UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 07-CV-943
	)	
STATE OF NEW YORK, et al.	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BY THE VIRGINIA DEFENDANTS

State of Virginia, Jean Cunningham, Harold Pyon and Nancy Rodrigues, State Board of Elections, (hereinafter "Virginia Defendants"), by counsel, submit this Memorandum in Support of their Motion to Dismiss.

The nature of his action is difficult to discern. Construing the complaint liberally, plaintiffs are attempting to state a claim for violation of protected rights. Assuming this to be the case, the Virginia defendants move to dismiss the complaint under Fed. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(3) and 12(b)(6).

The Virginia Defendants point this Court to the fairly recent case of *Bell Atlantic Corp. v. Twombly* 127 S.Ct. 1955, 1964-1965 (2007), wherein the United States Supreme Court made 12(b)(6) motions more "user friendly" for defendants. Specifically, the Court rejected the old standard (that essentially allowed a Motion to Dismiss to be granted only when it appeared certain that the plaintiff could not prove any set of facts in support of his claim entitling him to relief) in favor of a "plausibility" standard. Plaintiff is required

to provide more than labels and conclusions, and formulaic recitation of elements of a cause of action will not do. *Id*. A plaintiff now must present sufficient facts to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true. A constitutional tort is not described by plaintiffs' bald allegations.

The burden is on plaintiff, as the party asserting jurisdiction, to prove that federal jurisdiction is proper. A Motion to Dismiss tests the sufficiency of the complaint. Legal conclusions couched as factual allegations need not be taken as true. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Neither must the Court accept as true allegations that are merely conclusory, unwarranted deductions of fact or unreasonable inferences. The presence of a few conclusory legal terms does not insulate a complaint from dismissal where the facts alleged cannot support the claim. Dismissal is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense.

Plaintiffs herein failed to state a claim entitling them to relief. Nowhere in his complaint do plaintiffs inform this Court how the Virginia defendants' alleged acts, if they occur at all, are a violation of their constitutional rights. Plaintiffs believe the Virginia defendants demonstrate a particular bias when it comes to their case. Beyond conclusory statements, nothing is said about how the Virginia defendants' conduct violates plaintiffs' constitutional rights. Plaintiffs fail to allege facts necessary to support their federal claims. The Virginia defendants also enjoy sovereign immunity. This Court does not have personal jurisdiction over the Virginia defendants. Moreover, this Court does not have subject matter jurisdiction because plaintiffs lack standing. In addition, venue against the Virginia defendants is improper in this Court.

THE FEDERAL COURT IS PRECLUDED FROM HEARING THIS CASE UNDER THE ELEVENTH AMENDMENT

Plaintiffs' complaint is barred by the Eleventh Amendment, which prohibits suits in federal court against states and state agencies. The judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent. *Ex Parte New York*, 256 U.S. 490, 497 (1921) (citations omitted); *Seminole Tribe v. Florida*, 517 U.S. 44, 54-58 (1996). Only a person can be held liable for depriving another of rights. A state is not a person. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Moreover, the Supreme Court recognized that sovereign immunity applies not only to states but also state agencies and instrumentalities. See, e.g., *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997); *Florida Dep't. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982). Neither State Board of Elections, a state agency, or State of Virginia is a person. *Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Will* at 70. To the extent suit is against State Board of Elections or State of Virginia, this Court is without subject matter jurisdiction over such an action.

State Board of Elections is an arm of the State of Virginia and, like the state, is shielded from this action by immunity because it is subject to control of the State of Virginia, is involved with statewide concerns and is entitled to protection under the Eleventh Amendment. Moreover, all salaries and expenses of State Board of Elections are audited and paid out of the state treasury. State of Virginia and State Board of Elections did not waive immunity from the claims herein. To the extent plaintiffs here sue State Board of Elections, their suit seeks damages that would be paid from the state treasury. Accordingly, this Court is without jurisdiction to hear any complaint against State of Virginia or State Board of Elections.

JEAN CUNNINGHAM, HAROLD PYON AND NANCY RODRIGUES HAVE NO INDIVIDUAL LIABILITY

Jean Cunningham, Harold Pyon and Nancy Rodrigues, as individuals, have no power to comply with the injunctive relief sought by plaintiffs and are immune from liability. Plaintiffs can point to no analogous case.

PLAINTIFFS LACK STANDING

Plaintiffs must present an actual controversy to which they suffer from actual or threatened injury resulting from the Virginia defendants. See *Hein v. Freedom From Religion Found. Inc.*, 551 U.S. _____ (2007). The alleged injury must be actual or imminent, not conjectural. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It must be distinct and palpable, as opposed to a generalized grievance shared by a large class of citizens. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). No plaintiffs herein allege facts that could allow them to have standing to sue the Virginia defendants.

THIS COURT LACKS PERSONAL JURISDICTION OVER THE VIRGINIA DEFENDANTS

Due process prevents personal jurisdiction over non-resident defendants unless there are minimum contacts between defendant and the forum. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). Plaintiffs allege no conduct by the Virginia defendants in New York that even arguably could confer personal jurisdiction under New York's long-arm statute.

VENUE IN THIS COURT IS IMPROPER AGAINST THE VIRGINIA DEFENDANTS

The Northern District of New York is an improper venue for plaintiffs' claims against the Virginia defendants, none of whom reside in the Northern District of New York. To subject the Virginia defendants to this Court's venue would be inconvenient and unfair. No acts allegedly giving rise to a cause of action herein against the Virginia defendants are to occur in this district; as a consequence, venue is improper under 28 U.S.C. Section 1391(b).

PLAINTIFFS DID NOT ADEQUATELY ALLEGE A CLAIM

Plaintiffs' mere allegations standing alone are insufficient to state a claim as a matter of law. There is nothing in the amended complaint which adequately explains the nature of plaintiffs' constitutional claims. Plaintiffs' conclusory allegations with no supporting factual averments are legally insufficient. Plaintiffs must specifically present facts but fail in that their complaint is bereft of a detailed account.

CONCLUSION

WHEREFORE, the Virginia Defendants request that this Court grant their Motion to Dismiss the amended complaint with prejudice and grant other relief deemed appropriate.

STATE OF VIRGINIA, JEAN CUNNINGHAM, HAROLD PYON and NANCY RODRIGUES, STATE BOARD OF ELECTIONS

By: _____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, and I hereby certify that I mailed the document by U.S. mail to the following non-filing user:

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