

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

MARK R. CHRISTENSEN and LYDIA BRASCH,)
)
)
Plaintiffs,)
)
)
vs.)
)
)
JOHN GALE, Secretary of State for the)
State of Nebraska, INSURE THE GOOD)
LIFE, a Ballot Question Committee,)
SARAH AMANDA GERSHON, KATHY)
CAMPBELL, and ROWEN)
ZETTERMAN,)
)
Defendants.)
)
)

CASE NO. CI 18-2305

ORDER

LANCASTER COUNTY
2018 AUG 28 PM 1 25
CLERK OF THE COURT

At issue is whether an initiative petition to expand coverage in Nebraska of the Medical Assistance Act, referred to as the Medicaid Expansion Petition, is valid for the purpose of being placed on the November 2018 ballot.

On July 9, 2018, Plaintiffs, Mark R. Christensen and Lydia Brasch [hereafter "Plaintiffs"] brought this action against the Sponsors of the initiative: Insure the Good Life, a Ballot Question Committee; Sarah Amanda Gershon; Kathy Campbell; and Rowen Zetterman [hereafter "Sponsors"] and Nebraska Secretary of State John Gale [hereafter "Gale"] pursuant to Neb. Rev. Stat. § 32-1412(2) (Reissue 2016). Under Neb. Rev. Stat. § 32-1412(2) (Reissue 2016), upon a showing that an initiative petition is not legally sufficient, "the court, on the application of any resident, may enjoin the Secretary of State and all other officers from certifying or printing on the official ballot for the next general election the ballot title and number of such measure." Plaintiffs also seek a declaratory judgment that the Medicaid Expansion Petition Initiative is invalid and legally insufficient.

Gale filed a Motion to Dismiss, filing #2, on July 30, 2018. The Sponsors filed a Motion to Dismiss, filing #3, on August 1, 2018. Plaintiffs filed a Motion for Judgment, filing #4, on August 6, 2018. A hearing was had on August 20, 2018. J.L. Spray, R. McIntosh, and M. Blackburn were present for Plaintiffs. R. Post and B. Goins were present for Gale and A. Barry was present for the Sponsors. Evidence was adduced, arguments were heard, and the matter was taken under advisement.

Medicaid Expansion Petition

The object of [the Medicaid Expansion] Petition is to add Section 2 to Section 68-901 of the Revised Statutes of Nebraska to provide that the state shall amend its Medicaid state plan to expand eligibility to cover certain adults ages 19 through 64 whose incomes are one-hundred thirty-eight percent (138%) of the federal poverty level or below as defined and authorized by federal law, and to maximize federal financial participation to fund their care.

The proposed Section 2 to Neb. Rev. Stat. § 68-901 consists of five subsections. The first subsection expands Medicaid to adults ages 19 through 64 whose income is equal to or less than one-hundred thirty-eight percent of the federal poverty level. The second subsection directs the Department of Health and Human Services [hereafter “DHHS”] to submit “a state plan amendment and all other necessary documents seeking required approvals or waivers to the federal Centers for Medicare and Medicaid Services.” The third subsection directs DHHS to “take all actions necessary to maximize federal financial participation in funding medical assistance pursuant to this section.” The fourth subsection provides that no greater burdens or restrictions may be imposed on persons eligible for medical assistance under this new section than any other population eligible for medical assistance. The fifth subsection states that this section “shall apply notwithstanding any other provision of law or federal waiver.”

Contentions of the Parties

Plaintiffs allege: 1) The initiative is an unconstitutional delegation of legislative authority; 2) the initiative contains more than one subject; 3) the Sworn Statement of Petition Sponsors fails to identify a sponsor; and 4) the initiative violates certain appropriations criteria.

Defendants seek dismissal alleging the court lacks jurisdiction to consider claims one and four. As to claims two and three, Defendants argue the Complaint fails to state a claim.

Legal Standards

Before reaching the merits of a claim, the court must first consider whether it has jurisdiction to decide the case. *Bonge v. Cnty. of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998).

To prevail against a motion to dismiss for failure to state a claim, plaintiffs must allege sufficient facts to state a claim for relief that is plausible on its face. *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016). A court may typically look only at the face of the complaint to decide a motion to dismiss. *DMK Biodiesel, LLC v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013). A court may also consider materials that are part of the public record or which do not contradict the complaint without converting a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6) into a motion for summary judgment. *Id.* A court may also consider materials that are necessarily embraced by the pleadings. *Id.*

When matters outside the pleading are presented by the parties and accepted by the trial court with respect to a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6), the motion shall be treated as a motion for summary judgment. *Bros. v. Kimball Cnty. Hosp.*, 289 Neb. 879, 857 N.W.2d 789 (2015).

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Hallam v. L.G. Barcus & Sons, Inc.*, 281 Neb. 516, 798 N.W.2d 109 (2011); Neb. Rev. Stat. § 25-1332.

First and Fourth Theories of Recovery

The first question to resolve then is whether the court has jurisdiction to decide the case. Defendants argue that the court lacks jurisdiction to address Plaintiffs' first and fourth theories of recovery. Defendants correctly point out that a court lacks subject matter jurisdiction over claims not ripe for judicial determination. *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008).

As to their first and fourth theories of recovery, Plaintiffs allege the proposed statutory language is an unconstitutional delegation of legislative authority and that the Medicaid Expansion Petition is invalid because it creates an expenditure without the required specific appropriation of funds. As to their fourth theory of recovery, Plaintiffs argue, "[a] substantial commitment of state funds constitutionally requires an expenditure of public funds made through a valid appropriation, and the petition is therefore unconstitutional." (Pls.' Br. 9).

Neither claim is ripe for review.

Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy. The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated. Because the outcome of an election is a contingent future event, a challenge that a proposed ballot measure will violate the substantive provisions of the U.S. or Nebraska Constitution does not present a justiciable controversy. It is not ripe for judicial determination because the voters might vote to reject the measure.

State ex rel. Loontjer v. Gale, 288 Neb. 973, 984–85, 853 N.W.2d 494, 503–04 (2014) (citations omitted).

"In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory." *Stewart v. Advanced Gaming Techs., Inc.*, 272 Neb. 471, 483, 723 N.W.2d 65, 75 (2006); *see also Duggan v.*

Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

The statutory amendments proposed by the Medicaid Expansion Petition have not and may not be approved by the voters. Plaintiffs are therefore seeking a decision that the initiative, if adopted, would enact a statute that is unconstitutional. The issues presented by Plaintiffs' first and fourth theories of recovery are not ripe for judicial determination unless and until adopted by the voters.

Plaintiffs' first and fourth theories of recovery are dismissed.

Second Theory of Recovery

Questions affecting the legal sufficiency of the initiative itself are ripe for review. *See e.g., Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003). Plaintiffs raise two such questions in their second and third theories of recovery.

The parties agree and the court likewise agrees that its receipt of Exhibits 1 and 2 do not convert Defendants' Motions to Dismiss to Motions for Summary Judgment. Additional evidence was offered at the hearing including Exhibits 3 and 4 by Plaintiffs. The relevance objection by Defendants to Exhibit 3 is sustained. The objections by Defendants to Exhibit 4 is overruled and Exhibit 4 is received. Exhibits 5-8 are likewise received.

Defendants' Motions to Dismiss, as to Plaintiffs' second and third theories of recovery, under Neb. Ct. R. Pldg. § 6-1112(b)(6), shall therefore be treated as Motions for Summary Judgment. *Bros. v. Kimball Cnty. Hosp.*, 289 Neb. 879, 857 N.W.2d 789 (2015).

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record show there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332. A party moving for summary judgment must make a *prima facie* case by producing enough evidence to demonstrate the movant would be entitled to judgment if the evidence were uncontroverted at trial. *Pogge v. Am. Family Mut. Ins. Co.*, 272 Neb. 554, 723 N.W.2d 334 (2006). Once the moving party makes a *prima facie* case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* The existence of disputed facts do not necessarily preclude summary judgment if those facts are not material to the matters at issue. *Prof'l Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012). A fact is material for the purpose of summary judgment only if it would affect the outcome of the case. *Barnes v. Am. Standard Ins. Co. of Wis.*, 297 Neb. 331, 900 N.W.2d 22 (2017).

On a motion for summary judgment, the court is required to view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party, and any reasonable doubt must be resolved against the moving party. *Mayer v. Howard*, 220 Neb. 328, 370 N.W.2d 93 (1985).

In their second theory of recovery, Plaintiffs allege that by 1) expanding eligibility and 2) directing DHHS to “take all actions necessary to maximize federal financial participation in funding medical assistance”, the Medicaid Expansion Petition contains two separate and distinct subjects in violation of Article III, § 2 of the Nebraska Constitution.

Article III, § 2 of the Nebraska Constitution mandates that “Initiative measures shall contain only one subject . . .” Nebraska courts use the “natural and necessary connection” test to determine whether initiatives meet the constitutional requirement of containing only one subject. *See State ex rel. Loontjer v. Gale*, 288 Neb. 973, 853 N.W.2d 494 (2014); *Munch v. Tulsa*, 140 Neb. 457, 300 N.W. 385 (1941). The single subject test is satisfied so long as the various provisions of the petition have a natural and necessary connection. *Loontjer*, 288 Neb. at 999, 853 N.W.2d at 513 (citing *Munch, supra*). “[T]he controlling consideration in determining the singleness of an amendment is its singleness of purpose and the relationship of the details to the general subject.” *Id.* at 1001, 853 N.W.2d at 514 (citing *Munch, supra*). “The primary purpose of the single subject rule is to prevent ‘log-rolling,’ the practice of combining dissimilar propositions into one proposed amendment ‘so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately.’” *Loontjer v. Robinson*, 266 Neb. 902, 920, 670 N.W.2d 301, 314 (2003) (Wright, J., concurring) (citation omitted).

Plaintiffs concede that the two subjects (expansion and federal funding) both relate to the Nebraska Medical Assistance Act. However, Plaintiffs argue the two subjects are not naturally and necessarily connected to one another, and represent separate policy issues for Nebraska voters. Plaintiffs contend: “Medicaid *coverage* for a specific group is simply not necessarily connected to whether the State of Nebraska seeks further Medicaid *funding* from the federal government.” (Pls.’ Br. 7). Defendants argue, on the other hand, the two subjects are “intimately related because any expansion necessarily requires funding.” (Gale’s Br. 4).

The Nebraska Supreme Court has addressed the issue on several occasions. *Munch, supra*, involved a proposed amendment to a city charter seeking to create a uniform system of pensions for firefighters and police officers. While the proposal set forth several changes, the court found its provisions were closely related to a single purpose—to place firefighters and police officers on the same pension plan. In *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010), defendants sought to enact an ordinance prohibiting the harboring and hiring of illegal aliens in the City of Fremont. The proposal contained “several components dealing with occupancy, licensing, electronic verification, government uses, resources, and penalty provisions.” *Id.* at 728, 781 N.W.2d at 462. The Nebraska Supreme Court concluded the proposal did not violate the single subject rule because every provision had a “natural and necessary connection” and each “were part of the general subject of regulating illegal aliens in Fremont.” *Id.*

Plaintiffs’ second theory of recovery presents no genuine issue as to any material fact. The issues raised by the Medicaid Expansion Petition—expansion and federal funding—have a natural and necessary connection and are part of the general subject of expanding Medicaid.

Defendants' Motion for Summary Judgment as to Plaintiffs' second theory of recovery is sustained.

Third Theory of Recovery

In their third theory of recovery, Plaintiffs allege that the Medicaid Expansion Petition fails to include Nebraska Appleseed Center for Law in the Public Interest [hereafter "Nebraska Appleseed"] as a sworn sponsor in violation of Neb. Rev. Stat. § 32-1405 (Reissue 2016).

The facts relevant to this analysis are not in dispute. The Medicaid Expansion Petition filed with Gale on March 9, 2018, identified as its Sponsors: Sarah Amanda Gershon; Kathy Campbell; Dr. Rowen Zetterman; and Insure the Good Life. (Ex. 1). In September 2015, Nebraska Appleseed, a Nebraska non-profit corporation, submitted a Trademark or Service Mark Application to Gale to register "Insure the Good Life" with the stated purpose that it was to be used "on materials (website & printed materials) distributed to support expansion of Medicaid" "in the sale or advertising of services." (Ex. 2). Exhibit 4, the affidavit of R. McIntosh, confirms that Nebraska Appleseed, via Facebook, Twitter, and its website, refers to and displays the logo for Insure the Good Life. Plaintiffs argue Insure the Good Life is a "facade" for Nebraska Appleseed.

Neb. Rev. Stat. § 32-1405(1) provides:

Prior to obtaining any signatures on an initiative or referendum petition, a statement of the object of the petition and the text of the measure shall be filed with the Secretary of State together with a sworn statement containing the names and street addresses of every person, corporation, or association sponsoring the petition.

The issue is whether Nebraska Appleseed should have been listed as a sponsor of the petition under Neb. Rev. Stat. § 32-1405(1).

The Nebraska Supreme Court recently had the opportunity to discuss the meaning of "sponsor" and "sponsoring the petition" as used in Neb. Rev. Stat. § 32-1405(1) in *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016). "Sponsoring the petition" in the context of § 32-1405(1) means "assuming responsibility for the initiative or referendum petition process." *Id.* at 131, 881 N.W.2d at 596. *Hargesheimer* recognized a distinction between those "sponsoring" a petition and those *supporting* a petition financially or through other valuable contributions. *Id.*

A list of sponsors, or those who assume responsibility for the initiative or referendum petition process, informs the Secretary of State and the public of who may be held responsible for the petition. As issues arise throughout the referendum process, the sponsors must stand ready to accept responsibility to facilitate the [initiative's] inclusion on the ballot and stand ready to defend the [initiative] process if challenged.

Id. at 132, 881 N.W.2d at 596.

Plaintiffs in *Hargesheimer* alleged that the Governor was a sponsor-in-fact of a referendum based on, among other alleged actions, his financial contributions, his participation in and “control” over the management and organization of the referendum campaign, his participation in a public relations campaign in support of the referendum, and his efforts to raise money for the campaign. The Nebraska Supreme Court rejected this argument. The Court distinguished those “sponsoring” from those “contributing or pledging contribution of money or other things of value” and found the latter are not required to be listed as sponsors under § 32-1405(1). “If ‘sponsoring the petition’ were construed to include persons who could be said to have heavily participated in the initiation or supported the petition process, such construction would inject ambiguity and make adherence difficult.” *Id.* at 134, 881 N.W.2d at 598. Supporting the process or having a role in initiating the process does not make one a sponsor of the petition. *Id.*

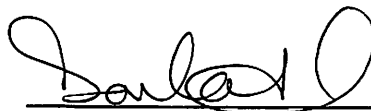
Viewing the evidence and inferences therefrom in favor of Plaintiffs, Nebraska Appleseed supports the Medicaid Expansion Petition. It participated in a public relations campaign in support of the initiative and it posts information on its social media accounts promoting the initiative and Insure the Good Life. Giving Plaintiffs the benefit of every reasonable inference and applying the rationale in *Hargesheimer*, *supra*, these activities do not support a finding that Nebraska Appleseed was “sponsoring the petition” as defined in § 32-1405(1). Neither its activities showing its support of the Petition nor its role in initiating the process forms a basis to conclude it was “sponsoring the petition” in the sense of assuming responsibility for the petition process. The absence of Nebraska Appleseed from the list of sponsors does not invalidate the Petition.

Defendants’ Motion for Summary Judgment as to Plaintiffs’ third theory of recovery is sustained.

IT IS SO ORDERED that Plaintiffs’ Complaint is dismissed with prejudice. Plaintiffs’ Motion for Judgment is denied.

DATED this 28 day of August, 2018.

BY THE COURT:



Darla S. Ideus
District Court Judge