

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

MICHAEL JOSEPH, and
JEWISH LEADERSHIP COALITION,

GENERAL JURISDICTION DIVISION

CASE NO. 2015-012209 CA 01

Plaintiffs

vs.

PHYLLIS SMITH, PAMELA L. LATIMORE, in
her official capacity as the North Miami Beach
City Clerk and in her capacity as a member of the
North Miami Beach municipal Canvassing Board,
JOSE J. SMITH in his capacity as a member of the
North Miami Beach municipal Canvassing Board,
and ANA M. GARCIA in her capacity as a
member of the North Miami Beach municipal
Canvassing Board,

Defendants.

**DEFENDANT, PHYLLIS SMITH'S, MOTION TO DISMISS, AND ANSWER
AND AFFIRMATIVE DEFENSES TO FIRST AMENDED COMPLAINT**

MOTION TO DISMISS

Defendant, PHYLLIS SMITH, by and through her undersigned counsel, hereby files this, her Motion to Dismiss the First Amended Complaint, and states that the First Amended Complaint should be dismissed for failure to state a cause of action and failure to join an indispensable party, as set forth below.

FIRST GROUND

The First Amended Complaint fails to state a cause of action for declaratory relief as it does not plead the necessary elements for granting such relief.

SECOND GROUND

The First Amended Complaint fails to state a cause of action for injunctive relief as it does not plead the necessary elements required for an injunction. In addition to its requests for declaratory relief finding the alleged subject absentee ballots void, the First Amended Complaint further requests a Court order: "...ordering the North Miami Beach municipal Canvassing Board and

Pamela L. Latimore to delete all the absentee ballot votes from precincts 123 and 127 in the North Miami Beach Run-off Election and submit a new vote total reflecting the adjusted numbers and declaring [Plaintiff] Michael Joseph as the proper winner of the Run-off Election and ordering the [City] clerk to certify Michael Joseph as the new councilperson for Group 3 in North Miami Beach, Florida”. Despite such allegations, the First Amended Complaint fails to state prima facie elements needed in order to support a cause of action for injunctive relief.

THIRD GROUND

The First Amended Complaint fails to join Penelope Townsley, Miami-Dade County Supervisor of Elections, as an indispensable party Defendant in this action. Although the requested relief is directed only to Defendants Phyllis Smith and the Canvassing Board, this Court’s consideration of the requested relief affects the duties and responsibilities of the County’s Elections Department, given its statutory role in having conducted the City’s Runoff Election and its interest and responsibility in ensuring an accurate election count, and the status of Supervisor Townsley as a party Defendant is required in order to ensure the complete adjudication of this matter.

FOURTH GROUND

The First Amended Complaint fails to sufficiently allege that Co-Plaintiff Jewish Leadership Coalition (JLC) has standing herein. Florida Statute 102.168(1) affords Plaintiff-party status to: “... any unsuccessful candidate for such office or nomination thereto or ... any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively”. (Emphasis added.) Although the First Amended Complaint alleges¹ that Jewish Leadership Coalition is “... a civic organization in North Miami Beach who’s [sic] members include many residents and voters in North Miami Beach who have been disenfranchised by the results of the May 19, 2015 Runoff Election which has been tainted by fraudulent absentee ballots” there are no allegations that the members are either “taxpayers” or in fact current registered electors of the City such that they would be “qualified to vote” in the subject May 19, 2015 Runoff Election. Further there are no allegations in the First Amended complaint that the JLC has organizational standing to sue on

¹ First Amended Complaint paragraph 8

behalf of its membership. Nor is the JLC shown to be incorporated in Florida, or authorized to do business in Florida. It is not a taxpayer or elector. It cannot join as a party Plaintiff.

FIFTH GROUND

The relief requested in the First Amended Complaint directing the Canvassing Board to “amend” the Certification of Election Results from the City’s Runoff Election by “deleting” therefrom the challenged vote total and “submitting a new vote total” showing Plaintiff Joseph as the Councilman-elect, is not within its powers and duties, as said action would be further subject to action by the County Elections Department, and is otherwise unauthorized. The First Amended Complaint therefore fails to state a cause of action.

SIXTH GROUND

Miami-Dade County section 12-14.1 does not on its face expressly declare that compliance therewith is essential to the validity of the City’s absentee ballots, said code section instead providing for monetary penalties, in lieu of the relief requested in the First Amended Complaint. The First Amended Complaint therefore fails to state a cause of action.

SEVENTH GROUND

The First Amended Complaint fails to join an indispensable party, The City of North Miami Beach Canvassing Board. Although the First Amended Complaint purports to join the members of said body, it does not purport to join the entity itself. As Florida Statute 102.168 expressly provides that the Canvassing Board is an indispensable party, the First Amended Complaint is insufficient and must fail.

EIGHTH GROUND

The First Amended Complaint fails to join an indispensable party, the City of North Miami Beach City Council. As the First Amended Complaint states at paragraphs 13, 14, 25, 26 and 41, the City Council was the final body certifying the results of the election, yet neither it nor its members have been joined. Since Florida Statute 102.168 expressly provides that the body canvassing the election is an indispensable party, and the City Council has not been joined, the First Amended Complaint is insufficient and must fail.

ANSWER AND AFFIRMATIVE DEFENSES

Defendant, PHYLLIS SMITH, by and through her undersigned counsel, hereby files her Answer and Affirmative Defenses to Plaintiff's First Amended Complaint and states as follows:

1. Defendant, Smith, admits the allegations contained in the following paragraphs of the First Amended Complaint: 1,6,7,9,10,11,12,13,14, 15,25 and 29.
2. The allegations in paragraphs 3,4,5,8,17, 18, 19 20,21,24,26,27,28,31,36,37,38,39,40 and 41 are denied and strict proof thereof is demanded.
3. With regard to paragraph 2 of the First Amended Complaint, the allegation is a legal conclusion, and while true, it is unrelated to the case at bar.
4. With regard to paragraph 16 of the First Amended Complaint, Smith admits that the Miami-Dade County Elections Department sent absentee ballots to requesting voters in North Miami Beach, but is without knowledge as to the exact dates said absentee ballots were sent by the Elections Department.
5. With regard to paragraph 22 of the First Amended Complaint, Smith admits that Miami-Dade County Code Section 12-14.1 imposes certain election-related reporting requirements pertaining to Absentee Ballot Campaigning Reporting Requirements, which Code section speaks for itself.
6. With regard to paragraph 23 of the First Amended Complaint, Smith admits that she did not file timely Form MD-ED 26 with the City Clerk's Office, denies that Frantz Pierre did not file Form MD-ED 26 with the City Clerk, and denies the remaining allegations therein as same are conclusions of law, and demands strict proof thereof.
7. With regard to paragraph 30 of the First Amended Complaint, Smith repeats and restates her above answers to the allegations of Paragraphs 1 to 29 of the First Amended Complaint as set forth herein.
8. With regard to Paragraphs 32 through 34 of the First Amended Complaint, said allegations contains conclusions of law, which are denied , and of which strict proof is demanded, and the cited legal authority and related propositions of law speak for themselves.
9. As to paragraph 35, Smith admits that the stated proposition is one of the statements contained in the decision.

FIRST AFFIRMATIVE DEFENSE

The First Amended Complaint fails to state a cause of action for declaratory relief as it does not plead the necessary elements for granting such relief.

SECOND AFFIRMATIVE DEFENSE

The First Amended Complaint fails to state a cause of action for injunctive relief as it does not plead the necessary elements required for an injunction. In addition to its requests for declaratory relief finding the alleged subject absentee ballots void, the First Amended Complaint further requests a Court order: "...ordering the North Miami Beach municipal Canvassing Board and Pamela L. Latimore to delete all the absentee ballot votes from precincts 123 and 127 in the North Miami Beach Run-off Election and submit a new vote total reflecting the adjusted numbers and declaring [Plaintiff] Michael Joseph as the proper winner of the Run-off Election and ordering the [City] clerk to certify Michael Joseph as the new councilperson for Group 3 in North Miami Beach, Florida". Despite such allegations, the First Amended Complaint fails to state prima facie elements needed in order to support a cause of action for injunctive relief.

THIRD AFFIRMATIVE DEFENSE

The First Amended Complaint fails to join Penelope Townsley, Miami-Dade County Supervisor of Elections, as an indispensable party Defendant in this action. Although the requested relief is directed only to Defendants Phyllis Smith and the Canvassing Board, this Court's consideration of the requested relief affects the duties and responsibilities of the County's Elections Department, given its statutory role in having conducted the City's Runoff Election and its interest and responsibility in ensuring an accurate election count, and the status of Supervisor Townsley as a party Defendant is required in order to ensure the complete adjudication of this matter.

FOURTH AFFIRMATIVE DEFENSE

The First Amended Complaint fails to sufficiently allege that Co-Plaintiff Jewish Leadership Coalition (JLC) has standing herein. Florida Statute 102.168(1) affords Plaintiff-party status to: "... any unsuccessful candidate for such office or nomination thereto or ... any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively". (Emphasis

added.) Although the First Amended Complaint alleges² that Jewish Leadership Coalition is "... a civic organization in North Miami Beach who's [sic] members include many residents and voters in North Miami Beach who have been disenfranchised by the results of the May 19, 2015 Runoff Election which has been tainted by fraudulent absentee ballots" there are no allegations that the members are either "taxpayers" or in fact current registered electors of the City such that they would be "qualified to vote" in the subject May 19, 2015 Runoff Election. Further there are no allegations in the First Amended complaint that the JLC has organizational standing to sue on behalf of its membership. Nor is the JLC shown to be incorporated in Florida, or authorized to do business in Florida. It is not a taxpayer or elector. It cannot join as a party Plaintiff.

FIFTH AFFIRMATIVE DEFENSE

Allegations in the First Amended Complaint (particularly 37 and 38) pertaining to activities alleged to have taken place at the subject Precincts and Defendant Canvassing Board's "acceptance" and "counting" of certain absentee ballots and its "certification" of election results, were subject to and consistent with actions of the Miami-Dade County Elections Department, which conducted the subject City's Runoff Election in accordance with its statutory duties and responsibilities.

SIXTH AFFIRMATIVE DEFENSE

The relief requested in the First Amended Complaint directing the Canvassing Board to "amend" the Certification of Election Results from the City's Runoff Election by "deleting" therefrom the challenged vote total and "submitting a new vote total" showing Plaintiff Joseph as the Councilman-elect, is not within its powers and duties, as said action would be further subject to action by the County Elections Department, and is otherwise unauthorized.

SEVENTH AFFIRMATIVE DEFENSE

Miami-Dade County section 12-14.1 does not on its face expressly declare that compliance therewith is essential to the validity of the City's absentee ballots, said code section instead providing for monetary penalties, in lieu of the relief requested in the First Amended Complaint.

² First Amended Complaint paragraph 8

EIGHTH AFFIRMATIVE DEFENSE

The First Amended Complaint fails to join an indispensable party, The City of North Miami Beach Canvassing Board. Although the First Amended Complaint purports to join the members of said body, it does not purport to join the entity itself. As Florida Statute 102.168 expressly provides that the Canvassing Board is an indispensable party, the First Amended Complaint is insufficient and must fail.

NINTH AFFIRMATIVE DEFENSE

The First Amended Complaint fails to join an indispensable party, the City of North Miami Beach City Council. As the First Amended Complaint states at paragraphs 13, 14, 25, 26 and 41, the City Council was the final body certifying the results of the election, yet neither it nor its members have been joined. Since Florida Statute 102.168 expressly provides that the body canvassing the election is an indispensable party, and the City Council has not been joined, the First Amended Complaint is insufficient and must fail.

In addition to the above, Defendant, Smith hereby adopts and incorporates herein, Affirmative Defenses pled by co-Defendants, Canvassing Board Members, Latimore, Smith and Garcia.

CERTIFICATE OF SERVICE TO FOLLOW ON NEXT PAGE

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been filed to Miami-Dade County Court and Electronic Mail on this the 14 day of **July, 2015** to:

Juan-Carlos Planas, Esq.
(Counsel for Plaintiffs Michael Joseph and Jewish Coalition)
Kurkin Brandes, LLP
18851 NE 29th Avenue, Suite 303
Aventura, FL 33180-2813

jcplanas@kbattorneys.com
rrivera@kb-attorneys.com
lbevans@kb-attorneys.com

Jean K. Olin, Esq.
(Counsel for Defendants Canvassing Board members Latimore, Smith and Garcia)
12550 Biscayne Blvd., Suite 800
Miami, Florida 33181

jeanolin.munilaw@gmail.com

Greenspoon Marder, PA

Joseph S. Geller, Esquire
Florida Bar No. 292771
200 E. Broward Blvd, Suite 1800
Fort Lauderdale, FL 33301
Telephone: (954) 491-1120

By /s/Joseph S. Geller
JOSEPH S. GELLER, ESQ.
Florida Bar No.: 292771
Joseph.Geller@gmlaw.com
Francine.Williams@gmlaw.com