UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

John DeRosier,

Plaintiff,

Civ. Action No.: 5:18-CV-0919 (GLS/DEP)

-against-

Dustin M. Czarny, in his official capacity as Commissioner of the Onondaga County Board of Elections,

Michele L. Sardo, in her official capacity as Commissioner of the Onondaga County Board of Elections,

Peter S. Kosinski, in his official capacity as Co-Chair of the New York State Board of Elections,

Douglas A. Kellner, in his official capacity as Co-Chair of the New York State Board of Elections,

Andrew J. Spano, in his official capacity as Commissioner of the New York State Board of Elections,

Gregory P. Peterson, in his official capacity as Commissioner of the New York State Board of Elections,

Defendants.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF COUNTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

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I. Preliminary Statement

Onondaga County Board of Elections ("CBOE") Commissioners Dustin M. Czarny and Michele L. Sardo ("County Defendants") submit this reply in further support of County Defendants' motion for summary judgment, and in opposition to Plaintiff's cross motion for summary judgment (hereinafter referred to as "Opposition"), based, in part, on the seemingly uncontested and legally dispositive fact that the County lacked a meaningful choice with respect to the enforcement of New York State anti-electioneering laws under the standard set forth in Vives v. City of New York, 524 F.3d 346 (2d. Cir. 2008). By way of this reply, County Defendants also support and adopt as their own the reply memorandum of law submitted by the State of New York on behalf of the named New York State Board of Elections ("SBOE") officials.

The relevant facts and applicable legal standards have been fully set forth in County Defendants' underlying motion papers and are incorporated by reference herein for purposes of brevity and convenience. It should be noted, however, that Plaintiff has clarified in his response and cross motion that he is challenging certain state anti-electioneering statutes solely on vagueness grounds and is not suing County Defendants on any failure to property train or educate theory. See Opposition at 4 n. 4, 17.

II. Argument

A. The County is Not Liable because it did Not Have a Meaningful Choice as to whether it would Enforce State Anti-Electioneering Laws

Initially, it appears as though Plaintiff misconstrues or misunderstands County Defendants' arguments concerning Vives and the County being the proper party to this lawsuit. See Opposition at 13-16. County Defendants' merely pointed out that the proper party is the County, not its CBOE Commissioners, pursuant to applicable case law and, therefore, this action

should be construed as an official capacity lawsuit against the County. See Kentucky v. Graham, 473 U.S. 159, 165-166 (1985); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 n. 55 (1978). While Plaintiff points to Parrish v. Kosinski as a recent example of the CBOE Commissioners being named individually in a "First Amendment case involving the application of 'mandatory' state election law" (Opposition at 14), Parrish settled based on intervening changes to state law prior to any procedural or Monell/Vives policy arguments being made and, in any event, the court decided to apportion costs solely to the State in part because it "was the State of New York Board of Elections that allowed the facially unconstitutional witness residency requirement to persist, and to be enforced." 2018 WL 1475222, at *8 (N.D.N.Y. 2018), adopted 2018 WL 1474366. In discussing the proper party to be named, the County was addressing a procedural issue unrelated to the merits of the case and was in no way attempting to "have the best of both worlds." Opposition at 13. The County does have control over the CBOE Commissioners, albeit subject to the mandates and requirements of the Election Law and the considerable autonomy granted them thereunder. See e.g. Election Law § 3-300. Nevertheless, the County, and by extension the CBOE Commissioners, simply does not have a "meaningful choice" regarding the enforcement of state anti-electioneering laws; a critical and dispositive threshold legal determination under Vives and its progeny.

Perhaps tellingly, Plaintiff focuses primarily on the purported electioneering policy of the CBOE while failing to analyze in any substantive way state Election Law statutes, and corresponding opinions, which deprive the County and its CBOE of any meaningful choice regarding anti-electioneering law enforcement. Contrary to Plaintiff's assertions, it is the presence of state statutes and corresponding opinions, not simply SBOE guidance materials, which deprive the County of any meaningful choice. As conceded by Plaintiff, the text of such

statutes and applicable case law form the proper basis of a motion for summary judgment. See Opposition at 2. It is the County's contention that based solely upon the law and judicially noticeable materials, the County should be dismissed from this lawsuit because it had no choice as to whether to enforce state anti-electioneering laws.

In order to find the County liable in this 42 U.S.C. § 1983 action, the County must have: (1) "had a meaningful choice as to whether it would enforce [state anti-electioneering laws]; and (2) if so . . . adopted a discrete policy to enforce" such laws that "represented a conscious choice by a municipal policymaker." Vives, 524 F.3d at 353. It is only after a determination that the County did in fact have a meaningful choice that Plaintiff would be required to prove, and this Court to decide, whether the County adopted a discrete policy, as evidenced by the use of "if so" in the aforementioned legal standard. While the County disputes that it has adopted any discreet policy within the meaning of Monell and Vives, it is the County's contention that, based upon applicable laws and opinions, the County is affirmatively required to enforce state anti-electioneering laws and is therefore entitled to summary judgment as a matter of law.

Plaintiff's cursory discussion of the meaningful choice element in his opposition papers relies on two cases, Garner v. Memphis Police Dep't, 8 F.3d 358, 364 (6th Cir. 1993) and Cooper v. Dillon, 403 F.3d 1208, 1222–23 (11th Cir. 2005), both of which were analyzed in Vives and involved statutes which authorized, but did not require, enforcement. Vives, 524 F.3d at 351. The Second Circuit "agree[s] with all circuits to address state laws mandating enforcement by municipal . . . officers that a municipality's decision to honor this obligation is not a conscious *choice*." Id. at 353. A "municipality cannot be liable under Monell in this circumstance." Id.

Unlike the penal law statute at issue in Vives, state law does not simply define the offense of electioneering "without directing municipal officers to take any steps to act when the

statute is violated." Id. Regardless of Plaintiff's disputed argument concerning the vagueness of the statutory definition of electioneering, the County simply does not have the power to instruct CBOE personnel not to enforce Election Law §§ 8-104(1) and 17-130(4) because state law mandates the contrary. See id. at 354.

As early as 1951 it has been stated that election officials "are charged by law to preserve good order." 1951 N.Y. Op. Atty. Gen. No. 214, 1951 WL 81786; see also 1933 N.Y. Op. Atty. Gen. No. 1973. More specifically, local inspectors "*shall* preserve good order within and around the place of registration," which includes ensuring lawful commands are obeyed, disorderly conduct disturbing election proceedings is prevented, and no one violates or attempts to violate "any provisions of [the Election Law]." Election Law § 5-204(9) (emphasis added). This affirmative requirement on the part of CBOE personnel to preserve good order is contained within the same paragraph as, and immediately follows, the prohibition on "any electioneering within the polling place." Id. Likewise, Election Law § 3-402 mandates that inspectors "*shall* preserve good order within and around the polling place or place of registration" and that "[a]ll election inspectors *shall* perform their duties *as required* by the election law . . . ." Election Law § 3-402(3), (4) (emphasis added). Election Law § 8-104(3) renders all provisions of the Election Law concerning "preservation of order and apprehensions for crime on a day of registration" applicable to Election Day. The Election Law prohibits electioneering and makes it a crime for any person to electioneer. See Election Law §§ 5-204(9), 8-104(1), 17-130(4). In addition, Election Law § 17-102(10) and (12) make it a misdemeanor for local inspectors to even "permit electioneering within the polling place or within [100] feet therefrom, or [to] fail[] to keep order within the polling place." Election Law § 17-102(10); see also Election Law § 17-128 (making

it a felony for a public officer or employee to "knowingly and wilfully omit[], refuse[] or neglect[] to perform any act required of him by this chapter").

The use of "shall" when describing the duties of local election officials denotes a mandatory or required action and the failure to abide by such state mandates results in criminal consequences for County personnel. See generally N.N. ex rel. S.S. v. Madison Metropolitan School Dist., 670 F.Supp.2d 927, 937 (W.D. Wis. 2009); see also Vives, 525 F.3d at 354 n. 6 (citing In re Jurnove, 38 A.D.3d 895 (2d Dep't 2007)). State law defines the crime of electioneering, mandates County personnel prevent electioneering, and then makes it a criminal offense to fail to prevent electioneering; in no manner could such a scenario be considered a meaningful choice. See Correction Officers Benev. Ass'n of Rockland County v. Kralik, 2011 WL 1236135, at *7-12, 26-27 (S.D.N.Y. 2011); see also Vives, 524 F.3d at 352; Vaher v. Town of Orangetown, N.Y., 133 F.Supp.3d 574, 607 (S.D.N.Y. 2015).

B. The County does Not Have a Monell Policy

Seeing as though the County lacked a meaningful choice, there is no need to address the second element, i.e., whether the County adopted a discrete policy to enforce Election Law § 8-104(1) representing a conscious choice by a municipal policymaker. See Vives, 524 F.3d at 353. Nevertheless, it is the County's contention that it does not have a distinct official anti-electioneering policy or custom within the meaning of Monell, much less one that "materially deviated" from SBOE guidance as claimed by Plaintiff. Opposition at 1, 10.

County Defendants will rest on the analysis of this element contained in its underlying motion papers, with one exception. Regrettably, the County inadvertently neglected to include in its discussion of, and citations to, the March 12, 2018 CBOE Training Manual ("Manual") the definition of "electioneering" contained on page 65 of said Manual. See Exhibit 1C to County

Defendants' Memorandum of Law at 65. The Manual defines "electioneering" as "[a]nything that promotes a candidate (Political buttons, T-Shirts, hats, Campaign Signs, etc.)." Id. Far from establishing a discrete County policy within the meaning of Monell, this language is derived from and in accordance with state guidance and statutes. While this particular version of the Manual predates the emailing of the SBOE Guidance to the CBOE on June 20, 2018, it is in accord with longstanding SBOE practice as well as the SBOE Guidance, which notes that Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876 (2018), "has no direct impact on New York law." See Exhibit 1A to County Defendants' Memorandum of Law at 1. The SBOE Guidance restated the existing law on electioneering, noting that electioneering is "communication . . . which seeks the election of a candidate" and that such remains the case post-Mansky. Id. The definitions and prohibited items in the Manual and SBOE Guidance largely mirror each other. A voter is not to promote or seek the election of a candidate via communications, such as buttons, signs, placards, and attire. The fact that New York City's 2016/2017 poll worker manual defines electioneering in a very similar manner, i.e., as "efforts to encourage voters to vote a certain way", and is cited in the SBOE Guidance further demonstrates that the State has long defined electioneering in such a way. See Exhibit 3 to Connolly Declaration. In addition, Education Law § 2031-a prohibits any "banner, poster or placard on behalf of or in opposition to any candidate", which is another way of prohibiting the promotion of a candidate. Education Law § 2031-a(2). While Plaintiff calls Defendants' citation to Education Law § 2031-a "inexplicable"; it would be inexplicable to not discuss a parallel non-Election Law statute prohibiting electioneering in the similar context of school district elections. Opposition at 16; see State Defendants' Memorandum of Law at 11, n. 3. In any event, it is the County's contention that the substantially similar definitions/descriptions of electioneering

contained in the County and New York City manuals, SBOE Guidance, and state statutes further evidence the lack of a discrete Monell policy on the part of the County. See Vives, 524 F.3d at 353.

III. Conclusion

For the foregoing reasons, County Defendants' motion for summary judgment should be granted, and Plaintiff's Complaint dismissed in its entirety.

Dated: February 12, 2019

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