Wong v. Nakamura, 4 ROP Intrm. 364 (Tr. Div. 1994)

NANCY WONG and LUCIA TABELUAL
Plaintiffs,

v.

KUNIWO NAKAMURA, President of the Republic of Palau,
and the ELECTION COMMISSION,
Defendants.

ISABELLA SUMANG, VALENTINA TMODRANG
AND JOHN DOES 1 THROUGH 1000 AND
JANE DOES 1 THROUGH 1000,
Plaintiffs,

v.

REPUBLIC OF PALAU, Represented by its President
KUNIWO NAKAMURA,
Defendant.

CIVIL ACTION NOS. 1-94, 2-94

Supreme Court, Trial Division
Republic of Palau

Decision
Decided: July 22, 1994

LARRY W. MILLER, Justice:

Before the Court is the Republic of Palau's motion for summary judgment on the two amended claims filed by plaintiffs which challenge the eighth plebiscite on the Compact of Free Association held in November 1993. Plaintiffs contend that some number of off -island voters were wrongfully disenfranchised and that those voters would have overwhelmingly opposed the Compact. Plaintiffs also assert that the denial of air time on Palau's radio station to Compact opponents in the days preceding the 1993 plebiscite was ⊥365 wrongful. As to both of these claims, plaintiffs seek that the plebiscite be invalidated.

Rule 56(e) of the Palau Rules of Civil Procedure provides:

> "When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against

him."

Rule 56(e) further provides that affidavits submitted on summary judgment:

> "Shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

The Republic's motion sets forth in a series of affidavits its contention that no irregularity has been shown in the conduct of the 1993 plebiscite and certainly none that, as a legal matter, could warrant its invalidation. It has also adduced the following undisputed facts as to the result of the plebiscite: The total number of votes cast in the plebiscite was 7624. Of that number, 1905 were cast outside of Palau. Within the Republic, 63% of those voting voted to approve the Compact. The approval rate for voters outside Palau was 84.9%. Overall, the Compact was favored by 5193 voters, while 2415 votes were cast against it -- a margin of 2778 votes.

There is no question that the Republic's motion was made and supported as provided in Rule 56. The only question, therefore, is whether plaintiffs, by affidavits made in conformity with the ⊥366 rule, have "shown that there is a genuine issue for trial." The Court concludes that they have not.

I. Plaintiffs' first claim asserts that some number of off-island Palauan citizens were wrongfully denied their right to vote in the plebiscite and that the plebiscite should therefore be invalidated. Evaluating this claim requires a twofold inquiry. [1] First, have the plaintiffs shown that there were irregularities in the conduct of the vote? Were there voters who were allowed to vote who were not eligible or, as alleged here, voters who were not allowed to vote who should have been? Second, and if so, were the irregularities such that the outcome would have been altered?[2] In the Court's view, plaintiffs' submissions do not raise a genuine issue for trial on either of these questions.

Plaintiffs' claim of disenfranchisement takes two forms. In their amended complaint, plaintiffs focused attention on the 60 day voter registration requirement in effect for the plebiscite. ⊥367 In more recent pleadings, plaintiffs have pointed to a government

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[1] Both the principal case relied on by plaintiffs and many of the cases cited by the Republic involved challenges to the conduct of state elections filed in United States federal courts. Given the unified nature of Palau's court system and given that this was a nationwide vote in any event, the Court believes that the somewhat more limited scope of review adopted in those cases is not appropriate here.

[2] "[W]e look to the record to ascertain whether any electors deprived of their vote would have altered the result of the election had they been allowed their ballot." *Reitveld v. Northern Wyoming Community College District*, 344 P.2d 986, 988 (Wyoming 1959). There is some debate in U.S. courts whether, in some circumstances, a showing that the result of an election could have been altered is sufficient to set it aside. See *Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978). Because plaintiffs do not make even this lesser showing, that debate need not be resolved here.

memorandum which, they contend, misled off-island voters into foregoing their opportunity to vote.

As to the requirement that voters register sixty days in advance of the election, plaintiffs offer no argument that it is illegal per se[3] nor do they present any evidence that it was applied unequally to disfavor off-island voters.[4] Rather, plaintiffs argue that inadequate notice was given of that requirement. Plaintiffs point out that the Rules and Procedures for the November 1993 plebiscite were not promulgated by the Election Commission until October 3, 1993, when it was too late to register in any event.

As the Republic responds, however, these Rules and Regulations did not create the 60-day limitation on registration. To the contrary, that limitation is a matter of Palau's statutory law, which has been part of the Palau National Code for many years. 23 PNC § 1408. The 60-day requirement was thus in effect and on notice to all Palauans at all times irrespective of the issuance of the Election Commission's regulations. Plaintiffs' contention that the ⊥368 timing of that issuance disenfranchised anyone is therefore without merit.[5]

Plaintiffs also contend that there is a genuine issue for trial whether "the mailing of an affirmatively wrong memorandum to hundreds of mainland Palauan citizens and officers [was] sufficient to have deflected large numbers of Palau citizens from learning of or trying to vote in the November 9, 1993 Referendum." Plaintiffs' Memorandum at 4. In requesting additional time to respond to the Republic's motion, plaintiffs repeatedly described this memorandum as saying that " only full-time students would be allowed to vote in the November 9, 1993 plebiscite." Plaintiffs' Preliminary Memorandum at 2 (emphasis in original).[6]

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[3] The United States Supreme Court has upheld against constitutional challenge state statutes requiring voters to register at least fifty days in advance of a scheduled election. *Burns v. Fortson*, 410 U.S. 686, 93 S.Ct. 1209 (1973); *Marston v. Lewis*, 410 U.S. 679, 93 S.Ct. 1211 (1973).

[4] Plaintiffs have asserted that the 60-day requirement was adopted to disfavor off-island voters, and have suggested that the legislative history of RPPL 3-76 reveals such a purpose. However, although plaintiffs attach that legislative history, neither their brief nor accompanying affidavit points to any proof of this assertion, nor has the Court found any support for it in its own review.

[5] It appears from the record that the OEK has apparently suspended the application of 23 PNC §1408 with respect to particular elections. It can hardly be argued that unregistered voters were entitled to wait and see whether the OEK would do so as to the plebiscite. See, e.g., *Moore v. City of Page*, 713 P.2d 813 (Ariz. App. 1986) (upholding election called after statutory cut-off date for registration). But even if they were, the statutes leading to the plebiscite, RPPL Nos. 3-76 and 4-9, which contained no waiver of the 60-day limitation, were enacted far more than 60 days before the plebiscite was held.

[6] See id. at 3 (describing "a memorandum telling the several thousand Palau citizens who reside in the United States that they could not vote unless they were full-time students"); id. at 4 ("the Republic told its off-shore citizenry it had no right to vote in the November 9, 1993 plebiscite"); id. at 5 (referring to "the circulation of official Palau government information to the off-shore electorate, telling it that it could not vote").

The memorandum in question, distributed by Charles Uong of the Republic's Washington, D.C., office, in fact says the following:

> "Please be informed that the Election Law of Palau only allow [sic] those full-time students outside the Republic ⊥369 to register. All registered voters who have once voted in any previous election plebiscite need not have to re-register."

The memo plainly does not say, as plaintiffs charged, that only full-time students could vote. What it does say, albeit not in the clearest way, [7] is an accurate statement of a provision of Palau law that plaintiffs do not challenge -- that only full-time students can register in absentia, without appearing before an election officer in Palau. See 23 PNC §§ 1403, 1407.

In sum, the Court is unable to find that plaintiffs have identified any irregularity affecting the 1993 plebiscite. But even if plaintiffs could make such a showing, they would still have the additional burden of demonstrating that the irregularity was so widespread as to call into question the result of the plebiscite. Plaintiffs have not met this burden.

Relying on their assertion that "there are probably at least 4,000 to 5,000 potential voters outside Palau," plaintiffs contend that there is a genuine issue for trial as to whether "the demographic base of potential off-shore voters [was] large enough to have changed the outcome of the vote." Affidavit of Nancy Wong, 6/17/94, ¶ 3(A) (emphasis in original); Plaintiffs' Memorandum at 4. But that fact is not material in and of itself.

To have any possibility of succeeding at trial, plaintiffs would have to show: 1) that there are indeed 5000 potential voters outside of Palau; 2) that, after discounting the 1905 persons who ⊥370 did vote, at least 2778 of the remaining 3100 or so failed to vote because of the irregularities charged by plaintiffs; and 3) that those voters would have voted against the Compact by a margin sufficient to overcome the margin of victory.

These hurdles are all but impossible to surmount. Taking at face value plaintiffs' estimate of potential off-island voters, and assuming that all of those who did not vote (5000-1905) were wrongfully disenfranchised for the reasons plaintiffs claim, roughly 3100 additional votes would have been cast. To offset the 2778 vote margin actually achieved, plaintiffs would have to show that 2969 of the 3100 new votes -- an astonishing 95% -- would have been cast against the Compact.[8]

In the face of these hurdles, plaintiffs' factual submission consists of the single affidavit of Ms. Wong. Remarkably, plaintiffs have failed to come forward with a single person who actually failed to vote for the reasons plaintiffs charge. Instead, citing her conversations with

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[7] A better word order would have been to say that "the election law of Palau allows only full-time students to register outside the Republic."

[8] Indeed, even giving credence to plaintiffs' survey indicating that 80% would oppose the Compact; see n.9 infra, only 2480 anti-Compact votes (offset by 620 pro-Compact votes) would result.

"dozens of Palauan citizens who reside outside Palau", Wong Aff. ¶ 3, Ms. Wong makes conclusory assertions about the number of Palauans who reside abroad, id. ¶ 3(A), the "thousands of citizens" who were disenfranchised, ¶ 3(D), and opines--contrary to the votes that were cast--that "the overwhelming majority of off-shore voters ... would have voted ⊥371 overwhelmingly against the Compact." Id. ¶ 3(E).[9] Even bypassing the hearsay nature of Ms. Wong's assertions, there is simply no way that conversations with "dozens" of people could permit her--or this Court on taking her testimony at trial--to conclude that thousands of anti-Compact voters were wrongfully disenfranchised.

A motion for summary judgment requires a plaintiff to

> "present evidence from which a jury might return a verdict in his favor. If he does, there is a genuine issue of fact that requires a trial." *Anderson v. Liberty Lobby* , 477 U.S. 242, 106 S.Ct. 2505, 2512-13 (1986).

Because plaintiffs have not come forward with such evidence, the Republic's motion for summary judgment should be granted.

II. Plaintiffs' second claim involves the denial of air time on Palau's radio station to Compact opponents who wished to present their views. On this claim, there is a clearly no question of fact requiring that a trial be held. In its motion, the Republic has provided affidavits stating that in the days leading up to the plebiscite, two Compact opponents and one Compact supporter made requests for air time, all of which were denied. Plaintiffs have not called into question any of the facts put forward by the Republic. Thus, the Court is faced with the legal question whether these facts entitle plaintiffs to the remedy they have sought.

Deciding whether Palau's radio station, as a government entity, had any obligation to provide air time to Compact opponents ⊥372 (or proponents) requires a balance between competing principles. On the one hand, the fundamental guarantee that "[t]he government shall take no action to deny or impair the freedom of expression or press", Palau Const., Art IV, Sec. 2, rests on the idea that "more speech, not enforced silence" will benefit the people and the Republic. See *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 649 (1927) (Brandeis, J., concurring). On the other hand, there is much to be said for the notion that the right of freedom of expression "does not guarantee access to property simply because it is owned or controlled by the government." *U.S. Postal Service v. Council of Greenburgh Civic Ass'ns.*, 458 U.S. 114, 129, 101 S.Ct. 2676, 2688 (1981).

In the Court's view, however, this issue need not be resolved at this time. Even if plaintiffs are right that the denial of air time was wrongful, the remedy that they seek--invalidation of the plebiscite--does not follow. It is one thing to say that the affected individuals might have been entitled to an injunction allowing them to go on the air or might even now be

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[9] In reaching this last conclusion, Ms. Wong also cites a "survey" of potential voters said to have been conducted by Singeo Singitz. Wong Aff. ¶ 3(F). But she includes no information about the scope or methodology of the survey, nor is there an affidavit by Mr. Singitz himself.

entitled to a declaration (for future guidance) that they should have been allowed. It is quite another to say that the denial of air time is a sufficient basis to set aside the freely cast votes of thousands of Palauans.[10]

No contrary authority having been cited by the plaintiffs, it ⊥373 is the Court's view that an election should not be set aside unless it can be said to have been unfairly conducted. This is not a case where the government is charged with having used its monopoly over mass communications to disseminate one-sided propaganda, nor is it a case (given the evenhandedness of the station's refusals) where the government acted to silence its opponents. It is simply a case where those hoping to sway the votes of Palauan citizens were required to do so by posting signs, passing out leaflets or talking face-to-face, but without the benefit of radio. The lack of mass media did not render unfair more than a century of American elections, nor does it render unfair the plebiscite last year. The Republic's motion as to plaintiffs' second amended claim is therefore granted as well.

CONCLUSION

For the reasons set forth herein, the Republic's motion for summary judgment is granted, and plaintiffs' amended complaint is dismissed.

SO ORDERED, this 22nd day of July, 1994.

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[10] Indeed, even where laws directly governing the conduct of elections are challenged, courts will often deny retrospective relief. See *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983).