IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ (New York), et al., Plaintiffs	*	
v.	*	**Case No. 07-CV-0943 LEK/DRH**
STATE OF NEW YORK, et al., Defendants	*	

MEMORANDUM OF LAW IN SUPPORT OF THE STATE OF RHODE ISLANDS' MOTION TO DISMISS THE PLAINTIFFS' COMPLAINT

INTRODUCTION

This Memorandum of Law supports the Motion to Dismiss filed by Defendants, the State of Rhode Island and A. Ralph Mollis, Rhode Island Secretary of State ("Rhode Island Defendants"), by and through counsel, the Department of the Attorney General for the State of Rhode Island. The Rhode Island Defendants hereby move this Honorable Court to dismiss the Plaintiffs' Amended Complaint on the following grounds:

(1) pursuant to the Federal Rule of Civil Procedure ("Fed. R. Civ. P.") Rule 12(b)(2), this Court does not have personal jurisdiction over the Rhode Island Defendants;

(2) pursuant to Fed. R. Civ. P. Rule 12(b)(3), this Court is improper venue as to the Rhode Island Defendants;

(3) pursuant to Fed. R. Civ. P. Rule 12(b)(5), the Plaintiffs have failed to make proper service of process on the Rhode Island Defendants;

(4) pursuant to Fed. R. Civ. P. Rule 12(B)(6), Plaintiffs have failed to state a claim upon which relief may be granted; and

(5) pursuant to the Eleventh Amendment, the State of Rhode Island is immune from suit.

PLAINTIFFS' AMENDED VERIFIED COMPLAINT

The Pro Se Plaintiffs in this civil action, Robert L. Schulz, et al., file this Amended Verified Complaint ("Amd. Ver. Cpt.") alleging three causes of action against the fifty States of these United States, including the Rhode Island Defendants. Fairly read and liberally construed, the allegations against each of the defendant states, including the Rhode Island Defendants, concern the Plaintiffs' objection to the defendant states' use of certain voting machines in elections held in each of the defendant states, including Rhode Island.

Plaintiffs request that this Court permanently enjoin the defendants from conducting elections:

(1) which are not "open, verifiable, transparent, machine-free, computer-free," ("Amd. Ver. Cpt." at ¶ 268(a));

(2) which do "not rely exclusively on paper ballots, hand marked and hand-counted," ("Amd. Ver. Cpt." 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." ("Amd. Ver. Cpt." at ¶ 268(c)).

ARGUMENT

A. Plaintiffs Lack Personal Jurisdiction To Bring This Civil Action Against The Rhode Island Defendants.

By invoking this Court's jurisdiction, Plaintiffs 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' Verified Amended Complaint fails to establish personal 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 demonstrate that this Federal Court has jurisdiction over the Rhode Island Defendants under New York's long arm statute, N.Y. C.P.L.R. § 302(a). Respectfully, Rhode Island is a sovereign state of these United States and the Secretary of State of Rhode Island, in his official capacity, is, de jure, the State of Rhode Island.[1] In addition, the Rhode Island Defendants do not transact business or contract anywhere to supply

[1] As the Supreme Court has reasoned, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." Will v. Michigan, 491 U.S. 58, 71 (1989) (citing Brandon v. Holt, 469 U.S. 464, 471 (1985)). "As such it is no different from a suit against the state itself." Id. (citing Kentucky v. Graham, 473 U.S. 159, 165-166 (1985) and Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 n. 55 (1978)).

goods or services in New York. Moreover, the Rhode Island Defendants do not own, use or possess any real property in New York.

(2.) Plaintiffs' Verified Amended Complaint fails to establish personal jurisdiction under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Due Process clause of the U.S. Constitution's 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). Accordingly, "[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 Rhode Island Defendants do not reside in New York. Moreover, none of the allegations contained in the Verified Amended Complaint relate to the Rhode Island Defendants performing any action in New York. The Rhode Island 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 Rhode Island Defendants. Accordingly, the Plaintiffs' Verified Amended Complaint against the Rhode Island Defendants must be dismissed.

B. This Court Is Not The Proper Venue To Bring This Civil Action Against The Rhode Island Defendants.

Respectfully, the U.S. District Court for the Northern District of New York is no the proper venue for this civil 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 Rhode Island Defendants, no part of the underlying events took place in New York, and no part of any Rhode

Island property subject to the action is situated in New York. See Gulf Ins.Co., 417 F.3d at 357 ("[D]istrict 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 Plaintiffs' Ver. Amd. Cpt. at ¶160), can "be found" in New York, New York is not the proper venue for the Rhode Island 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 Rhode Island Defendants reside in Rhode Island, and because the alleged events giving rise to the Plaintiffs' claim against the Rhode Island Defendants allegedly occurred, or will allegedly occur in Rhode Island, to the extent that venue is proper in any Federal Court for adjudicating Plaintiffs' claims against the Rhode Island Defendants, it must be the United States District Court for the District of Rhode Island.[2] Accordingly, pursuant to 28 U.S.C. §1391(b), Plaintiffs claim against the Rhode Island Defendants cannot be brought in this Court. Therefore, this Court should grant the Rhode Island Defendants' Motion to Dismiss.

C. Plaintiffs Failed To Effect Proper Service of Process.

Plaintiffs' "service of process" did not comply with Fed. R. Civ. P. Rule 4. The undersigned represents that the Amended Verified Complaint was hand-delivered to the

[2] 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).

Department of the Attorney General and to the Secretary of State of Rhode Island. This is not lawful and proper service under Rule 4. Therefore, Plaintiffs' Amended verified Complaint in this civil action should be dismissed.

D. The Secretary Of State Of Rhode Island Has No Statutory Authority To Control The Type Of Voting Machines Used In Rhode Island.

Plaintiffs request injunctive relief against the Rhode Island Secretary of State. See Plt. Amd. Cpt. at ¶¶ 268 (a), (b), and (c). Respectfully, this request is misplaced.

Under the General Laws of Rhode Island, the Secretary of State of Rhode Island does not have any statutory authority to select or otherwise approve what type of voting machines the municipalities in Rhode Island use in counting and/or processing votes for local, State or Federal elections. In 1996, the General Assembly of Rhode Island enacted the following legislation:

> WHEREAS, mechanical lever voting machines have been in use in the state of Rhode Island for more than fifty (50) years; and WHEREAS voting machine technology has now advanced to the point where votes can be cast and reliably recorded an optical scan precinct count voting systems; and WHEREAS, optical scan precinct count voting systems are now in use in various states and have resulted in returning accurate and reliable voting results within a shorter period of time than is possible through the use of mechanical lever machines; and WHEREAS, the general assembly finds that it is in the public interest to convert from mechanical lever voting machines to an optical scan precinct count voting system; THEREFORE, the general assembly determines that an optical scan precinct count voting system as described in § 17-19-3 shall be employed in elections held in the State of Rhode Island beginning in 1997.
>
> R.I. Gen. Laws § 17-19-2.1

See also the entirety of Chapter 19 of Title 17 of the General Laws of Rhode Island.

Because the Secretary of State of Rhode Island does not have statutory authority to select or otherwise approve voting machines in Rhode Island, Plaintiffs have incorrectly and improperly 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."). Therefore, this Court should dismiss, Plaintiffs' Amended Complaint against the Secretary of State of Rhode Island.[3]

E. Defendant State of Rhode Island 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 Rhode Island as a Defendant. Because the State of Rhode Island is immune from suit under the Eleventh Amendment, the claims against the State of Rhode Island should be dismissed.

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

CONCLUSION

For the reasons set forth herein, and incorporating by reference the arguments set forth in the dispositive memoranda filed by certain brother and sister states named as defendants in this civil action, the Defendants, State of Rhode Island and the Rhode Island Secretary of State, respectfully request that the instant Motion to Dismiss be granted; that this civil action be denied and dismissed, with prejudice; that a Final Judgment be entered in this civil action; and such other and further relief as the interests of justice may require.

Respectfully submitted,

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I hereby certify that I have filed the within Memorandum via the ECF filing system and caused a copy to be sent on this 13th day of December, 2007 to:

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