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IN THE SUPERIOR COURT

PINAL COUNTY, STATE OF ARIZONA

Date: 12/15/2020

THE HON KEVIN D WHITE,

By Judicial Administrative Assistant: Rosie Marquez

STACI BURK

Plaintiff(s),

vs.

**DOUG DUCEY, in his official capacity as
Governor of the State of Arizona; KATIE
HOBBS, in her official capacity as the
Secretary of State; and DOES I-X,**

Defendant(s).

)
) **S1100CV202001869**
)

) **RULING ON MOTION TO DISMISS**
)

The Court has reviewed and considered the Motions to Dismiss filed by the Governor, the Secretary of State and the Maricopa County Attorney’s Office and the Response filed by Plaintiff. In addition, the Court has also considered the oral arguments of counsel, the Notice of Filing, filed on December 14, 2020 by the Secretary of State and Plaintiff’s Response to it.

Good cause exists to grant the Motions to Dismiss on multiple separate and independent grounds raised by the moving parties, including the following:

- I. **PLAINTIFF IS NOT AUTHORIZED TO BRING THIS ELECTION CONTEST
BECAUSE SHE WAS NOT REGISTERED TO VOTE IN THE 2020 GENERAL
ELECTION WHEN SHE FILED HER COMPLAINT**

Plaintiff by her own admission was not registered to vote for the 2020 general election. She therefore does not qualify to contest the election under A.R.S. § 16-672(A)(1) because she was not an “elector” of the state and county in which she resides. She lacks standing to challenge an election in which she did not vote and could not vote.

II. PLAINTIFF FAILED TO FILE A COMPLAINT THAT COMPLIED WITH A.R.S. 16-673 WITHIN THE STATUTE OF LIMITATIONS SET BY A.R.S. 16-672

The Secretary of State completed the canvass of the election and declaration of result on November 30, 2020. See https://azsos.gov/sites/default/files/2020_General_State_Canvass.pdf. The five day statute of limitation set by A.R.S. § 16-672 began to run on that date. The fifth day, therefore, fell on Saturday, December 5, 2020. Plaintiff filed her original Complaint on Monday, December 7, 2020, 7 days after completion of the canvass. Plaintiff, however, did not verify the original Complaint as required by A.R.S. § 16-673(B). She filed an Amended Complaint the next day on December 8, 2020 that was verified.

As noted by all of the Defendants, failure to file a Complaint by the statutory deadline is a jurisdictional defect that is fatal to the action. See, *Smith v. Bd of Directors, Hosp. Dist. No.1 Pinal Cty, 148 Ariz. 598, 599 (App. 1985)(Court of Appeals affirmed trial court's dismissal of election contest filed 2 days after statutory 5 day deadline set by A.R.S. 16-673.);* see also *Donaghey v. Attorney General, 120 Ariz. 93, 95 (1978)(Court notes that Arizona Courts have held that the requirements as to time within the election contest must be brought are regarded as mandatory, and unless strictly complied with, the Court is without jurisdiction to proceed.)*. Plaintiff failed to file the original Complaint within the five day statutory time frame.

Plaintiff contends that "the Court should apply according to A.R.S. § 1-243(A), which provides for excluding Sundays from time computation." *Plaintiff's Response to Motion to Dismiss, p. 6, l. 1-8*. Even following A.R.S. 1-243(A) and excluding Sunday from counting, the original Complaint was not filed within five days.

Furthermore, as noted above, the original Complaint failed to comply with A.R.S. §16-673. The subsequent Amended Complaint filed the next day was certainly not filed within the five day statute of limitations. The Amended Complaint would not relate back to the date of the original defective Complaint for purposes of application of the statute of limitations set by A.R.S. §16-673. Allowing jurisdictionally defective complaints to be cured by subsequent untimely amended complaints would eviscerate the legislative mandate that such actions be filed within 5 days and permit parties to circumvent the strong public policy supporting prompt resolution of election cases.

III. LACHES WARRANTS DISMISSAL

As contended by the Secretary of State and the Maricopa County Attorney's Office, dismissal is also appropriate on the separate and independent ground of laches. In this case, Plaintiff waited until 35 days after the election and seven days after certification of the election to file her first Complaint (albeit a defective one as noted above). As well detailed in the Motions to Dismiss filed by the Secretary of State and Maricopa County Attorney's Office, Plaintiff's delay was unreasonable and highly prejudicial. Good cause therefore exists to dismiss the Complaint based on the ground of laches.

IV. PLAINTIFF'S FAILURE TO TIMELY JOIN INDISPENSABLE PARTIES ALSO CALLS FOR DISMISSAL

Good cause is also present for dismissal based on Plaintiff's failure to timely join indispensable parties in this case. On December 14, Plaintiff filed what she has labeled "Corrected Second Amended Complaint for Declaratory, Emergency Injunctive Relief" together with a Motion for Leave to Amend. The proposed amendment to the Complaint seeks to add who she now effectively concedes are indispensable parties: the Biden Electoral College Voters, the Pinal County Supervisors and the Pinal County Recorder. Plaintiff has yet to formally join Joe Biden the candidate whose election she seeks to set aside. Fourteen days have passed since the canvass of the vote was completed and 7 days have passed since she filed her original Complaint. Her failure to timely join these indispensable parties in the context of an election case, particularly one filed as late as this one, warrants dismissal on this separate and independent ground.

The Court notes that the requested amendment to the Complaint, if granted, would be flagrantly untimely under A.R.S. 16-672 and would only bolster the case for dismissal based on laches because of the significant additional delay and prejudice it would cause.

Based on the grounds noted above and other good cause stated by the Governor, the Secretary of State and the Maricopa County Attorney's Office,

IT IS ORDERED dismissing Plaintiff's Complaint.

IT IS FURTHER ORDERED denying the pending Motion to Amend the Complaint.

IT IS FURTHER ORDERED vacating the evidentiary hearing set for December 16, 2020 and rescinding the Court's order regarding disclosure of exhibits.

Plaintiff filed a "Motion to Cure Status as an Elector" at 3:53 p.m. on December 14, 2020. In the Motion she reiterates what she explained in closing argument: that she mistakenly plead that she was a "qualified elector" when she meant to plead that she was an "elector." This is an issue that would technically call for yet another amended complaint. Her request to "cure" by taking notice of what she meant has been done; the Court has given due consideration to her explanation and notes that whether she plead she was a "qualified elector" or an "elector" would not change the Court's ruling on the Motions to Dismiss.

The Court finds no just reason for delay and enters this final judgment as to all claims and parties and finds that no further matters remain pending, pursuant Rule 54(C), except for any request for costs or Motion for attorney's fees, pursuant to Ariz.R.Civ.P. 54(f) and (g). The Court makes this finding for purposes of permitting an immediate appeal to the Arizona Supreme Court.

Dated this 15th day of December, 2020



Kevin D. White
Judge of the Superior Court

Mailed/distributed copy: 12/15/2020

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