

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

2006 NOV 27 PM 4:20

CLERK OF COURT
DAVIDSON COUNTY, TENNESSEE
1000 BROADWAY
NASHVILLE, TN 37203

PHIL BREDESEN,)
Governor of the State of Tennessee,)
)
Plaintiff,)
)
v.)
)
TENNESSEE JUDICIAL)
SELECTION COMMISSION,)
)
Defendant.)

No. 06-2275 (III)

MOTION TO INTERVENE

Comes now J. Houston Gordon, by and through counsel, pursuant to Rules 5, 18, 19 and 24 of the Tennessee Rules of Civil Procedure, and moves to intervene as a necessary party in the above captioned matter and would show to the Court:

I.

STATEMENT OF CASE

(1)

On July 18, 2006, the names of three nominees were selected and certified as a three (3) person panel to the Governor for consideration for appointment to the vacancy on the Supreme Court. Richard H. Dinkins, George T. "Buck" Lewis, and J. Houston Gordon, Movant herein, were certified by the Judicial Selection Commission as nominees to fill the vacancy.

(2)

Upon being certified as a nominee, Movant became vested with a personal right to be considered by the Governor for appointment to the Supreme Court.

(3)

On July 24, 2006, Richard H. Dinkins, one of the nominees on the three (3) person panel, withdrew his application from consideration for appointment leaving only two (2) persons on the panel.

(4)

T.C.A. §§17-4-109 and 112(a) mandate a procedure whereby the Judicial Selection Commission, as a part of the Judicial Branch of government, is authorized to determine the qualifications of applicants and select and certify to the Governor three (3) persons whom the Commission has deemed to be the best qualified persons to fill the vacancy. It is from this three (3) person panel that the statute requires the Governor to appoint one person to fill the vacancy. Dinkins' withdrawal, however, caused the panel to be incomplete and not in compliance with the requirements of T.C.A. §§17-4-109 and 112(a) that there be a three (3) person panel.

(5)

Dinkins' withdrawal frustrated the procedure provided by statute. T.C.A. §§17-4-109 and 112(a) mandate that the Judicial Selection Commission select and certify a three (3) person panel to the Governor and that the Governor have a three (3) person panel of nominees certified by the Commission to consider for appointment to the vacancy. The withdrawal of Dinkins made the panel procedurally defective and incomplete. Upon Dinkins' withdrawal, the Governor was deprived of a valid three person panel from which to appoint.

(6)

At approximately noon on July 24, 2006, Movant was informed by the Deputy Governor that Dinkins had withdrawn and that the Governor was returning the panel to the Commission. On the same date, July 24, 2006, a letter was mailed and faxed to the Chair of the Judicial Selection Commission with the Governor's signature advising the Commission that the Governor was returning the panel due to Dinkins' withdrawal. The letter in its entirety is set forth as Exhibit C to the Complaint for Declaratory Judgment.

(7)

The Governor's action of returning the panel to the Commission because it was incomplete and, therefore, did not meet the statutory requirements of T.C.A. §§17-4-109 and 112(a) was consistent with the statutory procedure even though the wording of the July 24, 2006 letter and the explanation given is somewhat ambiguous.

(8)

The procedure that followed, however, after Chancellor Dinkins' withdrawal does not comply with the statutory requirements of T.C.A. §§17-4-109 and 112(a). The Commission was denied the right to submit a complete panel of three names as an original panel as required by T.C.A. §17-4-109(e); the Governor was denied the right to consider and choose from an original panel of three nominees; and Movant was denied his vested right to be considered for appointment.

(9)

The procedure that followed Dinkins' withdrawal prevented the Judicial Selection Commission from being able to supply another person to complete the original panel.

(10)

On September 18, 2006, the Governor's Complaint for Declaratory Judgment was filed. The construction of the statutory procedures proposed by the Attorney General in the Complaint for Declaratory Judgment filed on behalf of the Governor does not comport with the procedures set forth in T.C.A. §§17-4-109(e) and 112(a). It ignores the mandate that the Governor "shall" make the appointment from a three (3) person panel. It ignores the vested right of a nominee on a panel to be considered for appointment.

(11)

The relief sought in the Complaint and construction upon which it is based, as asserted by the Attorney General, would allow a *de facto* excision of the statutory requirements that there must be an original three (3) person panel selected, nominated and certified by the Judicial

Selection Commission, and considered by the Governor thereby eliminating one of the mandated procedural steps in the process.

(12)

The subsequent action in “rejecting” the incomplete panel after Dinkins’ withdrawal was a nullity under the statutory scheme.

(13)

Acceptance of the construction asserted by the Attorney General also unnecessarily raises unavoidable issues as to certain statutory and constitutional rights held by Movant under T.C.A. §§4-21-311 and 401, Art. 1, §8 of the Tennessee Constitution, 42 U.S.C. §1983 and the 14th Amendment to the United States Constitution.

(14)

As a result of the defect in procedure created by Dinkins’ withdrawal and the ensuing actions, an unnecessary dispute has arisen between the Executive Branch and the Judicial Branch of the government of Tennessee as to the validity of the September 7, 2006 panel of three (3) persons certified by the Commission and concerning the process, interpretation, and implementation of the statutory scheme for the selection of nominees to fill vacancies on the Tennessee Supreme Court, Tennessee’s highest court until the next election. T.C.A. §17-14-101, *et seq.* A declaratory judgment action to correct the defect in procedure and, to the extent necessary, clarify the obligations and limitations of the Executive Branch *vis a vis* that of the Judicial Branch and *vice versa* in this process is an appropriate dispute for declaratory judgment and will directly impact Movant’s rights and privileges under the law.

(15)

It was not until November 14, 2006, however, that the Judicial Selection Commission filed its Answer. Prior to that date, Movant had been informed that the Commission would be filing a motion to add Movant as a necessary and indispensable party.

(16)

On November 16, 2006, the Judicial Selection Commission filed its Motion For Order Naming Necessary Party Pursuant to Tenn.R.Civ.P. 19.01 and Tenn. Code Ann. §29-14-107 seeking to add J. Houston Gordon as a necessary party.

(17)

The Attorney General, on November 15, 2006, filed a motion for summary judgment on behalf of the Governor in which he seeks to limit the issues raised by his complaint to a mere interpretation of the wording of only one subsection of the Tennessee Plan, T.C.A. §17-4-112(a), as to the meaning of only certain selected words “one other panel” and the effect of the governor’s rejection of the “first panel” without any consideration of the issues related to: (1) the mandate of the statute that the Governor “shall” consider a three person panel; (2) “shall” submit his reasons for rejecting a panel in writing “for” the Commission; (3) whether nominees may be rejected solely on the basis of a race-based classification; (4) whether the Governor’s exercise of his claimed “political power” of appointment is limited by the federal and state constitutions; (5) whether the Governor’s actions under the facts and circumstances here, are subject to the restrictions imposed on the state by the Tennessee Human Rights Act; and (6) whether there was a precedent political commitment made that thwarts the very purpose of the Tennessee Plan.

(18)

On November 21, 2006, the Attorney General on behalf of the Governor filed his Response to Motion for Order Naming Necessary Party Pursuant to Tenn.R.Civ.P. 19.01 and Tenn. Code Ann. §29-14-107 in which it was denied that Movant was an indispensable party but that “the Governor does not oppose the addition of Mr. Gordon as a party defendant” so long as the Governor’s “motion for summary judgment as well as any other motions for summary judgment,” set for December 13, 2006, not be delayed.

II.

MOVANT'S BASIS FOR INTERVENTION

(19)

On July 18, 2006 and on September 7, 2006, the Judicial Selection Commission selected and certified the Movant as one of three nominees for the governor to consider for appointment to the Tennessee Supreme Court. The Movant, by filing his application for appointment and by being nominated and certified by the Judicial Selection Commission as one of three persons best qualified to serve, claims a vested right and interest related to the subject matter of the declaratory judgment action and is so situated that the disposition of the declaratory judgment action in the absence of the Movant will:

- (1) as practical matter impair or impede Movant's ability to protect his interest; or
- (2) leave the matter unsettled and the other parties subject to substantial risk of incurring double or otherwise inconsistent obligations by reason of Movant's interests in the subject matter.

(20)

Movant respectfully submits that, since the Judicial Selection Commission selected and certified him as one of those persons most highly qualified to the Governor for consideration for appointment to the Tennessee Supreme Court, his interest is such that he is a necessary party in this cause with the right to file his own responsive pleadings including a counter-complaint and cross-complaint for declaratory judgment.

(21)

Pursuant to Rule 18, Tennessee Rules of Civil Procedure, Movant should be allowed to assert his own claim for relief in the form of a counter-claim and/or cross-claim since he is entitled to equitable and declaratory relief in this cause under the facts and circumstances involved.

(22)

The effect of the relief sought by Plaintiff in the Complaint for Declaratory Judgment would result in a denial of Movant's vested right to be considered for appointment to the Supreme Court although the Judicial Selection Commission has certified him as being one of three (3) to be considered for appointment to the vacancy on the Court. Thus, Movant's interest in the legal and factual issues in this action are real and obvious. He is a necessary party.

(23)

Movant also submits that facts and circumstances underlying the implementation of the selection process established by statute, including the defective procedure and actions taken leading up to and after Chancellor Dinkins' withdrawal, the subsequent "rejecting" of an incomplete panel of nominees and the stated "reason" or lack thereof for doing so, and the Judicial Selection Commission's response thereto, if not corrected by this Court, will necessarily result in the Court being required to decide important questions of statutory interpretation, and of constitutional import which directly affect real interests held by Movant under T.C.A. §§4-21-311 and 401, Art. I, §8 and Art. XI, §8 of the Tennessee Constitution, the 14th Amendment of the United States Constitution, and 42 U.S.C. §1983 that impact Movant and will impact the rights of future nominees and the integrity of the Tennessee Plan. Therefore, Movant possesses a clear and substantial legal interest arising out of common questions of disputed facts and law in this action.


(24)


Since Movant is and will be directly and specifically affected, his rights and privileges under the law will be impacted by judicial resolution of the common issues of underlying facts and law raised by the Complaint for Declaratory Judgment, and since his request to intervene is timely filed, Movant has satisfied each and every requirement for intervention and should be made a necessary party Defendant.

Wherefore, it is respectfully requested that this motion to intervene be granted and that the Movant, as intervening defendant, be allowed to file his answer, counter-claim and cross-claim for relief to protect his interests as an applicant and nominee to the Tennessee Supreme

Court, a copy of which is attached hereto as Exhibit A as required by Rule 24, Tennessee Rules of Civil Procedure.

RESPECTFULLY SUBMITTED this the 27th day of November, 2006.

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CERTIFICATE OF SERVICE

Counsel for Intervenor certify that on this the 27th day of November 2006, a true and correct copy of the foregoing was mailed to:

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