

**IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO  
CIVIL DIVISION**

Robert J. Fittrakis,	:	
	:	
Plaintiff,	:	<b>Case No. 12CVH-13888</b>
	:	
-v-	:	<b>JUDGE SERROTT</b>
	:	
Ohio Secretary of State John Husted,	:	
et al.,	:	
	:	
Defendants.	:	

**DECISION AND ENTRY GRANTING DEFENDANT ELECTION SYSTEMS &  
SOFTWARE, INC.’S MOTION TO DISMISS**

Plaintiff initiated this lawsuit against Defendants Jon Husted, in his official capacity as the Ohio Secretary of State, and Election Systems & Software, Inc. (ES&S). The Complaint asserts a cause of action for violation of 42 U.S.C. § 1983 and an “Ohio Taxpayer Action” seeking mandamus relief against the Secretary of State. On November 20, 2012, Plaintiff filed a Notice dismissing his federal claim for violation of 42 U.S.C. § 1983, but stating that he “will proceed with his state claims against these defendants in this case.”

On November 27, 2012, ES&S filed this instant Motion to Dismiss. They argue that Plaintiff’s remaining “Ohio Taxpayer Action” pertains to and seeks relief only against the Secretary of State. It contends that, with the dismissal of the section 1983 cause of action, there are no longer any claims pending against it and that it should not be a party. Plaintiff filed a response on December 11, 2012 agreeing that his “Ohio Taxpayer Action” pertains only to the Ohio Secretary of State and further acknowledging that the Complaint, in its “present form”, does not assert any claims against ES&S.

Nevertheless, he argued that a dismissal was premature as he intended to file an amended complaint “within the time allowed for responding to the Ohio Secretary of State’s motion to dismiss,” which was filed on December 4, 2012.

Thereafter, due to the holidays and scheduled vacation time, Plaintiff received an extension until January 17, 2013 to respond to the Secretary of State’s Motion. On that date, Plaintiff filed a response to the Ohio Secretary of State’s separate motion to dismiss, but that filing and the exhibits attached thereto do not raise any claims against ES&S nor set forth any argument as to why this entity should remain a party.

Dismissal of a claim pursuant to Civ. R. 12(B)(6) is appropriate only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144 (1991). A court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). “In addressing a Civ. R. 12(B)(6) motion, a trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint.” *Brown v. Columbus City Schs. Bd. of Educ.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶5.

Here, Plaintiff has conceded that there are no claims pending against ES&S. The Court delayed ruling on the Motion to Dismiss as Plaintiff indicated an intent to file an amended pleading asserting a claim against ES&S, but Plaintiff’s subsequent filings continue to only raise claims against the Secretary of State. Accordingly, ES&S’s Motion to Dismiss is GRANTED, and it is hereby DISMISSED as a party to this action.

**IT IS SO ORDERED.**

Copies to (via e-filing notification):

Clifford O. Arnebeck  
Brett Colbert  
Counsel for Plaintiff

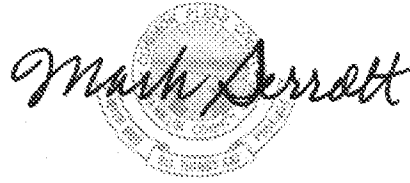
Richard N. Coglianesi  
Damian W. Sikora  
Counsel for Defendant Ohio Secretary of State

Steven D. Forry  
Counsel for Defendant Election Systems & Software, Inc.

Franklin County Court of Common Pleas

**Date:** 01-25-2013  
**Case Title:** ROBERT J FITRAKIS -VS- OHIO STATE SECRETARY JON HUSTED ET AL  
**Case Number:** 12CV013888  
**Type:** DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, "Mark Serrott", is written over a circular official seal. The seal is partially obscured by the signature and contains some illegible text around its perimeter.

/s/ Judge Mark Serrott

Court Disposition

Case Number: 12CV013888

Case Style: ROBERT J FITRAKIS -VS- OHIO STATE SECRETARY  
JON HUSTED ET AL

Motion Tie Off Information:

1. Motion CMS Document Id: 12CV0138882012-11-2799980000  
Document Title: 11-27-2012-MOTION TO DISMISS  
Disposition: MOTION GRANTED