

2020 WL 5552870

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United States District Court, N.D. Florida,
Tallahassee Division.

Kirk NIELSEN et al., Plaintiffs,
v.
Ron DESANTIS et al., Defendants.

Consolidated Case No. 4:20cv236-RH-MJF

|
Signed 07/06/2020

ORDER NARROWING THE § 203 CLAIM

Robert L. Hinkle, United States District Judge

***1** The plaintiffs in these consolidated actions challenge Florida voting procedures. One set of plaintiffs is sometimes referred to in this litigation as the Williams plaintiffs but usually referred to in this order simply as the plaintiffs. They assert a claim under § 203 of the Voting Rights Act. That section requires election officials in covered counties to provide materials in appropriate languages other than English. *See* 52 U.S.C. § 10503.

The § 203 claim is set out in count five of the plaintiffs' third amended complaint. A court-ordered more definite statement identified the claim more precisely in items 8, 9, 10, and 13:

8. Failure to provide mail ballot request forms in Spanish.

9. Failure to provide accurate translations into Spanish of online mail ballot request systems.

10. Failure to provide a means for voters to request a Spanish-language mail ballot.

....

13. Failing to deliver Spanish-language mail ballots or requiring voters to make a second request to receive a Spanish-language mail ballot.

ECF No. 68 at 3–4 (text identifying defendants for each item omitted).

The plaintiffs originally said they asserted the § 203 claim against the Governor and Secretary of State as well as against all Supervisors of Elections (for items 9, 10, and 13) and all Supervisors of Elections who do not provide Spanish-language ballot request forms (for item 8).

A subset of defendants—17 Supervisors of Elections—moved for summary judgment on this claim, asserting that § 203 does not apply to some of them at all and that the claim against the others is unfounded on the merits. Other Supervisors explicitly joined in the motion.

In response, the plaintiffs acknowledged that § 203 applies to only some Florida counties: Broward, DeSoto, Hardee, Hendry, Hillsborough, Lee, Miami-Dade, Orange, Osceola, Palm Beach, Pinellas, Polk, and Seminole. *See* ECF No. 78-1 at 4–5. The plaintiffs abandoned the § 203 claim against Supervisors from the other 54 counties.

The Supervisors from covered counties who filed the summary-judgment motion are from Broward, Lee, Osceola, and Polk. Each provided a declaration stating that all registration and voting notices, forms, instructions, assistance or other materials or information relating to the electoral process, including ballots, are provided in Spanish as well as English. Broward provides the materials in Creole, too. The Supervisors from Hardee and Hendry joined the motion and provided equivalent declarations. The Supervisor from DeSoto joined the motion but was omitted from an amended notice of joinder and did not file a declaration.

The plaintiffs said in their response to the summary-judgment motion that the Supervisors do not provide some election-related information in Spanish, including, for example, information disseminated on Facebook and Twitter, as well as cure affidavits for initially rejected mail ballots. But this is not the information on which the plaintiffs' claim is based. As the Eleventh Circuit has said time and again, a plaintiff cannot raise a new claim for the first time by including it in a response to a summary-judgment motion. *See, e.g., Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 859 (11th Cir. 2020); *Miccosukee Tribe of Indians of Fla. v. United States*, 716 F.3d 535, 559 (11th Cir. 2013).

***2** The plaintiffs' original complaint and each amended version of it are shotgun pleadings that were allowed to

go forward only in conjunction with the court-ordered more definite statement—an approach followed because time is of the essence as elections approach. The plaintiffs never mentioned any concern with social-media materials until they responded to the summary-judgment motion and did not list cure affidavits as a basis of the § 203 claim. They did not seek leave to amend to expand their allegations and would not be granted leave now, with discovery over and trial just two weeks away. The plaintiffs are stuck with the statement of their claim in the more definite statement.

The plaintiffs have not identified even a single instance in which a Supervisor failed to provide in Spanish as well as English the material described in the more definite statement. Instead, the plaintiffs say the Spanish translation of some material, apparently taken from Google Translate, is poor. In support of this assertion, the plaintiffs provide only a vague, conclusory explanation of the difficulty. More importantly, for this assertion the plaintiffs rely only on the testimony of Pamela Cataldo, who was not previously disclosed as an expert and for whom Federal Rule of Civil Procedure 26(a)(2) disclosures were not made.

Ms. Cataldo also apparently was not identified in Rule 26(a)(1) disclosures. Leaving that aside, she could properly authenticate, or any number of other witnesses could authenticate, the content of a Supervisor's website. She could provide lay testimony on other topics. But she has not been shown to be a qualified expert, and her testimony would be excluded for failure to provide proper 26(a)(2) disclosures, even if she was otherwise qualified. Under Rule 37, evidence for which proper disclosures were not made may be excluded unless the failure was substantially justified or harmless. Here it was neither.

In sum, the Supervisors who have filed declarations showing they provide all materials identified in the more definite statement in Spanish as well as English are entitled to summary judgment on the § 203 claim. And the claim has been abandoned against Supervisors from counties not covered by § 203.

IT IS ORDERED:

1. The Williams plaintiffs' § 203 claim has been abandoned and is thus dismissed as against the Supervisors of Elections of the 54 counties not covered by § 203.

2. The motion for summary judgment on the § 203 claim, ECF No. 78, is granted in part and denied as moot in part. Summary judgment on this claim is granted on the merits in favor of the Supervisors of Elections of Broward, Hardee, Hendry, Lee, Osceola, and Polk Counties. The claim remains pending only against the Secretary of State and the Supervisors of Elections of DeSoto, Miami-Dade, Orange, Palm Beach, Pinellas, and Seminole Counties.

3. I do *not* direct the entry of judgment under Federal Rule of Civil Procedure 54(b).

SO ORDERED on July 6, 2020.

All Citations

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