

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.

_____/

**DEFENDANTS CITY OF NORTH MIAMI BEACH
CANVASSING BOARD MEMBERS LATIMORE, SMITH AND GARCIA'S
ANSWER AND AFFIRMATIVE DEFENSES TO FIRST AMENDED COMPLAINT**

Defendants, City of North Miami Beach Canvassing Board members Pamela Latimore, Jose Smith and Ana Garcia ("Canvassing Board") by and through their undersigned counsel, hereby file this their Answer and Affirmative Defenses to the First Amended Complaint ("FAC"), and state as follows:

1. The Canvassing Board admits the allegations contained in the following paragraphs of the First Amended Complaint: 1, 6, 7, 9, 10, 11, 12, and 29.

2. The Canvassing Board is without knowledge or information as to the allegations contained in the following paragraphs of the First Amended Complaint: 8, 17, 18, 19, 20, 21, 27, 28, 40 and 41.

3. With regard to paragraph 2 of the First Amended Complaint, such allegation is a legal conclusion and although the Canvassing Board recognizes the taint of fraudulent election activity, any measures taken to remedy such fraudulent activity is subject to this Court's ruling.

4. With regard to paragraph 3 of the First Amended Complaint, the Canvassing Board admits that Plaintiffs purport to seek declaratory relief based upon the allegations therein.

5. With regard to paragraph 4 of the First Amended Complaint, the Canvassing Board admits that the allegations therein are the grounds pled for the relief sought, yet Canvassing Board is without knowledge or information as to the veracity of these grounds pled.

6. With regard to paragraph 5 of the First Amended Complaint, the Canvassing Board is without knowledge or information as to allegations pled therein, yet specifically denies that it erred in any manner related to its performance of Canvassing Board duties.

7. With regard to paragraph 13 of the First Amended Complaint, the Canvassing Board admits that its members canvassed absentee ballots from the City's May 19, 2015 Runoff Election and certified said Election results, yet denies that the City Council's actions constituted an official act of "certification".

8. With regard to paragraph 14 of the First Amended Complaint, the Canvassing Board admits allegations pertaining to Florida Statute section 102.168, which statute speaks for itself, yet denies the remaining allegation that the deadline per section 102.168 to contest the City's Runoff Election is June 5, 2015.

9. With regard to paragraph 15 of the First Amended Complaint, the Canvassing Board admits that on May 8, 2015 it issued Certification of Election from the City's May 5, 2015 General Election, resulting in the need for the subject May 19, 2015 Runoff Election.

10. With regard to paragraph 16 of the First Amended Complaint, the Canvassing Board admits that the Miami-Dade County Elections Department sent absentee ballot to requesting voters in North Miami Beach, yet is without knowledge as to the exact dates said absentee ballot were sent by County Elections Department.

11. With regard to paragraph 22 of the First Amended Complaint, the Canvassing Board 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.

12. With regard to paragraphs 23 and 24 of the First Amended Complaint, the Canvassing Board admits that Phyllis Smith did not file Form MD-ED 26 with the City Clerk's Office, denies that Frantz Pierre did not file Form MD-ED26 with the City Clerk, and denies the

remaining allegations therein as said allegations are conclusions of law.

13. With regard to paragraph 25 of the First Amended Complaint, the Canvassing Board admits that on May 26, 2015 the North Miami Beach City Council accepted the Canvassing Board's Certification of Election showing that Phyllis Smith received 71 more votes than Michael Joseph from the City's Runoff Election, yet denies that said Council's action constituted an official act of "certification".

14. With regard to paragraph 26 of the First Amended Complaint, the Canvassing Board denies that the City Council "certified" the City's Runoff Election, is without knowledge or information as to the remaining allegations therein alleging the illegal nature of the certain votes, and insofar as the allegation that the Election results are illegal constitutes a conclusion of law denies same.

15. With regard to paragraph 30 of the First Amended Complaint, the Canvassing Board repeats and restates its above answers to the allegations of paragraphs 1 to 29 of the First Amended Complaint as set forth herein.

16. With regard to paragraph 31 of the First Amended Complaint, the Canvassing Board is without knowledge or information as to allegations contained in the first sentence thereof; the second sentence of paragraph 31 contains conclusions of law and to that extent is herein denied.

17. With regard to paragraphs 32 through 35 of the First Amended Complaint, said allegations contain conclusions of law and to that extent the cited legal authority and related propositions of law speak for themselves.

18. With regard to paragraph 36 of the First Amended Complaint, the Canvassing Board is without knowledge or information as to whether fraud was "concentrated" in City precinct # 123 and #127; further, the remaining allegation within said paragraph 36, as well as allegations in paragraph 39, concern remedy for the alleged fraud as a conclusion of law and to that extent said allegations are herein denied.

19. With regard to paragraphs 37 and 38 of the First Amended Complaint, the Canvassing Board restates as pled above that it is without knowledge or information as to whether fraud occurred regarding City precinct # 123 and #127 for the Runoff Election and whether illegal votes were counted which would have changed such Election results; the Canvassing Board further restates that its actions taken relative to the City's Runoff Election

were consistent with its duties under the law and thus denies allegations in paragraphs 37 and 38 that its actions “disenfranchised” the City’s voters.

CANVASSING BOARD’S AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Defendant Canvassing Board fully complied with its statutory duties and responsibilities relative to the City’s May 19, 2015 Runoff Election, and in doing so, had no knowledge of fraudulent activities related to such Election. Any fraudulent activities or election irregularities as alleged in the First Amended Complaint that may have occurred with regard to the City’s Runoff Election were entirely independent and unrelated to actions taken by Defendant Canvassing Board members.

SECOND AFFIRMATIVE DEFENSE

The First Amended First Amended Complaint (“FAC”) 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 request for declaratory relief finding the alleged subject absentee ballots void, the FAC 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 FAC fails to state the prima facie elements needed in order to support a cause of action for injunctive relief.

THIRD AFFIRMATIVE DEFENSE

The FAC 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 FAC fails to sufficiently allege that Co-Plaintiff Jewish Leadership Coalition 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 FAC 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 run-off 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 FAC that the JLC has organizational standing to sue on behalf of its membership.

FIFTH AFFIRMATIVE DEFENSE

Allegations in the FAC (particularly paragraphs 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

Absent Court order, Defendant Canvassing Board was required to comply with its statutory duty to canvass the subject absentee ballots from the City’s Runoff Election and to certify the election results. The FAC’s allegation that the “...illegally obtained votes that were the result of fraud and coercion of the electors ... should not have been counted by the Canvassing Board” nor should such results have been “certified” by the Canvassing Board, fails to acknowledge the nature of the Canvassing Board’s statutory duties and its per se compliance with same, particularly in the absence of FAC allegations that the Canvassing Board had any knowledge of

¹ FAC at paragraph 8.

such alleged election irregularities.

SEVENTH AFFIRMATIVE DEFENSE

The relief requested in the FAC 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 understood by the Canvassing Board to be solely within its powers and duties, as said action would be further subject to action by the County Elections Department.

EIGHTH 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 FAC.

In addition to the above, Defendants Canvassing Board members Latimore, Smith and Garcia hereby adopt and incorporate herein, Affirmative Defenses pled by co-Defendant Phyllis Smith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via electronic mail on this 12th day of June, 2015 to: Juan-Carlos Planas, Esquire, Kurkin Brandes LLP, 18851 NE 29th Avenue, Suite 303, Aventura, FL 33180-2813 at: jcplanas@kb-attorneys.com, rrivera@kb-attorneys.com and lbevans@kb-attorneys.com; and Joseph S. Geller, Esquire, Greenspoon, Marder Law LLP, 18851 NE 29th Avenue, Suite 901, Aventura, FL 33180 at: joseph.geller@gmlaw.com.

Respectfully submitted,
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