

STATE OF MICHIGAN
COURT OF CLAIMS

NEVIN P. COOPER-KEEL, J.D.,

Plaintiff,

OPINION AND ORDER DENYING
PRELIMINARY INJUNCTION

v

Case No. 20-000091-MM

JOCELYN BENSON, in her official capacity as
Secretary of State,

Hon. Cynthia Diane Stephens

Defendant.

_____ /

YVONNE BLACK,

Plaintiff,

v

Case No. 20-000096-MZ

JOCELYN BENSON, in her official capacity as
Secretary of State,

Hon. Cynthia Diane Stephens

Defendant.

_____ /

Pending before the Court in these consolidated cases are plaintiffs' respective motions for preliminary injunctive relief filed in Docket Nos. 20-000091-MM and 20-000096-MZ.¹ For the reasons that follow, the motions are DENIED.

¹ The Court consolidated these matters along with *Davis v Jocelyn Benson* (Docket No. 20-000099-MM). Mr. Davis, as confirmed at the June 16, 2020, hearing conducted via Zoom, is not seeking preliminary injunctive relief. As a result, this opinion and order does not address his pending request for declaratory relief.

I. BACKGROUND

The pertinent underlying facts in this case are largely undisputed. This case arises out of defendant Secretary of State Jocelyn Benson's decision to mail absent voter ballot applications to all registered voters in this state for the upcoming August (primary) and November (general) elections. The parties agree that only the absent voter ballot applications have been sent to this state's electorate. There is no allegation that the defendant has mailed ballots. There is also no dispute that, in order to receive an absent voter ballot, a recipient must fill out, sign, and return the application. See MCL 168.759(4). Plaintiffs argue that defendant lacked authority to mail absent voter ballot applications in this state-wide, unsolicited fashion. Plaintiffs ask the Court to conclude that the Secretary of State exceeded her constitutional and statutory authority by sending out the applications and to preclude the defendant from directing or even encouraging local clerks to do the same. Plaintiffs argue that MCL 168.759 is the sole descriptor of the manner in which an elector may request and receive an absent voter ballot. They assert that the methods for a request for an application for an absent voter ballot found in MCL 168.759(3), exclude any other process. Citing *Taylor v Currie*, 277 Mich App 85; 743 NW2d 571 (2007), they argue that the request for an absent voter application must originate from the individual registered elector. They note that *Taylor*, 277 Mich App at 95-97, held that local election officials are prohibited from sending unsolicited absent voter ballot applications to electors and by analogy so is the defendant. The defendant to the contrary argues that her supervisory role over elections coupled with Const 1963, art 2, § 4(1)(g), authorizes her to send applications for absent voter ballots to persons whose names are on lists of registered voters without a request from the qualified elector.

II. ANALYSIS

Plaintiffs Cooper-Keel and Black request preliminary injunctions. A preliminary injunction is an “extraordinary and drastic” form of equitable relief that “should be employed sparingly and only with full conviction of its urgent necessity.” *Senior Accountants, Analysts & Appraisers Ass’n v Detroit*, 218 Mich App 263, 269; 553 NW2d 679 (1996). When considering whether to grant this extraordinary form of relief, the Court must consider:

(1) whether the applicant has demonstrated that irreparable harm will occur without the issuance of an injunction; (2) whether the applicant is likely to prevail on the merits; (3) whether the harm to the applicant absent an injunction outweighs the harm an injunction would cause to the adverse party; and (4) whether the public interest will be harmed if a preliminary injunction is issued. [*Slis v State*, ___ Mich App ___, ___, ___ NW2d ___ (2020) (Docket Nos. 351211; 351212), slip op at 12.]

A. PLAINTIFFS DID NOT SHOW IRREPARABLE HARM

The Court will begin with the first factor listed above—irreparable harm. Our Supreme Court has explained that a “particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction.” *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008) (citation and quotation marks omitted). The showing of irreparable harm must be particularized, i.e., “[t]he mere apprehension of future injury or damage cannot be the basis for injunctive relief.” *Id.*

Plaintiffs failed to demonstrate a particularized showing of irreparable harm, and this failure is fatal to their request for preliminary injunctive relief. Plaintiff Black argues that, without injunctive relief, she and every elector in this state will be harmed because the Secretary of State will be allowed to exercise power she does not possess. Plaintiff Black alleges she is harmed by the defendant’s failure to adhere to strict processes outlined in the Michigan Election Law, MCL 168.1 *et seq.* Furthermore, she asserts that unsolicited mailing of absent voter ballot applications deprives her and all electors of their ability to choose an absent voter ballot as guaranteed by Const

1963, art 2, § 4. See art 2, § 4(1)(g) (guaranteeing to every qualified elector in this state “The right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and *the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail*”) (emphasis added).

Neither allegation will suffice to make the requisite showing of irreparable harm. As to her first allegation, a generalized assertion that an action violates the law or Constitution is not “particularized” and fails to demonstrate the requisite irreparable injury. See *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 652; 825 NW2d 616 (2012). Here, plaintiff Black like the plaintiff in *Hammel* has done nothing more than assert, generally, that the law has been violated. With respect to plaintiff Black’s second assertion of irreparable harm, the Court concludes at this stage that no constitutionally guaranteed choice has been taken from the plaintiff or this state’s electorate. As counsel for the Secretary of State noted at oral argument, only applications for absent voter ballots were sent to this state’s registered electors. Recipients of the applications can choose to fill them out and apply for an absent voter ballot. Alternatively, recipients may apply by another method, they may ignore the applications altogether, or they may even throw away the applications. The Secretary of State’s actions did not compel anyone to act in a certain way, nor did her actions harm this state’s electors. The choice regarding whether to exercise the constitutional right to vote by absentee ballot set forth in art 2, § 4, and the decision of how to apply for the ballot, should one choose to apply, was not taken from an elector by way of the mailing of mere absent voter ballot applications. Accordingly, plaintiff Black has not demonstrated irreparable harm.

Plaintiff Cooper-Keel’s assertion of irreparable harm also falls short of convincing the Court that preliminary injunctive relief is warranted. He alleges that the sending of the absent

voter ballot applications is a ploy designed to solicit early voting that would prevent him, or other candidates, from reaching voters before votes are cast. He argues, also that the defendant's actions violate what he has described as a legal "preference" for in person voting. Neither argument persuades this court that he has met his burden of particularized injury. The Secretary of State has only sent applications for absent voter ballots. At most, this action informed registered electors of their constitutional right to cast an absent voter ballot without reason and provided electors with an option for applying for an absentee ballot should the elector choose to do so. Indeed, registered electors must complete an application and return it to the pertinent authority before they even receive an absentee ballot. The same voters had the option of exercising that right by utilizing the methods described in MCL 168.759(4). In either case, the ability of candidates to reach voters right up to election day is the same. The Secretary of State's decision to mail applications—which may be ignored or discarded at the choice of the recipient—has not occasioned the type of injury alleged by plaintiff Cooper-Keel. As to his argument that there is some legal preference for in person voting is unsupported by any authority.

In sum, neither plaintiff has demonstrated irreparable harm that would warrant the issuance of preliminary injunctive relief. The failure to make the required showing on this "indispensable" factor for establishing entitlement to preliminary injunctive relief is enough to convince the Court to deny the respective motions. See *Pontiac Fire Fighters Union*, 482 Mich at 9.

B. PLAINTIFFS HAVE NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS

Although the above analysis would suffice to deny the motions for preliminary injunctive relief, the Court will briefly comment on the respective plaintiffs' ability to demonstrate a likelihood of success on the merits. At this stage, and without making a definitive ruling on the

merits of the issues presented in this case, the Court is not convinced plaintiffs can make the requisite showing of success, thereby providing an additional basis to reject their claims for preliminary injunctive relief. To that end, the statutes and caselaw plaintiffs have cited in support of their arguments only focus on *local election officials* and the authority (or lack thereof) bestowed upon those local officials. See, e.g., MCL 168.759; *Taylor v Currie*, 277 Mich App 85; 743 NW2d 571 (2007). At this stage in the litigation, statutes and caselaw declaring that local election officials cannot send unsolicited absent voter ballot applications does not convince the Court that plaintiffs are likely to prevail on the merits of their allegations about the Secretary of State. Indeed, the Secretary of State’s authority was not at issue in *Taylor*, and there is some support for the notion that she possesses superior authority as compared to local election officials. See MCL 168.21 (declaring that “[t]he secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act.”). Furthermore, the statutes and caselaw cited by plaintiffs do not account for the change to this state’s constitution effectuated by way of 2018 Proposal 3, which enshrined in this state’s constitution the right to vote by absentee ballot for any reason. That the right to vote by absentee ballot is a new, self-executing right, see Const 1963, art 2, § 4,² raises the specter of whether plaintiffs’ proposed reading of the statute and caselaw cited above might infringe upon or unduly restrict the right established in art 2, § 4. Furthermore, adopting plaintiffs’ proposed construction appears, at least at this stage of the litigation, to run the risk of adopting impermissible restrictions on a self-executing constitutional right. See *League of Women Voters*

² Art 2, § 4 expressly declares that the right to vote by absentee ballot, like all rights listed in art 2 § 4, “shall be self-executing” and that the Constitution must be “liberally construed in favor of voters’ rights in order to effectuate its purposes.”

of *Mich v Secretary of State*, __ Mich App __, __; __ NW2d __ (2020) (Docket Nos. 350938; 351073), slip op at 11 (cautioning against the imposition of additional obligations on self-executing constitutional provisions).

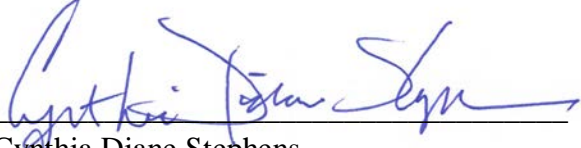
III. CONCLUSION

Plaintiffs are unable to demonstrate the existence of a particularized irreparable harm, and they are unable, at this stage of the litigation to establish a likelihood of success on the merits. For those reasons:

IT IS HEREBY ORDERED that plaintiff Nevin Cooper-Keel's and plaintiff Yvonne Black's respective motions for preliminary injunction are DENIED.

This is not a final order and it does not resolve the last pending claim or close the case.

June 18, 2020


Cynthia Diane Stephens
Judge, Court of Claims