

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-051714

11/17/2023

HONORABLE BRADLEY ASTROWSKY

CLERK OF THE COURT
C. Lockhart
Deputy

WE THE PEOPLE ARIZONA ALLIANCE

BRYAN JAMES BLEHM

v.

RUNBECK ELECTION SERVICES INC, et al.

ANDREW T FOX

JOSEPH EUGENE LA RUE
JUDGE ASTROWSKY

RULING RE: DEFENDANTS' MOTIONS TO DISMISS

On May 8, 2023, Plaintiff filed a Verified Complaint for Statutory Special Action to Secure Access to Public Video Records from Defendant(s). Plaintiff requested to be provided any and all video recorded between November 8, 2022, through November 15, 2022, of all loading dock locations (exterior and interior views) which clearly show the delivery and/or pick up of any items. Specifically, Plaintiff is interested in video that depicts the loading and unloading of Maricopa County ballot affidavit packets and other election related materials at Defendant Runbeck Election Services ("Runbeck") warehouse facility. On June 9, 2023, Runbeck filed a Motion to Dismiss arguing that it is a private corporation not subject to public records law, and the requested videos are not public records. Also on June 9, 2023, all Maricopa County Defendants ("Maricopa County") filed a Motion to Dismiss that echoes Runbeck's arguments. The Court considered those motions along with Plaintiff's Consolidated Response, Runbeck's Reply, Maricopa County's Reply, and the oral arguments of counsel made on September 20, 2023. For the reasons stated herein, the Court grants Defendants' Motion to Dismiss.

The present matter pertains to the 2022 general election and votes cast in Maricopa County concerning same. Runbeck is a private company contracted by Maricopa County to perform

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-051714

11/17/2023

certain functions concerning ballots for the election. Plaintiff alleges in its Complaint that Maricopa County used Runbeck’s private facility as an extension of the Maricopa County Tabulation Center as that is where Maricopa County had Runbeck count the election day affidavit envelopes received. Complaint at ¶ 6. In addition, Plaintiff contends Runbeck assisted in the collection, inspection, counting, supervision, administration, and retention of mail-in, drop box, and provisional ballots from the 2022 general election. *Id.* at ¶ 7.

On April 8, 2023, Plaintiff sent a public records request to Runbeck. *Id.* at ¶ 15. On April 28, 2023, Runbeck denied Plaintiff’s request. *Id.* at ¶ 17. On April 30, 2023, Plaintiff made the same request of Maricopa County, which was denied on May 2, 2023. *Id.* at ¶¶ 18-19. Pursuant to A.R.S. § 39-121.01(D)(1), any person may request to examine or be furnished copies of any public record. Plaintiff, an Arizona non-profit corporation, is a “person” for purposes of this statute, as the term “person” includes a corporation. A.R.S. §1-215(29). The denial of a public records request may be appealed through a special action in the superior court, pursuant to the rules of procedure for special actions, against the public officer or public body that denied the request. A.R.S. § 39-121.02(A). It is proper to file a special action in order to request the Superior Court to determine whether the defendant has failed to perform a duty required by law as to which it has no discretion. Rule 3, Ariz. Special Action. R.P. Such a special action must be brought in the Superior Court in the county in which the body or officer should have determined the matter to be reviewed. *Id.* Rule 4(b). Here, that would be Maricopa County. Accordingly, Plaintiff had standing to make a public records request and has standing to file this special action.

Both Runbeck and Maricopa County request dismissal of Plaintiff’s special action because they state Runbeck is not subject to Arizona’s Public Records Law (“PRL”), and, even if it were, the videos requested are not public records. Therefore, both pending motions to dismiss are premised upon Rule 12(b)(6), Ariz.R.Civ.P., i.e., that Plaintiff failed to state a claim upon which relief may be granted. The narrow question presented by a motion to dismiss for failure to state a claim is whether facts alleged in a complaint are sufficient “to warrant allowing the [plaintiff] to attempt to prove [its] case.” *Coleman v. City of Mesa*, 230 Ariz. 352, 363 (2012). Dismissal is permitted only when a “plaintiff” would not be entitled to relief under any interpretation of the facts susceptible of proof.” *Fid. Sec. Life Ins. Co. v. State Dep’t of Ins.*, 191 Ariz. 222, 224, ¶4 (1998). Moreover, a motion to dismiss requires a court to accept all material facts alleged by the nonmoving party as true. *Acker v. CSO Chevira*, 188 Ariz. 252, 255 (App. 1997) (citing *Lakin Cattle Co. v. Engelthaler*, 101 Ariz. 282, 284 (1966)). Typically, the Court may only consider evidence that is extrinsic to the pleadings, but extraneous matters that are central to the Complaint and public records regarding matters referenced in the Complaint are not “outside of the pleadings,” and may be relied upon by the Court. *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 63-64 (App. 2010); see also *ELM Retirement Center, LP v. Callaway*, Docket Code 926

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-051714

11/17/2023

226 Ariz. 287, 289, ¶ 6 (App. 2010). If a complaint incorrectly summarizes or characterizes a document properly considered by the Court, the document is controlling. See *Ott v. Home Sav. & Loan Ass'n*, 265 F.2d 643, 646 n.1 (9th Cir. 1958); *Imported Liquors Co. v. Los Angeles Liquor Co.*, 152 F.2d 549, 552 (9th Cir. 1945); *Alexander v. De Witt*, 141 F.2d 573, 576 (9th Cir. 1944). If after its review of all allowable materials, the Court finds that Plaintiff raised a triable issue of fact, it must conduct a bench trial. Rule 4(f), Ariz. Special Action R.P. If no triable issue of fact is raised, the Court may rule without taking evidence at a trial. Here, there is no triable issue of fact as a determination of whether Runbeck is subject to Arizona's PRL is dependent upon its contracted role with Maricopa County; and that role is defined within the public record.

Arizona's PRL imposes a duty upon all "officers" and "public bodies" to preserve and maintain their public records. A.R.S. § 39-121.01(C). An "officer" is "any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." A.R.S. § 39-121.01(A)(1). A "public body" is "this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state." A.R.S. § 39-121.01(A)(2). It is clear and undisputed that Runbeck is neither an officer nor a public body as Runbeck is a private corporation. Runbeck, in no way, qualifies as a public body or officer as those terms are defined in Arizona's PRL. However, Runbeck may still be subject to Arizona's PRL under certain conditions related to its relationship with the Maricopa County Defendants, who are undisputed officers or public bodies.

Before the November 2022 general election, Maricopa County and Runbeck entered a contract under which Runbeck agreed to provide various election services to Maricopa County. See Runbeck's Motion, Ex. 1 Declaration of D. Andrew Gaona (Contract for Printing and Distribution of Election Ballots) ("Contract"). The parties expressly agreed that Runbeck would provide services to Maricopa County under the Contract only as an independent contractor—not as an employee, agent, partnership, or joint venture between Maricopa County and Runbeck. See Contract § 8.29.1. The Contract specifies the election services that Runbeck provides to Maricopa County. Runbeck prints all the ballots. *Id.* at Ex. B (Scope of Work) § 2.1.1. The printed ballots contain all the ballot pages that Maricopa County approves. *Id.* § 2.1.10. Runbeck also prints and assembles all the outgoing early ballot packets. *Id.* §§ 2.1.13, 2.11, 2.12, 2.14; see also Maricopa County's 2022 Elections Plan ("2022 Elections Plan") § 6.3.4]3 An outgoing early ballot packet includes "a carrier envelope, the early ballot, an early ballot affidavit envelope, and voter instructions." See Maricopa County's 2022 Elections Plan § 6.3.4. Runbeck delivers the outgoing

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-051714

11/17/2023

early ballot packets to the United States Postal Service for mailing to voters. Contract at Ex. B §§ 2.14.4, 2.14.5.

After voters mail back their early ballot packets, Maricopa County retrieves the early ballot packets from the United States Postal Service and delivers them to Runbeck. *Id.* § 2.15.2; see also 2022 Elections Plan § 6.3.7. Runbeck then “conducts an inbound scan of the affidavit envelopes to capture a digital binary image of the voter signatures” and “places those images into an automated batch system” for Maricopa County to review. See 2022 Elections Plan § 6.3.7; see also Contract at Ex. B § 2.15.3. Maricopa County, “using the electronic file of scanned signatures,” conducts its signature verification process by comparing a voter’s signature to the signatures in the voter’s registration record. See Contract at Ex. B § 2.15.4; see also 2022 Elections Plan § 6.3.8 (describing Maricopa County’s “multi-level signature verification process”); A.R.S. § 16-550(A) (requiring Maricopa County to verify voters’ signatures). While Maricopa County verifies voters’ signatures, Runbeck “stores the unopened ballot packets in [its] facility in a secure, water and fireproof vault.” 2022 Elections Plan § 6.3.7. This “eliminate[s] the need to handle the actual physical ballot packet multiple times.” *Id.*

When Maricopa County completes its signature verification process, it gives a report to Runbeck. *Id.* § 6.3.8; see also Contract at Ex. B § 2.15.4. The report assigns each inbound early ballot packet a “disposition code” that Maricopa County establishes (e.g., Good Signature, No Signature, Questionable Signature, Need Packet, etc.). See Contract at Ex. B § 2.15.4; see also 2022 Elections Plan § 6.3.8. Using that report, Runbeck “sort[s]” the early ballot packets. Contract at Ex. B § 2.15.4. It does so by “creat[ing] smaller physical batches of the packets” based on the disposition codes that Maricopa County provides. 2022 Elections Plan § 6.3.8. Then, Maricopa County transports the batches of the early ballot packets to its facility. Contract at Ex. B § 2.15.4. Runbeck “never open[s] any of the [ballot affidavit] envelopes.” Complaint at Ex. B. “Maricopa County delivers them and picks them up sealed.” *Id.*

Once the early ballot packets arrive at Maricopa County’s facility, “the batched trays are appropriately distributed based on the dispositions made during signature verification.” 2022 Elections Plan § 6.3.8. “The affidavit envelopes deemed to have verified good signatures will be triaged to the bipartisan ballot processing boards.” *Id.* The other affidavit envelopes “will remain sealed and triaged . . . for research and curing.” *Id.* Maricopa County’s bipartisan ballot processing boards open—for the first time—the inbound early ballot packets, separate the early ballots from the early ballot affidavit envelopes, and transfer the early ballots to Maricopa County’s Ballot Tabulation Center to be counted. *Id.* § 6.3.9. After Maricopa County counts the votes, Maricopa County reports its election results.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-051714

11/17/2023

In summary, the Contract, the 2022 Elections Plan, and Exhibit B to the Complaint establish that Runbeck prints, assembles, and delivers outgoing early ballot packets and scans, stores, and sorts inbound early ballot packets. Nothing exists to suggest Runbeck does any of the following: uses artificial intelligence or any other means to verify voters' signatures; supervises Maricopa County in any of Maricopa County's election processes; administers the election; inspects any ballots; or counts any votes. Plaintiff's unsupported conclusions and desire that something be true does not make it true. The clear and unambiguous public record disproves Plaintiff's argument that Runbeck's contracted work performed in the 2022 election subjects to Arizona's PRL.

Plaintiff relies heavily upon *Cyber Ninjas, Inc. v. Hannah*, 2021 WL 5183944 (App. 2021), in an effort to demonstrate that Runbeck, like Cyber Ninjas, Inc., is subject to Arizona's PRL. The present case is not similar to *Cyber Ninjas*. In that case, the State "contracted with Cyber Ninjas to conduct an audit of the nearly 2.1 million ballots cast in Maricopa County." *Fann v. Kemp*, 253 Ariz. 537, 540 ¶ 2 (2022). The audit would "'attempt to validate every area of the voting process to ensure the integrity of the vote,' including 'auditing the registration and votes cast, the vote counts and tallies, the electronic voting system, as well as auditing the reported results.'" *Fann*, 253 Ariz. at 540 ¶ 2. At the end, "Cyber Ninjas was to draft a report detailing its findings." *Id.* "The report was also to include 'recommendations on how to prevent any detected weaknesses from being a problem in future elections.'" *Id.* Ultimately, Cyber Ninjas, Inc. was subject to Arizona's PRL because the Senate contracted with Cyber Ninjas to perform "an important legislative function" and in fact "entirely outsourced" the performance of that function to Cyber Ninjas. *Id.* *4 ¶ 19. In addition, Cyber Ninjas, "as a contractor and agent of the Senate," was in "sole possession of audit-related public records because of its contract with the Senate." *Id.* at *3 ¶¶ 15, 17.

Thus, under Cyber Ninjas, a narrow exception subjects private corporations to the public records law as "custodians." This exception applies only in the limited circumstance when (a) a public entity contracts with a private corporation to perform an important governmental function and "entirely outsource[s]" the performance of that function to the corporation and (b) the corporation is in "sole possession" of public records "because of its contract" with the public entity. *Id.* Here, Runbeck did not perform an important governmental function. It accepted ballots and maintained them. It did not count ballots, verify signatures, or serve any other substantive function in determining the validity of a ballot or the counting of same. Furthermore, it is not in sole possession of any public documents – as will be more detailed below.

Plaintiff cannot establish that Runbeck possesses security camera footage because of the Contract. The Contract does not require Runbeck to install or maintain any security-camera system

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-051714

11/17/2023

or record or retain any security-camera footage. While the Contract states that Runbeck must process the early ballot packets in a secure and access restricted facility, nothing in the Contract directs Runbeck how to secure its facility or requires that Runbeck video-record any activities at its facility. The parties knew how to negotiate specific security methods. Those same provisions authorize Maricopa County to “provide a security guard starting when the early ballots are delivered and may last up to a week after Election Day.” Runbeck must “accommodate” the security guard and allow the security guard to access Runbeck’s facility for “24/7 shifts.” But the Contract simply says nothing about security cameras. Plaintiff also alleges no facts tying Runbeck’s security-camera system and security camera footage to “the furtherance of [any of Maricopa County’s] duties.” *Griffis v. Pinal County*, 215 Ariz. 1, 4 ¶ 10 (2007). Plaintiff cites no statute requiring Maricopa County—or any independent contractor like Runbeck—to video-record “any item(s) being delivered and/or picked up” from Runbeck’s facility. [Compl. at Ex. C] As a result, Runbeck’s security-camera system and security-camera footage does not further any of Maricopa County’s duties.

IT IS ORDERED dismissing Plaintiff’s Complaint, with prejudice, as it fails to state a claim upon which relief can be granted.

IT IS FURTHER ORDERED as Defendants are the prevailing party, they are entitled to an award of their allowable costs. Defendants shall submit a Statement of Costs no later than **ten (10) business days** from the entry of this Order along with a draft of a final form of judgment, consistent with Rule 54(c), Ariz.R.Civ.P. Plaintiff shall file any Objection to the Statement of Costs and draft final form of judgment no later than **ten (10) business days** after the receipt of same from Defendants.

IT IS FURTHER ORDERED no party shall receive an award of attorneys’ fees as they are not required or warranted in this action.