

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREG DORSEY,

Plaintiff,

v.

LINDA H. LAMONE, et al.,

Defendants.

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Case No. 1:15-cv-02170-GLR

PLAINTIFF’S RESPONSE IN OPPOSITION TO MOTION TO DISMISS

On July 24, 2015, Plaintiff Greg Dorsey, a Maryland citizen who seeks access to the ballot in Maryland as an unaffiliated candidate for the 2016 United States Senate election and who wants to cast his vote for himself as an unaffiliated candidate for this U.S. Senate seat filed this lawsuit alleging that the requirements under Maryland law for unaffiliated candidates for such a seat unfairly burdens such candidates and voters and specifically is unconstitutional insofar as it discriminates against unaffiliated candidates in comparison with minor political party candidates.¹ [DE 1]

On September 4, 2015, Defendants filed a Motion to Dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, seeking the dismissal with prejudice of this lawsuit, on the assertion that it fails to state a claim upon which relief can be granted. [DE 9]

With all due respect to Defendants, the Motion is utterly without merit and must be denied out of hand. Defendants’ Memorandum in support of their Motion

¹“Unaffiliated” candidates in Maryland are independent candidates running for elective office on their own and not through any political party.

[DE 9-1], is quite long and it is well written; but it argues well beyond the purview of a motion to dismiss, is based in large part on unsupported factual assertions or matters of opinion without any support for the same apparent beyond, perhaps, counsel's views, and it does not in any way support dismissal under the standard for considering Rule 12(b)(6) motions. Plaintiff must be permitted to go forward with discovery and to a trial on the merits of his important constitutional claims.

Analytical Framework for a Rule 12(b)(6) Motion

“The purpose of a 12(b)(6) motion is to test the sufficiency of a Complaint; ‘importantly, [a Rule 12(b)(6)] motion does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses.’” *Butler v. U.S.*, 702 F.3d 749, 752 (4th Cir. 2012)(quotation omitted).

“To survive a Rule 12(b)(6) motion, a Complaint must satisfy the pleading standard articulated in Fed.R.Civ.P. 8(a)(2), which requires a ‘short and plain statement of the claim showing the pleader is entitled to relief.’” *Sinclair v. Parnell*, 2014 WL 4052859, *3 (D. Md., August 13, 2014)(Russell, J.); *Petty v. Sampong*, 2014 WL 4662397 (D. Md., September 16, 2014); Fed.R.Civ.P. 8(a)(2); *Buckler v. Israel*, 2014 WL 1464472, *4 (S.D. Fla., April 14, 2014); *Baez v. Root*, 2014 WL 1414433, *2 (S.D. Fla., April 11, 2014).

A complaint “attacked by a Rule 12(b)(6) motion does not need detailed factual allegations;” however, (F)actual allegations must be enough to raise a right to relief above the speculative level.” *Id.*, quoting from, *Bell Atlantic Corp. V. Twombly*, 550 U.S. 544, 555 (2007). The complaint must be “plausible on its

face” and must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Mancinni v. Broward County Sheriff*, 2014 WL 7792953, *2 (S.D. Fla., October 21, 2014), *citing, Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(quotations omitted); *Covey v. Assessor of Ohio County*, 777 F.3d 186, 192 (4th Cir. 2015); *Sinclair*, at *3.

“When considering a motion to dismiss, all facts set forth in the plaintiff’s complaint are accepted as true and the court limits its consideration to the pleadings” (where, as here, there are no exhibits attached thereto). *Mancinni, Id.*

Further when considering whether dismissal is appropriate pursuant to Fed.R.Civ.P. 12(b)(6), the court must construe the allegations and draw all favorable inferences in the light most favorable to the plaintiff. *Shiheed v. Shaffer*, 2015 WL 4984505, *2 (D. Md., August 18, 2015)(Russell, J.).

A complaint may not be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Mancinni, Id.* (Citations omitted).

A complaint “must be liberally construed” and “should not be dismissed simply because the court is doubtful that the plaintiff will be able to prove all of the necessary factual allegations.” Indeed, “a well pleaded complaint will survive a motion to dismiss ‘even if it appears that a recovery is very remote and unlikely.’” *Spadaro v. City of Miramar*, 855 F.Supp.2d 1317, 1328 (S.D. Fla. 2012), *quoting from, Twombly*, 550 U.S. at 555-556.

Indeed, as the Fourth Circuit has written as recently as this month, “[a]

lawsuit need not be meritorious to proceed past the motion-to-dismiss stage.” In fact, ‘a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbably and that a recovery is very remote and unlikely. To dismiss (a Complaint) because of some initial skepticism would be to mistakenly ‘collapse discovery, summary judgment[,] and trial into the pleading stages of a case.’” *SD3 LLC v. Black and Decker (U.S.) Inc.*, – F.3d –, 2015 WL 5334119, *17 (4th Cir., September 15, 2015).

The Motion to Dismiss Has No Merit

Plaintiff alleges the following in the Complaint in this case:

In order for him to gain access to the ballot in Maryland as an unaffiliated candidate for the 2016 United States Senate seat, Maryland law requires that the unaffiliated candidate file, *inter alia*, a ballot access petition signed by not less than 1% of the total registered voters who are eligible to vote for the office of U.S. Senate, with the 1% figure determined as of January 1, 2016. *See* MD Code, Election Law, § 5-703. A fair estimate, based on Maryland’s voter registration recent history and the fact that 2016 is a Presidential election year, is that an unaffiliated candidate for the 2016 U.S. Senate election in Maryland would require approximately 38,000 or more verified signatures.

In contrast, a candidate for this same U.S. Senate seat in Maryland in the 2016 election who seeks election to that seat as a representative of a new political party and is selected to be the new political party’s candidate for the same, automatically gains access to the ballot as a candidate for that seat or for any

elective office in Maryland in 2016 for which his or her new political party selects him or her, if the new political party files a ballot access petition signed by a total of 10,000 registered voters eligible to vote in Maryland on the first day of the month in which the petition is submitted. *See* MD Code, Election Law, §§4-102; 5-703.1.

In this lawsuit, as a qualified Maryland voter and as a Maryland resident-citizen who seeks access to the 2016 ballot in Maryland as a candidate for a seat in the U.S. Senate, Mr. Dorsey challenges the onerous requirements under Maryland law for an unaffiliated candidate to gain access to the ballot for a U.S. Senate seat. He specifically challenges such requirements, under the First and Fourteenth Amendments to the United States Constitution, insofar as Maryland law places a far more severe burden on unaffiliated candidates for such a seat and on their supporters and qualified voters who seek to cast their votes for him than the burden placed on candidates from a partisan political party and their supporters and voters. [DE 1 at 1-3]

As the Complaint alleges and Defendants acknowledge, under Maryland law, other than as a write-in candidate, there are three avenues for gaining access to the ballot for election as a U.S. Senator:

Qualified candidates seeking access to the 2016 general election ballot in Maryland for the office of U.S. Senate through the Democratic or Republican parties simply vie for the party's nomination for that seat and, once nominated, automatically are placed on Maryland's general election ballot for the U.S. Senate

race. They do not need to file any ballot access signature petition.

Qualified candidates seeking access to the 2016 general election ballot in Maryland for the office of U.S. Senator through a new political party (a political party other than the Democratic or Republican parties) simply vie for selection by the new political party to be its candidate for the seat of U.S. Senator and if the new political party as a whole files a ballot access signature petition reflecting the signatures of a total of 10,000 qualified electors, its nominee is placed on the 2016 general election ballot in Maryland for the seat of U.S. Senator. In addition, all other qualified candidates the new political party selects to be a candidate for any other elective office in Maryland under its party banner on the 2016 ballot also automatically gain access to the ballot by virtue of the new political party having obtained and filed 10,000 verifiable signatures, regardless of whether any support at all has been demonstrated for any such individual candidate running under the new political party's banner. MD CODE, Election Law, § 4-102.

Qualified candidates seeking access to the 2016 general election ballot in Maryland for the office of U.S. Senator as unaffiliated candidates must obtain and file by the first Monday in August in 2016, ballot access signature petitions containing verifiable signatures of not less in number than 1% of the total number of registered voters who are eligible to vote for the office of U.S. Senator from Maryland, with such number calculated as of January 1, 2016. MD Code, Election Law § 5-703.

The number of signatures that such an unaffiliated candidate in Maryland

has to obtain and submit in order to gain access to the ballot is the 4th highest of any state in the country and in the 3 states with a higher number of signatures, the law does not have such a disparity between unaffiliated and new or third party candidates. The unaffiliated candidate for a U.S. Senate seat in Maryland also has to pay a fee of \$290.00. MD Code, Election Law, § 5-401(b)(5). [DE 1 at 7]

It is impossible for Plaintiff or any unaffiliated candidate for the position of U.S. Senator from Maryland to know the exact number of signatures he or she will be required to obtain to gain access to the 2016 ballot until January 1, 2016. MD Code, Election Law, § 5-703(e)(3); yet a candidate for the same seat running under the banner of a new political party faces no such uncertainty. [DE 1 at 7]

The State Board estimates that the number of verifiable signatures that an unaffiliated candidate for Maryland's U.S. Senate seat in 2016 will need to obtain and file in order to gain access to the 2016 ballot is in excess of 38,000 and perhaps significantly more since 2016 is a presidential election year. In light of Maryland's verification process, a responsible unaffiliated candidate needing 38,000 verified signatures must plan to obtain approximately 60,000 raw signatures to have a reasonable safety margin.

Obtaining this amount of verifiable or raw signatures would require a tremendous amount of time and energy, limiting the amount of time and energy that can be devoted to the campaign. It also is very expensive, costing perhaps upwards of \$100,000 to retain a reasonable amount of relatively low paid help in undertaking to obtain the signatures. [DE 1 at 7-8]

Plaintiff Dorsey has been advised by the State Board that he really must obtain well in excess of the required number of signatures in order to be certain to have enough, given the number of signatures typically disqualified or otherwise not determine by the Defendant to be verifiable. [DE 1 at 8]

Mr. Dorsey has worked diligently at all times to meet all requirements for access to the 2016 ballot in Maryland for the office of U.S. Senator. [DE 1 at 8]

All of these facts of course, at this stage, be taken as true and all reasonable inferences flowing from them must be considered in favor of Mr. Dorsey, based on the authority cited above.

Mr. Dorsey has alleged that on the operative facts, Maryland's requirements for him to obtain ballot access as an unaffiliated candidate for the race he seeks to join, places a severe burden on the Plaintiff, requiring analysis under a strict scrutiny standard and cannot be justified by any sufficiently compelling state interest. [DE 1 at 8] Additionally, he asserts that requiring him to obtain in excess of 38,000 signatures to gain access to the ballot as an unaffiliated candidate for U.S. Senator from Maryland on the 2016 ballot unfairly burdens and discriminates against unaffiliated candidates and unfairly treats them in relation to new political party candidates and candidates of the Democratic and Republican parties and others similarly situated. [DE 1 at 8-9]

In the balance of his Complaint, Mr. Dorsey describes the burden the law places on him, the impact it will have on his candidacy if allowed to stand, and he complains that it unfairly discriminates between party candidates and unaffiliated

candidates in violation of his rights and the rights of voters who would like to cast their ballot for him as an unaffiliated candidate, under the First and Fourteenth Amendments to the United States Constitution. [DE 1 at 9-13]

In response to these assertions, Defendants have filed a motion to dismiss under Rule 12(b)(6), arguing that the Complaint fails to state a claim upon relief can be granted. In support of their position, Defendants argue (1) that Maryland's ballot access laws actually only place a "slight burden" on unaffiliated candidates and therefore do not merit strict scrutiny [DE 9-1 at 8-11]; and (2) that the law at issue does not violate Mr. Dorsey's rights because a State is allowed to treat unaffiliated and party candidates differently [DE 9-1 at 11-17].

Defendants' arguments are based, in the main, on nothing more than defense counsel's views on the severity of the burden various requirements in Maryland's ballot access laws place on unaffiliated candidates and a mistaken view, which finds no support in the law, that because there unaffiliated candidates and party candidates are differently situated in some ways, anything goes. Defendants' arguments, of course, are not in any way based on any record fact or piece of evidence, nor could they be at this stage, and, in any event, they are entirely inappropriate and completely unavailing in support of a Rule 12(b)(6) motion to dismiss.

Indeed, they have little or nothing whatsoever to do with whether Mr. Dorsey has met the pleading standard under Fed.R.Civ.P. 8(a)(2) or any other part of the established inquiry under the requisite analysis for a Rule 12(b)(6) motion.

Plaintiff certainly intends to establish as the case proceeds that Defendants' arguments are entirely wrong on the merits as well; but this is neither the time nor the place for the same.

Defendants recognize some of the relevant authority surrounding the underlying merits question of whether the far greater signature burden Maryland places on unaffiliated candidates in comparison to minor party candidates can withstand constitutional scrutiny; but in asking the Court to decide that question now, on a motion to dismiss with no record evidence concerning the burden or the countervailing claimed state interests, with no expert testimony, with no evidence of the history which reflects the discrimination against unaffiliated candidates (and which indisputably is relevant under the applicable jurisprudence), the Defendants present a skewed picture of the state of the law and, in any event, undercut their claim that the case should be dismissed on a Rule 12(b)(6) motion.

It is beyond any question that Mr. Dorsey has pled facts sufficient to go forward and that a claim, based on undisputed facts, that requiring unaffiliated candidates to get almost four times the number of signatures required of minor party candidates (with the minor party then getting full ballot access) raises an actionable constitutional claim. This is not even a close call. The level of scrutiny that should be applied and the constitutional acceptability of the differences in treatment accorded by Maryland law are merits question for this Court to determine as this case proceeds.

One of the most odd features of Defendants' Memorandum is found on Page

13 of DE 9-1. Defendants demonstrate that they are familiar with the Fourth Circuit's decision in *Cromer v. South Carolina*, 917 F.2d 819 (4th Cir. 1990); yet they cite it in support of their argument that the State has interests in regulating unaffiliated candidates, while ignoring the most directly relevant language in the case, cited in Mr. Dorsey's Complaint (DE 1 at 10), which undercuts the generalized claim Defendants make that it is ok to treat minor party candidates and unaffiliated candidates differently because they are differently situated and that such different treatment does not rise to the level of a constitutional concern.

In fact, this Circuit in *Cromer*, 917 F.2d 819 at 823, indicated just the opposite when it wrote:

“And as between new (third) party candidacies and independent candidacies, independent candidacies must be accorded even more protection than third party candidacies. This flows from the states' heightened interest in regulating the formation of new parties having the potential not possessed by independent candidates for long-term party control of state government, in combination with the peculiar potential that independent candidacies have for responding to issues that only emerge during or after the party primary process.”
(Citations omitted)

As the Fourth Circuit wrote, if minor party candidates and unaffiliated candidates are to be treated differently, in the wisdom of the legislature, the unaffiliated/independent candidates must be **accorded more protection than minor party candidates, not less**. Even without more, this clearly opens the door to Mr. Dorsey's challenge to Maryland's ballot access scheme which requires almost four times the number of signatures for independents than it requires for full ballot access by a minor party. Defendants' Rule 12(b)(6) motion should be

denied as frivolous on the language in *Cromer* alone; but there is, of course, much more.

A full exposition on the jurisprudence which supports the merits of Mr. Dorsey's claims certainly is not required here; but some discussion will be provided in response to Defendants' assertions, even Defendants' arguments are spurious at this juncture.

First of all, Equal Protection jurisprudence is alive and doing quite well in terms of requiring vigilance to ballot access related statutes which discriminate against minor parties or independent candidates and those who would vote for them and such jurisprudence clearly requires striking down statutes which discriminate against minor parties or independents, even when the discrimination falls short of functionally excluding such candidates from the ballot. *See e.g.*, *Green Party of Tennessee v. Hargett*, 791 F.3d 684 (6th Cir. 2015)(reaffirming the centrality of Equal Protection analysis in considering the constitutionality of ballot access laws which treat minor parties differently from major parties - and emphasizing the importance of fact-finding and fact-specific analysis); *Green Party v. Aichele*, – F.Supp. 3d –, 2015 WL 871150, *22 (E.D. Pa., March 2, 2015)(Ballot access restrictions must not discriminate against minor parties); *Lux v. Judd*, 651 F.3d 396 (4th Cir. 2011)(reversing Rule 12(b)(6) dismissal and remanding for fact-finding and opportunity for additional arguments, notwithstanding considerable leeway afforded in regulating ballots); *Lux v. Judd*, 842 F.Supp.2d 895 (E.D. Va. 2012)(on remand, minor party prevails on First

Amendment grounds); *Libertarian Party of Virginia v. Judd*, 881 F.Supp.2d 719 (E.D. Va. 2012); *Delaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D. N.C. 2004)(Equal Protection prohibits discrimination against minor parties or independents and between minor parties and independents).

The Court's decision in *Delaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D. N.C. 2004) completely undermines Defendants' argument that Mr. Dorsey's Complaint should be dismissed under Rule 12(b)(6). Defendants acknowledge the decision and acknowledge further, as they must, that it is a decision in which a court within this Circuit squarely held that a state's ballot access statute which required more signatures for unaffiliated candidates than were required for minor party candidates violated the First and Fourteenth Amendments. But Defendants stab at distinguishing the case by simply opining in conclusory fashion that Maryland's statutes do not impose as severe a burden as North Carolina's did in *Delaney* and therefore this Court should decline to apply strict scrutiny and can ignore *Delaney* since it applied strict scrutiny. [DE 9-1 at 16-17]

Defendants argument is completely out of line in the context of a Rule 12(b)(6) motion; but it is also dead wrong on the merits. Indeed, the decision undercuts not just the Rule 12(b)(6) argument, but even principles on which Defendants purport to base their argument. For example, at Pages 8-11 of their Memorandum, Defendants attempt to convince the Court (inappropriately without any evidence and in the context of a Rule 12(b)(6) motion) that the burden on unaffiliated candidates actually is slight and therefore, even if the signature

requirement is greater than what is required for minor party candidates, it is not constitutionally infirm because standing on its own it is acceptable. Plaintiff challenges this factual premise; but more to the point here, the Court in *Delaney* rejected that exact argument.

In *Delaney*, 370 F. Supp. 2d at 378, the Court expressly wrote that based on the level of the disparity in the signature requirement (a smaller disparity than is present here) and the historical evidence (which applies with full force here), even though the signature requirement itself, imposed on unaffiliated candidates was not *per se* unconstitutional, it was the burden vis a vis minor party candidates that made it problematic (unconstitutionally discriminatory) and sufficiently so as to require strict scrutiny.

Defendants refer the Court to other decisions from courts elsewhere in which signature disparity claims have not prevailed [DE 9-1 at 15-16]; but such cases do not in any way support dismissal of the instant case under Rule 12(b)(6).²

There is a great deal more by way of merits-directed legal argument that

² Plaintiff will not unduly burden the Court with a detailed response to an argument that has no place in the context of a Rule 12(b)(6) motion. Suffice it to say that one of the cases cited by Defendants in which the unaffiliated candidate lost and the court declined to apply strict scrutiny, *Nader v. Cronin*, 620 F.3d 1214 (9th Cir. 2010), is completely distinguishable on this issue, based on the *de minimis* signature requirement and differential at issue. The Ninth Circuit, perhaps not surprisingly, did not find the requirement that an independent candidate obtain a total of 3500 signatures to raise a “severe burden” requiring strict scrutiny or for the disparity (3500 vs. 600 for a minor political party). But there is a major difference between 3500 and 38,000; moreover, the deadline for the unaffiliated candidates to file their signature petitions was some seven months later than the deadline for the minor party candidates to file theirs, further significantly easing the burden. The other case cited by Defendants, *Parker v. Duran*, 2014 WL 7653394 (D. N.M., August 7, 2014)[DE 9-1 at 15-16] is currently pending on appeal in the Tenth Circuit, is factually distinguishable, and was decided after a hearing on the injunctive relief sought after a record was developed and not on a Rule 12(b)(6) motion.

could be offered here; but it is neither necessary nor appropriate in this procedural posture. Mr. Dorsey's Complaint states a fully viable (and meritorious) constitutional claim challenging the gross disparity in ballot access requirements for unaffiliated candidates for the elective office Mr. Dorsey seeks vis a vis ballot access requirements for party candidates for the same seat.

Mr. Dorsey's position on the severity of the burden, the requirement for strict scrutiny to be applied, and unconstitutionality of the relevant provisions of Maryland's ballot access laws at issue here will be supported by fact-specific submissions, expert testimony, and relevant historical facts, directly relevant under well settled jurisprudence. *See e.g., Storer v. Brown*, 415 U.S. 724 (1974).³

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully submits that Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) must be denied

Plaintiff respectfully submits that the Defendants' motion is due to be denied out of hand for lack of merit; however, Plaintiff, of course, remains ready and willing to appear before the Court to orally argue this motion if the Court believes the same would be helpful.

³ For example, Mr. Dorsey expects to adduce evidence that since the signature requirement in effect now for unaffiliated candidates has been in effect (since 1999), only one (very wealthy) unaffiliated candidate has achieved ballot access in a statewide race; whereas 27 minor party candidates have achieved ballot access in a statewide race during this same time frame, based on the gross disparity in requirements which Mr. Dorsey has alleged unconstitutionally favor minor party candidates over unaffiliated candidates. And, of course, he will put on evidence of the creation of sham political parties to "get over on" this gross disparity to further demonstrate the real difference the disparity makes between gaining ballot access and being excluded.

Respectfully Submitted.

/s/ David I. Schoen
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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing to be served on all counsel of record by filing the same through this Court's ECF system on this 21st day of September, 2015.

/s/ David I. Schoen
Counsel for Plaintiff Greg Dorsey
(Bar No. 28554)