

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.
Judge Leonardo Castro

Patrick Jensen, 

Petitioners/Contestants,

v.

Case No. 62-CV-20-5599

Steve Simon, in his official capacity as
Minnesota Secretary of State, and
Angie Craig, Congressional candidate,

Respondents/Contestees.

Robin Peterson, 

Petitioners/Contestants,

v.

Case No. 62-CV-20-5600

Steve Simon, in his official capacity as
Minnesota Secretary of State, and
Dean Phillips, Congressional candidate,

Respondents/Contestees.



Petitioners/Contestants,

v.

Case No. 62-CV-20-5601

Steve Simon, in his official capacity
Minnesota Secretary of State, and
Betty McCollum, Congressional candidate,

Respondents/Contestees.



Petitioner/Contestants,
v.

Case No. 62-CV-20-5602

Steve Simon, in his capacity as
Minnesota Secretary of State, and
Ilhan Omar, Congressional candidate,

Respondents/Contestees.

MEMORANDUM ON CONTESTEES' MOTIONS TO DISMISS

INTRODUCTION

The above-captioned matters came before the Honorable Leonardo Castro, Chief Judge of the Second Judicial District, on December 18, 2020, for hearing on Contestees' Motions to Dismiss. Susan Shogren Smith, Esq., appeared on behalf of Petitioners/Contestants ("Contestants"). Nathan Hartshorn, Assistant Minnesota Attorney General, appeared on behalf of Respondent/Contestee Minnesota Secretary of State Steve Simon ("Contestee" or "Secretary"), and Abha Khanna, Esq., appeared on behalf of Respondents/Contestees Angie Craig, Dean Phillips, Betty McCollum, and Ilhan Omar (collectively, "Contestees"). This Court having issued an Order granting Contestees' Motions to Dismiss, now issues the following findings of fact and conclusions of law in support of the dismissals.

FINDINGS OF FACT

Contestants filed, in Ramsey County District Court, Notices of Election Contests under Minn. Stat. § 209.01, *et seq.*, on December 1, 2020, challenging the successful candidates in Minnesota's Second, Third, Fourth and Fifth Congressional Districts (the "Districts"). In addition to naming the successful candidates as contestee in each of the above-captioned matters, Contestants named the Secretary as a contestee in each case. On December 1, 2020, Contestants

properly served the Secretary with notices of contest of the elections for U.S. Representatives for the Districts. On November 24, 2020, the State Canvassing Board certified that U.S. Representatives Craig, Phillips, McCullum, and Omar received more votes than their opponents.¹

On December 7, 2020, counsel for Contestants in Case Number 62-CV-20-5599, filed an Affidavit of Attempted Service declaring, under penalty of perjury, “that on the 1st day of December 2020, [she] attempted to make personal service . . . upon Craig.” In the same affidavit, Shogren Smith declares that she sent by certified mail a copy of Contestant’s Summons and Complaint to Craig. There was no proof of certified mail attached to the affidavit, but more importantly, Shogren Smith failed to include in the affidavit any declaration as to when the mailing may have occurred. Contestants’ counsel further declared that an additional affidavit would be filed with the court indicating when personal service was attempted by an uninterested third party; no such affidavit was ever filed with the court. Similar affidavits, sans the uninterested party declaration, were signed and filed in each of the other three cases on December 7th or 8th of 2020.

Contestants do not dispute, and in fact concede in their responses and oral arguments, that other than the Secretary, none of the Contestees were personally served by December 1, 2020; thereby effectively admitting their failure to comply with the filing and service requirements of Chapter 209. Additionally, Contestants do not dispute, and concede in their responses and oral arguments, that Representatives Craig, Phillips, and Omar reside outside of Ramsey County. Finally, Contestants do not dispute, and this Court takes judicial notice of, the fact that the Secretary was not a candidate in any of the elections contested in these actions.

¹ See *Minnesota State Canvassing Report*, Minn. Sec’y of State 18 (Nov. 24, 2020), <https://officialdocuments.sos.state.mn.us/Files/GetDocument/125081>.

CONCLUSIONS OF LAW

The Secretary

“Subject-matter jurisdiction is the court’s authority to hear the type of dispute at issue and to grant the type of relief sought.” *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 147 (Minn. 2010). Whether subject-matter jurisdiction exists is a question of law. *Centra Homes, LLC v. City of Norwood Young Am.*, 834 N.W.2d 581, 585 (Minn. Ct. App. 2013). Subject-matter jurisdiction cannot be conferred by consent of the parties, nor can lack of such jurisdiction be waived. *Tischer v. Hous. & Redev. Auth. of Cambridge*, 693 N.W.2d 426, 430 (Minn. 2005) (citing Minn. R. Civ. P. 12.08(c)). On a motion under Minn. R. Civ. P. 12, factual allegations in the complaint are entitled to some deference. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). Legal conclusions, however, are entitled to no deference. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008).

Minnesota courts’ jurisdiction over election contests is “solely statutory.” *Moulton v. Mewton*, 144 N.W.2d 706, 710 (Minn. 1966). As a result, state courts are “powerless to entertain such proceedings” except to the extent that the contestant brings them within the limitations provided by the contest statute. *Christenson v. Allen*, 119 N.W.2d 35, 38 (Minn. 1963). Chapter 209 governs election contests and strictly limits the individuals who can be named as contestee to a contest. *See* Minn. Stat. § 209.021, subd. 3 (2020). “In all contests relating to the nomination or election of a candidate, the notice of contest must be served on the candidate who is the contestee.” *Id.* (emphasis added). Accordingly, in such contests, only a *candidate* may be named as the contestee.

Having found that the Secretary was not a candidate whose election was being contested, the statute only permits the Secretary to be named as a contestee “[i]f the contest relates to a

constitutional amendment.” *Id.* Any contest filed against the Secretary that does not fit within this limitation must be dismissed as to the Secretary. *In re Contest of General Election Held on November 4, 2014, for the Purpose of Electing a United States Senator from the State of Minnesota*, No. 62-CV-14-7915, Order at 5-6 (Ramsey Cty. Dist. Ct. Dec. 30, 2014) (“2014 U.S. Senate Contest”), *appeal dismissed*, No. A14-2201 (Minn. Jan. 15, 2015).

Because no constitutional amendment was on the 2020 general election ballot, and the Contestants do not assert that the Secretary was a candidate for election in 2020 (for he in fact was not), this Court lacks subject-matter jurisdiction over these contests insofar as their attempted inclusion of the Secretary as a contestee. These election contests must therefore be dismissed as to the Secretary.

Representatives Craig, Phillips, and Omar

“Because the right to contest an election is purely statutory, the provisions of the statute relating to the filing and serving of notice of contest must be strictly followed if the court is to acquire jurisdiction.” *Lebens v. Harbeck*, 243 N.W.2d 128, 129 (Minn. 1976) (per curiam); *see also Christenson*, 119 N.W.2d at 38 (explaining that “both the right to contest an election and the authority of courts to hear and determine an election contest are purely statutory; and, absent statutory compliance, courts are powerless to entertain such proceedings.”). “[T]he legislature has set strict procedural requirements . . . in an effort to get election contests expeditiously resolved.” *O’Loughlin v. Otis*, 276 N.W.2d 38, 40 (Minn. 1979) (per curiam).

Failure to strictly comply with these procedural requirements must result in dismissal of the entire contest. *See, e.g., Rachner v. Growe*, 400 N.W.2d 749, 751-52 (Minn. Ct. App. 1987) (affirming district court’s dismissal of an election contest on the grounds that the contestant failed to send the notice of contest via certified mail to all interested parties, in addition to effectuating

proper personal service, as required by statute). Significantly, even substantial compliance with the statutory requirements is insufficient; *all* requirements must be completely satisfied to invoke jurisdiction. *O’Loughlin*, 276 N.W.2d at 40-41 (rejecting the argument that substantial compliance with the notice requirement was adequate to confer jurisdiction).

Minnesota law prescribes that contests for “statewide office” must be filed in Ramsey County. Minn. Stat. § 209.021, subd. 2. The term “statewide office,” however, does not include seats for the U.S. House of Representatives. *See id.* § 209.01, subd. 2. “For contests relating to any other office, the contestant shall file the notice of contest . . . in the county where the contestee resides.” *Id.* § 209.021, subd. 2. Accordingly, because these contests relate to elections for the U.S. House of Representatives, Contestants were required to file each contest in the county in which the respective Contestee resides—in Dakota County for Contestee Craig, and in Hennepin County for Contestees Phillips and Omar. Contestants’ failure to do so mandates dismissal of the contests relating to these three Contestees. *See Lebens*, 243 N.W.2d at 129.

Contestants’ Eligibility to Vote in Contested Elections

Minnesota law permits only “eligible voter[s]” and “candidate[s]” to assert an election contest. Minn. Stat. § 209.02, subd. 1. A voter may assert an election contest only as to elections in which “the voter had the right to vote.” *Id.* None of Contestants allege they were a candidate in the election for Minnesota’s Second, Third, Fourth, or Fifth Congressional Districts. The only information Contestants provided in their notices was that each of them “is an eligible Minnesota voter.” None indicated whether they were eligible to vote in the specific election being contested. By failing to indicate where Contestants live or that they were eligible to vote in this year’s election for a specific Minnesota congressional district, the notices of contest fail to demonstrate Contestants’ ability to pursue these election contests, thereby divesting this Court of its

jurisdiction.

Notice of Contest Not Timely Served

As previously noted, “[b]ecause the right to contest an election is purely statutory, the provisions of the statute relating to the filing and serving of notice of contest must be strictly followed if the court is to acquire jurisdiction.” *Lebens*, 243 N.W.2d at 129. The statute dictates that election contestants must serve and file their notice “within seven days after the canvass is completed.” Minn. Stat. § 209.021, subd. 1. Service of election contests is governed by Rule 4 of the Minnesota Rules of Civil Procedure. *See id.* (“Service of a notice of contest must be made in the same manner as the service of summons in a civil action.”). Rule 4 requires that individuals be served either “by delivering a copy to the individual personally or by leaving a copy at the individual’s usual place of abode with some person of suitable age and discretion then residing therein.” Minn. R. Civ. P. 4.03(a). “If personal or substituted service on the contestee cannot be made, an affidavit of the attempt by the person attempting to make service and the affidavit of the person who sent a copy of the notice to the contestee by certified mail is sufficient to confer jurisdiction upon the court to decide the contest.” Minn. Stat. § 209.021, subd. 3. Such affidavits, however, “must be executed and filed before the expiration” of the deadline for service. *Pearson v. Chmielewski*, 183 N.W.2d 566, 568 (Minn. 1971). Just as “[p]ersonal or substituted service made after that time is of no effect,” “[n]either is an attempted service by mail, which is a substitute for personal service, unless all the prerequisites of the statute are fully completed before expiration of the specified [7]-day period.” *Id.* at 569 (holding that jurisdiction must be acquired within the statutorily prescribed time frame or it is not acquired at all).

The canvass is completed when all postelection reviews (“PERs”) under Minn. Stat. § 206.89 are concluded, which occurs once the Secretary of State reports the results of all

postelection reviews at the meeting of the State Canvassing Board. *Id.* § 206.89, subds. 6, 10. There is no dispute that the State Canvassing Board met and completed its canvass on November 24, 2020. Therefore, Contestants’ deadline for filing and serving the notices of contest on Contestees Craig, McCollum, Phillips, and Omar was seven days after November 24, 2020—on or before December 1, 2020. Again, it is undisputed that Contestants failed to file and serve the notices by December 1, 2020. Although Contestants argue that they attempted service, they failed to address the concerns this Court expressed during the hearing about the content of the affidavits of attempted service and their failure to file the affidavits by the December 1, 2020, deadline. Therefore, Contestees Craig, McCollum, Phillips, and Omar did not receive service by the expiration of the statutorily prescribed deadline. Contestants’ failure to effectuate service by December 1, 2020, requires dismissal of these contests.

Allegations Facially Inadequate

When a contest challenges the outcome of a congressional race, “the only question to be decided by the court is which party to the contest received the highest number of votes legally cast.” Minn. Stat. § 209.12. While “[e]vidence on any other points specified in the notice of contest, including but not limited to the question of . . . deliberate, serious, and material violation of the provision of the Minnesota Election Law, must be taken and preserved by the judge trying the contest, . . . the judge shall make no findings or conclusion on those points.” *Id.* The only question this Court may adjudicate with respect to these contests is whether Contestees Craig, Phillips, McCollum and Omar received the most legal votes. Additionally, when the State Canvassing Board certified them as the winners of these elections, it constituted “prima facie evidence that [they], the contestee[s], ha[ve] been elected to the office,” [and] Contestants “bear[] the burden of proof” to “show that the Board’s certification was in error.” *In re Contest of Gen.*

Election Held on Nov. 4, 2008 for Purpose of Electing U.S. Senator from State of Minn., 767 N.W.2d 453, 458 (Minn. 2009) (per curiam).

In election contest cases under Section 209, the pleading requirement is jurisdictional. If the notice fails to allege sufficient facts that Contestees did not obtain the most valid votes, this Court lacks jurisdiction and is, “powerless to entertain such proceedings.” *Christenson*, 119 N.W.2d at 38. The factual allegations contained in Contestants’ notice, accepted as true, fail to identify how the irregularities alleged would have altered the result of any of the elections. Violating a rule or statute governing the conduct of an election, and assuming such violation in fact occurred, “is not fatal to the election in the absence of proof that the irregularity affected the outcome or was the product of fraud or bad faith.” *Hahn v. Graham*, 225 N.W.2d 385, 386 (Minn. 1975).

Here, Contestants allege that errors may have occurred in counting a relatively small number of ballots, but do not allege that the identified errors would be enough to reverse Contestee Craig’s almost 10,000-vote victory, Contestee Phillips’s more than 50,000-vote victory, Contestee McCollum’s more than 133,000-vote victory, and Contestee Omar’s more than 153,000-vote victory. Additionally, and fatal to these election contests, is Contestants’ concession that these election contests are “not necessarily about particularly who won,²” but rather how the Secretary of State and local units of government went about in processing the postelection ballots. Contestants’ failure to plead the narrow substantive grounds for jurisdiction over these congressional contests similarly requires dismissal of these contests.

CONCLUSION

Because the Secretary of State was not a candidate whose election was being contested, this Court lacks subject-matter jurisdiction over these contests insofar as the Secretary is a named

² Statement of Contestants’ counsel, Susan Shogren Smith, Esq., during oral argument on motions to dismiss.

contestee. These election contests relate to elections for the U.S. House of Representatives, and as such Contestants were required to file these contests in the county where Contestees reside. Contestee Craig resides in Dakota County, and Contestees Phillips and Omar reside in Hennepin County. Ramsey County District Court lacks subject-matter jurisdiction over these Contestees. Contestants also failed to indicate on their notices where they live or that they were eligible to vote this year in the election for a specific Minnesota congressional district, failing to demonstrate they can pursue these election contests. Contestants failed to file and serve the notices upon Contestees by the statutory deadline of December 1, 2020. Finally, Contestants failure to identify and allege how the alleged irregularities would have changed the outcome of any of the election contests requires this Court to dismiss for failure to state a claim upon which relief may be granted. For all these reasons, Contestees' motions to dismiss are granted, and the above-captioned election contests are dismissed with prejudice.

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