

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JASON GONZALES,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 16 C 7915
)	
MICHAEL J. MADIGAN, et al.,)	
)	
Defendants.)	

**ORDER ON DEFENDANTS' MOTION TO RECONSIDER
AND MOTION FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b)**

Jason Gonzales ran in the 2016 Democratic primary for the District 22 seat in the Illinois House of Representatives, which was held by Michael Madigan, the Speaker of the House. Madigan won the primary, which was tantamount to winning the general election. Gonzales then filed suit under 42 U.S.C. § 1983 and state law. He alleged that Madigan and others acting at his behest and in concert with him had put up two sham candidates with Hispanic last names to split up the Hispanic vote and had disseminated false information about him to confuse Hispanic voters. This conduct, he alleged, had caused him to lose the primary.

The Court originally granted defendants' motions to dismiss Gonzales's federal claims, finding that he had not adequately alleged that any of the defendants had acted under color of state law. Gonzales then filed an amended complaint, adding new allegations regarding the color of law issue as well as new claims. The Court again granted defendants' motions to dismiss the federal claims and dismissed the state law claims for lack of supplemental jurisdiction.

Gonzales then moved to reconsider. The Court granted his motion, concluding that it had "read [Gonzales's] complaint too narrowly and that Gonzales has in fact adequately alleged that Madigan's conduct in this case involved power and authority he had by virtue of his official positions." Mem. Op. and Order (dkt. no. 64) at 8 (Sept. 11, 2017). The Court went on to consider defendants' other arguments for dismissal of

Gonzales's federal claims. The Court dismissed most of them, leaving intact only his claims under section 1983 against certain of the defendants arising from his contention that he was deprived of his rights under the Fourteenth Amendment based on defendants' alleged registration of sham candidates as well as a similar claim under 42 U.S.C. § 1985(3).

After the Court's ruling, Gonzales withdrew one of the allegations on which the Court had relied in making its ruling on the color of state law issue. Specifically, he withdrew his allegation that Madigan had used the influence he has by virtue of his government office to get one of the alleged sham candidates, Grasiela Rodriguez, a job in the office of the Illinois Attorney General in return for her service as a sham candidate. Following the withdrawal of this allegation, defendants moved for reconsideration of the Court's ruling.

The premise of defendants' motion for reconsideration is that the allegation about Rodriguez was the linchpin of the Court's ruling on the color of state law question. That is not so. To be sure, this was a significant allegation and one that the Court had overlooked in earlier dismissing Gonzales's section 1983 claims, but it was not critical to the ruling upholding the claims. Even without this, Gonzales has adequately alleged that in orchestrating or directing the alleged scheme, Madigan used power that he possessed by virtue of, and that was made possible by, his governmental office—specifically, resources (such as political favors and control of campaign funds and precinct captains—generally, "clout") that he has by virtue of his office. The same is true of defendant Silvana Tabares, who, according to Gonzales, used resources available to her as a state representative to carry out the alleged scheme. And Gonzales has likewise adequately alleged that the other remaining defendants acted in concert with Madigan and/or Tabares, meaning that the color of state law requirement is likewise met for those defendants. For these reasons, the Court denies defendants' motion to reconsider.

Defendants have also moved the Court to certify for interlocutory appeal under 28 U.S.C § 1292(b) three issues: (a) the issue just discussed, namely whether Gonzales adequately alleged state action by Madigan and Tabares; (b) whether Gonzales has adequately alleged a claim under the Fourteenth Amendment; and (c)

whether Gonzales has plausibly alleged that he was harmed by the presence of the two sham candidates on the ballot seeing as how Madigan had a significant absolute majority of all votes cast. It is appropriate to certify a question for interlocutory appeal under section 1292(b) if it is a contestable and controlling question of law, the resolution of which will hasten the end of the litigation. *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000).

The Court concludes that there is not a "substantial ground for difference of opinion," 28 U.S.C. § 1292(b), on any of the questions defendants cite. First, Gonzales has more than sufficiently alleged that Madigan and Tabares used resources available to them only by virtue of their official positions. These are just allegations at this point, and Gonzales may not be able to prove what he claims. But he has adequately alleged it, and there is nothing implausible about the allegations. It is true that the Court previously dismissed Gonzales's amended complaint, but as stated in the Court's decision overturning the dismissal, this was because the Court had overlooked allegations Gonzales had made and because it had improperly given his complaint too narrow a reading, not because the issue was a close one.

Second, the Court's conclusion that Gonzales's allegations are sufficient to state a Fourteenth Amendment claim relies on controlling authority from the Seventh Circuit, including *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), which although it is forty-plus years old has never been overturned. In addition, defendants cite no contrary authority from other circuits or later contrary Supreme Court precedent. Among other things, Their citation of a Tenth Circuit case distinguishing *Cherry*, *Pagnanelli v. Pueblo School District No. 60*, 540 F.3d 1213 (10th Cir. 2008), is unavailing, because in the present case, unlike in *Pagnanelli*, Gonzales alleges that the defendants *did* have control over who got on the ballot, specifically by manipulating it to include sham candidates that they controlled. Defendants' apparent contention that *Cherry* has been limited to its facts is likewise unpersuasive, and in any event Gonzales's claim falls safely within the theory of "deception on the face of the ballot" that defendants articulate as the current viable basis for a *Cherry*-based claim.

Third, there is nothing implausible, for pleading and Rule 12(b)(6) purposes, about Gonzales's allegation that the presence of the other two (allegedly sham)

Hispanic candidates on the ballot actually harmed him. This is not simply a task of comparing numbers, as defendants contend. *Cf. Empress Casino Joliet Corp. v. Blagojevich*, 763 F.3d 723, (7th Cir. 2014) (concluding, albeit in a different context, that the fact that legislation had been passed by a veto-proof majority did not defeat the element of causation in a case alleging that the governor had been bribed to sign the legislation once it passed). It is not in the least bit implausible that a candidate-packed primary ballot, including three Hispanic candidates in a heavily Hispanic district, would lead to voter confusion and drive them toward the incumbent or keep them from voting. Again, Gonzales ultimately may be unable to produce evidence that sustains this aspect of his claims, but there is not a viable basis to claim that the causation allegation is so thin or deficient that there is a substantial ground for difference of opinion regarding its sufficiency.

Conclusion

For the reasons stated above, the Court denies defendants' motion to reconsider [dkt. no. 69] and their motion for certification under section 1292(b) [dkt. no. 74]. The remaining defendants are directed to answer Gonzales's remaining federal claims by no later than January 11, 2018. The Court will rule in due course on defendants' pending motion to dismiss Gonzales's state law claims.

Date: December 21, 2017


MATTHEW F. KENNELLY
United States District Judge