

Circuit Court for Anne Arundel County
Case No. C-02-CV-16-001949

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1804

September Term, 2016

JOHN F. McMAHON

v.

WAYNE ROBEY, ET AL.

Eyler, Deborah S.,
Friedman,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 26, 2017

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

From 2010 to 2014, James Fitzgerald was the Sheriff of Howard County.¹ In the 2014 General Election, he ran for that office again. John McMahon, the appellant, challenged him. Fitzgerald won the election with 55,659 votes. McMahon received the next highest number of votes, 42,692. The election results were certified on November 14, 2014.

On March 23, 2016, nearly sixteen months later, McMahon received an “anonymous packet” informing him that Fitzgerald had not taken the oath of office for the 2014–2018 term. On March 28, 2016, McMahon asked Wayne Robey, Clerk of the Howard County Circuit Court, to confirm whether Fitzgerald had taken the oath of office. The same day, Robey responded in writing that Fitzgerald last was administered the oath of office in 2010. Thus, he had not taken the oath for the 2014–2018 term. McMahon then asked Robey to administer the oath of office to him (McMahon). Robey did not comply with that request.

On March 31, 2016, in the Circuit Court for Howard County, McMahon filed suit against Robey, as the Clerk of the Court. The case was transferred to the Circuit Court for Anne Arundel County pursuant to Rule 2-505(a)(2), due a conflict with the “Howard County Bench.” After a motion to dismiss was granted for lack of necessary parties, McMahon amended his complaint to add as defendants Fitzgerald; Lawrence Hogan,

¹ That was his second term in that office. His first term was from 2006 to 2010.

Governor of Maryland; Linda Lamone, State Administrator of the Maryland Board of Elections; and John Wobensmith, Maryland Secretary of State.

McMahon was seeking a declaratory judgment and a writ of mandamus. Specifically, he asked the court to declare that he had received the highest number of valid votes from the 2014 General Election for the office of Howard County Sheriff and that he was “constitutionally qualified to assume” that office. He further asked the court to issue a writ of mandamus ordering the defendants (appellees in this Court) to take the official actions necessary to make him sheriff.² In his complaint, McMahon made reference to Md. Code (2002, 2010 Repl. Vol.), § 12-202 of the Election Law Article (“EL”), which is the statutory mechanism to challenge the qualifications of a candidate seeking election, *see Cabrera v. Penate*, 439 Md. 99, 109 (2014), although he did not allege facts challenging Fitzgerald’s qualifications to run as they existed when the election was held or the way in which the election was conducted. His challenge was grounded on the fact that after the election results were certified Fitzgerald did not take the oath of office.

The appellees filed a motion to dismiss McMahon’s amended complaint on two grounds. First, it failed to state a claim upon which relief could be granted, because there

² For example, McMahon asked the court to order Governor Hogan “to issue a commission declaring [McMahon] eligible for being sworn into elected office as Sheriff of Howard County,” and to order Robey “to promptly swear . . . McMahon into Office of Sheriff of Howard County[.]”

was no basis in Maryland law to nullify the votes Fitzgerald received in the election, and in the event of a vacancy in the office of sheriff the runner-up in the most recent election is not entitled to take office. Second, his claims were barred by the statute of limitations and by laches.

The court held a hearing and granted the appellees' motion to dismiss. It ruled that the amended complaint failed to state a claim upon which relief could be granted, as McMahon had no "valid claim" to the office of sheriff. It explained that under Article I, section 9, of the Maryland Constitution, every person elected to office must take the oath of office; that under Article I, section 11, the refusal or neglect to take the oath of office creates a vacancy; and under Article II, section 11, the Governor has the power to fill vacancies. More specifically, under Article IV, section 44, the Governor has the power to fill vacancies in the office of the sheriff.

Alternatively, the court ruled that the declaratory judgment action and request for writ of mandamus were barred by laches, as there "was an unnecessary delay in the assertion of the right." The court noted that a claim under EL section 12-202 must be filed "within the earlier of: (1) 10 days after the [occurrence of an] act or omission [that is related to an election] or the date the act or omission became known to the petitioner; or (2) 7 days after the election results are certified[.]" *See* EL § 12-202(b). That date passed long before suit was filed.

On November 1, 2016, the court entered an order dismissing the case with prejudice and a declaratory judgment stating:

That . . . Fitzgerald’s failure to take the oath of office does not nullify the votes cast for him in the 2014 election for the office of Sheriff of Howard County;

That [McMahon] did not, by virtue of any such failure, receive the majority of all legally valid votes in said election; and

That [McMahon] has no right or claim to the office of Sheriff of Howard County, and that only the Governor may make an appointment to a vacancy in the office of Sheriff.

McMahon noted a timely appeal. He presents four questions, which we have consolidated into one: Did the circuit court err by granting the appellees’ motion to dismiss?³ We hold that it did not and shall affirm the judgment.⁴

DISCUSSION

When reviewing a circuit court’s decision to grant a motion to dismiss for failure to state a claim upon which relief can be granted, we assume the truth of the well-pleaded

³ McMahon phrases his questions presented as follows:

1. Did the trial court err when it granted a motion to dismiss for failure to state a claim?
2. Did the trial court err when it declared there was a vacancy in the office of Howard County Sheriff as the term “vacancy” is used in Md. Const. Art. IV, § 44?
3. Did the trial court err when it declared Appellant John McMahon did not receive the majority of all legally valid votes for Sheriff of Howard County in the 2014 general election?
4. Did the trial court err when it declared any claim by Appellant to the office of Sheriff was barred by laches?

⁴ In October 2016, while this case was pending in the circuit court, Fitzgerald resigned as Howard County Sheriff. In November 2016, Governor Hogan appointed William McMahon to serve the remainder of that office.

allegations of fact in the complaint and the reasonable inferences that may be drawn therefrom. *Adamson v. Correctional Med. Services*, 359 Md. 238, 246 (2000) (citing *Allied Inv. Corp. v. Jasen*, 354 Md. 547, 555 (1999)). We do not assume the truth of bald assertions and conclusory statements, however. *State Ctr., LLC v. Lexington Charles Ltd. P'Ship*, 438 Md. 451, 497 (2014) (“The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice.” (quoting *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643–44 (2010))). “[B]ecause we must deem the [well-pleaded] facts to be true, our task is confined to determining whether the trial court was legally correct in its decision to dismiss.” *Adamson*, 359 Md. at 246. Therefore, we apply a *de novo* standard of review. *O’Brien & Gere Eng’rs, Inc. v. City of Salisbury*, 222 Md. App. 492, 506 (2015).

McMahon contends that because, after the election, Fitzgerald did not take the oath of office for the 2014–2018 term, all of the votes cast for Fitzgerald in the 2014 General Election must be nullified, leaving him (McMahon) the true winner.⁵ He maintains that this is “a novel case of first impression relating to the effect of a notorious failure of a candidate to take the Maryland oath of office” and encourages us to craft new

⁵ McMahon alleged below and repeats on appeal that Fitzgerald was a “sham candidate” who ran to deceive the electorate. McMahon did not sufficiently plead *facts*, as opposed to conclusions, to support the allegation of a sham candidacy.

law to resolve this issue.⁶ We need not do so because, as the circuit court recognized, Maryland constitutional and statutory law clearly guide the result.

Article IV, section 44 of the Maryland Constitution establishes the office of the sheriff:

There shall be elected in each county and in Baltimore City one person, resident in said county or City, above the age of twenty-five years, and for at least five years preceding his election a citizen of the State, to the office of Sheriff. He shall hold office for four years, until his successor is duly elected and qualified, give such bond, exercise such powers and perform such duties as now are or may hereafter be fixed by law.

As an elected official, the sheriff is constitutionally required to take the oath of office. Md. Const. art I, § 9 (“Every person elected, or appointed, to any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto, shall, before he enters upon the duties of such office, take and subscribe the [requisite] oath[.]”). *See also* Md.

⁶ For example, McMahan discusses in his brief two rules that have been applied elsewhere when a deceased or ineligible candidate is elected to office. He mischaracterizes the “English Rule” as voiding votes cast for a deceased or ineligible candidate as a matter of course, when, in actuality, that rule only operates to void votes cast when the voters knew, when voting, that the candidate is deceased or ineligible. *See* P. V. Smith, *Result of election as affected by votes cast for deceased or disqualified person*, 133 A.L.R. 319 (1941) (Under the “English Rule,” “votes cast for a person known to be deceased or disqualified are to be treated as void[.]” Under the “American Rule,” “the voters’ knowledge is not material, and votes cast for a deceased or disqualified person are not to be treated as void[.]”). *Id.* We need not resort to these rules here.

McMahan also discusses *Anderson v. Celebreeze*, 460 U.S. 780 (1983), which analyzed the constitutionality of state election code provisions under the First and Fourteenth Amendments. *Anderson* is irrelevant because the case at bar does not concern whether the voters of Howard County faced an “unconstitutional burden on the[ir] voting and associational rights[.]” *Id.* at 782.

Code (1974, 2013 Repl. Vol.), § 2-104(a) of the Courts & Judicial Proceedings Article (“CJP”) (“Every auditor, clerk, sheriff, constable, commissioner, surveyor, or other officer before he assumes the duties of his office, shall take and sign the oath or affirmation prescribed by the Constitution.”).

The Constitution further provides that “[e]very person, hereafter elected . . . to office, in this State, who shall refuse, or neglect, to take the oath . . . provided for in the ninth section of this Article, shall be considered as having refused to accept the said office[.]” Md. Const. art. 1, § 11. Moreover, pursuant to CJP section 2-106(a),

[a] person[, such as a sheriff,] who is required to take an oath under [CJP section] 2-104 . . . but . . . fails to qualify for office by [not] taking . . . the required oath . . . within 30 days from the date his commission is received by the clerk, or if no commission is sent to the clerk, within 30 days after receiving his commission or notice of appointment, is deemed to have refused the office, and the office shall be considered vacant, unless the time is extended by the court for good cause shown.

As the above constitutional and statutory provisions make clear, failure to take the oath of office as sheriff, whether intentionally or due to neglect, is a refusal to serve. A refusal to serve in turn creates a vacancy in the office of the sheriff and that vacancy is filled by an appointment by the Governor: “In case of vacancy by death, resignation, *refusal to serve*, or neglect to qualify or give bond, or by disqualification or removal from the County or City, the Governor shall appoint a person to be Sheriff for the remainder of the official term.” Md. Const. art. IV, § 44 (emphasis added).

Contrary to McMahon’s argument, there is no Maryland law that retroactively nullifies votes cast for a winning candidate who later fails to take the oath of office.

Rather, the failure of an elected sheriff to take the oath of office creates a vacancy and the power to appoint an interim sheriff is left to the Governor. In his complaint, McMahon asked, in effect, that the court ignore the Constitution and statutory law, create new law, and declare him to be the sheriff. The court correctly refused. McMahon has no claim to the office of Howard County Sheriff and, accordingly, his complaint failed to state a claim for which relief could be granted.

Even if that were not the case, McMahon's claims properly were dismissed. To the extent his claims were based on EL section 12-202, he was required to file suit within the earlier of 10 days after the act or omission occurred or became known to him or 7 days after the election was certified—*i.e.*, 7 days after November 14, 2014—which he did not do. As a matter of law, any such claims were time-barred.

And in any event, under the doctrine of laches, he was required to file suit within a reasonable timeframe. A person elected to the office of sheriff must take the oath of office within 30 days after the Clerk of Court receives the commission. Although the record does not reflect precisely when Robey received the commission for Fitzgerald, no one contends that he did not receive it in a timely manner after the election was certified on November 14, 2014. From the 31st day on, McMahon easily could have learned from the Clerk of Court whether Fitzgerald had taken the oath of office and, if not, taken action. Instead, he did nothing until sixteen months later when he received, by happenstance, an anonymous communication suggesting that Fitzgerald had not taken the oath of office.

“In reviewing whether the doctrine of laches bars [an appellant’s] claims, we review the Circuit Court’s decision without deference.” *State Ctr*, 438 Md. at 585. We conclude that, given our State’s strong public policy that “claims for judicial relief relative to an election must be prosecuted without delay[,]” *see Baker v. O’Malley*, 217 Md. App. 288, 296 (2014), McMahon’s delay of well over a year in taking action plainly was unreasonable, as a matter of law.

**JUDGMENT OF THE CIRCUIT
COURT FOR ANNE ARUNDEL
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**