Mashpee Wampanoag Tribal Court
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Docket Number: CV-17-004

Carlton Hendricks, Plaintiff(s))
)
v.)
)
Mashpee Wampanoag Tribal)
Election Committee, Defendant(s))

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Defendant Mashpee Wampanoag Tribal Election Committee moves to dismiss the complaint of Plaintiff Carlton Hendricks, a candidate for office, challenging the outcome of the February 12, 2017 election. The court GRANTS the motion.

The Mashpee Wampanoag Tribal Council adopted the Amended and Restated Mashpee Wampanoag Tribe Election Ordinance as Resolution number 2016-ORD-014 on November 21, 2016 (Election Ordinance). Section 9(A) provides that any candidate for office may file an appeal "no later than 5:00 p.m. (ET) the first Wednesday after the election . . . ." The Election Ordinance is silent as to what constitutes a proper filing. However, the Election Ordinance does suggest a time limit on tribal court proceedings: "The Tribal District Court shall make an effort to hear and decide the case within thirty (30) calendar days of receiving the complaint. If needed, the Tribal District Court may extend the thirty (30) calendar day deadline."[1]

Here, Mr. Hendricks initially proceeding pro se filed a complaint with the court on February 15, 2017, which was the first Wednesday after the election.[2] The court issued a summons on February 16, 2017, but Mr. Hendricks, it appears, did not understand he was to file the complaint with the Election Committee and return the summons. Mr. Hendricks filed an amended complaint on March 6, 2017. The amended complaint was served on the Election Committee chair on March 8, 2017. The record reflects that the plaintiff never served the initial complaint on the defendant. Counsel for the defendant confirmed at oral argument that it has never been formally served the initial complaint.[3]

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[1] Section 10 of the Mashpee Wampanoag Tribal Court Kât8ut (Rules) of Civil Procedure Amended 2016 provides for what constitutes a proper filing in cases governed not governed by the Election Ordinance. Section 10(b) states "[i]t is the Plaintiff's responsibility to make sure that the Defendant(s), or a representative of the Defendant-organization, receives a copy of both the Summons and Complaint within sixty (60) days after the Summons is issued." The Civil Procedure Kât8ut also provides that the "rules . . . must be applied to achieve the following purposes: resolving disputes efficiently, revealing the truth, and treating all parties fairly and without prejudice."

[2] The court initially assigned the matter to Judge Madison, but Mr. Hendricks moved to recuse Judge Madison. Judge Madison agreed to the recusal on March 8, 2017. The court then assigned the matter to Judge Fletcher on March 13, 2017.

[3] However, as counsel for Mr. Hendricks pointed out at oral argument, the Election Committee attached the complaint to its motion to dismiss, suggesting the defendant was on notice about the contents of the initial complaint at that time.

The Election Committee offers two main justifications for dismissal. The first is a statutory claim, and must be rejected. The defendant claims that since Section 9(A) of the Election Ordinance requires that an election irregularity appeal be concluded within 30 days, or 60 days if necessary. The court holds that the 30 and 60 day deadlines are not, by their terms, mandatory upon the court. Section 9(A) merely requires the court to "make an effort" to resolve election irregularity appeals within these deadlines. This is far from an obligation, but the court must respect the intent of the Tribal Council. These deadlines instead serve as a guide to the court as to the sense of the Tribal Council how quickly these matters must be resolved.

Normally, the court would resort to the more general Mashpee Wampanoag Tribal Court Kât8ut (Rules) of Civil Procedure Amended 2016 (Civil Procedure Kât8ut) to fill in the gaps in timelines for complex litigation such as this. But that is no help to the parties.[4] Rule 10(b) of the Civil Procedure Kât8ut imposes on plaintiffs the obligation to ensure that defendants or their representatives are served, but also allows plaintiffs 60 days to perfect the filing of the complaint by serving the defendant. Rule 11 further allows plaintiffs to amend their complaint at any time before a defendant's answer. If the court were to follow these rules, no election challenge could be concluded in 60 days, let alone 30. This holding necessitates the striking of the amended complaint, which has additional import later in the court's analysis.

Mr. Hendricks, proceeding pro se, is entitled to some leeway in proceeding. The Election Ordinance does not specifically prescribe how election irregularity appeals are to be perfected procedurally. The Election Board strives mightily, and with good reason, to avoid the application of the Civil Procedure Kât8ut, given that code's lengthier deadlines. Yet it would be a harsh result to dismiss this action because of a pro se plaintiff's reasonable misunderstanding of a code that offers little in the way of detail, especially given the more lengthy time lines mandated by the Civil Procedure Kât8ut.

Because the Election Ordinance alone offers little or no guidance on how much time plaintiffs have to serve their appeals on defendants, the court cannot find a written rule that Mr. Hendricks has violated. There is no statutory legal hook to dismiss Mr. Hendricks' appeal. The court finds that the defendant's statutory defense must fail.

The Election Committee's second main defense is based in equity, akin to laches, and far more compelling.[5] The defendant argues that Mr. Hendricks' negligence in not serving the Election Committee would improperly "allo[w] a litigant to prolong a challenge to an election through amendments to his complaint . . . through serial litigation not founded upon any legally cognizable challenge." Defendant's Motion to Dismiss at 3. At oral argument, counsel further asserted that swift resolution of election appeals is critical to the stability of a functioning tribal government. The court agrees.

In *Tobey v. Election Committee of the Mashpee Wampanoag Tribe*, No. CV-14-011 (Mashpee Wampanoag Supreme Court 2014), the Mashpee Wampanoag Supreme Court stated that the intent of the tribe's election ordinances is "to bring a quick and speeding resolution to any

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[4] The defendant's assertion that specific statutes tend to control over general statutes offers little help. That claim is dependent on the 30 and 60 day deadlines suggested in Section 9(A) are mandatory, which they are not.

[5] The defendant argues that the court's decision in *Tobey v. Election Committee of the Mashpee Wampanoag Tribe*, No. CV-14-011 (Mashpee Wampanoag Supreme Court 2014), compels dismissal. The relevant election ordinance there allowed candidates to file an election irregularity appeal, but by the next day. *Tobey*, at 7. The decision there cannot be binding on this court, but is persuasive authority.

appeal alleging an election irregularity. Id. At 7. There, the court struck an amended complaint that brought new claims to the court's attention after the deadline to complain had run. Id. This court similarly must strike the amended complaint as it was filed after the first Wednesday after the election. See Election Ordinance Section 9(A).

The court draws from the court's reasoning in *Tobey* the equitable doctrine of laches as applied in the context of tribal elections.[6] Cf. *Bibeau v. Wilson*, 2006 WL 6822505, at *2 (Leech Lake Band of Ojibwe Tribal Court, Dec. 12, 2006) (describing the doctrine of laches). Other tribal courts have addressed whether an election dispute must be dismissed due to a plaintiffs' delay. One tribal court held that a ten-week delay in bringing an election challenge was too long, and applied the doctrine of laches to dismiss the complaint. *Napont v. Grand Traverse Band Election Board*, 2007 WL 6551175, at *3 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court, Sept. 5, 2007) (dismissing an election challenge filed 10 weeks after the election board's decision, citing laches). Another tribal court dismissed an election challenge where the plaintiff's delay would impose substantial costs on the tribe. *Sam v. Little River Band of Ottawa Indians Election Board*, 2007 WL 6900801, at *1 (Little River Band of Ottawa Indians Tribal Court, April 17, 2007).

The court holds that a complaint may be dismissed where a statute of limitations is not present, or is ambiguous, where the claim is held up by inexcusable delay or lack of diligence by the plaintiff, and the defendant has suffered substantial injury. Laches as applied in the context of a tribal election challenge is not static and does not involve the drawing of bright lines. In this case, where the plaintiff failed to immediately serve the defendant, it is the defendant and the Tribe itself that suffers the injury for the delay.

In this specific context, the court holds that plaintiffs filing election irregularity appeals under Section 9(A) of the Election Ordinance must formally serve their filed appeals on the relevant defendants within a reasonable time. The deadlines in the Civil Procedure Kât8ut cannot be applicable to election irregularity appeals because the time allowances there undercut the 30 and 60 day soft deadlines in the Election Ordinance, and therefore the purpose of the statute to resolve appeals swiftly.

Here, the court finds that the Election Committee has never been served with Mr. Hendricks' initial complaint filed on February 15. Mr. Hendricks has served an amended complaint on the Election Committee, and that amended complaint includes allegations about the recount that apparently occurred on the day after Mr. Hendricks filed his initial complaint. The amended complaint also reframes three of the four initial allegations, at least partially as a result of new information learned between the filing of the first complaint and the amended complaint. Moreover, the court notes that it is May, two-and-a-half months since the election.

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[6] The court looks to the common law of other Algonkian language speaking tribal communities, such as the Anishinaabe Indian nations of the western Great Lakes, as persuasive intertribal common law. The precedents of the Mashpee Wampanoag judiciary are limited and do not provide the court a complete answer on this question. The Great Lakes Anishinaabe nations share some of the same traditions of the Mashpee Wampanoag Tribe, but that history is not what makes their legal authority relevant. The common law of the tribes cited in this opinion arises from similarly situated tribes to the Mashpee Wampanoag Tribe. They are relatively small tribal governments, with relatively small land bases surrounded by non-Indian communities, and for the most part have only recently established governments under the Indian Reorganization Act.

The plaintiff's failure to serve the defendant with the complaint can perhaps be excused for a limited time, given that the Election Ordinance is new and ambiguous as to how an election irregularity appeal filing is perfected. The court holds that Mr. Hendricks' error in not serving the Election Committee (which continues to this day) cannot be excused in light of the Tribe's interest in concluding elections and their appeals swiftly.

Were we to proceed with this action, the parties would enter into the realm of complex litigation. In a week, the parties are scheduled to provide pre-trial notices to each other on witnesses. A week later, the court is scheduled to conduct a trial, a trial the parties have suggested may take several days. The court and the parties would have to determine how to proceed in such a matter where the Civil Procedure Kât8ut are inapplicable. At oral argument, plaintiff's counsel suggested that a 10 month delay, apparently akin to the delay in the *Tobey* matter, was acceptable. The court is not so sure. Perhaps the recently amended Election Ordinance was designed to avoid the situation that presented itself in *Tobey*.

Finally, the claims presented here require plaintiff to make a rather significant factual showing in order to justify undoing the election. As the parties both concede, a recount has occurred and has reached the same outcome. While the Election Ordinance is ambiguous as to the justifications required for the court to order a new election ("election irregularities"), the plaintiff's hurdle necessarily must be high. Mr. Hendricks' claims involve misunderstandings about the closing time of the election and the weather, factual questions that could turn either way and would involve post hoc, self-interested witness testimony. The presumptive fact that this was an extremely close election would be a strong motivator for the parties to round up non-voters to testify that they would have voted one way or the other but for circumstances alleged by the plaintiff. The trial might, de facto, become a second election consisting entirely of persons who, for whatever reason, did not vote on February 12. Surely, that is not the intent of the Tribal Council.

The result here is not driven by Mr. Hendricks' misunderstanding of tribal statutes, which in other contexts likely would be excusable. It is perhaps unfortunate that the process to file an election irregularity appeal was not clearer for Mr. Hendricks. But is already apparent that resolution of this matter will extend beyond three months after the election,[7] far beyond the time limits contemplated in the Election Ordinance.

This is an incredibly close and difficult decision but the court must dismiss this matter. At times, the interests of the individual must give way to the interests of the tribal community. The result here is driven by the Tribal Council's instruction to the judiciary, not to forget the Supreme Court's dictate in *Tobey*, to conclude election disputes as quickly as possible. It is also driven by the need for tribal governments to move on as soon as possible after an election to ensure a smooth and peaceable transition to a new government.

DISMISSED.

[7] The court and the parties have tentatively scheduled a trial on this matter for the week of May 16, 2017.

0It is so ORDERED this 1st day of May, 2017

BY THE COURT:

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Matthew Fletcher, Supreme Court Judge
Sitting by Assignment as District Court Judge

This is to certify that all parties have been notified via U.S. Postal Service on this date:

Date:

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Nancy Rose, Court Clerk