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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

RONALD KRILETICH, Plaintiff and Appellant, v. ALAMEDA COUNTY REGISTRAR OF VOTERS et al., Defendants and Respondents.	A091941 (Alameda County Super. Ct. No. H2107518)

Ronald Kriletich appeals from a judgment of dismissal after the trial court sustained a demurrer to his complaint without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

On December 13, 1999, Kriletich filed, in propria persona, a complaint for damages against the Alameda County Registrar of Voters and two of its employees (collectively, County) alleging negligence, reverse sexual harassment, and civil rights violations. County filed a demurrer, a motion to strike, and a request for judicial notice of a number of County records. On February 11, 2000, Kriletich served a set of interrogatories. On March 3, he filed a first amended complaint alleging three causes of action for violation of his civil rights. On March 15, County defendants filed individual responses to Kriletich's interrogatories. County demurred to the first amended complaint and again requested judicial notice of relevant documents. Kriletich moved to compel further responses to his interrogatories and for sanctions. The court consolidated Kriletich's motion with County's demurrer for hearing, after which it sustained the

demurrer without leave to amend, denied the motion as moot, and dismissed the action with prejudice. Kriletich filed a timely notice of appeal and the parties stipulated to use of the superior court file in lieu of clerk's transcript (Cal. Rules of Court, rule 5.2).

DISCUSSION

A. Standard of Review

"On appeal from a dismissal after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether a complaint states a cause of action as a matter of law. [Citations.] We give the complaint a reasonable interpretation, reading it as a whole and viewing its parts in context. [Citations.]" (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501.) "The demurrer is treated as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. Matters which may be judicially noticed may also be considered." (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1104.)

If a proper ground for sustaining the demurrer exists, we will affirm the ruling regardless of whether the trial court relied on an improper ground or the defendants asserted the proper ground below. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 880, fn. 10.) "When a complaint shows on its face that an action is barred by the statute of limitations, the use of the demurrer to dispose of that action without additional trial court, attorney, or litigant time and effort is an efficient, appropriate, and well-accepted procedure. [Citation.]" (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1210.) "However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967).

B. Allegations

In his first amended complaint, Kriletich alleged that since July 1981 he has been a homeless Bay Area resident using a mailbox rental service to receive mail and

messages. (Para. 1.)[1] On June 2, 1998, he went to the Thomas Jefferson Elementary School in San Leandro to vote, but county voting official Donald Tackett told him he was not on the roster of registered voters. At Tackett's suggestion, Kriletich, who claimed to have experienced "an identical problem" during the November 5, 1996 election, telephoned the registrar of voters, filled out another voter registration form, was assigned a "log" and a "form" number, and proceeded to vote (as he had on the previous occasion).

On November 3, 1998, the same thing occurred (para. 9), only this time, Kriletich spoke by phone with Registrar of Voters office manager, Sandy Creque. Creque told him his rented mailbox was a business address, not a residence, and that he "was supposed to have some kind of residential real estate in his life as an integral part-and-prerequisite to voting." She then "placed [him] under heavy interrogation on where he slept," and made him use a provisional ballot (para. 10), which was placed in an envelope bearing his name, address and signature. Kriletich told Creque "he was a homeless man living out of his car, that he had a mobile, nomadic lifestyle, that he lived everywhere and that he used a mailbox rental as his official address." Creque, however, "wanted two cross streets," so he "rendered the two cross streets . . . where he received his mail at his mailbox rental." Creque agreed to mail Kriletich information about the "policy, regulation, law, rule, court case name or number, ordinance or standard" that required him "to have some form of real estate before he could vote."

In a letter dated March 29, 1999, Creque "admitted" that a person need not own property in order to vote, and may use a post office box as a mailing address, but she needed to know where Kriletich slept to determine his voting precinct. Creque also explained the use of a provisional ballot to ensure proper registration when eligibility is in question (Elec. Code, § 14310), and told Kriletich the log number he was issued for the June primary election was not valid for the November general election. Finally, Creque explained the requirement of a valid residence address. "This would include shelters, living in a car or living on the street, as long as we could determine your proper voting

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1 Paragraphs noted by number are those on which the trial court expressly relied. (See *post*, p. 4.)

precinct. You have now given us two cross streets and we were able to determine your voting precinct." The residency requirement "has to do with proper representation." That is, voters are entitled to vote only in the congressional, senatorial, assembly, supervisorial, school and/or special districts in which they reside. Despite Creque's detailed explanation, Kriletich was allegedly "unsure and unaware of his current-and-future status as a registered voter."

In addition to the above narrative, Kriletich alleged that since October 28, 1996, County has had an official policy precluding the use of mail box rental addresses as residence addresses for purpose of voter registration. On April 30, 1999, he filed a claim in compliance with the Government Tort Claim Act (Gov. Code, § 910 et seq.). Kriletich requested a judicial declaration that County's voter registration policy and its enforcement by Tackett and Creque unconstitutionally violated his civil rights, $2 million in damages, and an order that he be allowed to vote in any and all future elections "with regular ballots."

C. The Trial Court's Ruling

In sustaining County's demurrer, the court ruled that "plaintiff was not eligible to vote in the subject election, and is now properly registered," citing paragraphs 1, 9, and 10 of the first amended complaint (see *ante*, pp. 2, 3), exhibits A, C, and E to County's request for judicial notice, Elections Code, sections 321, 349, 2000, 2150 and 12220, and *Collier v. Menzel* (1985) 176 Cal.App.3d 24 (*Collier*).

Exhibit A to the request for judicial notice is an October 28, 1996 memorandum from the registrar of voters asking the precinct inspector to challenge prospective voters who attempted to use a certain mailbox address as a residence address. Kriletich's name appears on the attached list of such "illegally registered" voters. Exhibit C is Kriletich's voter registration record showing the maildrop address as his residence. Exhibit E is Kriletich's *current* voter registration information showing his residence address as the corner of Lewelling and Washington Streets in San Leandro.

Elections Code section 321[2] defines an elector as "a United States citizen 18 years of age or older and a resident of an election precinct at least 29 days prior to an election." Section 349 defines residence for voting purposes as a person's domicile, "that [one] place [at a given time] in which his or her habitation is fixed, wherein the person has the intention of remaining, and to which, whenever he or she is absent, the person has the intention of returning." (Subds. (a) & (b).) Section 2000 provides in pertinent part that every United States citizen 18 years of age and resident in California (Cal. Const., art. II, § 2) "and who complies with this code governing the registration of electors may vote at any election held within the territory within which he or she resides and the election is held." (Subd. (a).) Section 2150 describes the contents of an affidavit of registration, which include, as relevant here, the affiant's place of residence and mailing address, if different from the place of residence. (Subds. (a)(3) & (4).) Section 12220 prescribes the division of jurisdictions into election precincts and preparation of maps or exterior descriptions thereof.

In *Collier, supra*, 176 Cal.App.3d at page 37, the court held that the affidavits of registration of three homeless citizens of Santa Barbara County, who listed as their residence the address of a city-owned park in which camping or sleeping overnight was prohibited by ordinance (*id*. at pp. 29, 32), complied with state registration laws, and that the county's refusal to register them violated their voting rights under equal protection standards.

D. Kriletich's Contentions

The gravamen of Kriletich's complaint was that his civil rights were violated by 1) County's "policy" against the use of a rental mailbox as a residence address for voter registration purposes, 2) its attempt to ascertain, instead, the cross streets where he most often parks his car to sleep at night, and 3) its use of a provisional ballot while his eligibility to vote was in question. On appeal, Kriletich essentially repeats the arguments he made below.

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2 Unless otherwise indicated, all further statutory references are to the Elections Code.

To the extent Kriletich's civil rights claims are based on 42 U.S.C. section 1983,[3] they are time barred. In *Wilson v. Garcia* (1985) 471 U.S. 261 (*Wilson*), the court "held the statute of limitations for all section 1983 claims to be the forum state's statute of limitations for personal injury torts. [Citation.] In California this period is one year. [Code Civ. Proc., § 340, subd. (3).]" (*Usher v. City of Los Angeles* (9th Cir. 1987) 828 F.2d 556, 558.) The election at which Kriletich claims he was unlawfully prevented from voting—and the most recent election for which he claims his registration was questioned—took place on November 3, 1998, more than a year before he filed his complaint on December 13, 1999.

Contrary to Kriletich's suggestion, the fact that the *Wilson* court affirmed the application of a three-year statute of limitations in *that* case does not mean *he* had three years to file *his* complaint. The *Wilson* court was reviewing a section 1983 action brought in New Mexico, which, unlike California, has a three-year statute of limitations for personal injury actions. (*Wilson, supra*, 471 U.S. at pp. 265-266, 280.)

To the extent they are based on state law, the trial court properly determined that *Collier, supra*, fatally undermines Kriletich's claims. "Even if a person may be qualified to vote under constitutional standards, he/she may not be entitled to vote if compliance with state registration laws has not been met. [Citation.] Proper registration is a condition precedent to the exercise of the right to vote. [Citation.] [¶] In order to be properly registered, an elector must be a resident of an election precinct. [Citations.]" (*Collier, supra*, 176 Cal.App.3d at p. 30.) "States and their political subdivisions have the unquestioned constitutional authority to restrict availability of the ballot to those persons who reside within their borders. [Citations.] Thus, registration statutes are

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3 Section 1983 provides in pertinent part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

usually sustained on the theory that they do not impair or abridge an elector's right to vote, but merely regulate its exercise." (*Id.* at p. 33.) "Although registration laws are valid if reasonable, [they] will receive strict scrutiny if they *deny* certain classes of *residents* the right to vote. [Citation.] Thus, a governmental entity is not justified in excluding *otherwise qualified voters* who have no way of making themselves eligible to vote. [Citations.]" (*Ibid.*, italics in original.) "Denying the opportunity to vote to a resident merely because he or she cannot afford housing denies a citizen's vote on the basis of economic status and is therefore an impermissible basis for determining the entitlement to vote." (*Id.* at p. 37.)

Applying these guidelines, the *Collier* court found that Santa Barbara County could not deny homeless people the right to vote merely because they lived in a park, rather than in a traditional dwelling or habitation, so long as the park's precinct was ascertainable. "While a park may not be legally designated as a place for camping, it is a physical area where a person can sleep and otherwise use as a dwelling place." (*Id.* at p. 31.)

Kriletich asserts that, unlike the plaintiffs in *Collier* and in *Pitts v. Black* (D.C.N.Y. 1984) 608 F.Supp. 696 (homeless living in city park spread over several election districts can register to vote by identifying spot where they regularly sleep), on which it relies (*Collier, supra*, 176 Cal.App.3d at p. 35), he does not live in a park, but in his car. He has not, however, alleged that he was prevented from voting because he lives in his car, merely that he was prevented from using a rented mailbox address, where he admittedly does not reside, as a residence. Even though Kriletich describes himself as "a roaming vehicular nomad who frequently alters his sleeping locations," County seems to have gone out of its way to make it possible for him to vote by allowing him to name the cross streets nearest his maildrop as his residence, presumably on the rationale that he usually parks his car there for the night. Kriletich has not alleged any facts which materially differentiate his case from *Collier*.

Reduced to their essence, Kriletich's contentions seem to be that 1) the requirement of a residence address for voter registration disenfranchises the homeless,

and 2) the use of cross-streets to identify the location where a homeless person sleeps violates his right to privacy. As to the former, it is patently untrue, since Kriletich has been allowed to vote since he has furnished cross streets on his registration form. As to the latter, it is no more intrusive to ask a homeless person where he sleeps in his car at night than to ask a more fortunate voter where he sleeps in his bed at night, i.e., his residence address.[4]

The trial court correctly determined that Kriletich was not properly registered on November 3, 1998. Since he was therefore not entitled to vote, by provisional ballot or otherwise, he was not deprived of any civil right. Accordingly, as the trial court ruled, Kriletich's discovery motion was moot.

DISPOSITION

The judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Ruvolo, J.

[4] At oral argument, Kriletich emphasized an argument first made in his reply brief based on the "motor voter" provision of the National Voter Registration Act of 1993 (42 U.S.C. § 1973gg et seq.). Preliminarily, we note that "[p]oints raised in a reply brief for the first time generally will not be considered. [Citations.]" (*Kaichen's Metal Mart, Inc. v. Ferro Cast Co.* (1995) 33 Cal.App.4th 8, 17.) Moreover, the point is not well taken. The provision Kriletich quotes, permits a state driver's license renewal application to serve as an application for voter registration with respect to federal elections. (42 U.S.C. § 1973gg-3, subd. (a)(1).) This does not necessarily mean, however, that the application will be accepted and the driver registered to vote without the required residence address. Unlike the registrar of voters, the Department of Motor Vehicles needs only a mailing address.