and orders previously entered against Mr. McDonald by United States District Court for the District of Massachusetts in *McDonald v. Commonwealth of Massachusetts,* Civil Action No. 92-11772-NMB (April 5, 1995).

Pro se plaintiffs William McDonald, Stacey McDonald, and Donna Rondyke brought suit against twenty-five defendants, including: the Commonwealth of Massachusetts, the State of Connecticut, four Massachusetts executive agencies, one Massachusetts secretariat, three Massachusetts trial courts, one Massachusetts employee, a Massachusetts credit union, the Maine Department of Health and Human Services, Visiting Nurses Association-a Massachusetts health services organization, McDonald's previous attorney who

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represented him in a worker's compensation claim, and a number of insurance companies. Only two defendants appear to have direct ties to New York State-Speiser Dabran Management Company, a realty management company and New York Department of Social Services.

Plaintiffs' rambling and inarticulate complaint alleges, *inter alia,* that these defendants individually, and conspiratorially, denied Plaintiffs' due process and equal protection, and denied Plaintiffs' reasonable accommodation in the provision of medical services, medical benefits, legal redress, and insurance payments related to McDonald's injury in 1985. Jurisdiction is predicated on both federal question jurisdiction, 28 U.S.C. § 1331, and/or diversity of citizenship, 28 U.S.C. § 1332.

Defendants VNA Milford-Northbridge, Debra Perkins, Massachusetts South Middlesex Opportunity Council, Jacob Oppewal, Webster First Credit Union, Pawtucket Mutual Insurance, James Vaida, Patrick Rogers, Commonwealth of Massachusetts, Massachusetts Department of Revenue, Massachusetts Division of Medical Assistance, Massachusetts Department of Transitional Assistance, Massachusetts Department of Industrial Accidents, Massachusetts Department of Health and Human Services, Massachusetts Worcester Superior Court, Massachusetts Fall River Superior Court, MASSACHUSSETS Milford District Trial Court, and the State of Connecticut have moved this court for dismissal primarily on the grounds of improper venue, lack of personal jurisdiction, and improper service of process.

II. DISCUSSION

Even a cursory reading of the caption in this case raises the question of whether this action is in the proper court. 28 U.S.C. § 1406(a) provides that " the district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

***2** The proper venue for an action is determined by the statute at issue, if it contains a specific venue provision, or by the general venue statute at 28 U.S.C. § 1391. For claims under § 1983, 28 U.S.C. § 1391(b) governs venue. *See, e.g., Baker v. Coughlin,* 1993 WL 356852 (S.D.N.Y.1993).

Section 1391(b) sets forth three distinct conditions under which venue is conferred on one or more judicial districts:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

Applying § 1391(b) to the facts presented here, it is clear that the Northern District of New York is not the proper venue for this action. First, all twenty-five defendants do not "reside in the same State," let alone all reside in New York State. 28 U.S.C. § 1391(b)(1). Second, "a substantial part of the events or omissions giving rise to the claim" occurred in Massachusetts, not New York. 28 U.S.C. § 1391(b)(2). To wit, Plaintiff McDonald is claiming discrimination, on the basis of his disability, in the furnishing of medical assistance, medical benefits, legal redress, and insurance payments related to McDonald's injury and treatment in Massachusetts.

Finally, although two of the twenty-five defendants can "be found" in New York, New York is not the proper venue because there has not been a showing that there "is no district in which the action may otherwise be brought." 28 U.S.C. § 1391(b)(3). Indeed, this action can be brought in the District of Massachusetts-the situs of the alleged constitutional deprivations.

In the end, the decision whether transfer or

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dismissal is in the interest of justice rests within the discretion of this Court. *See Naartex Consulting Corp. v. Watt,* 722 F.2d 779, 789 (D.C.Cir.1983), *cert. denied,*467 U.S. 1210 (1984); *Sheet Metal Workers' Nat'l Pension Fund v. Gallagher,* 669 F.Supp. 88, 91 (S.D.N.Y.1987). Because Plaintiffs have not shown bad faith in initiating this action in the Northern District of New York and considering Plaintiffs' *pro se* status, it is in the interest of justice to transfer this case rather than dismiss it.

Therefore, it is hereby
ORDERED that this matter is hereby transferred to the United States District Court for the District of Massachusetts; and it is further
ORDERED that the Clerk of this Court shall transmit all records and papers in this civil action to the Clerk of the Court of the United States District Court for the District of Massachusetts, together with a copy of this order.
***3** IT IS SO ORDERED.

N.D.N.Y.,1996.
McDonald v. General Acc. Ins. Co.
Not Reported in F.Supp., 1996 WL 590722 (N.D.N.Y.), 9 NDLR P 37

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Citation: **1988 US Dist. LEXIS 10067**

*1988 U.S. Dist. LEXIS 10067, **

TYRONE ASHE et alia, Plaintiffs, v. THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK et alia, Defendants

No. CV-88-1566

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

1988 U.S. Dist. LEXIS 10067

September 6, 1988, Decided; September 8, 1988, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff voters brought an action under §§ 2 and 5 of the Voting Rights Act, 42 U.S.C.S. § 1973, 1973(c); 42 U.S.C.S. §§ 1981, 1983, 1985; the Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution; and various provisions of New York statutory and constitutional law. Defendants, the State of New York, the Governor of New York, New York's Secretary of State, and the New York State Board of Elections, filed motions to dismiss.

OVERVIEW: The voters sought a declaratory judgment that the New York State Election Law was unconstitutional and an injunction preventing further alleged violations of constitutional rights of black and Hispanic voters. The court granted defendants' motions to dismiss, with the exception of the motion by the Board. The court found that under the Eleventh Amendment, the State was immune from claims by individuals arising under the Constitution, under 42 U.S.C.S. §§ 1981, 1983, and 1985, under state law, and under the Voting Rights Act. Injunctive relief was available against state officers if there was a "particular relation" between the official and the constitutional violation. The court found that the Board had the duty to supervise elections and had a direct responsibility for the electoral system. As such, the Board could be held liable. However, the Governor and the Secretary had no direct role in the conduct of elections, and they could not be held liable. The court held the state election law facially constitutional because the voters failed to establish that it could never be applied constitutionally or that it was passed with discriminatory intent.

OUTCOME: The court denied the motion to dismiss filed by the Board. The court granted the motion as to all other defendants.

CORE TERMS: election, Election Law, governor, registration, secretary, Voting Rights Act, state law, state officers, injunction, voting, federal law, state attorney, state official, primary elections, discriminatory intent, presidential, declaration, injunctive, electoral, monitor, facial, voters, vital, facial constitutionality, political parties, appointment, canceled

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Federal & State Interrelationships > Sovereign Immunity > State Immunity
Civil Rights Law > Section 1983 Actions > Scope
Governments > State & Territorial Governments > Claims By & Against

HN1 The Eleventh Amendment bars claims arising under the United States Constitution against the state and its agencies. The Eleventh Amendment immunity protects the state from suit under 42 U.S.C.S. §§ 1981, 1983, 1985. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > State Autonomy > General Overview
Governments > State & Territorial Governments > Claims By & Against

HN2 A state cannot be sued for violations of state law under the Eleventh Amendment. More Like This Headnote

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
Governments > Federal Government > Elections
Governments > State & Territorial Governments > Claims By & Against

HN3 The Attorney General of the United States may sue a state pursuant to § 2 of the Voting Rights Act, 42 U.S.C.S. § 1971. An individual, however, may not avoid the Eleventh Amendment bar. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Justiciability > Case or Controversy Requirements > General Overview
Constitutional Law > The Judiciary > Case or Controversy > General Overview
Governments > State & Territorial Governments > Employees & Officials

HN4 After a thorough review of New York cases, the United States District Court for the Southern District of Ohio found that the duty to supervise the enforcement of the state's laws is enough to invoke the ability to enjoin a state official. In addition, the plaintiff must also show that there is a real potential that the power of the state official would be employed against plaintiff's interest. This analysis allows for liability based on general enforcement power but requires a "particular relation" to the violation. A realistic threat that plaintiffs will be harmed is, of course, part of the case or controversy requirement of U.S. Const. art. III. More Like This Headnote

Civil Rights Law > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Constitutional Law > Involuntary Servitude

HN5 In order to hold a statute unconstitutional on its face, plaintiffs must demonstrate that it can never be applied in a valid manner. Furthermore, plaintiffs' challenge to a statute under the Fourteenth and Fifteenth amendments must allege that it was enacted with discriminatory intent. Finally, a claim under the Thirteenth amendment must show how the statute complained of is used as a badge of servitude, a claim which involves racial animus. More Like This Headnote

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OPINION BY: SIFTON

OPINION

MEMORANDUM AND ORDER

CHARLES P. SIFTON, United States District Judge

This is an action brought by plaintiff under §§ 2 and 5 of the Voting Rights Act, 42 U.S.C. § 1973 and 1973(c); §§ 1981, 1983, and 1985 of title 42 of the United States Code; the thirteenth, fourteenth, and fifteenth amendments to the United States Constitution; and various provisions of New York State statutory and constitutional law. The claims under § 5 of the Voting Rights Act are before a three-judge panel of this Court. The other claims are addressed to the undersigned, sitting alone.

The matter is **[*2]** now before the Court on motions of the State of New York, Governor Mario Cuomo, Secretary of State Gail Shaffer, and the New York State Board of Elections. The State has moved to dismiss on eleventh amendment grounds; the State Board of Elections has moved to dismiss on the ground that it is not a proper party, as have the Governor and the Secretary of State; in addition, the Governor and the Secretary of State have moved to dismiss on the grounds that plaintiffs have failed to state a cause of action against them and that the claims against them are barred by the eleventh amendment; and, finally, Attorney General Robert Abrams, appearing as statutory intervenor, has moved to dismiss the claims alleging the facial unconstitutionality of the New York State Election Law.

Plaintiffs allege in their complaint that there was a massive failure on the part of the New York City Board of Elections, which is authorized to run elections in New York City, in the conduct of this year's presidential primary elections. The State Board of Elections is ultimately responsible for the running of all elections for public office in the state. The New York City Board of Elections is given direct responsibility **[*3]** for the running of elections within the City of New York. Governor Cuomo and the Secretary of State Shaffer are, by law, responsible for the enforcement of the laws within New York State, and the Governor receives reports from the State Board of Elections concerning matters within its jurisdiction. According to the complaint, defendants improperly canceled plaintiffs' registrations and failed to register plaintiffs, to monitor plaintiffs' registration properly, to provide plaintiffs with timely verification of their registration, and to advise plaintiffs of their right to re-register where their registration was canceled, and to have available plaintiffs' registration cards at voting sites.

Plaintiffs claim that, as a result of the failure of the defendants to run a proper primary, their constitutional rights under the thirteenth, fourteenth, and fifteenth amendments have been violated, as well as their rights under §§ 1981, 1983, and 1985 of title 42, and § 2 of the Voting Rights Act, the New York State Constitution, New York Civil Rights Law, and New York Election Law.

In addition, plaintiffs challenge the constitutionality of §§ 2-202, 3-400(3), and 3-404(2) of the New York Election **[*4]** Law, which provide for appointment to the New York City Board of Elections by representatives of the two major political parties, Articles 5 and 8 of the

Election Law to the extent that they provide for bi-partisan control of voting and registration, and Articles 3 through 9 and 11 through 12 of the Election Law to the extent that they provide for appointment of members of the New York City Board of Elections by the two major political parties. Plaintiffs claim that those sections of the law they attack are unconstitutional on their face and as applied, since they result in black and Hispanic citizens having less opportunity to participate in the political process.

As relief, plaintiffs request a declaratory judgment declaring the procedures for conducting elections in New York City in violation of § 2 of the Voting Rights Act and the thirteenth, fourteenth, and fifteenth amendments; a declaration that the above-mentioned portions of the New York Election Law are unconstitutional on their face and as applied; a declaration that the conduct of defendants has violated the New York Constitution and New York Election Law; an injunction preventing defendants from further violations of **[*5]** state and federal law and constitutions; an injunction ordering defendants to devise an electoral system that is not in violation of plaintiffs' rights under state and federal law and constitutions; an injunction restoring the registration of black and Hispanic voters whose registrations have been cancelled in the year prior to April 19, 1988; an order directing defendants to comply with the Voting Rights Act; and an order to the United States Attorney to appoint federal marshals to monitor and review the voting practices of the September 15, 1988 New York primary.

DISCUSSION

Motions by the State of New York

Constitutional and Civil Rights Claims. *HN1* The eleventh amendment bars claims arising under the United States Constitution against the state and its agencies. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) ("Pennhurst II"). The eleventh amendment immunity protects the state from suit under 42 U.S.C. §§ 1981, 1983, and 1985. Edelman v. Jordan, 415 U.S. 651 (1974).

Contrary to plaintiffs' contentions, the ruling in Ex Parte Young, 209 U.S. 123 (1908), does not allow injunctive action against a state, as opposed to state officers. **[*6]** [1]

FOOTNOTES

1 Moose Lodge 17 v. Irvis, 407 U.S. 163 (1972), does not support a waiver of the eleventh amendment, and United States v. Texas, 321 F. Supp. 1043 (E.D. Texas 1970) is not apposite. In involves a suit by the United States.

State Law. *HN2* The state also cannot be sued for violations of state law under the eleventh amendment. Pennhurst II.

The Voting Rights Act. *HN3* The Attorney General of the United States may sue a state pursuant to section 2 of the Voting Rights Act, 42 U.S.C. § 1971. An individual, however, may not avoid the eleventh amendment bar. See NAACP v. California, 511 F. Supp. 1244, 1250 (N.D. Cal. 1981), aff'd, 711 F.2d 121 (9th Cir. 1982); Ball v. Brown, 450 F. Supp. 4 (N.D. Ohio 1977). Accordingly, the claims against the state must be dismissed.

Motions by the State Board, Cuomo, and Shaffer

Ex Parte Young, as noted above, allows for injunctive relief against state officers. [2] In Young, the Court noted that "a particular relation" between the officer or agency sued and the constitutional violation was necessary to find liability. However, the Court specifically

approved of Smyth v. Ames, 169 U.S. 466 (1898), which **[*7]** allowed a suit against a state attorney general as a result of the attorney general's duty to enforce state law.

FOOTNOTES

2 The Board has defended this suit as if its members were sued in their official capacity; it has not raised the eleventh amendment defense as a state agency.

In New York, there have been conflicting decisions allowing and barring suits against state officers whose power is simply supervisory. Compare Oliver v. Board of Ed., 306 F. Supp. 1286 (S.D.N.Y. 1969) and Gras v. Stevens, 415 F. Supp. 1148 (S.D.N.Y. 1976) with Federal Nat'l Mtg. Ass'n v. Lefkowitz, 383 F. Supp. 1294 (S.D.N.Y. 1974) and Johnson v. Rockefeller, 58 F.R.D. 42 (S.D.N.Y. 1972) and Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y.), aff'd, 400 U.S. 806 (1970).

In Gras, the court drew a distinction between suits involving the enforcement of laws governing relations between the state and a citizen and laws concerning relations among citizens. The court declined to hold the governor liable simply as a result of his authority to enforce the laws where the law in question dealt only with relations among private persons. 415 F. Supp. at 1152.

*HN4*After a thorough review **[*8]** of New York cases, the United States District Court for the Southern District of Ohio found that the duty to supervise the enforcement of the state's laws is enough to invoke the Ex Parte Young ability to enjoin a state official. In addition, the plaintiff must also show that there is a real potential that the power of the state official would be employed against plaintiff's interest. Allied Artists Pictures Corp. v. Rhodes, 473 F. Supp. 560 (S.D. Ohio 1979), 496 F. Supp. 408 (S.D. Ohio 1980), aff'd, 679 F.2d 656 (6th Cir. 1982). This analysis reconciles the New York cases and the language of Young, allowing for liability based on general enforcement power, but requiring a "particular relation" to the violation. A realistic threat that plaintiffs will be harmed is, of course, part of the case or controversy requirement of Article III. See Wurth v. Seldin, 422 U.S. 490 (1975); NAACP, supra, 511 F. Supp. at 1259.

Here, the statute involved is one that regulates the relations between citizens and the state in a most vital way. The Board of Elections has direct responsibility for the electoral system and would be a vital part of any remedial relief in fashioning **[*9]** a new system. Accordingly, the Board of Elections may be held liable under the rule of Ex Parte Young. See Los Angeles Branch of the NAACP v. Los Angeles United School District, 714 F.2d 946, 950-51 (9th Cir. 1983).

By contrast, neither the Governor nor the Secretary of State has any direct role in the conduct of primary elections or the registration of voters under New York law. Accordingly, the secretary of state and the governor cannot be held liable under Ex Parte Young. See Los Angeles Branch of NAACP, supra, at 952, see also Rode v. Dellacripete, 845 F.2d 1195, 1208-09 (3d Cir. 1988). This is not the situation this court faced in Donohue v. Board of Elections of the State of New York, 435 F. Supp. 957 (E.D.N.Y. 1976), where the plaintiffs were challenging the validity of a general presidential election. In that case, the Governor and the Secretary of State were required by law to certify the electors and, accordingly, could be enjoined from doing so in violation of the Constitution. Here, the Governor and the Secretary of State have no direct participation in the state primary system. Accordingly, their motions to dismiss the claims against them must be granted. **[*10]** I need not consider Cuomo and Shaffer's other reasons for granting their motion to dismiss.

Facial Constitutionality of New York's Election Law

HN5 In order to hold a statute unconstitutional on its face, plaintiffs must demonstrate that it "can never be applied in a valid manner." N.Y.S. Club Ass'n v. City of New York, U.S. , 108 S. Ct. 2225, 2233 (1988). Furthermore, plaintiffs' challenge to a statute under the fourteenth and fifteenth amendments must allege that it was enacted with discriminatory intent. Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985). Finally, a claim under the thirteenth amendment must show how the statute complained of is used as a badge of servitude, a claim which involves racial animus. Memphis v. Green, 451 U.S. 100, 126-27 (1981).

Here, plaintiffs have failed to show that the act can never be applied constitutionally or that it was passed with discriminatory intent. Indeed, both Judges Leisure in Meyerson v. Board of Elections, No. CV-87-6168 (S.D.N.Y. April 27, 1988), and Weinfeld in McGee v. Board of Elections, 669 F. Supp. 73 (S.D.N.Y. 1987), have recently upheld the Election Law against similar challenges.

Of **[*11]** course, plaintiffs may show that the application of the law by the city is unconstitutional. What they cannot show is that the Election Law must be applied unconstitutionally. Accordingly, insofar as it attacks the facial constitutionality of the New York Election Law, the complaint is dismissed.

In sum, defendants' motion to dismiss as to Governor Cuomo, Secretary of State Shaffer, and the State of New York is granted, as is the motion to dismiss the facial attacks on the constitutionality of the Election Law. The New York State Board of Election's motion to dismiss is denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated : Brooklyn, New York, September 6, 1988

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