

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2021-000074-001 DT

10/01/2021

HONORABLE JOSEPH P. MIKITISH

CLERK OF THE COURT
E. Wolf
Deputy

AUDIT-U S A

WILLIAM J RISNER

v.

MARICOPA COUNTY (001)
MARICOPA COUNTY BOARD OF
SUPERVISORS (001)

JOSEPH EUGENE LA RUE

COURT ADMIN-CIVIL-ARB DESK
DOCKET-CIVIL-CCC
JUDGE MIKITISH

UNDER ADVISEMENT RULING
Defendants' Motion to Dismiss

The Court has received, reviewed, and considered the Defendants, Maricopa County and the Maricopa County Board of Supervisors' (collectively, "the County"), Motion To Dismiss, filed April 1, 2021; the Plaintiff, Audit-USA's ("Audit-USA"), Response thereto, filed April 15, 2021; and the County's Reply, filed April 27, 2021. The Court has also received, reviewed, and considered Plaintiff's Renewal Request for Order to Show Cause, filed May 11, 2021. The Court heard argument on the Motion to Dismiss on August 3, 2021 and took the matter under advisement. For the reasons set forth below, the Motion is granted.

Background

On February 23, 2021, Audit-USA served a public records request on the County. The County responded with all corresponding records to two of the three categories of requested documents. In the third category, Audit-USA requested digital images of voted ballots from the November 3, 2020 general election. The County declined to provide those records asserting that they cannot lawfully be produced, and Audit-USA commenced this legal action.

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Legal standard

Arizona rules provide that a claim may be dismissed for failure to state a claim upon which relief can be granted. Rule 4(d), Ariz. R. Spec. Act.; *Ringier Am. v. St. of Ariz. Dep't of Rev.*, 184 Ariz. 250 (App. 1995). A claim must be dismissed when the Plaintiff is not entitled to relief under any interpretation of the facts. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012). A court is to look only to the pleading itself and the well pled factual allegations therein. *Cullen v. Auto-Owners Insurance Co.*, 218 Ariz. 417, 419 ¶ 7 (2008). Mere conclusory statements are insufficient to state a valid claim. *Id.* Courts must assume the truth of the factual allegations and all reasonable inferences therefrom in the light most favorable to the pleading party. *Logan v. Forever Living Products Int.*, 203 Ariz. 191 (2002).

Discussion

The County argues that Arizona law prohibits it from producing digital images of ballots. It notes that paper ballots that are cast must be deposited in a vault and remain, “unopened and unaltered,” for 24 months unless a court orders otherwise. *See* A.R.S. § 16-624(A). It notes further that, “electronic data from and electronic or digital images of ballots are protected from physical and electronic access, including unauthorized copying or transfer, and that all security measures are at least as protective as those prescribed for paper ballots.” A.R.S. § 16-625. It also argues that Arizona law in general protect the secrecy of voted ballots. *See* Ariz. Const. art. VII, § 1; A.R.S. § 16-515(G) (illegal to take photographs within 75 feet of voting locations while voters are voting); A.R.S. § 16-1018(4) (unlawful to show another voter’s ballot to any person after is prepared for voting in such a manner as to reveal the contents); A.R.S. § 16-1005(H)-(I) (unlawful to collect another’s voted early ballot, with certain exceptions not applicable here).

Based on these provisions, the County argues that it has a legal obligation to protect electronic images of ballots from physical and electronic access. It argues that the statutes provide an exemption from release under Arizona’s Public Records Law, or alternatively that release would be contrary to the best interests of the State. The County points to three Arizona Superior Court cases that have held that digital images of ballots are not subject to release under Arizona Public Records Law.

Audit-USA argues that Arizona law prohibits physical and electronic access to the electronically stored ballot images. *See* A.R.S. § 16-625. It argues that it is not seeking “access” to those files. Rather, it argues that it is requesting the County to access the files and make a copy of them pursuant to public records law. It argues that the statute requires security measures be put in place to ensure the integrity of the system. Audit-USA argues that the statute is not an exemption

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from release of public records, but rather a safety measure to protect against voter fraud. It further argues that the statutes cited by the County are inapposite to release of the digital images and do not prevent the release of the digital images pursuant to the best interests of the state exemption. *See Carlson v. Pima County*, 141 Ariz. 487, 490 (1984). It argues that the Arizona Superior Court cases are not binding, distinguishable, or wrongly decided.

The applicable statute provides that “electronic data from and electronic or digital images of ballots are protected from physical and electronic access, including unauthorized copying or transfer, and that all security measures are at least as protective as those prescribed for paper ballots.” A.R.S. § 16-625. Audit-USA's argument that “access” does not mean receiving a copy of the digital images is contrary to the next clause of the statute, which provides “including unauthorized copying or transfer...” The statute expressly prohibits unauthorized copying or transfer of digital images of ballots. Further, there is nothing in the statute that authorizes a private entity such as Audit-USA to obtain a copy of the digital images.

In addition, the security measures imposed for digital images must be “at least as protective as those prescribed for paper ballots.” The security measures for paper ballots of course require that those ballots be locked in a vault and stored, “unopened and unaltered,” for 24 months. A.R.S. § 16-624. Audit-USA does not argue that it has the right to receive copies of the paper ballots cast in the November 2020 election, and such an argument would contravene the statutory requirements. The same must be true for the digital images.

Conclusion

Based on the foregoing and because the Court finds that Audit-USA is not entitled to relief under any interpretation of the facts,

IT IS ORDERED granting the County’s Motion to Dismiss.

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