

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.04-22572-CIV-KING

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EMMA YAIZA DIAZ, ET AL.,	:
	:
Plaintiffs,	:
	:
v.	:
	:
KURT S. BROWNING, SECRETARY OF STATE	:
OF FLORIDA, ET AL.,	:
	:
Defendants.	:
-----	X

**PLAINTIFFS' JOINDER IN THE SECRETARY OF STATE'S RESPONSE TO
DEFENDANT SUPERVISOR SOLA'S MOTION FOR JUDGMENT ON THE
PLEADINGS, AND PLAINTIFFS' FURTHER OPPOSITION TO DEFENDANT SOLA'S
MOTION, AND THE JOINDERS THEREIN, BY DEFENDANT SUPERVISORS
ANDERSON, COWLES, HOLLAND, AND SNIPES**

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Plaintiffs join in the argument by made the Secretary of State in response to Defendant Sola's Motion for Judgment on the Pleadings (the "Motion") and submit this further opposition to Sola's Motion and to the Joinders therein by Defendants Anderson, Cowles, Holland, and Snipes. The Motion is without merit and should be denied.

Preliminary Statement

Defendants ask this Court for unprecedented relief – in Florida's entire history of § 1983 litigation, no court has ever dismissed Supervisors of Elections on such grounds. Indeed, the only remotely comparable case with regard to such Supervisors, *Socialist Workers Party v. Leahy*, 145 F.3d 1240 (11th Cir. 1998), strongly supports plaintiffs' position that Supervisors of Elections, as the chief election officials at the county level, are indispensable parties to this litigation.

Defendants provide this Court with no legal support for this unprecedented request. *Friedman v. Snipes*, 345 F.Supp.2d 1356 (S.D.Fla. 2004), the only case cited by defendants, is inapposite. More importantly, defendants blatantly mischaracterize its holding, which actually lends further support to plaintiffs' position.

Defendants' two-page Motion comes both too late and too soon. Defendants have had ample opportunity to move against the Complaint and have, indeed, already raised the issue at the heart of their Motion in their previous motions to dismiss on which the Court has already ruled. Defendants now take a second "bite at the apple," seeking reconsideration of the Court's order on their motions to dismiss in the guise of a motion for judgment on the pleadings. At the same time, defendants' motion is premature in that it falsely claims that there are no material facts in dispute when in reality those facts are very much contested and will be established through discovery, something which defendants have evaded thus far.

In summary, Defendants' motion asks much but provides little, especially in light of the heavy burden they bear when seeking judgment on the pleadings. The motion is wholly without merit and should be dismissed.

Standard On The Motion

“Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.” *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1291 (11th Cir. 2002) (citation omitted). The court must view the facts “in the light most favorable to the nonmoving party,” and it can grant the motion only if the non-movant “can prove no set of facts” which would allow it to prevail. *Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002) (citation omitted).

Argument

I. Defendants' Argument Is Without Merit

A. *No Court Has Ever Found Supervisors Of Elections To Be Improper Defendants In Actions Challenging The Constitutionality Of Florida's Election Laws*

As the Secretary of State notes, Defendant Supervisors of Elections are proper parties in constitutional challenges to state election laws, given their critical role in the administering and enforcing of Florida's voter registration laws. (Secr. Mem., p. 2); *See e.g.*, *Wexler v. Anderson*, 452 F.3d 1226, 1233 (11th Cir. 2006). Accordingly, it is unsurprising that never, in Florida's entire history of § 1983 litigation, have County Supervisors been dismissed from an election law case on the grounds raised by defendants in their motion.

The single exception to the above-described rule is *Socialist Workers Party v. Leahy*, 145 F.3d 1240 (11th Cir. 1998). In *Leahy*, minor political parties sued County Supervisors, challenging a certain election law requiring political parties to file bonds. The statute at issue, Fla. Stat. § 101.121(3), was entirely silent as to enforcement. The district court

granted summary judgment to defendants and the circuit affirmed. The court stated that it could find no enforcement authority on the part of County Supervisors, and held that “an appropriate defendant, must, at a minimum, have some connection with enforcement of the provision at issue.” 145 F.3d at 1248. In the present case, we have precisely the opposite situation. County Supervisors are the primary enforcers of the law with regard to registration. Therefore, following the circuit court’s reasoning in *Leahy*, County Supervisors are entirely appropriate defendants in this case.

The defendant Supervisors are the principal election officials in their respective counties, possessing broad authority to effectuate and interpret state election law.¹ As the Secretary has noted, they have substantial and often exclusive duties relating to voter registration. (Secr. Mem., p. 2-3). Florida’s Supervisors administer the State’s voter registration system, with responsibilities such as updating voter registration information, entering new registrations into the voter registration system and acting as the official custodian of records related to registration of individuals within their county. Fla. Stat. § 98.015(3). County Supervisors are solely responsible for determining registration eligibility and for ensuring that every eligible applicant for voter registration is registered to vote and that each application for voter registration is processed in accordance with law. Fla. Stat. § 98.045. County Supervisors must notify applicants if they have failed to provide any of the required information on the voter registration application. Fla. Stat. § 97.052(6). Supervisors are also the ones who must notify each applicant of the disposition of the applicant’s voter registration application and whether the application has been approved, is incomplete, has been denied, or is a duplicate of a current

¹ Unlike their counterparts in many jurisdictions, County Supervisors do not function simply as appointees or employees of the Secretary of State. Under Florida’s constitution, County Supervisors are independently-elected county officers who serve four year terms. Fla. Const., Art. VIII, § 1(d). They are paid from county, not state, funds. Fla. Stat. § 98.015(2). If the Secretary of State differs with a County Supervisor concerning election law, her enforcement options are not significantly different than those of the public – she can sue. Fla. Stat. § 97.012(14). Even before the Secretary of State can bring an action against a County Supervisor, they are required to confer with said Supervisor. Fla. Stat. § 97.012(14)(c).

registration. Fla. Stat. § 97.073. Supervisors have broad discretion to select and maintain hardware or software that will assist them in their duties. Fla. Stat. § 98.035(4).

B. Defendants Cite No Valid Authority Supporting The Dismissal Of County Supervisors

There is simply no legal authority to grant the motion at issue, and Defendants provide none. Instead, they completely mischaracterize the holding of the only case they cite in favor of the proposition that the Supervisors are not necessary parties in this action, *Friedman v. Snipes*, 345 F.Supp.2d 1356 (S.D.Fla. 2004). In *Friedman*, Plaintiff voters brought suit for the alleged failure to count absentee ballots, naming two County Supervisors and the Secretary of State as defendants. 345 F.Supp.2d at 1358. The Court found that the failure to join the 65 other Florida County Supervisors would result in arbitrary and disparate treatment if the Court granted Plaintiffs' motion and therefore found that Plaintiffs had failed to join indispensable parties under Rule 19 of the Federal Rules of Civil Procedure. The Court there was concerned with "the unequal application of law to domestic absentee voters throughout the state."

By contrast, in this case Plaintiffs do not seek to affect a statewide vote count selectively by favoring extended deadlines in some counties but not in others. Rather, this case is brought against all those Counties in which Plaintiffs were injured and seeks to vindicate the rights of applicants and union members in those counties.

Friedman, the lone case cited by defendants, has nothing to do with the proposition that Defendants would urge on the Court in this case, namely that the Supervisors of Elections should be dismissed because they have no authority to interpret and enforce the State election laws regarding voter registration. In fact, *Friedman* supports the opposite conclusion, suggesting that, under certain circumstances not present here, it is necessary to join suit against all of Florida's County supervisors, in order to avoid disparate results in different counties.

In addition to *Leahy*, another § 1983 decision by the 11th Circuit further undermines defendants' position. In *McKusick v. City of Melbourne*, 96 F.3d 478 (11th Cir. 1996), a case closely analogous to this one, the Eleventh Circuit held that it was error to dismiss a § 1983 claim concerning a deliberate policy choice on behalf of defendants. In *McKusick*, plaintiff challenged the city of Melbourne's administration of a court-ordered injunction requiring plaintiff and others to refrain from coming within a certain distance of an abortion clinic. The district court dismissed plaintiff's complaint, holding that it failed to state a claim in that the injunction did not constitute a cognizable custom or policy under § 1983. Following *Oklahoma v. Tuttle*, 471 U.S. 808 (1985), the 11th Circuit vacated the district court's order. Noting that the injunction authorized, but did not command, the arrest of those who disobeyed its mandate, the court found that this constituted a policy. A similar relationship exists in the present case between County Supervisors and the registration statutes they enforce.

II. Plaintiffs Are Entitled To Discovery On The Pending Motion

A motion for judgment on the pleadings can be successful only when all material allegations of fact are admitted or not controverted in the pleadings. See *Slagle v. ITT Hartford*, 102 F.3d 494, 497 (11th Cir. 1996). Despite defendants' statements to contrary, that is not the case here. Defendants claim that Plaintiffs concede County Supervisors have no authority to provide voter applicants an opportunity to correct after the close of books and that there is no material fact in dispute on this issue. Plaintiffs vigorously opposed, however, and continue to oppose, the claim that County Supervisors lack discretion to establish policies or customs with regard to voter registration. Indeed, such a proposition is contradicted by the facts: in 2004, County Supervisors in Duval, Hillsborough and Manatee Counties notified prospective voters of inadequacies on their voter registration applications and provided them with an opportunity to update or correct information after the close of books. While state election procedures have become more standardized since 2004, County Supervisors, as the chief election officials at the

county level, still retain significant discretion and are in practice in control of the registration process.

Defendants' motion cannot be granted unless Plaintiffs "can prove no set of facts" that would allow them to prevail. *Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002). The facts in the present case, however, remain unsettled and require further discovery. Plaintiffs', in their complaint, undoubtedly characterize the attempt, on the part of the State to prohibit the Supervisors from accepting corrections after the close of books in order to make the point that their constitutional rights cannot be vindicated without an injunction by this court. But Plaintiffs have had no discovery on whether the County Supervisors have provided or continue to provide a grace period.

If Plaintiffs' can show that different Supervisors have had different policies on how and when they permitted applicants to update or correct their applications after the close of books, that would certainly have a bearing on the present motion. Thus Defendants cannot establish that Plaintiffs can "prove no set of facts" which would allow them to prevail. At a minimum, Plaintiffs are entitled to discovery on the issue of when Supervisors of Elections have, in fact, provided for an opportunity to correct after the close of books.

Because genuine issues of material fact are present in this case, and because further discovery is required, defendants' motion for judgment on the pleadings must fail. Plaintiffs are entitled to discovery on whether the defendants' failure to provide a grace period is necessary or even reasonable. *Anderson v. Cellebreze*, 460 U.S. 780, 788, 806 (1983). Part of the discovery that Plaintiffs are seeking is, accordingly, discovery on whether, and under what circumstances, other County Supervisors provided (and continue to provide) for opportunities to correct after the close of books. It is, therefore, not at all undisputed that the County Supervisors have not in fact exercised their discretion on this matter.

III. Defendants' Motion Is Procedurally Inappropriate

While styled a motion for judgment on the pleadings, defendants Motion can only be interpreted as either (1) a reworked and duplicative motion to dismiss; or (2) a motion for reconsideration of the Court's order on their motion to dismiss in the guise of a motion for judgment on the pleadings.

In the first case, the motion is clearly inappropriate and attempts to relitigate an issue that has previously been raised by defendants, briefed by the parties and decided by this Court. Defendants' originally raised their "lack of discretion" defense in their motions to dismiss the Third Amended Complaint. (*See* Sola Mem. at 4-5; Snipes Mem. at p. 7-8; Snipes Reply Mem. at 1-4.) Plaintiffs addressed this defense in their opposition papers. (*See* Plaintiffs' Mem. Opp. at 21-23.) The Court decided this issue in its February 27, 2007 Order on Motion Dismiss, dismissing certain claims but allowing Plaintiffs' claim with regard to defendants' failure to provide a grace period.²

In the second case, if properly pled as a motion for reconsideration, the motion would be decided under a very different standard, one far more difficult for the defendants to satisfy. While this Court clearly "has the power to revisit prior decisions of its own ... as a rule courts should be loathe to do so in the absence of extraordinary circumstances." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988); *see also U.S. v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198, 70 S.Ct. 537, 544, 94, L.Ed. 750 (1950) ("The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter."); *White v.*

² Defendants go so far as to mischaracterize the opinion of this Court, properly quoting its decision but attributing it incorrectly. In its Order, the Court was fully aware of defendants' "lack of discretion" argument but chose not to credit it with regard to the grace period.

Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967) (The law of the case “must be followed in all subsequent proceedings in the same case in the trial court” unless there is new evidence, an intervening change of law, or “the decision was clearly erroneous and would work a manifest injustice”).

Conclusion

For all these reasons, Plaintiffs respectfully request that the Court deny the defendants’ Motion.

Dated: New York, New York
April 20, 2007

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via U.S. mail and e-mail this 20th day of April, 2007, to counsel for the parties listed in Exhibit A, attached hereto.

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