IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

VICENTE MANGLONA ATALIG,

Plaintiff-Appellant,

v.

COMMONWEALTH ELECTION COMMISSION, MIGUEL M. SABLAN, MIRANDA V. MANGLONA, HENRY S. ATALIG, FRANCES M. SABLAN, ELIZABETH DLG. ALDAN, MELVIN B. SABLAN, JOSE L. ITIBUS, and JOSE P. KIYOSHI, in their official capacity as Election Commissioners; and JOSEPH SONGAO INOS, Real Party in Interest,

Defendants-Appellees.

Supreme Court Appeal No. 05-033-GA
Superior Court Civil Action No. 05-0516B

OPINION

Cite as: *Atalig v. Inos*, 2006 MP 1

Argued and Submitted on January 5, 2005
Saipan, Northern Mariana Islands
Decided January 16, 2006

Attorney for Appellant: Stephen C. Woodruff 2/F Hill Law Ofc. Bldg., Susupe P.O. Box 500770 Saipan, MP 96950	Attorney for Appellees: Perry B. Inos Suite 2-C, 2nd Floor Sablan Bldg. P.O. Box 502017 Saipan, MP 96950	Arin Greenwood Jay Livingstone CNMI Attorney General's Office 2nd Floor Sablan Mem. Bldg. Caller Box 10007 Saipan, MP 96950

BEFORE: JUAN T. LIZAMA, Chief Justice Pro Tempore; EDWARD MANIBUSAN, Associate Justice Pro Tempore; and JESUS C. BORJA, Associate Justice Pro Tempore.

Justice Lizama delivered the opinion of the Court:

¶ 1 This matter came before the Court for oral arguments on January 5, 2006 on the appeal of the trial court's Com. R. Civ. P. 12(b)(1) dismissal. Appearing on the briefs and/or at oral arguments were: Stephen C. Woodruff for Vicente Manglona Atalig (hereafter referred to as "Appellant"); Arin Greenwood and Jay Livingstone, Assistant Attorneys General, for the Commonwealth of the Northern Mariana Islands Election Commission ("CEC") and its members in their official capacity (hereafter referred to as "Appellees"); and Perry B. Inos for Real Party in Interest, Joseph S. Inos (included in the reference to "Appellees"). Having carefully considered the briefs, the arguments, and the record, the Court is now prepared to rule.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The essential facts in this case are not in dispute. November 5, 2005, was Election Day in the Commonwealth. Sablan Decl. ¶3, ER at 9. Prior to the election, the CEC had sent out absentee ballot packages to eligible voters who requested, and were qualified for voting absentee. Sablan Decl. ¶¶ 23, 24, ER at 13.

¶ 3 On Election Day, two Rota voters who had requested absentee ballots, Analy June T. Mundo and Bryden Luis M. Taimanao, attempted to vote at the polling place on Rota and were not allowed to vote. Earlier in the day, another Rota voter who had likewise requested an absentee ballot, Vicente Mesgnon Rosario, was allowed to vote at the polling place on Rota. Complaint ¶ 10, ER at 3; Sablan Decl. ¶¶ 26, 30-32, ER at 14-15.

¶ 4 Although 1 CMC § 6213(a) requires the CEC to retrieve and secure absentee ballots from the post office "***on and*** no later than fourteen days after the election," (emphasis added), the CEC did not

pick up the absentee ballots on election day. It did so only once, fourteen days after the election, November 19, 2005. *See* Sablan Decl. ¶¶ 3,7, ER at 9-10.

¶ 5 On November 19, 2005, the CEC counted the absentee ballots for the election and officially certified the final results on the same date. Atalig's Trial Brief at 8-9. The certified results of the race for the office of Mayor of Rota show that Appellee-Defendant Inos of the Covenant Party received 511 votes (including 92 absentee ballots), and Appellant-Plaintiff Atalig of the Republican Party received 500 votes (including 95 absentee ballots). *Id.* at 7, 11-12.

¶ 6 The CEC determined that 72 of the absentee ballots contained insufficient postmarks to discern whether the ballots had been timely sent in accordance with 1 CMC § 6213(a). Five members of the commission voted in favor of preserving the votes unopened, and three members voted against. Sablan Decl. ¶ 11, ER at 11. Because the proposed disposition of the subject reply envelopes (and the contents thereof) failed to garner the three-fourths vote of the members present required by 1 CMC § 6106, the motion failed as a matter of law. Nevertheless, the CEC followed the suggested course supported by five of its members, and preserved the ballots—including their outer reply envelopes—unopened.

¶ 7 Rudy Pua and Diego C. Blanco were appointed to serve as observers for the Republican Party of the Northern Mariana Islands Association. ER 68. Both Mr. Pua and Mr. Blanco were present when the Commission counted the ballots on November 5th and 6th, 2005, and both were present for the count of absentee ballots on November 19, 2005. *Id.* Both Mr. Pua and Mr. Blanco were present on November 19, 2005 when the Commission voted to reject the 72 ballots without discernable postmarks. *Id.* Thus, Appellant learned that the CEC rejected 72 ballots for lack of a discernible postmark on November 19, 2005. ER 68 (Superior Court ruling); Opening Brief at 9-10.

¶ 8 Pursuant to the instructions of Executive Director Sablan, the CEC posted the vote totals on its website on the evening of November 19, 2005. *Id.* Election results were also published in the local print and cable television media. *Id.*

¶ 9 On November 23, 2005, four days after the CEC certified the results of the election, then-counsel for Appellant wrote to the Executive Director of the CEC inquiring how many of the 72 absentee ballots in question were from Rota and requesting the CEC's final decision on this matter. ER at 5-6; Sablan Decl. ¶ 16, ER at 12. Assistant Attorney General James Livingstone's November 28, 2005 response to Appellant's November 23 inquiry made it clear that the decision was final and that Appellant could not find out from the CEC how many Rota ballots were involved. ER at 7.

¶ 10 Four days later, on December 2, 2005, Appellant filed the instant election contest. ER at 1-4. This date was 13 days after the official election results had been declared.

¶ 11 Defendants responded on December 9, 2005, with motions to dismiss or, alternatively, for summary judgment. ER at 26-44 & 45-59. The parties stipulated to set the hearing for December 14, 2005. Appellant filed a cross motion for summary judgment and a written opposition to defendants' motions on the day of the hearing.

¶ 12 At the conclusion of the December 14 hearing, the court continued the matter to the following Friday, December 16, 2005. The court ruled from the bench on this matter on December 16, 2005. Pursuant to Com. R. Civ. P. 12(b)(1), the court dismissed Appellant's election contest for lack of jurisdiction on account of the complaint's untimeliness.

¶ 13 Appellant filed his notice of appeal on December 19, 2005. The Superior Court entered its written Order Following Ruling from the Bench Granting Defendant's Motion to Dismiss on December 21, 2005, ER at 67-71, consistent with the mandate of 1 CMC § 6605(c) that judgment issue within 5 days of submission.

¶ 14 This Court received briefs from both Appellant and Appellees, and heard oral arguments on January 5, 2006.

II. ISSUES PRESENTED

¶ 15 (1) Whether Appellant knew the "facts supporting the election contest" more than seven days before filing his complaint.

(2) Whether the Superior Court properly dismissed the case under Com. R. Civ. P. 12(b)(1) for lack of jurisdiction under the Northern Mariana Islands Election Reform Act of 2000 (the "Election Act").

III. ANALYSIS

A. Scope and Standard of Review

¶ 16 Com. R. Civ. P. 12(b)(1) allows a defendant to move for dismissal of the plaintiff's case on grounds that the court lacks jurisdiction over the subject matter. In other words, dismissal is appropriate if the plaintiff has no right to be in a particular court. When ruling on a motion to dismiss for lack of subject matter jurisdiction under Rule12(b)(1), the court must accept as true the complaint's undisputed factual allegations and construe the facts in the light most favorable to plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). If the court lacks jurisdiction, it has no power to enter judgment and may only dismiss. *Dassinger v. S. Cent. Bell Tel. Co.*, 505 F.2d 672, 674 (5th Cir. 1974); 10 WRIGHT & MILLER § 2713 at 404-405.

¶ 17 Dismissal of a complaint for lack of subject matter jurisdiction pursuant to Com. R. Civ. P. 12(b)(1) is subject to de novo review on appeal. *Rivera v. Guerrero*, 4 N.M.I. 79, 81 (1993).

¶ 18 Com. R. Civ. P. 12(b)(1) differs from Com. R. Civ. P. 12(b)(6), which allows dismissal for failure to state a claim upon which relief can be granted. The Superior Court did not determine whether, pursuant to Com. R. Civ. P. 12(b)(6), Appellant had a valid claim. *See Atalig v.*

Commonwealth Election Commission, No. 05-0516B, (Super Ct. Dec. 21, 2005), Order Following Ruling from the Bench Granting Defendant's Motion to Dismiss at 1 n.1. Rather, the court determined that Appellant had no right to be in the Superior Court because he did not timely file his complaint under the Election Act

¶ 19 Section 6603 sets forth the filing time requirement as follows:

> The contestant shall verify the complaint and shall file and serve it upon the defendant within seven days after the discovery of the facts supporting the contest, except that no complaint may be filed over fifteen (15) days after the declaration of the official results.

¶ 20 For reasons set forth below, the Court finds that Appellant did not timely file his complaint.

B. Appellant knew the "facts supporting the election contest" on November 19, 2005.

¶ 21 Both parties agree that the fifteen-day limit set forth in 1 CMC § 6603 acts as an absolute cut-off for filing. For example, if a month after the declaration of results, the loser discovers facts supporting a contest, the fifteen-day limit would bar any action.

¶ 22 Although the parties have described the seven-day limit of 1 CMC § 6603 in different terms, they seem to agree that it provides the contestant with seven days following discovery of "facts[1] supporting the election contest" in which to file. The parties differ on (1) ***when*** Plaintiff discovered "the facts supporting the election contest" and (2) what the statute means by "facts supporting the election contest." With regard to the second question, the parties disagree as to whether the plaintiff must show "actual prejudice" (the title of 1 CMC § 6602) in order to bring the contest, or whether "actual prejudice" is significant only with respect to the court's decision of the merits of the case.

¶ 23 In his Brief at 17, Appellant suggests that "facts supporting the election contest" must fall within the limited reasons for bringing election contests: (1) there must have been error sufficient to change the final result of the election (1 CMC § 6601(a)(4)); and (2) the error or misconduct must have

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[1] While the codified version of the law, 1 CMC § 6603, uses the word "fact," the original version, P.L. 12-18, uses the word "facts." This Court follows the original version. The need for "facts" rather than a single "fact" does not change the outcome in this case.

been the reason why the contestant lost (1 CMC § 6602(a)). Citing the title of § 6602, Appellant argues that it was necessary to confirm actual prejudice before contesting.[2] Brief at 18. For there to be "actual prejudice," Appellant asserts, he had to show that there were enough uncounted votes pertaining to the Rota race to change the results of that particular election. *Id.* Appellant claims that "It was only upon receiving the letter from CEC counsel James Livingston, Esq. on November 28, 2005, ER at 7, that Atalig and his attorney discovered that the information they sought to support Atalig's election contest would not be forthcoming. In essence, this was discovery of the final fact supporting the election contest." Brief at 19.

¶ 24 Appellees assert that "the statute does not require a contestant to 'know everything necessary' prior to bringing the dispute . . . To flesh out supplemental or additional grounds for filing a complaint, civil discovery is always available. In an election contest, however, extreme diligence and promptness are routinely required." Inos' Motion to Dismiss the Appeal at 9. The Appellees' Brief at 12 states: "The only obligation imposed upon a potential contestant is the duty to act within seven days of discovering **any** facts that would support a contest. 1 CMC § 6603."

¶ 25 At oral arguments, Appellees pointed out that the complaint Appellant filed on December 2, 2005 contained no more facts than those known by Appellant on November 19, 2005. These facts were that (1) two Rota voters were denied the opportunity to vote, (2) the CEC failed to retrieve and secure the absentee ballots on the day of the election, (3) the CEC failed to follow its own regulations calling for a three-fourths majority vote to determine whether to preserve unopened the 72 ballots that are the subject of this dispute, (4) the CEC decided not to open the outer envelopes of the 72 absentee ballots, (5) the unopened outer envelopes of the 72 absentee ballots were marked in some fashion by postal

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[2] During oral arguments, Appellant conceded that the title of a section held little significance.

personnel, and (6) a certain percentage of the absentee votes were most likely pertinent to Rota elections.

¶ 26 Because election statutes are to be construed strictly, *see Mundo v. Superior Court*, 4 N.M.I. 395 (1996), this Court is not inclined to be lenient in its interpretation of "facts supporting the election contest." Even if Appellant did not have sufficient facts to show "actual prejudice" on November 19, 2005, he had sufficient facts to bring his case. Through discovery, he might have been able to show the "actual prejudice" needed to win the case.

¶ 27 The Court agrees with Appellees that it was unnecessary for Appellant to know the exact number of ballots from Rota. *See In re Ocean County Com'r of Registration for a Recheck*, 879 A.2d 1174, 1178 (N.J.Super. 2005) (the challenger is not required to prove that the rejected votes were cast for him or her). Indeed, Appellant was able to file his complaint without this information, relying instead on historical absentee voting patterns. Further, even if Appellant knew the number of Rota voters, he still would not have known for certain whether these ballots had enough votes in his favor to change the election. Thus, even knowing the percentage of Rota voters, Appellant would have had to proceed without being able to show "actual prejudice" on the face of his complaint.

¶ 28 As Appellees suggest, Appellant already had a case on November 19, 2005. He was simply waiting for a better case. Unfortunately for Appellant, he waited too long.

C. Because the Superior Court did not have jurisdiction under the Election Act, dismissal pursuant to Com. R. Civ. P. 12(b)(1) was proper.

¶ 29 The Court agrees with Appellant's assertion that the trial court did not give enough attention to the analysis of "facts supporting the election contest." *See* Appellant's Brief at 17. The trial court never attempted to analyze what facts Appellant should have known. Further, the only mention of ***when*** the contestant discovered the facts is in the court's description of the CEC's arguments: "They contend that Atalig knew all facts necessary to bring an action on November 19, 2005 and at the very latest,

November 21, 2005. Appellant counters that he filed well within the time limits . . . The Court does not agree with Atalig." Order at 2. The trial court provided no further discussion on the timing of Appellant's discovery of the facts. Rather, the trial court stated that statutes governing election contests are to be strictly construed, Order at 3, and concluded that "By waiting until December 2, 2005 to file his complaint, Atalig surpassed the seven day limit set forth in 1 CMC § 6603." Order at 4.

¶ 30 Although the trial court may have reached its decision improperly, this Court, upon a *de novo* review of the facts, reaches the same decision. The Court finds that, because Appellant knew all the facts necessary to contest the election by November 19, 2005, his delay in bringing action must result in dismissal.

D. Peripheral Issues

¶ 31 To reach its decision, the Court need not analyze the merits of the case. Thus, the Court offers no opinion on whether the CEC improperly refused to count the 72 absentee votes that it deemed to have inadequate postmarks, or whether the CEC should have opened the outer reply envelopes. However, the Court notes that the degree of irregularities with which the CEC conducted the election is alarming.

¶ 32 Appellant has pointed out that two individuals were turned away from the polling place on Rota, while a similarly situated individual was allowed to vote. *See* Appellant's Brief at 31. Further, the CEC failed to follow its own regulations calling for a three-fourths majority vote to determine whether to preserve the 72 ballots unopened. *See* Appellant's Brief at 2. Finally, the CEC failed to retrieve the absentee ballots on Election Day, in apparent violation of 1 CMC § 6213(a). *See* Appellant's Brief at 30. Timely retrieval could have shown that some of the uncounted absentee votes were, in fact, mailed by the deadline.

¶ 33 Those citizens who properly mailed their absentee ballots had a legitimate expectation that their votes would be counted. Given the relatively small population of voters in the Commonwealth, the need to properly manage the ballots is critical. If anything, the small number of ballots should simplify this management.

¶ 34 A difference of eleven votes between two candidates is minuscule. Timely retrieval of the absentee ballots and proper counting could well have resulted in a different election outcome.

E. Attorney's Fees

¶ 35 Appellees have petitioned for attorney's fees pursuant to the Election Law, 1 CMC § 6608, and Com. R. App. P. 38(b).

¶ 36 Section 6608(a) allows the defendant to collect attorney's fees if (1) "the proceedings . . . are dismissed for insufficient evidence or for want of prosecution," or (2) "the election is confirmed by the Court." The trial court did not dismiss Appellant's case for insufficient evidence or want of prosecution. Nor did it decide the merits of the case in a manner that would "confirm" the election. Rather, the trial court dismissed the case because it had no jurisdiction under Com. R. Civ. P. 12(b)(1). Similarly, this Court has not "confirmed" the election, so much as it has determined that the trial court's ruling was not reversible error. While the Court believes that Appellees have the superior interpretation of "facts supporting election contest," the Court has not endorsed the manner in which the election was conducted. Accordingly, the Court will not award attorney's fees under 1 CMC § 6608.

¶ 37 Com. R. App. P. 38(b) allows the Court to assess the appellant with attorney's fees when the appeal is not "well grounded in fact and is warranted by existing law (or a good faith argument for the amendment or repeal of existing law can be made)." Because the instant case is one of first impression,

and because Appellant raised a reasonable argument, the assessment of attorney's fees is not warranted.

IV. CONCLUSION

¶ 38 Because Appellant's complaint was not timely filed under 1 CMC § 6603, the dismissal of his complaint under Com. R. Civ. P. 12(b)(1) is AFFIRMED. Pursuant to Com. R. App. P. 39, the costs of the appeal (not including attorney's fees) are assessed against the Appellant.

SO ORDERED this 16th day of January 2006.

/s/_____
Juan T. Lizama
Chief Justice Pro-Tempore, Supreme Court

/s/_____
Jesus C. Borja
Justice Pro-Tempore, Supreme Court

/s/_____
Edward Manibusan
Justice Pro-Tempore, Supreme Court