VERMONT SUPREME COURT
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Case No. 2021-167

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

MARCH TERM, 2022

Brian Judd* v. City of Barre

} APPEALED FROM:
} Superior Court, Washington Unit,
} Civil Division
} CASE NO. 21-CV-00607
Trial Judge: Robert R. Bent

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals pro se from the entry of judgment for the City of Barre in his suit challenging a local election. He argues that the court should have credited his evidence and found in his favor. He also contends that the court erred in excluding certain evidence. We affirm.

Plaintiff ran unsuccessfully for City Council in March 2021. That month, he filed a complaint contesting the election under 17 V.S.A. § 2603. Section 2603(b) allows a person to initiate an election contest by filing a complaint in superior court alleging:

> (1) that errors were committed in the conduct of the election or in count or return of votes, sufficient to change the ultimate result;
>
> (2) that there was fraud in the electoral process, sufficient to change the ultimate result; or
>
> (3) that for any other reason, the result of the election is not valid.

"If the court finds just cause," it "shall grant appropriate relief, which may include ordering a recount, or ordering a new election." Id. § 2603(e). Plaintiff alleged that the City failed to maintain two voting machines during the election and that these machines rejected multiple ballots of multiple voters throughout the day. He asked the court to order a hand recount of the ballots.

Following a June 2021 merits hearing, the court concluded on the record that plaintiff failed to establish his claim by a preponderance of the evidence. Plaintiff presented evidence that when he and several others went to vote on election day, the AccuVote voting machines rejected their ballots once or twice before accepting them. The Director of Elections and

Campaign Finance for the Vermont Office of the Secretary of State, William Senning, testified that this was a common occurrence with the AccuVote machine. The court found that the machine was designed to reject ballots that could not be read and that sometimes skewing the ballot differently allowed the machine to read the ballot. A manual put out by the Secretary of State's Office addressed this topic and indicated that, when this occurred, election workers should ask voters to reinsert their ballots into the machine. The court found that this was the type of error that occurred here: the ballots could not be read and needed to be reinserted.

Plaintiff expressed concern that the rejection of a ballot multiple times might be sending a message that there was an overvote on the ballot. The court credited Mr. Senning's testimony that an overvote could not occur because the machine would not accept an overvote ballot. While plaintiff alleged that there had been a problem with this type of machine in New Hampshire, the court had no information about what occurred in New Hampshire and no ability to compare what occurred there with the problems described by plaintiff. The court explained that, under the law, a recount was available only under specified circumstances. Because plaintiff failed to establish any of these circumstances, the court denied his request for relief. The court noted that the Secretary of State's Office also took other steps to confirm the integrity of the voting machines, including random audits of these machines in different locations throughout Vermont. Plaintiff appeals.

On review, we will uphold the trial court's findings of fact unless they are clearly erroneous, meaning that there "is no credible evidence" to support them. Mullin v. Phelps, 162 Vt. 250, 260 (1994) (quotation omitted). In conducting our review, we view the findings "in a light most favorable to the prevailing party, disregarding modifying evidence." Id. We leave it to the trial court "to weigh the evidence and assess the credibility of witnesses." Estate of George v. Vt. League of Cities & Towns, 2010 VT 1, ¶ 36, 187 Vt. 229.

Plaintiff first argues that the court erred in finding that it was normal for the Accuvote to reject ballots and in finding that the machine would not allow an overvote. He cites to materials he believes support his position.[*]

Plaintiff fails to show that the court's findings are clearly erroneous. Mr. Senning testified that it was not at all unusual for ballots to be "tossed back" on "the first try" and that, when a scanning issue occurred, the manual instructed election officials to tell voters "to try it again in a different orientation and see if it's accepted." He stated that the machine would not accept an overvote, referencing a statute requiring that tabulators be set to reject overvotes and explaining that this was "a basic functionality of those machines." See also 17 V.S.A. § 2493(a)(4)(A) (providing that "[a]ll vote tabulators shall be set to reject a ballot that contains an overvote"). The trial court credited Mr. Senning's testimony and found that the ballots here were rejected and then accepted due to scanning functionality; when the ballot was not at first read by the machine, the voter was instructed to reinsert the ballot and then it was successfully read and the vote recorded. There is no basis to disturb these findings on appeal.

[*] To the extent that plaintiff asks this Court to accept into evidence exhibits excluded by the trial court, we deny that request. "[O]ur review is confined to the record and evidence adduced at trial" and "we cannot consider facts not in the record." Hoover v. Hoover, 171 Vt. 256, 258 (2000).

Plaintiff next asserts that the trial court should have granted his motion to compel the City to provide physical proof that it had retained the paper ballots from the election. The record indicates that in May 2021, in response to plaintiff's request, the court issued an order directing that the ballots be preserved. The City also agreed in writing that it would preserve the paper ballots. The court denied plaintiff's motion to compel the City to provide proof that it had maintained the ballots, explaining that plaintiff failed to submit any evidence suggesting that its prior order had been violated and the court would not assume that to be the case. The court provided reasonable grounds for its decision and we discern no error.

Plaintiff next contends that the court erred by failing to pursue a resolution whereby he could pay the City for a hand recount. The record indicates that, at the outset of the first scheduled hearing, the court proposed to ask the City whether it would agree to plaintiff's offer to pay for a hand recount. Before the City could answer, the court rescinded its question, explaining that the question might be unfair as other candidates would have an interest in it and the court consequently would not "try to parlay this into a resolution as we go forward." Plaintiff maintains that the court speculated about how a self-paid recount would affect the interests of other candidates. The court was not obligated to try to settle this case and the record shows that the court applied the law as written. We find no error in its decision not to question the City about its willingness to allow plaintiff to pay for a hand recount. As the court later explained, the statute allows for a recount only under specified circumstances and plaintiff failed to show the existence of those circumstances here.

Finally, plaintiff argues that the court erred in rejecting several of his exhibits. As the City points out, several of the exhibits discussed in plaintiff's brief were not actually offered at the hearing; others were excluded as hearsay. Plaintiff fails to show that he offered Exhibits 3 or 5 into evidence. Exhibit 3 consisted of plaintiff's email exchanges with Mr. Senning and the court explained that, as Mr. Senning was present at the hearing, plaintiff could question him rather than relying on the emails. Plaintiff then did so. Exhibit 5 was the "Vermont Vote Tabulator Guide." Mr. Senning answered questions about this manual but the manual itself was never offered into evidence. These claims of error therefore fail.

The court considered and rejected the remaining exhibits discussed in plaintiff's brief. Plaintiff's Exhibit 2 was a newspaper article that concerned an election in New Hampshire. The court excluded this exhibit on hearsay grounds, explaining that the rules of evidence did not allow such articles to be introduced without the presence of the person who wrote the article. While plaintiff argues that the article was relevant, he fails to show that the court abused its discretion in excluding it on hearsay grounds. See Southface Condo. Owners Ass'n, Inc. v. Southface Condo. Ass'n, Inc., 169 Vt. 243, 249 (1999) ("Trial courts have broad discretion in ruling on the relevance and admissibility of evidence, reversible only for abuse of that discretion."). Plaintiff's Exhibit 6 was a document prepared by the company that was hired to oversee and implement the software program for Vermont and several other states' elections. The document was a company-prepared overview of the AccuVote-OS Tabulator that apparently described how these machines operate. The City objected to the admission of this exhibit. The court excluded this document on hearsay grounds. It also noted that plaintiff failed to establish that the witness through whom he attempted to admit this exhibit was an expert in elections, conducting elections, or machines related to elections. It explained that the witness was not familiar enough with the material to become an expert and to testify to the relevance of this document. Again, plaintiff fails to show that the court erred in reaching its conclusion. While he describes the witness's qualifications in his brief, that evidence was not presented at the hearing

below and he fails to show that the court precluded him from presenting it. The court did not err in denying plaintiff's request for relief under 17 V.S.A. § 2603.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice