

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DONALD J. TRUMP FOR PRESIDENT, INC., et al.	:	NO. 2:20-CV-00966
Plaintiffs,	:	
	:	
v.	:	JUDGE J. NICHOLAS RANJAN
	:	
KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of Pennsylvania, et al.	:	JURY TRIAL DEMANDED
Defendants.	:	

**DEFENDANT BERKS COUNTY BOARD OF ELECTIONS' MOTION TO
DISMISS PLAINTIFFS' AMENDED COMPLAINT, OR, ALTERNATIVELY,
MOTION FOR A MORE DEFINITE STATEMENT AND JOINDER**

Defendant, Berks County Board of Elections, by and through its attorneys, Deasey, Mahoney & Valentini, Ltd., files the instant Motion to Dismiss Plaintiffs' Amended Complaint, or, alternatively, Motion for a More Definite Statement, and to join in those arguments of Defendants Boards of Elections of Armstrong, Bedford, Blair, Centre, Columbia, Dauphin, Fayette, Huntingdon, Indiana, Lackawanna, Lawrence, Lebanon, Mercer, Montour, Northumberland, Venango, York (ECF 274, 275), Bucks, Chester, Montgomery, and Philadelphia Counties (ECF 283, 284), and Defendant Secretary of the Commonwealth Kathy Boockvar (ECF 263, 264) as set forth below:

I. FACTS & PROCEDURE

1. Plaintiffs, the President's reelection campaign, the Republican National Committee, and various elected officials and registered electors (collectively "the Plaintiffs"), have brought suit against the Defendants, including the Secretary of the Commonwealth of Pennsylvania and the Boards of Elections of Pennsylvania's 67 Counties, including Berks County Board of Elections ("Berks County").

2. Plaintiffs' Amended Complaint continues to allege purported election irregularities surrounding Pennsylvania's June 2, 2020 Primary Election and raises the specter of the same plaguing the November 3, 2020 General Election.

3. Plaintiffs continue to allege that the irregularities are a result of the flawed administration of Act 77, the mail-in voting law enacted by the General Assembly in the fall of 2019.

4. Plaintiffs continue to challenge specific practices, including, but not limited to, the return of ballots to locations other than the offices of the Counties' Boards of Elections; the counting of ballots lacking a secrecy envelope; and residency requirements imposed on poll watchers.

5. Berks County filed a Motion to Dismiss Plaintiffs' original Complaint because the Complaint contained no allegations specific to Berks County or its conduct during the Primary June 2020 election, especially with reference to any of the above-identified practices.

6. In the Amended Complaint, Plaintiff have again failed to allege any election related misconduct or wrongdoing on the part of Berks County, and, as such, have failed to state any plausible claims against it.

7. Accordingly, Berks County seeks dismissal and/or other relief as specified herein.

II. ARGUMENT IN SUPPORT OF MOTION TO DISMISS

8. In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "[t]he applicable standard of review requires the court to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party." *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989).

9. Under the United States Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, dismissal of a complaint pursuant to Rule 12(b)(6) is proper where the averments of the complaint demonstrably fail to raise directly or inferentially the material elements necessary to obtain relief under a viable legal theory of recovery. 550 U.S. 544 (2007).

10. As in the original Complaint, Berks County receives only passing references in the Amended Complaint, only appearing in the caption and listed as a Defendant under the "Parties" section of the Amended Complaint, along with 66 other Counties. (ECF 232, Pls.' Amended Compl. at ¶ 17).

11. The Amended Complaint is absolutely devoid of any allegations implicating Berks County in the practices of which Plaintiffs complain.

12. The Amended Complaint does not accuse Berks County of violating Act 77 by accepting ballots at locations other than the office of the Board of Elections, counting ballots without a secrecy envelope, or excluding non-resident poll watchers.

13. The Amended Complaint does not cure the legal insufficiency of the Plaintiffs' original claim(s) levied against Berks County, in that it does not include any additional or novel allegations against Berks County.

14. Plaintiffs have had their second bite at the apple and should not be permitted a third. *See Milton Reg'l Sewer Auth. v. Travelers Cas. & Sur. Co. of Am.*, No. 4:13-CV-2786, 2014 WL 5529169, at *8, n. 2 (M.D. Pa. Nov. 3, 2014) ("For instance, where the plaintiff had already amended plaintiff's complaint and yet failed to allege sufficient facts, the courts may find that '[t]hree bites at the apple is enough,' and conclude that it is proper to deny leave to replead."), *aff'd*, 648 F. App'x 215 (3d Cir. 2016); and *see Jones v. Philadelphia Parking Auth.*, No. CIV.A. 11-4699, 2015 WL 1378737, at *3 (E.D. Pa. Mar. 26, 2015) ("Here, where plaintiff

has been permitted to file at least four versions of his Complaint, each one failing to properly and sufficiently allege a claim for relief, dismissal of his Third Amended Complaint is with prejudice, in light of his ‘repeated failure to cure deficiencies by amendments previously allowed,’ as well as the futility of giving plaintiff a fifth bite at the apple.”).

15. Plaintiffs, in both their original Complaint and now their Amended Complaint, neglect to charge Berks County with deviating from or violating Act 77 or any other election laws. Specifically, the Plaintiffs do not allege that Berks County endorsed or engaged in the collection of absentee and mail-in ballots at locations other than the office of the Board of Elections; improperly counted absentee and mail-in ballots that should not have been counted for want of a secrecy envelope; excluded poll watchers who were not residents of Berks County; or, prevented eligible voters from casting an in-person ballot rather than voting by the absentee or mail-in ballot they had applied for and received.

16. It only stands to reason that if the Plaintiffs had evidence of Berks County committing any of these practices, then they would have now pleaded in their Amended Complaint that Berks County committed these practices. This is especially so given that the Plaintiffs were “put on notice” by virtue of Berks County’s Motion to Dismiss their original Complaint for want of any such allegations.

17. Accordingly, even accepting as true the allegations and inferences of Plaintiffs’ Amended Complaint, it is evident that those allegations and inferences do not elevate the Plaintiffs’ claims against Berks County from the realm of possibility to that of plausibility.

18. Therefore, Plaintiffs have not stated any claims against Berks County upon which the Court can grant relief, and, as such, Berks County should be dismissed.

III. ARGUMENT IN SUPPORT OF MOTION FOR MORE DEFINITE STATEMENT

19. Federal Rule of Civil Procedure 12(e) authorizes a party to make a motion for a more definite statement if a pleading is “so vague or ambiguous that the party cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e).

20. In the event the Court declines to grant dismissal, it should, in the alternative, only afford Plaintiffs one more opportunity to file an amended pleading that remedies the woeful insufficiency of their allegations with respect to Berks County.

21. Although the Amended Complaint is excessively long and verbose, spanning 72 pages and consisting of 267 paragraphs, concrete factual allegations involving Berks County are remarkably absent for a second time.

22. Notwithstanding the additional 16 pages in the Amended Complaint, Plaintiffs again fail to include even a solitary allegation that Berks County permitted ballots to be returned to locations other than the office of the Board of Elections; processed and counted ballots returned without a secrecy envelope; or barred poll watchers from Counties other than Berks County.

23. In light of the continued absence of allegations against Berks County, coupled with the vague and ambiguous character of Plaintiffs’ allegations overall, the Court should, at best, allow Plaintiffs one more opportunity to file an amended pleading supplying a more definite statement of Plaintiffs’ claims against Berks County.

IV. JOINDER IN AND INCORPORATION OF OTHER DEFENDANTS’ MOTIONS

24. Berks County joins in and incorporates by reference in their entirety as part of its Motion to Dismiss all other legal grounds for dismissal of the Plaintiffs’ Amended Complaint

asserted in the motion to dismiss and accompanying briefs filed today with the Court on behalf of the Bucks, Chester, Montgomery and Philadelphia County Boards of Elections (ECF 283, 284), in the motion to dismiss and accompanying brief filed today with the Court on behalf of the Armstrong, Bedford, Blair, Centre, Columbia, Dauphin, Fayette, Indiana, Lackawanna, Lawrence, Mercer, Montour, Northumberland, Venango, and York County Boards of Elections (ECF 274, 275), and in the motion to dismiss and accompanying brief filed today with the Court on behalf of Kathy Boockvar, the Secretary of the Commonwealth of Pennsylvania (ECF 263, 264).

25. Berks County joins in and incorporates these Motions to Dismiss and other Motions both to the extent they align with Berks County's own Motions and to the extent they introduce additional and/or alternative grounds for relief, including but not limited to those relating to the Plaintiffs' standing, the existence of jurisdiction, the propriety of venue, and the applicability of the Pullman and Burford abstention doctrines.

WHEREFORE, the Defendant, Berks County Board of Elections, respectfully requests that this Honorable Court GRANT the within Motion, thereby dismissing Plaintiffs' Amended Complaint and all claims set forth therein against the Defendant, Berks County Board of Elections, in their entirety and with prejudice. Alternatively, Berks County Board of Elections move the Court to order Plaintiffs to file an amended pleading curing the pleading deficiencies discussed above.

Respectfully submitted,

DEASEY, MAHONEY & VALENTINI, LTD.

Date: July 31, 2020

BY: /s/ Christine D. Steere, Esquire
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CERTIFICATE OF SERVICE

I, Christine D. Steere, Esquire, attorney for Defendant, Berks County Board of Elections, hereby certify that a true and correct copy of the foregoing Motion to Dismiss, or, alternatively, Motion for a More Definite Statement and Joinder were filed electronically and served via the Court's ECF system to all counsel of record.

DEASEY, MAHONEY & VALENTINI, LTD.

Date: July 31, 2020

BY: /s/ Christine D. Steere, Esquire
CHRISTINE D. STEERE, ESQUIRE