

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT
CASE TYPE: Civil Other

Destiny Dusosky, v. Michelle Fischbach, Defendant.	<p>Court File No. 62-CV-18-254 Chief Judge John H. Guthmann</p> <p style="text-align: center;">MEMORANDUM SUPPORTING DEFENDANT'S MOTION TO DISMISS</p>
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INTRODUCTION

Senator Michelle Fischbach moves the Court to dismiss Plaintiff's Complaint on three grounds. First, the Court lacks subject matter jurisdiction. Minn. R. Civ. P. 12.02(a). This case involves two nonjusticiable political questions. Only the Minnesota State Senate may determine the eligibility of its members, MINN. CONST. art. IV, § 6, and only Minnesota's voters may recall a senator from office, *id.* art. VIII, § 6. The Court also lacks subject matter jurisdiction because this controversy is unripe for adjudication.

Second, Plaintiff fails to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). The Minnesota Supreme Court has unequivocally held that a senator does not cease to be a senator after becoming lieutenant governor by reason of a vacancy in that office. *State ex rel. Marr v. Stearns*. 75 N.W. 210, 214 (Minn. 1898), *rev'd on other grounds*, 179 U.S. 223 (1900). Neither the Minnesota Constitution nor the lieutenant governor's duties have materially changed since *Stearns* was decided. The doctrine of stare decisis directs the Court to adhere to the *Stearns* decision.

Third, Plaintiff failed to join the senate as an indispensable party. Minn. R. Civ. P. 12.02(f). Plaintiff demands the Court declare Senator Fischbach ineligible to remain a senator and enjoin the duly-elected, eight-term senator from being a senator. Granting Plaintiff's requested relief would require the Court to exercise constitutional powers properly belonging to the senate. Removing Senator Fischbach from the senate would affect its functionality. The Court cannot proceed "in equity and good conscience" without affording the senate an opportunity to defend its constitutional interests at stake in this action. Minn. R. Civ. P. 19.02; *see* Minn. Stat. § 555.11.

Most of the arguments supporting Senator Fischbach's motion to dismiss were discussed in her response to Plaintiff's temporary injunction motion. (*See* Def.'s Mem. Opposing Pl.'s Mot. Temp. Inj. and Consolidation, Jan. 30, 2018.) To the extent possible, those arguments are incorporated by reference herein.

FACTS

On January 2, 2018, United States Senator Al Franken resigned from office. (Compl. ¶ 5.) Lieutenant Governor Tina Smith resigned from office later that day. (Compl. ¶ 7.) On January 3, 2018, Governor Mark Dayton appointed former Lieutenant Governor Smith to temporarily fill the vacancy created by Al Franken's resignation. (Compl. ¶ 7.)

The Minnesota Constitution provides that "[t]he last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office." MINN. CONST. art. V, § 5. Minnesota State Senator Michelle Fischbach was the last elected president of the senate when former Lieutenant Governor Smith resigned. (Compl. ¶ 9.) Senator Fischbach consequently became the acting lieutenant governor by operation of law. (Compl. ¶ 10, Ex. A.) After taking on the additional role as lieutenant governor, Senator Fischbach made the following public statement:

The position of lieutenant governor has no constitutional duties and its authority is what is provided by the governor. I have had cordial conversations with Governor Dayton and am looking forward to a positive relationship with him and his staff. I am confident that I will be able to handle duties as both state senator and acting lieutenant governor through the remaining months of Governor Dayton's term.

(Compl. at Ex. A.) Senator Fischbach declined to take the lieutenant governor's salary. (Compl. at Ex. A.)

Senator Fischbach is the tenth senator to become lieutenant governor by reason of a vacancy in that office. (Aff. of Brett D. Kelley Ex. 1, January 30, 2018.)¹ Seven of the nine previous senators who became lieutenant governor did not resign their senate seat and acted as both senator and lieutenant governor. (Kelley Aff. Ex. 1.) The other two voluntarily resigned from the senate.² (Kelley Aff. Ex. 1.) Litigation only resulted in one of these nine instances. *Stearns*, 75 N.W. 210. In *Stearns*, the Minnesota Supreme Court unequivocally held that the senator in question "did not cease to be a senator when he became lieutenant governor." *Id.* at 214. That decision remains controlling.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS POLITICAL DISPUTE BECAUSE THE CONTROVERSY INVOLVES NONJUSTICIABLE POLITICAL QUESTIONS AND IS UNRIPE FOR ADJUDICATION.

A. This Dispute Involves Two Nonjusticiable Political Questions.

The Minnesota Constitution provides two remedies to this political dispute which deprive the Court of subject matter jurisdiction. First, the constitution textually commits the exclusive

¹ Exhibit 1 to the Kelley Affidavit was explicitly referenced by Plaintiff at Paragraph 28 of the Complaint. The "court may consider documents referenced in a *complaint* without converting a motion to dismiss to one for summary judgment." *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004); *see also Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 197 (Minn. Ct. App. 2007) (the court may consider affidavits on a question of law without converting a motion to dismiss to a motion for summary judgment).

² The two senators who voluntarily resigned were Archie H. Miller in 1943 and Alec G. Olson in 1976. (Kelley Aff. Ex. 1.)

power to determine the eligibility of its members to the senate: “Each house shall be the judge of the election returns and eligibility of its own members.” MINN. CONST. art. IV, § 6. Only the senate may determine Senator Fischbach’s eligibility to remain a senator. *Id.*; *Derus v. Higgins*, 555 N.W.2d 515, 518 (Minn. 1996); *Pavlak v. Growe*, 284 N.W.2d 174, 179 (Minn. 1979) (“emphasiz[ing] the importance and exclusiveness of this legislative prerogative.”); *Scheibel v. Pavlak*, 282 N.W.2d 843, 847–48 (Minn. 1979) (stating the supreme court lacks jurisdiction to issue a “final and binding decision” on the eligibility of members of the house of representatives, and issuing an advisory opinion instead). Second, the constitution textually commits the power to recall a legislator from office to Minnesota’s voters. MINN. CONST. art. VIII, § 6; Minn. Stat. §§ 211C.01–211C.09 (recall statutes); *see generally In re Ventura*, 600 N.W.2d 714, 715 (Minn. 1999) (discussing the recall process). Each of these constitutional remedies renders this case nonjusticiable under the political question doctrine. Senator Fischbach incorporates by reference Section I.A.1 of her memorandum opposing Plaintiff’s temporary injunction motion. (Def.’s Mem. Opposing Pl.’s Mot. Temp. Inj. 6–8.)

B. This Controversy Is Unripe for Adjudication.

The Court also lacks subject matter jurisdiction over this dispute because the controversy is unripe for adjudication. Plaintiff alleges harm from Senator Fischbach being both senator and lieutenant governor and exercising the duties of both offices. Plaintiff’s claim that Senator Fischbach is exercising the duties of both offices is purely hypothetical. Plaintiff cannot argue that Senator Fischbach is exercising conflicting constitutional powers until (1) Senator Fischbach takes the oath of office of lieutenant governor and exercises some duty as lieutenant governor; and (2) the legislature convenes. Neither of those conditions have been satisfied and Plaintiff has not alleged otherwise. Additionally, further factual development would help the Court deal with the

legal issues involved in this case. Minnesota's voters will elect a new senator on February 12, 2018 to fill the vacancy created by former Minnesota State Senator Dan Schoen's resignation, and the senate will likely vote on Senator Fischbach's eligibility to remain a senator once the 2018 yearly session begins on February 20, 2018. Both of these events will impact this case.

The supreme court recently provided guidance for courts faced with political disputes like this case. *Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609 (Minn. 2017). When faced with the exercise of a constitutional right by another branch of government, the courts should not intervene until all avenues of political resolution have played out. *Id.* at 623–25. If there is still potential for a political resolution, supreme court precedent counsels that the action must be dismissed. *Id.* at 626.

As this Court is well aware, the governor line-item vetoed the entire appropriations for the house and senate for the 2018–2019 fiscal biennium. However, the governor left the appropriations to the Legislative Coordinating Commission (LCC) intact. The house and senate filed suit, claiming the governor's use of his constitutional right to line-item veto appropriations violated the overarching Separation of Powers Clause of the Minnesota Constitution.³ The supreme court found the house and senate could syphon enough money from the LCC's appropriations to get to the opening of the 2018 yearly session. Once in session, the legislature and the governor might be able to resolve the budget dispute in the political arena. The courts are required to stay out of the controversy entirely because of the potential for a political resolution. *Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d at 624 (“our precedent counsels that we avoid reaching constitutional questions if there is another way to resolve the case.”). The supreme court dismissed

³ The governor was made a party to the line-item veto case to afford him an opportunity to defend his constitutional interests at stake.

the case even though it is entirely possible the legislature and governor may not resolve the dispute.

Id. at 626.

This dispute has obvious parallels to the line-item veto litigation. It involves tension between two clauses of the constitution: the right of the senate to determine the eligibility of its members and the Separation of Powers Clause. Similar to the line-item veto case, the Plaintiff here argues the Separation of Powers Clause trumps the other constitutional provisions at issue. The legislature has not been afforded an opportunity to resolve this dispute in the political arena. The senate may well resolve this controversy when it convenes its 2018 yearly session. Until then, the Court must stay out of this dispute.

Senator Fischbach incorporates by reference Section I.A.2 of her memorandum opposing Plaintiff's temporary injunction motion. (Def.'s Mem. Opposing Pl.'s Mot. Temp. Inj. 8–10.)

II. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The Court must dismiss this case under Minnesota Rule of Civil Procedure 12.02(e), because the complaint fails to set forth a legally sufficient claim for relief. *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). In making this determination, courts “consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.” *Id.* The court “review[s] the complaint as a whole, including the documents upon which [the plaintiff] rel[ies] to determine whether as a matter of law a claim has been stated.” *Martens v. Minn. Min. & Mfg. Co.*, 616 N.W.2d 732, 740 (Minn. 2000). The court is not bound by legal conclusions stated in a complaint. *Finn v. All. Bank*, 860 N.W.2d 638, 653 (Minn. 2015). “When constitutional violations are alleged, the defendant must demonstrate the complete frivolity of the complaint before dismissal under Rule 12.02 is proper.” *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32, 33 (Minn. 1980); *Schocker v. State*

Dep't of Human Rights, 477 N.W.2d 767, 768–71 (Minn. Ct. App. 1991) (affirming dismissal for failure to state a claim of constitutional due process claim), *rev. denied* (Minn. Jan. 30, 1992). Dismissal is proper where “it appears to a certainty that no facts, which could be introduced consistent with the pleader’s theory, exist which would support granting the relief demanded.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 602 (Minn. 2014) (quoting *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963)).

As previously stated, the supreme court has definitively ruled on the precise issue before this Court. A senator does not cease to be a senator after becoming lieutenant governor by reason of a vacancy. *Stearns*, 75 N.W. at 214. Critical to the *Stearns* decision was that “[t]here [was] no language in the constitution requiring or justifying the conclusion that the senatorial office of the president pro tempore becomes vacant when he becomes lieutenant governor by reason of, and during, a vacancy in the office of governor.” *Id.* at 213. That is still true today. The doctrine of stare decisis directs the Court to adhere to the supreme court’s decision in *Stearns*. *Walsh*, 851 N.W.2d at 604. Senator Fischbach incorporates by reference Section I.C.1 of her memorandum opposing Plaintiff’s temporary injunction motion. (Def.’s Mem. Opposing Pl.’s Mot. Temp. Inj. 11–28.)

III. THE MINNESOTA SENATE IS AN INDISPENSABLE PARTY AS THE JUDGE OF THE ELIGIBILITY OF ITS OWN MEMBERS.

By necessity, granting Plaintiff’s requested relief requires the Court to usurp the senate’s right to judge the eligibility of its own members. Yet the senate is not joined as a party to defend its constitutional interests. The senate is an indispensable party to this action. MINN. CONST. art. IV, § 6; Minn. R. Civ. P. 19.01; *see* Minn. Stat. § 555.11. This action cannot proceed in equity and good conscience without the senate as a party. Minn. R. Civ. P. 19.02. The Court should dismiss the Complaint for failure to join the senate. Minn. R. Civ. P. 12.02(f).

Minnesota Rule of Civil Procedure 19.01 requires the following:

A person must be joined in an action if (1) in that person's absence, complete relief could not be accorded among the existing parties; or (2) the person claims an interest in the subject of the action and is so situated that a disposition of the action in the person's absence would impede the person's ability to protect that interest or leave a current party subject to a substantial risk of incurring multiple or inconsistent obligations by reason of the person's claimed interest.

Hoyle Properties, Inc. v. Prod. Res. Grp., L.L.C., 716 N.W.2d 366, 377 (Minn. Ct. App. 2006), *aff'd*, 736 N.W.2d 313 (Minn. 2007) (citing Minn. R. Civ. P. 19.01). “If the person has not been so joined, the court shall order that the person be made a party.” Minn. R. Civ. P. 19.01.

The Complaint demands the Court determine Senator Fischbach’s eligibility to remain a senator. The senate must be made a party to this action to defend its constitutional interests. The right to make that determination belongs exclusively to the senate: “Each house shall be the judge of the election returns and eligibility of its own members.” MINN. CONST. art. IV, § 6. The supreme court has repeatedly affirmed this exclusive right. *Derus*, 555 N.W.2d at 518; *Pavlak v. Growe*, 284 N.W.2d at 179; *Scheibel v. Pavlak*, 282 N.W.2d at 847–48. “[T]he ultimate qualification of a member . . . is a matter reserved for the legislature.” *Derus*, 555 N.W.2d at 518. “[T]here is no question of the Legislature’s final authority in this matter. The constitutional directive is explicit[.]” *Scheibel v. Pavlak*, 282 N.W.2d at 847.

Once the court determines a person should be made a party to an action under Rule 19.01, it must then determine “whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.” Minn. R. Civ. P. 19.02. The court must balance the following factors in deciding whether a party is indispensable:

- (a) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;
- (b) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
- (c) whether a judgment rendered in the person's absence will be adequate; and
- (d) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id. As stated above, the constitution textually commits the power to determine the eligibility of its members to the senate. MINN. CONST. art. IV, § 6. Any judgment rendered in the senate's absence would deny the senate an opportunity to defend this right. An injunction prohibiting Senator Fischbach from being a senator will undeniably upset the political balance of power in the senate and negatively impact its functionality. There is no way for the Court to lessen or avoid this resulting prejudice. Moreover, Plaintiff has an adequate remedy at law if this action is dismissed. She may pursue a recall petition. MINN. CONST. art. VIII, § 6. This action cannot proceed in equity and good conscience without the senate as a party.

The Uniform Declaratory Judgments Act also requires that the Court dismiss the Complaint for failure to join the senate. Plaintiff fails to meet the minimum pleading requirements under the Act: “When declaratory relief is sought, **all persons shall be made parties** who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” Minn. Stat. § 555.11 (emphasis added); *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 275 (Minn. Ct. App. 2001) (“The Minnesota Declaratory Judgment Act provides that all persons potentially affected by a declaratory action must be made parties to the action”). The court may refuse to enter a declaratory judgment if the judgment “would not terminate the uncertainty or controversy giving rise to the proceeding.” Minn. Stat. § 555.06. As discussed above, the senate will be prejudiced if Plaintiff’s requested relief is granted. Any

judgment regarding Senator Fischbach's eligibility to remain a senator runs a substantial risk of being ignored by the senate. Consequently, a judgment from the Court would not terminate the controversy giving rise to this dispute. Minn. Stat. § 555.11.

For all these reasons, this case cannot proceed without the senate as a party. The Court should therefore dismiss the Complaint.

CONCLUSION

For these reasons, Defendant respectfully requests the Court grant its motion to dismiss.

Respectfully submitted,

Dated: February 2, 2018

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The undersigned acknowledges that sanctions may be imposed pursuant to Minn. Stat.

§ 549.211.

