

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

**ROBERT L. SHULZ, et al.,
Plaintiffs**

v.

**STATE OF NEW YORK, et al.,
Defendants**

**NO. 07-CV-0943
(LEK/DRH)**

**MEMORANUDM OF LAW IN SUPPOERT OF MOTION TO DISMISS ON BEHALF
OF DEFENDANTS COMMONWEALTH OF PENNSYLVANIA AND PEDRO A.
CORTÉS**

INTRODUCTION

Plaintiffs filed this Amended Complaint alleging three causes of action against the Commonwealth of Pennsylvania and Pedro A. Cortés (Pennsylvania Defendants). Plaintiffs in their amended complaint object to the Defendants' use of certain voting machines in elections held in each of the 50 States of the United States. The first cause of action alleges that the voting procedures used by Defendants infringe on Plaintiffs' right to vote. The second cause of action alleges that these voting procedures are a violation of Plaintiffs' "contractual rights," based on the assertion that "[f]ormally registering with the State to vote...is a contract." Compl. ¶ 252. In what purports to be a third cause of action, Plaintiffs identify a set of voting procedures they allege Defendants are constitutionally required to follow during the 2008 primary and general elections.

Plaintiffs request that this Court permanently enjoin the Defendants from conducting elections: (1) which are not "open, verifiable, transparent, machine-free, computer-free," (2) which do not "rely exclusively on paper ballots, hand marked and hand-counted," 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.* ¶ 268.

The Complaint does not allege any contacts, related to elections or otherwise, between the Pennsylvania Defendants and the State of New York. It does not allege any acts by the Pennsylvania Defendants that occurred within the State of New York and it does not allege any acts by the Pennsylvania Defendants that have violated the rights of any New York resident in any way.

ARGUMENT

I. PLAINTIFFS LACK PERSONAL JURISDICTION TO BRING THIS ACTION AGAINST THE PENNSYLVANIA 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)).

A. The Complaint Fails to Establish Jurisdiction under New York’s Long-Arm Statute.

The Pennsylvania Defendants do not fall within the ambit of New York’s long arm statute, which provides in pertinent part as follows:

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
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

N.Y. C.P.L.R. § 302(a).

The Complaint fails to provide any factual basis to support this Court's jurisdiction over the Pennsylvania Defendants under section 302(a)(1). "To determine the existence of jurisdiction under section 302(a)(1), a court must decide (1) whether the defendant 'transacts any business' in New York and, if so, (2) whether this cause of action 'aris[es] from' such a business transaction." *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 246 (2d Cir. 2007) (citation omitted). For the first part of the test, "courts look to 'the totality of the defendant's activities within the forum,' to determine whether a defendant has 'transact[ed] business' in such a way that it constitutes 'purposeful activity.'" *Id.* (citations omitted). "As for the second part of the test, '[a] suit will be deemed to have arisen out of a party's activities in New York if there is an articulable nexus, or a substantial relationship, between the claim asserted and the actions that occurred in New York.'" *Id.* (citations omitted).

Here, Plaintiffs have failed to allege that the Pennsylvania Defendants transact business or contract anywhere to supply goods or services in New York. Moreover, they fail to identify any connection between the cause of action, which relates to Pennsylvania's use of voting machines, and any business Pennsylvania may conduct in New York. Accordingly, Plaintiffs' have failed to establish the "articulable nexus" or "substantial relationship" required for personal jurisdiction to lie against the Pennsylvania Defendants under section 302(a)(1).

Similarly, Plaintiffs have failed to provide any factual allegations to support jurisdiction over the Pennsylvania Defendants under section 302(a)(2), (3) or (4). First, Plaintiffs make no allegations that the Pennsylvania Defendants have committed a tort of any kind, but rather only allege voting and contractual right violations. Accordingly, they cannot satisfy section 302(a)(2) and (3). *See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 125 (2d Cir. 2002) (a plaintiff must "aver facts constituting 'a tort under the law of the pertinent jurisdiction'" for personal jurisdiction to lay under 302(a)(2) and (3)). Second, Plaintiffs' have made no allegations that the Pennsylvania Defendants own, use or possess any real property in New York.

For these reasons, Plaintiffs have failed to establish personal jurisdiction over the Pennsylvania Defendants under any of the relevant provisions of New York's Long Arm Statute.

B. The 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 the instant matter, the Pennsylvania Defendants do not reside in New York. Moreover, none of the allegations contained in the Complaint relate to the Pennsylvania Defendants performing any acts in New York. Further yet, the Pennsylvania Defendants could not reasonably have anticipated litigation in New York relating to Pennsylvania’s own voting machines and procedures as a result of Plaintiffs’ allegations. For these reasons, Plaintiffs have failed to allege the “minimum contacts” between the Pennsylvania Defendants and New York that are required under the Due Process Clause to exercise personal jurisdiction over the Pennsylvania Defendants.

II. THIS ACTION AGAINST THE COMMONWEALTH OF PENNSYLVANIA IS BARRED BY THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Supreme Court of the United States has determined that the Eleventh Amendment generally bars claims in federal court against the states and their agencies. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Under *Ex Parte Young*, 209 U.S. 123 (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. *See CSX Transp., Inc. v. N.Y. State Office of Real Prop. Servs.*, 306 F.3d 87, 98 (2d Cir. 2002). In this case, Plaintiffs have named the Commonwealth of Pennsylvania as a defendant by name. Because the Commonwealth of Pennsylvania is immune from suit under the Eleventh Amendment, this Court this action against it should be dismissed.

III. DEFENDANT PENNSYLVANIA IS NOT A “PERSON” UNDER THE MEANING OF 42 U.S.C. § 1983.

Under 42 U.S.C. §1983, only “persons who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia” may be held liable for depriving an individual of his or her “rights, privileges, or immunities secured by the Constitution and laws” enacted hereunder. *Id.* The Supreme Court has firmly concluded that a State is not a “person” within the meaning of 42 U.S.C. § 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58, 64-67 (1989); *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 708-709 (2003). Accordingly, this Court must conclude that all federal claims against the Commonwealth of Pennsylvania be dismissed as a matter of law.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court dismiss the Amended Complaint as against the Pennsylvania Defendants.

Respectfully submitted,

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Date: December 17, 2007

CERTIFICATE OF SERVICE

I, Michael L. Harvey, Senior Deputy Attorney General, Commonwealth of Pennsylvania, hereby certify that on this date, I caused to be served a copy of the foregoing document via ECF to counsel for the other named defendants. I further certify that a copy of the foregoing document was served on the following non-ECF participant who has been designated by the Court as the “Lead Plaintiff Representative” by depositing a copy in the United States mail, first class postage prepaid, in Harrisburg, Pennsylvania, addressed to the following individual:

Robert L. Shulz
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s/Michael L. Harvey
MICHAEL L. HARVEY
Senior Deputy Attorney General

Date: December 17, 2007