

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-030770

11/04/2024

HONORABLE SCOTT MINDER

CLERK OF THE COURT
M. R. Diaz
Deputy

MARICOPA COUNTY REPUBLICAN
COMMITTEE, et al.

DENNIS I WILENCHIK

v.

MARICOPA COUNTY ARIZONA, et al.

JOSEPH EUGENE LA RUE
THOMAS PURCELL LIDDY
TYLER Q SWENSEN
JUDGE MINDER

ORDER DECLINING SPECIAL ACTION JURISDICTION

On October 29, 2024, Plaintiffs filed this special action and asked this Court to enjoin Defendants' use of any voting system that does not comply with certain password protections. Alternatively, the Plaintiffs seek an order for the production or inspection of election-related logs, tapes, and reports. Plaintiffs also seek a declaratory judgment that the Defendants have not followed Arizona law regarding the security of the voting system. Defendants disagree with the accusations and have filed a declaration regarding their compliance with Arizona law and asked the Court to decline special action jurisdiction.

On November 1, the Court convened the parties for a short discussion regarding procedures and asked the parties to submit briefs on whether this Court should accept special action jurisdiction over the matter. The Court has reviewed the October 29 *Verified Complaint for Special Action*, the October 29 *Application for Order to Show Cause*, the November 4, 2024 *Motion to Decline Special Action Jurisdiction*, and the November 4, 2024 *Brief Re: Special Action Jurisdiction* along with all related exhibits. Both parties indicated in communications with the

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Court's staff that no oral argument was necessary and that the issue regarding special action jurisdiction could be decided on the basis of the filings.

The Court now declines jurisdiction over this special action.

Factual Summary

Plaintiffs brought this special action over their concerns about password-related security for the Defendants' voting system. Plaintiffs claim that passwords related the voting system employed by Defendants may not comply with Arizona's 2023 Election Procedure Manual.

Plaintiffs expressed security concerns to Defendants in a series of letters, phrased as a "pre-suit litigation demand," beginning on September 19, 2024—forty days prior to the lawsuit and almost seven weeks before Election Day. Defendants' September 26 response prompted another letter from Plaintiffs two days later, which provided additional details mimicking those contained in the verified complaint and set a deadline of October 2 for a substantive response to avoid litigation. Defendants responded at length on October 3, 2024—twenty-six days prior to the filing of this special action—disagreeing vehemently about the passwords. *See* Complaint, Exs. 3-8. According to the briefing, however, Plaintiffs made similar claims as far back as 2021.

The verified complaint was filed on the afternoon of October 29, one week before Election Day and weeks after early voting began.

Legal Principles and Analysis

"A petition for special action seeks extraordinary relief, and the acceptance of jurisdiction rests within the discretion of the court." *Bishop v. Horne*, 2011 WL 846436 at *2 (Ct. App., March 10, 2011) (memorandum decision) (citing *Pompa v. Super. Ct.*, 187 Ariz. 531, 533 (Ct. App. 1997)). "[W]hen a special action is initiated by complaint in superior court the judge must first exercise his discretion and decide whether to consider the case on its merits." *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92 (Ct. App. 1979)(affirming superior court's dismissal of special action). That "acceptance of jurisdiction of a special action is *highly* discretionary with the court to which the application is made." Ariz. R. P. Spec. Act. 3, State Bar Committee note (emphasis added). And the plaintiff "must always carry the burden of persuasion as to discretionary factors." *Id.*

Plaintiff's Request for Injunctive Relief

The Court's exercise of special action jurisdiction related to Plaintiffs' request to enjoin the use of the current voting system would be inappropriate based on the timing of the

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complaint. “Challenges concerning alleged procedural violations of the election process must be brought prior to the actual election.” *Sherman v. City of Tempe*, 202 Ariz. 339, 342 (2002); *c.f. Purcell v. Gonzales*, 549 U.S. 1, 4-5 (2006) (courts typically avoid requiring procedural changes immediately before an election). Our Supreme Court recently affirmed a denial of an election-procedure-related injunction request because the request was impracticable once early voting began. *See Fontes v. Lewis*, No. CV-24-0251 at 3-4 (Ariz. Oct. 24, 2024) (decision order) available at https://www.azcourts.gov/Portals/201/2024_10_25_05308539-0-0000-DecisionOrder.PDF.

Accepting jurisdiction for a special action seeking an injunction related to the voting systems would disregard this well-reasoned, decades-old principle. Election Day may be November 5, 2024, but the election commenced weeks ago with ballots mailed, returned, and tabulated already using the system challenged here. Indeed, according to Defendants, the County has tabulated roughly 895,000 ballots as of Saturday, November 2, 2024, including in-person and mail-in votes. Mot. to Decline Jurisdiction, Ex. A at ¶ 9. Although Plaintiffs filed before Election Day, the complaint must also be filed with enough time to permit due consideration and, if necessary, to implement changes. The present timeline permits neither. *See id.* at ¶¶ 18-20.

For similar reasons, Plaintiffs’ request for an injunction is also likely barred by the doctrine of laches, which prevents claims which are unreasonably delayed. *See Harris v. Purcell*, 193 Ariz. 409 (1988) (holding that claims challenging ballot proposition were barred by laches where the plaintiff’s delay in bringing the action was not justified and prejudiced proponents of the ballot proposition and those who signed petitions). To decide if the request should be precluded, the Court considers the justification for any delay, including advanced knowledge of the basis for the challenge. *Id.* at 412. The Court also must assess whether the delay caused actual prejudice. *Id.*

Here, Plaintiffs made the same assertions underlying the complaint in a September 19, 2024 letter to Defendants. Compl., Ex. 3. And Plaintiffs may have expressed similar concerns as early as 2021. *See* Mot. to Decline Jurisdiction at 3. Defendants disputed the allegations on September 26, 2024 and again on October 3, 2024. Yet the request for injunctive relief was filed on October 29, 2024—one week prior to Election Day, 18 days after in-person early voting began, and four days after tabulation of early ballots commenced using the same system challenged here. *Id.* at Ex. A, ¶¶ 7-9.

Giving Plaintiffs all benefit of any doubt, the twenty-six-day delay between October 3 and October 29 is likely unreasonable under the circumstances. Plaintiffs had reviewed their materials and prepared their arguments in advance of their letters. They could have filed this special action weeks, if not months or years, ago. Waiting until October 29 effectively eliminated the possibility of entertaining the injunctive relief requested. Plaintiffs are sophisticated and well-aware of the election procedures, deadlines, and timelines. In these circumstances, the delay is likely both

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substantial and unjustified; Plaintiffs have presented no bases for waiting weeks, months, or years to file the special action complaint.

Actual prejudice would likely occur should the Court entertain the request for an injunction. The Court cannot envision election officials implementing any changes—warranted or otherwise—without significantly delaying vote tabulation and reporting. At worst, that delay in reporting election results could be extraordinary. Mot. to Decline Jurisdiction, Ex. A at ¶¶ 18-20. Plaintiff argues against any actual prejudice because the Defendants were aware of their concerns before the complaint was filed. But that has no bearing on the actual impact of a last-minute injunction.

Plaintiffs claim that Defendants own alleged failures should excuse any delay. According to Plaintiffs, Defendants have known about the assertions for years and failed to confirm compliance with Arizona law before the election began. But the record provided by Plaintiffs shows that Defendants did, in fact, respond to and deny the allegations before the special action was filed. Compl. at Exs. 4 (Letter asserts that Plaintiffs allegations “reveal a substantial misunderstanding [about] the County’s actual practices and procedures), 6 (“[T]he allegations in the Letter are false . . . Maricopa County has **not** violated Arizona election law. . . . The County only uses County-generated passwords to conduct elections.”) (emphasis in original), and 8 (“You ask that the County comply with Arizona law in the upcoming election. It will[.]”). Under these circumstances, the Court sees no reason to attribute the delay in bringing the lawsuit to Defendants’ actions.

Plaintiff’s Request for Documents

The Court also declines jurisdiction over Plaintiff’s alternative request for the release of various documents related to the voting process and results because that request exceeds the scope of the Court’s special action jurisdiction. Ariz. R. P. Spec. Act. 3 delineates the “only questions” that may be raised in a special action:

- (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
- (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
- (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

Only sections (a) and (b) could relate here. The committee notes to Rule 3 detail that special actions under (a) are “restricted to the present right to the performance of the duty which is demanded[.]” Likewise, special actions under (b) are meant “to control acts beyond the jurisdiction of another body.” Ariz. R. P. Spec. Act. 3, committee note.

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Plaintiffs' alternative request for relief here does not demand performance of a legal obligation, nor does it prohibit performance by Defendants; it seeks documents to test Plaintiffs' claims. Those requests do not fall within the scope of Rule 3 and the relief sought is inappropriate for a special action.

This is consistent with the general concept that, for special actions, "[j]urisdiction is generally accepted only when justice cannot be obtained through other means." *Bishop*, 2011 WL 846436 at *2 (affirming dismissal of special action when the document retention claims could be litigated in a separate action). Here, Plaintiffs' demand for various documents could be addressed through a public records request under Ariz. Rev. Stat. § 39-121 *et seq.* The public records statutes permit a special action to appeal the denial of a proper request, but the Court is unaware of any request already made or denied. Because Plaintiffs may have an alternate means to retrieve the documents they seek, the Court declines jurisdiction as to the request for election-related documents.

Plaintiff's Request for Declaratory Judgment

The Court, in its discretion, also declines special action jurisdiction over Plaintiff's request for declaratory judgment. *See* Compl., Count III, at ¶ 85 ("the Court should issue an Order declaring that it is a violation of the laws of this State"). Defendants did not address the declaratory judgment portion of the Complaint in their *Motion to Decline Jurisdiction*, but this Court declines jurisdiction for largely the same reason as the document request: the declaratory judgment request neither prohibits nor demands performance and, therefore, falls outside the scope of Ariz. R. P. Spec. Act. 3. Likewise, Plaintiff may still, under Arizona's Rules of Civil Procedure, elect to seek declaratory judgment in a separate complaint.

Good cause shown, and in the Court's discretion,

IT IS ORDERED declining jurisdiction over this special action.