

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO. CACE 15-17333

The CITY OF HOLLYWOOD,
FLORIDA,

Plaintiff,

vs.

The BOARD OF TRUSTEES OF THE
EMPLOYEES RETIREMENT FUND
OF THE CITY OF HOLLYWOOD, and
The BOARD OF TRUSTEES OF THE
CITY OF HOLLYWOOD FIREFIGHTERS
RETIREMENT SYSTEM, and The
BOARD OF TRUSTEES OF THE CITY
OF HOLLYWOOD POLICE OFFICERS
RETIREMENT SYSTEM,

Defendants.

MOTION TO DISMISS

Defendants, the BOARD OF TRUSTEES OF THE CITY OF HOLLYWOOD FIREFIGHTERS RETIREMENT SYSTEM (“Firefighter Pension Board”), and the BOARD OF TRUSTEES OF THE CITY OF HOLLYWOOD POLICE OFFICERS RETIREMENT SYSTEM (“Police Pension Board”) (collectively the “Boards), file¹ this Motion to Dismiss for failure to state a cause of action, failure to join indispensable parties, failure to exhaust administrative remedies, and pursuant to the doctrine of primary jurisdiction, and as good cause shown state:

¹ A Motion to Abate and a Motion to Sever are being filed contemporaneously with this Motion to Dismiss.

1. On or about September 29, 2015, Plaintiff, the City of Hollywood, Florida (the “City”) filed its Complaint against the Boards² seeking a declaratory judgment against the Boards and injunctive relief and recoupment from retirees who have not been named as defendants by the City.
2. The Boards are charged with the responsibility of administering the CITY OF HOLLYWOOD FIREFIGHTERS RETIREMENT SYSTEM (the “Firefighter Plan”), and the CITY OF HOLLYWOOD POLICE OFFICERS RETIREMENT SYSTEM (the “Police Plan”), collectively (the “Plans”).

Failure to Name Indispensable Parties:

3. The relief demanded by the City, if granted, would materially affect the interests of the members of the Plans, active firefighters and active police officers, as well as certain retirees and their survivors. Accordingly, the participants of the Plans are indispensable parties and the City cannot properly maintain this action without first joining and serving all such necessary and indispensable parties.
4. In *Florida Dept. of Revenue v. Cummings*, 930 So. 2d 604, 607 (Fla. 2006), the Florida Supreme Court held that “[t]he general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of the suit, must be made parties either as complainants or defendants, so that a complete decree may be binding upon all parties.”
5. “Before any proceeding for declaratory relief is entertained, all persons who have an actual, present, adverse, and antagonistic interest in the subject matter should be before

² A third City pension plan, the Employees Retirement Fund of the City of Hollywood (the “General Employees Plan”), is also named as a defendant. The General Employees Plan is separately represented by its own counsel.

the court.” *Bethel v. Security National Ins. Co.*, 949 So. 2d 219, 223 (Fla. 3d DCA 2007); *see also Crescenze v. Bothe*, 4 So. 3d 31 (Fla. 2d DCA 2009) (holding that beneficiaries of a trust are indispensable parties to a suit involving the trust).

6. *Shaw v. City of Miami*, 322 So. 2d 649 (Fla. 3d DCA 1975), is directly on point. In *Shaw*, the Third District upheld the dismissal of a suit against a pension fund for failure to join indispensable parties, due to the complaint’s failure to join each member of the pension fund.
7. A required element of an action for a declaratory judgment is that “the antagonistic and adverse interest(s) are all before the court by proper process or class representation” *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 404 (Fla. 1996). The failure to name such indispensable parties is particularly glaring where constitutional and due process rights are implicated. *See* Art. 1, §§ 9 and 10, Fla. Const.
8. Further, under Florida law, “[n]o declaration shall prejudice the rights of persons not parties to the proceedings.” §86.091, Fla. Stat. The declaratory relief sought by the City, if granted, would obviously prejudice members of the Plans.
9. The fact that the City is seeking injunctive relief directly impacting non-party members of the Plan and retirees underscores the necessity to name indispensable parties. *Stevens v. Tarpon Bay Moorings Homeowners Ass’n, Inc.* 15 So. 3d 753, 755 (Fla. 4th DCA 2009) (holding that all impacted homeowners were indispensable parties where the interests of all homeowners were impacted by requested injunctive relief). “A court is without jurisdiction to issue an injunction which would interfere with the rights of those who are not parties to the action. An injunction can lie only when its scope is limited in effect to

the rights of parties before the court.” *Sheoah Highlands, Inc. v. Daugherty*, 837 So. 2d 579 (Fla. 5th DCA 2003).

10. Attached as Exhibit “A” is a Circuit Court order by Judge French granting a motion to dismiss for failure to name indispensable parties in *City of Lake Worth v. Board of Trustees*, Case No. 2010 CA 18632 (Fla. 15th Cir. Ct. 2011). While the Hollywood and Lake Worth cases involve different underlying issues, the cases both involve a suit by a City against a pension board(s) for declaratory and injunctive relief. Judge French granted the Lake Worth Firefighter Pension Board’s motion to dismiss, with leave to permit the City of Lake Worth “to join all plan participants whose interest is or may be affected by this action.”
11. Based on the allegations contained in the City’s Complaint, members of the Plans, both active members and certain retirees, have an actual, present, adverse, and antagonistic interest in the subject matter of the instant case. Thus, the City’s Complaint should be dismissed due to the City’s failure to properly join each member of the Plans whose rights would necessarily be affected by the relief sought by the City.

Failure to Exhaust Administrative Remedies with Pension Boards:

12. The City’s Complaint should also be dismissed because the City failed to exhaust its administrative remedies before the Pension Boards.
13. The City never appeared before the Boards, or even requested a hearing before the Boards, prior to filing this action. In its Complaint, the City fails to make any allegation that it properly exhausted available administrative remedies before the Boards, the sole and exclusive entities charged with administering the Plans. The City merely makes the

boilerplate allegation that all conditions precedent to this action has been complied with or waived.

14. The failure to exhaust administrative remedies deprives the trial court of subject matter jurisdiction. *Bd. of Trustees of Broward Community College v. Caldwell*, 959 So. 2d 767, 771 (Fla. 4th DCA 2007).
15. “The exhaustion rule serves a number of policies, including promoting consistency in matters which are within agency discretion and expertise, permitting full development of a technical issue and factual record prior to court review, and avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any errors and possibly moot the need for court action.” *Central Florida Investments, Inc. v. Orange County Code Enforcement Bd.*, 790 So. 2d 593, 596 (Fla. 5th DCA 2001) (citing *Deltona Corp. v. Alexander*, 682 F.2d 888 (11th Cir. 1982)).
16. The rule requiring exhaustion of administrative remedies “[p]ermits full development of a factual record and technical issues and avoids unnecessary judicial decisions by allowing the agency to correct any errors and possibly moot the need for court action. It also allows the agency to exercise its discretion and expertise initially in an area of governance designed for its operation and administration.” *Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160, 163 (Fla. 5th DCA 2003); *Moore v. City of St. Petersburg*, 662 So. 2d 1342 (Fla. 2d DCA 1995) (applying the requirement of exhaustion of administrative remedies in suit brought against public pension board).
17. A hearing before the Boards is an available administrative remedy that is a prerequisite to filing an action against the Boards.

18. Section 33.037(A) of the Firefighter Plan provides that “[t]he sole and exclusive administration and responsibility for the proper operation of the system and for making effective the provisions of this subchapter is hereby vested in a Board of Trustees.” Among the duties and responsibilities of the Firefighter Pension Board is “to construe the provisions of the system and determine all questions arising thereunder.” *See* §33.037(E)(1).
19. The Firefighter Plan is governed by Chapter 175, Florida Statutes. Section 175.071(5), Fla. Stat., provides that “[t]he sole and exclusive administration of, and the responsibilities for, the proper operation of the firefighters’ pension trust fund and for making effective the provisions of this chapter are vested” in the Firefighter Pension Board. Moreover, Section 175.061(1), Fla. Stat., provides that the board of trustees of each firefighters’ pension trust fund “shall be solely responsible for administering the trust fund.”
20. Likewise, Section 33.132 of the Police Plan provides that the “general administration and responsibility for the proper operation of the system and for making effective the provisions of this subchapter” are vested in the Police Pension Board.
21. The Police Plan is governed by Chapter 185, Florida Statutes. Section 185.06(4), Fla. Stat., provides that “[t]he sole and exclusive administration of, and the responsibilities for, the proper operation of the retirement trust fund and for making effective the provisions of this chapter” are vested in the board of trustees. Moreover, Section 185.05(1), Fla. Stat., provides that the board of trustees of each police pension plan “shall be solely responsible for administering the trust fund.”

22. As the City failed to appear before the Boards and has failed to allege that it exhausted its administrative remedies, the City's Complaint should be dismissed due to its failure to exhaust administrative remedies prior to filing suit. *Caldwell*, 959 So. 2d at 771 (directing the trial court to grant a motion to dismiss due to the plaintiff's failure to exhaust administrative remedies).

Failure to Exhaust Administrative Remedies with the Division of Retirement:

23. Paragraph 15 of the Complaint cites to a July 3, 2014 letter from the State of Florida, Division of Retirement. The Division of Retirement's letter is not attached as an exhibit to the Complaint. The July 3 letter indicates that if steps are not taken by the City to satisfy the unfunded liability, the Plans will not be state accepted for compliance with Part VII of Chapter 112, Florida Statutes.

24. Section 112.63(4) set forth a procedure for a petition and hearing with the Department of Management Services under Chapter 120, Florida Statutes. Nowhere does the City allege that it filed a Chapter 120 petition with the Department of Management Services.

25. The City has failed to exhaust its administrative remedies under Chapter 120.

Dismissal under the Doctrine of Primary Jurisdiction:

26. Additionally, the City's Complaint should be dismissed under the doctrine of primary jurisdiction. In *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037 (Fla. 2001), the Florida Supreme Court explained:

The doctrine of primary jurisdiction enables a court to have the benefit of an agency's experience and expertise in matters with which the court is not as familiar, protects the integrity of the regulatory scheme administered by the agency, and promotes consistency and uniformity in areas of public policy. . . . Pursuant to the doctrine, '[j]udicial intervention in the decision-making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow

the executive branch to carry out its responsibilities as a co-equal branch of government.

Id. at 1037 (quoting *Key Haven Associated Enters. v. Bd. of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982)).

27. The interpretation of the governing documents the Plans are within the experience and expertise of the Boards and, as such, the City's Complaint should be dismissed under the doctrine of primary jurisdiction. The Boards have the "sole and exclusive administration and responsibility for the proper operation" of the respective Plans. *See* ¶18 – ¶21 above.
28. Likewise, the Division of Retirement, Department of Management Services, is the agency specifically charged with the responsibility for distributing premium tax revenue to municipal police and firefighter pension funds under Chapters 175 and 185, Florida Statutes. §175.341 & §185.23. Premium taxes are only released to the Boards after the Division of Retirement has annually determined "compliance" with Chapters 175 and 185, Fla.Stat.
29. The Division is also responsible for "daily oversight and monitoring" of actuarial matters and the review of required actuarial valuations pursuant to Chapter 112, Part VII. §175.341(1), §185.23(1), & §112.63(4). As specified in Section 112.63(4), any disputes under Chapter 112, Part VII, are properly resolved before an Administrative Law Judge and the Division of Retirement in a Chapter 120 proceeding. §112.63(4)(c)(specifying that the administrative hearing shall be conducted under §120.569 and §120.57).

Additional Defects Establishing Failure to State a Claim:

30. Apart from the defects identified above, the City's Complaint generally fails to state a claim for the following reasons:

(i) The City never validly adopted a resolution authorizing suit. Paragraph 19 erroneously alleges that the City, by a "vote of three-fourths or more of its governing body," found that significant legal rights would be compromised by complying with the mandatory conflict resolution procedures of Chapter 164, Florida Statutes. As set forth in the Boards' contemporaneously filed Motion to Abate, this allegation by the City is demonstrably false.³ As a result, the putative Resolution that the City relies upon is invalid. Absent legal authority to institute suit by the City, this matter is properly dismissed.

(ii) Paragraphs 34 and 41 seek injunctive relief, but fails to state a cause of action for injunctive relief. One of the requisite elements of injunctive relief is irreparable harm. *Hiles v. Auto Bahn Federation, Inc.*, 498 So. 2d 997 (Fla. 4th DCA 1987). The City fails to make any allegation that it will suffer irreparable harm if the relief sought is not granted.

(iii) Paragraph 18 indicates that the Division of Retirement may withhold disbursement of monies under Chapter 175 and 185. Yet, the City has not availed itself of

³ Resolution No. R-2015-214, Item 38, was purportedly adopted by the City on July 8, 2015 but is invalid according to its own terms. Of the seven members of the City Commission, only four voted to authorize suit. Vice Mayor Kevin Biederman, Commissioner Traci Callari, and Commissioner Peter Hernandez all voted "NO" against the Resolution. Thus, the July 8 vote was a bare 57% majority, which is invalid under the 75% requirement set forth in Section 164.1041(2). Not surprisingly, the minutes for the July 8, 2015 meeting have not yet been approved by the City, but the video of the meeting is available online: http://hollywoodfl.granicus.com/MediaPlayer.php?view_id=2&clip_id=472&meta_id=37447

the Chapter 120 hearing procedure. Until the City does so, this case is not ripe for resolution.

(iv) Paragraph 12 of the Complaint alleges that the Firefighter Pension Board authorized supplemental payments dating back to the year 2000. Paragraph 13 alleges that the Police Pension Board authorized supplemental payments dating back to the year 2000. Accordingly, the City fails to state a claim under the statute of limitations and has waived and/or is estopped from objecting to longstanding interpretations by the Boards.

WHEREFORE Defendants, Board of Trustees of the City of Hollywood Firefighters Retirement System and Board of Trustees of the City of Hollywood Police Officers Retirement System respectfully request this Honorable Court dismiss the City's Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by electronic mail on this 23rd day of November, 2015, to the Clerk of Court by the e-filing portal system which will send a notice of electronic filing to the following:

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