

KEITH KISHBAUGH

* 15TH JUDICIAL DISTRICT COURT

*

* DOCKET NO. 2019-2137 "A"

*

* PARISH OF LAFAYETTE

*

VERSUS

CITY OF LAFAYETTE, ET AL.

* STATE OF LOUISIANA

PEREMPTORY EXCEPTION OF PEREMPTION

NOW INTO COURT, through undersigned counsel, come Defendants-in-Intervention, DEBORAH AMY, DENNIS SULLIVAN, DANIEL GILLANE, BRUCE SAWVEL, JANE SAWVEL and HAROLD BERNARD, JR., who file this Exception in response to Plaintiff's, KEITH KISHBAUGH'S, Suit for Injunction, and Plaintiff-in-Intervention's, the Honorable KYLE ARDOIN'S, Petition of Intervention (collectively, the "Plaintiffs"), as follows:

1.

On December 8, 2018, a special election (the "Election") was held in Lafayette Parish to consider, among other things, a proposition (the "Proposition") for the amendment of the Lafayette City-Parish Home Rule Charter (the "Charter"). The Proposition generally provided for a split in the Lafayette City-Parish Council, with the establishment of a five (5) member city council for the City of Lafayette, to be elected from single member districts within the city limits, and a five (5) member parish council for the balance of Lafayette Parish, to be elected from single member districts within the remainder of the parish. A copy of the Proposition is attached hereto as Exhibit "A".

2.

The Proposition was approved by the voters of Lafayette Parish by a vote of 18,569 in favor and 16,155 against, and the results of the Election were promulgated on December 18, 2018. A copy of the Resolution of the Lafayette City-Parish Council promulgating the results of the Election is attached hereto as Exhibit B.

3.

Pursuant to Louisiana Revised Statute 18:1405(D), "An action contesting an election submitting a proposition to the voters...*shall be instituted not later than 4:30 p.m. of the thirtieth day after the official promulgation* of the results of the election." [Emphasis Added] "The delay created by this statute is a peremptive period, not a prescriptive period." Hunter v. Jindal, 20 So.3d 592, 596 (La.App. 2 Cir. 2009), addressing La. R.S. 18:1405(F), but equally applicable to 18:1405(D). *See, also*, La. Civ. Code art. 3458 ("Peremption is a period of time fixed by law for

the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the preemptive period.”) and Hebert v. The Lafayette City Council, et al., 692 So.2d 750 (La.App. 3 Cir. 1997).

4.

Plaintiffs’ claims seek to collaterally attack and overturn the results of the Election. However, Plaintiffs’ actions were not filed until on or after April 5, 2019, far in excess of the 30-day preemptive period allowed by Louisiana Revised Statute 18:1405(D). Accordingly, Plaintiffs’ actions are barred.

WHEREFORE, premises considered, Defendants-in-Intervention, DEBORAH AMY, DENNIS SULLIVAN, DANIEL GILLANE, BRUCE SAWVEL, JANE SAWVEL and HAROLD BERNARD, JR., respectfully pray:

- a) That these Exceptions be set for hearing;
- b) That Plaintiffs, KEITH KISHBAUGH and the Honorable KYLE ARDOIN, in his official capacity as Louisiana Secretary of State, be served with this Exception and Notice of Hearing, and be required to appear herein and show cause why this Exception should not be granted;
- c) And that after due proceedings be had, this Exception be granted, dismissing the petitions of Plaintiff and Plaintiff-in-Intervention, without prejudice; and
- d) That Plaintiffs, KEITH KISHBAUGH and the Honorable KYLE ARDOIN, in his official capacity as Louisiana secretary of state, be cast with all costs for these Exceptions.

[Signature of counsel and verification of Petitioners located on following pages.]

[Remainder of page intentionally left blank.]

Respectfully submitted,

Steven Ramos (TSB w/permission)

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Counsel for Intervenors, DEBORAH AMY,
DENNIS SULLIVAN, BRUCE SAWVEL,
JANE SAWVEL, HAROLD BERNARD, JR.,
and DANIEL GILLANE

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing instrument has this day been served on all parties through their counsel of record in this proceeding by:

- Hand Delivery
- Prepaid U.S. Mail
- Electronic Mail
- Facsimile
- Federal Express

Lafayette, Louisiana, this 18th day of April 2019.

Travis J. Broussard

KEITH KISHBUAGH

* 15TH JUDICIAL DISTRICT COURT

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ORDER

Considering the Peremptory Exception of Peremption filed herein by DEBORAH AMY, DENNIS SULLIVAN, DANIEL GILLANE, BRUCE SAWVEL, JANE SAWVEL and HAROLD BERNARD, JR.:

IT IS HEREBY ORDERED that said Exception be and is fixed for hearing before this Honorable Court on the 29th day of April 2019 at ____ o'clock A.M.

IT IS FURTHER ORDERED that Plaintiffs, KEITH KISHBUAGH and KYLE ARDOIN, in his official capacity as Louisiana secretary of state, then show cause, if any they have, why this Exception should not be granted and they should not be cast with costs.

ORDER SIGNED in Lafayette, Louisiana, this ____ day of April 2019.

Honorable John Trahan
15th Judicial District Court

PLEASE SERVE:

Keith Kisbaugh
through counsel of record
L. Lane Roy
Brown Sims, P.C.
600 Jefferson Street, Suite 800
Lafayette, LA 70501

Kyle Ardoin, Louisiana Secretary of State
through counsel of record
Jeff Landry, Louisiana Attorney General
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KEITH KISHBAUGH

* 15TH JUDICIAL DISTRICT COURT

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* STATE OF LOUISIANA

CITY OF LAFAYETTE, ET AL.

MEMORANDUM IN SUPPORT OF PEREMPTORY EXCEPTION

This Memorandum in Support of Peremptory Exception is submitted on behalf of Defendant-in-Intervention, DEBORAH AMY, DENNIS SULLIVAN, DANIEL GILLANE, JENNIFER GILLANE, BRUCE SAWVEL, and HAROLD BERNARD, JR., in support of his Peremptory Exception of Peremption and against Plaintiff's, KEITH KISHBAUGH'S ("Kishbaugh"), Suit for Injunction, and Plaintiff-in-Intervention's, the Honorable KYLE ARDOIN'S (the "Secretary of State"), Petition of Intervention (collectively, the "Plaintiffs"), as follows:

A. Background.

The facts of this dispute are well documented, both in the pleadings filed in the above-captioned matter and in local media. On December 8, 2018, the voters of Lafayette Parish went to the polls (the "Election") to consider a proposition (the "Proposition") amending the Lafayette City-Parish Consolidated Government Home Rule Charter (the "Charter"). The Proposition provided for the split of the Lafayette City-Parish Council (the "Council"), with the establishment of a five (5) member city council for the City of Lafayette, to be elected from single member districts drawn from within the city limits, and a five (5) member parish council for the balance of Lafayette Parish, to be elected from single member districts drawn from the remainder of the parish. The amendments reflected in the Proposition were previously approved by the Council on August 7, 2018, upon adoption by the Council of Ordinance No. O-121-2018 (the "Charter Ordinance"). The Proposition was ultimately approved by the voters of Lafayette Parish by a vote of 18,569 in favor and 16,155 against, and the results of the Election were promulgated on December 18, 2018.¹

After the Election, it was discovered that certain errors existed in the Charter Ordinance. Namely, the textual descriptions of some of the newly created Lafayette City Council districts contained typographical or clerical errors that deviated from the "most current City Council five-district map" in certain respects. The result was to exclude from the new Lafayette City Council

¹ See Exhibit B

districts several electors residing within the City of Lafayette, and to include others within more than one Lafayette City Council district. In order to rectify this situation, the Council adopted Ordinance No. O-042-2019 on March 25, 2019 (the “Reapportionment Ordinance”), which, upon adoption, reapportioned the Lafayette City Council and Lafayette Parish Council districts to equitably remedy the errors in the Charter Ordinance. Shortly thereafter, Plaintiff, Keith Kishbaugh, instituted this action contesting the validity of the Charter Ordinance, the Proposition, the Election, and/or the Reapportionment Ordinance.

B. Law.

1. Peremptory Exceptions. The function of the peremptory exception is to have the plaintiff’s action declared legally nonexistent, or barred by effect of law, and hence this exception tends to dismiss or defeat the action.² A peremptory exception may be raised at any stage of the proceeding in the trial court prior to the submission of the case for a decision.³ Where a peremptory exception is pled prior to trial, the exception is tried and disposed of in advance of or on the trial of the case.⁴ Although peremption and prescription differ in some respects, peremption is a species of prescription, which begins to run upon obtaining actual or constructive knowledge of facts which should have alerted a reasonable person....⁵ Generally, the exceptor bears the burden of proof.⁶

2. La. R.S. 18:1405(D). Louisiana Revised Statute 18:1405(D) states as follows:

An action contesting an election submitting a proposition to the voters, except a constitutional amendment or a proposition covered by Subsection E of this Section, shall be instituted not later than ***4:30 p.m. of the thirtieth day after the official promulgation of the results*** of the election. [Emphasis Added]

“When a statute creates a right of action, and stipulates the delay within which that right is to be executed, the delay thus fixed is not, properly speaking one of prescription, but it is one of peremption. Statutes of prescription simply bar the remedy. Statutes of peremption destroy the cause of action itself. That is to say, after the limit of time expires the cause of action no longer exists; it is lost.”⁷ Thus, La. R.S. 18:1405(D) establishes a 30-day peremptive period for contesting elections submitting a proposition to voters.⁸

² La. Code Civ. Proc. art. 923.

³ La. Code Civ. Proc. art. 928(B).

⁴ La. Code Civ. Proc. art. 929.

⁵ Holloway Drilling Equip. v. Broussard, 158 So.3d 164, 170-71 (La.App. 3 Cir. 2015).

⁶ Id.

⁷ Town of Church Point v. Acadia Parish Police Jury, 849 So.2d 87, 88-89 (La.App. 3 Cir. 2003).

⁸ Hunter v. Jindal, 20 So.3d 592, 596 (La.App. 2 Cir. 2009), addressing La. R.S. 18:1405(F), but equally applicable to 18:1405(D). *See, also*, La. Civ. Code art. 3458 (“Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period.”) and Hebert v. The Lafayette City Council, et al., 692 So.2d 750 (La.App. 3 Cir. 1997).

C. Argument.

In their petitions and memoranda, Plaintiffs seek to collaterally attack the results of the Election. Specifically, Kishbaugh complains:

At this Stage, all agree that the amendment presented to the voters of the Parish of Lafayette and the City of Lafayette December of 2018, was erroneous and all agree it must be corrected. While the amendment, had to go to all of the voters within those two entities to be passed by a majority in each separate entity, the representative of the City and the Parish now take the position that in order to correct something that only the people can pass, can be done by an ordinance of the governing authorities of the two districts. This makes no sense, common or legal. If the law mandates that passage of a Charter amendment in its correct form must be done by the people, and it did not go to the people in its correct form, then the people did not pass what the City and Parish want to use and which is faulty and illegal. It deprives persons within one or the other districts from proper representation.⁹

Likewise, the Secretary of State avers:

The election provisions in the newly adopted charter amendment describe council election districts by precinct number. Unfortunately, one or more of the precincts in the City of Lafayette were omitted from the district descriptions, and that omission left voters out of any election called by the City.

...

All concerned recognize that the election provisions of the amended charter cannot be given effect. The Secretary of State believes that the omission of precincts and thus voters was inadvertent, and had the errors been discovered, the charter amendment would never have been submitted to the voters. Nonetheless, now that the charter amendment has been submitted to and ratified by the voters, ***a declaration of invalidity by the court and entry of an injunction to prevent the implementation of the election provisions of the charter is necessary.***¹⁰ [Emphasis Added]

While the petitions filed by Plaintiffs focus on the Reapportionment Ordinance, their true aim is to delay or defeat the enactment of the Charter amendments approved by voters in the Election. The cited provisions make this clear.

Regardless, Plaintiffs' actions are barred. The Election took place on December 8, 2018, and the Council promulgated the results on December 18, 2018. In order for any aggrieved party, including Kishbaugh or the Secretary of State, to challenge the results of the Election, an appropriate action would have had to be filed no later than 4:30 p.m., Wednesday, January 17, 2019, as provided for in La. R.S. 18:1405(D). Kishbaugh did not file his action until April 5, 2019, some 78 days *after* the preemptive period mandated by the statute (and 108 days after the promulgation of the Election results). The Secretary of State brought his intervention even later. Accordingly, both actions must fall.

⁹ Kishbaugh Pre-Trial Memorandum, page 5.

¹⁰ Secretary of State, Memorandum in Support, page 3.

This result is supported by relevant case law. In Hebert v. Lafayette City Council, 692 So.2d 750 (La.App. 3 Cir. 1997), the Louisiana Third Circuit reached a similar result. In Hebert, a voter brought an action to overturn a proposition passed by election on November 3, 1992, in Lafayette Parish. The proposition merged the governments of the City of Lafayette and Parish of Lafayette into a consolidated Home Rule Charter. The results of the election were promulgated on December 3, 1992.

In 1996, Hebert filed a mandamus action, and subsequently an action challenging the right of the parish government to call the original election. The Lafayette City Council and other defendants filed a peremptory exception of prescription based on La. R.S. 18:1405(D), as more than three (3) years had elapsed between the time of the election and the filing of Hebert's action. The trial court granted the peremptory exception.

On appeal, Hebert argued that sustaining the peremptory exception was error, since he was not contesting the conduct of the election. Rather, he claimed that the parish council lacked "authority to call an election purporting to change the structure, organization, distribution, and redistribution of the powers and functions of the City of Lafayette" under applicable law. Thus, the 1992 election was illegal and an absolute nullity, not subject to prescriptive or preemptive periods.

In affirming the trial court, the Third Circuit stated:

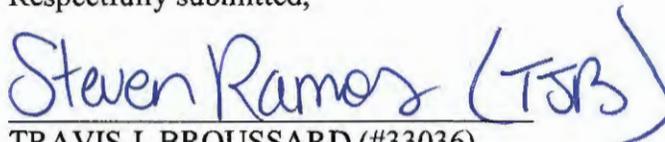
In this instance, we find that Hebert is arguing, in essence, that the irregularity in the election of November 3, 1992 was the Lafayette Parish Council's calling of the election. We do not agree with Hebert's contention that "conduct" as used in La. R.S. 18:1401(D) *pertains to only actions that take place during the actual process of the election*. Instead, we believe that "conduct" is a broader concept, which includes the events leading up to the actual election which includes, but not limited to, the legislature authorizing the election and the "call" for the election, as well as the proposition as found on the ballot. [Emphasis Added]

Hebert controls this dispute. Plaintiffs are seeking to undermine the December 2018 Election with actions filed well after the preemptive period provided in La. R.S. 18:1405(D). Further, Plaintiffs are couching their arguments in terms of the Reapportionment Ordinance in order to avoid the only result possible under La. R.S. 18:1405(D). However, as noted in Hebert, the statute encompasses more than simply the Election. The irregularities stemming from the Charter Ordinance existed prior to the Election and undoubtedly form part of the "conduct" of the Election as contemplated in Hebert and La. R.S. 18:1401(D). As such, Plaintiffs were required to raise their grievances within the time allowed under La. R.S. 18:1405(D). Neither action was filed timely.

D. Conclusion.

This dispute is controlled by La. R.S. 18:1405(D) and Hebert v. Lafayette City Council. Plaintiffs initiated the instant action far beyond the timeframe contemplated by the statute, and such action is barred. In Hebert, the Third Circuit declined to restrict the application of La. R.S. 18:1405(D) to only the contest of issues directly stemming from an election. Instead, the Court took an expanded approach encompassing actions well outside election day. For these reasons, the peremptory exception of Defendant-in-Reconviction should be GRANTED.

Respectfully submitted,



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and DANIEL GILLANE

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing instrument has this day been served on all parties through their counsel of record in this proceeding by:

- Hand Delivery Prepaid U.S. Mail Electronic Mail
 Facsimile Federal Express

Lafayette, Louisiana, this 18th day of April 2019.

