STATE OF MICHIGAN

COURT OF APPEALS

COMMITTEE TO BAN FRACKING IN MICHIGAN and LUANNE KOZMA,

Plaintiffs-Appellants,

v

DIRECTOR OF ELECTIONS, SECRETARY OF STATE, and BOARD OF STATE CANVASSERS,

Defendants-Appellees.

UNPUBLISHED
March 14, 2017

No. 334480
Court of Claims
LC No. 16-000122-MM

Before: CAVANAGH, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendants' motion for summary disposition and dismissing plaintiffs' complaint for injunctive and declaratory relief challenging the constitutionality of MCL 168.472a, which requires signatures on initiative petitions be made within 180 days of their filing. We affirm.

Plaintiff Committee to Ban Fracking in Michigan (CBFM) is engaged in a statutory initiative campaign that seeks to include a ballot option to ban horizontal hydraulic fracturing, which is commonly known as "fracking."[1] Plaintiff Luanne Kozma "directs the campaign." Plaintiffs sought to have the issue on the 2016 ballot and, on April 14, 2015, the Board of State Canvassers approved the form of CBFM's initiative petition. On May 22, 2015, plaintiffs began circulating their petitions and collecting signatures. By November 18, 2015, the 180th day, plaintiffs had collected over 150,000 signatures—but that was less than the required number of 252,523.[2] By June 1, 2016, the deadline for filing initiative petitions for the November 2016

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[1] Article 2, § 9 of the Michigan Constitution provides: "The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . ."

[2] As set forth in Article 2, § 9 of the Michigan Constitution, the required number of registered voter signatures is "not less than eight percent for [an] initiative . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected[.]"

ballot, plaintiffs had over 207,000 signatures—but, again, that was less than the required number.[3] Plaintiff is apparently continuing to collect signatures with the same petition sheets in an effort to have the fracking issue on the November 2018 ballot. Accordingly, on June 1, 2016, plaintiffs filed this action challenging the 180-day rule set forth in MCL 168.472a, which provides:

> The signature on a petition that proposes an amendment to the constitution or is to initiate legislation shall not be counted if the signature was made more than 180 days before the petition is filed with the office of the secretary of state.

Plaintiffs alleged that MCL 168.472a violates Article 2, § 9 of the Michigan Constitution because it restricts the utilization of the initiative petition by placing an undue burden on their ability to obtain the required number of signatures. Thus, plaintiffs requested the court to declare MCL 168.472a unconstitutional and enjoin defendants from its enforcement.

Defendants responded to plaintiffs' complaint with a motion for summary disposition under MCR 2.116(C)(4), (5), and (8). Defendants argued that plaintiffs did not collect the required number of signatures and did not file their petition with the Secretary of State; thus, no actual controversy existed from which declaratory or injunctive relief could be provided. Moreover, plaintiffs lacked standing and the issue—whether MCL 168.472a was constitutional—was not ripe. Simply stated, the challenged statute had not been applied to plaintiffs, accordingly, plaintiffs' claim was premised on hypothetical facts. In effect, then, plaintiffs were seeking an advisory opinion, which the Court of Claims was not empowered to render. Therefore, defendants requested the dismissal of plaintiffs' complaint.

Plaintiffs responded to defendants' motion for summary disposition, arguing that they met the requirements for declaratory relief under MCR 2.605. Plaintiffs asserted that an actual controversy existed because this action was necessary to guide their future conduct and they could demonstrate a substantial interest distinct from the interest of the public, i.e., "the huge logistical effort of assembling, training, and motivating a volunteer team of hundreds of circulators—which will be detrimentally affected in a manner different from the citizenry at large." Moreover, this matter was ripe for adjudication because, considering the number of signatures already collected, they were likely to obtain the rest before the cut-off date. Accordingly, plaintiffs requested the court to deny defendants' motion for summary disposition.

Subsequently, the Court of Claims issued an opinion and order granting defendants' motion for summary disposition. The court noted that it only had authority to enter a declaratory judgment under MCR 2.605 if an actual controversy existed, which plaintiffs failed to establish in this case. That is, plaintiffs did not submit their initiative petition to the Secretary of State and had not even collected the requisite number of signatures. The court recognized that plaintiffs intended to obtain enough signatures for a ballot initiative, but found "their ability to do so is, at most, speculative." The court determined that "[a] declaratory judgment is not necessary to

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[3] Pursuant to MCL 168.471, petitions in support of a ballot initiative must be filed at least 160 before the election.

guide plaintiffs' future conduct when, at this point, an application of MCL 168.472a to their efforts would be purely hypothetical." And, for the same reasons, the court concluded, plaintiffs' challenge to the constitutionality of MCL 168.472a was not ripe for judicial consideration. Plaintiffs' claim was contingent on them collecting enough petition signatures and, thus, plainly rests upon a future event that may or may not occur. The ripeness doctrine prevents the adjudication of hypothetical or contingent claims before injury has occurred. Accordingly, plaintiffs' complaint was dismissed. This appeal followed.

Plaintiffs argue that their constitutional challenge to MCL 168.472a presents an actual controversy that is ripe for judicial consideration because a ruling will have a significant effect on their signature collection efforts and it is likely that they will be able to collect the necessary signatures for their ballot initiative. We disagree.

This Court reviews de novo a ruling on a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Although the Court of Claims did not indicate under which subrule it was granting defendants' motion for summary disposition, we review this matter as granted under MCR 2.116(C)(8).[4] A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone, determining whether it states a claim upon which relief could be granted. *Id*. We also review de novo the lower court's determination whether an actual controversy exists that is ripe for adjudication. *King v Mich State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013); *Kircher v City of Ypsilanti*, 269 Mich App 224, 226-227; 712 NW2d 738 (2005).

Plaintiffs' complaint sought a declaratory judgment that MCL 168.472a violates Article 2, § 9 of the Michigan Constitution because it restricts the utilization of the initiative petition by placing an undue burden on their ability to obtain the required number of signatures. Thus, consistent with the purpose of a declaratory judgment action, plaintiffs sought a judicial determination on a question of law. See *Health Central v Comm'r of Ins*, 152 Mich App 336, 347; 393 NW2d 625 (1986). And in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), our Supreme Court held that "a litigant has standing whenever there is a legal cause of action;" thus, if plaintiffs meet the requirements of MCR 2.605, they have standing to seek a declaratory judgment. *Id*. at 372.

MCR 2.605 governs declaratory judgments and provides, in pertinent part: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). In this case, the Court of Claims

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[4] This case was not dismissed under MCR 2.116(C)(4) because it was undisputed that the Court of Claims had the right to exercise judicial power over a case of this kind, i.e., had subject-matter jurisdiction. See *Joy v Two-Bit Corp*, 287 Mich 244, 253-254; 283 NW 45 (1938) (citation omitted). Further, this case was not dismissed under MCR 2.116(C)(5) because there was no allegation that plaintiffs lacked the "legal capacity" to sue, which is not the same concept as "standing," i.e., whether the litigant is the proper party to bring the action. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010).

held that it could not render a declaratory judgment because an actual controversy ripe for adjudication did not exist, which is a necessary precondition for declaratory relief. See *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 127; 715 NW2d 398 (2006). We agree.

The "actual controversy" requirement prevents a court from deciding hypothetical issues. *Shavers v Kelley*, 402 Mich 554, 589; 267 NW2d 72 (1978). In *Allstate Ins Co v Hayes*, 442 Mich 56; 499 NW2d 743 (1993), our Supreme Court explained:

> Properly understood, however, the actual controversy requirement is simply a summary of justiciability as the necessary condition for judicial relief. Thus, if a court would not otherwise have subject matter jurisdiction over the issue before it or, if the issue is not justiciable because it does not involve a genuine, live controversy between interested persons asserting adverse claims, the decision of which can definitively affect existing legal relations, a court may not declare the rights and obligations of the parties before it. [*Id*. at 66 (internal citations omitted).]

Similarly, in *Lansing Sch Ed Ass'n*, 487 Mich at 372 n 20, the Court clarified that the "essential requirement of the term 'actual controversy' under the [declaratory judgment] rule is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised." (internal quotation marks and citations omitted). Stated differently, "before affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, pleads facts entitling him to the judgment he seeks and proves each fact alleged, i.e., a plaintiff must allege and prove an actual *justiciable* controversy." *Shavers*, 402 Mich at 589. But, "[g]enerally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000).

This case does not "involve a genuine, live controversy between interested persons asserting adverse claims," *Allstate Inc Co*, 442 Mich at 66, and the injury that plaintiffs seek to prevent is merely hypothetical, *Citizens for Common Sense*, 243 Mich App at 55. Plaintiffs, in effect, are claiming that they are unable to meet the 180-day rule set forth in MCL 168.472a with regard to their ballot initiative; thus, they filed this action seeking the declaration that the 180-day rule is unconstitutional. But this is not a "genuine, live controversy." This is not a case in which plaintiffs have collected the number of required petition signatures, albeit during a time-frame outside the 180-day rule, filed those petitions at least 160 days before the election, had those petitions rejected by defendants as insufficient, and then had their ballot proposal denied. In fact, defendants had made no adverse claim and had taken no adverse action that impacted plaintiffs' legal rights in any way before plaintiffs filed this action. That is, no controversy between the parties existed. Rather, plaintiffs are projecting that, in the future, if they ever collect the precise number of petition signatures required for their ballot initiative, they will be rejected by defendants because they do not meet the requirements of the 180-day rule. Thus, plaintiffs' claim sets forth a possible—not actual—controversy that may arise in the future which rests upon contingent, uncertain events that may not occur at all and the injury plaintiffs seek to prevent is merely conjectural or hypothetical.

Further, plaintiffs' reliance on the case of *Huntington Woods v Detroit*, 279 Mich App 603; 761 NW2d 127 (2008), is misplaced. In that case, the golf course property that the defendant was in the process of selling was located in the plaintiffs' city and residential subdivision, and was subject to certain deed restrictions that impacted the plaintiffs' own property rights. *Id*. at 606-610. Thus, the parties had clear antagonistic legal interests with regard to the real property at issue which existed *before* the lawsuit was filed, i.e., "adverse claims." In this case, the parties did not have antagonistic legal interests before this lawsuit was filed; defendants had taken no action that impacted plaintiffs' legal rights.

In summary, because no actual controversy ripe for declaratory relief exists, the Court of Claims lacked jurisdiction to issue a declaratory judgment and properly dismissed plaintiffs' complaint.

Affirmed. Defendants are entitled to tax costs as the prevailing parties. See MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Deborah A. Servitto