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

DAWN NORTH, *et al.*,	)	
	)	
Contestants,	)	
	)	Case No. 18CV06796
v.	)	Division 19
	)	K.S.A. Chapter 60
ADAM THOMAS,	)	
	)	
Contestee.	)	

ORDER ON CONTESTEE'S MOTION TO DISMISS

Before the Court is a unique case involving a rarely-invoked statutory scheme, K.S.A. 25-1435 *et seq.* (the "Act"), whereby eleven registered voters (the "contestants") of the 26th House legislative district of Kansas challenged the election of Adam Thomas (the "contestee"), who was elected to serve the 26th District in November of 2018. The contestants allege that contestee was never eligible to serve the 26th House legislative district because he was not a resident of that district. On September 11, 2019, the Court heard oral arguments on a motion to dismiss the election contest and took the matter under advisement.

Factual and Procedural History

The election contest was originally filed under Chapter 60 on December 10, 2018, with notice of service going out that same day. (Doc. 1). At oral argument, contestants assert that the case was originally electronically filed under Chapter 25 and summarily rejected, and in response, contestants filed under Chapter 60. At that time, the case was assigned to now-retired Judge Moriarty in Johnson County District Court, Division 14. Contestee was served on December 19, 2018, and the face of the summons stated that contestee had 21 days to answer.[1] On December 28, 2018, the Chief Clerk of the Johnson County District Court allowed contestee

[1] The distinction between Chapter 60 and Chapter 25 is significant. Chapter 60 allows 21 days to answer, K.S.A. 60-212(a)(1)(A)(ii), while the Act within Chapter 25 only allows for five days to answer. K.S.A. 25-1444.

an extension of time[2] to answer. (Doc. 5). On January 22, 2019, contestee answered. (Doc. 6). Prior to answering, contestee was sworn in to his seat with the Kansas House of Representatives. *See* KAN. CONST. art. II, § 2 ("The terms of representatives. . . shall commence on the second Monday of January of the year following election.").

The dates for every action in cases filed under this Act are of special importance because the Act has various time constraints it imposes, which according to contestants are not mandatory, but according to contestee are mandatory and demand dismissal of the case if compliance is not met. Essentially, the Act creates an expedited process by which challenged state senators or representatives can be removed from office as soon as practicable if it is found that the senator/representative was ineligible for office, bribed his or her way into office, or only was elected because of illegal votes or improper tabulation of votes, among other reasons. *See* K.S.A. 25-1436.

To initiate proceedings, the contestants file a written notice of contest, specifying the grounds upon which the contest is based. K.S.A. 25-1437. This must be filed with the clerk of the district court of the county in which the person whose election is contested resides. *Id.* It also must be filed within five days after the certificate of election is issued.[3] K.S.A. 25-1439. Then, **within three days** of receipt of the notice of contest, the clerk of the district court shall mail a copy of the notice of contest to the Chief Justice of the Kansas Supreme Court, presently Chief Justice Lawton Nuss. K.S.A. 25-1442. Upon receipt of the notice of contest, and **within five days** thereafter, Chief Justice Nuss was to submit to the parties a list of all the district judges in Johnson County. *Id.* **Within two days** of receiving the list of judges, the contestant and contestee were to meet together at a "place designated by the chief justice" and, "under the

[2] Contestants did not oppose contestee's motion for extension of time.
[3] Contestee has not argued that contestants did not timely file their election contest; as such, the Court assumes compliance with K.S.A. 25-1439.

supervision of the clerk of the supreme court," alternatingly strike Johnson County judges' names from the list until one judge remained. *Id.*

After this, the selected judge "shall, **within twenty (20) days** after notice has been filed, convene a hearing at an appropriate place within the county" and "hear testimony of the parties, under the rules of evidence for civil actions." *Id.* (emphasis added). K.S.A. 25-1442 concludes by saying that "[i]f **the contestant** does not proceed within the time provided for herein the action **shall be dismissed**. . . ." (emphases added). During that hearing, the selected judge receives evidence, without making findings of fact, and upon conclusion of the hearing, the clerk of the district court is to "transmit all the files and records of the proceedings with all the evidence taken to . . . the speaker of the house of representatives." K.S.A. 25-1451(a). The selected judge can make findings of fact only if the question posed involves the number of legally cast votes the candidates received. *Id.* The existence of any other issue contesting the election divests the Court of fact-finding capability and instead vests the Court solely with an evidentiary gatekeeper role.

Notice of the selection of judge was not filed until May 20, 2019, more than six months after the initial election contest was filed, far exceeding the twenty (20) days contemplated by statute. (Doc. 8). The notice of selection of judge indicated that the parties, using the "procedure specified in K.S.A. 25-1442," selected Judge Welch, the undersigned judge on this order, in Division 19. (Doc. 8 at ¶ 1). Contrary to the notice of selection of judge, it does not appear that the procedure specified in K.S.A. 25-1442 was actually followed, because the notice of contest was never sent to the Kansas Supreme Court, and as a result, Chief Justice Nuss never sent the parties a list of Johnson County judges. Contestants' counsel admitted the same at oral argument. Rather, the parties received the list of judges from Division 14's administrative

assistant. While the notice of selection of judge appears on the docket on May 20, 2019, the case was not officially transferred to Division 19 until June 13, 2019 (ROA, entry 20). Before that time, it appears that a conference call was held on January 14, 2019, and a status conference took place on April 25, 2019 pursuant to a February 26, 2019 order for a status conference. These hearings were taken up by Judge Moriarty, before Division 19's involvement in the case.

Contestee filed a motion to dismiss and corresponding memorandum on the basis that the contestants have not complied with the "very rigorous and prompt deadlines" of the Act. (Docs. 10, 11). Contestee also notes that, to the extent that the contestants are challenging the August 2018 primary rather than the November 2018 general election, such a challenge is barred because the three-day time limit in K.S.A. 25-308(a)(1) had expired, the Court lacks jurisdiction, and a Kansas State Objections Board already heard and overruled a primary challenge. (Doc. 11 at 1-2). Contestants filed a response, whereby they conceded that they "are challenging the result in the November, 2018, general election," not the primary. (Doc. 13 at 2). Therefore, the Court need not address whether the primary can be, or was, challenged by the contestants. In response to contestants' opposition, contestee filed a reply. (Doc. 14). The Court heard oral argument on the matter on September 11, 2019, taking the same under advisement.

As an exhibit to his motion to dismiss, contestee attaches the communications that Division 14, through its administrative assistant, Emily Gray, had with the parties while attempting to get the matter scheduled for a hearing. The Court believes these communications are relevant to the motion to dismiss and therefore has set them out below.

12/10/18	*North et al v. Thomas*, Case No. 18CV06796 filed.
1/4/19	Email from Ms. Gray stating in part, "In order to prevent it from slipping between the cracks, I need to set [it] for hearing."

1/14/19 Email from Ms. Gray stating, "Good Morning, Judge would like to set this for a conference call. Do parties have any time this morning?"

1/14/19 Email from Ms. Gray stating, "Good Morning, here is a list of all District Court Judges for your convenience."

1/17/19 Email from Ms. Gray stating, "I am following up regarding the conference call on Monday, January 14th. Have the parties reached a decision? If you would like to have another conference call please let me know."

2/5/19 Email from Ms. Gray stating, "Good Morning, I am following up regarding the conference call that was held on Monday, January 14th. Have the parties reached a decision?"

2/21/19 Email from Ms. Gray stating, "Good Morning, [t]his case has no future court dates set. In order to prevent it from slipping between the cracks I need to set it for a hearing. I can set it for a status conference at 10:30 am on April 25, May 2, May 16 or June 27. Let me know what date the parties agree on, or I will pick a date if I don't hear back by the end of the day on February 1."

Additionally, there was correspondence from contestants' counsel to Ms. Gray, as follows:

1/10/19 Email from contestants' counsel stating, "Dear Ms. Gray: this case is not a normal civil case. There is an election contest, to be handled under a special procedure outlined in the statute. Under K.S.A. 25-1442, the Clerk of the Court is supposed to send a copy of the notice of election contest to the Chief Justice of the Supreme Court and not, by implication, assign the matter to a judge of the District Court. The Chief Justice is to send to the counsel for the parties a list of the District Court judges, and we are to strike from that list until one judge is left, and the matter is assigned to that judge."

Analysis

Contestants suggest two reasons opposing dismissal. The first is that all parties, including the contestee and his counsel, Division 14 and its staff, and the Clerk of the Court, did not comply with the deadlines, and thus the deadlines have been rendered unenforceable. The second is that the word "shall" as it is attached to the numerous deadlines in the statute does not carry a mandatory meaning, and thus, non-compliance does not subject them to dismissal. The Court will address these arguments in turn.

The Court will first address whether "shall" has a mandatory or directory meaning, because if the meaning is directory, the deadlines do not have to be strictly enforced. Contestants argue that the word "shall" does not always carry a mandatory meaning. In this context, contestants contend that the Kansas Legislature revised certain sections of Chapter 25 to specify that "shall" has a mandatory meaning. In their brief, they write:

> Specifically, with respect to revisions of provisions of K.S.A. 25-3904, the Legislature specified that "[f]or the purposes of this section, the word 'shall' imposes a mandatory duty and no court may construe that word in any other way." 2015 Session laws, Ch. 88, Sections 3, 4, and 5, pages 1154, 1156, and 1157. The legislation did not state "for the purposes of this chapter," rather the legislation referred only to the sections being revised.

(Doc. 13 at 6). Thus, according to contestants, because the legislature did not treat K.S.A. 25-1442 in a similar manner, then by implication, "shall" does not carry a mandatory meaning.

"The difference between directory and mandatory statutes, where their provisions are not adhered to, is one of effect only; the legislature intends neither to be disregarded." *Wilcox v. Billings*, 200 Kan. 654, Syl. ¶ 2, 438 P.2d 108 (1968). "However, violation of the former is attended with no consequences but failure to comply with the requirements of the latter either invalidates purported transactions or subjects the non-complier to affirmative liabilities." *Id.* at Syl. ¶ 2. The *Wilcox* court continues:

> No absolute test exists by which it may be determined whether a statute is directory or mandatory. Each case must stand largely on its own facts, to be determined on an interpretation of the particular language used. Certain rules and aids to construction have been stated. **The primary rule is to ascertain legislative intent by an examination of the whole act. Consideration must be given to** the entire statute, its nature, its object, and **the consequences which would result** from construing it one way or the other. It has been said that **whether a statute is** directory or **mandatory depends on whether the thing directed to be done is of the essence of the thing required**, or is a mere matter of form. Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is

> generally regarded as directory, unless followed by words of absolute prohibition; and a statute is regarded as directory where no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results. On the other hand, **a provision relating to the essence of the thing to be done, that is, to matters of substance, is mandatory, and when a fair interpretation of a statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding**, or when some antecedent and prerequisite conditions must exist prior to the exercise of power or must be performed before certain other powers can be exercised, **the statute must be regarded as mandatory.**

Id. (emphases added).

Wilcox makes clear that the relevant inquiry is into the Act, not the chapter containing the act. The Act extends from K.S.A. 25-1434 to K.S.A. 25-1452. Legislative history indicating that "shall" is mandatory in K.S.A. 25-3904, which relates to filling vacancies in office, is not relevant to the Act at issue. Therefore, it also has no relevance as to whether language within the Act carries a mandatory or directory meaning.

The language in the Act setting specific deadlines for particular actions, especially as it relates to K.S.A. 25-1442, is mandatory, not directory. It is clear with the various references to specific time constraints (five days to file the notice of contest after election certification, three days for the clerk of the district court to contact the Chief Justice of the Supreme Court, five days for the Chief Justice to give the parties a list of district judges, two days for the parties to choose a judge, and twenty days from the filing of the election contest to convene a hearing) that time is of the essence and critical to compliance with the statute. This makes sense, as an election contest should be completed in a manner that does not allow an ineligible official to hold office any longer than absolutely necessary. In fact, if a contestant follows the prescribed timeline when contesting an election, the evidentiary record would be sent to the Kansas legislature

before the challenged official would be sworn into office. Specifically in this case, had the Act been followed, the timeline would have been as follows:

Election certified		12/03/2018
Filing of petition	K.S.A. 25-1439	12/10/2018[4]
Contestee served	K.S.A. 25-1439	12/17/2018 (no later than)
Answer filed	K.S.A. 25-1444	12/24/2018 (no later than)
Supreme Court notified	K.S.A. 25-1442	12/13/2018 (no later than)
List of judges sent	K.S.A. 25-1442	12/18/2018 (no later than)
Judge selected	K.S.A. 25-1442	12/20/2018 (no later than)
Hearing	K.S.A. 25-1442	12/30/2018 (no later than)

The term of a representative commences the second Monday of January the year following election. KAN. CONST. art. II, § 2. Thus, under the Act, the hearing would have taken place and evidence would have been sent to the Kansas Speaker of the House before contestee's term ever commenced. Clearly, the statute envisioned an election contest being concluded either before the term's commencement or shortly thereafter. In reflecting that desire, the legislature used mandatory language for how and when an election challenge was to take place. The word "shall" as it relates to time deadlines is mandatory.

At oral argument, contestants made an unbriefed argument that the only requirement on the part of contestants was that they "proceed" with the action. *See* K.S.A. 25-1442 ("If the contestant does not proceed within the time provided. . . the action shall be dismissed. . . ."). Contestants claim compliance with this provision by arguing that the filing of the action and their various communications with the Court indicated that they were "proceeding." However, this argument fails for two reasons. First, the requirements for filing the action are not described in

[4] Although the timeline reflects seven days in between certification and the notice of contest, the five-day period prescribed by K.S.A. 25-1439 ended on a Saturday, which allows for filing the following Monday. K.S.A. 60-206(a)(1)(C).

K.S.A. 25-1442; they are only present in K.S.A. 25-1439. Thus, the filing of the action would not be a time "provided for" in K.S.A. 25-1442. Second, if the only requirement to proceed with the lawsuit was to file the action, then it would make no sense to have time constraints that were relative to when the action was filed. "Proceeding" in this context means more than just filing the action. The "time provided for herein" applies to, among other things, selecting a judge and convening a hearing, neither of which were done in a timely fashion. Contestants may have filed the action in a timely fashion, but they did not proceed within the time provided for in K.S.A. 25-1442.

Because the Court views "shall" as mandatory, contestants must appeal to this Court's equity and convince the Court to extend leniency regarding the otherwise mandatory deadlines. Mandatory language "subjects" the non-complier to liability, in this case dismissal of the case, but does not demand it. *Wilcox*, 200 Kan. at 657. In other words, if the language were directory, there would be no consequences for non-compliance, while mandatory language provides a court with the option for consequences.

A court can still exercise its equitable powers and overlook non-compliance with the deadlines should good cause be shown. For example, a court can set aside a default for good cause shown, even though the defaulting party missed the mandatory time period during which to answer. *See* K.S.A. 60-260(b); *see also State ex rel. Stovall v. Alivio*, 275 Kan. 169, 172-73, 61 P.3d 687 (2003) ("the trial court may grant a motion to set aside a default judgment when it finds '(1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and, (3) that the default was not the result of inexcusable neglect or a willful act.'"). Other examples of a court excusing missed deadlines are K.S.A. 22-3219(1), where a criminal defendant must serve the prosecuting attorney with notice

he/she intends to assert a defense of lack of mental state within 30 days after a not-guilty plea, unless good cause is shown to extend the deadline, and K.S.A. 60-1507(f)(2), where the court can extend the time to file a motion attacking sentence to "prevent a manifest injustice."

Here, contestants appeal to the Court's equity by arguing that they are not solely responsible for the missed deadlines. Delays were also caused by the clerk's office rejecting the original Chapter 25 petition, the case mistakenly being assigned to a district court judge as opposed to going directly to the Kansas Supreme Court, the summons allowing contestee 21 days to answer, the court clerk allowing contestee an extension of time to answer, and Division 14 instead of Chief Justice Nuss providing the list of judges to the parties. The Court is aware that these delays would have made compliance with the 20-day hearing requirement extremely difficult, if not impossible. Notably, the 21 days that were provided in the summons to file an answer exceeded the 20-day hearing requirement.

The Court also recognizes that this is a seldom-used statute, and it appears that neither the court, its staff, nor the parties were initially familiar with the Act. However, this does not excuse the failure of contestants to proceed, if not within the 20-day requirement, then within a reasonable time. As of January 14, 2019, contestants had the list of judges at their disposal and were fully aware of the statutory timeline. Nevertheless, according to contestants, it was not until May 4, 2019 that a judge was selected, and it was not until May 20, 2019 that the notice of selection of judge was filed. Had the parties chosen a judge when directed to by Judge Moriarty on January 14, 2019, notified Division 19 immediately upon selection, and made an effort to set the matter for hearing within 20 days of selection, the Court would be more sympathetic regarding the missed deadlines. As it stands, there were 126 days that passed between receiving

the list of judges and filing the notification of selection of judge, more than 100 days longer than the legislature contemplated for the entire process.

During this time, Division 14's administrative assistant contacted the parties, indicating that she did not want the case to "slip between the cracks." (Doc. 11, Exhibit B). When asked by the Court at oral argument about the 126-day period between receipt of the list of judges and notice of selection of judge, contestants indicated that their counsel was busy in a two-week jury trial, then after that trial was concluded, had difficulty contacting contestee's counsel. With counsel on notice of the Act's deadlines, this neglect is not excusable. The burden is on contestants to comply with the Act to the best of their ability. *See* K.S.A. 25-1442 ("If the contestant does not proceed. . . the action shall be dismissed."). Trial and communication difficulties do not justify such an excessive delay.

Contestants' counsel recalled that the selection of judge occurred over the phone. A simple phone call in which 18 judges were alternatingly struck should not have taken four months to complete. If non-compliance was caused by contestee's counsel's unavailability, contestants, as the party with the burden, should have informed the Court long before 126 days elapsed. This 126-day period where the case languished was not the result of any error by the Court or any of its staff.

As of September 11, 2019, the date of the oral argument on the motion to dismiss, it had been 275 days since this case was filed, pursuant to an Act that contemplated a 20-day process. Contestee has already served almost half of his term. Allowing the case to proceed does not comport with the legislative purpose behind the Act which anticipates a speedy process to prevent an ineligible candidate from taking office. The Court will not utilize its equitable powers in overlooking the Act's deadlines. Even with the various delays by court personnel and

contestee's counsel, the hearing could have been set for late January 2019 or early February 2019, when contestee's term still would have been in its infancy. Ergo, contestee's motion to dismiss is granted.

The Act mandates that "[i]f the election be confirmed or the contest be dismissed, judgment shall be rendered against the contestant for all costs." K.S.A. 25-1452. Thus, contestants are responsible for all costs of these proceedings. However, this does not include attorneys' fees. *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 957 P.2d 379 (1998) ("We conclude that the words 'all costs' used in K.S.A. 25-1452 include the costs in this action in the amount of $1,630.12 but do not include attorney fees in the amount of $40,000."). Contestee is to submit a statement of costs, and if need be, the Court will hear any objection to the same at a later date.

Conclusion

The Act's language imposing strict time constraints is mandatory, as it contemplates a process where time is of the essence. The Court will not depart from the provided deadlines because even with delays caused by the court, its staff, and contestee's counsel, a hearing could have been set within a reasonable time that still would have advanced the legislative purpose of the Act. Contestee's motion to dismiss is **GRANTED**. Pursuant to K.S.A. 25-1442, the judge shall transmit a copy of the order of dismissal to the Chief Clerk of the House of Representatives.

IT IS SO ORDERED.

09/20/19
Date

____/s/ Sara Welch_____
SARA WELCH
DISTRICT COURT JUDGE, Div. 19

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60-258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e-mail addresses provided by counsel of record in this case. Counsel for the parties so served shall determine whether all parties have received appropriate notice, complete service on all parties who have not yet been served, and file a certificate of service for any additional service made.

/s/ SW