

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LIBERTARIAN PARTY OF MICHIGAN,
GARY JOHNSON, and DENEEN ROCKMAN-
MOON,

Plaintiffs,

v

RUTH JOHNSON, Secretary of State of
Michigan, in her official capacity,

Defendant.

No. 2:12-CV-12782

HON. PAUL D. BORMAN

MAG. MICHAEL J.
HLUCHANIUK

Robert W. Roddis (P32145)
Attorney for Plaintiffs
424 Madison
Gross Pointe Farms, MI 48236
(734) 769-3430

Nicole A. Grimm (P74407)
Denise C. Barton (P41535)
Attorneys for Defendant
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

**DEFENDANT'S RESPONSE TO PLAINTIFFS'
MOTION TO EXPEDITE**

CONCISE STATEMENT OF ISSUES PRESENTED

1. Because Plaintiffs have created their own “election emergency” by neglecting to vigorously, or even reasonably, pursue their claims before this Court, their Motion to Expedite should be denied.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Kay v. Austin, 621 F.2d 809 (1980)

STATEMENT OF FACTS

This lawsuit, and the purported basis therefor, has existed for some time now. As discussed in the Secretary of State's Motion to Dismiss, Plaintiff Gary Johnson actively campaigned for the Republican Party nomination for President of the United States throughout 2011. Dkt. #4, Mot. to Dismiss, at p. 2; Dkt. #1, Compl., at ¶ 10. Prior to his unsuccessful run for said nomination, Gary Johnson announced, on or about December 28, 2012, that he would be seeking the presidential candidate nomination from the Libertarian Party, instead. Dkt. #4, Mot. to Dismiss, at p. 2; Dkt. #1, Compl., at ¶ 11. On May 3, 2010, the Secretary of State sent a letter to counsel for Plaintiff the Libertarian Party of Michigan (LPM) informing it that Mich. Comp. Laws 168.695, also known as Michigan's "sore loser law," prevented Gary Johnson, who had previously appeared as a candidate for the Republican Party on the presidential primary ballot, from running as the Libertarian Party's presidential candidate in the November 6, 2012 election. Dkt. #4, Mot. to Dismiss, p. 3; Dkt. #1, Compl., at ¶ 16. The Secretary of State's May 3, 2012 letter contained no ambiguity regarding her interpretation of the statute:

Because Governor Johnson's name lawfully appeared on the Republican Presidential primary ballot in Michigan, he is not eligible as a candidate of any other political party at the election following that primary In our opinion, Governor Johnson would be barred from appearing on the ballot at the November 6, 2012 general election as a presidential candidate for the Libertarian Party of Michigan.

Docket #4, at Ex. 1.

The Libertarian Party nominated Gary Johnson as its presidential candidate at its national convention held May 3-6, 2012. Despite Mich. Comp. Laws 168.695

and the Secretary of State's clear correspondence on May 3, 2012, the LPM ratified Gary Johnson as its presidential candidate on June 2, 2012. The LPM notified the Secretary of State of the ratification on June 4, 2012.

Weeks passed after these occurrences before Plaintiffs asserted any injury before this Court. Although Plaintiffs *filed* their Complaint with this Court on June 25, 2012, Dkt. #1, they did not *serve* their Complaint upon the Secretary of State until July 18, 2012, more than a month after the LPM nominated Gary Johnson as its presidential candidate.

The Secretary of State filed a Motion to Dismiss Plaintiffs' Complaint on July 31, 2012. Dkt. #4, Mot. to Dismiss. On August 6, 2012, this Court issued a briefing schedule requiring Plaintiffs to respond to the Secretary of State's motion by September 4, 2012 and setting the hearing date on the Secretary of State's motion for March 13, 2013. Plaintiffs waited thirteen days after this Court issued its scheduling order to file their Motion to Expedite on August 19, 2012, which is the subject of the instant response. Dkt. # 9, Mot. to Expedite.

ARGUMENT

I. Gary Johnson's lawsuit lacks merit.

Plaintiffs' Motion to Expedite includes a second brief on the merits of its claims and the affidavit and curriculum vitae of Richard Winger. These materials have no relevance whatsoever to Plaintiffs' Motion to Expedite and serve only to reiterate the substantive arguments already made before this Court; as such they should be disregarded. Plaintiffs' case lacks merit for the reasons set forth in the

Secretary of State's Motion to Dismiss Plaintiffs' Complaint. Mot. to Dismiss, Dkt. # 4, Appendix to Mot. to Dismiss, Dkt. #5. Yet irrespective of the merits of Plaintiffs' claims, there is no basis for granting Plaintiffs' motion to expedite consideration of this matter. That is, even if this Court finds some degree of merit to Plaintiffs' claims, Plaintiffs have simply waited too long to assert their rights to have this Court consider Plaintiffs' purported injury a serious one or to compromise the State's interest in an orderly election by adjudicating Plaintiffs' claims on an inordinately expedited basis. Case law supports this conclusion.

II. Gary Johnson's untimely request for expedited action is barred by laches.

Gary Johnson's request to expedite the proceedings in this case is barred by laches. The defense of laches is rooted in the principle that "equity aids the vigilant, not those who slumber on their rights." *Lucking v. Schram*, 117 F.2d 160 (6th Cir. 1941). An action may be barred by the equitable defense of laches if: (1) the plaintiff delayed unreasonably in asserting her rights and (2) the defendant is prejudiced by this delay. *Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000).

In *Kay v. Austin*, 621 F.2d 809 (1980), the Sixth Circuit considered laches in the context of an elections case like this one. In that case, the plaintiff sought to have his name included on the 1980 Michigan presidential primary ballot as a candidate generally advocated by the national news media, as allowed by MCL 169.614. *Id.* at 810. There was no factual dispute that the plaintiff was informed

that if he was selected, he would be informed of his selection shortly after March 7, 1980. *Id.* When the plaintiff had heard nothing for some time after that date, he called the Secretary of State's office on March 20, 1980 and learned that his name would not appear on the ballot. *Id.* The plaintiff filed suit eleven days later. *Id.*

The Sixth Circuit held that laches barred the plaintiff's claim to equitable relief. *Id.* at 813. In reaching this conclusion, the Court reasoned that "[a]s time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by having slept on his rights." *Id.* In the time-sensitive elections context, the Court found that the fact that the plaintiff "waited until nearly two weeks after he knew the choice of the candidates would be made," and that he "further delayed eleven days before filing suit," indicated that he had failed to expeditiously "press his case" – and that the failure to sufficiently pursue his claim "when he should have known that an injury had occurred" was "fatal to his receiving any relief." *Id.* *See also McNeilly v. Terri Lynn Land*, No. 1:10-cv-612 (W. Mich., filed July 22, 2010) (denying relief to a plaintiff who failed to pursue his November elections claim until June 28, 2010 because "[w]hether based on laches, as argued by Defendant, or merely the fair and efficient administration of justice, the Court finds no basis in the facts or the law to accommodate what is essentially Plaintiff's 'self-made election emergency.'").

As in *McNeilly*, Plaintiffs have created their own “election emergency” in this case. At the latest, Plaintiffs knew they had suffered some form of injury on June 2, 2012, when Gary Johnson secured the LPM’s nomination for 2012 presidential candidate. Yet despite this knowledge, Plaintiffs “slept on [their] rights,” i.e., neglected to serve the Secretary of State with their complaint in this case, for more than a month. Although Plaintiffs knew that the election was fast approaching, they filed their Complaint and their subsequent Motion for Summary Judgment without corresponding requests to expedite their action. Dkt. ##1, 6. It took Plaintiffs *thirteen days* after this Court issued its scheduling order setting the hearing date on the Secretary of State’s Motion to Dismiss Plaintiffs’ Complaint for March 2013 for Plaintiffs to finally request that their case be expedited.

Plaintiffs’ dilatory conduct in this case is even more pronounced than that which the Sixth Circuit found “fatal to . . . any relief” in *Kay*. *Kay*, 621 F.2d at 813. Whereas the plaintiff in *Kay* waited only eleven days after his injury accrued to sue, *id.* at 810, Plaintiffs in this case waited twenty-three days after the LMP nominated Gary Johnson as its candidate to file their Complaint on June 25, 2012. Plaintiffs then waited almost another month to *serve* the Secretary of State with their Complaint, which they did not do until July 18, 2012. Finally, Plaintiffs waited *thirteen days* after this Court had issued a briefing schedule setting the hearing date on the Secretary of State’s Motion to Dismiss Plaintiffs’ Complaint to object to the dates contained therein. Mot. to Expedite, Dkt. #9. As the Sixth Circuit indicated in *Kay*, this passage of time severely undermines a “candidate’s claim to

be a serious candidate who has received a serious injury.” *Id.* at 813. In the same way, the Secretary of State strongly disagrees with Plaintiffs’ argument that she will not be prejudiced by the delay that has occurred in this case. Plaintiffs’ delay has prejudiced the State, whose “interest in proceeding with the election increases in importance” as she works diligently to prepare the ballot for the November general 2012 election. *Id.*

There are presently seventeen days, thirteen business days, before the September 7, 2012 date on which ballots for the November 2012 general election ballot must be printed. Exhibit 1, Affidavit of Christopher Thomas, at ¶ 7. Recognizing that all issues relative to ballot content must be unequivocally and finally resolved by before this date, the Michigan Supreme Court has held in another elections case that the Michigan Court of Appeals must render its decision on the merits of an elections challenge by August 27, 2012. *Protect Our Jobs v. Bd. of State Canvassers* (Mich. S.C., filed Aug. 21, 2012).

Either party that is disappointed in the result of this Court’s adjudication of the issues before it would most certainly appeal to the Court of Appeals for the Sixth Circuit. Plaintiffs provide no excuses whatsoever for their delays in filing this lawsuit or pursuing it, and based purely on their inaction in this matter, there is simply not sufficient time to adjudicate Plaintiffs’ claim at the trial court level, let alone before this Court and an appellate tribunal, within the time table provided. Even if there were, Plaintiffs’ failure to pursue their claim diligently, or even reasonably, means that laches bars their requested recovery.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs' Motion to Expedite is barred by laches. Accordingly, for the reasons more fully articulated herein, the Secretary of State respectfully requests that this Court deny Plaintiffs' Motion.

Respectfully submitted,

BILL SCHUETTE
Attorney General

s/Nicole A. Grimm
Nicole A. Grimm (P74407)
Denise C. Barton (P41535)
Attorneys for Defendant
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434
E-mail: grimmn@michigan.gov
(P74407)

Dated: August 22, 2012

CERTIFICATE OF SERVICE (e-file)

I hereby certify that on July 20, 2012, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

s/Nicole A. Grimm
Nicole A. Grimm (P74407)
Attorney for Defendant
Michigan Department of Attorney
General
Public Employment, Elections & Tort
Division
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434
E-mail: grimmn@michigan.gov
(P74407)