

**In The United States District Court
For The Northern District Of New York**

Robert L. Schulz, et al.,

Plaintiffs,

vs.

Case No. 07-cv-0943

State of New York, et al.,

Judge

Defendants.

**Defendants State of Ohio And
Secretary of State Jennifer Brunner's Motion To Dismiss**

Now comes Defendants the State of Ohio and Secretary of State Jennifer Brunner and, pursuant to Fed. R. Civ. P. 12(b)(1), (2), and (6), ask this Court for an order dismissing this case.

A memorandum in support is attached.

Respectfully submitted,

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Memorandum In Support

I. Introduction

The pro se plaintiffs in this case are 150 different individuals, located in 501 different states, who claim that the United States Constitution and their voter registration cards give them a right to cast a paper ballot that is hand counted. These Plaintiffs have sued 50 states and their respective Secretaries of State in this Court. This Court lacks personal jurisdiction over the State of Ohio and Secretary of State Jennifer Brunner. It also lacks subject matter jurisdiction over the Plaintiffs' breach of contract claim. The State of Ohio is not a proper defendant. Finally, the Plaintiff has failed to state a claim for which relief can be granted. Therefore, this Court should issue an order dismissing the State of Ohio and Secretary of State Jennifer Brunner.

II. Law and Argument

A. This Court Lacks Personal Jurisdiction Over The State of Ohio And Secretary of State Jennifer Brunner.

The Second Circuit has recognized that in order for a court to exercise personal jurisdiction over a defendant, that defendant must have ““certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007) quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In determining whether a court has jurisdiction, the court must evaluate the quality and nature of the defendants’ contacts under a totality of circumstances test. *Id. citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). The central question in such a test is whether the defendant has ““purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.”” *Id. quoting Hanson v. Denclka*, 357 U.S. 235, 253 (1958). This minimum contacts test is the first prong of personal jurisdiction in a federal question case.

The Plaintiffs have failed to allege any facts which show that either Jennifer Brunner or the State of Ohio had any contact, much less, that they purposefully availed themselves the privilege of conducting activities within the State of New York. There are simply no factual allegations whatsoever that either the State of Ohio or Jennifer Brunner had any contact with New York. As a result, this deficiency is enough for the Court to dismiss these defendants due to a lack of personal jurisdiction.

In addition to showing that the Fourteenth Amendment minimum contacts are sufficient to confer personal jurisdiction, Plaintiffs must also show that the State's long arm statute confers jurisdiction over the out-of-state defendants. In a federal question case, the federal court must apply the forum state's personal jurisdiction rules if the federal statute does not provide for national service of process. *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997). New York's long arm statute allows a court to exercise personal jurisdiction over a defendant who either personally or through an agent:

1. Transactions any business within the state or contracts anywhere to supply goods or services in the state;
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). Nowhere in the complaint do the Plaintiffs allege that either the State of Ohio or Secretary of State Brunner transacted any business in the State of New York, committed a tortious act inside New York, committed a tortious act outside of New York that caused injury to persons inside the State of New York, or owns or uses real property situated within the State of New York. Since the Plaintiffs have failed to allege that either the State of Ohio or Secretary of State Brunner meet the terms of the New York long arm statute, this Court should dismiss this case for lack of personal jurisdiction over these defendants.

B. This Court Lacks Jurisdiction To Hear The Plaintiffs' Claims Against The State of Ohio

To the extent that this Court believes it has personal jurisdiction over the State of Ohio, the Eleventh Amendment deprives this Court of jurisdiction to hear any of the Plaintiffs claims brought against the State. *See, e.g., Spector v. Bd. of Trustees of Community-Technical Colleges*, 463 F. Supp.2d 234, 249 (D. Conn. 2006) *citing Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *see also CSX Transp., Inc. v. N.Y. State Office of Real Prop. Servs.*, 306 F.3d 87, 94-95 (2d Cir. 2002); *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594-95 (2d Cir. 1990). Furthermore, the State of Ohio has not consented to be sued in federal court. *Johns v. Supreme Court of Ohio*, 753 F.2d 524, 527 (6th Cir. 1985). Since the Eleventh Amendment deprives this Court of jurisdiction over the claims brought against the State of Ohio, it should dismiss the State as a defendant.

In addition, the State of Ohio is not a person for purposes of § 1983 litigation. *See, e.g., Foster v. Walsh*, 864 F.2d 416, 418-19 (6th Cir. 1988). Since the State is not a person for purposes of § 1983 litigation, the claims against the State should be dismissed.

C. The Plaintiffs Have Failed To State Any Claim Against Secretary of State Jennifer Brunner.

To the extent that this Court believes it has personal jurisdiction over Ohio Secretary of State Jennifer Brunner, the Plaintiffs have failed to state a claim as a matter of law. The Plaintiffs have attempted to bring three different claims against Secretary of State Brunner under 42 U.S.C. § 1983: (1) failure to count ballots in public view violates their constitutional rights; (2) using computerized voting machines constitutes a breach of contract; and (3) the constitution forbids the use of machines to count votes.

42 U.S.C. § 1983 is not an independent source of rights. Rather, it merely provides a mechanism to protect federally granted constitutional or statutory rights. *See, e.g., Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 225 (2d Cir. 2004). Therefore, a plaintiff must show that a person, acting under color of state law, violated his or her federal constitutional or statutory rights. *Id. citing* 42 U.S.C. § 1983. Since none of the Plaintiffs' claims are that Secretary of State Brunner deprived them of their federal statutory or constitutional rights, they must be dismissed.

1. The Plaintiffs breach of contract claim is not cognizable under 42 U.S.C. § 1983.

The Plaintiffs have failed to allege a breach of contract claim under 42 U.S.C. § 1983. As an initial matter, they have simply failed to plead the existence of any contract because filling out a voter registration form does not amount to entering into a contract with the State of Ohio. Under Ohio law, in order for there to be a contract, there must be an offer, acceptance,

contractual capacity, consideration, a manifestation of mutual assent, and legality of object and of consideration. *Lake Land Employment Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 246, 2004-Ohio-786, ¶ 14 (2004) citing *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16 (2002).

Filling out a voter registration form does not amount to entering into a contract with the Secretary of State. She did not provide any legal offer. She did not provide or receive any consideration. This theory would be similar to finding that the Ohio Bureau of Motor Vehicles enters into a contractual relationship with every person who obtains a drivers license. Surely, this Court would not find that a person injured through the negligence of a licensed driver could sue the State on a breach of contract theory because that driver contracted with the State of Ohio to use reasonable care and to follow all traffic laws. Yet, that is the basis for the Plaintiffs' breach of contract claim.

Even if this Court were to find a contract existed between the Secretary of State and the Plaintiffs in this case,¹ there would be no basis for a § 1983 lawsuit. Courts have consistently held that “[a]n individual breach of contract ... does not reach constitutional dimensions and create a cause of action based on the contract clause.” *TM Park Avenue Associates v. Pataki*, 214 F.3d 344, 348 (2d Cir. 2000) citing *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 311-12 (8th Cir. 1978); *E & E Hauling v. Forest Preserve Dist. of Du Page County, Ill.*, 613 F.2d 675, 678 (7th Cir. 1980). Thus, the mere refusal by the State to perform a contract does not create a constitutional claim. *Id.* As a result, the Plaintiffs cannot succeed on their breach of contract claim and it must be dismissed.

¹ Only James Condit, Jr. is a resident of the State of Ohio and eligible to vote in its elections. There is simply no allegation that the residents of the other states have tried to register to vote in the State of Ohio.

2. The Plaintiffs Have Failed To State A § 1983 Claim For The Manner In Which The State of Ohio Counts Ballots.

Plaintiffs' first and third causes of action revolve around the idea that the United States Constitution mandates that paper ballots be used in elections and that those ballots must be counted in public. Since the constitution does not dictate such a result, this Court should dismiss both of those claims.

In *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003), the Ninth Circuit was faced with a claim that electronic voting machines without a paper trail violated the constitution. The court began its analysis by recognizing that the right to vote is fundamental. *Id.* at 1105 *citing Yick Wo. v. Hopkins*, 118 U.S. 356, 370 (1886). Despite this, states are entitled to broad leeway in enacting reasonable, nondiscriminatory legislation to ensure that elections are carried out in a fair and orderly manner. *Id. citing Storer v. Brown*, 415 U.S. 724, 730 (1974). Therefore, when examining a constitutional challenge to any state election law, the court must weigh the character and magnitude of the asserted injury against the precise interests put forth by the State in justifying the burden while taking into account the extent to which those interests make it necessary to burden the plaintiff's rights. *Id.* at 1106 *citing Burdick v. Takushi*, 504 U.S. 428, 434 (1992). As a result, the Ninth Circuit determined that "the use of touchscreen voting systems is not subject to strict scrutiny simply because this particular balloting system may make the possibility of some kinds of fraud more difficult to detect." *Id.*

The *Weber* court went on to recognize touchscreen voting systems do not severely restrict the right to vote and that every type of voting system presents problems. As a result, "it is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems. So long as their choice is reasonable and neutral, it is free from judicial second-

guessing.” *Id.* at 1106. As a result, the Plaintiffs have failed to state a claim under their first and third causes of action and those claims must be dismissed.

III. Conclusion

For the foregoing reasons, this Court should dismiss the Plaintiffs’ complaint.

Respectfully submitted,

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Certificate of Service

This is to certify that I have filed the above Notice of Motion with the clerk of courts through ECF and that ECF will send a notice of electronic filing to counsel for the other named defendants. I further certify that a copy of the foregoing document was served upon the following by mailing a true and correct copy to the following non-ECF participant who has been designated by the Court as the “Lead Plaintiff Representative”:

Robert L. Schulz
2458 Ridge Road
Queensbury, N.Y. 12804

THIS 14th day of December, 2007.

/s Richard N. Coglianes