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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/30/2012
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RECALL THEM ALL 2012, a) 1 CA-CV 12-0617 EL
political committee; and)
MITCHELL DUNN,) DEPARTMENT B
)
Plaintiffs/Appellants,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
ROBYN STALLWORTH-POUQUETTE, in)
her official capacity as Yuma)
County Recorder; and LYNDA)
BUSHONG, in her official)
capacity as Yuma City Clerk,)
)
Defendants/Appellees,)
)
)
PAUL JOHNSON and JERRY STUART,)
Yuma City Councilmen,)
)
Real Parties in Interest/)
Appellees.)
_____)

Appeal from the Superior Court in Yuma County

Cause No. S1400CV201200890

The Honorable John Neff Nelson, Judge

REVERSED AND REMANDED

Davis Miles McGuire Gardner, PLLC
by Joshua W. Carden
Attorneys for Plaintiffs/Appellants

Tempe

Snell & Wilmer LLP
by Adam E. Lang
Eric H. Spencer
Martha E. Gibbs
Attorneys for Defendant/Appellee Lynda Bushong

Phoenix

Glenn J. Gimbut, San Luis City Attorney
by Glenn J. Gimbut
Attorneys for Real Parties in Interest/Appellees

San Luis

P O R T L E Y, Judge

¶1 We are asked to determine whether the trial court erred by dismissing the special action filed by Recall Them All 2012 and its Chairman, Mitchell Dunn (collectively "the Committee"), for lack of jurisdiction. For the reasons that follow, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 The Committee sought to recall Yuma Councilmembers Paul Johnson and Jerry Stuart. The Committee filed an application for recall petitions, circulated the petitions, and submitted them to the Yuma City Clerk ("Clerk") to verify the signatures pursuant to Arizona Revised Statutes ("A.R.S.") section 19-208.01 (West 2012). The Clerk, as the receiving officer,¹ and pursuant to the authority of § 19-202.01(A) (West 2012), struck some signatures but still found that the verified signatures exceeded the constitutional minimum, and submitted the signatures for verification to the Yuma County Recorder

¹The City Clerk is the receiving officer for purposes of a municipal recall election. A.R.S. § 19-203(A) (West 2012).

("Recorder") pursuant to § 19.208.02(A). The Recorder struck additional signatures and returned the petitions to the Clerk, noting that the remaining verified signatures fell below the constitutional minimum.

¶13 The Clerk notified the Committee that the petitions did not have sufficient verified signatures to force a recall election. The Committee then filed a "statutory" special action complaint against the Clerk and Recorder challenging the disqualification of the signatures under § 19.208.04(B) (West 2012).² The Clerk responded by arguing that § 19.208.04(B) does not provide a cause of action to challenge the determination that the recall petitions had insufficient signatures to force an election. The trial court set a show cause hearing and heard argument. The court noted that it did not find any "statutory action whereby the signatures have been found to be insufficient" and "was not in a position to amend the pleadings." As a result, the court dismissed the case because it had "no jurisdiction over the case as pled." The court then asked for and received a form of order "for purposes of the

² The Councilmembers intervened and were the Real-Parties-in-Interest in the trial court. Their arguments are similar to those of the Clerk.

appeal process" and dismissed the case with prejudice. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (West 2012).³

DISCUSSION

¶4 "The Arizona Constitution guarantees the people the right to recall public officers who hold elective offices." *Ross v. Bennett*, 228 Ariz. 174, 176, ¶ 7, 265 P.3d 356, 358 (2011). "Although the recall procedure has been used rarely," the "recall provision remains in force today" and our supreme court has "interpreted constitutional and statutory provisions governing recall liberally to protect the public's right to recall its officials." *Id.* at ¶¶ 7-8. Mindful of the continuing historical importance of the ability of citizens to attempt to recall their elected officials, we turn to whether the trial court erred by dismissing this case.

¶5 The trial court dismissed this action for two reasons. First, the court did not find authority that allows a challenge to the receiving officer and Recorder for insufficient signatures. Second, the court declined to amend the pleading even though it recognized that "other relief may be available." We will address each in turn. We review a dismissal for lack of jurisdiction de novo. *Satterly v. Life Care Centers of Am., Inc.*, 204 Ariz. 174, 177, ¶ 5, 61 P.3d 468, 471 (App. 2003);

³ The Recorder filed a notice in this court that she "will abide by[] the direction provided by the Court in its resolution of the issues."

Ariz. Soc'y of Pathologists v. Ariz. Health Care Cost Containment Sys. Admin., 201 Ariz. 553, 556, ¶ 13, 38 P.3d 1218, 1221 (App. 2002). We also review de novo the interpretation of the statute. *N. Valley Emergency Specialists, L.L.C. v. Santana*, 208 Ariz. 301, 303, ¶ 8, 93 P.3d 501, 503 (2004); *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 178, ¶ 5, 181 P.3d 219, 225 (App. 2008).

A.

¶16 The trial court correctly noted that none of the reported recall election cases have addressed whether an elector may challenge a determination that the petitions did not have sufficient signatures. And, as the Clerk points out, the relevant statutory provisions do not seem to provide a direct statutory basis for challenging signatures that have been struck.

¶17 We disagree, however, that the relevant statutes do not allow a challenge to stricken signatures. Although § 19.208.04(B) allows an elector to "challenge the number of signatures certified by the county recorder," the signatures on the recall petitions must first be submitted to, verified and certified by the "receiving officer." A.R.S. § 19-208.01(A). Only if the receiving officer finds that the number of signatures equals or exceeds the constitutional minimum will the

receiving officer then forward the petitions' signatures to the county recorder for certification. *Id.*; A.R.S. § 19-208.02.

¶18 To effectuate the purpose of § 19.208.04(B) an elector has to be allowed to challenge not only the signatures the receiving officer strikes, but also those the county recorder strikes. To read the statutes otherwise is to read them as separate individual and independent provisions without referring to related provisions and would defeat the liberal construction of the recall statutes. *Ross*, 228 Ariz. at 176, ¶ 8, 265 P.3d at 358; see also *Johnson v. Maehling*, 123 Ariz. 15, 18, 597 P.2d 1, 4 (1979). More importantly, such a myopic construction would undermine the constitutional guarantee of the people's right to attempt to recall public officials. *Ross*, 228 Ariz. at 176, ¶ 7, 265 P.3d at 358. Consequently, the Committee can challenge the signatures stricken by the receiving officer and Recorder from the recall petitions' signature sheets.

B.

¶19 The court also determined that it could not amend the pleadings even though other relief might be available. Our reading of the record suggests that because the court found that the Committee had labeled its verified complaint as one for "statutory special action" it could not allow the matter to proceed as a regular "garden variety" special action seeking mandamus relief.

¶10 The Committee thought it had ten days to file its action, and it filed its complaint as a "statutory special action" because it relied on § 19-208.04(B) to challenge the certification of signatures as the Committee made clear during the appellate oral argument. A reading of the statute reveals that, unlike others, the statute does not suggest that it would be enforceable by mandamus. Compare, e.g., § 19-208.04(B) (providing that an elector may "commence an action") and A.R.S. § 3-1010(B) (West 2012) ("The provisions of this article . . . shall be enforceable by mandamus or other appropriate action in a court of competent jurisdiction."). Consequently, despite the title of the complaint, it was not a statutory special action. See Ariz. R.P. Spec. Act. 1(b).

¶11 If the complaint could not be a statutory special action because § 19-208.04 did not authorize a direct mandamus action, then it could only be a special action that sought general mandamus relief pursuant to A.R.S. § 12-2021 (West 2012). Although the trial court was not required to independently analyze the complaint and statutes for the Committee, once the Clerk raised the issue, more was required than merely relying on the complaint's title. We do not rely on a title of a statute when interpreting it, see A.R.S. § 1-211(A) (West 2012), and should not rely on any title of a complaint once challenged.

¶12 Moreover, "Arizona follows a notice pleading standard, the purpose of which is to give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 6, 189 P.3d 344, 346 (2008) (internal quotation marks omitted). A complaint is sufficient if it provides notice of the claims and the relief sought. See *Best v. Edwards*, 217 Ariz. 497, 504, ¶ 28, 176 P.3d 695, 702 (App. 2008); *Rowland v. Kellog Brown & Root, Inc.*, 210 Ariz. 530, 533, ¶ 10, 115 P.3d 124, 127 (App. 2005). And, like the requirement to liberally construe recall statutes, our supreme court has directed courts to "look to substance rather than to form" and to "determine cases on their merits rather than on points of procedure." *Rodriguez v. Williams*, 104 Ariz. 280, 283, 451 P.2d 609, 612 (1969).

¶13 Despite the complaint's title, our reading of the pleading demonstrates that the complaint substantively alleges a mandamus cause of action and relief. Paragraphs 16 and 19 allege that the Clerk and Recorder, respectively, "removed individual signatures from each recall petition for reasons other [than] those allowed by A.R.S. § 19-121.01(A)." Paragraph 28 expanded the claim to allege that signatures were removed for reasons not included in § 19-121.02(A). Paragraph 30 alleged that the Clerk and the Recorder "made determinations that were

arbitrary and capricious or an abuse of discretion." The complaint then sought an order validating the "individual signatures previously removed by the Clerk or the Recorder for unlawful reasons" to allow the recall election to go forward.

¶14 Although the complaint did not list the general mandamus statute, A.R.S. § 12-2021, the Committee was not required to cite the statute. See *Toney v. Bouthillier*, 129 Ariz. 402, 408, 631 P.2d 557, 563 (App. 1981) ("[F]ailure to make reference to a statute is not fatal to a claim."). Consequently, our review of the complaint, as a challenge to actions by public officials, indicates that it sufficiently sets forth a special action claim seeking mandamus relief.

II

¶15 Finally, the Councilmembers have requested attorneys' fees and costs on appeal pursuant to A.R.S. §§ 12-341.01 and -349 (West 2012).⁴ They are not entitled to fees because this is not a case involving a contract. Moreover, they are not entitled to fees as a sanction for filing a meritless appeal because it was not meritless. Consequently, we deny their requests for fees and costs.

⁴ The Councilmembers argued in their brief, and the Clerk reiterated in her argument, that they were indispensable parties, and the fact that they were not joined in this case is another reason to affirm the dismissal. Because we are remanding the matter, the trial court can address the argument from the parties that the court allowed the Councilmembers to participate in the proceeding as intervenors.

¶16 The Committee also requests attorneys' fees and costs on appeal pursuant to A.R.S. § 12-2030 (West 2012). We deny its request because the Committee has yet to prevail in the adjudication of its mandamus action.

CONCLUSION

¶17 Based on the foregoing, the trial court had jurisdiction to address the Committee's challenge to the certification of the signatures on the recall petitions by both the Clerk, as the receiving officer, and County Recorder, and the complaint provided sufficient notice of the claim and relief sought. Consequently, we reverse the dismissal with prejudice and remand this matter for a hearing to allow the court to determine whether any of the stricken signatures were struck contrary to the applicable statutes.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

RANDALL M. HOWE, Judge

/s/

MICHAEL J. BROWN, Judge