

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE**

Roque De La Fuente,	)	
	)	
Plaintiff,	)	Case No. 3:16-cv-00189
v.	)	Judge Aleta A. Trauger
	)	
Democratic Party of Tennessee, et. al,	)	
	)	
Defendants.	)	
	)	
	)	

**DEFENDANT TENNESSEE DEMOCRATIC PARTY'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS**

On February 5, 2015, Plaintiff Roque De La Fuente ("Plaintiff") filed his complaint in this matter seeking placement of his name on the March 1, 2016 ballot (the "Ballot") for Tennessee's Democratic Presidential Preference Primary Election (the "Primary Election"). Defendant, the Tennessee Democratic Party (the "TNDP"), hereby files this memorandum of law in support of its motion to dismiss.

FACTUAL BACKGROUND

Plaintiff alleges that he was denied access to the Ballot by Tre Hargett, Secretary of State of Tennessee ("Secretary Hargett"). (Complaint ¶¶ 11-12.) Plaintiff alleges that he sought placement of his name on the Ballot in November 23, 2015 by sending a letter to Secretary Hargett purporting to show that he was "generally [] recognized as candidates in national news media throughout the United States" as a candidate in the Primary Election. (Complaint ¶¶ 8-9 and Ex. A.)

Secretary Hargett, however, did not include Plaintiff's name on the Ballot, instead only listing Hillary Clinton, Bernie Sanders, and Martin O'Malley on the Ballot. (Complaint ¶ 9 and

Ex. B.)¹ The Complaint principally alleges that Secretary Hargett violated state and federal law by failing to include Plaintiff's name on the Ballot. (*See generally* Complaint.) Other than mentioning that the TNDP is "one of two major political parties in Tennessee and is the official representative entity of the Democratic National Committee in Tennessee, and is responsible for ...promulgating delegate selection rules for Tennessee for the 2016 Democratic National Convention," the Complaint is bereft of other factual allegations concerning the TNDP's actions or inactions that give rise to Plaintiff's purported claims. (Complaint ¶ 4.)

Although not mentioned in his complaint, the Court is well aware that on March 1, 2016, the Primary Election occurred, and that former Secretary of State Hillary Rodham Clinton won the Primary Election. The court should take judicial notice of these facts, which are not subject to reasonable dispute.²

STANDARD OF REVIEW

The TNDP moves this Court to dismiss this case under both Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim).

¹ Secretary Hargett's selection of Mr. O'Malley occurred prior to Mr. O'Malley formally ending his campaign for President of the United States.

² Under Fed. R. Civ. P. 201(b)(1), a court may take judicial notice of a fact that is not subject to reasonable dispute because it is "generally known within the trial court's territorial jurisdiction" of where it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Civ. P. 201(c) also authorizes the court to judicial notice of facts on its own or upon request when a party supplies the court with the necessary information. Courts commonly take judicial notice of the fact of an election, the identities of candidates, and the political affiliation of candidates, among other types of election-related information, because that information is sufficiently "notorious in the community" to permit judicial notice under Rule 201. *See City of Dayton v. Reynolds*, Case No. C-3-84-145, 1990 U.S. Dist. LEXIS 20951, at *9-11 (S.D. Ohio Oct. 2, 1990) (collecting cases); *see also Sincock v. Gately*, 262 F. Supp. 739, 804 (1967) (taking judicial notice of the City of Wilmington election results); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1307 n.36 (S.D. Fla. 2002) (taking judicial notice of election results posted on Florida Department of State website). Here, the information is well known in the local community, the March 1, 2016 Democratic Primary Election results are publicly available on the tn.gov website at <http://elections.tn.gov/results.php> (last accessed March 3, 2016), and the substance of those results are not subject to reasonable dispute.

In determining whether to grant a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the Court is to determine “whether the complaint alleges facts on its face which, if taken as true, would be sufficient to invoke the district court’s jurisdiction.” *FOCUS v. Allegheny Cnty. Ct. of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996). The plaintiff bears the burden of establishing the existence of subject matter jurisdiction. *Id.*

To survive a motion to dismiss under Rule 12(b)(6), Plaintiff's complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Villegas v. Metro. Gov't of Davidson Cnty.*, 2009 WL 4015975, at *2 (M.D. Tenn. Nov. 19, 2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard "requires more than labels and conclusions, and a formulaic recitation on the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. The *Twombly* standard applies to all civil cases, and a plaintiff must allege enough facts to allow the fact finder to draw a "reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (emphasis added). Thus, a complaint must proffer sufficient factual support to bring the plaintiff’s claim "above the speculative level." *Twombly*, 550 U.S. at 555.

Federal courts, including this Court in the context of election related disputes, routinely grant motions to dismiss at the pleading stage, where the complaint fails to state a claim on which relief may be granted. *See, e.g., Kurita v. State Primary Bd. of the Tenn. Democratic Party*, Case No. 3:08-0948, 2008 U.S. Dist. LEXIS 88071 (M.D. Tenn. Oct. 14, 2008) (granting Rule 12(b)(6) motions to dismiss); *Fair Elections Ohio v. Husted*, Case No. 2:12-cv-763, 2013 U.S. Dist. LEXIS 86393 (June 19, 2013) (granting Rule 12(b)(6) motion on grounds of mootness).

ARGUMENT

Plaintiff has failed to state a claim upon which relief can be granted because: 1) the Primary Election has occurred, and therefore any claim that Plaintiff had that he should have been included on the Ballot is moot; and 2) Secretary Hargett has the sole discretion, in this instance, to determine who appears on the Ballot, and therefore the TNDP is not a proper party to the action.

I. The Case Is Moot And Should Be Dismissed For Lack of Subject Matter Jurisdiction Under Rule 12(b)(1).

The Court has “no power to adjudicate disputes which are moot.” *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997). “The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.” *Id.* (internal citations and quotations omitted).

Here, Plaintiff’s suit seeks inclusion on the Ballot for the Primary Election. This case became moot the day after said election, March 2, 2016. In a case directly on point from the Tennessee Court of Appeals, that court held that a person seeking access to a presidential preference primary ballot could only maintain a suit prior to the election upon in which she sought to appear on the ballot. *LaRouche v. Crowell*, 709 S.W.2d 585, 587 (Tenn. Ct. App. 1985). In that case, the trial court had granted defendant’s motion to dismiss for mootness and held that “the 1984 primary election has already been conducted and all questions relating to that election are moot. Whether [the candidate] will attempt to be placed on the ballot in 1988...are matters of pure conjecture and speculation, not appropriate for declaratory judgment.” *Id.* The Tennessee Court of Appeals fully upheld this reasoning as it relates to a candidate’s attempts to sue for access to a presidential preference primary ballot after conclusion of that election.

This Court should follow the Tennessee Court of Appeals' lead and dismiss this case on the basis of mootness. *Id.*

II. Secretary Hargett, In This Instance, Has Control Over Who Appears On The Ballot Under Tenn. Code Ann. § 2-5-205.

In relevant part, Tenn. Code Ann. § 2-5-205 states as follows:

a) The names of candidates for president of the United States shall be printed on the ballot for the presidential preference primary only if they are:

(1) The names of persons whom the secretary of state, *in the secretary of state's sole discretion*, has determined are generally advocated or recognized as candidates in national news media throughout the United States....

Tenn. Code Ann. § 2-5-205(a)(1) (emphasis added). In other words, under Tennessee law the initial decision as to whether a candidate can appear on a presidential preference ballot as a “recognized” candidate is within the sole discretion of Secretary Hargett. Tennessee election law provides no role, no discretion, and no function for the TNDP to allow a person to appear on the Ballot simply by virtue of being a nationally recognized candidate.³ Since Plaintiff sought only to qualify for the Ballot under Tenn. Code Ann. § 2-5-205(a)(1), and to the extent he was improperly left off the Ballot, his claim is strictly against Secretary Hargett. (Complaint ¶¶ 15-16 and Ex. A.)

Although Plaintiff's Complaint gives lip service to the fact that the TNDP's “Delegate Selection Plan” does not define “nationally recognized candidate,” this is wholly immaterial to the present suit. As Tenn. Code Ann. § 2-5-205(a)(1) it is not the TNDP's “Delegate Selection

³ This is not to say that the TNDP cannot in a different scenario have a say as to who may or may not appear on a presidential preference ballot. This is only limited to the present circumstance when a potential candidate attempted to qualify for a presidential preference primary ballot under the “nationally recognized candidate” prong of Tenn. Code Ann. § 2-5-205(a)(1) and was denied such access by the Tennessee Secretary of State.

Plan” that determines who is qualified to appear on the Ballot as a “nationally recognized candidate,” but rather the sole discretion of the Secretary Hargett.

Moreover, the Complaint is utterly devoid of any action that the TNDP took in depriving Plaintiff of any access to the Ballot. He does not allege the TNDP told Secretary Hargett to leave him off the Ballot, he does not allege Secretary Hargett requested such help from the TNDP, and he has alleged no role whatsoever the TNDP played in Secretary Hargett’s decision to leave Plaintiff off the Ballot.

Accordingly, even assuming *arguendo* that Plaintiff qualified as a nationally recognized candidate and Secretary Hargett improperly left his name off of the Ballot, Plaintiff’s claim is solely and exclusively against Secretary Hargett. The TNDP had nothing to do with it, and as a result Plaintiff has failed to state a claim against the TNDP upon which relief can be granted.

CONCLUSION

For the stated reasons, Defendants respectfully request that the Court dismiss the TNDP from this lawsuit.

Submitted this 8th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via U.S. Mail and the Court's CM/ECF system, on March 8, 2016, upon:

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/s/ J. Gerard Stranch, IV
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