

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION**

**JANET C. BAKER, SUSAN INMAN, and
OLLY NEAL**

PLAINTIFFS

V

60CV-20-3565

**JOHN THURSTON, in his official capacity
as the Secretary of State of Arkansas**

DEFENDANT

MEMORANDUM ORDER

Janet Baker, Judge Olly Neal (retired, Arkansas Court of Appeals), and Susan Inman filed this declaratory judgment lawsuit against Arkansas Secretary of State John Thurston on June 23, 2020. Their lawsuit seeks a declaratory judgment that “Arkansas law, as interpreted by the Supreme Court of Arkansas, allows voters to use any and all reasons or excuses to receive and vote by absentee ballot. Alternatively, plaintiffs request the Court to issue a declaratory judgment finding that under Arkansas law as interpreted by the Supreme Court of Arkansas, fear of contracting COVID-19 by itself is a valid excuse for receiving an absentee ballot and voting absentee. Alternatively, Plaintiffs request the Court to issue a declaratory judgment finding that Arkansas Code Annotated Sections 7-5-402 and -405

violate Arkansans' fundamental right to suffrage in Article 3, Section 2 of the Arkansas Constitution and therefore, declare a declaratory judgment that the State of Arkansas shall not require any excuse or reason for a qualified elector to vote absentee." [Complaint, paragraphs 89, 90, and 91].

Secretary of State Thurston has moved to dismiss the complaint on June 29, 2020 pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure (ARCP) and contends that the complaint fails to state facts upon which a claim for relief can be granted. Specifically, the Secretary of State contends that the complaint does not present a justiciable issue on the grounds of standing, ripeness, and mootness, and that the complaint is barred by the doctrine of sovereign immunity.

Also on June 29, 2020, Doyle Webb (Chairman of the Republican Party of Arkansas) and Representative Douglas House of the Arkansas House of Representatives (hereafter referred to as "intervenor movants") moved to intervene in this lawsuit pursuant to Rule 24 of the ARCP, separately moved to dismiss the complaint for failure to state a legal claim pursuant to Rule 12(b)(6) and for failure to join the county clerks and election commissioners in each of the seventy-five (75) Arkansas counties as indispensable parties pursuant to Rule 12(b)(7) of the ARCP.

The court heard arguments from counsel for plaintiffs (David Couch), the Secretary of State (Michael Mosley), and the intervenor movants (George Kitter) on July 17, 2020. After consideration of the complaint, motion to dismiss by the Secretary of State, and motion for intervention, the Court holds that the complaint should be dismissed pursuant to Rule 12(b)(6) of the ARCP because it fails to allege facts upon which a claim for relief can be granted for the reasons stated herein.

Discussion

Arkansas Rule of Civil Procedure 8 requires that a pleading which sets forth a claim for relief shall contain a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim...and that the pleader is entitled to relief. Ark. R. Civ. P. 8. All reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Baptist Health v Murphy*, 2010 Ark 358, 373 S.W.3d 269.

The purpose of the declaratory judgment statute is “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” Declaratory relief will lie when (1) there is a justiciable controversy; (2) It exists between the parties with adverse

interests; (3) those seeking relief have a legal interest in the controversy; and (4) the issues involved are ripe for decision. To satisfy the first requirement and to show the existence of a justiciable controversy, the complaint must show a reason to answer the question posed. *Williams v City of Sherwood*, 2019 Ark. App. 487, 586 S.W.3d 711. The general rule is that one must have suffered injury or belong to a class that is prejudiced in order to have standing to challenge the validity of a law. *Ghegan & Ghegan v Weiss*, 338 Ark 9, 991 S.W.2d 536 (1999).

The Arkansas Supreme Court held in *Forest v Baker* that “we do not believe the legislature meant for an absentee voter explain in detail the ‘reason’ for being absent on election day. If a real and convincing ‘reason’ should be required, then it follows that someone would have to judge the sufficiency of that reason. Such a procedure could easily result in an elector being compelled to divulge personal secrets in order to exercise his constitutional right to sufferance.” *Forrest v Baker*, 287 Ark 239, 698 S.W.3d 497 (1985).

Plaintiffs concede that applications for absentee ballots are submitted to county clerks. See A.C.A. 7-5-409. The Secretary of State under Arkansas law is “statutorily responsible in his official capacity for determining how many valid signatures a petition contains, *certifying*

election results, maintaining State election records, and administering the election and voter registration laws of the State of Arkansas.” Whitfield v Thurston, ---F.Supp.3d---, 2020 WL 3451692 (8th Cir. 2020) (emphasis added); see also Ark Code Ann. §7-7-103.

Plaintiffs seek declaratory judgment relief on three issues: (1) that current Arkansas law allows fear of COVID-19 as a valid excuse for being “unavoidably absent” for the purposes of voting by absentee ballot; (2) that current Arkansas law allows voters to use any and all reasons or excuses whatsoever for the purpose of being “unavoidably absent” and voting by absentee ballot; and (3) alternatively, that if the Arkansas Code does not allow any excuse to suffice for voting absentee, then the law is an unconstitutional infringement of Plaintiff’s rights to vote under Article three, Section two of the Arkansas Constitution.

Based on the legal standard governed by Arkansas Rule of Civil Procedure 12(b)(6), the complaint in this case fails to state facts upon which relief can be granted. The complaint contains no factual allegation that plaintiffs, or any of them, have been denied or that they are imminently threatened with denial of an absentee ballot voting application by the Pulaski County clerk (as for plaintiffs Baker and Inman) and the Lee County clerk (as for plaintiff Judge Neal) due to their concerns about voting in

person due to the COVID-19 pandemic and statewide state of emergency. The complaint does not allege that any plaintiff has applied for an absentee ballot, let alone that such an application has been denied. Furthermore, the complaint does not allege that Secretary of State Thurston, as the state official in charge of administering election laws, has counseled, directed, or otherwise intimated that county clerks should deny absentee ballot applications to persons seeking them based on fears of contracting COVID-19 due to in person voting in the November 3, 2020 general election.

Simply put, this complaint does not allege a legal controversy. Because the Court holds that the complaint should be dismissed on grounds of standing, ripeness, and mootness (justiciability) pursuant to Rule 12(b)(6) of the ARCP, the Court does not reach the other arguments asserted by the Secretary of State (sovereign immunity and indispensable parties). Due to the Court's decision on the Secretary of State's motion to dismiss, the motion to intervene and motion to dismiss by the intervenor movants are denied as moot.

Accordingly, the complaint should be dismissed without prejudice. In the interest of judicial economy, the Court will allow plaintiffs five (5) days to file an amended complaint if they are inclined to do so. Otherwise, the

Court will issue a dismissal order consistent with this Memorandum Opinion.

Conclusion

Because the complaint in this lawsuit lacks factual allegations showing that plaintiffs – or any of them – have suffered or face imminent danger of suffering any injury protected by law, the motion of Secretary of State Thurston will be granted without prejudice, provided that plaintiffs do not file an amended complaint within five (5) days from the date of this Memorandum Opinion. The motions by the intervenor movants will be denied as moot.

IT IS SO ORDERED, this __21st__ day of July, 2020.



CIRCUIT JUDGE