

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JASON GONZALES,)	
)	
Plaintiff,)	
)	Case No. 16 cv 7915
v.)	
)	Judge: Matthew F. Kennelly
MICHAEL J. MADIGAN, et al.,)	
)	
Defendants.)	

DEFENDANTS' JOINT RESPONSE TO PLAINTIFF'S MOTIONS TO STRIKE
DEFENDANTS' FIRST AND SECOND AFFIRMATIVE DEFENSES

Defendants Michael J. Madigan, Friends of Michael J. Madigan ("Friends"), 13th Ward Democratic Organization ("13th Ward"), Shaw Decremer, Silvana Tabares, Joe Barbosa, and Grasiela Rodriguez (collectively "Defendants") collectively respond to Plaintiff's Motion to Strike With Prejudice Defendants' First Affirmative Defense (Dkt. #180) and Defendants Joe Barbosa and Grasiela Rodriguez respond to Plaintiff's Motion to Strike with Prejudice Second Affirmative Defense (Dkt. #181). In support, Defendants state:

Introduction

On September 5, 2018, Plaintiff filed a "Motion to Strike With Prejudice Defendants' First Affirmative Defense" (Dkt. #180) and a "Motion to Strike With Prejudice Second Affirmative Defense." (Dkt. #181).

Defendants' First Affirmative Defense, applicable to all Defendants, is titled "First Amendment right to participate in political process." (Dkt. 97. at 81-2) The First Affirmative Defense states in whole as follows:

Plaintiff's claims are barred or limited because the imposition of a judgment in favor of Plaintiff and against any Defendant would violate the First Amendment to the United States Constitution by infringing, and imposing adverse consequences based on, each Defendant's exercise of his or her right to participate in the political process to either support or defeat a political candidate, including (but not limited to) the acts alleged by Plaintiff that form the basis for his complaint. Those rights are protected at all times, but are especially subject to First Amendment protection where, as in this case, the acts alleged involve conduct related to a partisan primary election in which a political party was engaged in choosing its nominee to run for public office.

Defendants' Second Affirmative Defense, applicable only to Defendants Barbosa and Rodriguez, is titled "First Amendment right to seek access to ballot and run for office." (*Id.* at 82) The Second Affirmative Defense states in whole as follows:

Plaintiff's claims against Defendants BARBOSA and RODRIGUEZ are barred or limited because the imposition of a judgment in favor of Plaintiff and against either of them would violate the First Amendment to the United States Constitution by infringing, and imposing adverse consequences based on, his or her exercise of their right to seek access to the ballot and to run for public office.

(*Id.*)

Plaintiff's motions are premised on the claim that Defendants' alleged conduct is "unlawful" under *Smith v Cherry*, 489 F.2d 1098 (7th Cir. 1973). (Dkt. #180 at 5, Dkt. #181 at 2) From that premise, Plaintiff argues that Defendants' First Affirmative Defense should be stricken because it is an improper "justification" defense that has not been

properly pleaded. (Dkt. #180) Plaintiff argues that Defendants' Second Affirmative Defense should be stricken because Defendants Barbosa's and Rodriguez's conduct is not protected by the First Amendment. (Dkt. #181 at 2) This Court should deny Plaintiff's motions for the reasons stated below.

Argument

Affirmative defenses are pleadings subject to the pleading requirements of the Federal Rules of Civil Procedure. *Heller Fin'l, Inc. v. Midwhay Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989). Accordingly, affirmative defenses must contain sufficient factual allegations that state a defense that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court may strike affirmative defenses that are conclusory, vague, and unsupported because they do not meet the requirements imposed by Rule 8(a). Fed. R. Civ. P. 12(f); see also *Heller*, 883 F.2d at 1294.

Moreover, motions to strike affirmative defenses are disfavored because of their tendency to delay the proceedings. *Heller*, 883 F.2d at 1294. Such motions will only be granted where they remove unnecessary clutter from the case or where the affirmative defense is insufficient on the face of the pleadings. *Id.* A Rule 12(f) motion must be filed "within 21 days after being served with the pleading." Fed. R. Civ. P. 12(f). "The moving party has the burden of showing that the challenged allegations are so unrelated to plaintiff's claim as to be devoid of merit, unworthy of consideration, and unduly prejudicial." *Causay v. Wells Fargo Bank, N.A.*, No. 16-cv-7398, 2016 U.S. Dist.

LEXIS 171206, at *6 (N.D. Ill. Dec. 12, 2016) (citing *E & J Gallo Winery v. Morand Bros. Beverage Co.*, 247 F. Supp. 2d 979, 982 (N.D. Ill. 2003) (internal quotations omitted)). This Court should deny Plaintiff's Motion to Strike on any of several independent grounds.

- *First*, Plaintiff filed his motion well after the 21 days permitted by Rule 12(f).
- *Second*, Defendants' First Affirmative Defense is not a "justification" defense as Plaintiff argues, but rather a clear affirmative defense stating that each Defendant has the First Amendment right "to participate in the political process to either support or defeat a political candidate, including (but not limited to) the acts alleged by Plaintiff that form the basis for his complaint." (Dkt. #97 at 81-2); see *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 939 (7th Cir. 2018) ("Any effort by the judiciary to stop one politician from proposing and advocating steps that injure another politician would do more to violate the First Amendment ... than to vindicate the Equal Protection Clause.")
- *Third*, Plaintiff argues the Second Affirmative Defense should be stricken because Defendants' alleged conduct was "unlawful." (Dkt. #181 at 1) The Second Affirmative Defense states, however, that Defendants Barbosa and Rodriguez had the First Amendment right "to seek access to the ballot and to run for public office." (Dkt. #97 at 82) The First Amendment permitted

Barbosa and Rodriguez to run for office for any reason, including the reasons alleged in the complaint.

I. Plaintiff's Motions violate Rule 12(f) because they were filed more than 21 days after the Affirmative Defenses were filed.

Plaintiff filed his Motions to Strike Defendants' First and Second Affirmative Defense under Rule 12(f) of the Federal Rules of Civil Procedure on September 5, 2018. (Dkt. #180, 181) Defendants filed their Answer and Affirmative Defenses nearly eight months earlier on January 17, 2018. (Dkt. #97)

Federal Rule of Civil Procedure 12(f) states that the Court may strike an affirmative defense "on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading." Fed. R. Civ. Pro. 12(f). By waiting nearly eight months to file his Motions to Strike, Plaintiff has violated Rule 12(f)'s 21-day requirement. This Court should therefore deny Plaintiff's Motions for being untimely filed.

II. Defendants' First Affirmative Defense clearly puts Plaintiff on notice that the conduct alleged is protected by the First Amendment.

Plaintiff argues in his Motion to Strike Defendants' First Affirmative Defense that Defendants allege an "affirmative defense of 'justification'" that is not properly pleaded. (Dkt. #180) Plaintiff argues that Defendants cannot allege their conduct was "justified" because it was "unlawful as a matter of law" citing *Smith*, 489 F.2d 1098.

As Defendants' Joint Brief in Support of Summary Judgment explains in detail, this is not a *Smith* case. (Dkt. #278 at 9-15) *Smith* "turned on its own unique facts," *Rudisill v. Flynn*, 619 F.2d 692, 694 (7th Cir. 1980), facts that are not present in this case. (See, Dkt. #278 at 9-15) As argued by Defendants in their Joint Brief in Support of Summary Judgment, Plaintiff, at best, alleges Barbosa and Rodriguez were spoiler candidates who would have served if elected, but whose presence on the ballot made it more difficult for Gonzales to win. (Dkt. #278 at 13) But complaints about campaign strategies, even "dirty tricks" that successfully undermine candidacies, are not actionable in federal court. *See, e.g., Jones*, 892 F.3d at 939 (referendum pushed by candidate's opponents to disqualify him from running for mayor was "a political dirty trick," but the "right response" would have been a "political," "campaign[] against the ... referendum" and prevail "at the ballot box rather than the courthouse"). As the *Jones* court stated, "[a]ny effort by the judiciary to stop one politician from proposing and advocating steps that injure another politician would do more to violate the First Amendment ... than to vindicate the Equal Protection Clause." *Id.*

As a result, even if Plaintiff's allegations were true, Defendants' purported conduct would be protected by the First Amendment. That is why the First Affirmative Defense clearly states "Plaintiff's claims are barred or limited because the imposition of a judgment in favor of Plaintiff and against any Defendant would violate the First Amendment to the United States Constitution by infringing, and imposing adverse

consequences based on, each Defendant's exercise of his or her right to participate in the political process to either support or defeat a political candidate, including (but not limited to) the acts alleged by Plaintiff that form the basis for his complaint." (Dkt. #97 at 81-2)

Thus, Plaintiff's motion, arguing that Defendants' "justification" defense must be stricken, should be denied. Defendants did not file a "justification" defense. The First Affirmative Defense is based on Defendants' First Amendment right to engage in political activity in support of or opposition to a candidate for public office, and, accordingly, any conduct by Defendants in support or opposition, whether alleged or otherwise, is protected. This Court should therefore deny Plaintiff's Motion to Strike with prejudice Defendants' First Affirmative Defense.

III. Defendants Barbosa and Rodriguez had a First Amendment Right to run for office for any reason.

Plaintiff also moves to strike Defendants Barbosa and Rodriguez's Second Affirmative Defense, which states judgment entered against them in Plaintiff's favor would violate their First Amendment Right to seek ballot access. (Dkt. #97 at 82) Plaintiff argues, again citing *Smith*, that "Defendants cannot be heard to state the outrageous contention that the First Amendment is a license to rig an election . . . [and] Defendants' alleged conduct was unlawful as a matter of law." (Dkt. #181 at 2)

Plaintiff's complaint against Defendants Barbosa and Rodriguez is that they did not run with the intent to win the primary, but rather to take votes away from Plaintiff.

Interestingly, Plaintiff's own Motion to Strike Defendants' First Affirmative Defense supports Barbosa and Rodriguez' Second Affirmative Defense. Plaintiff's motion essentially argues that he had the right to run as a Republican plant in the Democratic Primary because state law does not require a candidate to have "party affiliation, prior voting or party registration" to run in a primary. (Dkt. #180 at 7) Plaintiff then argues that "[b]ecause Plaintiff's candidacy was completely legal, Defendants held no 'right' to interfere other than by the lawful means of debate and communication to primary voters in the election campaign." (*Id.*)

Thus, Plaintiff argues in his motion to strike the First Affirmative Defense that it was "completely legal" (Dkt. #180 at 7) if he "affiliate[ed] and coordinat[ed] with the Republican Party" (*id.* at 6) as a candidate in the Democratic Primary election, while in his second motion to strike argues that Barbosa and Rodriguez were not permitted to run as candidates because their intent was to take votes from Plaintiff. But there is no intent requirement to run for office under Illinois law. *See*, Ill. Const. art. IV, § 2(c); 10 ILCS 5/8-8. As Plaintiff's Motion to Strike the First Affirmative Defense states, "[f]or a candidate to be on the primary ballot, Section 8-8 requires only that that [*sic*] the candidate filed proper papers and obtain a specified number of valid signatures on nomination petitions from registered voters of the district." (Dkt. #180 at 7)

In fact, the state could not impose an intent requirement on any candidate for their purpose in running for office. For example, states cannot force candidates to swear

loyalty oaths disclaiming certain beliefs to access the ballot. *See, e.g., Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 442-43, 449-50 (1974) (striking down requirement that political candidates swear that they do not advocate for the overthrow of government by force or violence); *Socialist Workers Party v. Hill*, 483 F.2d 554, 556-57 (5th Cir. 1973) (candidates could not be forced to swear “obedience and homage” to current form of government to access ballot). If the state cannot require Barbosa and Rodriguez to swear loyalty to the United States to run for office, the state certainly cannot require Barbosa and Rodriguez to swear they are not running to make it harder for Plaintiff to win a primary. And if the First Amendment protects candidates who run with the intent of altering our form of government, then certainly it protects Barbosa and Rodriguez for running with whatever intent they had, including the alleged intent to take votes away from Plaintiff.

As a result, this Court should deny Plaintiff’s Motion to Strike Defendants’ Second Affirmative Defense.

Conclusion

For all of the reasons stated above, Defendants respectfully request that this Court deny Plaintiff's Motions to Strike Defendants' First and Second Affirmative Defenses (Dkt #180, 181).

Respectfully submitted,

/s/ Adam R. Vaught

Adam R. Vaught

Adam R. Vaught
Vincent M. Rizzo
Carson R. Griffis
Hinshaw & Culbertson LLP
151 North Franklin Street, Suite 2500
Chicago, IL 60606
Telephone: 312-704-3000
avaught@hinshawlaw.com
Attorneys for Michael J. Madigan

Michael J. Kasper
151 North Franklin Street, Suite 2500
Chicago, IL 60601
Telephone: 312-704-3292
mjkasper60@mac.com
*Attorney for Friends of Michael J. Madigan
and 13th Ward Democratic Organization*

Richard J. Prendergast
Deirdre Ann Close
Michael Thomas Layden
Richard J. Prendergast, Ltd.
111 West Washington Street , Suite 1100
Chicago, IL 60602
Telephone: (312) 641-0881
rprendergast@rjpltd.com
dclose@rjpltd.com
mlayden@rjpltd.com
Attorneys for Silvana Tabares

Sean Michael Sullivan
Del Galdo Law Group, LLC
1441 S. Harlem Ave.
Berwyn, IL 60402
Telephone: (773) 562 3090
sullivan@dlglawgroup.com
grandfield@dlglawgroup.com
Attorneys for Shaw Decremer

Michael Kreloff
Law Offices of Michael Kreloff
3710 Commercial Ave. Ste. 5
Northbrook, IL 60062
Telephone: (847)525-1139
capitolaction@yahoo.com
Attorney for Shaw Decremer

James Patrick Nally
James P. Nally PC
8 South Michigan Avenue, Suite 3500
Chicago, IL 60603
Telephone: 312-422-5560
jamesnally@goldmanlegalhelp.com
Attorney for Joe Barbosa

Scott Brent Erdman
The Law Offices Of Scott B Erdman
8 S. Michigan Avenue, Suite 3500
Chicago, IL 60603
Telephone: (312) 263-5700
ScottErdman@ErdmanLawOffices.com
Attorney for Grasiela Rodriguez

CERTIFICATE OF SERVICE

The undersigned certifies that on July 8, 2019, I electronically filed the forgoing DEFENDANTS' JOINT RESPONSE TO PLAINTIFF'S MOTIONS TO STRIKE DEFENDANTS' FIRST AND SECOND AFFIRMATIVE DEFENSES with the Clerk of the U.S. District Court, using the Court's CM/ECF system, which will accomplish service electronically on all counsel of record.

/s/ Adam R. Vaught