

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of
Pennsylvania, et al,

Petitioners,

v.

The Commonwealth of
Pennsylvania, et al,

Respondents.

:
:
: No. 261 MD 2017
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: Electronically Filed Document
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: *Petition filed June 15, 2017*
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NOTICE TO PLEAD

YOU ARE HEREBY NOTIFIED to file a written response to the enclosed Preliminary Objections within thirty (30) days of service or within such other period of time as the Court may direct, whichever is shorter, or a judgment may be entered against you.

Respectfully submitted,

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Date: August 18, 2017

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, <i>et al</i>,	:	
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**PRELIMINARY OBJECTIONS
OF THE COMMONWEALTH OF PENNSYLVANIA**

The Commonwealth of Pennsylvania, by its undersigned attorneys, hereby files these Preliminary Objections to the June 15, 2017 Petition for Review (the “Petition”) filed by Petitioners League of Women Voters of Pennsylvania, Carmen Febo San Miguel, James Solomon, John Greiner, John Capowski, Gretchen Brandt, Thomas Rentschler, Mary Elizabeth Lawn, Lisa Isaacs, Don Lancaster, Jordi Comas, Robert Smith, William Marx, Richard Mantell, Priscilla McNulty, Thomas Ulrich, Robert McKinstry, Mark Lichty, and Lorraine Petrosky (together, the “Petitioners”) and, in support thereof, states as follows:

INTRODUCTION

The Petitioners brought this lawsuit alleging that the redistricting plan passed by Pennsylvania’s House and Senate and signed into law by then-Governor

Corbett on December 22, 2011, is unconstitutional. In doing so, the Petitioners specifically identified every individual and Commonwealth agency that they wanted to sue and named them as respondents. Then, for good measure, the Petitioners named the “Commonwealth of Pennsylvania” as a respondent, too.

This is wrong both as a matter of procedure and as a matter of law. The Pennsylvania Rules of Civil Procedure specifically advise that, when suing the Commonwealth of Pennsylvania, litigants must identify the specific individuals and agencies against which their action is directed. And every plaintiff in any lawsuit must plead sufficient facts to state a legal claim and allow the defendant to understand the facts alleged against it so it can prepare a defense. Here, the only fact that the Petitioners alleged about the “Commonwealth of Pennsylvania” is that its capital is in Harrisburg. It did not plead any legal claims against the Commonwealth of Pennsylvania, at all.

The Petitioners appear to have named the “Commonwealth of Pennsylvania” as a “catchall” – “belt and suspenders” in case they accidentally omitted a proper respondent. This is not allowed. It not only violates Pennsylvania law and procedure, but it also wastes limited Commonwealth resources and complicates the adjudication of legal cases. After all, the Petitioners already identified, by name, every individual and Commonwealth agency they wanted to sue. Each has competent legal counsel charged with defending the law. By adding the

“Commonwealth of Pennsylvania” on top of the properly named respondents, it is unclear *who*, exactly, the Petitioners additionally wish to sue – and *why*.

For these reasons, as set forth more fully below, this Court should sustain these Preliminary Objections and dismiss the “Commonwealth of Pennsylvania” from this lawsuit with prejudice.

FACTUAL BACKGROUND

1. On June 15, 2017, the Petitioners filed a Petition for Review in this Court’s original jurisdiction seeking to challenge the Congressional Redistricting Act of 2011 (“Act 131”), the law through which, following the 2010 United States Census, Pennsylvania’s General Assembly redrew Pennsylvania’s Congressional districts in 2011 (the “Redistricting Plan”). Pet., ¶ 3.

2. Act 131 was passed by Pennsylvania’s House and Senate before it was signed into law by then-Governor Corbett on December 22, 2011. Pet., ¶ 76.

3. Since then, United States Congressional elections have been conducted in 2012, 2014 and 2016 based on the Redistricting Plan. Pet., ¶¶ 77-81.

4. The Petitioners claim that the Redistricting Plan is unconstitutional because it discriminates against Democratic Party registered voters on the basis of their political expression and affiliation. Pet., ¶ 104.

5. By way of their Petition, the Petitioners seek equitable relief including a judicial declaration that the Redistricting Plan is unconstitutional. Pet., ¶ 12.

6. The Petitioners named as respondents the following individuals and Pennsylvania governmental entities: the Pennsylvania General Assembly, Governor Tom Wolf, Secretary Pedro Cortés, Commissioner Jonathan Marks, Lieutenant Governor Stack, Pennsylvania House Speaker Michael Turzai, and Pennsylvania Senate President *Pro Tempore* Joseph Scarnati. Pet., ¶¶ 33-40.

7. They also named as a respondent the “Commonwealth of Pennsylvania.” Pet., ¶ 32.

8. Petitioners’ allegations, logically, concern the actions taken by specific individuals and governmental agencies *within* the Commonwealth of Pennsylvania – not the state as a whole. *See, e.g.*, Pet., ¶¶ 42-49 (discussing how national Republicans targeted Pennsylvania for redistricting purposes, and secretly created a gerrymandered map), ¶¶ 105-107 (stating that the General Assembly drew the 2011 Redistricting Plan to favor Republican voters), etc. After all, the Commonwealth of Pennsylvania, like any state, can only act through its individuals and governmental agencies.

9. Despite separately suing the “Commonwealth of Pennsylvania” in addition to the other Commonwealth respondents, the Petitioners make only one allegation against it: “Respondent the Commonwealth of Pennsylvania has its capital located in Harrisburg, Pennsylvania.” Pet., ¶ 32.

10. Petitioners allege no statutory or constitutional duties that the “Commonwealth of Pennsylvania” has related to Act 131 and seek no relief from the Commonwealth of Pennsylvania, at all.

PRELIMINARY OBJECTION I
Pa. R.Civ.P. 1028(a)(5) – MISJOINDER OF PARTIES

11. The Commonwealth of Pennsylvania incorporates the foregoing paragraphs as if set forth at length.

A. Pennsylvania Law and Procedure Dictate That the “Commonwealth of Pennsylvania” May Not Be Named as a Respondent.

12. Misjoinder objections are based on grounds that an improper party was joined in the action. *See Bell v. Beneficial Consumer Disc. Co.*, 360 A.2d 681, 687 (Pa.Super. 1976); *see also Haber v. Monroe Cty. Vocational-Tech. Sch.*, 442 A.2d 292, 294 (Pa.Super. 1982).

13. As a general matter, the “Commonwealth of Pennsylvania” is not a proper defendant to a lawsuit; rather, the specific agencies or individuals who are alleged to have acted on behalf of the Commonwealth must be named. *See Tork-Hiis v. Commonwealth*, 735 A.2d 1256 (Pa. 1999). Pennsylvania Rules of Civil Procedure state that such an action “shall be styled” as “Plaintiff v. ‘ _____ (*Name of Agency or Party*) of the Commonwealth of Pennsylvania’”. Pa. R.Civ.P. 2102(a)(2)(emphasis added).

14. Naming an individual or state agency is meaningfully and practically different from naming the Commonwealth of Pennsylvania, as a whole. *See Tork-Hiss*, 735 A.2d at 1258 (amending a complaint to substitute a “Commonwealth party” for the Commonwealth of Pennsylvania, itself, constitutes “the addition of a new party and not merely the correction of a captioned party name”)(citations omitted).

15. Pennsylvania Rule of Civil Procedure 2102 states that, while “[a]n action *by the Commonwealth*” may be brought in the name of “the Commonwealth of Pennsylvania,” an action “*against* a Commonwealth agency or party” generally may not. Pa. R.Civ.P. 2102(a)(emphasis added).

16. There is “only” one exception – where there is a cause of action against the Commonwealth of Pennsylvania and an express “right of action [against the “Commonwealth of Pennsylvania”] ***has been authorized by statute***”. Pa. R.Civ.P. 2102(a)(2), *Note (citing* CONSTITUTION of 1968, Art. I, Sec. 11, 1 Pa. C.S. § 2310)(emphasis added). This is a Constitutional issue. *Id. See also Commonwealth v. Glover*, 794 A.2d 410 (Pa. Cmwlth. 2007)(noting that Pa. R.Civ.P. 2102 was amended to add section (a)(2) “specifically for the purposes of alerting practitioners to the distinction between the Commonwealth and a commonwealth agency” and notifying them that “it is a *commonwealth agency*, and ***not the Commonwealth, that must be named*** in an action.” *Glover*, 794 A.2d

at 415 (*citing* Pa. R.Civ.P. 2102(a)(2) and explanatory comment)(emphasis added); *see also* *Piehl v. City of Philadelphia*, 930 A.2d 607 (Pa. Cmwlth. 2007), *affirmed*, 987 A.2d 146 (Pa. 2009)(finding use of “Commonwealth,” as a defendant was really shorthand for “Department of Transportation” of the Commonwealth of Pennsylvania where it was clear from the pleading that the Plaintiff’s claims could be directed only at that agency of the Commonwealth).

17. Here, the statute at issue does not expressly “authorize[]” a cause of action against the “Commonwealth of Pennsylvania.” Pa. R.Civ.P. 2102(a)(2), *Note* (*citing* CONSTITUTION of 1968, Art. I, Sec. 11, 1 Pa. C.S. § 2310).

18. Therefore, the “Commonwealth of Pennsylvania” is not a proper party here and must be dismissed.

B. Common Sense Also Dictates That the “Commonwealth of Pennsylvania” Should Not Be Named as a Respondent.

19. To be clear, dismissing the “Commonwealth of Pennsylvania” from this lawsuit is no loss for Petitioners.

20. The Petitioners named as respondents in this matter every individual and agency of the Commonwealth that they wanted to sue: the Pennsylvania General Assembly, Governor Tom Wolf, Secretary Pedro Cortés, Commissioner Jonathan Marks, Lieutenant Governor Stack, Pennsylvania House Speaker Michael Turzai, and Pennsylvania Senate President *Pro Tempore* Joseph Scarnati. Pet., ¶¶ 33-40.

21. Each of these respondents was properly named under Pa. R.Civ.P. 2012, is represented by able counsel and, if only by virtue of their status as respondents, is motivated to defend the legality of the statute at issue and maintain the status quo. Indeed, the Pennsylvania General Assembly drafted the maps in the first place – presumably no respondent will fight harder than it will to defeat the Petition.

22. To be clear, adding the Commonwealth of Pennsylvania as a respondent does *nothing* for the Petitioners. The Pennsylvania Rules of Civil Procedure allow a plaintiff to add new parties identified through discovery (Pa. R.Civ.P. 2232(c) and subpoena documents and testimony from non-parties (Pa. R.Civ.P. 4009.21). Adding the Commonwealth of Pennsylvania does not help the Petitioners gain judicial control over any person or agency of the Commonwealth that might arise later through discovery.

23. Presumably the Petitioners simply added the “Commonwealth of Pennsylvania” to their list in case they inadvertently left anyone out – like wearing a “belt and suspenders”. Unlike actually wearing a belt and suspenders, however, which is just unnecessary, naming the “Commonwealth of Pennsylvania” on top of all the other respondents actually does *harm* – it creates significant confusion in the adjudication of this matter and needlessly depletes the limited resources of the Commonwealth, generally, and of the Office of Attorney General, in particular.

24. Here, the Office of Attorney General represents only the “Commonwealth of Pennsylvania” – without any individual or agency identified. As such, it is not clear who its client actually *is*. And the Commonwealth suspects that Petitioners do not know either.

25. One thing is certain: Respondent the “Commonwealth of Pennsylvania” cannot be the Pennsylvania General Assembly, Governor Tom Wolf, Secretary Pedro Cortés, Commissioner Jonathan Marks, Lieutenant Governor Stack, Pennsylvania House Speaker Michael Turzai, or Pennsylvania Senate President *Pro Tempore* Joseph Scarnati. Pet., ¶¶ 33-40. Each of these respondents has been named separately and is well-represented by counsel.

26. So when the Petitioners serve discovery upon the “Commonwealth of Pennsylvania,” the Office of Attorney General does not know whom to contact to determine whether the Commonwealth has responsive documents or information. This is precisely why the Pennsylvania Rules of Civil Procedure do not permit plaintiffs to name the “Commonwealth of Pennsylvania” as a defendant.

27. As set forth above, in naming the other respondents, the Petitioners identified every specific agency and individual they wanted to sue.

28. The true parties in interest here are those Commonwealth agencies and individuals that Petitioners named in their lawsuit – not the “Commonwealth of Pennsylvania” as a whole.

29. For the reasons set forth above, there is no basis for including the Commonwealth of Pennsylvania as a respondent in this litigation. *See* Pa. R.Civ.P. 1028(a)(5).

WHEREFORE, because naming the “Commonwealth of Pennsylvania” as a stand-alone respondent violates the Pennsylvania Rules of Civil Procedure, is completely unnecessary, and needlessly depletes the limited resources of the Commonwealth, this preliminary objection should be sustained and the Petition should be dismissed against the “Commonwealth of Pennsylvania” with prejudice.

PRELIMINARY OBJECTION II
Pa. R.Civ.P. 1028(a)(4) – DEMURRER

30. The Commonwealth of Pennsylvania incorporates the foregoing paragraphs as if set forth at length.

31. The two Counts of the Petition criticize the 2011 Redistricting Plan (*see, e.g.*, Pet., ¶ 104), the General Assembly (*see, e.g.*, Pet., ¶¶ 105-106), and Republicans generally (*see, e.g.*, Pet., ¶ 112), but do not mention the Commonwealth of Pennsylvania at all. *See* Pet., Counts I and II.

32. Pennsylvania is a fact-pleading state. *Gen. State Authority v. Sutter*, 403 A.2d 1022 (Pa. Cmwlth. 1979); Pa. R.Civ.P. 1019(a).

33. As such, Petitioners may not rely on factually unsupported claims or legal conclusions to establish their cause of action. *See Valley Forge Towers v. Ron-Ike Foam Insulators, Inc.*, 574 A.2d 641, 644 (Pa.Super. 1990), *aff'd*, 605

A.2d 798 (Pa. 1992); *Erie County League of Women Voters v. Department of Environmental Resources*, 525 A.2d 1290 (Pa. Cmwlth. 1987).

34. Pennsylvania Courts must disregard argumentative allegations and expressions of opinion and may not supply facts that were not pled. *See Griffin v. Chronister*, 616 A.2d 1070 (Pa. Cmwlth. 1992); *see also Linda Coal & Supply Co. v. Tasa Coal Co.*, 204 A.2d 451, 454 (Pa. 1964).

35. Here, as set forth above, the Petitioners failed to allege a single meaningful fact against the “Commonwealth of Pennsylvania,” just that its capital is located in Harrisburg. Pet., ¶ 32.

36. Because the Petitioners have failed to proffer any meaningful factual allegations against the Commonwealth, they have also failed to state a cause of action against it. *Miketic v. Baron*, 675 A.2d 324 (Pa.Super. 1996)(requiring specific factual averments to be pled); *Commonwealth v. Zanella Transit*, 417 A.2d 860 (Pa. Cmwlth. 1980)(general conclusions of law do not satisfy Pennsylvania’s fact-pleading requirements). *See also Feldman v. Hoffman*, 107 A.3d 821, 825 n.5 (Pa. Cmwlth. 2014)(to plead a cause of action, plaintiff must allege facts to demonstrate defendant acted to do something); *Miller v. Pa. Board of Probation and Parole*, 2016 WL 2984218, *2 (Pa. Cmwlth. 2016)(complaint that fails to allege facts fails to provide “trial court or the Defendants with any guidance as to

the acts of which he is complaining” and “there can be no recovery for a vague assertion of committing an intentional tort”)(further quotations omitted).

37. Furthermore, the Petition seeks declaratory relief. However, to obtain declaratory relief, there must be an “actual controversy” between the named parties. *See Berwick Twp., v. O’Brien*, 148 A.3d 872, 881 (Pa. Cmwlth. 2016); *Pa. Indep. Oil & Gas Ass’n v. Com., Dep’t. of Env’t. Prot.*, 135 A.3d 1118, 1128 (Pa. Cmwlth. 2015); *see also Pa. Medical Soc. v. Dep’t of Public Welfare*, 39 A.3d 267 (Pa. 2012)(citing *William Penn Parking Garage, Inc., v. City of Pittsburgh*, 346 A.2d 269, 280-83 (1975)).

38. Petitioners must show a direct and substantial interest that is immediate and causally connected to the actions of the “Commonwealth of Pennsylvania,” generally, and not the individuals and agencies the Petitioners properly named as respondents. *See William Penn*, 346 A.2d at 280-87.

39. Again, Petitioners have alleged insufficient facts to state a cause of action against the “Commonwealth of Pennsylvania”. In fact, the only fact pled against “the Commonwealth” is that “Respondent the Commonwealth of Pennsylvania has its capital located in Harrisburg, Pennsylvania.” Pet., ¶ 32.

40. Nor do Petitioners seek any particular relief against the Commonwealth of Pennsylvania.

41. Therefore, the Petitioners have stated no case or controversy against the “Commonwealth of Pennsylvania”. *See Mistich v. Commonwealth of Pennsylvania Board of Probation and Parole*, 863 A.2d 116, 119 (Pa. Cmwlth. 2004).

42. For the reasons set forth above, the Petition fails to state a claim against the Commonwealth of Pennsylvania. *See* Pa. R.Civ.P. 1028(a)(4).

WHEREFORE, because the Petitioners have failed to state a claim against the “Commonwealth of Pennsylvania” as a stand-alone respondent, this preliminary objection should be sustained and the Petition should be dismissed against the “Commonwealth of Pennsylvania” with prejudice.

PRELIMINARY OBJECTION III
Pa. R.Civ.P. 1028(a)(2) and (3)
INSUFFICIENT SPECIFICITY and FAILURE TO CONFORM TO LAW

43. The Commonwealth of Pennsylvania incorporates the foregoing paragraphs as if set forth at length.

44. A petition must conform to the law and rules of court, and it must be sufficiently specific to allow a respondent to defend itself. Pa. R.Civ.P. 1028(a)(2) and (3).

45. As set forth above, Pennsylvania is a fact-pleading state; therefore, Petitioners may not rely on factually unsupported claims or legal conclusions to establish their cause of action. *Sutter*, 403 A.2d 1022; Pa. R.Civ.P. 1019(a); *Valley*

Forge Towers, 574 A.2d 641, 644; *Erie County League of Women Voters*, 525 A.2d 1290. Indeed, Pennsylvania Courts must disregard argumentative allegations and expressions of opinion and may not supply facts that were not pled. *See Griffin*, 616 A.2d 1070; *see also Linda Coal & Supply Co.*, 204 A.2d 451, 454.

46. In order to survive preliminary objections, the Petition must be both *sufficiently clear* to enable the “Commonwealth of Pennsylvania” to defend itself, and *sufficiently specific and complete* to inform the “Commonwealth of Pennsylvania” what recovery is sought against it, as a whole. *See Mi v. Greene*, 906 A.2d 1232, 1236 (Pa.Super. 2006) and *Schweikert v. St. Luke’s Hosp. of Bethlehem, Pa.*, 886 A.2d 265, 270 (Pa.Super. 2005)(noting that pleadings must “convey notice of the intended grounds for suit, not require the opponent to guess at their substance”). *See also Miketic*, 675 A.2d 324 (requiring specific factual averments to be pled); *Zanella Transit*, 417 A.2d 860 (dismissing general conclusions of law because they do not satisfy Pennsylvania’s fact-pleading requirements). *See also Feldman*, 107 A.3d 821, 825 n.5 (noting that to plead a cause of action, the plaintiff must allege facts to demonstrate that the defendant intentionally acted to do something); *see also Miller*, 2016 WL 2984218, *2 (Pa. Cmwlth. 2016)(a complaint that fails to allege facts fails to provide “the trial court or the Defendants with any guidance as to the acts of which he is complaining and

there can be no recovery for a vague assertion of committing an intentional tort”)(further quotations omitted).

47. This Petition is neither.

48. The two Counts of the Petition do not mention the Commonwealth of Pennsylvania at all. *See* Pet., Counts I and II. And, in the entire Petition for Review, all that is alleged about “the Commonwealth of Pennsylvania” is that its capital is in Harrisburg. Pet., ¶ 32. Certainly, that does not violate any law.

49. For the reasons set forth above, the Petition is not sufficiently clear, specific or complete to allow the “Commonwealth of Pennsylvania” to defend itself or even know what recovery Petitioners seek against it. Pa. R.Civ.P. 1028(a)(2) and (3).

WHEREFORE, because the Petition fails to conform to the law and rules of court and is insufficiently specific to allow the “Commonwealth of Pennsylvania” to defend itself, these preliminary objections should be sustained and the Petition should be dismissed against the “Commonwealth of Pennsylvania” with prejudice.

CONCLUSION

For the forgoing reasons, these Preliminary Objections should be sustained and the “Commonwealth of Pennsylvania” should be dismissed as a respondent from the Petition with prejudice.

Respectfully submitted,

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Date: August 18, 2017

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Counsel for Respondent
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CERTIFICATE OF SERVICE

I, Jonathan Scott Goldman, Executive Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on AUGUST 18, 2017, I caused to be served the foregoing document titled **PRELIMINARY OBJECTIONS OF THE COMMONWEALTH OF PENNSYLVANIA**, utilizing the PacFile E-file System, addressed to the following:

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ORDER

AND NOW, this _____ day of _____, 2017, having considered the Preliminary Objections filed by the Commonwealth of Pennsylvania (the “Preliminary Objections”), the Petitioners’ response thereto, oral argument, if any, and for good cause shown, it is hereby ORDERED that the Preliminary Objections are SUSTAINED. The Commonwealth of Pennsylvania is hereby DISMISSED WITH PREJUDICE.
