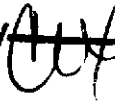


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Court Administrator

FEB 26 2009

By  Deputy

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

In the Matter of the contest of General
Election held on November 4, 2008, for the
purpose of electing a United States Senator
from the State of Minnesota,
Cullen Sheehan and Norm Coleman,

Court File No. 62-CV-09-56

Contestants,

v.

Al Franken,

Contestee.

Dennis Peterson, et. al.,

Supreme Court File No. A09-65

Petitioners,

v.

Mark Ritchie, Minnesota Secretary of State,
et. al.,

Respondents.

**CONTESTANTS' OPPOSITION TO RENEWED
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Contestants do not support a remedy that would disenfranchise Minnesota voters whose ballots already have been counted. We would prefer to respond to Petitioners' renewed motion for summary judgment as we did the first such motion: let these ballots be counted so long as all similarly situated ballots are counted as well. The Court's rulings, however, dictate otherwise. Moreover,

subsequent events have shown that Petitioners' declarations and affidavits are not always trustworthy; nor are the registration records used to support them. As a result, Contestants must oppose Petitioners' motion.

Petitioners' motion should be denied on two grounds. First, as to several of the ballots, the proffered evidence either demonstrates that they cannot meet the Court's standard for a legally cast vote or the proffered evidence is incomplete. These voters have not met their burden of proof. Second, as to the remainder of the ballots, the cloud cast by the subsequent revelation that Ms. Gorski's affidavit (which appears to have been obtained by the same persons who obtained these Petitioners' affidavits and declarations) was false, together with Contestee's stance on the necessity of having voters testify so as to be subject to cross-examination, augers in favor of leaving their claims to be resolved at trial.

ARGUMENT

Summary judgment is a blunt instrument. It should be used only when the moving party has satisfied the Court that there is no genuine issue of material fact and judgment should be granted in his or her favor. Minn. R. Civ. P. 56.03; Anderson v. State Dep't of Natural Res., 693 N.W.2d 181, 186 (Minn. 2005). All facts must be viewed in the light most favorable to the non-moving party. State Farm Fire & Casualty v. Aquila Inc., 718 N.W.2d 879, 883 (Minn. 2006). Here, that means the Court must cast a wary eye on self-serving declarations and must scrutinize the documentary evidence; if it is not clear that the statutory standard has been met, summary judgment should be denied.

The individualized evidence submitted with the Petitioners' motion is insufficient to satisfy the Court's February 13, 2009 order and, in several instances, contradicted by the supporting documentation attached to the voters' declarations. These voters must be required to provide live testimony in Court subject to cross-examination by the Contestants. Kleingbeil v. Truesdell, 98 N.W.2d 134, 140 (Minn. 1959) ("The right of cross-examination is an inviolate right. . . . which is of fundamental importance in the discovery of truth in the trial of a case."); State v. Pearson, 110 N.W.2d 206, 214 (Minn. 1961) ("the right to cross-examination is fundamental to any adversary proceeding"); see also Woods v. Robb, 171 F.2d 539, 541 (5th Cir. 1948) ("the best test of the rights of the movant" is a trial on the merits). This cross-examination will permit the Court to receive testimony regarding the issues raised in each voter's declaration or affidavit, as the case may be, and, in some instances, the disconnect between the plain language of a voter's declaration and the documentation attached to the declaration. In doing so, the Court will have the opportunity to weigh the reliability of the statements contained in each voter's declaration.

Listed below are the voters included in the Petitioners' motion and Contestants' concerns regarding the adequacy of the evidence presented.

1. Brenda Rengo

Ms. Rengo's declaration states that her absentee ballot application and absentee ballot return envelope contain her genuine signature. Nauen Aff. Exh. 1 (Rengo Aff.). However, her absentee ballot application was not included with her

declaration, which does not permit independent verification of her signature on the absentee ballot envelope. Moreover, Ms. Rengo's declaration states that her absentee ballot return envelope was properly executed by an authorized witness, but the proof of residence section of the absentee ballot return envelope is not completed. See id.

2. Shirley VanDyck

Ms. VanDyck's declaration states that her genuine signature is listed on her absentee ballot return envelope and that her daughter signed her absentee ballot application due to her illness. Nauen Aff. Exh. 2 (VanDyck Aff.). This is not sufficient to meet the Court's standard for a legally cast vote. In addition, she has not included her application, so the Court cannot independently verify that the information listed on her application and absentee ballot return envelope is otherwise similar.

3. Arvid Blackbird

Mr. Blackbird's declaration appears not to suffer from any such infirmities, but it is conclusory and his averments should be subject to testing under cross-examination.

4. Laurence Engebretson

Mr. Engebretson's declaration states that his absentee ballot application and absentee ballot return envelope both contain his genuine signature. Nauen Aff. Exh. 4 (Engebretson Aff.). However, the election judges rejected his absentee ballot on the basis of signature mismatch and the signatures do appear dissimilar.

5. Caitlin Heinz

Ms. Heinz's declaration states that she was entitled to vote as of November 4, 2008. Nauen Aff. Exh. 5 (Heinz Aff.). However, the documentation submitted with her declaration does not contain any information or verification from the Secretary of State's Office that she was properly registered to vote.

6. Donald Applebee

Mr. Applebee's declaration appears not to suffer from any such infirmities, but it is conclusory and his averments should be subject to testing under cross-examination.

7. Donelda Applebee

Ms. Applebee's declaration appears not to suffer from any such infirmities, but it is conclusory and her averments should be subject to testing under cross-examination.

8. Dennis Erickson

Mr. Erickson's declaration appears not to suffer from any such infirmities, but it is conclusory and his averments should be subject to testing under cross-examination.

9. Craig Lindquist

Mr. Lindquist's declaration appears not to suffer from any such infirmities, but it is conclusory and his averments should be subject to testing under cross-examination.

10. Todd Toner

Mr. Toner's declaration appears not to suffer from any such infirmities, but it is conclusory and his averments should be subject to testing under cross-examination.

11. Eila Nelson

Ms. Nelson's declaration appears not to suffer from any such infirmities, but it is conclusory and her averments should be subject to testing under cross-examination.

12. Judith Conlow

Ms. Conlow's declaration appears not to suffer from any such infirmities, but it is conclusory and her averments should be subject to testing under cross-examination.

13. Emma Bruggeman

Ms. Bruggeman's declaration appears not to suffer from any such infirmities, but it is conclusory and her averments should be subject to testing under cross-examination.

14. Josephine Garcia

Ms. Garcia's declaration appears not to suffer from any such infirmities, but it is conclusory and her averments should be subject to testing under cross-examination.

15. Sophia Hall

Ms. Hall's declaration appears not to suffer from any such infirmities, but it is conclusory and her averments should be subject to testing under cross-examination.

16. Dennis Peterson

Mr. Peterson's declaration states that his absentee ballot application and absentee ballot return envelope contains his genuine signature. Nauen Aff. Exh. 16 (Peterson Aff.). However, only Mr. Peterson's absentee ballot return envelope is included with his declaration, which does not permit independent verification of his signature on both forms. In addition, Mr. Peterson's return envelope does not include his address as this Court has said is required for a ballot to be legally cast.

17. June Srok

The face of Ms. Srok's ballot indicates that it was rejected because the date that she signed the absentee ballot envelope does not correspond with the date her witness signed the envelope. Nauen Aff. Exh. 17 (Srok Aff.). Ms. Srok's declaration does not address this issue, leaving the Court to guess at the reason. This is one potential indication of voter fraud. Ms. Srok should appear as a live witness at trial to explain the circumstances so that the Court and the parties can be assured there was no impropriety.

18. Lora West

Ms. West's declaration states that the replacement absentee ballot she completed and returned may have been a replacement absentee ballot that was sent

to her husband, Albert B. West. Nauen Aff. Exh. 18 (West Aff.). In particular, she declares that the absentee ballot return envelope listed a sticker containing her husband's name and their home address on the back of the envelope (the side without the eligibility certificate). Ms. West further declares that her husband may have completed, signed, and returned an absentee ballot envelope listing a sticker containing her name and their home address. No information or declaration from her husband accompanies Ms. West's declaration, leaving the parties and the Court insufficiently certain as to whether her ballot meets the standard for a legally cast vote.

19. Orin Ottman

Mr. Ottman's declaration states that he completed the eligibility certificate on the back of the envelope and had it witnessed as prescribed in the absentee ballot directions. Nauen Aff. Exh. 19 (Ottman Aff.). However, the witness on Mr. Ottman's absentee ballot envelope did not list his complete address.

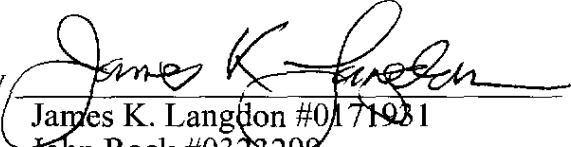
CONCLUSION

For all of the foregoing reasons, Contestants respectfully request this Court deny Petitioners' motion.

Dated: February 26, 2009

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AFFIDAVIT OF SERVICE VIA EMAIL

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

Katheryn Hanson, being first duly sworn on oath, deposes and states that on the 26th day of February, 2009, she served the following:

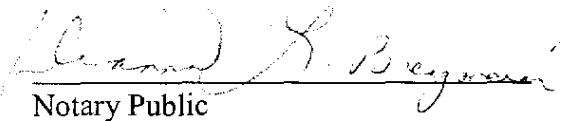
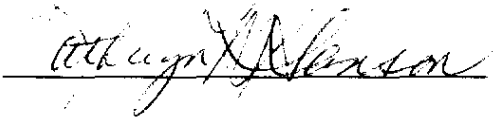
Contestants' Opposition to Renewed Motion for Summary Judgment

by sending true and correct copies via email to:

elizabeth.hayden@courts.state.mn.us'; 'kurt.marben@courts.state.mn.us';
'denise.reilly@courts.state.mn.us' 'Christopher.Channing@courts.state.mn.us';
'Jennifer.hobbs@courts.state.mn.us'; 'fiona.ruthven@courts.state.mn.us';
'angella.erickson@courts.state.mn.us'; 'michael.baker@courts.state.mn.us';
'dlillehaug@fredlaw.com'; 'frankenperkinsattys@perkinscoie.com'; djzoll@locklaw.com

the last known email addresses of said addressees.

Subscribed and sworn to before me this
26th day of February, 2009


Notary Public