

STATE OF MICHIGAN
COURT OF CLAIMS

BEVERLY BIGGS-LEAVY,

Plaintiff,

v

JOCELYN BENSON, in her individual capacity
and in her official capacity as Secretary of State,
and JONATHAN BRATER, in his individual
capacity and in his official capacity as Director of
Elections,

Defendants.

OPINION AND ORDER

Case No. 24-000175-MB

Hon. James Robert Redford

**OPINION AND ORDER DENYING PLAINTIFF’S REQUEST FOR INJUNCTIVE
RELIEF AND DISMISSING PLAINTIFF’S COMPLAINT**

Plaintiff, Beverly Biggs-Leavy, has filed a complaint seeking a writ of mandamus requiring defendants, Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater, “to not only hold, but also count and canvass *every legal vote* for Flint’s Third Ward City Council Member in the upcoming election.” In addition, or in the alternative, plaintiff seeks a declaratory judgment recognizing that “(1) the currently scheduled recall election for Quincy Murphy’s former office must proceed as scheduled, (2) no provision of [law or ordinance] authorizes either defendant . . . to fail or refuse to count all legal votes cast in the recall election, and (3) all legal votes cast as of November 5, 2024, must be counted.” Finally, plaintiff alleges that Secretary Benson, in her individual capacity, violated 42 USC § 1983 by allegedly depriving plaintiff of “a valuable right, privilege or immunity, namely the right to vote in the election at issue.” In a separate, expedited

motion, plaintiff seeks a temporary restraining order (TRO) or preliminary injunction requiring defendants to issue a press release to protect votes cast in the recall election.

In response, defendants seek summary disposition on their behalf under MCR 2.116(C)(8) on the basis that plaintiff's action is barred by the doctrine of laches, injunctive relief is not warranted because plaintiff cannot establish that she is likely to succeed on the merits, and that plaintiff has not stated a claim on which relief can be granted.

For the reasons explained herein, the Court DENIES plaintiff's motion for preliminary injunctive relief, GRANTS defendants' motion for summary disposition, and DISMISSES plaintiff's complaint with prejudice.

I. BACKGROUND

While this lawsuit was filed only days before the November 5, 2024 general election, its underpinnings began months ago. In January 2024, plaintiff submitted a petition to recall Flint's Third Ward City Council Member, Quincy Murphy. Plaintiff's recall petition was officially filed on February 7, 2024, and the recall election was scheduled to be held on the same date as the federal and state general election, i.e., November 5, 2024. Sadly, Council Member Murphy passed away on September 28, 2024. Flint City Clerk Davina Donahue requested advice from the Bureau of Elections regarding the conduct of a recall election when the officer targeted in the recall no longer holds the position. Director Brater responded via a letter dated October 3, 2024, reporting the Bureau of Election's opinion that the votes cast in the recall election could not be counted or canvassed. The letter provides in pertinent part as follows:

Under Michigan Election Law (MEL), a recall petition must meet certain format requirements, state factually and clearly each reason for the recall, and be in a form

prescribed by the secretary of state. MCL 168.951a. Critically, the MEL also provides that a recall petition is filed against an “elective officer[,]” not against the office. MCL 168.951. See also MCL 168.952b, 168.955, 168.958. The recall petition itself indicates that all signers “petition for the calling of an election to recall [Name of Officer].” A recall election is different from other elections. While other elections seek to fill an office, a recall election targets a specific individual; it follows, therefore, that when the individual no longer holds the position, an election targeting that individual would be moot.

The MEL provides that “If an officer whose recall is sought resigns after the calling of a recall primary election, recall general election, recall election, or special recall election, the election shall not be held.” MCL 168.977. While the MEL is silent as to whether an election must be held when the target of the election passes away, in our opinion the situation is analogous to the situation where the target resigns, and that the election is not held. Because ballots have already been printed, it is the Bureau’s position that votes cast in that contest not be counted or canvassed. The Flint city charter governs the vacancy in the office of a council member and is the appropriate authority for this situation. Flint Charter § 2-410. You should consult your city or county legal counsel for advice in connection with this matter.

Clerk Donahue issued a press release on October 4, 2024, and attached Director Brater’s letter. Through the press release, Clerk Donahue notified the public that although “this Recall Election will still appear on these ballots,” the “votes cast in that contest” will “not be counted or canvassed.” The press release further advised that under the city charter, the city council would appoint a temporary replacement pending a special primary and special election to fill the seat. See Office of the City Clerk Press Release, October 4, 2024, available at <<https://www.eastvillagemagazine.org/wp-content/uploads/2024/10/PR.CC-Recall-Election-3rd-Ward-10-04-2024.pdf>> (accessed October 29, 2024).

By the date of the October 3, 2024 letter, the general election was already well underway. Absent voter ballots (AVBs) had been circulated with the recall election candidates printed on it. Plaintiff is one of the candidates named on this ballot as running in the recall election of Flint’s Third Ward City Council Member Murphy. According to the pleadings, plaintiff “had received campaign contributions and she had begun making expenditures for her campaign, sending out

mailers, organizing rallies, and doing all things a candidate for that position is legally authorized to do.” Plaintiff filed this suit, seeking direction that the votes for the recall election be counted and canvassed.

II. LEGAL STANDARDS

Several legal standards are of import here. Of first importance is plaintiff’s motion for a TRO or a preliminary injunction. This equitable relief is issued for the goal of maintaining the status quo pending a final hearing on the parties’ rights. *Slis v State*, 332 Mich App 312, 336-337; 956 NW2d 569 (2020). Courts may grant this “extraordinary remedy” “only when justice requires, there is no adequate remedy at law, and there is a real and imminent danger of irreparable injury.” *Janet Travis, Inc v Preka Holdings, LLC*, 306 Mich App 266, 274-275; 856 NW2d 206 (2014), citing *Wiggins v City of Burton*, 291 Mich App 532, 558-559; 805 NW2d 517 (2011). In deciding whether to grant such relief, courts balance the alleged benefit of an injunction against the damage and inconvenience threatened by it. *Id.* An injunction may issue only “if doing so is most consistent with justice and equity” given the facts of each particular case. *Soergel v Preston*, 141 Mich App 585, 590; 367 NW2d 366 (1985). And a preliminary injunction may issue only if the requesting party is likely to “prevail on the merits.” *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 148; 809 NW2d 444 (2011) (quotation marks and citation omitted). Normally, the grant or denial of a preliminary injunction is only the first step in a process that requires a separate, expedited review of the substantive issue on the merits. *Detroit Fire Fighters Ass’n, IAFF Loc 344 v Detroit*, 482 Mich 18, 21-22; 753 NW2d 579 (2008). However, given that this dispute involves an election-related matter served approximately a week before election day, the Court will issue its final opinion based on the pleadings alone as defendants request.

Defendants seek summary disposition under MCR 2.116(C)(8).

A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint. When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. [*El-Khalil v Oakwood Healthcare Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019) (citations omitted).]

The motions and pleadings before the Court require an interpretation of Michigan Election Law, particularly MCL 168.977, among others. The goal of statutory interpretation is to give effect to the Legislature’s intent. *TRJ & E Props, LLC v Lansing*, 323 Mich App 664, 670; 919 NW2d 795 (2018). The language of the statute itself is the best indicator of the Legislature’s intent. *Id.* When the language of the statute is clear and unambiguous, judicial construction is not permitted, and this Court must give the words their plain and ordinary meaning. *Mich Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 664; 753 NW2d 28 (2008).

Plaintiff also requests declaratory relief under MCR 2.605, which permits the Court “[i]n a case of actual controversy within its jurisdiction” to “declare the rights and other legal relations of an interested party seeking a declaratory judgment.” MCR 2.605(A)(1). If “a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment.” *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).

III. LACHES

The Court finds that any relief to plaintiff is barred by the doctrine of laches. In *Davis v Secretary of State*, ___ Mich App ___, ___; ___ NW3d ___ (2023); slip op at 9, our Court of Appeals recently described the doctrine as follows:

Laches is an equitable tool that may be used to remedy the inconvenience or prejudice caused to a party because of an improper delay in asserting a right. The issue of whether relief will be withheld on the basis of laches is contingent upon the facts and circumstances of the particular case. . . . As the Court of Claims observed, legal challenges that affect elections are especially prone to causing profound harm to the public and to the integrity of the election process the closer in time those challenges are made to the election, making laches especially appropriate to apply in such matters. Elections require the existence of a reasonable amount of time for election officials to comply with the mechanics and complexities of our election laws. [Cleaned up.]

To establish laches as an affirmative defense, a defendant must demonstrate both undue delay and prejudice occasioned by that delay. *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 589; 939 NW2d 705 (2019).

There was certainly delay in this matter. Director Brater sent his letter to Clerk Donahue on October 3, 2024. Plaintiff filed suit in Ingham Circuit Court in Docket No. 24-000818-PZ on October 7, 2024, against Genesee County Clerk Domonique Clemons, Flint City Clerk Donahue, and Secretary Benson. The Ingham Circuit Court dismissed the action for lack of jurisdiction on October 16, 2024. Alarming, defendants assert that plaintiff never served them in the Ingham Circuit Court action. Despite the election looming ever closer, plaintiff waited six more days to file her first suit in this Court against the current defendants in Docket No. 24-000172-MB on October 22, 2024. This complaint lacked “[a] signature and verification by the claimant before an officer authorized to administer oaths.” MCL 600.6431(2)(d). On October 23, 2024, the Court permitted plaintiff an opportunity to remedy the deficiencies, but the amended complaint was not notarized. The Court dismissed the action on October 24, 2024. See *Elia Cos, LLC v Univ of Mich Regents*, 511 Mich 66, 68; 993 NW2d 392 (2023) (holding that the “failure to timely comply

with the notice and verification requirements of MCL 600.6431” requires dismissal of a complaint).¹ Plaintiff then filed a properly verified complaint in this action on October 25, 2024.

As a result of these procedural irregularities, plaintiff failed to file a legally viable complaint until 12:41 p.m. on Friday, October 25, 2024, 11 days before the November 5, 2024 election. Service was not effectuated until Monday, October 28, 2024, and defendants filed a response the following day. In civil actions regarding elections, there is “a rebuttable presumption of laches if the action is commenced less than 28 days prior to the date of the election affected.” MCL 691.1031. Given the prejudice occasioned by plaintiff’s delay, plaintiff has not rebutted that presumption.

It is too late for this Court to effectuate a remedy without unacceptable prejudice to defendants and the voting public. As noted by defendants, plaintiff’s belated filing left this Court with no choice but to direct defendants to respond “in a matter of hours.” Further, Secretary Benson is tasked with supervising all local election officials in this state, MCL 168.21, and providing direction and advice. MCL 168.31(1). In the days leading up to a major general election in a presidential election year, defendants are inundated with little to no time to effectuate a sea change in this one local recall election.

Moreover, AVBs had already been dispersed when Council Member Murphy died. Ballots were already being cast when Director Brater sent the October 3 letter. By October 30, 2024, 2,197,759 voters (30.3% of active registered voters) had returned AVBs or voted early statewide.

¹ The Court notes that plaintiff also filed suit in Genesee Circuit Court against Clerk Clemons, Clerk Donahue, and Secretary Benson on October 23, 2024.

In the city of Flint, 19.3% of active registered voters had already returned AVBs or voted early. It is impossible to know how many of these voters chose not to fill in a circle in Flint's Third Ward City Council Member Recall Election based on the news of that particular contest being cancelled due to Council Member Murphy's death. Accordingly, if this Court ordered defendants to rescind the October 3 letter, the Court would be sanctioning an election in which many voters would be disenfranchised.

Accordingly, plaintiff's complaint is barred by the doctrine of laches.

IV. IMPOSSIBILITY OF MANDAMUS

In addition, plaintiff cannot establish her likelihood of success to support a preliminary injunction because she is not entitled to a writ of mandamus.

To obtain the extraordinary remedy of a writ of mandamus, the plaintiff bears the burden of showing that: "(1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result." *Taxpayers for Mich Constitutional Gov't v Michigan*, 508 Mich 48, 82, 972 NW2d 738 (2021) (quotation marks and citation omitted). "[A] clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *O'Connell v Dir of Elections*, 317 Mich App 82, 91; 894 NW2d 113 (2016) (quotation marks and citation omitted). "A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Id.* (quotation marks and citation omitted). However, where the plaintiff is unable to point to any source of law prescribing or defining the duty to act in a way

the complaint alleges, an order of mandamus may not issue. *Kennedy v Secretary of State*, ___ Mich ___; 10 NW3d 632 (2024). Applying these maxims to plaintiff’s claims strongly counsels against mandamus relief.

First, to the extent plaintiff seeks an order for the votes to be counted and canvassed, it appears that plaintiff is suing the wrong government official. Petitions for the recall of a local city official are filed with the county clerk, not the Secretary of State. MCL 168.960(1). When a recall petition is filed under MCL 168.960, “the board of county canvassers in the county where the recall petition is filed shall conduct the canvass of the recall election,” MCL 168.968, not the Secretary of State. This Court is unaware of any authority that would allow—much less require—either named defendant (i.e., Director Brater or Secretary Benson) to count and canvass the votes in this local election.

Second, and in a similar vein, Director Brater did not order Clerk Donahue to cancel the recall election. Rather, Director Brater provided advice, and more specifically, advice simply that the council member’s passing should be considered a vacancy in this position and fall within the jurisdiction of local ordinances and procedure. Director Brater advised Clerk Donahue to confer with legal counsel for the city of Flint or Genesee County. This Court does not have jurisdiction to order the city or county clerk to do anything, let alone order the clerks to count or canvass the votes cast in this recall election. See MCL 600.6419(1) (providing the Court of Claims has jurisdiction only over claims “against the state or any of its departments or officers”).

Third, even if this matter fell within this Court’s jurisdiction and state law regarding recall elections, mandamus remains inappropriate because the law at issue does not precisely and with certainty require the counting of the recall election votes under the circumstances. Director Brater

cites MCL 168.977(4), which states: “If an officer whose recall is sought resigns after the calling of a recall primary election, recall general election, recall election, or special recall election, the election shall not be held.” As noted by plaintiff, this statute does not require the recall election to be cancelled if the officer whose recall is sought dies after the calling of the recall election. However, it is equally true that neither this statute, nor any other statute to which plaintiff has pointed or of which the Court is aware, requires the continuance of a recall election when the officer whose recall is sought dies. There is no clear duty for this Court to direct. As our Supreme Court recognized in a very recent opinion, mandamus is inappropriate in situations like this. *Kennedy*, 10 NW3d at 632-633. Having found neither a clear legal duty, nor a state or federal law violated, the Court also denies plaintiff’s remaining claims including her request for a declaratory judgment and for relief under 42 USC § 1983.²

V. CONCLUSION

The Court is not unsympathetic to the resources expended by plaintiff, and others, to facilitate the recall election in such a way to enable it to be included on the ballot in the 2024 general election. Likewise, the Court expresses its condolences to the city of Flint and to Council Member Murphy’s friends and family in his passing. However, the relief that plaintiff seeks through mandamus or otherwise is simply not available under Michigan law, nor advisable at this late date in the 2024 election cycle. The Court finds no clear legal duty to order Secretary Benson

² The Court finds these additional claims to be without merit for purposes of completeness; however, the basis for the dismissal of plaintiff’s claims is the necessary and appropriate application of the doctrine of laches and the unavailability of mandamus given the plain language of the statutes at issue. The Court was not able to include a full analysis of plaintiff’s claims or defendants’ request for immunity due to the short time frame in which an opinion needed to be issued given the late filing of a procedurally effective complaint and the nearness of election day.


or Director Brater to act in the way that plaintiff requests in her complaint. Summary disposition in defendants' favor is warranted.

IT IS ORDERED:

1. Plaintiff's request for a TRO and preliminary injunction is DENIED.
2. Defendants' motion for summary disposition under MCR 2.116(C)(8) is GRANTED.
3. Plaintiff's complaint is DISMISSED in its entirety and with prejudice.
4. This is a final order resolving all issues in this case.

IT IS SO ORDERED.

Date: October 31, 2024


James Robert Redford
Judge, Court of Claims

