

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ADELBERT BRYAN,	)	
	)	
Plaintiff,	)	
	)	CASE NO. SX-10-CV-363
v.	)	
	)	ACTION FOR INJUNCTIVE RELIEF;
JOHN ABRAMSON, JR. SUPERVISOR OF	)	PRELIMINARY INJUNCTION;
THE BOARD OF ELECTIONS, AND THE	)	TEMPORARY RESTRAINING ORDER
JOINT BOARD OF ELECTIONS and	)	
GOVERNMENT OF THE VIRGIN	)	
ISLANDS	)	
	)	
Defendants.	)	

**ORDER**

THIS MATTER is before the Court on the Plaintiff's Motion for Preliminary Injunction and the Government's Motion to Dismiss.

**PREFATORY NOTE**

Due to the exigency to act before the primary election scheduled for Saturday, September 11, 2010, this Order will address only Plaintiff's request for an injunction and an order to permit Plaintiff and others similarly situated to decline to use the election voting machines and instead be supplied with either "an official or unofficial paper ballot" in the primary election.

This order effectively permits the responsible parties, namely the Office of the Supervisor of Elections and the Joint Board of Elections to conduct the primary election pursuant to their published processes and procedures.

**STATEMENT OF THE CASE**

The complaint in this matter was filed on August 17, 2010, when Plaintiff, acting *Pro Se*, alleged several faults with the voting system in use in Virginia. Specifically, Plaintiff claimed that the decision by the Joint Board of Elections, in a July 30, 2010 meeting, to use provisional ballots for those voters who decide not to use the electronic voting machines violates The Help America Vote Act of 2002 (HAVA).

Plaintiff states that the use of paper ballots and ballot boxes has not been repealed under Title 18 V.I.C., and such ballots are available for use. Additionally, Plaintiff avers that while he and others have made it known to Defendants via public radio talk shows that he intends to vote using an official or unofficial paper ballot. Defendants will not allow for this method of voting, and as a result Plaintiff and others will suffer the loss of their ability to vote.

Plaintiff further alleges that this matter could not be determined administratively, as the matter would not be decided until after the September 11, 2010 primaries had concluded. Plaintiff also alleges that Defendants improperly cancelled the voter registrations of over six thousand previously registered eligible voters, although Plaintiff never claims that he was among those six thousand. In fact, Plaintiff stated and Defendants admitted that Plaintiff is currently a legally registered voter. Plaintiff further stated that while Title 18 V.I.C. requires Defendant to post notice in three places of those removed from the list of eligible voters, Defendants failed to do so.

Later, in Plaintiff's Motion and Memorandum of Law in Support of Preliminary Injunction and Emergency Ex Parte Temporary Restraining Order, Plaintiff claims other deficiencies with the voting process, specifically, problems with the voting machines themselves.

The crux of Plaintiffs argument on the voting machines is that the machines are allegedly unable to perform proper recounts of votes if necessary, and that they do not meet federal requirements.

As a remedy to these asserted violations, Plaintiff requested a preliminary restraining order and an emergency ex parte permanent injunction prohibiting the Defendant from enforcing their decision of July 30, 2010, announced in a press release dated August 4, 2010, and for an order allowing Plaintiff and other similar voters the ability to vote by using an official or unofficial paper ballot instead of a provisional ballot.

#### ANALYSIS

The Defendants have moved for a dismissal of the Plaintiff's pro se Complaint on the following grounds:

1. Pursuant to Rule 12(b)(1), Defendants contends that the Court lacks subject matter jurisdiction. In so far as the Defendants relies upon the Help American Vote Act (HAVA) a Congressional enactment, the Defendants' motion to dismiss will be GRANTED as to the request for an injunction halting the primary election scheduled for Saturday, September 11, 2010. Since there is no primary contest for the Delegate to Congress in that election, HAVA is simply not applicable to that race. *The American Civil Liberties Union of New Mexico v. Santa Clara* 546 F2d. 1313, 1325 (10<sup>th</sup> Cir. 2008)
2. The Defense also moved for a dismissal of Plaintiff's Complaint on the ground that he lacks standing to maintain such an action under HAVA. Plaintiff asserts that he is a registered voter, indeed, as a candidate for the Board of Elections in the November, 2010 General election he is qualified to bring this action. However, the enforcement provision

of HAVA only explicitly provides for civil actions by the Attorney General of the United States of America (emphasis added). Under 42 U.S.C. § 1551[1]:

The Attorney General may bring a civil action against any State of jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief (including a temporary restraining order, a permanent or temporary injunction or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 15481, 15482 and 15483 of this title.

The Court of Appeals in *Sandusky County Democratic Party v. Blackwell*, 387 F. 3d 565, 572 (6<sup>th</sup> Cir. 2004) opined that HAVA does not create a private right of action, *See Morales Garage v. Lorenzo Giguere* 2008 WL 1976620 (5<sup>th</sup> Cir. 2008).

Additionally, our Supreme Court has held both local courts, even though they are not Article III courts under the U.S. Constitution, require that a litigant must demonstrate standing to invoke the jurisdiction of both local courts. *Arlington Funding Services, Inc. v. Siegel* 2009 WL 357944, 2 (V.I.) (V.I. 2009). *See also Legislature of the Virgin Islands v. deJongh*, 645 F. Supp. 2d 452 (D.V.I. App Div. 2009) (holding that the Superior Court may exercise jurisdiction only if the Plaintiff demonstrated that he had standing to sue). Defendants have challenged Plaintiff's standing to sue to enjoin, in essence, the primary and general elections scheduled for September 11, 2010 and November, 2010.

One of Senator Bryan's allegations is that the Board of Elections "have impiously cancelled the voter registration of over six thousand (6000) previously registered person eligible to vote in upcoming primary and general elections." *Plaintiff's Motion and Memorandum of*

?? → Plaintiff is Adelbert M. Bryan

*Law in Support of Preliminary Injunction and Emergency Ex-Parte Restraining Order,*  
paragraph 35. In the same document filed with the Court on September 2, 2010, the Plaintiff  
asserts:

18 V.I. C provides for the use of paper ballots and ballots boxes amongst other  
official instruments and documents to be delivered at all polling districts and  
polling places. The defendants arbitrarily, capriciously and discriminatorily  
agreed to influence persuade intimidate or coerce Plaintiff and other to use a  
provisional ballot rather than the electronic voting machines, as adapted as  
one of the choices to register a voter's choice, will or preference to manifest  
his/her vote pursuant to 18 V.I.C (Id paragraph 30. pg. 6).

The United States Supreme Court has evaluated and clarified the standard that a  
court must use when considering a Fed. Civ. Pr. 12(b)(6) motion to dismiss. *Ashcroft v.*  
*Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)

Essentially a court should conduct a two-part analysis:

First, the factual and legal elements of a claim should be separated. The  
District Court must accept all of the complaint's well-pleaded facts as true,  
but may disregard any legal conclusions. Second, a District Court must then  
determine whether the facts alleged in the complaint are sufficient to show  
that the plaintiff has a "plausible claim for relief." *Fowler v. UPMC*  
*Shadyside*, 578 F. 3d. 203, 210-211(3d Cir. 2009) (citing *Iqbal*, 129 S. Ct. at  
1949-50).

→ non-District  
Court

Using the criteria discussed above, this Court concludes that Senator Bryan lacks standing to sue the named Defendants and has failed to meet his burden of proof to obtain any injunction or restraining order.

Even a cursory examination of the written submissions and oral arguments presented by the Plaintiff demonstrate a startling absence of proof of facts. Rather, his presentation can best be described as expressions of personally held opinions on the election system. Plaintiff submitted but three (3) Exhibits along with his Complaint (i.e. a copy of a provisional ballot, the August 4<sup>th</sup> Press Release by the Joint Board of Election and copies of the Senator's Voter Registration Card and a Proof of Citizenship Card). Needless to say, none of these documents in any way substantiate the multiplicitous complaints he leveled at the election system of the Territory. Nor do they aid in proving that he has standing to maintain this action since he has unequivocally confirmed that he is eligible to vote in both upcoming elections. His one unwavering demand was that this Court order the election system to allow him to use either an official or unofficial ballot but not a provisional ballot as prescribed by the Joint Board of Elections to vote on both election dates.

In ruling on injunctive relief the Plaintiff must be able to show a reasonable probability, not only of obtaining the relief sought, but also that he/she will be irreparably injured if the relief is not granted. Additionally, the Court must weight the possibility of harm to the Defendant and the effect it may have on the public interest. *West Indian Co. v. Government of Virgin Islands*, 22 V.I. 358, 643 F. Supp. 869, 1986 U.S. Dist. LEXIS 20896 (1986), *aff'd*, 844 f. 2d. 11, 1988 U.S. App. LEXIS 4158 (3d Cir. 1988), cert. denied, 488 U.S. 802, 109 S. Ct. 31, 102 L. Ed. 2d

11, 1988 U.S. LEXIS 3476 (1988), rehearing denied, 488 U.S.976, 109 S. Ct. 517, 102 L.Ed. 2d 551, 1988 U.S. LEXIS 5373 (1988).

CONCLUSION

In summary, based on the lack of substantive justification presented by the Plaintiff in support of his request for injunctive relief coupled with the realistic result of disrupting the fundamental democratic process of conducting a primary election on September 11<sup>th</sup> of this year in our Territory, the Court is convinced that denial of the injunction sought by the Plaintiff is the only legally sound, fair and equitable result in this case.

The Court being advised of the premises, it is hereby;

**ORDERED** that Plaintiff's Motion for Preliminary Injunction is **DENIED** as to the primary election scheduled to take place on September 11, 2010. It is further

**ORDERED** that Defendant's Motion to Dismiss is **GRANTED** as to the primary election scheduled to take place on September 11, 2010.

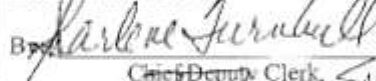
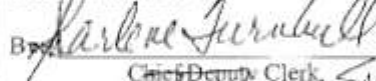
Dated: September 7, 2010

  
Julio A. Brady  
Judge

ATTEST:

VENETIA H. VELÁZQUEZ

Clerk of the Court

  
By:   
Chief Deputy Clerk  
Court 9/8/10