

MINUTE ORDER

CASE NUMBER: CIVIL NO. 20-00280 LEK-KJM

CASE NAME: Khistina Caldwell De Jean vs. Scott Nagao

JUDGE: Leslie E. Kobayashi

DATE: 10/19/2020

COURT ACTION: EO: COURT ORDER: DENYING PLAINTIFF'S EMERGENCY MOTION; AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

On September 14, 2020, pro se Plaintiff Khistina Caldwell De Jean ("Plaintiff") filed a motion that has been construed as a motion seeking either a temporary restraining order ("TRO") or a preliminary injunction ("Emergency Motion"). Dkt. no. 32 (Emergency Motion); see also Minute Order, filed 9/15/20 (dkt. no. 35) ("9/15/20 EO"), at 1 (entering order construing motion). Defendant Scott Nago, in his official capacity as Chief Election Officer of the State of Hawai'i ("Defendant"), filed a memorandum in opposition to the Emergency Motion ("Emergency Motion Opposition") on October 13, 2020. [Dkt. no. 51.] Also before the Court is Defendant's Motion to Dismiss with Prejudice ("Motion to Dismiss"), filed on September 23, 2020. [Dkt. no. 39.] On September 30, 2020, Plaintiff filed a document that is construed as her response to the Motion to Dismiss ("Motion to Dismiss Opposition"). [Dkt. no. 43.] The Court has found the Emergency Motion and the Motion to Dismiss suitable for disposition without a hearing, pursuant to Local Rule 7.1(c). [EO, filed 10/16/20 (dkt. no. 55) (vacating hearing originally scheduled for 10/23/20).]

I. Emergency Motion

Plaintiff has disagreed with this Court's characterization of the Emergency Motion and argued she has never sought a TRO. See, e.g., Motion to Dismiss Opp. at 27 ("I DID NOT ASK FOR A TRO I WILL NOT BE FILING ANYTHING ABOUT TRO" (emphasis in original)). Thus, the Emergency Motion is no longer construed as requesting a TRO.

Plaintiff has not disputed the characterization of the Emergency Motion as seeking a preliminary injunction. However, Plaintiff was previously cautioned that: 1) the legal standards applicable to a request for a TRO are the same as those applicable to a request for a preliminary injunction; and 2) the Emergency Motion did not address the requirements. [9/15/20 EO at 1.] In spite of this warning, Plaintiff failed to address the requirements for a preliminary injunction in her supplement to the Emergency Motion. See "Emergency Hearing To Stop Race 20," filed 10/2/20 (dkt. no. 45); Minute Order, filed 10/6/20 (dkt. no. 46) (construing dkt. no. 45 as Plaintiff's supplement to the

Emergency Motion). Plaintiff has therefore failed to establish the requirements to obtain a preliminary injunction. See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” (citations omitted)).

Because Plaintiff has failed to show that a preliminary injunction is warranted and because no other request for relief or court action can be discerned from Plaintiff’s motion, the Emergency Motion is DENIED.

II. Motion to Dismiss

Defendant argues the document that has been construed as Plaintiff’s complaint (“Complaint”), [filed 6/19/20 (dkt. no. 1),] should be dismissed with prejudice because Plaintiff’s action is barred by the Eleventh Amendment, and the Complaint fails to state a claim upon which relief can be granted. [Motion to Dismiss at 1-2.] In the Complaint and Plaintiff’s other filings, she seeks: 1) an injunction enjoining the enforcement of the requirement to obtain 4,377 petition signatures prior to August 5, 2020 for placement on the 2020 presidential ballot for the general election ballot in the State of Hawai‘i (“the Signature Requirement”); 2) monetary damages for Plaintiff’s campaign expenses from February 2019 to August 2020; and 3) Defendant’s removal as the State of Hawaii’s (“the State”) Chief Election Officer. [Complaint at ¶ 2; Opening Statement/Focus of Concise Statement, filed 9/4/20 (dkt. no. 30), at 1.]

A. Monetary Damages and Defendant’s Removal

The Eleventh Amendment bars individuals from pursuing claims for monetary damages or other retrospective relief from a state or a state instrumentality. Ariz. Students’ Ass’n v. Ariz. Bd. of Regents, 824 F.3d 858, 865 (9th Cir. 2016). Further, Plaintiff’s suit against Defendant, in his official capacity, constitutes a suit against the State itself. See Will v. Mich. Dep’t of State Police, 491 U.S. 58, 71 (1989). Thus, Plaintiff’s claim for monetary damages must be dismissed because it fails to state a plausible claim for relief. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

Plaintiff’s claim seeking Defendant’s removal from his position seeks future action. However, this claim is also barred by the Eleventh Amendment because Plaintiff asks the State to terminate Defendant’s employment, and therefore the State “is the real, substantial party in interest.” See Va. Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 255 (2011) (citation and quotation marks omitted). Further, Plaintiff seeks Defendant’s removal from his position because he refused to meet with her and with other candidates and because she alleges he provided insufficient supervision over the election process. Thus, Plaintiff does not seek to stop him from committing an on-going violation of her constitutional rights. See id. (“when a federal court commands a state

official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes”). Plaintiff seeks Defendant’s removal as a form of relief because of his allegedly wrongful past actions, *i.e.*, she seeks retrospective relief barred by the Eleventh Amendment. This claim must therefore be dismissed.

The dismissal of Plaintiff’s claim for monetary damages and her claim seeking Defendant’s removal from his position must be with prejudice because it is absolutely clear that Plaintiff cannot amend these claims to cure the defects. See Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per curiam) (“Unless it is absolutely clear that no amendment can cure the defect, however, a pro se litigant is entitled to notice of the complaint’s deficiencies and an opportunity to amend prior to dismissal of the action.” (citations omitted)). The Motion to Dismiss is GRANTED, insofar as Plaintiff’s claim seeking monetary damages and her claim seeking Defendant’s removal from his position are DISMISSED WITH PREJUDICE.

B. Plaintiff’s Exclusion from the Ballot

Plaintiff’s central claim is that she is being excluded from the State’s presidential election ballot because she was unable to satisfy the Signature Requirement due to the COVID-19 pandemic.

Defendant raises a factual attack challenging this Court’s jurisdiction over Plaintiff’s case. See Bishop v. United States, Civ. No. 16-00248 JMS-KSC, 2017 WL 1381653, at *7 (D. Hawai`i Apr. 13, 2017) (“A [Fed. R. Civ. P.] 12(b)(1) motion may be either facial (attacking the sufficiency of the complaint’s allegations to invoke federal jurisdiction) or factual (disputing the truth of the allegations of the complaint).” (citing Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004))). Because the jurisdictional issues are intertwined with the substantive issues in this case, this Court will apply the summary judgment standard, considering all of the evidence in the record, in the light most favorable to Plaintiff as the non-moving party. See id. (citing Autery v. United States, 424 F.3d 944, 956 (9th Cir. 2005)).

Plaintiff is proceeding pro se, thus her Complaint and her other filings must be liberally construed. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam). Liberally construed, Plaintiff’s Complaint alleges Defendant’s enforcement of the Signature Requirement under the circumstances created by COVID-19 violates her rights under the First and Fourteenth Amendments. See, e.g., Ariz. Libertarian Party v. Hobbs, 925 F.3d 1085, 1090 (9th Cir. 2019) Defendant’s argument that the Complaint fails to identify the federal law that Plaintiff alleges is being violated is thus rejected.

Plaintiff’s alleged injury in this case is her exclusion from the 2020 presidential ballot. There is no dispute that Plaintiff did not comply with the Signature Requirement, but she alleges she attempted to do so and was unable to because of COVID-19 and the Government restrictions imposed to prevent the spread of COVID-19. [Complaint at ¶¶ 1-2.] In response to the Motion to Dismiss, Plaintiff alleges Defendant’s office has made other accommodations to account for the COVID-19 restrictions. [Motion to Dismiss Opp. at 7.] Liberally construing her documents, Plaintiff’s position is that her injury is

being caused by Defendant's failure to make accommodations in the Signature Requirement to address the extraordinary circumstances created by the COVID-19 pandemic. There are genuine issues of material fact that preclude judgment in Defendant's favor at this time.

Finally, Defendant argues the relief that Plaintiff seeks, being placed on the 2020 presidential ballot, is not prospective relief because it is not possible for her to obtain it at this point. In other words, Defendant argues this Court lacks jurisdiction over Plaintiff's claim because it is moot. See, e.g., Bannister v. Ige, CIVIL NO. 20-00305 JAO-RT, 2020 WL 5031994, at *3 (D. Hawai'i Aug. 25, 2020). In response, Plaintiff states she previously ran for governor twice and for mayor twice in this State. She also ran once each for governor and mayor in Texas. [Motion to Dismiss Opp. at 10.] Plaintiff emphasizes that she filed this action on June 19, 2020. [Id. at 8.] Counsel for Defendant entered a special appearance in this case during a status conference on July 17, 2020, and counsel indicated that she would work with Plaintiff regarding service of the Complaint. [Minutes, filed 7/17/20 (dkt. no. 16).] However, by September 14, 2020, Plaintiff had attempted, but was unable to complete, service. See Minutes, filed 9/14/20 (dkt. no. 33), at 1 (stating Defendant's counsel "reports the attempted service that was made by Plaintiff Khistina Caldwell De Jean"). Thus, Plaintiff filed this action several weeks before the Signature Requirement's deadline and she appears to have diligently litigated this action.

The current record raises a genuine issue of fact as to whether the "capable of repetition, yet evading review" exception to the mootness doctrine may apply. "Such 'exception applies when (1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.'" Bannister, 2020 WL 5031994, at *3 (quoting Feldman v. Bomar, 518 F.3d 637, 644 (9th Cir. 2008)).

C. Ruling

Plaintiff's Complaint alleges a violation of her rights under the First and Fourteenth Amendments, and there are genuine issues of material fact as to the standing issues that Defendant raises in the Motion to Dismiss. Defendant's Motion to Dismiss is DENIED with regard to Plaintiff's claim challenging her exclusion from the presidential ballot. However, as addressed below, further briefing regarding this claim is necessary.

The Motion to Dismiss is GRANTED as to Plaintiff's claims seeking monetary damages and Defendant's removal from his position. Those claims are DISMISSED WITH PREJUDICE. In other words, they are no longer part of this case. The only claim that remains in this case is Plaintiff's challenge to her exclusion from the presidential ballot.

Thus, Defendant's Motion to Dismiss is GRANTED IN PART AND DENIED IN PART.

III. Further Briefing

Plaintiff Complaint appears to assert that this Court has jurisdiction pursuant to Haw. Rev. Stat. § 11-52, which states: “When the appeal is perfected, the court shall hear the appeal as soon thereafter as may be reasonable.” Defendant is ORDERED to file a memorandum addressing: 1) whether Plaintiff filed a challenge with the State’s Board of Registration prior to filing this action; and 2) whether the filing of, or the failure to file, such a challenge affects Plaintiff’s standing to pursue this action.

Defendant shall file his memorandum by **November 2, 2020**, and Plaintiff is ORDERED to file a response to Defendant’s memorandum by **November 16, 2020**.

IT IS SO ORDERED.

Submitted by: LEK LC1