IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE BALLOT PROPOSITION 404 OF THE CITY OF SIERRA VISTA, ARIZONA DAVID M. MORGAN, Petitioner/Plaintiff/ Appellant, v. THE CITY OF SIERRA VISTA, ARIZONA, and SIERRA VISTA CITY CLERK, JILL ADAMS, Respondents/Defendants/ Appellees.	2 CA-CV 2011-0005 2 CA-CV 2011-0028 (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause Nos. CV201000951 and CV201001067

Honorable Ann R. Littrell, Judge
Honorable Stephen M. Desens, Judge

AFFIRMED

David M. Morgan
Sierra Vista
In Propria Persona

Law Offices of Joseph Mendoza, P.L.L.C.
By Joseph Mendoza
Sierra Vista
Attorney for Respondents/
Defendants/Appellees

V Á S Q U E Z, Presiding Judge.

¶1 David Morgan appeals from the trial court's order granting the City of Sierra Vista's ("the City") motion to dismiss his two complaints challenging the election for a ballot proposition, Proposition 404. He contends the court erred in finding his complaints were filed untimely and in failing to rule on the merits of his claims. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 3, 92 P.3d 882, 885 (App. 2004). On October 28, 2010, Morgan filed a complaint, entitled "Petition to set aside election," alleging there were a number of procedural defects in the ballot forms for Proposition 404. He sought an order "nullifying the election as to Proposition 404 and resetting the election on th[at] matter for the next permissible election date." The election was held on November 2. The following day, the trial court scheduled a hearing on Morgan's complaint for November 9.

¶3 Morgan did not serve the City with the summons and complaint until November 8, a week after the election. The City moved to dismiss the complaint, arguing it was filed untimely. The trial court granted the motion to dismiss, finding that because Morgan was attempting to set aside election results pursuant to A.R.S. §§ 16-672 through 16-674, his complaint was premature.

¶4 Consequently, Morgan refiled his complaint on November 30. Once again, the City moved to dismiss the complaint, this time arguing it was filed too late because, under § 16-673(A), Morgan was required to file his complaint "within five (5) days after completion of the canvass of the election and declaration of the result," and Morgan's complaint was filed one day past the five-day deadline. The trial court granted the City's motion. Morgan appealed both rulings, and this court granted his motion to consolidate the two appeals.

Discussion

¶5 Morgan contends the trial court erred in finding his first complaint had been filed prematurely and in granting the city's motion to dismiss. "We review a trial court's decision on a motion to dismiss for an abuse of discretion, but review issues of law de novo." *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 16, 181 P.3d 219, 227 (App. 2008). Morgan argues that "because his election contest was procedural in nature," he was required to file his challenge "before the actual day of the election" pursuant to *Sherman v. City of Tempe*, 202 Ariz. 339, 45 P.3d 336 (2002). And he maintains that his complaint, filed three working days before the election, was timely.

¶6 At the hearing on the motion to dismiss, the trial court stated that Morgan had "jump[ed] the gun" and had filed his election challenge prematurely. Morgan responded "it [was his] reading of the law . . . that in fact [h]e had to file a claim of this nature . . . as quickly as possible after [h]e learned of the errors in the ballot preparation, and prior to the actual election." And, he asserted that, because the alleged defects in the ballot were procedural in nature, his complaint was filed timely. The court disagreed and

dismissed the complaint. The court reasoned that Morgan's complaint was an election challenge under § 16-672 and, accordingly, he should have filed an injunction to prevent the election from going forward. We agree with Morgan that the court erred in ruling the complaint was filed prematurely because his challenge was procedural in nature.

¶7 But, "[w]e may affirm the trial court's ruling if it is correct for any reason apparent in the record." *Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006). In *Tilson v. Mofford*, 153 Ariz. 468, 470, 737 P.2d 1367, 1369 (1987), our supreme court held that "procedures leading up to an election cannot be questioned after the people have voted, but instead the procedures must be challenged before the election is held." Furthermore, "[trial] courts should review alleged violations of election procedure prior to the actual election." *Sherman*, 202 Ariz. 339, ¶ 11, 45 P.3d at 339.

¶8 Here, although Morgan challenged the election on procedural grounds and his complaint was filed before the election, he did not request an emergency hearing even though the complaint was filed three working days before the election. He also did not serve the City with the summons and complaint until November 8, a week after the election had been held. Under these circumstances, Morgan essentially was asking the trial court "to overturn the will of the people, as expressed in the election[, and] to overlook [the supreme court's] mandate that courts should review alleged violations of election procedure prior to the actual election." *Id.* ¶ 11. Because there was no

opportunity for the court to review the matter until after the election was over, it did not err in granting the City's motion to dismiss.[1]

Disposition

¶9 For the reasons stated above, we affirm the trial court's order.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

[1]Because we conclude the complaint was procedural in nature, we would also affirm the trial court's ruling that the second complaint was untimely, although on the grounds it had to be filed before the election rather than on the grounds relied on by the trial court. We do, however, note that Morgan expended time and resources filing his second complaint, something he need not have done had the trial court ruled correctly in the first instance. We also decline to address Morgan's arguments that the trial court should have reached the merits of his complaints. Both complaints were untimely filed, as neither afforded an opportunity for judicial review before the election. *See Sherman v. City of Tempe*, 202 Ariz. 339, ¶ 11, 45 P.3d 336, 339 (2002).