6/12/2018 11:11 AM
Chris Daniel - District Clerk Harris County
Envelope No. 25223135
By: Joshua Bovell
Filed: 6/12/2018 11:11 AM

NO. 2017-83251

JAMES NOTEWARE, Contestant, v. SYLVESTER TURNER, MAYOR OF THE CITY OF HOUSTON, TEXAS, AND CITY OF HOUSTON, TEXAS, Contestees.	§ § § § § § § § § § §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 269TH JUDICIAL DISTRICT

CONTESTEES' RESPONSE TO NOTEWARE'S MOTION TO COMPEL

Contestees Sylvester Turner, Mayor of the City of Houston, Texas, and the City of Houston, Texas, file this Response to Contestant James Noteware's Motion to Compel the depositions of Melissa Dubowski and City of Houston Corporate Witness, and would show the following.

I. INTRODUCTION

At 11:58 p.m. on May 21, 2018 – two minutes before the expiration of the discovery deadline in the agreed Discovery Control Plan – Contestant noticed the oral depositions of Melissa Dubowski and a "corporate witness" for the City of Houston via email. Both depositions were noticed to be taken on June 1, 2018 at Contestant's attorney's law office. Contestees timely filed motions to quash these depositions. Because Contestees objected to the time and place of these depositions, the motions automatically stayed those depositions. *See* Tex. R. Civ. P. 199.4.

Contestees also filed, as part of their motions to quash, motions for a protective order that these depositions not be taken. In response, Contestant filed a motion to compel the City to produce Ms. Dubowski and a "corporate witness" for depositions. These depositions should not go forward because:

- The only cause of action Contestant has pleaded is an Election Code contest claim alleging that the ballot language for Proposition A was materially misleading in that it allegedly failed to inform the voters at the November 7, 2017 election that the taxes to be levied to finance the debt service obligation for the Pension Obligation Bonds (the "Bonds") would not be limited by the City Charter's property tax revenue cap. Contestees established in their Motion to Dismiss that the City must comply with the Charter property tax revenue cap in the levying of taxes to finance the Bonds. Therefore, the issue to be decided in this case is a pure legal issue for which no discovery is warranted;

- The proposed depositions have no relevance to Contestant's pleaded Election Code contest claim;

- The proposed depositions also are irrelevant to Contestees' pending Motion to Dismiss because all of the events that have rendered moot Contestant's Election Code contest claim occurred prior to the disbursement of the Bond proceeds about which Contestant seeks discovery.

II. PROCEDURAL BACKGROUND AND DISCOVERY STATUS

On March 22, 2018, the parties filed with the Court their agreed Discovery Control Plan ("DCP"). At Contestant's urging, the DCP contained procedures requiring Contestees to respond to Contestant's discovery on an expedited basis, as well as be able to respond to any discovery disputes on an shortened timeframe. Moreover, again, at Contestant's urging, the DCP established a discovery deadline of May 21, 2018, just under two months after the entry of the DCP.

But, despite advocating for expedited discovery, Contestant waited until April 2, 2018 to serve written discovery on Contestees. On April 23, 2018, Contestees served responses (based on the expedited schedule) to the discovery requests via electronic service with the Harris County District Clerk's office. Contestees did not object to any of the discovery requests. After making several attempts to serve Contestant's counsel with the discovery responses he claimed to have needed on an expedited basis – which included 4,782 pages of documents – Contestant's counsel sent an email stating that Contestees could "cease any further delivery efforts" of the documents, and that he "cannot receive the documents until next week."

On May 10, 2018, Contestees served supplemental discovery responses that included 2,140 pages of additional documents. Contestees also served a privilege log six days prior to the due date for filing the log.

In accordance with the DCP, the Court conducted a hearing on Contestees' Motion to Dismiss in the Harris County District Court on May 11, 2018. Contestant asked the Court to delay its ruling on the motion to dismiss to permit Contestant to conduct additional discovery. When the Court asked what discovery Contestant sought to conduct, Contestant related that he had contacted the Texas Attorney General's office to seek to depose one or two assistant attorneys general. *See* Transcript of May 11, 2018 Hearing at 15-16 (attached as Exhibit A). Contestant made no mention whatsoever of an intent or desire to depose anyone connected with the City. *Id*. Following the hearing, the Court re-set the hearing on the motion to dismiss to June 29, 2018, directed Contestant to file any dispositive motion by June 15, 2018, and directed Contestees to file by June 22, 2018 any response to any dispositive motion that Contestant filed.

On May 14, 2018, Contestees received an email from Contestant's counsel asking for dates when Contestees' counsel could be available to attend one or two depositions of assistant attorneys general of the State of Texas in Austin. Once again, Contestant made no mention of any desire to depose anyone else in the case. Even though Contestees did not and do not believe any written discovery or oral depositions are needed or are relevant in this case, Contestees did not object to attending a deposition of an assistant attorney general, as Contestees have no control over the personnel of the Texas Attorney General's office.

Under the DCP, the deadline to amend the pleadings was May 16, 2018. Contestant did not amend the original petition he filed on December 15, 2017. As a result, Contestant's only pleaded claim is that Contestants allegedly violated Section 221.003(a)(2) by omitting from the

ballot the following language contained in Proposition A: "such tax to be levied without being limited by any provisions of the City's home rule charter limiting or otherwise restricting the City's combined ad valorem tax rates or combined revenues from all City operations." *See* Original Petition at ¶¶ 21-24, 28, 38.

At 7:00 p.m. on May 17, 2018, Contestant's counsel – for the very first time – communicated to Contestees his desire to depose persons other than the Texas assistant attorneys general. Contestant's counsel said he sought to depose Ms. Dubowski, a City "corporate witness," and an individual named John Lawson. Contestees responded the following day that they would not agree to these depositions because such depositions were outside the scope of the discovery Contestant's counsel represented to the Court he needed to take in order to respond to the pending motion to dismiss, and because these depositions were not relevant to Contestant's only pleaded claim.

Since the time of the above-referenced communications, a deposition of Leslie Brock, a Texas Assistant Attorney General, was taken on May 31, 2018 in Austin. Contestees did not object to this deposition and attended the deposition. Contrary to the expectations Contestant's counsel related at the May 11, 2018 hearing, Ms. Brock's testimony did not disclose any relevant information concerning Contestant's Election Code contest claim or Contestees' Motion to Dismiss. The only testimony Ms. Brock gave of any consequence was that she confirmed sending to the City a letter dated December 20, 2017, in her capacity as the Chief of the Public Finance Division of the Texas Attorney General's Office, stating that "for future tax obligations, the outstanding amount of 2017 Pension Obligation Bonds must continue to be included in the combined debt service schedule <u>for purposes of demonstrating compliance with</u> . . . . <u>the tax limit requirements of article III, section 1(a) of the city charter</u>." Ex. B (emphasis added).

Contestees' counsel subsequently learned that John Lawson – who is the Executive Director of the Houston Police Officers' Pension System – was not a City employee and had his own legal counsel. A tentative agreement has been reached between Mr. Lawson's counsel and Contestant's counsel for Mr. Lawson to be deposed at his counsel's office on June 13, 2018. Contestees have not objected to that deposition, even though it is irrelevant, because Contestees have no legal control over Mr. Lawson.

Therefore, the only issue before the Court is whether City employee Melissa Dubowski and a "corporate witness" of the City should proceed. They should not, for the reasons outlined below.

III. CONTESTANT'S REQUESTS TO DEPOSE MS. DUBOWSKI AND A CITY "CORPORATE WITNESS" ARE OUTSIDE THE DISCOVERY CONTESTANT REPRESENTED TO THE COURT AS HIS BASIS FOR REQUESTING THE COURT TO DELAY A RULING ON CONTESTEES' PENDING MOTION TO DISMISS

As discussed above, Contestant never mentioned at the May 11, 2018 hearing his desire or need to depose Ms. Dubowski or a City "Corporate Witness." He made no mention of the need to depose any person employed by the City. Ex. A at 15-16. In fact, Contestant restricted his need for discovery to personnel employed by the Attorney General's office to determine if that office reviewed the ballot for Proposition A in the bond election to see if the ballot complied with the common law requirements set forth in *Dacus v. Parker*, 466 S.W.3d 820 (Tex. 2015). *Id.* That deposition has been taken.

An election contest lacks the element of an ordinary civil lawsuit. *Carter v. Tomlinson*, 149 Tex. 7, 227 S.W.2d 795, 799 (1950). A district court's authority to act in an election contest is limited to the subjects or grounds expressly or impliedly authorized by the Election Code. *Rossano v. Townsend*, 9 S.W.3d 357, 361 (Tex. App.—Houston [14th Dist.] 1999, no pet.). No

provision of the Election Code authorizes the taking of depositions in an election contest. The DCP contains no provision authorizing or permitting depositions to be taken in this case.

Had Contestant's counsel said anything at the May 11, 2018 hearing about a desire to depose a City employee, Contestees would have immediately objected and this issue could have been resolved at that hearing. Instead, Contestant's counsel represented to the Court that the only depositions he sought to take were personnel from the Texas Attorney General's office. Ex. A at 15-16.

IV. THE DEPOSITIONS OF MS. DUBOWSKI AND A CITY "CORPORATE WITNESS" ARE NOT RELEVANT TO THE ONLY CLAIM CONTESTANT HAS PLEADED

Contestant was very specific in his original petition when he pleaded the only cause of action for which he sought relief: an alleged violation of Section 221.003(a)(2) of the Election Code because the ballot for Proposition A allegedly was materially misleading because it omitted the phrase "such tax to be levied without being limited by any provision of the City's home rule charter limiting or otherwise restricting the City's combined ad valorem tax rates or combined revenues from all City operations." *See* Original Petition at ¶¶ 21-24, 28, 38. Despite having prosecuted his lawsuit for six months and having received from Contestees almost 7,000 pages of documents, Contestant did not amend his pleading in accordance with the DCP's pleading amendment deadline of May 16, 2018. And, at the hearing on May 11, 2018, Contestant reiterated that his is solely an election contest, which he asserted is not impacted by the Attorney General's approval of the issuance of the bonds [although incongruous to his argument later in the hearing (pp. 15-16) that it is necessary for him to depose the AG's office to determine if it applied *Dacus*]. Ex. A at 8-9. Thus, Contestant's request to depose Ms. Dubowski and a City "corporate witness" cannot be relevant unless the subject matter of these depositions relates to his pleaded claim under Section 223.003(a)(2) of the Election Code. It does not.

Contestant first sought to justify his desire to depose Ms. Dubowski and the City corporate witness in an email Contestant's counsel sent to Contestees on May 23, 2018. In that email, Contestant stated the following concerning Ms. Dubowski:

> She is a high level employee in the City Finance Department and the documents reflect that she was copied on much of the correspondence regarding the progress of work on the closing memorandum, official statement, and other work on the Bonds. Additionally, the emails reflect that she was apparently in close contact with John Lawson and other pension principals regarding the plan for distribution of proceeds during the final run toward issuance immediately surrounding our TRO hearing.

Ex. C.

In that same May 23, 2018 email, Contestant sought to justify his deposition notice of a City "corporate witness" by referring to the deposition notice itself. The deposition notice listed the following subject matter about which the corporate witness was to testify:

> (a) With regard to the "Closing Memorandum" setting out the wire instructions for the distribution of the proceeds from the Proposition A bonds, the circumstances, timing and logistics of the preparation of such memorandum, including but not limited to the process by which the City Attorney's office, and/or bond counsel, reviewed or approved or had knowledge of the memorandum, and the persons within the City Attorney's office and/or bond counsel's firm(s) with such knowledge.
>
> (b) The Official Statement regarding the bonds at issue in this case states that enterprise fund monies may be or will be used to pay a portion of the debt service on the bonds. Designate a witness competent to testify regarding the purported sources and scope of the City of Houston's authority to utilize monies from any of the enterprise funds for such purpose.

Ex. D.

Nothing in Contestant's counsel's May 23, 2018 email nor in the deposition notices remotely relates to Contestant's pleaded cause of action under the Election Code. Contestant's email made no mention whatsoever to the specific complaint about the ballot language that he asserted in his Original Petition.

Contestant's Motion to Compel now seeks to justify these depositions by claiming that Ms. Dubowski and the City corporate witness have knowledge regarding "closing logistics." That has nothing to do with the ballot language about which Contestant complains in his pleading. The bond closing occurred over six weeks after the City voters overwhelmingly approved Proposition A that was submitted on the ballot language about which Contestant complains.

Contestant further argues in his Motion to Compel that the City corporate witness would have knowledge about the "enterprise funds" for which the City has authority to use to pay a portion of the debt service on the Bonds. That also has nothing to do with the Election Code claim Contestant has pleaded.

Contestant did not plead that the ballot language for Proposition A was materially misleading because it did not describe all of the possible sources of revenues the City is legally entitled to use to pay the future debt service obligations for the Bonds. On the contrary, Contestant made one complaint and one complaint only: "The Proposition therefore asks the voters to approve more than a billion dollars in new debt, the levying of taxes to pay for this debt, and provides that such taxes are not subject to the Charter limitation on the growth of property tax revenues year after year." *See* Original Petition at ¶ 22.

Because Contestant's proposed depositions of Ms. Dubowski and a City corporate witness are not relevant to the only cause of action Contestant has pleaded, Contestees are entitled to a protective order that these depositions not go forward, and Contestant's Motion to Compel should be denied.

V. THE DEPOSITIONS OF MS. DUBOWSKI AND A CITY CORPORATE WITNESS ARE NOT RELEVANT TO CONTESTEES' PENDING MOTION TO DISMISS

The primary justification Contestant offers in his Motion to Compel for seeking the depositions of Ms. Dubowski and a City corporate witness is to discover facts about the "closing

logistics" related to the bond closing that occurred on December 22, 2017. Contestant then attempts to link other events that occurred during or after the bond closing – specifically, the disbursement of the Bond proceeds to the Houston Police Officers Pension System and the Houston Municipal Employees Pension System – to Contestees' Motion to Dismiss. There is no such relationship.

As Contestees established in the Motion to Dismiss, every event rendering moot Contestant's Election Code lawsuit already had occurred prior to the disbursement of the Bond proceeds. Taxes to finance the Bonds had been levied. *See* Motion to Dismiss, Ex. 3. A sinking Fund had been created. *Id*. The Bonds were issued. *Id*. at Exs. 6 and 7. The Bonds had been delivered to the representative of the underwriter. *Id*. Moreover, the Texas Attorney General's office issued its opinion validating and approving the Bonds prior to the disbursement of the Bond proceeds. *Id*. at Ex. 5. The Texas Comptroller of Public Accounts also had certified and registered the Bonds. *Id*. at Ex. 6.

Rather than acknowledging these undisputed facts, Contestant instead repeats the personal attacks he has made in prior filings against Contestees' counsel. Contestant apparently seeks to use this lawsuit to air his personal grievances against Contestees' counsel and statements Contestant's counsel believes were made or not made during the in-chambers discussion with the Court following the Court's denial of Contestant's TRO motion. Contestees will not engage in a back and forth of who said what during those discussions other than to say that Contestees' counsel has a different recollection from Contestant's counsel as to what transpired during the December 21, 2017 in-chambers discussion with the Court.

What cannot be disputed is that at the time the Bond proceeds were disbursed, Contestees were under no court order and had entered into no stipulation to delay the implementation of the

election results, which included the disbursement of the Bond proceeds. What also cannot be disputed is that Contestant had no legal right to use the guise of an Election Code contest to attempt to interfere with the implementation of the election results, which included the disbursements of the Bond proceeds. *See* Motion to Dismiss at 8, 15. Simply put, once the Court denied Contestant's application for a TRO, Contestees had the legal right to proceed with the Bond closing and implement the election results. Those election results included the reduction of a portion of the unfunded liability of the City with respect to the Houston Police Officers' Pension System and the Houston Municipal Employees Pension System.

Contestant further cannot overcome the mootness and lack of ripeness of his Election Code lawsuit by seeking to challenge, through discovery, the City's calculation of its capacity to pay the principal and interest of all of the City's tax-supported bonds, notes, and other obligations in any fiscal year – including the Bonds – without providing for a tax increase that exceeds the Charter property tax revenue cap. *See* Motion to Dismiss at Ex. 4. Contestees already have established beyond dispute that the City's initial tax levy to finance the Bonds does not exceed the Charter property tax revenue cap. *Id*. at Ex. 3. That fact alone renders moot Contestant's Election Code contest claim. Contestant's speculation about what might or might not happen in the future is not ripe for resolution unless and until (1) the City were to levy taxes in excess of the current Charter property tax revenue cap, which it has never done and, to do so, would be in direct violation of the Attorney General's directive that the City must comply with the Charter property tax revenue cap; and (2) the City did so without first obtaining a valid amendment of the City Charter, which cannot be done by passing an ordinance that violates the Charter. Thus, deposing Ms. Dubowski and a City "corporate witness" on these speculative, hypothetical events has no relevance to this lawsuit.

Finally, Contestant also is wrong in arguing that the City supposedly "changed its behavior" in order to render moot Contestant's Election Code lawsuit. Contestant has failed to come forward with a single document contradicting the undisputed fact that the City has never levied taxes to finance its debt service obligations in excess of the existing City Charter property tax revenue cap. Nor could the City do so without first obtaining voter approval to amend the City Charter. *See Vosberg v. McCrary*, 77 Tex. 568, 14 S.W. 195 (1890) (holding that an ordinance cannot violate a city charter). And this is not a case where the City is arguing that "we made a mistake in the ballot language and we won't do it again; therefore, your lawsuit is moot." *Compare Matthews, on behalf of M.M. v. Kountze Ind. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016). On the contrary, this is a case where a ruling on Contestant's Election Code contest claim will not have any practical legal effect on a then-existing controversy, and would be nothing more than an impermissible advisory opinion in a case that is not ripe. That is because all of the events that render moot Contestant's lawsuit occurred by virtue of actions the City had the legal right to undertake and the determination by the Texas Attorney General to approve and validate the Bonds, which determination cannot be challenged in this Court or in any other court for any reason. *See* TEX. GOV'T CODE §§ 1202.006(a), 1371.059(a).

Deposing Ms. Dubowski and a City corporate witness about the "closing logistics" concerning the Bonds simply has no relevance to Contestees' pending Motion to Dismiss. The Court therefore should grant Contestees' Motion for Protective Order and deny Contestant's Motion to Compel.

VI. CONTESTANT'S REQUEST TO DEPOSE MS. DUBOWSKI AND A CITY CORPORATE WITNESS ON THE CITY'S RIGHT TO USE "ENTERPRISE FUNDS" HAS NO RELEVANCE TO THIS DISPUTE

Contestant's final argument to attempt to justify the deposition of a City corporate witness relates to the City's authority to use certain "enterprise funds" to contribute to the payment of the

debt service obligations on the Bonds. "Enterprise funds" are revenue-generating funds including the City's Combined Utility System and Airport System. *See* Ex. E. These enterprise funds are not ad valorem taxes levied on the City's taxpayers. They are revenues generated by the City's airports and combined utility system.

The fact that the City has the authority, ***but not the obligation***, to use these enterprise funds to augment its tax levied to pay the City's various obligations – including the debt service obligations on the Bonds – does not have the slightest relevance to this lawsuit. As discussed previously, Contestant has not pleaded that the ballot language for Proposition A somehow materially misled the City's voters because it did not mention that revenue sources other than the taxes that were levied as authorized by Proposition A could be used at the City's discretion to finance the debt service obligation on the Bonds. Moreover, Contestant's thirteenth-hour argument in his Motion to Compel concerning the City's authority to use these enterprise funds does not remotely resemble the only claim Contestant referred to in his Declaration attached as Exhibit G to Contestant's May 10, 2018 First Amended Response to Contestees' Motion to Dismiss ("I was incensed to learn of the City's attempt to create an exception to the charter limit on property tax revenues without including such fact in the ballot description in the November 2017 election"). Again, the claim Contestant asserted in his Declaration is the only claim Contestant alleged in his pleadings.

But even if Contestant had asserted such a claim in his pleadings, that claim would have been frivolous.[1] A municipality is not required to seek voter approval to use general or special

[1] If Contestant had attempted to amend his pleadings by the pleading amendment deadline in the DCP to allege an Election Code violation relating to the City's authorization to use enterprise funds to partially finance the debt service on the Bonds – which he did not – it would have been proper for the Court to strike the amended pleading. *See Rodriguez v. Cuellar*, 143 S.W.3d 251, 258-59 (Tex. App.—San Antonio 2004, no pet.) (holding that the trial court properly struck an amended pleading in an election contest lawsuit when the amendment was filed after the statutory deadline for filing an election contest and sought to add a new basis for the contest).

revenue funds to finance its obligations. As a general matter, a municipality has any authority not otherwise prohibited by statute, charter, or ordinance. *See* TX. CONST. art. XI, § 5; TEX. LOC. GOV'T CODE ANN. § 51.072 (2017); *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (holding that home-rule cities possess "the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power."). Therefore, unless the City of Houston is restricted in some way from expending its funds in a particular manner, the City Council has broad discretion to carry out its business. *Id.* Because no statute, charter, or ordinance prohibits the City of Houston from using its general or special revenue funds in its discretion without voter approval, Contestant cannot complain about the City's use of enterprise funds to pay its pension obligations. *See Putnam v. City of Irving*, 331 S.W.3d 869, at 878–879 (Tex. App—Dallas 2011, pet. denied) (holding that a city did not "violate its 'contract' with voters" by pledging additional revenue sources to repay the bonds, which were not referenced in the relevant ballot language).

Contestant's reference in his Motion to Compel to a descriptive statement in the Official Statement for the Bonds – which describes the City's past and expected discretionary practices to paying a portion of the debt service from otherwise legally available revenues – has no bearing on a legally enforceable pledge of those revenues to pay the Bonds. The statute requiring voter approval of pension obligations provides that the voted authorization for pension obligation bonds may make bonds payable from "taxes, revenues, both taxes and revenues, or any other source or combination of sources of money that the municipality may use under state law to secure or pay any kind of bond or obligation." *See* TEX. LOC. GOV'T CODE § 107.005(3). Consistent with the ballot initiative, the City created a legal obligation to pay its bonds solely from ad valorem taxes. But the absence of an enforceable legal pledge between the City and bondholders does not mean the City is somehow prohibited from using other available funds, including enterprise funds, as an

exercise of its broad discretionary power to do so when, as here, there is no legal limitation on the City's power to use general or special revenue funds to finance its obligations.

Consequently, Contestant's request to depose a City corporate witness about these enterprise funds and their potential use has no relevance to either Contestant's pleaded Election Code contest claim or Contestees' pending motion to dismiss.

VII. CONCLUSION

For the reasons set forth herein, Contestees' Motion for Protection should be granted and Contestant's Motion to Compel should be denied. The depositions of Melissa Dubowski and a City "corporate witness" should not proceed. Contestees further pray for such other and further relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This pleading has been served upon all counsel of record in compliance with the Texas Rules of Civil Procedure on June 12, 2018.

/s/ Reagan M. Brown
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