

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

BRENDA PRIESTLY JACKSON,
Plaintiff,
v.

CASE NO.: 16-2018-CA-004630- MA
DIVISION

RICK SCOTT, in his official
capacity as the Governor of the State
of Florida, and TERRANCE
FREEMAN, an individual,
Defendants.

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DEFENDANT TERRANCE FREEMAN'S MOTION TO DISMISS

Defendant Terrance Freeman, through undersigned counsel and pursuant to Rule 1.140, Fla.R.Civ.P., moves this Court for a dismissal with prejudice of the Petition filed in this matter. The grounds upon which this motion is based and the substantial matters of law intended to be argued are as follows:

Introduction

The Plaintiff's claims are contrary to the clearest statements of law in that she has brought this matter before the wrong tribunal and she misapprehends the distinction between an appointment to office and actually entering into or, as alleged, assuming the duties of office. As set forth below, the Court should dismiss the Petition with prejudice.

The Court Lacks Subject Matter Jurisdiction

1. The Plaintiff has improperly brought a claim to challenge the qualifications of a sitting City Council member and effectively remove him from office. The ad damnum clauses of the Petition specifically seek a declaration that Terrance Freeman, a sitting City Council member, is "unqualified" and should be permanently prevented from exercising

the duties and responsibilities of the office as District 10 City Council member. Petition, at unnumbered pp. 4&5, and ¶29.

2. This Court does not have jurisdiction to determine whether a sitting City Council member meets the qualifications to hold office.² The Charter of the City of Jacksonville (“Charter”) clearly reserves this jurisdiction to the City Council. The Charter, Section 5.07. – Powers, states, “The council shall be the judge of the elections and qualifications of councilmen.” Thus, the City Council maintains exclusive jurisdiction to determine the qualifications of its members.
3. Plaintiff pleads no set of facts nor any specific provisions of statute or law that convey subject matter jurisdiction to this Court to determine whether a sitting City Council member meets the qualifications to hold office. Petition, ¶5. “[T]here is no inherent power in the courts of this state to determine election contests **and the right to hold legislative office.**’ *McPherson v. Flynn*, 397 So.2d 665, 667 (Fla. 1981).” *Harden v. Garrett*, 483 So. 2d 409, 411 (Fla. 1985)(Determining that under similar language in Art. 3, Sec. 2 of the Florida Constitution, as with Sec. 5.07 of the Charter, that the Court had no jurisdiction over a challenge to the election of a sitting member of the Florida House.)(emphasis added); see also *State ex rel. Rigby v. Junkin*, 146 Fla. 347, 1 So.2d 177 (1941)(cited in *English v. Bryant*, 152 So. 2d 167, 168 (Fla. 1963).
4. Plaintiff alleges that Terrance Freeman assumed the duties as the District 10 City Council member immediately upon his appointment by Governor Scott on July 10, 2018. Petition

² As a sitting City Council member, Terrance Freeman may only be removed from office as prescribed in Article IV, Sec. 7 of the Florida Constitution; Florida Statutes, §§112.501-112.52; or the Charter.

¶19.³ As stated below, the law is clear that Terrance Freeman did not become the sitting District 10 City Council member until he took the oath of office on July 12, 2018. Regardless, Plaintiff filed her Petition on July 13, 2018, against a sitting member of the City Council, and this Court lacks jurisdiction to hear a case challenging his qualification to hold that office. *McPherson v. Flynn*, 397 So. 2d at 668 (“That the original complaint may have been filed prior to the actual seating of the petitioner is of no consequence. The issue of qualifications is nonetheless within the purview of legislative powers. Article III, section 15(d) provides that the term of legislative office shall begin upon election. It is undisputed that the petitioner is presently seated in the House. We need not determine whether the courts of Florida ever had jurisdiction; we need only determine they do not now have jurisdiction.” *Id.*).

5. While *Harden* and *McPherson* relied on the latest revision to the Florida Constitution, which states that each legislative House shall be the “sole” judge of the qualifications of its members and the Charter simply states the City Council “shall” be the judge of the qualifications of its members, this is a distinction without a difference. The prior version of the Florida Constitution that lacked the word “sole” was still held to grant exclusive jurisdiction over qualifications to the legislative body.

The Constitution of Florida, Art. III, Sec. 6, F.S.A., provides inter alia as follows:
‘Each house shall judge of the qualifications, elections and returns of its own members, *
* *.’

This Court in *State ex rel. Rigby v. Junkin*, 146 Fla. 347, 1 So.2d 177 (1941), construed the quoted provision to mean that:

³ Plaintiff is also estopped from bringing this action in that she failed to take action when she claims she was aware of what she perceived as irregularities in the application process and of Terrance Freeman’s alleged, but false, lack of qualification and instead waited until after he was seated as the District 10 City Council member. *Republican Party v. Davis*, 18 So. 3d 1112, 1118 (Fla. 3d DCA 2009).

‘This Court is without jurisdiction to determine the rights of one who has been elected a member of the Legislature to hold such office. That question is one which only the Legislature may determine.’

Inasmuch as this Court is without jurisdiction of this cause, the application for alternative writ is denied and the petition dismissed.

English, 152 So. 2d at 168.

6. The Florida Supreme Court relied upon the decisions from other states with almost identical language as the Charter, each lacking the word “sole” in their Constitutions and each merely stating that the legislative body “shall” be the judge of the qualification of its members. Courts have consistently held that legislative bodies have exclusive jurisdiction over challenges to a sitting member’s qualification. In *McPherson*, the Court relied upon *Buskey v. Amos*, 294 Ala. 1, 310 So. 2d 468 (1975). The Alabama Supreme Court, examining its Constitution, with almost identical language as our Charter, ruled that the legislature, not the judiciary, has the sole jurisdiction over a challenge to the qualifications of its members:

This court considered the application of Article 4, Section 51 [Each house shall choose its own officers and shall judge of the election, returns, and qualifications of its members.], of our state constitution in *In re Opinion of the Justices*, 254 Ala. 160, 47 So.2d 586 (1950), wherein it was stated:

‘The Constitutions of most, if not all, of the states contain provisions similar to those quoted above from Section 51 of the Constitution of this state. And **it is well settled that such a provision vests the legislature with sole and exclusive power in this regard, and deprives the courts of jurisdiction of those matters.**’ In view of this constitutional provision this court is compelled to hold that it lost jurisdiction of this appeal when the appellee became a member of the State Senate.

Buskey, 294 Ala. at 2, 310 So. 2d at 469 (emphasis added) (cited by *McPherson*, 397 So.2d at 668); see also *In re McGee*, 36 Cal.2d 592, 226 P.2d 1 (1951); *State ex rel. Turner v. Scott*, 269 N.W.2d 828 (Iowa 1978)(each omitting “sole” from the constitutional retention of jurisdiction to the legislative body over a member’s qualifications).

7. Accordingly, whether Terrance Freeman assumed the duties of his office as Plaintiff claims on July 10, 2018, or as the law provides on July 12, 2018, the Plaintiff's Petition challenges the qualifications of a sitting member of the City Council. The Court simply lacks subject matter jurisdiction over this issue, as that authority lies exclusively with the City Council. Therefore, this Petition should be dismissed with prejudice.
8. While Plaintiff's Petition must be dismissed for lack of subject matter jurisdiction, the Petition also has no legal or factual support.

The Petition Fails to State a Cause of Action

9. There is a fundamental distinction between the time of a gubernatorial appointment and the time of entering into office. Plaintiff fails to grasp that distinction and it is fatal to the merits of her Petition. The crux of Plaintiff's claim is contained in ¶19 of the Petition:

Upon his appointment on July 10, 2018, Defendant TERRANCE FREEMAN immediately assumed the duties of the office of the District 10 Jacksonville City Council member.
10. This is an incorrect statement of the law and is in complete contradiction to the Ordinance Code of Jacksonville, the Charter of the City of Jacksonville, the Constitution of the State of Florida, and the binding precedent of the Supreme Court of Florida.
11. Terrance Freeman did not assume the duties of the office of District 10 City Council member until he took the oath of office on July 12, 2018.⁴
12. Section 5.04 of the Charter states in part: "Every member of the council shall be continuously **throughout his or her term of office**, a resident and qualified elector of

⁴ Although not specifically pled as a fact in the Petition, the Court may take Judicial Notice of the date of the Oath of Office by Terrance Freeman. Fla.Evid.Code §90.202; *English*, 152 So. 2d 167 (taking judicial notice of the date of the Oath of Office).

Duval County, and of his or her district or residence area.” Charter, Sec. 5.04 (emphasis added).

13. Accordingly, as an appointed member of City Council, the residency requirement commences with the start of the term of office, i.e. when Terrance Freeman entered into the duties of the office on July 12, 2018. There is no advance residency requirement for an appointed City Council member in the Charter.⁵
14. The Ordinance Code of Jacksonville (“Code”) makes the point very clear that a City Council member does not enter into the duties of the office, or as Plaintiff alleges, assume the duties of the office, until the City Council member has actually taken the oath of office.

Sec. 2.101. - Oaths of public officials.

The Mayor, all Council Members, all appointed employees confirmed by Council, and all appointees to non-advisory Boards and Commissions of the City, **before entering upon the duties of the office, shall sign an oath, swearing or affirming the following:**

"I do solemnly swear (or affirm) that I am duly qualified to hold office under the Constitution of the state, or of the Charter or Ordinance Code of the City of Jacksonville; that I will support, protect, defend and honor the Constitutions, Governments, and laws of the United States and of the State of Florida; that I will support, protect, defend and honor the Charter, the ethics laws, and other ordinances, rules, and regulations of the City of Jacksonville; and that I will well and faithfully perform the duties of (title of office) **on which I am now about to enter**. So help me God."

Code, Sec. 2.101 (emphasis added).

15. The Constitution of the State of Florida (“Fla.Con.”) makes clear that a City Council member, as a county officer, does not enter into the duties of the office, or as Plaintiff

⁵ Candidates for *election* to a City Council seat must meet certain residency requirements in advance of the election in order to qualify to be on the ballot, but by its plain clear language that provision of the Charter is inapplicable to an appointment. Charter, Section 5.04

alleges, assume the duties of the office, until the City Council member has actually taken the oath of office.

SECTION 5. Public officers.

* * *

(b) Each state and county officer, **before entering upon the duties of the office**, shall give bond as required by law, and shall swear or affirm:

“I do solemnly swear (or affirm) that I will support, protect, and defend the Constitution and Government of the United States and of the State of Florida; that I am duly qualified to hold office under the Constitution of the state; and that I will well and faithfully perform the duties of (title of office) **on which I am now about to enter**. So help me God.”,

and **thereafter shall devote personal attention to the duties of the office**, and continue in office until a successor qualifies.

* * *

Fla.Con., Art. II, Sec. 5 (emphasis added).

16. Relying upon the principals of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Florida Supreme Court has long held that an official assumes the duties of the office or becomes invested with the duties and powers of the office upon the happening of the last public act required by law to assume such duties. *State ex rel. Davis v. Giblin*, 98 Fla. 802, 806, 124 So. 375, 376 (1929) (Justice Ellis concurring).

17. In *Giblin* the question facing the Florida Supreme Court was when a circuit court judge became invested in the office, i.e., assumed the duties of the office. The contention was that he could not assume the duties of the office until he received a signed commission from the governor. The Supreme Court of Florida rejected this argument and identified that where the law requires the taking of an oath of office it is at that point that the official is invested with the powers of the office – it is at that point that the official may assume the duties of the office. As the Court held: “Conditions imposed by the statute, such as giving

bond and **taking the oath are conditions precedent to the complete investiture of the possession of the office not conditions precedent to his election or appointment to office.** When he has performed the required conditions his title to enter on the possession of the office is complete.” *Giblin*, 98 Fla. at 809, 124 So. at 377 (emphasis added).

18. Indeed, to clearly state the point that the taking of the oath of office was the key element to assuming the duties of the office, the Court stated: “It follows, therefore, that when the respondent was appointed by the Governor and confirmed by the Senate to be judge of the Twenty-second Circuit **he became with the filing of the oath of office completely invested with the title to the office of judge of that circuit and charged with the duty to discharge its functions** for the period prescribed by the law under which he was appointed and confirmed.” *Giblin*, 98 Fla. at 812, 124 So. at 378 (emphasis added).⁶

19. The issue was again addressed by the Florida Supreme Court in *Tappy v. State*, 82 So. 2d 161 (Fla. 1955). The duly elected Governor Collins contended that his term of office began upon his election, giving him the full power and duties of the office of Governor, including the power to appoint a County Court Judge.

20. The operative facts were that the “Honorable Dan McCarty, then Governor of Florida, died on September 30, 1953. Upon his death, the powers and duties of the office of Governor devolved upon The Honorable Charley Johns, then holding the office of President of the Florida Senate, until the installation in said office of Governor Le-Roy Collins, who had been elected to the office at the 1954 general election, for the unexpired portion of the

⁶ Any attempt to distinguish the case as involving the judiciary is ineffective as the binding solemnity of the oath of office is coequal with the branches of government. *State ex rel. Atl. C. L. R. Co. v. State Bd. of Equalizers*, 84 Fla. 592, 622, 94 So. 681, 691 (1922) (“The oaths of office of the executive officers of the State are as binding as are the oaths of office taken by the members of the judiciary.” *Id.*).

regular term to which the late Governor McCarty had been elected, . . .” *Tappy v. State*, 82 So. 2d 161, 162 (Fla. 1955). After Governor Collins won the election, a vacancy arose for a county court judgeship in Volusia County and Acting Governor Johns appointed Thomas N. Tappy. Governor-elect Collins took exception to the appointment, essentially declaring it a nullity because it was performed by Acting Governor Johns after Governor-elect Collins, had assumed the duties of the office of Governor of Florida.

21. The ultimate decision for the Florida Supreme Court was determining when, as a matter of law, Governor Collins assumed the duties of the office of Governor. Again, the Court was very clear in its reasoning:

As has been heretofore noted, Governor Collins did not take his oath of office until about noon on Tuesday, January 4, 1955. Section 2, Article XVI, of the Constitution provides, so far as it is material here, that ‘Each and every officer of this State * * * shall before entering upon the discharge of his official duties take the following oath of office * * *.’ **There can be no doubt that because of this provision, the taking of the official oath by Governor Collins was an indispensable ingredient of the installation in office which the Constitution required, and that until this oath was taken Governor Collins was not ‘duly qualified’ as governor, for the reason that without the oath he had no power or authority to discharge the official duties of the office of governor.** Compare *Opinion of the Justices*, 14 Fla. 277.

Tappy v. State, 82 So. 2d at 165-66 (emphasis added). Because Acting Governor Johns’ appointment occurred before Governor-elect Collins assumed the duties of the office of Governor, i.e. before he took the oath of office, the appointment by Acting Governor Johns was upheld.

22. When the Court examines the Code, the Charter, the Florida Constitution, and the binding precedent of the Florida Supreme Court, there is no doubt that Terrance Freeman did not assume the duties of District 10 City Council member until he took the oath of office on July 12, 2018. Accordingly, his term of office did not begin until July 12, 2018 and Plaintiff’s claim that he did not have residency on July 10, 2018, 2 days before he assumed

the duties of the office of District 10 City Council member, fails to state a cause of action as a matter of law. The Petition should be dismissed with prejudice.

The Petition Fails to Join an Indispensable Party or Parties

23. Additionally, Plaintiff failed to bring this suit against Terrance Freeman in his official capacity as a sitting member of the Jacksonville City Council. The relief sought in the Petition is a permanent injunction to prohibit the District 10 City Council member from functioning and serving the needs of the citizens in that legislative district.
24. Such injunctive relief also has the effect of disrupting the orderly and efficient exercise of government functions by the Jacksonville City Council, as a body, by seeking to enjoin the sitting District 10 City Council member from lawfully participating in the proper functions of government and disenfranchising the citizens of District 10 from any direct representation on the Jacksonville City Council, save the At-Large City Council members.
25. Accordingly, the Petition fails to join the indispensable parties of Terrance Freeman in his official capacity as District 10 City Council member and the City of Jacksonville. Rules 1.250 & 1.610(c), Fla.R.Civ.P.; *Reform Party v. Black*, 885 So. 2d 303, 307 (Fla. 2004); see also City of Jacksonville's Motion to Intervene filed July 17, 2018.

The Petition Fails to State a Cause of Action for Injunctive Relief

26. The allegations set forth in the Petition are mere conclusory allegations, wholly insufficient to properly state a claim upon which relief may be granted. Rule 1.110, Fla.R.Civ.P.; *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Barrett v. City of Margate*, 743 So. 2d 1160, 1163 (Fla. 4th DCA 1999).
27. To obtain injunctive relief, the Plaintiff must plead and establish the following: (1) an irreparable injury; (2) a clear legal right; (3) a lack of an adequate remedy at law; and (4)

that the requested injunction would not be contrary to the interest of the public generally. *Weekley v. Pace Assembly Ministries*, 671 So. 2d 220, 220 (Fla. 1st DCA 1996). Plaintiff's allegations simply fail to plead those elements.

28. Plaintiff's Petition fails for lack of subject matter jurisdiction and on the merits. Plaintiff's Petition has no legal or factual support and Florida law clearly requires dismissal with prejudice.

WHEREFORE, Defendant Terrance Freeman, through undersigned counsel, respectfully requests this Court dismiss the Petition with prejudice, and for any other relief the Court deems just and proper.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served via electronic mail and filed with the Court using the Florida Courts E-Filing Portal which will send a notice of electronic filing to all counsel of record on this 18th day of July, 2018.



Attorney