

IN THE DISTRICT COURT OF BOURBON COUNTY, KANSAS

SUSAN E. WALKER)
Bourbon County Clerk,)
)
Plaintiff,)
)
v.)
)
JAMES CRUX)
Bourbon County Attorney,)
)
Defendants.)
)

Case No. BB-2026-CV-000048

Pursuant to K.S.A. Chapter 60

**PLAINTIFF’S RESPONSE TO KEVIN WAGNER’S MOTION TO SET ASIDE
ORDER DISMISSING DEFENDANT RECALL COMMITTEE AND
OBJECTION TO MOTION TO DISMISS DEFENDANT RECALL
COMMITTEE**

COMES NOW the Plaintiff Susan E. Walker (“Plaintiff”), by and through counsel Jonathan L. Ehrlich, of KN Law Group, and hereby responds to Kevin Wagner’s (“Wagner”) Motion to Set Aside Order Dismissing Defendant Recall Committee and Objection to Motion to Dismiss Defendant Recall Committee (“Wagner Motion”). Plaintiff respectfully requests the Court DENY the Wagner Motion. In opposition to the Wagner Motion, Plaintiff offers the following:

INTRODUCTION

Wagner’s Motion lacks citations to caselaw and has more conclusory statements than logical reasoning. Accordingly, Plaintiff is left guessing in large part as to what exactly Wagner is arguing. This is not surprising in context though. The volume of caselaw addressing the questions Wagner alludes to is small while the magnitude of the issues he presents is large. Since filing her original petition, (“the

Petition”), and through filing her Amended Verified Petition for Declaratory Judgment and Injunctive Relief (“the Amended Petition”), Plaintiff has sought to posture this case to achieve two purposes: (1) promptly answer whether the Petition to Recall Susan Walker being circulated by former defendant Recall Committee (the “Recall Petition”) is legally sufficient, and (2) minimally complicate or interfere with all parties’ exercise of legal rights. To those ends, Plaintiff presents the following arguments and authorities.

ARGUMENTS AND AUTHORITIES

I. The Court’s Order to Dismiss Defendant Recall Committee should not be set aside.

K.S.A. 60-5320 does not stay a Plaintiff’s ability to amend her petition. “All discovery, motions or other pending hearings shall be stayed upon the filing of the motion to strike.” K.S.A. 60-5320(e)(2). “A party may amend its pleading once as a matter of course within 21 days after serving it...” K.S.A. 60-215(a)(1)(A). A petition is a pleading. A pleading is not discovery, a motion or a hearing. Therefore, amending a petition under K.S.A. 60-215 is not stayed by K.S.A. 60-5320(e)(2).

Wagner filed a K.S.A. 60-5320 motion to strike (“Motion to Strike”), which triggered a stay of discovery, motions and pending hearing. There never was a stay on Plaintiff’s ability to amend the Petition. Therefore, Plaintiff permissibly filed the Amended Petition.

The remaining issues mentioned in ¶ I of Wagner’s motion are discussed in sections below.

II. Plaintiff’s Motion to Dismiss Recall Committee was not stayed by the Wagner Motion because the Wagner Motion was made moot by

Plaintiff filing the Amended Petition.

Generally, a motion to strike relates to a specific filing or component of a filing. For anti-SLAPP motions to strike, a party may bring a motion to strike against a claim. K.S.A. 60-5320(d). Then, the moving party must make a *prima facie* case showing the targeted claim concerns a party's "exercise of the right of free speech, right to petition or right of association." *Id.*

Here, the Motion to Strike was "brought", i.e. filed. Before any finding of whether Wagner's motion satisfied his initial burden, and within 21 days of the Petition, Plaintiff amended the Petition removing Wagner and the rest of the Recall Committee as defendants and withdrew her requests for a TRO or injunction restraining the Recall Petition from being circulated. In doing so, all claims and issues between Plaintiff and Recall Committee members were resolved. At the moment Plaintiff filed the Amended Petition, the Motion to Strike became moot because the Motion to Strike targeted claims in the Petition, not the Amended Petition. Since the Motion to Strike became moot, the K.S.A. 60-5320(e)(2) stay also became moot.

Because the Motion to Strike and the statutory stay that accompanied it was moot, nothing prevented the Court from considering and ruling on Plaintiff's Motion to Dismiss.

III. Wagner's bald assertion the Recall Committee members need to be parties is not necessarily wrong, but setting aside the Order to Dismiss Defendant Recall Committee is not the proper means of them rejoining the case.

K.S.A. 60-220 governs permissive joinder of parties. Plaintiff joined Recall

Committee members as defendants to the Petition pursuant to K.S.A. 60-220(b)(2)(A) because she sought to enjoin Recall Committee from circulating a recall petition she pled was invalid. Additionally, Plaintiff joined Recall Committee as a defendant under K.S.A. 60-220(b)(2)(B) because questions of fact were likely to arise in the case concerning contents of any recall petition drafted by Recall Committee.

Plaintiff filed the Amended Petition on May 28, 2026, pursuant to K.S.A. 60-215(a)(1)(A), discussed above. The Amended Petition removed Wagner and other Recall Committee members as defendants in the case because Plaintiff no longer sought an injunction against Recall Committee. Barring a court order, nothing requires a plaintiff to name any defendant in her initial or first amended pleading. Since Plaintiff properly filed the Amended Petition as a matter of course and may name whomever she believes she has a claim against in a petition, Recall Committee and all its members ceased being parties to the case as a matter of law upon the Amended Petition being filed.

K.S.A. 60-219 governs compulsory joinder. Plaintiff, by her pleadings, the facts, and the law, does not conclude or assert Recall Committee or any one of its members is a required party to this action. If the Court believes Recall Committee is a required party, it may order Recall Committee be joined. K.S.A. 60-219(a)(2). If Defendant Crux believes Recall Committee is a required party, he may file a motion to dismiss for failure to join a necessary party. K.S.A. 60-212(b)(7). As a non-party, Wagner has no ability to compel the Court to order joinder under K.S.A. 60-219.

K.S.A. 60-224 governs intervention. If Wagner wishes to participate in this

case, and is not named by Plaintiff as a defendant or determined a required party by the Court under K.S.A. 60-219, he may file a motion to intervene under K.S.A. 60-224. Case law in clear K.S.A. 60-224 should be construed liberally and Wagner has a good chance at being allowed to participate in the case as an intervenor. As he admits in the Motion, Wagner wants to proceed on his anti-SLAPP claim, so he filed a motion to set aside the order dismissing him rather than a motion to intervene. See Wagner Motion ¶ IV.

Neither the Petition nor the Amended Petition create a SLAPP suit. K.S.A. 60-5320 is the Public Speech Protection Act and says its purpose is: “to encourage and safeguard the constitutional rights of a person to petition, and speak freely and associate freely, in connection with a public issue or issue of public interest to the maximum extent permitted by law while, at the same time, protecting the rights of a person to file meritorious lawsuits for demonstrable injury.” K.S.A. 60-5320(b) (emphasis added). K.S.A 60-5320 is “[s]ometimes referred to as an anti-SLAPP statute [because] the Act is intended to prevent meritless lawsuits that inhibit free speech, known as SLAPPs, or strategic lawsuits against public participation.” *Kansas Governmental Ethics Comm'n v. Shepard*, 65 Kan. App. 2d 1, 5, 556 P.3d 890, 894 (2024) citing *T&T Financial of Kansas City v. Taylor*, No. 117,624, 2017 WL 6546634, at *3 (internal quotations omitted).

As made clear on the face of both the Petition and Amended Petition, Plaintiff’s claims seek review of and action on normal processes concerning a recall petition filed against her. See K.S.A. 25-4331 and K.S.A. 25-4322(d), respectively. If an elected

official seeking review under K.S.A. 25-4331 and K.S.A. 25-4322(d) is a SLAPP, then K.S.A. 25-4331 and K.S.A. 25-4322(d) have no effect and elected officials have no remedy to challenge or enjoin legally insufficient recall petitions against them. Wagner has neither briefed nor otherwise argued that in detail, but his Motion to Strike and reference to it in his Motion to Set Aside would require such a conclusion. Wagner is arguing without arguing that no recall petition may be challenged. That cannot be the law. No Kansas court of appeals has held K.S.A. 25-4331 and K.S.A. 25-4322(d) are voided by K.S.A. 60-5320. Plaintiff's asking the Court for relief under statutes that allow her to do so does not amount to a SLAPP suit.

Plaintiff's claims, as pled, would survive K.S.A. 60-5320(d). Assuming the Motion to Strike meets Wagner's burden to show a *prima facie* case Plaintiff's active claims concern exercise of his or another's speech rights, which it doesn't, Plaintiff's filings already clearly overcome the burden Plaintiff would be required to overcome. Under K.S.A. 60-5320(d), if the burden shifts to the responding party, Plaintiff here, she must "establish a likelihood of prevailing on the claim by presenting substantial competent evidence to support a *prima facie* case." "In making its determination, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." *Id.*

Either the Petition or the Amended Petition alone is enough for the Court to find a *prima facie* case the Plaintiff has a likelihood of prevailing on her claims. All the factual claims in the petitions are verified as true or, a few, as true based upon Plaintiff's information and belief. And if true, they necessarily lead to the conclusion

the Recall Petition is invalid. Additionally, Plaintiff filed affidavits of fact as exhibits to her previously filed applications for temporary restraining orders that augment the verified facts in the Petition and Amended Petition.

Accordingly, if the Court found Wagner's Motion to Strike was not moot, litigating it would only add delay and costs to getting the dispositive question in this case before the Court.

IV. Wagner's rights and interests under K.S.A 60-5320 are moot because he is not a named party or intervener and his anti-SLAPP motion is moot.

The Kansas Public Speech Protection Act is meant to reenforce and safeguard constitutional rights. See K.S.A. 60-5320(b). But, it is not a guarantee of new rights for any person to prevent others from seeking judicial relief for "meritorious lawsuits for demonstrable injury." See *Id.* Kansas' Anti-SLAPP statute has teeth in that it provides for attorney fees and sanctions in specific circumstances. K.S.A. 60-5320(g)(1-2). However, despite promises or wishes to the alternative, the statute does not create a right to either attorney fees or sanctions.

Here, Plaintiff immediately considered Wagner's anti-SLAPP motion and Wagner's stated concerns about his rights to petition being infringed. Despite her legally supported belief her Petition would survive Wagner's Motion to Strike (discussed above), and her personal and professional hardships resulting from the petition circulating (presented in TRO applications), Plaintiff promptly dropped her prayers for a TRO or injunction and dropped Recall Committee from the lawsuit.

The Recall Petition, which Plaintiff complains about in this case, is and has been continuously circulated. In addition to this case not legally being a SLAPP, in

practice it has had no effect on any person's exercise of public speech rights. So, Kansas's Public Speech Protection Act worked.

V. Plaintiff's Motion to Dismiss Recall Committee contained no contestable facts or issues.

As stated above, Recall Committee and all its members stopped being parties to the case when Plaintiff filed the Amended Petition. Plaintiff filed the Motion to Dismiss Recall Committee as Defendant simply because there was no means for Plaintiff to remove Recall Committee as defendants in the Court filing system without an Order. The motion contained no controversial facts and stated only what was already true. When the Court granted Plaintiff's Motion to Dismiss Recall Committee as Defendants, its Order likewise contained nothing that was not already legally true. Therefore, setting aside the Order Dismissing Recall Committee as a Defendant would have no legal effect and no benefit to Wagner or any other person. As such, the Court should deny Wagner's motion to set aside the Order to dismiss Defendant Recall Committee.

CONCLUSION

Recall Committee and each of its members ceased being defendants when Plaintiff filed the Amended Petition. The Court's Order granting Plaintiff's motion to dismiss Recall Committee and its members simply stated that existing legal truth. Neither the Petition nor the Amended Petition create a SLAPP suit. Wagner is not currently a party in the case and has no live or unresolved issue in the case. Setting aside the order dismissing Recall Committee from the suit would only delay the central question is this case getting before the Court. For the reasons stated herein,

Plaintiff respectfully asks the Court to DENY Kevin Wagner's Motion to Set Aside the Order to Dismiss Defendant Recall Committee.

Respectfully Submitted By:

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ATTORNEY FOR THE PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the file-stamped date above I filed a true and correct electronic copy of the above and foregoing document with the Clerk of the District Court via the Kanas Judicial Branch's e-Flex Filing System, which automatically provides electronic notification to participating parties.

A copy was also placed in the US Mail, first-class postage prepaid, addressed to:

James Crux
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