

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Ohio Democratic Party	:	
	:	Case No. C204-1055
Plaintiff,	:	
v.	:	Judge Marbley
	:	
J. Kenneth Blackwell, et al.,	:	Magistrate Judge Abel
	:	
Defendants.	:	

**MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE AND
MOTION TO STRIKE OR DISMISS PURPORTED COUNTERCLAIM**

Plaintiff, the Ohio Democratic Party moves, pursuant to Federal Rule of Civil Procedure 41(a)(2), for leave to dismiss its complaint and terminate this action for the reason that the claims asserted in this action are moot and no justiciable controversy remains pending before the Court. Plaintiff also moves, pursuant to Rules 8(c) and 12(b) and (f) to strike or dismiss the purported counterclaim filed by the State of Ohio on the grounds that the State of Ohio has not sought leave to intervene before filing the counterclaim, the purported claim is not a proper counterclaim, and this Court lacks jurisdiction over the claim.

A Memorandum in Support of both motions is attached.

Respectfully submitted,

/s/ Kathleen M. Trafford

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MEMORANDUM IN SUPPORT

I. Procedural History.

This action was commenced by Plaintiff, the Ohio Democratic Party, on the afternoon of the November 2, 2004 national election. The named defendants were J. Kenneth Blackwell, in his official capacity as Ohio Secretary of State, and the Franklin and Knox county boards of elections. The sole claim for relief raised in the complaint was that thousands of Ohio voters in Franklin and Knox counties might be disenfranchised due to the Defendants' failure to provide a sufficient number of voting machines in certain precincts in these two counties. The complaint sought emergency injunctive relief to provide an alternative means to supplement the inadequate electronic voting systems in these counties.

The Court conducted an immediate evidentiary hearing on Plaintiff's motion for a temporary restraining order. Both Defendant Blackwell and Defendant Franklin County Board of Elections appeared and were heard at that hearing. The Knox County Prosecutor received notice of the hearing but did not attend. The Ohio Republican Party appeared at the hearing and was given leave to intervene for the limited purpose of opposing the application for emergency injunctive relief. At the close of the hearing, the Court issued an order, which stated:

[I]t is ORDERED that for the reasons stated in plaintiff's motion for a temporary restraining order and memorandum in support thereof, the defendants . . . are required to provide paper ballots or another mechanism to provide an adequate opportunity to vote. The Court directs the defendants shall keep the polls open for voters waiting in line at 7:30 p.m.

This Order shall expire by its terms on November 2, 2004 at the close of voting, unless good cause is shown why this period should be extended.

Defendant Franklin County Board of Elections immediately appealed this Court's order to the United States Court of Appeals for the Sixth Circuit and sought an emergency stay of the

Court's ruling. Later in the evening of November 2, 2004, the Court of Appeals denied the request to stay this Court's order.

Defendants Blackwell and Franklin County Board of Elections filed answers to the complaint on November 2 and November 3, 2004, respectively. Neither answer included a counterclaim. The Complaint was not served on the Knox County Board of Elections and no summons was issued to it. Plaintiff and Defendant Franklin County Board of Elections have agreed to the dismissal of all claims against the Defendant Franklin County Board of Elections without prejudice.

On November 19, 2004, the State of Ohio, without seeking leave of the Court and purporting to act as a defendant-intervenor, filed an answer and counterclaim in this action. In its purported answer, the State of Ohio asserts, as affirmative defenses, that the action is moot and the Court lacks jurisdiction over Plaintiff's claims. (Answer at ¶¶17, 21.) The State then advances a purported counterclaim which alleges that Defendants' refusal to provide paper ballots or adequate voting machines, as alleged in the complaint, does not violate the right to vote as secured by the United States Constitution. (*Id.* at 3-4.) Even though the State of Ohio alleges the action is moot and the Court lacks jurisdiction, the State of Ohio asks this Court for an advisory opinion declaring that Defendants did not violate the United States Constitution.

Because the controversy that gave rise to this action -- the unprecedented and extremely long lines and delays at certain polling places in Franklin and Knox counties -- is now moot, and the Court's temporary restraining order has expired by its terms, Plaintiff seeks leave to voluntarily dismiss its complaint. Plaintiff also asks that the purported counterclaim be stricken or dismissed for the reasons that it is not a proper counterclaim, was filed without leave of court, and improperly seeks to have the Court issue an advisory opinion.

II. Plaintiff's Reason for Seeking A Voluntary Dismissal.

Plaintiff seeks to voluntarily dismiss this action because the sole claim for relief advanced by Plaintiff is now moot. There is no longer a live and justiciable controversy and there is no further relief the Court can grant. This action was brought for the sole purpose of securing the right to vote of all citizens in Franklin and Knox counties during the November 2, 2004 national election. Plaintiff had a reasonable and good faith belief, as evidenced by the declarations of poll watchers who personally observed the long lines and frustrations of electors, that the right to vote of electors in certain precincts in these two counties was in jeopardy due to the lack of sufficient voting machines. Plaintiff asked the Court to issue immediate equitable relief ordering Defendants to provide additional or alternative voting mechanisms in these precincts. The Court's order recognized that the controversy was both immediate and short-lived. It issued a temporary restraining order directing Defendants to provide alternative mechanisms, but provided that the order would expire by its own terms at the close of the polls on November 2, 2004. This Court's Order, now expired, was the sole relief Plaintiff requested. Thus, Plaintiff seeks to dismiss its complaint because it is moot.

III. Dismissal of The Complaint Without Prejudice Will Not Prejudice Defendants.

Rule 41(a)(2) provides that "unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." Courts generally exercise their discretion under the rule by granting dismissal without prejudice absent demonstrable legal prejudice to the defendant. *See generally* 8 MOORE'S FEDERAL PRACTICE 3d § 41.40 [5]. The factors courts typically consider in resolving motions for voluntary dismissal are:

(1) the extent to which the suit has progressed, including the defendant's effort and expense in preparing for trial, 2) the plaintiff's diligence in prosecuting the action or in bringing the motion, (3) the duplicative expense of relitigation, and (4) the adequacy of plaintiff's explanation for the need to dismiss.

Id. at §41.40[6]. See e.g., *Grover By Grover v. Eli Lilly and Co.*, 33 F.3d 716,718 (6th Cir. 1994); *Catanzano v. Wing*, 277 F.3d 99, 110 (2nd Cir. 2001); *Ellett Bros. Ins. v. U.S. Fidelity & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001). Each of these factors support granting Plaintiff's motion in this instance.

Plaintiff has timely filed this motion for voluntary dismissal, as the action has been pending for only one month. No summons has been served in this case, although two of the three defendants voluntarily filed answers to the complaint. Defendants have not incurred expense in preparing for trial and will incur no duplicative expense of relitigation. Plaintiff and Defendant Franklin County Board of Elections have agreed to the dismissal of the complaint as to it. Plaintiff believes this action is now moot and has no intention to refile this action. The State of Ohio concedes this point, as it stated, "Plaintiff's claims are barred, in whole or in part, because they are moot." (Answer at ¶17). Plaintiff's motion is intended to facilitate an end to the litigation without preclusive effect or prejudice as to any party. See *Natl R.R. Passenger Corp. v. Iaman*, 915 F.2d 43, 48 (1st Cir. 1990). Thus, the Plaintiff requests this Court to dismiss its complaint.

IV. The State of Ohio's Purported Counterclaim is Improper and Should Be Stricken or Dismissed.

The State of Ohio's purported counterclaim should not preclude the dismissal of this action because it is not a proper counterclaim. The sum and substance of the purported counterclaim is the State's allegation that "[t]he refusal of the [Defendants] to provide paper ballots or 'adequate voting machines' as alleged in the Plaintiff's complaint does not violate the

right to vote of any person as secured by the United States Constitution as alleged in the Plaintiff's complaint." (Counterclaim at ¶ 4.) The relief sought is a declaration that "none of the Defendants violated the United States Constitution as alleged in the Plaintiff's complaint." The purported counterclaim is a purely defensive pleading and really an affirmative defense. Consistent with Rule 8(c), the counterclaim should be treated as an affirmative defense, and should not preclude the dismissal of this action. *See Hinfin Realty Corp. v. Pittston Co.*, 206 F.R.D. 350, 354 (E.D.N.Y. 2002).

The counterclaim also is procedurally improper because the purported intervenor has not sought leave to intervene in this action. The State of Ohio contends it has a statutory right to intervene based on 28 U.S.C. § 2402. That provision is not applicable here, however, because it merely authorizes jury trials against the United States in limited situations. Nor is 28 U.S.C. § 2403 applicable because that section, which does authorize state intervention in actions in federal courts, applies only if the constitutionality of a state statute has been called into question and there is no state officer named as a defendant. The complaint in this action did not attack the constitutionality of any state statute and did name Defendant Blackwell. Thus, the State of Ohio does not have a statutory right to intervene in this action. But even if it did, it nevertheless would have to make a proper application to this Court consistent with Fed. R. Civ. P. 24(a).

Alternatively, the purported counterclaim should be dismissed for lack of subject matter jurisdiction. The counterclaim seeks a declaration that Defendants' actions related to making adequate provision for voting in the November 2, 2004 national election did not violate federal law. The counterclaim, in effect, is seeking nothing more than an advisory opinion. Yet, it is well-settled that federal courts sit to decide actual cases and controversies and do not have jurisdiction to give advisory opinions that cannot affect the rights of the litigants or give

effective, meaningful relief. *Coalition for Gov't Procurement v. Fed. Prison Indus.*, 365 F.3d 435, 458 (6th Cir., 2004); *McCurry v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 597 (6th Cir., 2002). Accordingly, even if the purported counterclaim was a real and properly counterclaim, it still would be subject to dismissal for lack of subject matter jurisdiction.

V. Conclusion.

Plaintiff asks that the purported counterclaim be stricken or dismissed and that the action be dismissed without prejudice.

Respectfully submitted,

/s/ Kathleen M. Trafford

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CERTIFICATE OF SERVICE

I certify that on December 2, 2004, a copy of the foregoing *Motion for Voluntary Dismissal Without Prejudice and Motion to Strike or Dismiss Purported Counterclaim* were filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Kathleen M. Trafford
Kathleen M. Trafford