

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ, et al.,

Plaintiffs,

vs.

Case No. 1:07-CV-0943

STATE OF NEW YORK, et al.,

Defendants.

**WEST VIRGINIA DEFENDANTS'
MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO DISMISS**

I. INTRODUCTION

The West Virginia Defendants have moved the Court to dismiss the Plaintiffs' Complaint for the following reasons:

1. That this Court lacks personal jurisdiction over the West Virginia Defendants pursuant to Federal Rule of Civil Procedure 12(b)(2), and accordingly the Court should dismiss this action as to the West Virginia Defendants.

2. This Court is not the proper venue within which to bring an action against the West Virginia Defendants, and accordingly this action should be dismissed against the West Virginia Defendants pursuant to Federal Rule of Civil Procedure 12(b)(3).

3. The West Virginia Defendants are further immune from suit pursuant to the Eleventh Amendment to the United States Constitution.

4. The West Virginia Defendants are not "persons" as described in 42 U.S.C. § 1983 and the Plaintiffs' claims against the West Virginia Defendants under this section must be dismissed.

II. ARGUMENT

1. The Plaintiffs have failed to establish that this Court has personal jurisdiction over the West Virginia Defendants.

To establish jurisdiction in the instant case, one must look to the long-arm statute of the applicable state and the Due Process clause of the Fourteenth Amendment. The New York long-arm statute (N.Y.C.L.P.R. 301, McKinney 2007) has been interpreted to include the power to exercise personal jurisdiction over a non-domiciliary defendant based upon the traditional notion of the defendant's presence within the state. *Twine v. Levy*, 746 F Supp 1202, 1204 (ED NY 1990). In addition, a non-domiciliary may be served outside New York if it engages in a continuous and systematic course of doing business in New York. *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F 2d 55, 58 (CA 2, 1985). New York courts have considered factors such as the existence of a New York office, the solicitation of business in New York, the presence of bank accounts or property in New York, and the presence of employees in the state.

In none of these considerations are the West Virginia Defendants present in the state of New York - they were not domiciled in New York, and they were not in New York when served with process. The West Virginia Defendants do not do any business in New York and own no property in New York. They have no office in New York, solicit no business in New York, have no employees in New York, and maintain no sufficient minimal contacts with New York to confer jurisdiction upon the New York courts.

2. The West Virginia Defendants are immune from suit under the Eleventh Amendment .

The Eleventh Amendment to the United States constitution generally bars claims against the states and their agencies. The State of West Virginia is immune from suit and the claims against the State of West Virginia should be dismissed.

Insofar as the plaintiffs' claims are directed at Betty Ireland, West Virginia Secretary of State and chief election official, the Supreme Court has ruled that the *Ex Parte Young* doctrine no longer is an automatic waiver of the Eleventh Amendment bar. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 117 S Ct 2028 (1997) The rule of the *Coeur d'Alene* decision is that a case-by-case analysis and balancing is required.

In the instant case, the plaintiffs have sued Betty Ireland, the West Virginia Secretary of State, individually and in her capacity as Secretary of State. As to her official capacity, the Plaintiffs' claims are barred by the Eleventh Amendment. Insofar as the claim against her, individually, do not fall within the parameters of the *Ex Parte Young* exception. First, there exists an available state forum for those who are unhappy with procedures to be employed in West Virginia for the 2008 primary and general elections. Additionally, while the plaintiffs assert federal constitutional questions, the state courts have the capacity to resolve such questions. As noted by the Court in *Coeur d'Alene* the state courts have the right and duty to interpret the United States Constitution : "Interpretation of federal law is the proprietary concern of state, as well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret and follow the Constitution and all laws enacted pursuant to it, . . ." *Coeur d'Alene*, 521 US at 275.

The State of West Virginia, and its chief election official Betty Ireland, have a compelling and sovereign interest in preserving the sanctity of elections. The sovereign interest is that of the State of West Virginia, not the conduct of a lone state official, and the exercise of jurisdiction by the federal courts would substantially impact the sovereign interest of the State of West Virginia. This Court lacks jurisdiction and should also dismiss Betty Ireland in her official capacity as the Secretary of State and chief election official.

Insofar as the Plaintiffs' claim against Betty Ireland, individually, the Plaintiffs' Amended Complaint asserts no claims that Betty Ireland has taken any action in her individual capacity, nor has the said Betty Ireland taken any individual actions, and the claims against her in her individual capacity should be dismissed.

3. The West Virginia Defendants are not “persons” for the purposes of 42 USC 1983.

The plaintiffs have asserted a claim against all defendants pursuant to 42 USC §1983. The Plaintiffs 1983 claim should be dismissed because the State of West Virginia is not a “person” under § 1983. The statute provides that:

“Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit inequity or other proper proceeding for redress . . . “

The State of West Virginia and its officials acting in their official capacities are not “persons” under § 1983 and this action should be dismissed as to them.

4. Conclusion.

For the reasons set forth herein, the State of West Virginia and Betty Ireland, Secretary of State and chief election official, in both her official and individual capacity, respectfully request that the Court dismiss with prejudice the Plaintiffs’ Amended Complaint against the West Virginia Defendants and grant such other further and general relief as the Court deems appropriate.

West Virginia Defendant

By Counsel

DATED: Charleston, West Virginia
_____ December 17, 2007

By: s/ *Christie S. Utt*

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