

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CV 2008-08053

DANIEL P. SILVA, JAMES TAYLOR and
SHANNON ROBINSON,

Contestants,

vs.

ELEANOR CHAVEZ, CENTER FOR CIVIC POLICY,
INC., ELI IL YONG LEE, director and individually, *et al.*

Contestees and Third Party Defendants.

**MEMORANDUM IN SUPPORT OF NONPROFIT THIRD PARTY
DEFENDANTS' MOTION TO DISMISS ALL CLAIMS AGAINST THEM**

Defendants Center for Civic Policy, Eli Lee, Southwest Organizing Project, Bineshi Ozawa Albert, New Energy Economy, John Fogarty, and Keegan King (collectively "Nonprofit Third Party Defendants"), by and through undersigned counsel, submit this Memorandum in Support of their Motion to Dismiss All Claims Against Them.

**I.
INTRODUCTION**

On June 3, 2008, voters in three districts in Bernalillo County overwhelmingly cast their ballots in a statewide primary election in support of Eric Griego and Timothy Keller for state senate, and Eleanor Chavez for the state house of representatives (collectively "Contestees"). On August 1, 2008, the unsuccessful candidates in those districts, Shannon Robinson, Daniel P. Silva and James Taylor (collectively "Contestants"), filed this election contest. Contestants complaint ("Complaint") does not allege any of the usual conduct that constitutes legitimate grounds for filing an election contest, such as when a contestant's name is left off a ballot, when a contestant's name is placed in an improper position on a ballot, or when precincts fail to

properly count votes. Nor does the Complaint allege other irregularities in the mechanics of the election process that led to the Contestants' defeat in an election where each of them may have actually received a majority of the legal votes cast. Rather, Contestants here use the election contest procedures found in the New Mexico Election Code to complain of a widespread, well-funded "scheme to defraud voters" coordinated by certain nonprofit entities, their individual directors¹ and the Contestees. But for this grand conspiracy, Contestants argue, Robinson, Silva and Taylor somehow would have each overcome his respective widespread margin of defeat and won his election.

Setting aside the hyperbole permeating their Complaint, it is difficult to determine the precise legal theory under which Contestants bring this action. Contestants have filed an election contest, but do not seek a recount of the votes as contemplated by the Election Code. Instead, Contestants demand that this Court ignore the clear and convincing will of the voters, void the June 3, 2008, primary election result in its entirety, and simply declare the Contestants to be the winners in their respective races. Based on the allegations made in Contestants' Complaint, this action must be dismissed as to the Nonprofit Third Party Defendants in this case.

II. APPLICABLE LEGAL PRINCIPLES

A Rule 1-012(B)(6) motion to dismiss for failure to state a claim tests the sufficiency of the complaint. *See New Mexico Life Ins. Guar. Ass'n v. Quinn & Co., Inc.*, 111 N.M. 750, 753, 809 P.2d 1278, 1281 (N.M. 1991). Under the rule, dismissal is proper when the law does not support the claim under any set of facts subject to proof. *See Wallis v. Smith*, 2001-NMCA-017, ¶ 6, 130 N.M. 214, *cert. denied*, 130 N.M. 254, 23 P.3d 929 (2001). Dismissal is also proper

¹ Contestants have not named the proper individual defendants in the following instances: Bineshi Ozawa Albert is not "Albert Ozawa Bineshi." Keegan King is not the Director of New Energy Economy.

when a plaintiff lacks standing to pursue his claims. *See Town of Silver City v. Scartaccini*, 138 N.M. 813, 126 P.3d 1177 (N.M. Ct. App. 2005). In cases involving election contests, a valid claim must assert that the results of an election were changed by “irregularities,” or that the contestant was entitled to the certificate for nomination. *Eturriaga v. Valdez*, 109 N.M. 205, 207, 784 P.2d 24, 26 (N.M. 1989). In other words, a contestant of an election must allege that he or she was entitled to the certificate of nomination because they received “the greater number of the legal votes cast.” *Id.*; *see also Heth v. Armijo*, 83 N.M. 498, 494 P.2d 160 (N.M. 1972).

III. ARGUMENT

There are a number of legal deficiencies in the complaint filed by the Contestants that require the immediate dismissal of the Nonprofit Third Party Defendants. First, the Contestants have no legal basis to include the Nonprofit Third Party Defendants in this action because they are clearly not proper defendants in an election contest. Second, even if these defendants were proper parties to this contest, Contestants do not have standing to bring claims against these individuals and organizations for alleged violations of federal tax law or for any alleged violations of state campaign finance or campaign reporting laws. And finally, Contestants have failed to plead facts necessary to establish a legally valid claim under the statutes governing election contests in New Mexico.

A. The Nonprofit Third Party Defendants Should be Dismissed From This Action Because They are not Proper Parties to an Election Contest.

Contestants do not specify exactly how or why the Nonprofit Third Party Defendants are proper parties in this action. Instead, they only make outlandish allegations against these defendants that have nothing to do with the contest of an election. For instance, Contestants repeatedly claim that defendants acted in concert with the Contestees: 1) to “evade the New

Mexico Campaign Finance Act;” 2) to engage in a diabolical conspiracy to commit fraud upon voters by secretly financing coordinated advertisements; and 3) to “knowingly and recklessly register [] non-citizens to register and vote in the primary election.” *See* Complaint ¶¶ 3-5, 46. In addition, Contestants allege a myriad of civil violations and criminal conduct on the part of the Nonprofit Third Party Defendants that they contend violate the New Mexico Campaign Reporting Act, the New Mexico Campaign Practices Act and the Internal Revenue Code. *See* Complaint ¶¶ 7, 9, 43. None of these allegations, however, even if true, would make the Nonprofit Third Party Defendants proper parties to an election contest.

1) An election contest is exclusively between candidates.

Contestants’ disappointment over losing their seats in the elected offices they have held for some time is understandable. Nevertheless, Contestants’ choice for asserting their discontent with their substantial loss at the polls is not the appropriate or legal method by which to assert their complaints in this instance. As has long been recognized by the New Mexico judiciary, the right of an unsuccessful candidate to contest the result of a primary election is entirely and exclusively governed by the New Mexico Election Code. *See Dinwiddie v. Bd. Of County Comm’rs*, 103 N.M. 442, 445, 708 P.2d 1043, 1046 (N.M. 1985).

Under the relevant statute:

Any action to contest an election shall be commenced by filing a verified complaint of contest in the district court of the county where either of the parties resides. . . The party instituting the action shall be known as the contestant, *and the party against whom the action is instituted shall be known as the contestee.*

N.M.S.A. § 1-14-1 (1978) (emphasis added). This provision of the Election Code makes clear that the proper parties in an election contest are the “Contestee” and the “Contestant.” In fact, it is well-established law that an election contest is “a proceeding *exclusively* between rival

candidates for office in which the people are in no sense parties.” *Bull v. Southwick*, 2 N.M. 321 (1882) (emphasis added). A disappointed candidate for office cannot simply drag into such an election dispute any and all third parties and individuals he or she believes are somehow to blame for their loss. Instead, a contestant has a right to contest an election only in the manner and to the extent provided in the election contest statutes. *See State ex rel. Abercrombie v. District Court*, 37 N.M. 407, 24 P.2d 265 (N.M. 1933); *Montoya v. Gurule*, 39 N.M. 42, 38 P.2d 1118 (N.M. 1934); *State ex rel. Denton v. Vinyard*, 55 N.M. 205, 230 P.2d 238 (N.M. 1951).

Despite the dictates of the statutory scheme governing election contests, Contestants here have improperly named as “defendants” to this action individuals and organizations that are not the Contestees, including the Nonprofit Third Party Defendants. Contestants’ attempt to shoehorn these individuals and organization into these proceedings through unsubstantiated and false accusations of collusion with the actual Contestees necessarily must fail because the Nonprofit Third Party Defendants are not proper parties to an election contest brought under the Election Code. Therefore, the claims against the Nonprofit Third Party Defendants should be dismissed in their entirety. *See Montoya v. McManus*, 68 N.M. 381, 362 P.2d 771 (N.M. 1961) (holding that the statutory provisions for an election contest must be strictly followed); *see also Derus v. Higgins*, 555 N.W. 2d 515, 517-518 (Minn. 1996) (dismissing all claims against third party newspaper whom losing candidate for state senate had blamed for his defeat because the conduct of a third party could not be the basis for contesting an election result).

2) Contestants have not requested any relief that could be granted with regard to their claims against the Nonprofit Third Party Defendants.

Contestants’ sole request for relief in this action is that this Court void the election results in their respective districts and declare Contestants to be the winners in those elections. *See*

Complaint ¶¶ 50, 54, 58. Contestants do not, however, seek any relief that would specifically address the claims brought against the Nonprofit Third Party Defendants. Indeed, the statutes governing election contests in New Mexico do not provide for the granting of any relief from third party non-candidate individuals or organizations, but instead make clear that relief under the code can be sought only against the “contestee” in the election. As stated in the relevant statute, “judgment shall be rendered in favor of the party from whom a majority of the legal votes shall be proven to have been cast, and shall be to the effect that he is entitled to the office in controversy with all the privileges, powers and emoluments belonging thereto and for his costs.” NMSA § 1-14-4. Thus, regardless of how the Court may ultimately rule on the issues raised by the Contestants in this election contest, the Nonprofit Third Party Defendants have absolutely no stake in the matter and there is no relief that could be granted to Contestants related to their claims against these defendants. The action against the Nonprofit Third Party Defendants should therefore be dismissed.

B. Contestants do not Have Standing to Sue for Nonprofit Third Party Defendants’ Alleged Violations of Federal Tax Laws and State Campaign Practices Laws.

This is a suit contesting a primary election. However, the main thrust of Contestants’ complaints in this case—although certainly not well pleaded—is that the Nonprofit Third Party Defendants in this action have violated federal tax and state campaign practices laws. If this Court were to generously read Contestants’ complaint as asserting claims for these statutory violations, these claims must be dismissed as Contestants are not the proper parties to assert these claims because the applicable New Mexico and federal statutes do not provide them with a private cause of action as to these alleged violations.

1) Contestants do not have a private right of action against the Nonprofit Third Party Defendants for alleged violations of the New Mexico Campaign Practices and Reporting Act.

Contestants allege that the Nonprofit Third Party Defendants engaged in activities that violated Sections 1-19-16 of the Campaign Practices Act and 1-19-25 through 1-19-36 of the Campaign Reporting Act. *See* Complaint ¶ 9.

NMSA § 1-19-16 provides penalties against persons, organizations, and political committees who print or publish campaign advertising material that fails to specify the name of the sponsor or responsible officer who authorized the printing or publication of the material. Anyone who violates this statute is guilty of a fourth degree felony “and shall be punished as provided in the Criminal Code.” NMSA § 1-19-16(C). Contestants do not allege, nor could they as a matter of law, that they are entitled to enforce any provision of New Mexico’s criminal code.

The New Mexico Campaign Reporting Act, NMSA §§ 1-19-25 through 1-19-36 , states that “any person who believes that a provision of that act has been violated may file a written complaint with the secretary of state any time prior to ninety days after an election, except that no complaints from the public may be filed within eight days prior to an election.” Other than the one enumerated procedure for the filing of an individual’s complaint, it is the secretary of state who has authority to determine whether any provision of the Campaign Reporting Act has been violated. *See* NMSA § 1-19-34.4(B). If the secretary of state determines that a provision of the act has been violated, she may seek correction and an explanation from the reporting individual, *see* NMSA § 1-19-34.4(C), or she “may refer the matter to the attorney general or a district attorney for a civil injunction or other appropriate order or for criminal enforcement.”

NMSA § 1-19-34.4(G). Contestants cannot by law maintain that they are entitled to enforce, through civil action, the provisions of the Campaign Reporting Act.

2) Contestants do not have a private right of action against any of the Nonprofit Third Party Defendants for alleged violations of the Internal Revenue Code.

Contestants allege that Defendants engaged in activities that Contestants claim violated various provisions of the Internal Revenue Code (“IRC”). Without specifying how Defendants violated the IRC, Contestants cite random sections of the code that address issues such as exempt organizations and their contributions, private foundations and their undistributed income, exempt organization and their required returns, and general penalties for evading tax or failing to file returns.² See Complaint ¶ 9. However, even if these broad allegations are taken as true, it is the Secretary of the Treasury—not Contestants—who has the authority to investigate violations of the IRC, including “inquiring into any offense connected with the administration or enforcement of the internal revenue laws.” See 26 USC § 7602 (b). There is simply no legal basis for Contestants to infer that they have standing to sue Defendants for activities that allegedly violate federal tax law.

C. The Claims Brought by Contestants in this Election Contest Fail as a Matter of Law Because Contestants Have not Alleged, and Cannot in Good Faith Allege, that they Received the Majority of the Legal Votes Cast.

In New Mexico, in order to state a valid claim under the state’s election contest statutes, a contestant must allege that he or she “is legally entitled to the office” in question. *Heth v. Armijo*, 83 N.M. 498, 499, 494 P.2d 160, 161 (N.M. 1972) (quoting *Rogers v. Scott*, 35 N.M.

² Contestants allege violations of IRC 170(c)(2) (defining “charitable contribution”), 2055(a)(2) (describing the value of the taxable estate after deductions for transfers to charitable and educational organizations); IRC 4942 (describing axes on private foundations for undistributed income) IRC 6033(e) (describing returns required by exempt organizations) and IRC 7201 (describing penalties imposed for attempting to evade or defeat tax), and IRC 7203 (describing penalties imposed for willful failure to file return, supply information, or pay tax)

446, 300 P. 441 (N.M. 1931)). Ordinarily, this requires that the contestant allege that he or she “received more legal votes than the contestee.” *Id.* at 500, 162. At a minimum, the complaint must set forth a claim that “the results of the election were changed by the alleged irregularities, or that the contestant was entitled to the certificate of nomination. . .” *Eturriaga*, 109 N.M. at 207, 784 P.2d at 26. This requirement ensures that election contest procedures are used for the purpose that they were intended – to provide a mechanism by which to challenge election results that may be the product of irregularities in election procedures. *See id.*

Here, Contestants demand that this Court place them back into the political positions they lost during the elections because they were the victims of a grand conspiracy to remove them from office. They do not, however, allege that they received the majority of the legal votes cast in their respective elections, or even that there were irregularities in the manner by which the elections were conducted such that they lost when they actually had enough votes to win their bids for reelection.

Contestants have therefore failed to state a claim under the New Mexico statutes governing election contests and their action should be dismissed in its entirety.

IV. CONCLUSION

The Contestants here have improperly named as “defendants” a number of nonprofit entities and their individual directors in this election contest. Moreover, Contestants have not properly pled a valid claim against any of the parties in this action and do not have standing to act as private prosecutors for alleged violations of federal tax laws or state campaign finance laws. For these reasons the Non-profit Third Party Defendants request that this Court dismiss all claims brought against them in this election Pursuant to Rule 1-012(B)(6) NMRA.

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