

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. CHARLES V. HARRINGTON

CASE NO. **C-20085016**

COURT REPORTER: NONE

DATE: January 29, 2009

**BETH FORD, in her official capacity as Pima
County Treasurer,
Plaintiff,**

vs.

**DEMOCRATIC PARTY OF PIMA
COUNTY, a political organization; et al.
Defendants.**

**PIMA COUNTY COMMITTEE OF THE ARIZONA LIBERTARIAN PARTY INCORPORATED,
a political organization,
Cross-Claimant,**

vs.

**PIMA COUNTY; BETH FORD, in her official capacity as Pima County Treasurer
Cross-Defendants.**

UNDER ADVISEMENT RULING

**UNDER ADVISEMENT RULING RE: PIMA COUNTY'S MOTION TO DISMISS SECOND
AMENDED CROSS-CLAIM and RE: PIMA COUNTY'S OBJECTION TO DEMOCRATIC PARTY
OF PIMA COUNTY'S SUPPLEMENTAL CITATION OF AUTHORITIES**

I. Introduction

Pima County, joined in part by Treasurer Beth Ford, requests that this Court dismiss the Second Amended Cross-Claim of the Pima County Committee of the Arizona Libertarian Party Inc. ("Libertarian Party"), joined by the Democratic Party of Pima County ("Democratic Party").

The Libertarian Party's Cross-Claim, asserted against Pima County and Treasurer Beth Ford,¹ alleges that Pima County elections employees tampered with the ballots cast in the May 26, 2006, Special Election. The Libertarian Party requests that this court order (1) that the ballots be retained;² (2) that they be made available to the Libertarian Party for inspection as part of the on-going investigation into the tampering; and (3) after a hearing on the issue of tampering, issue an injunction to prevent a reoccurrence.

¹ As the parties acknowledge in their Joint Pretrial Memorandum, the Libertarian Party's claim against Beth Ford is not properly termed a cross-claim, but rather a counter-claim. Nevertheless, to avoid confusion, this Court will use the naming convention used in the pleadings.

² At this time, the Court is not ruling on the issue of whether Beth Ford shall retain or destroy the ballots pursuant to A.R.S. § 16-674, the issue that is the subject of the original Complaint in this case.

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Pima County argues that the Cross-Claim must be dismissed in its entirety on three alternative grounds: (1) the Court lacks subject matter jurisdiction; (2) as a matter of law the Cross-Claimants cannot be entitled to relief under any interpretation of the facts susceptible to proof; or (3) the Cross-Claimants have failed to join an indispensable party (i.e., the Arizona Attorney General) under Rule 19, Arizona Rules of Civil Procedure.

Beth Ford joins in Pima County's Motion to Dismiss with the exception that Ford contends that the Attorney General is not an indispensable party and should not be joined. Additionally, Ford argues that the claims against her must be dismissed because she is merely the custodian of the ballots at issue, and the Cross-Claim makes no substantive allegations against Ford or her office.

At the hearing on this motion, Pima County made an oral motion to strike the Democratic Party's Supplemental Citation of Authorities, filed on January 6, 2009. The supplement contains no citations of "new" law that could not have been included in the Democratic and Libertarian Parties' memorandum in opposition to the motion to dismiss, filed on December 12, 2008. Therefore, Pima County's motion to strike is granted.

This Court has read and considered the pleadings and memoranda of all parties as to the Motion to Dismiss, and heard oral argument on January 14, 2009.

In a nutshell, Cross-Claimants ask this Court to examine the ballots from a past election and find that elections employees tampered with the ballots, but then *do nothing* about that election's outcome. Rather, the Cross-Claimants urge this Court to issue an injunction prohibiting future ballot tampering. As explained in more detail below, nothing in law or equity allows this Court to circumvent the existing statutory schemes governing election challenges or to usurp the role of the executive branch by conducting what is essentially a criminal investigation. Therefore, the Motion to Dismiss Second Amended Cross-Claim is granted.

II. Analysis

This Court has striven to identify the exact legal or equitable ground upon which the Libertarian and Democratic Parties base their cross-claim.

To this Court, the cross-claim appears to be an election challenge, because it asks this Court to determine, in colloquial terms, whether the election was "rigged." Election challenges are governed by A.R.S. §§ 16-671, *et seq.* The jurisdictional time limit for bringing an election contest in county elections is "within five days after completion of the canvas of the election and the declaration of the result by [the Board of Supervisors]." A.R.S. § 16-673. The Court, after hearing all issues arising, shall "file its findings and immediately thereafter shall pronounce judgment, either confirming or annulling and setting aside the election." A.R.S. § 16-676(B).

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The Libertarian and Democratic parties argue that, because they are only seeking prospective relief in the form of an injunction against future unlawful conduct, and not seeking the statutory remedies of annulling or setting aside the election, that their action is not subject to the time limitation set forth in A.R.S. §§ 16-673. They argue that this Court has equitable powers to fashion an alternate remedy.

While it is true that this Court has equitable powers under certain circumstances, that authority is tempered by the principle that equity may not be invoked when the complainant has a plain, speedy, and adequate remedy at law. *City of Bisbee v. Arizona Ins. Agency*, 14 Ariz. 313, 314, 127 P.2d 722, 723 (1912). Put another way, courts of equity are as much bound by the plain provisions of statutes as are courts of law. *Valley Drive-In Theatre Corp. v. Superior Court*, 79 Ariz. 396, 399, 291 P.2d 213, 214 (1955). Because the elections statutes provide a remedy for the cross-claimants' allegations, their claim is subject to the jurisdictional time limits of A.R.S. § 16-673. Cross-Claimants filed their cross-claim more than two years after the canvas was completed and the cross-claim is therefore time-barred.

Assuming for the sake of argument that the cross-claim is not an election challenge, then it can only be a request for this Court to conduct an investigation into criminal conduct. Although the Democratic and Libertarian Parties assert in their memorandum that they are "not pursuing a criminal prosecution", the same parties argue that "[i]f . . . this Court has no jurisdiction to protect the foundation of the people's power in this state from criminal fraud, it would be a shocking result." (emphasis added).

It is axiomatic that this Court is not vested with the authority to perform criminal investigations, as that authority is vested in the executive branch of the government. Further, Pima County asserts that the Cross-Claimants lack standing to maintain a criminal investigation, a proceeding that would otherwise be handled by the Arizona Attorney General's office. This Court agrees with Pima County's assertion, and the Cross-Claimants have provided this Court no legal authority to support a request for this Court to conduct a criminal investigation.

Because this Court cannot identify a cognizable legal claim that is not otherwise time-barred, the Cross-Claim fails to state a claim on which relief can be granted. Because the Cross-claim fails to state a claim, this Court need not address whether the Attorney General is an indispensable party.

III. Ruling

IT IS HEREBY ORDERED that Pima County's Motion to Dismiss Second Amended Cross-Claim, as joined by Treasurer Beth Ford, is GRANTED.

DATED this _____ day of January, 2009.

HON. CHARLES V. HARRINGTON

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