**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MIAMI-DADE COUNTY**

**CIRCUIT CIVIL DIVISION**

**CASE NO. 15-000256-CA-01 (08)**

MICHAEL A. PIZZI, JR., and
MARY COLLINS,

Plaintiffs,

v.

TOWN OF MIAMI LAKES, FLORIDA, WAYNE SLATON, and MARJORIE TEJEDA-CASTILLO, in her official capacity as Town Clerk, Town of Miami Lakes, Florida

Defendants.
_____/

## MAYOR WAYNE SLATON'S MOTION TO DISMISS

Mayor Wayne Slaton ("Mayor Slaton"), respectfully moves to dismiss Plaintiffs Michael A. Pizzi and Mary Collins' Verified Complaint, pursuant to Florida Rule of Civil Procedure 1.140(b)(6), and requests alternative relief, and in support states:

## INTRODUCTION

Plaintiffs filed a seven count Complaint wherein they contend that Michael A. Pizzi ("Mr. Pizzi") is entitled to be reinstated as Mayor of Miami Lakes following his acquittal on federal criminal charges, and that Mayor Slaton should be removed from office.

Plaintiffs' contentions are meritless. The Miami Lakes Charter (the "Charter") provides that a suspension from office creates a vacancy. Charter, Art. II, § 2.5(a) (App. 10) [1]. The Charter requires that a special election be held for "the election of a new Mayor" where, as here,

[1] References to "App. ___" refer to the page of the Appendix to the Complaint.

there is a vacancy in the Mayor's office and six months or more remain in the term of office. Charter, Art. II, § 2.5(c)(iv) (App. 10). The Charter says "new Mayor," not "temporary Mayor."

When Mr. Pizzi was indicted he was suspended by Governor Scott. This created a vacancy in the office of Mayor. Because more than six months remained in his term, a special election was held, and Wayne Slaton was elected as the "new Mayor."

As succinctly stated by the Florida Supreme Court, "The **permanent replacement mayor** [Mayor Slaton] assumed office on October 8, 2013, and the **new mayor's** term will run until the next regularly scheduled election in November 2016." *Pizzi v. Scott*, No. SC14-1634, 2014 WL 7277376, at *1 (Fla. Dec. 22, 2014) (emphasis added).[2]

Mr. Pizzi's claims must be dismissed. First, the Florida Supreme Court has held that quo warranto – which is Count 3 of the Complaint – is the "exclusive method of determining the right to hold and exercise a public office…." *McSween v. State Live Stock Sanitary Bd. of Fla.*, 122 So. 239, 244 (Fla. 1929). Accordingly, all Counts, except Count 3, must be dismissed on this basis alone.[3]

Moreover, as set forth more fully herein, Count 3 (Quo Warranto) fails to make out a prima facie case against Mayor Slaton and should also be dismissed.[4]

[2] Plaintiffs have expressly incorporated the Florida Supreme Court's Order in their Complaint. *See* App. 94 – 96. "Any exhibit attached to a pleading shall be considered a part thereof for all purposes." Fla. R. Civ. P. 1.130(b).

[3] Alternative grounds for dismissing these Counts are also set forth herein.

[4] In an abundance of caution, Mayor Slaton incorporates the arguments contained in the motions to dismiss of the Town of Miami Lakes and the Town Clerk.

## ARGUMENT

### I. Count 3 (Quo Warranto) is the Exclusive Remedy Available, Therefore All Other Counts Must be Dismissed and Mary Collins Should be Dismissed as a Plaintiff

Each of Plaintiffs' causes of action seek to determine whether Mayor Slaton has the right to hold the office of Mayor of Miami Lakes. The Florida Supreme Court has held that quo warranto, which is Count 3 of the Complaint, is the "**exclusive** method of determining the right to hold and exercise a public office…." *McSween*, 122 So. at 244 (emphasis added).

"[W]here quo warranto is an available remedy, a person aggrieved may not file writs of prohibition or mandamus, or suits for injunctive or declaratory relief…." 43 Fla. Jur. 2d *Quo Warranto* § 8 (2014).[5]

Accordingly, Count 1 (Declaratory Relief), Count 2 (Injunctive Relief), Count 4 (Mandamus), Count 5 (Judgment of Ouster), Count 6 (Estoppel) and Count 7 (Due Process) must be dismissed on this ground alone. Further, Counts 4-7 must be dismissed for the additional reasons that follow.

[5] *See Hajec v. Town of Medley*, 189 So. 2d 835, 836 (Fla. 3d DCA 1966) (proper remedy was by quo warranto, not declaratory relief); *Winter v. Mack*, 194 So. 225, 228 (Fla. 1940) (quo warranto, not injunctive relief); *Swoope v. City of New Smyrna*, 125 So. 371, 372 (Fla. 1929) (same); *City of Sanford v. State ex rel. Preston*, 75 So. 619, 619-20 (Fla. 1917) (quo warranto, not mandamus); Philip J. Padovano, *Florida Civil Practice* § 30:3 (2014) ("The proper method of challenging the right of a public official to hold office or to take a particular action by the purported authority of the office is to file a complaint for a writ of quo warranto.").

There are narrow exceptions to the general rule that quo warranto proceedings are the only proper remedy in cases in which they are available. *See State v. Duval County*, 141 So. 173 (Fla. 1932) (special statutory remedy specifically provided for relief sought); *Bloomfield v. City of St. Petersburg Beach*, 82 So. 2d 364, 366 (Fla. 1955) (en banc) (municipality that had been thrust into chaos by election contest, where opposing factions of city commission had each appointed their own city department heads, could obtain declaratory relief). These narrow exceptions are inapplicable here.

A. Count 4 (Mandamus) Must be Dismissed on the Additional Ground That Mr. Pizzi Cannot Establish a Clear and Certain Right

Count 4 (Mandamus) must be dismissed because mandamus may only be used to enforce a right that is both clear and certain, not to establish the existence of such a right. *Florida League of Cities v. Smith*, 607 So. 2d 397, 401 (Fla. 1992). This Count should be dismissed because Mr. Pizzi asks this Court to use mandamus to declare his rights. That is not a proper use for mandamus.[6]

B. Count 5 (Judgment of Ouster) and Count 6 (Estoppel) Must be Dismissed on the Additional Ground That These Are Not Causes of Action

In Count 5, Mr. Pizzi seeks a judgment of ouster pursuant to Section 80.032, Florida Statutes, to remove Mayor Slaton from office. Compl. ¶ 86. "Judgment of ouster," however, is a remedy, not a cause of action. *See* § 80.032, Fla. Stat. ("When any petition [for quo warranto] is well-founded, a judgment of ouster may issue . . . ."); Henry P. Trawick, Jr., *Trawick's Florida Practice and Procedure* § 36:5 (2015) ("If the plaintiff prevails, the final judgment must oust the defendant from the office he is holding…."); 43 Fla. Jur. 2d *Quo Warranto* § 56 (2014) (same).[7]

In Count 6 (Estoppel), Plaintiffs purport to bring a cause of action for estoppel. Estoppel is an affirmative defense, not a cause of action. *See Meyer v. Meyer*, 25 So. 3d 39, 43 (Fla. 2d DCA 2009) ("Because Daron's count for equitable estoppel was a claim for affirmative relief

[6] Mr. Pizzi specifically did not include a request for reinstatement in his petition for writ of mandamus in the Florida Supreme Court. Compl. ¶ 36. By omitting a claim for reinstatement, Mr. Pizzi tacitly acknowledged that mandamus is not an available remedy for reinstatement. *See Pizzi v. Scott*, 2014 WL 7277376, at *1 ("In the order to show cause, this Court stated that it was not suggesting that the Governor is required to reinstate Petitioner to his former municipal office, which has been filled by operation of a special election in accordance with the Town's charter.") (App. at 94).

[7] In Count 3 (Quo Warranto), Mr. Pizzi already seeks a judgment of ouster. *See* Compl. ¶ 73.

rather than an attempt to avoid potential defenses, the trial court correctly concluded that it failed to state a cause of action."); *Agency for Health Care Admin. v. MIED, Inc.*, 869 So. 2d 13, 20 (Fla. 1st DCA 2004) ("In this state, equitable estoppel is a defensive doctrine rather than a cause of action."); *Kerivan v. Fogal*, 22 So. 2d 584, 586 (Fla. 1945) (same).[8]

C. Count 7 (Violation of Due Process by Deprivation of Property Right As Applied) Must be Dismissed On the Additional Grounds That It Is Not Properly Pleaded and Mr. Pizzi's Property Right Was At All Times Subject to the Charter Provisions

Count 7 is a purported claim for "violation of due process by deprivation of property right as applied." Count 7: (1) fails to make clear whether it purports to bring a claim on behalf of Mr. Pizzi alone, or on behalf of Ms. Collins as well; and (2) fails to specify whether it is directed to all of the Defendants, or less than all of the Defendants.

Further, the fatal flaw in this Count is that Mr. Pizzi has no cognizable due process claim. Mr. Pizzi assumed the office of Mayor subject to all the terms and limitations of the Charter. *See, e.g., Du Bose v. Kelly*, 181 So. 11, 17 (Fla. 1938) (elected officer is "presumed to accept the same with the condition annexed that his tenure of the office may be terminated at any time in the manner prescribed by the charter."); *Williams v. Kelly*, 133 Fla. 244, 246 (Fla. 1938) (same).

The Town Charter is crystal clear regarding the filling of vacancies in office. Under the Charter, a suspension creates a vacancy in office. Charter, Art. II, § 2.5(a) (App. 10-11). The Charter unequivocally states that, "If the Mayor's position becomes vacant and six months or more remain in the unexpired term, a special election shall be held for the election of a **new**

[8] Mr. Pizzi's attempt to use estoppel to support any of his other claims is unavailing. As a matter of law, a municipality is not bound by the erroneous legal statement of its attorney. *Council Bros., Inc. v. City of Tallahassee*, 634 So. 2d 264, 266 (Fla. 1st DCA 1994) (estoppel "will not apply to mistaken statements of the law"); *see also State Dep't of Rev. v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981) ("[T]he state cannot be estopped through mistaken statements of the law."). Furthermore, Mayor Slaton was not a member of the Town Council at that time, and is in no way estopped from arguing the correct law.

Mayor within 90 calendar days following the occurrence of the vacancy." *Id.* at § 2.5(c)(iv) (emphasis added).

Mr. Pizzi took office subject to those specific limitations imposed by the Charter. Thus, Mr. Pizzi has no property right in the office of Mayor that goes beyond what was provided for in the Charter. *See DuBose*, 181 So. at 17 (recalled commissioner had no due process claim where he "accepted the office with the recall provisions prescribed by the Miami charter, and the right in his office is not affected by the qualified electors enforcing the provisions of the charter.").

It is Mayor Slaton who has a present property right in his office as Mayor of Miami Lakes. His rights are also defined by the Charter. The Charter unequivocally provided for Mayor Slaton's election pursuant to a special election on October 1, 2013 as the permanent replacement Mayor of Miami Lakes until November 2016. *See* App. 11. To remove Mayor Slaton from his public office, without any support for such removal in the Charter, in order to place Mr. Pizzi in that position would violate the terms of the Charter, and afford Mr. Pizzi rights that go beyond that which he is entitled to.[9]

If this Court agrees that Counts 1-2 and 4-7 must be dismissed, then Ms. Collins must be dismissed as a Plaintiff. That is so because Ms. Collins is not a plaintiff in the quo warranto count (Count 3). Quo warranto is only available to a "person claiming title to an office which is exercised by another . . . ." § 80.01, Fla. Stat.

[9] Plaintiffs' reference to the municipal recall statute, Section 100.361, Florida Statutes, is of no moment. *See* Compl. ¶ 100. This is not a recall case. The municipal recall statute deals with removal from office by the electors of a municipality. *See* § 100.361(1), Fla. Stat. This case involves a municipality's constitutional and statutory authority to determine its public officials' terms of office, including the manner in which to fill vacancies in office. *See* Art. VIII, § 2(b), Fla. Const.; Art. IV, § 7(c), Fla. Const.; § 166.021, Fla. Stat. The question presented in these proceedings is whether Mr. Pizzi's term of office ended in accordance with the express language of the Charter. The answer to that question is yes.

D. The Attorneys' Fees Claim Must be Dismissed as to Mayor Slaton

Mr. Pizzi requests attorneys' fees, Compl. at ¶ 114, without specifying which Defendant he seeks fees from. The request must be dismissed as to Mayor Slaton as there is no legal basis for obtaining attorneys' fees from Mayor Slaton.

## II. Count 3 (Quo Warranto) Should be Dismissed Because Mr. Pizzi Has Not Shown a Prima Facie Basis for Relief

In Count 3 (Quo Warranto), Mr. Pizzi seeks a writ of quo warranto to challenge the right of Mayor Slaton to hold the office of Mayor. The basis of this claim is Mr. Pizzi's allegation that the special election whereby Mayor Slaton was elected was "only to elect a mayor to occupy the office during the period of the suspension vacancy," Compl. ¶ 2, and his position that, "No provision in the Miami Lakes Charter provides that a gubernatorial suspension creates a permanent vacancy in office," Compl. ¶ 5. For the reasons stated below, Mr. Pizzi has failed to show a prima facie basis for relief and Count 3 should be dismissed.

A. Quo Warranto Procedure

As stated previously, quo warranto is the correct and exclusive manner of determining title to office. Quo warranto actions are governed by Florida Rule of Civil Procedure 1.630. Rule 1.630(d) provides that "[i]f the complaint shows a prima facie case for relief, the court shall issue…a writ of quo warranto," which, in practice, takes the form of a preliminary writ of quo warranto or an order to show cause. *See* Bruce J. Berman, *Berman's Florida Civil Procedure* § 1.630:13 (2014); Philip J. Padovano, *Florida Civil Practice* § 30:3 (2015).

Only *if* this Court finds that the Complaint shows a prima facie case *and* issues an order to show cause, shall the defendant (Mayor Slaton) "respond to the writ as provided in rule 1.140[.]" Fla. R. Civ. P. 1.630(e).

B. An Order to Show Cause Should Not Issue Because the Complaint Does Not Show a Prima Facie Case for Quo Warranto Relief

The Complaint fails to demonstrate a prima facie case for a writ of quo warranto. Instead, it shows that Mayor Slaton was elected to permanently replace Mr. Pizzi.

***1. The Charter provides that a suspension creates a vacancy.***

Mr. Pizzi concedes that he was suspended by the Governor on August 6, 2013, Compl. ¶ 22, and that his suspension was in accordance with Article IV, Section 7(c), Florida Constitution. *Id.* Article IV, Section 7(c), Florida Constitution, provides: "By order of the governor any elected municipal officer indicted for crime may be suspended from office until acquitted and the office filled by appointment for the period of suspension, not to extend beyond the term, **unless these powers are vested elsewhere by law or the municipal charter**." (emphasis added). In other words, the Charter can – and in this case, *does* – provide for the manner in which to fill a vacancy created by a gubernatorial suspension.[10]

The Charter provides: "The office of a Councilmember *shall become vacant upon* his/her … *suspension* … from office in any manner authorized by law[.]" Charter, Art. II, § 2.5(a) (App. 10). Thus, when Mr. Pizzi was suspended, the office of Mayor became vacant.

[10] "Both Article VIII, Section 2(b) of the Florida Constitution and the Florida's [sic] Municipal Home Rule Powers Act, Chapter 166, Florida Statutes permit Florida municipalities to do anything that fulfills a municipal purpose that they are not expressly prohibited from doing by the United States or Florida Constitutions, general or special laws, or a county charter." *Everett v. City of Tallahassee*, 840 F. Supp. 1528, 1541 (N.D. Fla. 1992); s*ee also* § 166.021, Fla. Stat. Section 112.51(6), Florida Statutes, provides, "If, during the suspension, the term of office of the municipal official **expires** and a successor is…elected,…he or she shall not be reinstated." (Emphasis added). Under the Charter, Mr. Pizzi's term expired when Mayor Slaton was sworn in. Rules of statutory construction require Article IV, Section 7(c) of the Florida Constitution, Section 112.51, Florida Statutes, and the Charter to be read in *pari materia*. *See E.A.R. v. State*, 4 So. 3d 614, 628-29 (Fla. 2009). Article IV, Section 7(c) and Section 112.51 each state that a municipal charter may provide conditions for filling the office of a suspended official.

***2. The Charter provides for a special election to be held where, as here, a vacancy occurs and there are six months or more remaining in the term of office.***

"If the Mayor's position becomes vacant and six months or more remain in the unexpired term, a special election shall be held for the election of a **new** Mayor within 90 calendar days following the occurrence of the vacancy." Charter, Art. II, § 2.5(c)(iv) (App. 11) (emphasis added); *see also* note 9 *supra*. Mr. Pizzi concedes that at the time of his suspension, more than six months remained in his term of office. Compl. ¶¶ 1, 22.

***3. Mr. Pizzi concedes that Mayor Slaton was elected in the special election.***

The Town Council passed Resolution No. 13-1125, scheduling a special election for October 1, 2013. Compl. ¶ 23. Nothing in the resolution indicated that the special election was to *temporarily* fill the vacancy created by Mr. Pizzi's suspension. App. 40 – 43. Likewise, nothing in the published sample ballot nor the approved Special Election Ballot indicated that the special election was to *temporarily* fill the vacancy created by Mr. Pizzi's suspension. App. 49 – 50. Mr. Pizzi concedes that Mayor Slaton won the special election. Compl. ¶ 29.

***4. The Florida Supreme Court recognized that Mayor Slaton is the permanent replacement mayor.***

The Florida Supreme Court has already recognized that Mayor Slaton has **permanently** replaced Mr. Pizzi. *Pizzi v. Scott*, 2014 WL 7277376, at *1 (App. 94). The Court stated, "The **permanent replacement mayor** assumed office on October 8, 2013, and the **new mayor's** term will run until the next regularly scheduled election in November 2016." *Id.* (emphasis added).

Given these facts, the Complaint fails to make out a prima facie case for a writ of quo warranto, this Court should not issue an order to show cause, and Count 3 should be dismissed.

C. Alternatively, If the Court Issues an Order to Show Cause, Mayor Slaton Should be Given 20 Days to Respond

Alternatively, if the Court determines that the Complaint does show a prima facie case for quo warranto, and issues a preliminary writ of quo warranto or order to show cause, Rule 1.630(e) provides that a response is only required after service of the preliminary writ or order to show cause. After service, the respondent (Mayor Slaton) has twenty (20) days to respond. *See* Fla. R. Civ. P. 1.630(e); Fla. R. Civ. P. 1.140(a). Accordingly, Mayor Slaton requests that, if this Court issues a preliminary writ or order to show cause, he be provided twenty (20) days to respond.

**WHEREFORE**, Mayor Slaton respectfully requests:

I. That this Court dismiss Counts 1-2 and 4-7 because Quo Warranto (Count 3) is the exclusive method of determining title to office, and on the alternative grounds stated herein. Additionally, that this Court dismiss Plaintiff Mary Collins from this action, and dismiss Plaintiffs' claim for attorneys' fees, to the extent such claim is made against Mayor Slaton.

II.A. With respect to Count 3 (Quo Warranto), Mayor Slaton respectfully requests that this Court dismiss Count 3 on the grounds that Mr. Pizzi has failed to show a prima facie case for the issuance of a preliminary writ of quo warranto or order to show cause.

B. Alternatively, if this Court determines that Count 3 (Quo Warranto) does show a prima facie case, and issues a preliminary writ of quo warranto or order to show cause, then Mayor Slaton respectfully requests that this Court grant him twenty (20) days to respond to the preliminary writ of quo warranto or order to show cause, and that the Court grant any further relief it deems just and proper.

Respectfully submitted,

**AKERMAN LLP**
Attorneys for MAYOR WAYNE SLATON
One Southeast Third Avenue - 25th Floor
Miami, Florida 33131-1714
Phone: (305) 374-5600
Facsimile: (305) 374-5095
Email: gerald.cope@akerman.com
Email: elizabeth.hernandez@akerman.com
Email: vanessa.berman@akerman.com

By: */s/Gerald B. Cope, Jr.*
GERALD B. COPE, JR.
Florida Bar No. 251364
ELIZABETH M. HERNANDEZ
Florida Bar No. 378186
LORAYNE PEREZ
Florida Bar No. 85265

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss was served via e-mail on this **27th** day of January, 2015 on:

**RAUL GASTESI, JR., ESQ.**
**HAYDEE SERA, ESQ.**
**GASTESI & ASSOCIATES, P.A.**
*Town of Miami Lakes Attorney*
8105 NW 155th Street
Miami Lakes, FL 33016
Telephone: 305-818-9993
rgastesi@gastesi.com
hsera@gastesi.com

**JUAN-CARLOS PLANAS, ESQ.**
**KURKIN BRANDES LLP**
*Counsel for the Town of Miami Lakes*
18851 NE 29th Avenue, Suite 303
Aventura, FL 33180
Telephone: 305-929-8500
jcplanas@kb-attorneys.com
rrivera@kb-attorneys.com

**MURRAY A. GREENBERG, ESQ.**
**GERALD E. GREENBERG, ESQ.**
**GELBER SCHACHTER & GREENBERG, P.A.**
*Counsel for Town Clerk, Marjorie Tejeda-Castillo*
1441 Brickell Avenue, Suite 1420
Miami, Florida 33131
Telephone: (305) 728-0950
Facsimile: (305) 728-0951
ggreenberg@gsgpa.com

**EDWARD R. SHOHAT , ESQ.**
**JONES WALKER**
*Counsel for Plaintiffs*
201 S Biscayne Blvd., Suite 2600
Miami, FL 33131
Tel: 305.679.5700
ed@slsdefense.com
eshohat@joneswalker.com

**BENEDICT P. KUEHNE, ESQ.**
**MICHAEL T. DAVIS, ESQ.**
**LAW OFFICE OF BENEDICT P. KUEHNE, P.A.**
*Counsel for Plaintiffs*
100 S.E. 2nd St., Suite 3550
Miami, FL 33131-2154
Tel: 305.789.5989
ben.kuehne@kuehnelaw.com
efiling@kuehnelaw.com

**RALF R. RODRIGUEZ, ESQ.**
**PECKAR & ABRAMSON, P.C.**
*Counsel for Plaintiffs*
1 S.E. Third Avenue, Suite 3100
Miami, FL 33131
Tel: 305.358.2600
rrodriguez@pecklaw.com

**DAVID P. REINER, II, ESQ.**
**REINER & REINER, P.A.**
*Counsel for Plaintiffs*
9100 So. Dadeland Blvd., Suite 901
Miami, FL 33156-7815
Tel: 305.670.8282
dpr@reinerslaw.com

**MARK HERRON, ESQ.**
**MESSER CAPARELLO & SELF, P.A.**
*Counsel for Plaintiffs*
2618 Centennial Place
Tallahassee, FL 32308-0572
Tel: 850.222.0270
mherron@lawfla.com

**KENT HARRISON ROBBINS**
*Counsel Plaintiffs*
1224 Washington Avenue
Miami Beach, Florida 33139
Tel: (305) 532-0500
khr@khrlawoffices.com

By: */s/Gerald B. Cope, Jr.*
Attorney