

STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

SOCORRO ELECTRIC COOPERATIVE, INC.,

Plaintiff,

v.

CHARLENE WEST, et al.,

No. D1314-CV-2010-0849

Judge: Mitchell

Defendants,

And

CHARLES WAGNER, individually and
on behalf of those similarly situated, et al.,
Cross-Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.,
et al.,

Cross-Claim Defendants.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

AS TO ALL CLAIMS INVOLVING VOTING RIGHTS

Cross Claim Defendants Socorro Electric Cooperative, Inc., et al, by and through their counsel of record, Kennedy & Han, P.C., hereby brings this, their Motion for Partial Summary Judgment as to all Claims Involving Voting Rights.

By and through the instant Motion, Cross Claim Defendants ask the Court to dismiss all claims contained in the Cross Claim Plaintiff's Cross Claim which address matters of voting rights.^{1, 2} Defendants make this Motion based on the undisputed fact that all claims based on

¹ For purposes of simplicity and ease of reading, Cross Claim Defendants are referred to throughout this Motion as "Defendants." Cross Claim Plaintiff is similarly referred to only as "Plaintiff".

voting rights are now moot, following the changes to the Cooperative's Bylaws which were instigated by the action of the members and the Trustees, by and through the Cooperative's regular business processes and without resorting to the courts.

In support of this Motion, Defendants state as follows:

I. Introduction.

On or about August 24, 2010, Plaintiff filed an unverified Cross Claim and Request for Class Action Certification in the current matter. The Cross Claim was brought against the Socorro Electric Cooperative, Inc. (hereinafter "Cooperative") as an independent corporation, and against fourteen individuals. Thirteen of these individuals are current or past Trustees of the Cooperative, and one individual is a past general manager of the Cooperative.

In Counts 12 through 15 of his Cross Claim, Plaintiff Wagner makes various vague allegations concerning voting rights within the Cooperative. Based on these allegations, Plaintiff asks this Court to take the extraordinary step of removing the individual Defendants from their positions as Trustees of the Cooperative, appointing new Trustees, officers and managers of the cooperative, re-drawing the Trustee's election districts in accordance with the spirit of "one man, one vote," and insuring that "democratically elected trustees and officers may take office and act in the best interests of the SEC'S members." Cross Claim, at ¶100. Taken literally, Plaintiff is asking the Court to step directly and deeply into the world of business, effectively taking control of a private corporation, hiring and firing corporate actors, and providing continuing oversight as to corporate activities.

² The current Motion is being filed concurrently with a Motion to Dismiss based on Lack of Standing, a Motion to Dismiss based on Failure to Properly Plead under Rule 1-009(b), a Motion to Dismiss for Failure to Join an Indispensible Party, and a Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Defendants hereby incorporate all statements of fact and arguments of law contained in these various Motions as if fully set forth herein.

However, while making these extremely intrusive and inappropriate requests of the Court, Plaintiff has failed to inform the Court that the Cooperative's Bylaws have been amended to address the specific concerns Plaintiff cites in his Cross Claim, and that the Cooperative's Board of Trustees is currently working in good faith to implement these reforms. By and through these alterations, all claims made by Plaintiff as to voting rights have been rendered moot and may be dismissed by this Court.

II. Undisputed Material Facts (UMF):

UMF No. 1: Plaintiff's claims regarding voting rights are based on Article III, §§6 and 8 of the Cooperative's Bylaws. Cross Claim, at ¶87.

UMF No. 2: Plaintiff has not claimed that Article III, §§6 and 8 of the Cooperative's Bylaws were wrongfully enacted or that they contain or embody any improper principles of corporate governance. Cross Claim, at ¶87.

UMF No. 3: Plaintiff filed his Cross Claim on or about August 24, 2010. Since the filing of the Cross Claim, Plaintiff/Trustee Wagner has taken active part in amending the Cooperative's Bylaws. The Bylaws were extensively amended at the Cooperative's Annual Meeting, which occurred on or about April 17, 2010. Certain portions of the April 2010 version of the Bylaws were not immediately acted upon, based on Board's good faith belief that complying with the Bylaws would render the Cooperative essentially ungovernable. Following the Court's oral ruling at the May 18, 2011 hearing, the Board immediately began to attempt to comply with the spirit of that ruling. By August 2011, a final version of the Bylaws, incorporating the changes and rulings of this Court, were in place. The Board has continued, as

best it best understands the current Bylaws, to comply with each of the requirements of these Bylaws. See, Second Affidavit of Joseph Herrera, attached hereto as Exhibit A.

UMF No. 4: Article III, §6 has been altered to strike the words “number of members” and the term “membership” has been substituted. See, Exhibit A.

UMF No. 5: Article III, §8 has not been altered in any way. See, Exhibit A.

UMF No. 6: Article III, §14 has been added to concern the issue of Fair Elections. This Section now states that: “The Socorro Electric Cooperative, Inc., Board of Trustees shall make adequate arrangements for, and assure Fair Elections, which include voting by mail and election administration by a third party accounting firm.” See, Exhibit A.

UMF No. 7: Article V, §1 has been amended to reduce the number of directors from 11 to 5. See, Exhibit A.

UMF No. 8: Article V, §2 has been amended to impose term limits on the Cooperative’s Trustees. This Section now states that: “No member of the Board of Trustees of The Socorro Electric Cooperative shall serve more than two consecutive terms.” See, Exhibit A.

UMF No. 9: Article V, §7 has been amended so as to limit the overall compensation a Trustee may receive in a calendar year. Trustees are limited to \$10,000 per year, while the President of the Board is limited to \$15,000 per year. The Article does not distinguish between direct payment, reimbursement for actual expenses, and payment of a Trustee’s healthcare insurance costs. See, Exhibit A.

UMF No. 10: Article V, §8 has been amended to address the Cooperative’s redistricting needs. As amended, the Article now includes language stating: “The service area comprising the Socorro Electric Cooperative, Inc., shall be divided into five representative voting districts of as

equal member population as possible and the members of each shall elect one trustee.” See, Exhibit A.

UMF No. 11: Plaintiff Charles Wagner was elected to the Board of Trustees under the policies and procedures outlined in the 2004 version of the Cooperative’s Bylaws. See, Exhibit A.

III. Standard of Review.

Under Rule 1-056(C) NMRA 2010, “summary judgment is appropriate where there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law.” *Self. v. United Parcel Service*, 1998-NMSC-046, ¶6, 126 N.M. 396. When considering a summary judgment motion, the court “must resolve all reasonable inferences in favor of the nonmovant and must view the pleadings, affidavits, depositions, answers to interrogatories and admissions in a light most favorable to a trial on the merits.” *Garcia-Montoya v. State Treasurer’s Office*, 2001-NMSC-003, ¶7, 130 N.M. 25. When attempting to present a dispute of material fact, the non-moving party cannot rely on the allegations contained his complaint or other pleadings, but must instead present “specific facts showing that there is a genuine issue for trial.” Rule 1-056(E), NMRA 2010. Summary judgment allows courts to resolve matters where facts are undisputed, but “summary judgment is not an appropriate vehicle for courts to weigh the evidence and judge the credibility of witnesses.” *J.R. Hale Contracting Co. v. Union Pacific R.R.* 2008-NMCA-037, ¶27, 143 N.M. 574, 583. Awards of summary judgment are reviewed by the Court of Appeals under a *de novo* standard. *Garcia-Montoya*, at ¶7.

IV. Analysis and Arguments of Law.

a. Changes to Bylaws have Rendered Claims as to Voting Rights Moot.

It is well established that New Mexico courts do not decide moot cases. *Gunaji v. Macias*, 2001-NMSC-028, ¶9. A case is deemed moot where no actual controversy exists, and the court cannot grant actual relief. *Id.* The doctrine of mootness “is a limitation upon jurisdiction or decrees in cases where no actual controversy exists.” *Mower v. Rusk*, 95.N.M. 48, 51, 681 P.2d 886, 889 (1980). Where no actual controversy exists, the court may dismiss an issue or claim as moot through summary judgment or a motion to dismiss, and this determination will be reviewed under a *de novo* standard. *Garcia v. Dorsey*, 2006-NMSC-052, ¶13.

In the current matter, Plaintiff has attempted to assert claims related to denial of voting rights under various theories of liability. Plaintiff has generally stated that “Cross Claim Defendants have manipulated [the voting rules] to create a system of scheming quorum calls and an ineffective means of having proposals heard, denying Cross Claim Plaintiff and the Class any semblance of democratic participation in the affairs of the SEC.” Cross Claim, at ¶87.

By and through their various Motions filed concurrently with the present Motion, Defendants have argued that these claims, contained ¶¶ 86-94 of the Cross Claim, should be dismissed for failure to plead the proper specificity, for lack of standing, and should be limited to the relevant statutory period. Additionally, these claims should be denied for the simple reason that, even if the language of the claims is viewed in light most favorable to Plaintiff, there is simply no actual controversy between Plaintiff/Trustee Wagner and Defendants.

While Plaintiff never explicitly states his concerns with voting procedures, it is indisputable that the claims could only have been based on the Bylaws as they existed at the time of filing, that is, on or about August 24, 2010. However, at the behest of Cooperative members

under the leadership of Plaintiff Wagner, the Bylaws underwent significant amendment and alteration in 2010, and that these changes have been fully in effect since August 2011. Many of these amendments, as stated in the Undisputed Material Facts presented above, explicitly concerned fair elections, voting rights, voting procedures, district size, term limits, and Trustee compensation. The fact that the Bylaws could be so extensively amended belies Plaintiff's claim that there is no "semblance of democratic participation in the affairs of the SEC." The election of Plaintiff himself to the Board in 2006 demonstrates that, even under the old rules, the elections were functioning and new voices were being added to the Board. The election of new Trustees in 2011 only furthers this process.

Plaintiff Wagner and the membership have had the opportunity to amend the Bylaws so as to address any concerns they might have had with the Cooperative's voting procedures. Plaintiff Wagner and the membership have used this opportunity, and by doing so they have provided themselves with almost all of the injunctive relief sought in the Cross Complaint. New Trustees and a new manager are in place at the Cooperative. The amended Bylaws call for redistricting of the Cooperative and an overall reduction in the number of Trustees. These actions have rendered moot *any* actual controversy which might have existed under the old Bylaws and voting procedures. Any additional changes sought by the membership are matters of corporate governance, to be pursued through the corporate structures enacted by the Rural Electric Cooperative Act. These matters are *not* actual legal controversies, and thus they cannot be litigated in this, or any other, Court.

WHEREFORE, premises considered, Defendants Socorro Electric Cooperative, *et al*, ask that the Court FIND that all claims now pending in the current matter which addressing denial of

voting rights are MOOT and that Counts 12 through 15 of the Cross Complaint are DENIED as a matter of law. Defendants further request that the Court award any and all costs and fees for which Defendants may show themselves to be entitled, and that the Court grant any such other and further relief as it may find to be in the interests of justice.

Respectfully submitted,

KENNEDY & HAN, P.C.

/s/ Darin M. Foster

Paul J. Kennedy

Darin M. Foster

201 12th Street N.W.

Albuquerque, New Mexico 87102

Counsel for Cross Claim Defendants

CERTIFICATE OF SERVICE:

I certify that a copy of this
Motion was served by the Court's
electronic filing system to the following
counsel of record on this 25th day of January 2012.
Pro Se Litigants were served by 1st Class U.S. mail.

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/s/ Darin M. Foster
Darin M. Foster

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SECOND AFFIDAVIT OF JOSEPH HERRERA

**STATE OF NEW MEXICO)
) ss.
COUNTY OF SOCORRO)**

I, Joseph Herrera, being first duly sworn upon his oath, hereby depose and state:

- 1) I am over the age of majority and in all other ways competent to give the current testimony.**
- 2) I am the current General Manager of the Socorro Electric Cooperative, Inc.**
- 3) I have personally examined the current and past Bylaws of the Socorro Electric Cooperative, and I have personally determined, to the best of my ability and understanding, that the following information is true and correct on the basis of these regularly kept business documents.**

- 4) The Socorro Electric Cooperative Bylaws were extensively amended at the Cooperative's Annual Meeting, which occurred on or about April 17, 2010. The previous version of the Cooperative Bylaws had been enacted in 2009.
- 5) Certain portions of the April 2010 version of the Bylaws were not immediately acted upon, based on Board's good faith belief that complying with the Bylaws would render the Cooperative essentially ungovernable.
- 6) Following the Court's oral ruling at the May 18, 2011 hearing, the Board immediately began to attempt to comply with the spirit of that ruling. By August 2011, a final version of the Bylaws, incorporating the changes and rulings of this Court, were in place. The Board has continued, as best it best understands the current Bylaws, to comply with each of the requirements of these Bylaws.
- 7) Article III, §6 has been altered to strike the words "number of members" from the 2009 version. The term "membership" has been substituted.
- 8) Article III, §8 has not been altered in any way.
- 9) Article III, §14 has been added to concern the issue of Fair Elections. This Section now states that: "The Socorro Electric Cooperative, Inc., Board of Trustees shall make adequate arrangements for, and assure Fair Elections, which include voting by mail and election administration by a third party accounting firm."
- 10) Article V, §1 has been amended to reduce the number of directors from 11 to 5.
- 11) Article V, §2 has been amended to impose term limits on the Cooperative's Trustees. This Section now states that: "No member of the Board of Trustees of The Socorro Electric Cooperative shall serve more than two consecutive terms."
- 12) Article V, §7 has been amended so as to limit the overall compensation a Trustee may receive in a calendar year. Trustees are limited to \$10,000 per year, while the President of the Board is limited to \$15,000 per year. The Article does not distinguish between direct payment, reimbursement for actual expenses, and payment of a Trustee's healthcare insurance costs.
- 13) Article V, §8 has been amended to address the Cooperative's redistricting needs. As amended, the Article now includes language stating: "The service area comprising the Socorro Electric Cooperative, Inc., shall be divided into five representative voting

districts of as equal member population as possible and the members of each shall elect one trustee."


- 14) Plaintiff Charles Wagner was elected to the Board of Trustees under the policies and procedures outlined in the Cooperative's Bylaws as of 2004.

FURTHER AFFIANT SAYETH NAUGHT.



Joseph Herrera

SUBSCRIBED AND SWORN TO before me this 23rd day of January, 2012, by
Joseph Herrera.



Notary Public

My Commission Expires:

11/21/13