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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1370

Filed: 5 June 2018

Wake County, No. 17 CVS 012072

STELLA ANDERSON, Petitioner,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT, Respondent.

Appeal by respondent-intervenor from order entered 13 October 2017 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 2 May 2018.

Bailey & Dixon, L.L.P., by Sabra J. Faires and William R. Gilkeson, Jr., for petitioner-appellee.

Miller & Johnson, PLLC, by Nathan A. Miller, for respondent-intervenor-appellant.

TYSON, Judge.

I. Background

The Towns of Beech Mountain, Blowing Rock, Boone, and Seven Devils are located in Watauga County and held municipal elections on 7 November 2017. The Watauga County Board of Elections (the "Watauga Board") is responsible for

conducting all public elections within Watauga County, including municipal elections. The Watauga Board was required to provide early voting sites, at a minimum, at the Watauga Board's office beginning on the third Thursday before the 2017 election.

Stella Anderson ("Petitioner") served on the Watauga Board from 2005 to 2013 and again from 2015 until March 2018. On 4 August 2017, the town manager of Boone sent a letter to the Watauga Board requesting an early voting site to be located at the Plemmons Student Union at Appalachian State University (the "ASU Site"). At a 22 August 2017 meeting, the Watauga Board was unable to unanimously agree on an early voting plan for the municipal elections to be held in Watauga County on 7 November 2017. Petitioner and another member of the board, Nancy Owen, voted for an early voting plan which included the ASU Site. The chair of the Watauga Board, William Aceto ("Intervenor") objected to the inclusion of the ASU Site and voted against the plan.

On 8 September 2017, Petitioner filed a petition with the North Carolina State Board of Elections & Ethics Enforcement (the "State Board") pursuant to N.C. Gen. Stat. § 163-227.2(g). N.C. Gen. Stat. § 163-227.2 was recodified as N.C. Gen. Stat. §§ 163A-1300 to 163A-1304 by Session Law 2017-6, § 3, effective 1 May 2017.

N.C. Gen. Stat. § 163A-1303(a) (2017) provides, in part:

> If a county board of elections has considered a proposed Plan or Plans for Implementation and has been unable to

> reach unanimity in favor of a Plan, a member or members of that county board of elections may petition the State Board to adopt a plan for it.

As a result of the Supreme Court of North Carolina's 20 July 2017 Order in *Cooper v. Berger*, 52PA17-2, as amended on 1 September 2017, no members had been appointed by the Governor to the State Board at the time Petitioner petitioned it to adopt a plan. No other county board of elections petitioned the State Board to approve a non-unanimous early voting plan for the 2017 election.

On 27 September 2017, the State Board's legal counsel sent an email to Petitioner notifying her that "[b]ecause members have not been appointed, no administrative relief is available to you at this time and the agency cannot act on your petition." On 28 September 2017, Petitioner sent a letter to the State Board asking it to submit a request to the three-judge panel in the *Cooper* lawsuit for a modification to the Supreme Court's order to allow an early voting plan adopted by a majority of a county board of elections to be treated as a unanimous plan. By a letter dated 29 September 2017, the State Board's legal counsel responded to Petitioner's request and informed her that the State Board would not seek Petitioner's requested modification, but concluded:

> North Carolina vests the Superior Courts with "original general jurisdiction throughout the State," and the legal basis for your petition would seem more appropriately considered on the merits in that forum, should you seek judicial review of the county board of elections' one-stop decision.

On 2 October 2017, Petitioner filed a petition for judicial review in the Wake County Superior Court seeking to have the superior court determine an early voting plan for Watauga County. N.C. Gen. Stat. § 163A-741(*l)* (2017) provides the statutory authority for a person to seek judicial review of a decision of the State Board:

> Notwithstanding any other provision of law, in order to obtain judicial review of any decision of the State Board rendered in the performance of its duties or in the exercise of its powers under this Subchapter, the person seeking review must file his petition in the Superior Court of Wake County.

On 6 October 2017, Intervenor filed a motion to intervene and a response to Petitioner's petition for judicial review. Intervenor moved to dismiss Petitioner's petition on several grounds, including: (1) the location of additional early voting sites presents a non-justiciable political question; (2) a trial court's ruling on the matter would constitute a violation of separation of powers; (3) filing a petition with the trial court is an improper procedure to appeal an administrative decision; (4) lack of subject matter jurisdiction; (5) failure to join the County Board as a necessary party; (6) violation of Intervenor's due process rights; (7) impossibility of the County Board to comply with the early voting plan and state law; and (8) failure to state a claim for which relief can be granted.

On 13 October 2017, the superior court filed an order, which allowed Intervenor's motion to intervene and approved the early voting plan set out in

Petitioner's petition with modifications. From that order, Intervenor gave timely notice of appeal to this Court.

On 16 October 2017, Intervenor filed an emergency motion for temporary stay, petition for writ of supersedeas, and motion for expedited response with this Court to stay the enforcement of the superior court's 13 October 2017 order. By an 18 October 2017 order of this Court, we allowed Intervenor's motion for temporary stay pending a ruling on Intervenor's petition for writ of supersedeas. By order of this Court dated 25 October 2017, Intervenor's motion for temporary stay was dissolved. Following dissolution of the temporary stay, early voting began at the sites designated in the superior court's 13 October 2017 order, including the ASU Site.

On 23 April 2018, after the parties had filed their briefs, Petitioner filed a motion for judicial notice with this Court. Petitioner requested this Court to take judicial notice of certain facts. To support her motion, Petitioner attached the minutes of a 21 March 2018 meeting of the now-constituted State Board ("State Board Minutes"), a list promulgated by the State Board listing the individuals appointed to the Watauga Board on 27 March 2018 ("Watauga Board Appointees"), and the minutes of a 29 March 2018 meeting of the Watauga Board ("Watauga Board Minutes"). By an order dated 26 April 2018, this Court allowed Petitioner's motion to take judicial notice.

II. Analysis

Intervenor argues the order of the superior court adopting an early voting plan for Watauga County should be reversed on the grounds: (1) the superior court erred in hearing a petition for judicial review over which it did not have subject matter jurisdiction; (2) the superior court erred by entering an order that forced the Watauga Board to violate laws requiring it to provide notice of the hours a voting site is open; (3) the superior court erred in not applying the whole record test in reviewing Petitioner's petition for judicial review; (4) the superior court erred by not remanding the matter to the State Board; and (5) the superior court failed to follow the statutory default provision for an early voting location.

Petitioner argues: (1) this Court does not have subject matter jurisdiction because Intervenor lacks standing; (2) this Court does not have subject matter jurisdiction because the case is moot and no exceptions exist to the mootness doctrine; (3) the superior court correctly concluded that it had jurisdiction; and (4) the superior court's order is proper.

1. Mootness

We initially address Petitioner's argument asserting this Court lacks subject matter jurisdiction because the case is moot. We conclude this appeal is moot and does not fall within any exception to the mootness doctrine. This appeal is dismissed as moot.

"Whenever, during the course of litigation it develops that the relief sought has

been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed [.]" *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978).

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citation omitted). "[A] moot claim is not justiciable, and a trial court does not have subject matter jurisdiction over a non-justiciable claim [.]" *Yeager v. Yeager*, 228 N.C. App. 562, 565, 746 S.E.2d 427, 430 (2013) (citations omitted). "Moreover, '[i]f the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action' for lack of subject matter jurisdiction." *Cumberland Cty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Servs.*, 242 N.C. App. 524, 528, 776 S.E.2d 329, 333 (2015) (quoting *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994)).

The 2017 municipal elections for the Towns of Beech Mountain, Blowing Rock, Boone, and Seven Devils have already occurred and the early voting plan ordered by the superior court remained in effect for those elections. Intervenor concedes this appeal is moot, but argues it satisfies two exceptions to the mootness doctrine for this Court to address the issues on the merits.

2. Capable of Repetition, Yet Evading Review

The first exception to where an issue is moot and is subject to dismissal occurs when the issue is "capable of repetition, yet evading review." The "capable of repetition, yet evading review" exception applies when: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. at 654, 566 S.E.2d at 703-04.

Petitioner concedes the first prong of this test is satisfied "due to the short time frame between adoption of an early voting site plan for an election and the election." Intervenor contends the second prong is also satisfied because there is a reasonable expectation that the same issue will arise again. The purported reasons for this issue arising again is the Watauga Board will fail to reach a unanimous vote regarding the approval of early-voting sites, and that the State Board will remain without members and be unable to review early-voting plans submitted by the Watauga Board.

As to the second prong, of "a reasonable expectation that the same complaining party would be subjected to the same action again[,]" the Supreme Court of the United States has clarified "that a mere physical or theoretical possibility [is not] sufficient to satisfy the test . . . . Rather, . . . there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482, 71 L.Ed.2d 353, 357 (1982)

(citation omitted).

The information submitted by Petitioner pursuant to her 23 April 2018 motion to take judicial notice was allowed by this Court by order dated 26 April 2018. This Court recognized that on 21 March 2018, the State Board's membership was fully reconstituted. On 27 March 2018, the State Board appointed the county boards of election, including the Watauga Board. Neither Intervenor nor Petitioner are members of the Watauga Board. On 29 March 2018, the Watauga Board unanimously adopted an early voting plan for the 8 May 2018 primary election that included the ASU Site at issue here. Early voting at the ASU Site commenced on 30 April 2018 and the primary election concluded on 8 May 2018.

Based upon these occurrences, Intervenor is unable to establish a reasonable expectation, much less a "demonstrated probability," that this same action involving the same complaining party will occur again. *See id.*

The action here involved a petition to the Superior Court of Wake County to adopt an early voting plan for a county, when the State Board was in the unusual position of not being able to review or adopt an early voting plan because no members had been appointed to the State Board. While there may be a possibility or probability the Watauga Board may be unable to unanimously adopt an early voting plan for future elections, there is no reasonable expectation the State Board will be unable to consider a Watauga Board member's petition to adopt an early voting plan

because of a lack of members.

Intervenor also contends that a similar action will arise again because "Petitioner will continue circumventing the State Board" and "Petitioner will continue her attempts to bypass the State Board for political gain in elections to come." Since Petitioner is no longer a member of the Watauga Board, Petitioner would have no right to petition the State Board to adopt an early voting plan for Watauga County, if the Watauga Board is unable to adopt a unanimous plan. *See* N.C. Gen. Stat. § 163A-1303(a) (granting county board of election members right to petition State Board to adopt early voting plan if county board is unable to do so).

Furthermore, in the interim period since this appeal was filed, the public records and materials submitted by Petitioner, and of which this Court took judicial notice, reflects that Petitioner has been appointed as a member of the State Board. Intervenor has not demonstrated a reasonable expectation or attempted to explain how or why Petitioner is likely to "circumvent" the State Board of which she is now a member.

Additionally, now that the membership of the State Board has been reconstituted, Intervenor cannot demonstrate a reasonable expectation that a Watauga Board member could successfully bypass the State Board and petition the Superior Court of Wake County to adopt an early voting plan, if the State Board has not rendered a decision. *See* N.C. Gen. Stat. § 163A-741(*l*). Intervenor has failed to

establish "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again" to satisfy the "capable of repetition, yet evading review" exception to mootness. *See Murphy*, 455 U.S. at 482, 71 L.Ed.2d at 357. Intervenor's arguments are overruled.

3. Public Interest

Intervenor also argues that the "public interest exception" applies to overcome dismissal for mootness. Courts may consider a case that is moot if it "involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph,* 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). The public interest exception "is a very limited exception that our appellate courts have applied only in those cases involving clear and significant issues of public interest." *Anderson v. N.C. Bd. of Elections*, __ N.C. App. __, __, 788 S.E.2d 179, 188 (2016).

This appeal involves an early voting plan for municipal elections and concerns a matter of public interest. Nothing in the record indicates why it is a matter of "general importance" or "deserves prompt resolution." *Randolph*, 325 N.C. at 701, 386 S.E.2d at 186. The 2017 municipal elections are long over and the May 2018 primary elections were conducted under a unanimous plan for early voting in Watauga County. The superior court expressly limited the future value or applicability of its ruling, as stated in its 13 October 2017 order:

> Given the unique circumstances that have given rise for the Court to issue this Order, nothing in this Order shall

> have any precedential effect on any other petition for review of any decision of the North Carolina State Board of Elections and Ethics Enforcement.

Combining this express limiting language and the unique circumstances of no members serving on the State Board when the superior court issued its order, there is no basis to conclude the superior court's decision to review and adopt the early voting plan at issue will have any impact upon any future elections.

Intervenor asserts his appeal falls within the public interest exception to mootness, because the superior court's order forced the Watauga Board to violate the statute regarding election notice requirements. *See* N.C. Gen. Stat. § 163-33 (2016) (recodified as § 163A-769 by S.L. 2017-6, section 3, effective May 1, 2017). N.C. Gen. Stat. § 163A-769(8) requires in part:

> the county board of elections shall give notice at least 20 days prior to the date on which the registration books or records are closed that there will be a primary, general or special election, the date on which it will be held, and the hours the voting places will be open for voting in that election.

Intervenor asserts the superior court's order has opened up the Watauga Board to election protests or challenges because the Board's compliance with the order forced it to fail the required minimum of 20 days' prior notice of the hours voting places would be open. *See id.* Presuming the superior court improperly entered the order at issue, nothing in the record tends to show the Watauga Board's inability to comply with the statutory notice requirement affected the election results or gave

candidates or voters a basis to protest the election. *See* N.C. Gen. Stat. § 163A-1177 (granting registered voters and candidates for an election the power to protest election results for irregularities).

The 2017 Watauga County municipal elections are concluded, the State Board's membership has been reconstituted, and an early voting plan was unanimously adopted by the constituted Watauga Board for the May 2018 primary elections. Intervenor has not established a basis to show why review of the superior court's order "deserves prompt resolution." *Randolph*, 325 N.C. at 701, 386 S.E.2d at 186.

Intervenor has failed to establish this appeal falls within either the "capable of repetition, yet evading review" or public interest exception to mootness. "If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action for lack of subject matter jurisdiction." *Cumberland Cty. Hosp. Sys.,* 242 N.C. App. at 528, 776 S.E.2d at 333 (citation, alteration, and quotation marks omitted).

III. Conclusion

Intervenor concedes this case is moot and has failed to establish that it falls within an exception to the mootness doctrine to provide jurisdiction for this Court to review the issues. Because this appeal is moot, we do not have subject matter jurisdiction to consider the merits of Intervenor's appeal. Nothing herein addresses

the validity or merits of the superior court's or Watauga Board's decisions concerning the location of any early-voting site. Intervenor's appeal is moot and dismissed. *It is so ordered.*

DISMISSED.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).