

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

HARRY STOLTZFUS,
Plaintiff,

CASE NO.: 2010-CA-004620

v.

ROBERT E. "BOB" CARTER, as
Chair of the Committee to Recall
Harry Stoltzfus; ALICE BAIRD, CMC,
as City Clerk of Anna Maria, Florida;
and ROBERT "BOB" SWEAT, as
Manatee County Supervisor of Elections.
Defendants.

FILED FOR RECORD
R.D. SHORE
2010 AUG 24 AM 9:40
CLERK CIRCUIT COURT
MANATEE CO. FLORIDA

Order

THIS CAUSE having come to be heard upon the Plaintiff's Amended Complaint, and the Court having reviewed said complaint, having considered the Defendant's Memorandum of Law in Opposition to Claims Asserted by Plaintiff, having considered the argument of counsel at the hearing in this cause and the case law provided by each, and being otherwise fully advised in the premises, finds as follows:

As the Florida Supreme Court made clear in Garvin vs. Jerome, 767 So. 2d 1190 (Fla. 2000), election recall is an extraordinary process. The Court made clear that the burden rests solely on those seeking to overturn an election upon lawful and sufficient grounds. Even as far back as 1959, the Second District Court noted in Joyner vs. Shannon, 116 So. 2d 472 (2nd DCA 1959), that there must be a "real foundation" for such a "harsh test" as a recall. As was aptly pointed out by Justice Lewis in his dissent in Garvin, however, the statutory recall procedure "involves a delicate balance between the important property rights of the office holder (and the participatory and representative rights of those voters who originally elected him or her) and the rights of the dissatisfied electorate (which may include those same voters) which must be respected" . Id at 1192.

This State's recall statute is accusatory in nature and requires that a recall petition allege conduct by the elected official that would constitute one of the seven grounds for removal outlined in Section 100.361(1)(b). The truth or falsity of an allegation is ultimately for the electorate to determine and is not subject to judicial inquiry. The mere recital of a statutory ground, however, without a sufficient allegation of conduct constituting that ground, is improper. Section 100.361(1)(b), states that the grounds for removal of elected municipal officials shall, for the purposes of this act, be limited to the following:

1. Malfeasance
2. Misfeasance
3. Neglect of duty
4. Drunkenness
5. Incompetence
6. Permanent inability to perform official duties
7. Conviction of a felony involving moral turpitude

Turning, then, to the Petition in this cause, this Court will find as follows:

Ground One alleges that "Public records evidences that Stoltzfus violated Government-in-the-Sunshine Law by holding electronic meetings and using liaisons to discuss public business, which has not been advertised to the public". Quite clearly, compliance with Florida's Sunshine Law is required by all elected officials and, thus, Commissioner Stoltzfus' alleged failure to so comply would be unlawful. The language set forth in ground one of the recall petition is sufficient to adequately allege a cause of action for potential recall based upon a statutory claim of malfeasance. More specifically, this ground clearly and sufficiently alleges a violation of Florida's Sunshine Law, and, as such, if true, this language

constitutes a lawful ground for recall pursuant to section 100.361(1)(b)(1). Commissioner Stoltzfus's argument that this ground is vague, and does not provide him with a fair, reasonable and adequate notice is not well taken. Based upon the foregoing, this ground may proceed.

The second ground states: "Stoltzfus' email communications contain libelous and inflammatory remarks concerning city staff, citizens, and professional consultants, in violation of the City's stated policy against such attacks, which expose the City to significant legal expense". This Court finds, as in ground one, that the language here is clear and definite and constitutes sufficient statutory ground for recall. The alleged conduct is both potentially unlawful and improper and, assuming its truth, constitutes both malfeasance and misfeasance under the very definition of those terms. Such conduct, at its worst, affords a basis for suit by those to whom the alleged "libelous" emails were directed, and, at its very least, would constitute a violation of the City of Anna Maria's Code of Conduct, approved and adopted by the City Commission on July 24, 2004. This charge, with its language of both improper and potentially unlawful conduct, constitutes a sufficient ground for recall, is legally adequate, and shall be permitted to proceed.

Ground three alleges: "[Commissioner Stoltzfus] has also made numerous statements in violation of the requirement for a fair hearing in a quasi judicial proceeding, thus abusing his authority in order to achieve a desired result". It is true that the alleged "numerous statements" nor the "quasi judicial proceeding" are not specifically identified. Having said that, Resolution 95-536 of the City of Anna Maria establishes procedures for ex-parte communications in quasi-judicial proceedings, requiring, among other things, specific disclosure. The allegation that the Plaintiff here has pre-judged a matter to come before him as Commissioner in an effort to "achieve a desired result," in light of Resolution 95-0536, would constitute misfeasance, as that term is defined. It is not the province of the Court to determine the truth or falsity of the claims (see Moultrie vs. Davis, 498 So. 2d 993 (Fla. 4th DCA 1986), but simply to

determine their legal sufficiency. As with charge one and two, the Plaintiff claims that the language here is vague, conclusory and not definite enough to provide him with fair notice and enable him to adequately defend his actions before the public. As with ground one and two, however, this Court does not agree. The language in this ground, if true, constitutes misfeasance, “the performance, in an official capacity, of a legal act in an improper or illegal manner”. Black’s Law Dictionary, 1151 (rev. 4th ed. 1986). The language here describes actions that, if true, provides a legally sufficient ground, is more than a vague and general allegation of bad behavior, and may proceed.

Ground four indicates: “Public records reveal that Stoltzfus employed ‘evasive devices’ in order to intentionally circumvent state statutes”. There is no indication within the petition as to exactly what were the “evasive devices” allegedly engaged in nor what specific statutes were “circumvented”. Part of the challenge here, however, is that the grounds are not individually numbered or separated in any way other than by the period between the sentences. Under these circumstances then, is that to say that the Court is unable to consider the petition as a whole? Is that to say, for instance, that the Court cannot consider whether the Plaintiff’s alleged violation of public records laws (sentence one) might result in “potentially harmful and expensive legal action against the City” (sentence five)? Is that to say, for instance, that the Court cannot consider whether the Commissioner’s alleged violation of Florida’s Sunshine Law (sentence one) could be considered an “evasive device” (sentence four) designed to circumvent full disclosure under said statute? This Court is well aware that *each* ground must be legally sufficient and that, as indicated in Garvin, the fact that despite the validity of four of the five grounds, one invalid ground will prevent recall. Having said that, this Court will find that the language in ground four, particularly in light of the non-numbered petition as a whole, is legally sufficient. The language here describes behavior that, if true, could constitute a violation of Anna Maria City Code of Conduct, and could be considered malfeasance. The Commissioner’s alleged intentional circumvention of a state statute, i.e. Florida’s Sunshine Law, is sufficiently specific and will support the recall effort. The language

here describes behavior and conduct that, if true, constitutes misfeasance and provides a legally sufficient basis for statutory recall.

Ground five states: “[Commissioner Stoltzfus] conspired with others to deceive citizens and bring financial harm to the City of Anna Maria by encouraging potentially harmful and expensive legal action against the City while hiding his own involvement”. As is the case with grounds three and four, this is no definitive indication as to exactly what the alleged conspiracy consisted of, with whom the Commissioner is alleged to have conspired, and the exact nature of the “harmful and expensive legal action” that is potential here. Having said that, however, an elected official’s encouraging a private citizen’s lawsuit against the very City upon who’s council he or she sits, if true, would certainly be improper as it relates to his official duties. While not disclosing specifically the nature of the “legal action”, a Commissioner encouraging a lawsuit against his City would be violative of the public trust and would constitute misfeasance. The truth of the alleged “conspiracy”, and whether or not he did, indeed, encourage others to engage in litigation against the City, is not of this Court’s concern. Of concern, of course, is the legal sufficiency of the language. This Court will find that the conduct described and language here is legally sufficient and may proceed.

As an aside, this Court does not find that the final sentence of the Petition which states that Commissioner Stoltzfus’ “conduct cannot be legally justified and conflicts with state law” is an independent and distinct ground, as suggested by the Plaintiff. The Court determines that such conclusory language refers to all the grounds alleged and is not a separate charge, subject to review.

Ultimately, then, the recall grounds here, as stated, are sufficiently definitive to enable the Plaintiff, as the public official charged, to respond to and meet the allegations before the public. The allegations are concise, clear and contain valid grounds of either malfeasance, misfeasance or both to support the

recall process. The petition is legally sufficient and, as such, the Plaintiff's requested relief is DENIED.

This recall shall proceed.

DONE AND ORDERED in Chambers at Bradenton, Manatee County, Florida, this 24th day of

August, 2010.



CIRCUIT JUDGE

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