IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC., SHANE MONTGOMERY, and WILLIAM THEODORE MOORE, III,	)	
Plaintiffs,	)	Civil Action No. SPCV 18-00523-BA
v.	)	
THOMAS C. BORDEAUX, JR., Individually and as Judge of the Chatham County Probate Court	)	
Defendant.	)	

BRIEF IN SUPPORT OF MOTION TO STRIKE

Introduction

Plaintiffs Shane Montgomery, William Theodore Moore, III, and GeorgiaCarry.Org, Inc. (collectively, "GCO") commenced this action for mandamus and other relief against Defendant Thomas C. Bordeaux, Jr.,, the judge of the Probate Court of Chatham County, ("Bordeaux") for violating O.C.G.A. § 16-11-129(d)(4) by failing to process applications and issue Georgia weapons carry licenses ("GWLs") within the time required by that statute. Bordeaux has filed an Answer containing twelve defenses. Because most of the defenses are insufficient on their face or as a matter of law, GCO moves to strike them pursuant to O.C.G.A. § 9-11-12(f).

Legal Standard for Motions to Strike

Pursuant to O.C.G.A. § 9-11-12(f), a party may move to strike "from any pleading any insufficient defense." Such motion must be made within 30 days of service of the allegedly insufficient defense. *Id.* A motion to strike is the proper way to attack an insufficient defense (i.e., and not a motion for summary judgment). *Bedford v. Bedford*, 246 Ga. 780, 782, 273 S.E.2d 167,

168 (1980). It is error to deny a motion to strike an insufficient defense if the plaintiff shows the insufficiency. *Padgett v. Bryant,* 121 Ga.App. 807, 175 S.E.2d 884 (1970).

Argument

Bordeaux served his Answer on GCO's counsel on May 31, 2018, so this Motion is being filed within the 30-day statutory window. Answer, *unnumbered certificate of service.* GCO will show why all Defenses but the Seventh and Twelfth should be stricken.

First Defense

Bordeaux's First Defense is failure to state a claim for which relief may be granted. GCO is cognizant that somewhere in the Defense Bar Manual there must exist advice always to lodge this defense in an answer. It is unnecessary, however, because if a defendant does not contemporaneously move to dismiss, it serves no purpose. Aside from that, however, the Verified Complaint clearly does state a claim, because Bordeaux admits it.

In Paragraph 19 of the Answer, Bordeaux "admits that it routinely takes longer than 35 days from the time of filing to the time of issuance to process some other Georgia Weapons Carry License applications." Then in Paragraph 23 Bordeaux admits that "he as Judge of the Probate Court of Chatham County is violating O.C.G.A. § 16-11-129(d)(4)." Pursuant to O.C.G.A. § 16-11-129(j), a judge of a probate court that does not issue GWLs in the times required by O.C.G.A. § 16-11-129(d)(4) is liable in mandamus or other relief. Thus, without even delving deeply into the merits of the case, it is clear that GCO has stated a claim for which relief may be granted, and the First Defense is therefore insufficient.

Second Defense

Bordeaux's Second Defense is that he has no authority, right, or power "Individually," to act upon an application for a GWL. Answer, p. 1. He reasons, therefore, that no relief may be

granted as to him in his individual capacity. *Id.* This defense is insufficient as a matter of law, however, because the law in Georgia is clear that mandamus may be obtained against a government official in his individual capacity. *Crow v. McCallum*, 113 S.E.2d 203, 215 Ga. 692 (Ga., 1960) ("What the writ of mandamus seeks to enforce is the personal obligation of the individual to whom it is addressed. The writ does not reach the office nor can it be directed to the office. It acts directly on the person of the officer …, coercing him in the performance of a plain duty. It is a personal action against the officer and not one in rem against the office). *See, also Harmon v. James*, 200 Ga. 742, 38 S. E. 2d 401 (1946); *Bryant v. Mitchell,* 195 Ga. 135 23 S. E. 2d 410 (1942); *McCallum v. Bryan,* 213 Ga. 669, 670, 100 S.E.2d 916, 918 (1957); *City of Elberton v. Adams,* 130 Ga. 501 61 S. E. 18(1908).

In addition, the Supreme Court of Georgia has made clear that sovereign immunity applies to the state, its agencies ***and its employees in their official capacities,*** but that government employees in their individual capacities may be sued for prospective relief to right future wrong. *Lathrop v. Deal,* 301 Ga. 408, 444, 801 S.E.2d 867, 891 (2017) (Allegedly unconstitutional laws may give rise to "remedies that the plaintiff … may pursue against state officers in their individual capacities."), *Georgia Department of Natural Resources v. Center for a Sustainable Coast,* 294 Ga. 593, 755 S.E.2d 184, 192 (2014) ("[C]itizens aggrieved by the unlawful conduct of public officers … must seek relief against such officers in their individual capacities [to avoid sovereign immunity bars].")

TheSupreme Court of the United States has similarly concluded:

> The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may. . . have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it

> addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right.

United States v. Boutwell, 84 U.S. 604 21 L. ed. 721(1873). The defense that Bordeaux in his individual capacity is not subject to suit for prospective relief is wholly untenable.

Third Defense

The Third Defense is that claims against Bordeaux in his individual capacity are barred by official immunity and claims against Bordeaux in his official capacity are barred by sovereign immunity. GCO will show why each in turn is inapplicable.

Official Immunity

Official Immunity is established in the state Constitution. "[O]fficers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions." Ga.Const. Art. 1, Sec. II, Par. IX(d). Once again, *Lathrop* is dispositive:

> Read in its proper context, Article I, Section II, Paragraph IX(d) is most reasonably understood to be about suits and liabilities for ***retrospective relief,*** mostly monetary damages in tort cases…. Accordingly, the plaintiff…need not worry any longer that official immunity would bar a suit [seeking prospective relief only] if only it were brought against state officials in their individual capacities.

Lathrop, 301 Ga. At 443-444,801 S.E.2d at 891. GCO in the present case seeks only prospective relief (declaratory, injunctive, and mandamus). Therefore official immunity is no bar to the claims against Bordeaux in his individual capacity.

Sovereign Immunity

Sovereign immunity protects the state, its departments and officials (in their official capacities) from suits of all kinds, unless immunity has been waived by the legislature. *Fulton County v. Colon*, 730 S.E.2d 599 (Ct.App. 2012). An act of the General Assembly must specifically provide that sovereign immunity is waived, but the Constitution "does not require that the Act of the General Assembly expressly state 'sovereign immunity is hereby waived.'" *Id.* at 601. "Where a legislative act creates a right of action against the state … and the state otherwise would have enjoyed sovereign immunity from the cause of action, the legislative act *must* be considered a waiver of the state's sovereign immunity…." *Id.* [emphasis in original].

In the present case, O.C.G.A. § 16-11-129(j) creates a private right of action for an eligible GWL applicant who does not receive a GWL within the time required by law. The establishment of a private right of action constitutes a waiver of sovereign immunity.

Regardless, the law in this State is that when an official fails or refuses to perform an official duty requiring no exercise of discretion, any person who sustains personal inquiry thereby is entitled to mandamus relief. *Stanley v. Sims*, 185 Ga. 518, 525-26, 195 S.E. 439, 443 (1938). Such an action is not within the rule that a State cannot be sued without its consent. *Id.* As repeated by the United States Supreme Court in *Rolston v. Mo. Fund Comm'rs*, 120 U.S. 390, 7 S. Ct. 599, 30 L.Ed. 721 (1887) "the litigation is with the officer, not the State." The rule as to immunity of the State does not "forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest." *In re Ayers*, 123 U.S. 443, 8 S. Ct. 164, 31 L.Ed. 216 (1887)*; See also Pennoyer v. McConnaughy*, 140 U.S. 1, 11 S. Ct. 699, 35 L.Ed. 363 (1891). O.C.G.A. § 16-11-129 contains no provision for discretion of the judicial officer in issuing a GWL; either the

applicant meets the requirements, or the applicant does not. As will be discussed more fully below, the issuance of GWLs in Georgia is a purely ministerial function, and therefore Bordeaux is subject to mandamus under the longstanding principals set forth by the highest courts of both Georgia and the United States.

Fourth Defense

The Fourth Defense is that Bordeaux is protected by judicial immunity. "Judicial officers have been shielded from civil actions for acts done in their judicial capacity from the earliest dawn of jurisprudence." *West End Warehouses, Inc. v. Dunlap*, 233 S.E.2d 284, 141 Ga.App. 333 (1977). …. Judicial immunity is foreclosed and a judge is not immune from liability for nonjudicial functions, i.e., actions not taken in the judge's judicial capacity. *Mireless v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991).

A judicial act is one that is "normally performed by a judge" when the plaintiff "dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107 (1978). The issuance of licenses, especially licenses to carry firearms, is not "normally performed by a judge." In the five states bordering Georgia, licenses to carry concealed weapons are issued by sheriffs (Alabama[1] and North Carolina[2]), the state Department of Safety (Tennessee[3]), the state Department of Agriculture (Florida[4]), and the state Law Enforcement Division (South Carolina[5]). In fact, of the 49 states that issue licenses to carry concealed firearms,[6] only New York and New Jersey have provisions for judges to be involved at all in the licensing process. No state besides Georgia actually requires that applicants apply to a judge for a license.

[1] Alabama Code 13A-11-75
[2] North Carolina Statutes 14-415
[3] Tennessee Code Annotated 39-17-1351
[4] Florida Statutes 790.06
[5] South Carolina Code 23-31-215
[6] Vermont does not issue licenses, but does not prohibit carrying a concealed firearm without a license.

The act of issuing a license is ministerial and not judicial. When what we now call a probate judge was referred to as the "county ordinary," the Supreme Court of Georgia noted that issuing licenses by probate judges is not a judicial act:

> The ordinary, under our laws, is an official charged with the performance of duties judicial, ministerial, and clerical. Not by his title, but only by his acts, can the exact capacity in which he appears ever be known upon any special occasion. In admitting a will to probate, he acts as a judicial officer… In issuing a marriage license, he for the moment becomes a ministerial officer.

Comer v. Ross, 100 Ga. 652, 28 S.E. 387 (1897). [Emphasis supplied]. *Comer* was decided some 13 years before the General Assembly created a licensing requirement and assigned the task of issuing Georgia firearms licenses (the predecessor to the current GWLs) to the probate judges ("ordinaries"). 1910 Ga.L. 134. Presumably, the General Assembly knew from *Comer* that it was assigning yet another ministerial task to the probate judges.

It would be difficult to explain why issuing a GWL is a judicial function, when issuance of a marriage license is not. It is clear in O.C.G.A. § 15-9-30(b)(11) that probate judges "[p]erform such other judicial and ***ministerial*** functions as may be provided by law." (Emphasis supplied).

Moreover, judicial acts involve discretion and ministerial acts do not. The GWL statute itself, O.C.G.A. § 16-11-129, does not appear to confer any discretion upon the probate judges. This is one of the main distinctions between a "shall issue" state like Georgia and a "may issue" state like New Jersey. A probate judge is required to issue a license to all eligible applicants. *Moore v. Cranford*, 285 Ga.App. 666 (2007), abrogated by statute on other grounds ("The use of the term 'shall' means that the probate judge has no discretion…."); Op.Atty.Gen. U89-21 ("Generally speaking, the current statutory provisions do not provide for the exercise of discretion by the probate judge in passing upon an application for a firearms permit").

In addition, it must be kept in mind that the General Assembly made a provision for mandamus to obtain a GWL for an eligible applicant. Mandamus is intended to compel ministerial acts. It is not available to compel discretionary ones. *Duty Free Air & Ship Supply Co. v. City of Atlanta*, 282 Ga. 173, 174 (2007) ("It is axiomatic that mandamus is a remedy designed to compel the doing of ministerial acts. Mandamus is not an appropriate remedy to … compel the exercise of official discretion.")

The General Assembly is presumed to be aware of existing law when it enacts a new law. *United States Bank National Association v. Gordon*, 289 Ga. 12, 14 (2011). It is therefore safe to say that the General Assembly knew when it enacted the language providing for mandamus to compel issuance of a GWL that mandamus is available for ministerial functions and not discretionary ones. The General Assembly can thus be presumed to know that issuance of GWLs is a ministerial function (consistent with the Supreme Court's pronouncement in *Comer* that issuance of marriage licenses is a ministerial function).

Even if the Court somehow concludes that Defendant's processing of a GWL application is a judicial function, judicial immunity still does not apply. GCO did not sue Bordeaux for damages. GCO sued in mandamus and for declaratory and injunctive relief. It is well settled that the doctrine of judicial immunity does not apply for declaratory and injunctive relief. *Earl v. Mills*, 275 Ga. 503, 504 (2002). Moreover, the attorney's fees sought by Plaintiff are not an item of damages. This is distinguishable from a case for attorney's fees under O.C.G.A. § 13-6-11, in which attorney's fees are an item of damages (and explicitly called so). *Earl, Id.* GCO is unable to find a case where Georgia courts have disallowed attorney's fees, under a public policy fee-shifting statute, on the grounds of judicial immunity.

At least one other court in this state has explicitly considered the issue of whether the processing of a GWL is a judicial function. In 2010, the Superior Court of Gwinnett County, in deciding a mandamus case similar to the present case, said:

> It cannot be said that processing a firearms license application is an exercise of "judicial powers." This Court finds that the processing of firearms license applications is not a judicial function.

Hill v. Clarke, Case No. 09-A-07488-2, Order Granting Plaintiff's Motion for Summary Judgment (Superior Court of Gwinnett County, August 3, 2010) ("*Hill 1"*). A copy of the Order in *Hill 1* is being filed contemporaneously with this Brief for the Court's convenience.

The *Hill* case is a close parallel to the present case. In *Hill*, the plaintiff sued the probate judge of Gwinnett County for refusing to issue him a GWL. The Superior Court of Gwinnett County ruled in the plaintiff's favor, entered a writ of mandamus to issue the GWL, but denied the plaintiff's motion for attorney's fees pursuant to O.C.G.A. § 16-11- 129(j), on the grounds that it was not "appropriate" to do so. The Court of Appeals reversed, but ordered the trial court to consider the issue of judicial immunity. *Hill v. Clarke,* 310 Ga.App. 799, 714 S.E.2d 385 (2011) ("*Hill 2"*). On remand, the trial court decided there was no judicial immunity and awarded fees and costs of $20,545.50. *Hill v. Clarke*, Case No. 09-A-07488-2, Order Awarding Attorney's Fees and Costs (Superior Court of Gwinnett County, March 2, 2012) ("*Hill 3*"). A copy of *Hill 3* is being filed contemporaneously with this Brief for the Court's convenience.

In another closely paralleled case, the Superior Court of Clayton County entered a writ of mandamus against the Probate Judge of Clayton County for failing to issue a GWL to an eligible applicant. *Perry v. Ferguson*, Case No. 2010CV-1196-6, Order on Motions for Summary Judgment (Superior Court of Clayton County, March 30, 2012) ("*Perry 1"*). A copy of *Perry 1* is filed contemporaneously with this Brief for the Court's convenience. The Supreme Court of

Georgia affirmed, without any mention of judicial immunity. *Ferguson v. Perry*, 292 Ga. 666 (2013) (*"Perry 2"*). After affirmance in that case, the Superior Court of Clayton County awarded fees and costs in the amount of $32,910. *Perry v. Ferguson*, Case No. 2010CV-1196-6, Final Order Awarding Plaintiff's Costs and Fees (Superior Court of Clayton County, September 9, 2013) (*"Perry 3"*). A copy of *Perry 3* is filed contemporaneously with this Brief for the Court's convenience.

There is no support for the defense of judicial immunity based on the allegations of the present case.

Fifth Defense

The Fifth Defense is that Bordeaux did not do any wrongful acts or breach any duty. This is not a "defense" in the legal sense, but is instead a mere denial of liability. A denial of liability does not constitute a defense. At best it merely joins issue.

Sixth Defense

The Sixth Defense is that Plaintiff GeorgiaCarry.Org, Inc. ("GCOI") lacks standing. An association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests the association seeks to protect are germane to its purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Atlanta Taxicab Comp. Owners Assoc., Inc. v. City of Atlanta*, 218 Ga. 342, 344 (2006). Bordeaux does not complain that Plaintiffs Montgomery and Moore do not have standing, so presumably he concedes that. Even if he did not concede it, however, it is clear that they do. They allege an entitlement to a GWL and the failure of Bordeaux to issue one as provided by law. These allegations make out the prerequisites for standing. GCOI alleges that Montgomery and Moore are members, and that it has other members who have to

apply to Bordeaux for GWLs. Bordeaux admits he sometimes does not issue GWLs in the time required by law and that he therefore violates O.C.G.A. § 16-11-129. GCOI's members therefore would have standing in their own right.

GCOI alleges that its mission is to foster the rights of its members to keep and bear arms, so obtaining GWLs for its members and vindicating the rights of its members to obtain GWLs are clearly germane to GCOI's purpose. Finally, it is not necessary for individual GCOI members to participate in the case, because no special damages (or any damages) are claimed. GCOI therefore has organizational standing and the sixth defense is insufficient.

Eighth Defense

The Eighth Defense is that the claims are barred by O.C.G.A. § 9-6-22. That Code section affirms that mandamus lies against certain officers that fail to discharge a duty required by Title 5 of the O.C.G.A. (dealing with appeals). It goes on to say that no party loses any right on account of an officer's failure. This Code section appears to protect parties in an appeal from losing an appeal on account of an officer's failure to do something (such as the failure of a court clerk to file a brief on a timely basis). The Code section does not bar any actions. The present case has nothing to do with an appeal, and the Code section cited has no bearing on the case.

Moreover, as grounds for the eighth defense, Bordeaux in his official capacity blames his failure to process GWL applications in a timely manner on the Chatham County Board of Commissioners' failure to fund Bordeaux's office. A suit against Bordeaux in his official capacity is a suit against the County. The County is therefore blaming its liability on itself, for failing to fund itself. This is nonsense.

Ninth Defense

The Ninth Defense is that Bordeaux cannot be sued in his individual capacity because as an individual he has no right, power, or authority to process GWL applications. Bordeaux claims GCO's naming him as an individual capacity defendant is frivolous.

The individual capacity issue was discussed above in relation to the Second Defense and Third Defense. Given the Supreme Court's repeated pronouncement that a citizen that has a beef with the government can sue government officials in their individual capacities for prospective relief (*see Lathrop* above), it is impossible to conclude the frivolousness that Bordeaux claims. Indeed, not only are individual capacity suits available, they are the only avenue available when there has been no waiver of sovereign immunity. With sovereign immunity waived, as in the present case, Bordeaux may be sued in both his official and individual capacities.

Tenth Defense

The Tenth Defense is that everything in the Verified Complaint not alleged is denied. This is not a "defense." It is merely a restatement of a general principle and at best a clarification. But is does not and cannot constitute a defense.

Eleventh Defense

The Eleventh Defense also is no defense. It is merely a statement that Bordeaux "did his best" in responding to the Verified Complaint. Again, however, it is insufficient as any kind of defense.

Conclusion

For the reasons stated herein, all defenses but the Seventh and Twelfth should be stricken as insufficient.

This 19th day of June, 2018

/s/ John R. Monroe

John R. Monroe
John Monroe Law, P.C.
Attorney for Plaintiffs
5586 Owens Drive
Austell, GA 30106
678-362-7650
jrm@johnmonroelaw.com
State Bar No. 516193

CERTIFICATE OF SERVICE

I certify that on June 19, 2018, I served a copy of the foregoing via U.S. Mail upon:

Jennifer Davenport
Assistant County Attorney
POB 8161
Savannah, GA 31412

_____
John R. Monroe