

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

JEFFREY W. HARRIS, et. al)	
)	
Plaintiffs,)	
)	
vs.)	CIVIL ACTION NO. 2007-901079
)	
DON DAVIS, Judge of Probate- Mobile County, Alabama, and THE CITY OF MOBILE, a municipal corporation;)	
)	
Defendants.)	
)	

ORDER AND FINAL JUDGMENT ON MOTION TO DISMISS

This matter coming on for consideration by the Court on the Motion To Dismiss And Renewed Motion For Summary Judgment of the City of Mobile with respect to the plaintiffs' averment of an "Election Contest allowed under Ala. Code 1975 § 11-42-52 and § 17-15-56" contained in the "Election Contest and Amended Complaint For Declaratory And Injunctive Relief, Including Petition For Writ of Prohibition And Quo Warranto Relief" filed by the plaintiffs on September 24, 2007 (hereinafter "Election Contest and Amended Complaint"), and the Court having duly considered the averments of the Election Contest and Amended Complaint, the undisputed facts disclosed by the record, and the briefs and arguments of counsel for the parties, the Court hereby FINDS, ORDERS, ADJUDGES, and DECREES as follows:

1. On August 14, 2007, the City Council of the City of Mobile by unanimous vote of all seven of its members adopted four separate resolutions pursuant to *Ala. Code* § 11-42-41, each of which was "to the effect that the public health or public

good requires that certain territory (described in the resolution) shall be brought within the limits of the city.” (Resolutions 02-411, 02-412, 02-413, and 02-414).

2 On August 14, 2007, the Mayor of the City of Mobile separately certified a copy of each such resolution to the Judge of Probate of Mobile County and separately filed each such resolution with an attached map or plat of the territory proposed to be brought into the corporate limits of the city under that resolution with the Judge of Probate of Probate pursuant to *Ala. Code* § 11-41-42.

3 On August 15, 2007, the Judge of Probate of Mobile County entered Orders upon the minutes of the Probate Court in Probate Cases 2007-1919, 2007-1920, 2007-1921, and 2007-1922 directing the conduct of four separate elections on September 18, 2007, pursuant to *Ala. Code* § 11-42-43, to determine separately in each instance whether the qualified electors residing within each territory favored the extension of the corporate limits of the City of Mobile to embrace the territory described in the applicable Order.

4. In the original “Complaint For Declaratory And Injunctive Relief Including Petition For Writ of Prohibition And Quo Warranto Relief” filed by the plaintiffs in this action on September 4, 2007 (hereinafter “”Original Complaint”), the plaintiffs here sought to enjoin the holding of the September 18 elections. The Original Complaint was dismissed under Ala. R. Civ. P 12(b)(1) on motion of the City for lack of jurisdiction based on the absence of a justiciable controversy prior to the determination of the outcome of the voting in the elections. In its order of dismissal entered on September 13, 2007, the Court expressly provided that “nothing in this Order shall be construed as a ruling on the merits of the claims the plaintiffs seek to assert in the Complaint.

Notwithstanding Ala. R. Civ. P. 78 which otherwise provides an automatic right to amend the Complaint within ten (10) days from service of this Order, the plaintiffs shall instead have the right to amend the Complaint to allege a present justiciable controversy within ten (10) days following the September 18, 2007 elections.”

5. On September 18, 2007, a 153 vote majority of the 279 electors voting in the election held with respect to the proposed annexation of the territory described in Resolution 02-411 as ordered in Probate Case 2007-1919 (hereafter referred to as “Area A”) cast their votes in favor of annexation. The total number of electors that were identified by the Judge of Probate as eligible to vote in the Area A election was 689, so that only 40.5% of the persons identified as eligible voters in fact voted in the election.

6. On September 24, 2007, the plaintiffs Jeffrey W. Harris, Furman Smith, and Timothy Prine filed the Election Contest and Amended Complaint in this case. This document purports to amend claims made in the dismissed Original Complaint and to bring “an Election Contest allowed under Ala. Code § 11-42-52 and § 17-16-56.” The allegations of the document relevant to the purported “Election Contest” are

a. “Based on information and belief, there appear to be at least seventy-nine (79) individual voters listed on the official Voters List for ‘Area A’ who, for one reason or the another, do not appear to reside in the territory designated as ‘Area A.’ Attached and made a part [of the document] and denominated as Exhibit ‘A’ is list of questionable, purportedly qualified voters and their addresses.” (Paragraph 4).

b. “Considering the referendum in Area ‘A’ passed by only twenty-seven (27) votes, there are significantly more questionable votes than necessary to

have defeated the proposition. For this reason if no other, the election results in ‘Area A’ are due to be set aside, annulled, and voided.” (Paragraph 5).

c. The document does not allege that any illegal votes were in fact cast in the election. The document does not allege that any of the individuals listed on its “Exhibit A” were not in fact eligible voters. The document does not allege that any of the individuals listed on its “Exhibit A” in fact voted in the election, either for or against annexation.

d. The document alleges that a uniformed female Mobile police officer was present at the site of the voting and “violate[d] Alabama law, including, without limitation, Ala. Code 1975 § 17-1-4 (c).” The document further alleges that the officer’s presence “was intimidating, wrongful, and meant to coerce and scare voters in ‘Area A’ to vote in favor of annexation.” The document does not allege that the police officer in question in fact took any action to obstruct, intimidate, threaten, or coerce any voter. The document does not allege that any vote cast in favor of annexation was cast as result of intimidation or other misconduct by the police officer in question.

e. The document itself is not verified. It references “information and belief” only but does not identify whose “information and belief” is being referenced. The list of names and addresses attached as Exhibit A is not verified or attributed to any source. The document attaches an “Affidavit” of plaintiff Furman Smith, who alone of the plaintiffs alleges that he is a registered resident voter in Area A who voted in the election. The “Affidavit” states that from his “own observations” there are a “significant number of voters whose names are reflected on the Voter’s List who

have provided addresses which contain no dwellings whatsoever.” The Affidavit does not indicate whether Mr. Smith has personally examined a “Voter’s List” and, if so, what “Voter’s List” he has examined. The Affidavit makes no contention that any illegal votes were cast either by persons who were not residents of Area A or by any voter who voted in favor of annexation as a result of alleged intimidation. The Affidavit states only that Mr. Smith “strongly question(s) the legitimacy of the election which was conducted” in Area A.

7. On September 25, 2007, the plaintiffs filed a “Motion For Temporary Restraining Order/Preliminary Injunction To Maintain Status Quo And Motion To Advance Trial On The Merits.” The relief sought in this Motion was the issuance of “a temporary restraining order/preliminary injunction prohibiting Defendant Honorable Don Davis, Judge of Probate, Mobile County, Alabama, from certifying the election results conducted in “Area A” by the City of Mobile, Alabama, on September 18, 2007.” The Motion was presented to the Court at a hearing on September 25 and the relief sought in the Motion was denied in an Order entered on September 25. The Judge of Probate thereafter on September 25, 2007, entered an Order Declaring Results of Election in Case No. 2007-1919 confirming the vote of 153 votes for annexation and 126 votes against annexation and declaring that the area known as Area A “be and is hereby annexed into the City of Mobile, Alabama.”

8. On September 26, 2007, the City filed a “Motion To Dismiss And Renewed Motion For Summary Judgment” (hereinafter “Motion To Dismiss”). The City’s Motion To Dismiss requests the Court “to dismiss the ‘Election Contest and Amended Complaint’ for failure to state a claim for an election contest and to enter a

summary judgment in its favor as to all other claims asserted in the Amended Complaint.” The Court here considers and addresses only the City’s motion to dismiss the Election Contest and Amended Complaint for failure to state a claim for an election contest, and the Court reserves the consideration of the issues raised by the City’s request for summary judgment as to all other claims asserted for later proceedings.

9. The document filed by the plaintiffs on September 24, 2007 purports to present an “Election Contest allowed under Ala. Code 1975 §11-42-52 and § 17-16-56.” The Court finds that the plaintiffs’ document does not allege grounds for an election contest under Alabama law and is due to be dismissed pursuant to Ala. R. Civ. P. 12(b)(6) insofar as it is presented as an election contest.

10. “An election contest is strictly statutory, and the statute must be strictly observed and construed. ... Washington correctly notes that if a complaint initiating an election contest is defective as to any of the jurisdictional requirements, it cannot be amended by adding the missing element after the time for commencing the contest has expired.” *Washington v. Hill*, 960 So. 2d 643, 647 (Ala. 2006). By statute, a contest of an “Article 3” annexation election is brought “in the manner provided for the control of general municipal elections” (*Ala. Code* § 11-42-52), which is specified in *Ala. Code* § 11-46-69:

(a) **The election** of any person declared elected to any office of a city or town **may be contested** by any person who was at the time of the election a qualified elector of such city or town **for any of the following causes**:

(1) Misconduct, fraud or corruption on the part of any election official, any marker, the municipal governing body or any other person;

(2) The person whose election to office is contested was not eligible thereto at the time of such election;

(3) Illegal votes;

- (4) The rejection of legal votes; or
(5) Offers to bribe, bribery, intimidation or other misconduct calculated to prevent a fair, free and full exercise of the elective franchise.

(b) Any contest of such an election must be commenced within five days after the result of the election is declared. **Such contest shall be instituted in the manner prescribed by Section 17-15-29** and, except as otherwise provided in this article, all proceedings relative to contests of elections to municipal offices shall be governed by the provisions of Articles 2 and 3, Chapter 15, Title 17 of this Code, insofar as they are applicable.

Articles 2 and 3 of Chapter 15 were renumbered as §§ 17-16-47 through 17-16-76 effective January 1, 2007, with § 17-15-29 being renumbered as § 17-16-56:

If the contest is of an election to the office of judge of the probate court, sheriff, tax assessor, tax collector, county treasurer, clerk of the circuit court, or any other office filled by the vote of a single county or any subdivision thereof, or any office of a city or town not in this article otherwise provided for, **the party contesting must file in the office of the clerk of the circuit court of the county in which the election was held, a statement in writing, verified by affidavit, of the grounds of the contest as provided in this article and must give good and sufficient security for the costs of the contest, to be approved by the clerk.** On the filing of the statement and the giving of the security, the clerk must enter the contest on the trial docket as a civil action pending in the court for trial, and, after having made such entry, the clerk must issue a summons, accompanied by a copy of the statement directed to the party whose election is contested, requiring the party, within five days after the service of the summons, to appear and make answer to the statement, which summons must be served by the sheriff or by a constable, if the contest is with respect to the office of sheriff. The contest is triable by the court without the intervention of a jury and must be heard and tried in precedence of all other cases, civil or criminal, standing for trial in the court. Either party is entitled to the writ of subpoena to compel the personal attendance of witnesses on the trial of the contest, and against defaulting witnesses such proceedings may be had as against other defaulting witnesses in civil cases pending in the court. Testimony may also be taken by depositions in the case, and in like manner as depositions are taken in other civil cases.

“Each of these statutory requirements is fundamentally one of substance rather than form. . . . What the text of the statute requires is language that makes sufficiently clear which election is being challenged and some form of an affidavit by the contestant that communicates the grounds of the contest.” *Washington v. Hill*, 960 So. 2d 643, 647 (Ala. 2006).

11. In order to commence an election contest with regard to an annexation election, the plaintiff must timely file a verified written statement specifically alleging statutory grounds recognized in §11-46-69 for the contest. Here the plaintiffs have not met these substantive requirements. The “Election Contest and Amended Complaint” fails to satisfy these requirements because it does not allege the casting of any illegal or “intimidation” votes in the election, much less the casting of enough illegal or “intimidation” votes to make a difference in the outcome. All the plaintiffs have alleged is their belief that there may be 79 bad addresses on the “Voter’s List” that identifies the 689 persons listed as eligible to vote in the Area A election. The plaintiffs do not allege that any illegal or improper votes were cast by anyone in the election, much less that enough illegal or improper votes to change the result of the election were cast. The plaintiffs do not allege that any of the 79 persons on their list were not in fact eligible voters. The plaintiffs do not allege that any of the 79 persons on their list in fact voted in the election. The plaintiffs do not allege that any of the 79 persons on their list in fact voted for annexation if they in fact voted at all. The plaintiffs do not allege that any vote in favor of annexation was cast as a result of alleged intimidation by the female police officer. The plaintiffs, in the words of plaintiff Smith, only aver that they “question the legitimacy of the election which was conducted.” This falls far and fatally short of the

specific averments that under Alabama law must be contained in the verified complaint itself before the finality of the electoral process is disturbed by an election contest. To allow an election contest to proceed based merely on a contestant's belief that the voter's list contained some number of inaccurate or out of date addresses would open every election to challenge, since it is necessary to accept that every voter's list can be expected to contain some number of inaccurate or "stale" addresses.

12. This Court's dismissal of the Election Contest and Amended Complaint insofar as it attempts to proceed as an election contest is clearly compelled by the Alabama Supreme Court's decision in *Pitman v. Macon County*, 595 So.2d 1333 (Ala. 1992) :

This Court has held under a similar statute pertaining to municipal elections that the annulment of an election requires either (1) proof of illegal votes; (2) proof of rejected legal votes; or (3) proof of the failure of the contestee to receive the requisite number of legal votes. *Blocker v. City of Roosevelt City*, 549 So.2d 90, 92 (Ala.1989). This Court in *Blocker* went on to state:

"[E]rrors and irregularities of election officers that are shown not to have affected the election result will not be considered in an election contest. *Turner v. Cooper*, 347 So.2d 1339, 1344 (Ala.1977); 29 C.J.S. Elections § 249 (1966). Threats, violence, or disturbances not materially affecting the result should not invalidate an election."

Id.

Therefore, we note that in an election contest, a complaint must state that the election was improper for one of the stated grounds and that the election result would have been different but for the alleged grounds for contest.

The plaintiffs' complaint failed to state that the election would have been different but for the alleged irregularities. The trial court's dismissal of the plaintiff's election contest is affirmed.

595 So.2d at 1335 (emphasis added).

13. The Motion to Dismiss And Renewed Motion For Summary Judgment of The City of Mobile considered as a motion to dismiss under Ala. R. Civ. P. 12(b)(6) is due to be, and hereby is, GRANTED insofar as it seeks the dismissal of the “Election Contest and Amended Complaint” for failure to state a claim for an election contest, and the Election Contest and Amended Complaint is hereby DISMISSED insofar as it attempts to proceed as an election contest.

14. Nothing in this Order shall be construed as a ruling on the merits of the other claims the plaintiffs seek to assert in the Election Contest and Amended Complaint separate and apart from the claim for an election contest.

15. This Order is a final judgment dismissing the plaintiffs’ claims for an election contest. Pursuant to Ala. R. Civ. P. 54(b), the Court expressly determines that there is no just reason for delay and that this Order is entered as a final judgment. Plaintiffs shall have no automatic right of amendment under Ala. R. Civ. P. 78.

16. Each party to bear its own costs.

Done this the 28th day of September, 2007.


Circuit Court Judge