

IN THE CIRCUIT COURT, FOURTH  
JUDICIAL CIRCUIT, IN AND FOR  
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CA-5799  
DIVISION: CV-H

FRANK DENTON,

Plaintiff,

vs.

MAYOR ALVIN BROWN, in his official capacity,  
THE CITY OF JACKSONVILLE; and THE  
JACKSONVILLE POLICE AND FIRE PENSION  
FUND BOARD OF TRUSTEES,

Defendants.

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**MOTION TO DISMISS COMPLAINT**

Defendants, Mayor Alvin Brown and the City of Jacksonville (“the City”), move to dismiss the Complaint filed by Plaintiff, Frank Denton (“Denton”). As discussed below, dismissal is appropriate because: (i) Denton’s allegations about purported Sunshine Law violations are contradicted by the exhibits attached to his Complaint, (ii) Denton inaccurately alleges that collective bargaining occurred when in fact the Fraternal Order of Police (FOP) and Jacksonville Association of Firefighters (JAFF) waived their right to collective bargaining through both actions and written words; (iii) Denton launches a collateral attack on an order entered by a federal district court and seeks to freeze public debate on its implementation, and (iv) Denton ignores clear Florida and federal law governing court-ordered mediation. The City further states the following in support of dismissal:

1. Denton, the Editor of the *Florida Times Union*, asks this Court to prevent a federal court from endorsing a proposed mediation settlement agreement submitted by the parties

in *Wyse v. City of Jacksonville & Jacksonville Police & Fire Pension Bd. of Trustees*, Case No. 3:13-cv-121-J-34MCR, United States District Court, Middle District of Florida (the “Mediation Settlement Agreement”).

2. Denton assumes that the confidential mediation sessions which precipitated the Mediation Settlement Agreement *must have* involved final agency action and collective bargaining (and therefore violated the Sunshine Law). He specifically asks this Court to declare that the Mediation Settlement Agreement is void *ab initio* and enjoin the City from “adopting, performing or otherwise implementing” the proposed Agreement.<sup>1</sup>

3. By extension, Denton asks this Court to prevent an elected public body – here, the Jacksonville City Council – from debating or even considering a tentative settlement agreement negotiated on the City’s behalf and proposed to City Council by the City’s lawyers after weeks of mediation in a federal lawsuit. Not surprisingly, there is absolutely no legal authority whatsoever to support such a breathtaking restraint on local governmental decision making, political debate and other constitutional protections in the guise of a Sunshine Law claim.

4. As this Court is well aware, governmental entities must mediate under different rules than private parties. [*See, e.g.*, Rule 1.720(d), Fla.R.Civ.P.; Rule 9.05, Local Rules of the Middle District of Florida]. The government’s representatives in mediation cannot reach a final and binding decision in private mediation. That is because the ultimate approval of such decisions must be made “in the sunshine” by the appropriate governmental body, in this case, the City Council. The City followed these rules in the federal case, and the persons who signed the

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<sup>1</sup> Denton also demands attorney’s fees from the City and its Mayor.

proposed Mediation Settlement Agreement on its behalf only obligated the City to seek approval of the proposal by City Council. [*See Mediation Settlement Agreement*, p.10].<sup>2</sup>

5. As Denton should know, his stated assumption that the confidential mediation sessions *must have* involved final agency action and collective bargaining is completely at odds with the exhibits attached to his complaint.

6. First, the language in the Mediation Settlement Agreement (Exhibit E to Denton’s complaint) plainly shows that it is *tentative* and conditioned on final agency action and approval of Jacksonville’s City Council, as well as the Police and Fire Pension Fund Board of Trustees (“Pension Fund Board”). [*See Mediation Settlement Agreement*, p. 2]. In fact, the Agreement requires its signatories to “present and support [its] terms to their respective elected and/or appointed officials and use their best efforts to obtain the approval of said officials ...” [*Id.*, pp. 3 and 10]. At the very least, it shows that final agency action has not occurred.

7. The public actions to be taken by these governing bodies include certain recodification of Jacksonville’s Ordinance Code and passage of new legislation by Jacksonville’s City Council to harmonize with and implement the Agreement. [*See Mediation Settlement Agreement*, p. 4, “modifications will be incorporated into the Ordinance Code upon approval by the City Council of this Settlement Agreement;” p. 10, “the City and Trust each represent that they will urge the approval of this Agreement, and implementation of its terms, by each of their governing bodies”].

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<sup>2</sup> It is settled that the Sunshine Law is implicated where two or more “sunshine officials” have attempted to reach an official and final agreement out of the sunshine. *See Mitchell v. School Bd. of Leon County*, 335 So. 2d 354, 355 (Fla. 1st DCA 1976) (stating the same but noting that “the [Sunshine Law] was never intended to become a millstone around the neck of the public’s representatives when being sued by a private party”). However, it is undisputed that *no* such officials were present and *no* final agreement was ever reached in the federal court mediation at issue here.

8. This much is consistent with Jacksonville's City Charter, which provides that the City Council can only approve an agreement following notice and hearing under Florida law, and by action of ordinance or resolution. [*See, e.g.*, Section 5.08 of City Charter (stating, in part, that "the council may take official action only by the adoption of ordinances or resolutions")].

9. In fact, the Jacksonville City Council has already had at least one open meeting on the proposed ordinance (2013-366) which would adopt the tentative Mediation Settlement Agreement. On Thursday, June 27, 2013, the City Council Finance Committee met at 3:00 P.M. on the subject of 2013-366. The meeting was properly noticed in accordance with the law. Committee members listened to a presentation, asked questions, and sought public comment from citizens attending the meeting. However, since neither the Finance Committee nor the full City Council has acted on this agreement, it remains proposed and not final.

10. In any event, the proposed Mediation Settlement Agreement attached to Denton's complaint shows that there *is no* final, official agreement here at all. It is therefore impossible that a *private* final agreement was reached.

11. Likewise, the Joint Motion to Approve the Proposed Mediation Settlement Agreement (Exhibit F to Denton's complaint) also makes clear that the City and Pension Fund Board must be presented with the potential settlement and that the federal court's judgment (adopting the Agreement) will be entered only with the Mayor's and City Council's consent and "upon the completion of the legislative process." [*See Joint Motion to Approve Mediation Settlement Agreement*, p. 1]. There is nothing private about this process.

12. The *Wyse v. City of Jacksonville* complaint (Exhibit C to Denton's complaint) also contradicts Plaintiff's assertion that the mediation of that case must have involved secretive collective bargaining. Notably, the *Wyse* complaint was brought by three firefighters and a

police officer – one of whom does not even qualify for membership in any collective bargaining unit. Further, the counts therein asserted have nothing to do with collective bargaining. That much is not surprising, as the Pension Fund Board is not a bargaining agent and does not engage in collective bargaining of any nature. *See* Section 447.203(11), (12) and (14), Fla. Stat.

13. Rather, the *Wyse* complaint asks the federal court to restrain the City from breaching or changing the City’s 30-year contract with the Pension Fund Board (“Pension Fund Contract”), the terms of which affect the *Wyse* Plaintiffs’ pension benefits and contributions and notably define the finances of the trust being managed by the Board. Ironically, the main argument of the *Wyse* Plaintiffs is that the City cannot force the unions to bargain a violation of that very same contract. [*See Wyse* complaint, ¶¶ 58, 67].

14. The Unions unequivocally waived their right to bargain by their actions and written words. As to actions, Fraternal Order of Police (FOP) Local 5-30 refused to negotiate pension benefits and walked away from the collective bargaining table on October 31, 2012. The Jacksonville Association of Firefighters Local 122 also declined to negotiate pension benefits at collective bargaining meetings on December 27, 2012 and January 3, 2013.

15. As to written words, the Mediation Settlement Agreement goes further, and does not merely rely on the earlier verbal waivers but unambiguously memorializes the Unions’ decision to waive any right to bargain that could have been impacted by the Agreement. [*See Mediation Settlement Agreement*, pp. 2-3]. Waiver of this nature is permitted under Florida law. *See Palm Beach Jr. College Bd. of Trustees v. United Faculty of Palm Beach Jr. College*, 475 So. 2d 1221, 1226 (Fla. 1985) (“We conclude that a union may contractually waive its statutorily guaranteed right to collective bargaining to the extent that it waives the right to demand bargaining to alter the status quo during the term of the contract”).

16. Accordingly, the contention that the City somehow violated the Sunshine Law by mediating the breach of contract claim at issue in *Wyse* is baseless.

17. The *Jacksonville Association of Fire Fighters v. City of Jacksonville* complaint filed in state court in 2010 (Exhibit B of Denton's complaint) further illustrates the disconnect between collective bargaining activities ostensibly open to public scrutiny and the private mediation in *Wyse*. The 2010 case also focused on the Pension Fund Contract. And, like the *Wyse* case, the 2010 complaint distinguished the relief sought therein from collective bargaining activities. In fact, it explained that "the City and Association have never collectively bargained the Pension Fund Contract benefits." [See *Jacksonville Association of Fire Fighters v. City of Jacksonville* complaint, ¶ 49].

18. The 2010 *Jacksonville Fire Fighters* complaint also accurately asserts that the Pension Fund Contract actually emanated from the settlement of yet an earlier lawsuit in 1992, in which the Pension Fund Board sued the City for failing to make certain contributions to the fund. [See *Jacksonville Association of Fire Fighters v. City of Jacksonville* complaint, ¶¶ 36-41].<sup>3</sup>

19. The 2010 *Jacksonville Fire Fighters* complaint correctly explains that the Pension Fund Contract was approved, subsequently amended and adopted "in the sunshine" on a number of occasions via City ordinance by City Council in 2001, 2003, 2004 and 2006. [*Id.*, ¶¶ 39-40].

20. It follows that Denton's case is therefore due to be dismissed, as the exhibits attached to his complaint show a lack of any factual basis upon which he may state a viable Sunshine Law claim. See *Hunt Ridge at Tall Pines, Inc. v. Hall*, 766 So. 2d 399, 401 (Fla. 2d DCA 2000) ("Where complaint allegations are contradicted by exhibits attached to the

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<sup>3</sup> As in the federal *Wyse* case at issue here, the settlement of the 1992 litigation arose from mediation sessions. City Council later approved that settlement by ordinance, in the sunshine. The same process is in place with the Mediation Settlement Agreement.

complaint, the plain meaning of the exhibits control [sic] and may be the basis for a motion to dismiss”); *American Seafood, Inc. v. Clawson*, 598 So. 2d 273, 274 (Fla. 3d DCA 1992) (“These exhibits are inconsistent with the allegations of the complaint [...] thereby rendering such allegations a nullity [...]”); *see also Rudloe v. Karl*, 899 So. 2d 1161, 1164 (Fla. 1st DCA 2005) (explaining that courts must consider the allegations of the complaint and all exhibits thereto in deciding a motion to dismiss).

21. Dismissal is also appropriate because Denton seeks to undermine the federal court’s authority to control the cases and parties before it. As noted, the *Wyse* case concerns whether the Pension Fund Contract is valid and whether the City can force unions to negotiate certain of its terms. In this case, Denton not only asks this Court to answer the same questions, but also recommends a pronouncement by this Court that the Pension Fund Contract is invalid and its terms must be negotiated “in the sunshine.” In essence, it represents little more than a collateral attack on the federal court’s authority to order and control mediation in *Wyse*.

22. Finally, the Court should dismiss Denton’s complaint because it demonstrates either a lack of understanding or total disregard of the rules governing court-ordered mediation. Indeed, the complaint not only ignores Section 44.401 of the Florida Statutes (the “Mediation Confidentiality and Privilege Act”) and Rule 1.730, Fla.R.Civ.P., but also tramples the mediation confidentiality requirements set out by the Federal Alternative Dispute Resolution Act, 28 U.S.C. § 652, and Local Rule 9.07(b) of the United States District Court for the Middle District of Florida (providing that mediation proceedings “including statements made by any party, attorney, or other participant, are privileged in all respects”).

23. What’s more, the idea that mediation involving the government is always open to public scrutiny is undermined by the Sunshine Law itself. *See, e.g., Paranzino v. Barnett Bank*

of *South Florida, N.A.*, 690 So. 2d 725, 728 (Fla. 4th DCA 1997) (explaining that, notwithstanding Chapter 119, Fla. Stat., “the confidentiality afforded to parties involved in mediation proceedings must remain inviolate”), citing *Gordon v. Royal Caribbean Cruises Ltd.*, 641 So. 2d 515, 517 (Fla. 3d DCA 1994); see also *News-Press Pub. Co., Inc. v. Lee County*, 570 So. 2d 1325, 1327 (Fla. 2d DCA 1990) where a similar argument raised by a newspaper was rejected (“the narrow scope of the mediation proceedings in this case does not give rise to a substantial delegation affecting the decision-making function of any board, commission, agency or authority sufficient to require that this mediation proceeding be open to the public”).

24. Here, the proposed Mediation Settlement Agreement is a public document that is being reviewed, debated and considered “in the sunshine” by City Council. This agreement cannot become law until it has traveled through the open Council process and received approval.

25. At bottom, Plaintiff Denton seeks to not only freeze public debate and governmental decision-making, but also to unravel a *tentative* federal court mediation agreement which resolves a contract dispute between the City and the Pension Fund Board.

26. Denton has the absolute right to his opinion on the Mediation Settlement Agreement, and he and the *Times-Union* have frequently offered editorial commentary on the matter before and since he decided to bring this meritless lawsuit against the Mayor<sup>4</sup> and the City. However, he does not have the right to unravel in this Court a matter of federal litigation,

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<sup>4</sup> Denton’s decision to name Mayor Brown as a party defendant independent of the City is questionable at best. The Mayor is not a proper party defendant, as a suit against a governmental official in his official capacity is deemed a suit against the entity that he represents – here, the City of Jacksonville. See *Stephens v. Geoghegan*, 702 So. 2d 517, 527 (Fla. 2d DCA 1997); *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991) (holding that suits against municipal officers are suits directly against the city that the officer represents). Moreover, the steps necessary to bind the City to the terms and conditions of the Mediation Settlement Agreement cannot be taken by the Mayor alone. Rather, as the Agreement specifically states, its implementation is dependent upon the approval of Jacksonville’s City Council.

undermine a mediation process governed by federal and Florida law, or preempt the Jacksonville City Council's consideration of this matter. This Court should not allow that effort and should dismiss this case with prejudice.

**WHEREFORE**, the City respectfully requests that this Court enter an order granting this motion, dismissing Denton's complaint with prejudice, awarding the City its attorney's fees incurred in defending this action, and granting any additional relief which the Court deems just and appropriate.

Respectfully submitted this 2nd day of July, 2013 by:

**OFFICE OF GENERAL COUNSEL**

*/s/ David J. D'Agata*

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 2nd day of July, 2013, a true and correct copy of the foregoing was filed with the Clerk of Court via the Florida Courts eFiling Portal and served via electronic and United States Mail to:

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