

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 04-22572-CIV-KING/O'SULLIVAN

EMMA YAIZA DIAZ, et al.,

Plaintiffs,

vs.

KURT S. BROWNING, Secretary of State of Florida,
Defendant.

**MOTION TO QUASH TRIAL SUBPOENAS FOR JERRY HOLLAND,
JEAN BEDENI AND RICHARD CARLBERG**

Jerry Holland, Duval County Supervisor of Elections ("Supervisor Holland"), Jean Bedini and Richard Carlberg move this Court for an Order quashing the trial subpoenas issued to Supervisor Holland, Richard Carlberg and Jean Bedeni in this matter and as grounds therefor would state:

1. Supervisor Holland was dismissed from this lawsuit pursuant to this Court's October 3, 2007 Order.
2. Council for Plaintiffs served trial subpoenas on Supervisor Holland, Richard Carlberg and Jean Bedeni on December 22, 2007, commanding them to appear at trial during the week of February 4, 2008 in Miami, Florida.
3. Supervisor Holland was dismissed as a Defendant in this case pursuant to this Court's October 3, 2007, order. As a result, neither he, nor his office, the Duval County Supervisor of Elections, is a party to the case. Ms. Bedeni is currently employed by Supervisor Holland.
4. Mr. Carlberg, who lives in Jacksonville, Florida, is a former employee of Supervisor Holland.

5. Jacksonville, Florida, where Supervisor Holland and Ms. Bedeni work and reside, and where Mr. Carlberg resides, is approximately 340 miles from the trial location in Miami, Florida.

6. Both Supervisor Holland and Ms. Bedeni were previously deposed at length in this case. As such, their testimony is preserved and is available for use at trial.

7. Supervisor Holland and Ms. Bedeni are instrumental and pivotal in conducting election activities for Duval County. On January 29, 2008, a county-wide election will be held in Duval County regarding the Presidential Preference Primary Election and decision on a proposed state-wide Constitutional amendment, mandating participation by both individuals. Election results are required to be certified to the State Division of Elections on February 10, 2008, requiring canvassing of absentee and provisional ballots during the week of January 28, 2008. If there is a recount ordered, the deadline for the initial recount would be Sunday, February 3, 2008 (§102.141(7)(c), Florida Statutes). If a manual recount were still needed pursuant to §102.166, Florida Statutes, such would necessarily occur during the week of February 4, 2008, the same week Supervisor Holland and one of his senior staff, Jean Bedeni, will be forced to travel to Miami and testify in the trial.

8. In addition, several state required actions will occur during the week of February 4, 2008, relating to the January 29, 2008, election, including meetings of the Duval County Canvassing Board to certify the election results. Supervisor Holland is a member of the Duval County Canvassing Board, along with a Jacksonville City Council Member and a County Court Judge. §104.121(1), Florida Statutes. The canvassing board is responsible for certifying the election results, and the Duval County Canvassing Board has scheduled its meetings to certify the results for February 7 and 9, 2008.

9. One of the motivating factor in Supervisor Holland's decision to settle this litigation was to avoid continued expense and disruption of his office's administration of elections, including the prospect of appearing in trial on the heels of the 2008 Presidential Preference Primary.

10. Supervisor Holland, Ms. Bedeni and Mr. Carlberg would incur substantial expense in having to travel to Miami, arranging for transportation and lodging, and expending the personal time necessary to physically attend the trial. Additionally, Mr. Carlberg has a permanent physical handicap that makes travel difficult and physically exhausting.

11. Mr. Carlberg, who was not previously deposed, has agreed to be deposed in this matter, which would serve as an effective and less burdensome substitute for Mr. Carlberg's live trial testimony.

12. Federal Rule of Civil Procedure 32(a)(3)(B) permits the use at trial of the depositions of Supervisor Holland and Ms. Bedeni and, when taken, of Mr. Carlberg in that all three individuals are located considerably in excess of 100 miles from the place of trial. 13.

13. Attached hereto is an affidavit of Jerry Holland, Exhibit A, verifying the allegations set forth within this Motion.

14. Undersigned counsel has conferred with Plaintiffs, who have advised that they have no objection to this motion, provided that Mr. Carlberg may be deposed and that the deposition transcripts of Mr. Carlberg, Mr. Holland and Ms. Bedeni may be introduced as evidence at trial. Counsel for Defendant has indicated that they take no position on the motion to quash the trial subpoenas, but do oppose any deposition of Mr. Carlberg outside of the discovery period established by this Court.

WHEREFORE, Jerry Holland, Duval County Supervisor of Elections, Jean Bedeni and Richard Carlberg request this Court to enter an Order quashing the trial subpoenas issued to Supervisor Holland, Jean Bedeni and Richard Carlberg in this matter and enter an Order authorizing the use of deposition transcripts of these three individuals at trial, subject to resolution of any objections raised during the course of such depositions.

Memorandum Of Law

Pursuant to Rule 45(c)(3)(A)(ii), Fed.R.Civ.Pro., the court shall quash a subpoena when such subpoena commands the presence at trial of any non-party witness who is required to travel more than 100 miles from the place where that person resides, unless the party issuing the subpoena can demonstrate undue hardship caused by the failure of the witness to attend the trial. Pursuant to Rule 32(a)(3)(B), Fed.R.Civ.Pro., a deposition transcript may be used at trial in lieu of live testimony when the witness resides in excess of 100 miles from the trial location.

When a non-party's testimony has been preserved, and that party would be compelled to travel more than 100 miles to testify, the Motion to Quash the Subpoena should be granted. *See Mendez v. Unitrin Direct Property & Cas. Ins. Co.*, 2007 WL 2726900 (M.D. Fla. 2007). Therefore, since Mr. Carlberg has agreed to be deposed in this matter and because Supervisor Holland and Ms. Bedeni have already been deposed, there is no undue hardship if the Court were to enter an Order quashing the trial subpoenas and authorizing use of such depositions, subject to resolution of any objections raised during such deposition, at trial.

Dated this 15th day of January, 2008.

Respectfully submitted,

RICHARD A. MULLANEY
GENERAL COUNSEL

s/ Tracey I. Arpen, Jr.

TRACEY I. ARPEN, JR.

Deputy General Counsel

Florida Bar No. 0154493

Office of General Counsel

117 West Duval Street, Suite 480

Jacksonville, FL 32202

(904) 630-1835

(904) 630-2388

Attorneys for Supervisor Jerry Holland,
Jean Bedeni and Richard Carlberg

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 10, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices for Electronic filing.

BY: _____
TRACEY I. ARPEN, JR.

SERVICE LIST

Diaz, et al. v. Hood, et al., Case Number 04-22572-CIV-King O'Sullivan

Mary Jill Hanson
Hanson, Perry & Jensen, P.A.
400 Executive Center Drive, Suite 207
West Palm Beach, Florida 33401
Via ECF

Judith A. Browne
Sheila Y. Thomas
Elizabeth Westfall
Advancement Project
1730 M. Street, NW, Suite 910
Washington, DC 20036
Via U.S. Mail

Judith A. Scott
John J. Sullivan
SEIU, 1313 L. Street, NW
Washington, DC 20005
Via U.S. Mail

Michael Halberstam
Paul, Weiss, Rifkind, Wharton,
Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Via U.S. Mail

Elliot Mincberg
People for the American Way Foundation
2000 M. Street, Suite 400
Washington, DC 20036
Via U.S. Mail

Jonathan P. Hiatt
AFL-CIO
815 Sixteenth Street, NW
Washington, DC 20006
Via U.S. Mail

Manny Anon, Jr.
Florida Public Employees Council
AFSCME 79
99 N.W. 183 Street, Suite 224
N. Miami, FL 33169
Via U.S. Mail

Stephanie Alexander
Alexis Marie Yarborough
Edward Joseph Pozzuoli, III
Tripp Scott
110 SE 6th Street
15th Floor P.O. Box 14245
Fort Lauderdale, Florida 33302
Via ECF

S. Gale Dick
Steven S. Michaels
Eliza Sporn
Debevoise & Plimpton
919 SE 3rd Avenue
New York, NY 10022
Via U.S. Mail

Peter Antonacci
Gray-Robinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302-1189
Via ECF

Allen C. Winsor
Gray-Robinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302-1189
Via ECF

Lynn Hearn
500 S. Bronough Street
Tallahassee, FL 32399-0250
Via U.S. Mail

Thomas P. Abt
Paul, Weiss, Rifkind, Wharton,
Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Via ECF

Michael D. Cirullo
Goren, Cherof, Doody & Ezrol, P.A.
3099 East Commercial Blvd., Suite 200
Fort Lauderdale, FL 33308
Via ECF

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 04-22572-CIV-KING/O'SULLIVAN

EMMA YAIZA DIAZ, et al.

Plaintiffs,

v.

KURT BROWNING, Secretary of State of
Florida, et al.

Defendants

STATE OF FLORIDA

COUNTY OF DUVAL

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared, JERRY HOLLAND, and after being duly sworn, deposes and says:

1. I am the duly elected Duval County, Florida, Supervisor of Elections.
2. As the Duval County Supervisor of Elections, I serve as the Chief Elections Official for Duval County and my responsibilities include oversight and supervision of all election matters and actions in Duval County.
3. On January 29, 2008, the State of Florida will be conducting its presidential preference primaries for both the Democratic and Republican parties, as well as a statewide election involving an amendment for the Florida Constitution. My office is responsible for conducting this election.

EXHIBIT A

4. In the event of any recounts for any of the elections conducted on January 29, 2008, such recounts could extend into the week of February 4, 2008. In addition, during the week of February 4, 2008, the Duval County Canvassing Board must meet to certify the election results. As the Supervisor of Elections, I serve on the Canvassing Board. The scheduled dates for those public meetings are Thursday, February 7, 2008 and Saturday, February 9, 2008.

5. The location of the trial, Miami, Florida is over 300 miles from my office location and from my residence and those of Jean Baldwin and Richard Calberg.

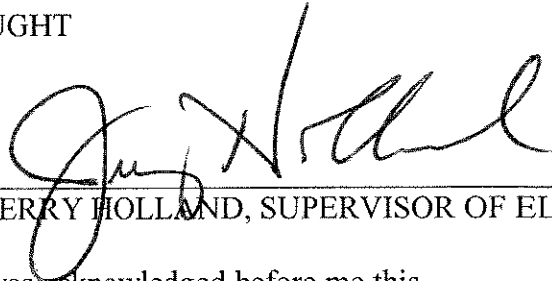
6. My absence from the office during the week of February 4, 2008, to attend a trial in Miami, Florida, would adversely affect my ability to oversee election matters that were ongoing during my absence, as well as adversely affect the Duval County Canvassing Board's ability to certify the election results from the January 29, 2008 election.

7. Travel to Miami would be an unnecessary cost to the Duval County Supervisor of Elections Office and the Duval County taxpayers that has not been budgeted. Given recent property tax reforms, my office budget is limited.

8. Richard Calberg is a former employee of this office. I know that Mr. Carlberg has a permanent physical condition which would make travel to Miami very difficult and exhausting.

9. Plaintiffs previously took my deposition and that of Ms. Bedeni in Jacksonville, Florida both of which lasted several hours and in which Plaintiffs counsel thoroughly questioned me on issues relating to the processing of voter registration applications and potential "grace periods" as that terms is used by Plaintiffs counsel.

FURTHER AFFIANT SAYETH NAUGHT



JERRY HOLLAND, SUPERVISOR OF ELECTIONS

THE FOREGOING INSTRUMENT was acknowledged before me this _____ day of January, 2008, by JERRY HOLLAND, Supervisor of Elections, Duval County, Florida, who is personally known to me or has produced _____ as identification.

NOTARY PUBLIC

Print or Type Name

My Commission Expires: