

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

DAWN NORTH, et al.)	
)	
Plaintiffs,)	
)	
v.)	Case No. 18CV06796
)	Division 14
)	K.S.A. Chapter 60
ADAM T. THOMAS)	
)	
Defendant.)	

CONTESTEE ADAM T. THOMAS'
REPLY IN SUPPORT OF MOTION TO DISMISS

Contestee Adam T. Thomas respectfully submits this Reply in support of his motion to dismiss.

I. Contestee’s Nomination In the August 2018 Primary is Final Pursuant to K.S.A. 25-308(c).

The Contestants make a circular argument that they are challenging Contestee’s eligibility for the November 2018 general election but the basis of their objection is in regard to Contestee’s residency prior to the August 2018 primary. For example, on page 2, Contestants argue “The claim raised in this proceeding is that the Contestee was not a qualified candidate in the general election because he did not live in the District from and after June 1, 2018, when he filed to be a candidate.” The period June 1, 2018 through the August 7, 2018 primary is not an issue for the present election contest.

K.S.A. 25-308 is the controlling statute for challenging nominations from primary elections. There was an objection to Contestee’s nomination from the August 2018 primary. The Kansas State Objections Board unanimously overruled the objection. (See, Order of the Board, attached as Ex. A to Motion to Contestee’s Memorandum of Law In Support Of Motion to Dismiss.). The

decision of the Objections Board in regard to the August 2018 primary “shall be final.” K.S.A. 25-308(c). Contestants cannot challenge the Contestee’s eligibility to be a candidate in the 2018 General Election by challenging his right to be his party’s nominee from the 2018 Primary Election.

II. Contestee’s Election in the November 2018 General Election is Final Pursuant to K.S.A. 25-1442.

1. Contestants failed to timely prosecute their election objection.

Contestants failed to timely prosecute this contest and therefore, it must fail. “If the contestant does not proceed within the time provided for herein the action **shall** be dismissed and the judge shall transmit a copy of the order of dismissal to the chief clerk of the house of representatives or the secretary of the senate as appropriate.” K.S.A. 25-1442. (emphasis added). Contestants were obligated to take prosecute this election contest within 20 days of filing the December 10, 2018, i.e. by December 30, 2018. K.S.A. 25-1442.

The Court docket and the Court’s correspondence with counsel for the Contestants make clear the failure of the Contestants to timely prosecute this election contest. We are now more than nine months out from the November 2018 general election. The Contestee has been sworn in. He has served in the Legislature one full session. It is too late for Contestants election contest.

2. Contestants attempt to blame the Court and Contestee For Contestants’ Failure to Prosecute Must Fail

Contestants argue “[]parts of the timeline for the handling of this Contest have not been followed by the Court and Contestee...” (Contestants’ Brief, p.6). The Contestants cannot escape the mandatory language of K.S.A. 25-1442 by arguing the failure to prosecute is a failure by the Court and the Contestee. Pursuant to K.S.A. 25-1442, the duty to timely prosecute is the duty of the Contestants. The Court and the Contestee do not have a duty to prosecute the case

but as the Court file demonstrates, the Court pushed multiple times for Contestants to prosecute the case to no avail. The Court's Administrative Assistant sent multiple emails to spur the Contestants to prosecute the case to no avail. The failure of the Contestants to prosecute this case is not the fault of the Court or of the Contestee.

3. The Case History (ROA) Demonstrates The Significant Efforts Undertaken By the Court to Spur the Contestants to Prosecute This Case.

The case history (ROA) demonstrates the Court pushed multiple times for the Contestants to prosecute the case. Even with the Court's urging, Contestants allowed months to pass without taking any meaningful effort to prosecute the election contest. Thus, even if Contestants argument that "shall" means something other than mandatory in the context of K.S.A. 25-1442, this Court should still dismiss the Contestants' election contest because the Contestants failed for months to prosecute this case. Contestants cannot put the blame on the Court or the Contestee. The Contestants attempt to blame the Court for treating this as a Chapter 60 case rather than an election contest case. However, it was the Contestants that opted to file the case as a Chapter 60 case on December 10, 2018. It was the Contestants who asked the Clerk of the Court to issue a Chapter 60 Summons to be served on Contestee. At the request of the Contestants, the Contestee was served a Chapter 60 summons on December 19, 2019 which on its face permitted Contestee to file an answer "within 21 days after service of summons upon you." Contestee's Answer was first due January 9, 2019. Since counsel was out of state for the holidays, a clerk's 14-day extension was requested. Without objection by the Contestants, a clerks extension was granted making the Contestee's Answer due January 23, 2019. The Contestee's Answer was timely filed on January 22, 2019.

After Contestee timely filed his Answer on January 22, 2019 the Contestants still failed to prosecute the case. In fact, the Contestants allowed the case to sit idle for over 30 days after the

Answer was filed. There was no activity in the case until the Court sent notice on February 25, 2019 for the parties to attend a scheduling / status conference scheduled for April 25, 2019.

After the April 25, 2019 status conference, the Contestants failed to prosecute the case for more than another month. The Court ordered a follow up status conference on June 3, 2019. The scheduling conference was cancelled by the Court and the case was scheduled for a hearing on June 21, 2019, which is five months after the Answer was filed and nearly six months after the deadline for the statutory 20-day hearing.

It cannot be ignored that even after being ordered to select a judge out of time allowed by K.S.A. 24-1442, the Contestants sat idle for another 122 days before notifying the Court of the selection of a judge to preside over the election contest. According to the Court Case History (ROA), On January 18, 2019 Judge Moriarty ordered that the Court be notified when a decision is made regarding a judge. Contestants notified the Court of the selection of a judge when Contestants filed a notice of selection of judge on May 20, 2019 which was 122 days after being ordered to do so.

4. Any reasonable review of any time line of this case demonstrates Contestants have wholly failed to prosecute this case.

By the time of the next hearing on September 11, 2019, the following number of days will have elapsed:

275 days – since the case was filed.

253 days – since the K.S.A. 25-1442 hearing was required to be held.

253 days – since the case should have been dismissed for failure to prosecute. (If the contestant does not proceed within the time provided for herein the action **shall** be dismissed K.S.A 25-1442) (emphasis added).

240 days – Contestee has occupied the elected seat.

240 days – since the Court ordered the selection of a judge.

122 days – the length of time between order to select a judge and Contestants filing a notice of selection of judge.

Any reasonable review of the Case History (ROA) and the correspondence from the Court's Administrative Assistant strongly supports that the Contestants have failed to prosecute this case and pursuant to K.S.A. 25-1442, it must be dismissed.

Wherefore, Contestee Adam Thomas moves this Court to dismiss the Notice of Election Contest and for such other orders this court deems just and equitable.

Respectfully submitted,

/s/ Michael J. Kuckelman

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all persons listed in the Court's electronic notification system.

/s/ Michael J. Kuckelman

Attorney