

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

ROB SCHAAF, et al.,)	
)	
Plaintiffs,)	Cause No. 15AC-CC00239
)	
vs.)	
)	
JEREMIAH W. NIXON, in his official)	
capacity as Governor of the State of)	
Missouri, et al.,)	
)	
Defendants.)	

**DEFENDANT’S SUGGESTIONS IN SUPPORT OF ITS
MOTION FOR TRANSFER OF VENUE BASED ON PRETENSIVE JOINDER**

Defendant Regional Convention and Sports Complex Authority (“RSA”)¹, for its Suggestions in Support of Its Motion for Transfer of Venue Based on Pretensive Joinder, states as follows:

Plaintiffs named Governor Jeremiah W. Nixon (“Governor”) as a Defendant in this action without stating any claim against him or seeking any relief from him. He was pretensively joined only to establish venue in the Circuit Court of Cole County. The only remaining Defendant is the RSA, which is not a resident of Cole County. Venue is therefore improper in the Circuit Court of Cole County. The proper venue for this case is in the Circuit Court of St. Louis City, where the RSA resides.

I. Plaintiffs Have Not Stated A Claim Against the Governor

Every cause of action alleged in the Amended Petition is based on powers and limitations set out in the RSA Statutes.² The Governor has no authority under the RSA Statutes to finance, develop, or construct a stadium complex. Therefore, the Governor cannot be liable for any

¹ RSA has filed a special limited appearance for the purpose of challenging venue.

² All references herein to the “RSA Statutes” are to MO. REV. STAT. 67.650-67.658.

action to finance, develop, or construct a stadium complex under the RSA Statutes. There is no relief requested that the Governor could provide. Every action that Plaintiffs seek to enjoin the Governor from performing is an action that Plaintiffs fail to allege is an action that the Governor is empowered to take pursuant to the RSA Statutes. There is no request to enjoin the Governor from performing any action that he could perform. Therefore, the Governor is not a proper party to this lawsuit.

A. Standard For Dismissal

A Petition that does not allege unlawful action by a defendant does not state a cause of action against the defendant. *See Duvall v. Lawrence*, 86 S.W.3d 74, 84 (Mo. App. E.D. 2002) (dismissing claim against prosecutor where “Plaintiff does not allege that [the prosecutor] personally initiated the actions against Plaintiff or that he represented [other defendants] in doing so.”).

B. The Amended Petition States No Cause Of Action Against The Governor

Only Counts I-IV purport to make allegations against the Governor; Count V is exclusively “v. Defendant RCSCA.” None of the four counts that attempt to implicate the Governor succeed in stating a claim against him. In the end, Plaintiffs either include the Governor in claims without ever alleging that the Governor has the authority to take the actions that are challenged, or allege facts about the Governor that are not actionable in any way. Either way, there is no cause of action against the Governor.

1. The RSA Is An Independent, Statutorily-Created Entity That Is Governed By A Board Of Commissioners

Plaintiffs' allegations make clear that they believe that the RSA's actions are controlled by the Governor.³ The RSA, however, is a statutorily-created entity with its own board of commissioners governing its actions. MO. REV. STAT. § 67.652. It is one of many such entities that are governed by their statutory language and their boards of commissioners. *See, e.g.*, MO. REV. STAT. § 70.370 – 70.441 (Bi-State Development Agency of the Missouri-Illinois Metropolitan District, providing public transit services in the City); MO. REV. STAT. § 99.300-99.231 (Land Clearance for Redevelopment Agency, possessing powers to assist in St. Louis City developments, but still independently controlled); MO. REV. STAT. § 349.010-349.105 (Industrial Development Authority of the City of St. Louis, Missouri (“IDA”), possessing powers relating to development); Chapter 68 MO. REV. STAT. (Port Authority of the City of St. Louis (“Port Authority”), possessing powers relating to development); MO. REV. STAT. § 92.700-92.920 (Land Reutilization Authority of St. Louis, possessing statutory powers related to property and development); MO. REV. STAT. § 99.010-99.231 (St. Louis Housing Authority (“Housing Authority”)).

These statutorily-created bodies are distinct legal entities controlled by their empowering statutes. *See Waris v. Carnes*, 760 S.W.2d 573, 575 (Mo. App. W.D. 1988) (finding that “[t]he [Jackson County Sports Authority] was a distinct legal entity established to perform the public purpose designated by the legislature.”); *Champ v. Poelker*, 755 S.W.2d 383, 390 (Mo. App. E.D. 1988) (“The IDA is a distinct legal entity . . .”). The same is true of the Port Authority entities. *State ex rel. Wagner v. St. Louis Cnty. Port Auth.*, 604 S.W.2d 592, 604 (Mo. banc

³ Throughout this Motion, the RSA refers to Plaintiffs' allegations. The RSA is not yet obligated to respond to the Amended Petition. The RSA does not admit any of Plaintiffs' allegations in the Amended Petition by mentioning them here in the context of pretensive joinder/venue.

1980) (finding that the Port Authority is not subject to constitutional requirements for voter approval of indebtedness). The Housing Authority is an independent municipal corporation, a “creature of state statute,” that is not “a department or agency of its city government.” *State ex rel. City of St. Louis v. Ryan*, 776 S.W.2d 13, 15-16 (Mo. banc 1989).

Like these entities, the RSA is a distinct legal entity. It is empowered by the RSA Statutes. It is governed by its board of commissioners. There is no legal authority that the Governor controls the RSA. Allegations that the RSA’s actions are the Governor’s actions are therefore factually and legally incorrect.

2. The Governor Cannot Violate Financing Structures Set Out In The RSA Statutes Concerning Stadium Complex Construction In St. Louis

The Governor has no stadium complex development authority under the RSA Statutes. Therefore, Plaintiffs fail to state a cause of action against the Governor in Counts I and II. Both Counts allege that the RSA and the Governor seek to issue, refund, or refinance bonds in violation of the RSA Statutes. Yet Plaintiffs fail to allege that the Governor has the authority to issue, refund, or refinance bonds. In fact, Plaintiffs allege the opposite when they allege that the RSA Statutes exclusively grant the RSA authority to finance stadium complex construction. *Amended Petition*, ¶¶ 60, 70. The Governor has no such authority. Therefore, he cannot violate the RSA Statutes in the manner claimed in Counts I and II. Plaintiffs have stated no claim against the Governor and Plaintiffs’ joinder of the Governor is, therefore, pretensive.

3. Plaintiffs Do Not Allege That The Governor Is Subject To An “Adjacency” Requirement

In Count III, Plaintiffs allege that the RSA Statutes “limit[] the authority of Defendant RCSCA to finance stadiums, requiring that ‘any stadium, complex or facility newly constructed by the authority . . . shall be located adjacent to an existing convention facility.’” *Amended*

Petition, ¶ 82. Again, the Governor has no stadium complex development authority under the RSA Statutes. Plaintiffs have not alleged that the Governor has such authority, and it is only a portion of that authority that is limited by an adjacency requirement. Count III therefore does not state a cause of action against the Governor.

4. The RSA Receives Appropriations Pursuant To The RSA Statutes, Not The Governor

In Count IV, Plaintiffs allege that the State appropriated funds to the RSA – not the Governor – for the “Edward Jones Dome project” only, but that the Defendants have both used funds to pay for planning a new stadium complex. *Id.*, ¶ 99, 100. This contradicts Plaintiffs’ own allegation that the State appropriated money to the RSA and their allegation that the RSA, and only the RSA, has expended the funds appropriated to it. *Amended Petition*, ¶¶ 30, 41, 43, 99. The basis of Plaintiffs’ Count IV, and of the allegations against the Governor, is that the Governor is expending funds in support of a stadium complex. However, the only allegation in the Amended Petition is that the RSA – not the Governor – is appropriated funds to expend, and there is no express allegation that the Governor is somehow writing checks out of the RSA’s appropriations. Plaintiffs have not alleged that the Governor is expending the RSA’s funds in any way or that he has the authority to do so. Therefore, Plaintiffs do not state a cause of action against the Governor in Count IV.

5. Plaintiffs Fail To Allege Any Statute Or Law On Which To State A Claim For Other Actions Alleged To Have Been Taken By The Governor

In addition to attempting to allege that the Governor is a proper party with respect to actions related to the RSA Statutes, Plaintiffs complain of various other actions taken by the Governor. Plaintiffs allege, for example, that the Governor appointed a two-person task force, “direct[ed]” and “pledged” that the Department of Economic Development would “outline[.]” a

“plan” for funding, spent money to communicate with the NFL, and made “public statements” to a radio reporter. *Amended Petition*, ¶¶ 27, 35, 48-50, 61, 62, 73, 74. Plaintiffs do not allege a statutory provision, and there is no such statute, that prevents the Governor from encouraging new development in the State. These allegations, on their face, make no allegation that the Governor has taken any action that should make him a party to this lawsuit or that state a claim against him. Further, Plaintiffs’ position is to hold the Governor legally responsible for all action of an independent entity that he publicly supports. Despite Plaintiffs’ rhetoric – that the Governor is “actively leading” a stadium effort, that he has “set a deadline” to finalize financing, that litigation “has not slowed his efforts” – Plaintiffs still cannot allege that the Governor is expending funds or acting in any way violative of any law, let alone the RSA Statutes. Plaintiffs have failed to cite any law that the Governor violates when he takes the actions that Plaintiffs allege – that he “appointed a two-person task force,” that he “set forth specific criteria,” that he communicates with the NFL – to publicly support a project. They cannot do so because there is no such law, and for that reason, there is no cause of action stated against the Governor.

6. The Missouri Constitution Does Not Make The Governor A Proper Party For Any Alleged Breach Of Law In The State

Finally, Plaintiffs repeatedly allege in their Amended Petition that the Missouri Constitution states that the Governor “shall take care that the laws are distributed and faithfully executed[.]” *Amended Petition*, ¶¶ 7, 66, 78, 94. Plaintiffs apparently believe that this makes the Governor a proper party for this suit. Reading between the lines, Plaintiffs are alleging that this constitutional provision compels the Governor to be a defendant in any action where the RSA is alleged to have violated the law. Of course, the Governor’s joinder under this tortured interpretation would not only be limited to alleged violations of the RSA Statutes; he could also be made a party to any action in which a Missouri law is allegedly violated. Plaintiffs believe

that the Governor could be made a party to every civil and criminal action involving a Missouri law, because the fact that a law was violated means that he had failed in his duty to “take care that the laws are distributed and faithfully executed.” This is an illogical and impossible conclusion. Even where the Governor has publicly supported a State agency’s allegedly unconstitutional enforcement of a statute, the Governor’s constitutional duty to enforce laws of the State does not make him a proper party to the action. *Lakeside Roofing Co. v. Nixon*, 2011 WL 1465593 (E.D.Mo. April 18, 2011) (granting Governor’s motion for judgment on the pleadings in suit challenging constitutionality of a statute and agency’s enforcement).

Plaintiffs have not, and cannot, cite any authority that makes the Governor a proper party for the actions of a statutorily-created entity. The RSA is an independent entity that is governed by its own board of commissioners. MO. REV. STAT. § 67.652.

C. Plaintiffs Seek No Relief From The Governor

Further, Plaintiffs do not seek any relief that may be satisfied by the Governor. The relief sought is often against the “Defendants,” but the Governor cannot provide the requested relief. Every manner of relief requested is to restrict the Governor and the RSA from spending funds to finance a new stadium complex. Plaintiffs repeatedly allege in their Amended Petition, however, that only the RSA is empowered to finance and construct a stadium complex under the RSA Statutes, and any limitation placed upon such financing and construction limits only the RSA.

In Counts I and II, Plaintiffs seeks to prohibit “Defendants” from spending any funds on a stadium complex financing plan that “would increase the amount of principal and debt owed under the current bonds” or would extend bond payments beyond the year 2041, allegedly in violation of the RSA Statutes. *Amended Petition*, pp.13-16. Plaintiffs allege, however, that only the RSA is empowered and limited in issuing bonds for stadium complex construction, and only

the RSA is empowered and limited in increasing debt for stadium complex construction. *Id.*, ¶ 60, 70. Plaintiffs also allege that the RSA, and not the Governor, issued the existing bonds. *Id.*, ¶ 71.

In Count III, Plaintiffs seek a prohibition upon “Defendants” from spending funds for building a stadium complex that they allege is not in a location compliant with the RSA Statutes’ “adjacency” requirement. *Id.*, pp. 19-20. Plaintiffs also allege that the “adjacency” provision of the RSA Statutes “limits the authority of Defendant RCSCA to finance stadiums, requiring that” new stadium complexes be constructed adjacent to an existing convention facility. *Id.*, ¶ 82 (emphasis added). According to the Plaintiffs themselves, the Governor has no power to construct a stadium under the RSA Statutes.

Count IV’s relief requested against the Governor is duplicative of the relief sought in Counts I-III. In Count IV, Plaintiffs seek a prohibition upon the Governor from spending money for planning or building a stadium complex “as described in Counts I-III of this Petition.” *Id.*, p. 21. Plaintiffs admit that the legislature appropriated funds is to the RSA, and not the Governor, and take issue with how the money appropriated to the RSA is spent. *Id.*, ¶ 99. Plaintiffs point to no provision of the RSA Statutes that authorizes the Governor to spend the RSA funds, and no action taken by the Governor to spend the RSA’s funds. The relief requested is duplicative of the other relief requested in Counts I-III, and it also seeks to prohibit the Governor from doing something that he has not done and that Plaintiffs allege he is not empowered to do or restricted from doing.

Finally, Plaintiffs have piled on additional relief requested at the end of their Amended Petition in a “Prayer for Relief” section. Plaintiffs seek prohibitions against, again, “Defendants” from entering into a variety of agreements that would further stadium complex financing. *Id.*,

pp. 23-24. Plaintiffs also repeat their prior requests for relief. The Governor is included in only the most pretensive and perfunctory manner. Plaintiffs have alleged repeatedly in their Amended Petition that the RSA is charged with carrying out financing, development and construction of stadium complexes pursuant to the RSA Statutes, and that likewise the RSA alone is limited by those statutes.

In sum, Plaintiffs seek no relief from the Governor. As a token gesture, Plaintiffs often refer to “Defendants” in the plural, but the relief requested, given the nature of the RSA Statutes, is directed against the RSA alone. Therefore, Plaintiffs state no claim against the Governor.

II. When A Defendant Is Pretensively Joined, Transfer To An Appropriate Venue Is Warranted

The Amended Petition states no cause of action against the Governor. The residency of the Governor, however, is the only basis upon which this action has established venue in the Circuit Court of Cole County. *Amended Petition*, ¶ 4. The joinder of the Governor is therefore pretensive and this case must be transferred to an appropriate venue.

Pretensive joinder exists where (1) the pretensive nature of the joinder appears on the face of the pleadings; or (2) there is in fact no cause of action against the joined defendant. *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 824 (Mo. banc 1994). The test for pretensive joinder has also been stated as:

Venue is pretensive if (1) the petition on its face fails to state a claim against the [joined] defendant; or (2) the petition does state a cause of action against the [joined] defendant, but the record, pleadings and facts presented in support of a motion asserting pretensive joinder establish that there is, in fact, no cause of action against the [joined] defendant and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the [joined] defendant.

Id. at 824-25 (quoting *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525, 527 (Mo. banc 1994)).

As explained above, the Amended Petition “on its face fails to state a claim against” the

Governor. *See id.* His joinder therefore satisfies the pretensive joinder test and he has been pretensively joined.

Further, even if there are allegations that facially allege a cause of action against the Governor, those allegations are transparently included for the purpose of manipulating venue. Plaintiffs' Amended Petition alleges in its facts section and in each count that the RSA alone is granted authority of stadium complex development, and that that authority is limited. *Amended Petition*, ¶¶ 8-22, 60, 70-72, 82, 99, 105. The Amended Petition makes certain allegations about the Governor that are limited to his public support of the stadium complex development, including public announcements about progress. *Amended Petition*, ¶¶ 27-29, 31-37, 48-54, 56. Other than these allegations that the RSA has exclusive authority over stadium complex development and that the Governor supports stadium complex development, Plaintiffs allege that "Defendants" have violated the laws. What is clear from these allegations is that: (1) Plaintiffs believe that the Governor has no duties relating to stadium complex development under the RSA Statutes; and (2) Plaintiffs have brought causes of action alleging violations of the RSA Statutes; but (3) Plaintiffs have named the Governor as a party despite the fact that he has no duties relating to stadium complex development under the RSA Statutes. What is also clear is that there is no cause of action against the Governor and that he is joined to establish venue in Cole County.

This is even clearer when comparing the original Petition to the Amended Petition. In the original Petition, Plaintiffs made two cursory allegations exclusively against the Governor (that he is the Governor and that he resides in Cole County), and nearly every statement thereafter named "Defendants" for violations of the RSA Statutes. *See Petition*. There were five causes of action alleged against the same Defendants for violations of the RSA Statutes. *Id.* After a

motion to dismiss from the Governor noting the lack of substantive allegations against the Governor, Plaintiffs immediately amended their Petition. The Amended Petition added the allegations, set out above, about the Governor's public support of stadium complex development. The Amended Petition also added citations to the Missouri Constitution provision that the Governor is tasked with law enforcement. *Amended Petition*, ¶¶ 7, 66, 78, 94. The Governor was also singled out in the requests for relief, although the relief requested in the Petition and Amended Petition are ultimately the same. *See, e.g., Petition*, p. 8 (seeking prohibition against "Defendants" from "entering agreements" related to financing); *Amended Petition*, pp. 13-14 (seeking declaration that the RSA Statutes prohibit the financing plans "presented in the claims of [RSA] in its lawsuit against the City of St. Louis and in the financing plan presented by DED at the direction of [the Governor]" and prohibiting Defendants from expending money to plan or build a new stadium complex). These additional allegations do not amount to a substantive cause of action against the Governor. No matter how many times the Plaintiffs name the Governor in the Amended Petition, they still cannot allege that he has violated the RSA Statutes that do not grant him power to develop a stadium complex, and they have not made any allegation about any other law that his public support of stadium complex development violates. There is no cause of action against the Governor and he has been joined to this lawsuit solely to establish venue in Cole County.

There is no basis to establish venue in the Circuit Court of Cole County. After dismissal of a pretensively-joined defendant, a Court must order a case transferred to the proper venue. *See Shelton*, 879 S.W.2d at 350 (ordering a writ of mandamus be issued transferring the case to a proper venue following dismissal of improper defendant). MO. REV. STAT. 476.410 provides for a venue transfer: "The division of a circuit court in which a case is filed laying venue in the

wrong division or wrong circuit shall transfer case to any division or circuit in which it could have been brought.” The language is mandatory: where the venue is improper, the case must be transferred to a court where the case could have been brought. *See also State ex rel. Kyger v. Koehr*, 831 S.W.2d 953, 957 (Mo. App. E.D. 1992) (holding that, following dismissal of the defendant upon which venue was determined, “[t]he statute requires that the trial court transfer the case to a court of proper venue[.]”).

III. Venue Should Be Transferred To The Circuit Court Of The City Of St. Louis

The proper venue for this case is in the Circuit Court of the City of St. Louis. Venue is determined solely by statute. *State ex rel. Health System v. Neill*, 121 S.W.3d 528, 529 (Mo. banc 2003). The RSA Statutes, section 67.650 *et seq.*, do not provide a venue for service of a suit against the RSA. The RSA is an “authority” established by statute. *See MO. REV. STAT. 67.650*. There is no special venue statute for actions against a statutorily-created “authority.”

Venue for this action therefore falls under the standard venue statute. *MO. REV. STAT. 508.010(2)* states:

In all actions in which there is no count alleging a tort, venue shall be determined as follows:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county[.]

The RSA has no presence in Cole County. The RSA has no office in Cole County. The RSA has no employees in Cole County. The RSA’s office and employees are located in St. Louis City. Plaintiffs admitted in their Petition that the RSA resides in St. Louis City, where the Plaintiffs sought service upon the RSA’s agent. *See Petition*, p. 1 (seeking service of the RSA by its Executive Director at its office in St. Louis, Missouri). The proper venue for transfer

following dismissal of the Governor, therefore, is the Circuit Court of the City of St. Louis, where the RSA is located.

IV. Conclusion

The Plaintiffs have not alleged any cause of action against the Governor. The Plaintiffs do not seek relief from the Governor. The Amended Petition alleges that only the RSA has powers and limitations under the statutes upon which the causes of action are based. The Governor should be dismissed. Following his dismissal, the RSA will be the only remaining Defendant. The RSA resides in St. Louis City.

WHEREFORE, Defendant Regional Convention and Sports Complex Authority respectfully requests that this Court grant its Motion for Transfer of Venue and

- (1) Dismiss the Governor and transfer this matter to the Circuit Court of the City of St. Louis pursuant to section 476.410 RSMo.; or
- (2) Find that the Governor is pretensively joined and transfer this matter to the Circuit Court of the City of St. Louis pursuant to section 476.410 RSMo.;
- (3) and grant any further relief the Court deems necessary and appropriate.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: /s/ Robert D. Blitz
Robert D. Blitz #24387
Marc. H. Ellinger, #40828
Christopher O. Bauman, #52480
120 South Central Ave., Suite 1500
St. Louis, Missouri 63105
314-863-1500
314-863-1877 (facsimile)
rblitz@bbdlc.com
mellinger@bbdlc.com
cbauman@bbdlc.com

Respectfully submitted,

THOMPSON COBURN LLP

By: /s/ Lawrence C. Friedman
Lawrence C. Friedman #34382
Michael F. Lause #24811
Shaun C. Broeker #65804
One US Plaza, Suite 2600
St. Louis, Missouri 63101
314-552-6000
314-552-7000 (facsimile)
lfriedman@thompsoncoburn.com
mlause@thompsoncoburn.com
sbroeker@thompsoncoburn.com

Counsel for the Defendant Regional Convention and Sports Complex Authority

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June 2015, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

Jay Barnes
Barnes & Associates
219 East Dunklin St., Ste. A
Jefferson City, MO 65101
(573) 634-8884
(573) 635-6291 (facsimile)
Jaybarnes5@zoho.com
Attorney for Plaintiffs

J. Andrew Hirth
Office of the Attorney General of the State of Missouri
P.O. Box 899
Jefferson City, MO 65102
(573) 751-0818
(573) 751-0774 (facsimile)
andy.hirth@ago.mo.gov
Attorney for Defendant Nixon

/s/ Robert D. Blitz