IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIACARRY.ORG, INC. and REBECCA BREED,	*	
Plaintiff,	*	
	*	CIVIL ACTION FILE
v.	*	NO. 1:07-CV-2128
KIPLING L. MCVAY in her official Capacity as Probate Judge for Cherokee County, Georgia	*	
Defendant.	*	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6)

COMES NOW, Defendant Kipling L. McVay in her official capacity as Probate Judge of Cherokee County, Georgia and in support of her Motion Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) avers the following:

I. FACTUAL BACKGROUND

According to Plaintiff's Complaint, this matter arises out of Plaintiff Rebecca Breed's alleged application for a Georgia Firearms License (hereafter, GFL) with the Probate Court of Cherokee County on August 31, 2007. According to the Complaint, on that date, she appeared at the counter of the Court and

requested an application for a GFL. The Complaint alleges that Ms. Breed was required to provide her social security number and employment information on the GFL application. She refused to do so and questioned the form being used. Plaintiffs' Complaint alleges that Defendant's clerk refused to accept the GFL application without the social security number and employment information supplied. The Complaint is silent as to whether Plaintiff Breed attempted to submit the application without providing such information.

While Defendant is aware that a woman appeared at the counter of the Court and made inquiries regarding the forms provided for a GFL on that date, the woman never gave her name and no application was received by the Probate Court for a Rebecca Breed on August 31, 2007 or at any time prior to the institution of this lawsuit on September 4, 2007. Defendant's affidavit to this effect is attached hereto as Exhibit "A".

II. SUMMARY OF ARGUMENT

This Complaint fails to set forth a basis for subject matter jurisdiction and also fails to state a claim upon which relief can be granted because neither Plaintiff has standing to pursue this entire matter. Further, Plaintiffs' Complaint fails to state a claim upon which relief can be granted for violation of Section 7 of the Privacy Act of 1974. Moreover, Plaintiffs' claim that Defendant violated

O.C.G.A. § 16-11-129 is also without merit. Finally, Plaintiffs' claim for attorneys' fees under 42 U.S.C. 1988 fails because such fees cannot be imposed against Defendant, who is a judicial official.

III. ARGUMENT

A. Plaintiff's Complaint Fails To Allege Facts Sufficient To Establish Jurisdiction Over The Subject Matter Or A Claim Upon Which Relief Can Be Granted Due To Lack Of Standing.

Federal Rule of Civil Procedure 12(b)(1) allows a court to dismiss for lack of jurisdiction over the subject matter . Case law has extended lack of jurisdiction over the subject matter to include lack of standing. In Doe v. Pryor, 344 F.3d 1282 (11th Cir. 2003), several homosexuals sued the Attorney General of Alabama following the U.S. Supreme Court's decision in Lawrence v. Texas, 539 U.SA. 558, 123 S.Ct. 2472, 156 L.Ed. 508 (2003) which overturned state sodomy laws. The Eleventh Circuit characterized the plaintiffs' claims:

> [i]n the wake of the Lawrence decision the statute has been declared dead by the Alabama Attorney General, who as the chief law enforcement officer of the state ought to know. But the corpse is not dead enough to suit the plaintiffs, who want the federal courts to drive a stake through its heart by adding our pronouncement to the Attorney General's. For the reasons that follow, they don't have standing to get us to speak on the subject beyond what we must say in order to dispose of their appeal from the district court's dismissal of their complaint for lack of standing.

Doe v. Pryor, supra, at 1282.

The Eleventh Circuit upheld the District Court's dismissal of the case for lack of standing under Rule 12(b)(1). Accordingly, where lack of standing can be shown at the level of a motion to dismiss, it is clearly appropriate to dismiss for lack of subject matter jurisdiction pursuant to this Rule.

Perhaps the lead case on the issue of federal standing is Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). There, Justice Scalia, writing for the majority, held as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly trace[able] [sic] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before this court. . Third, it must be 'likely,' as supposed to merely 'speculative' that the injury will be redressed by a favorable decision.

Id. at 560-561 (citations omitted).

The District Court's dismissal of the case on the grounds of lack of standing was upheld.

Similarly, Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 119 L.Ed.2d 343 (1975), involved a challenge to a local ordinance which effectively excluded people of lower and moderate income from the town of Penfield, New York. The

U.S. Supreme Court held that none of the plaintiffs had standing. "We hold that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he would personally benefit in at tangible way from the court's intervention." Id. at 508. The Court also held "[o]f course, Article III's requirement remains: ***the plaintiff must still allege a distinct and palpable injury to himself, even if it is shared by a large class of other possible litigants***." Id. at 501 (emphasis supplied).

In the case at bar, this is exactly the case. Plaintiff's Complaint alleges in paragraph 10 that "[o]n or about August 31, 2007, Plaintiff Breed applied for a GFL to Defendant pursuant to O.C.G.A. § 16-11-129." Plaintiff also alleges that Defendant's clerk refused to accept Breed's application form. However, as set forth in Defendant's affidavit, attached hereto as Exhibit "A", this is simply not so. While Plaintiff Breed may have indeed appeared at the Probate Court of Cherokee County on August 31, 2007, she did not actually submit an application for a GFL to Defendant's office on August 31, 2007 or at any time prior to the date suit was instituted. Further, no application for a GFL was refused acceptance on that date. See Exhibit "A". Further, Plaintiff's Complaint fails to allege that any other

member of Georgia Carry.Org, Inc. either submitted an application for a GFL which was refused or were denied a GFL by Defendant.

Neither Plaintiff Breed nor any other member of Georgia Carry.Org, Inc. has established the first element for standing under Article III of the United States Constitution, that they suffered any sort of injury at the hands of the Defendant. Because no plaintiff was either denied the opportunity to apply for a GFL nor was any GFL not issued by Defendant, regardless of any other allegations of the Complaint, no injury was suffered by any plaintiff. There was simply no injury in fact, particularly no concrete and particularized or actual and imminent injury, nor does the Complaint allege any concrete, particularized, actual or imminent injury. Further, particularly with regard to possible claims which could be raised by other members of Georgia Carry.Org, Inc., the plaintiff must still allege a distinct and palpable injury to himself, even if it is shared by a large class of other possible litigants. Warth, supra. Accordingly, regardless of whatever other allegations the Plaintiffs set forth in their Complaint, because they have suffered no actual injury, they lack standing so as to create either subject matter jurisdiction before this Court, or an actual claim upon which relief can be granted. Accordingly, Plaintiffs' Complaint should be dismissed in its entirety.

B. Plaintiff Fails To State A Claim Upon Which Relief Can Be Granted For Violation Of Section 7 of the Privacy Act.

Initially, because Plaintiffs have no standing, this Court need not even engage in further inquiry. However, in an abundance of caution, Defendant submits the following alternate argument. The U.S. Congress passed the Privacy Act in 1974. One of the key provisions of the Act was a portion known colloquially as the "Buckley Amendment." The purpose of this provision was to protect citizens from abuse of the social security number by restricting the conditions under which one could be compelled to disclose it. The provision is found at P.L. 93-579, but was not codified into the United States Code except as a note to 5 U.S.C. 552a.

As set forth in Plaintiffs' Complaint, Section 7 provides as follows:

> "(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.
>
> "(2) the [The] provisions of paragraph (1) of this subsection shall not apply with respect to--
> "(A) any disclosure which is required by Federal statute, or
> "(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

> "(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it."

Initially, on the face of the Complaint, Plaintiff Georgia Carry.Org, Inc. fails to state a claim for violation of any portion of the Privacy Act because the plain language of both sections (a) and (b) apply to individuals, whereas Plaintiff Georgia Carry.Org has pled in Paragraph 8 of the Complaint that it is a corporation. Further, Section (a) does not apply to Plaintiff Breed because she was not denied any right, benefit, or privilege provided by law because of her refusal to disclose her social security account number. Since Plaintiff Breed did not even submit an application to Defendant, there can be no argument that she was denied a right, benefit or privilege for refusing to supply her social security number. Indeed, if she was denied anything, it was based on her own action in failing or refusing to submit any application whatsoever to Defendant.

As to any claim that Defendant is in violation of Section 7(b) of the Privacy Act, this claim is also without merit. Initially, since Plaintiff did not submit a GFL application, there is no case or controversy that she was even asked to voluntarily disclose her social security number to Defendant without the proper disclosures. Further, Plaintiff can point to no source of law to establish that Defendant is unable

to seek voluntary disclosure of the social security number in order to carry out the mandates of O.C.G.A. § 16-11-129.

The United States District Court for the Eastern District of Pennsylvania recently addressed a similar issue in Stollenwerk v. Miller, 2006 WL 463393 (E.D. Pa. 2006). There, the plaintiff sought to invalidate a Pennsylvania statute which *required* disclosure of the applicant's social security number in order to obtain a handgun carrying license. The court initially determined that under Section 7 (a) of the privacy act, the Commonwealth of Pennsylvania did not have the authority to require the disclosure. However, the Court determined that the state *did* have the ability to seek voluntary disclosure of the social security number for this purpose.

Interesting to our case, the court went on to state "If Stollenwerk declines to disclose his social security number, he may find that his application takes significantly longer to process than that of an applicant who has disclosed his social security number. That is his decision to make." Id. at 9. This case is nearly identical to the instant case in that the stated reason for which Defendant seeks the social security number is to aid in the prompt background check in order to expedite issuance of a GFL. Defendant is mindful that this is not a published

decision, but it appears to be the case most materially similar to any decided by any federal court on this subject.

Moreover, Stollenwerk cites Russell v. Board of Plumbing Examiners of Westchester, 74 F.Supp. 2d 339 (S.D.N.Y. 1999) which held that a city *could* ask for an applicant's social security number but could not deny a license for nude dancing clubs or dancers because the applicant refused to disclose the information. On this basis, it is clear that Plaintiffs fail to state a claim upon which relief can be granted under Section 7 of the Privacy Act.

C. Plaintiffs' Claim That Defendant Violated OCGA §16-11-129 By Requesting Plaintiffs' Employment Information Is Without Merit.

OCGA §16-11-129 provides as follows:

> (a) Application for license or renewal license; term. The judge of the probate court of each county may, on application under oath and on payment of a fee of $15.00, issue a license or renewal license valid for a period of five years to any person whose domicile is in that county or who is on active duty with the United States armed forces and who is not a domiciliary of this state but who either resides in that county or on a military reservation located in whole or in part in that county at the time of such application, which license or renewal license shall authorize that person to carry any pistol or revolver in any county of this state notwithstanding any change in that person's county of residence or state of domicile. Applicants shall submit the application for a license or renewal license to the judge of the probate court on forms prescribed and furnished free of charge to persons wishing to apply for the license or renewal license. ***An applicant who is not a United States citizen shall provide sufficient personal identifying data,***

> ***including without limitation his or her place of birth and United States issued alien or admission number, as the Georgia Bureau of Investigation may prescribe by rule or regulation***. An applicant who is in nonimmigrant status shall provide proof of his or her qualifications for an exception to the federal firearm prohibition pursuant to 18 U.S.C. Section 922(y). ***Forms shall be designed to elicit information from the applicant pertinent to his or her eligibility under this Code section, including citizenship, but shall not require data which is nonpertinent or irrelevant such as serial numbers or other identification capable of being used as a de facto registration of firearms owned by the applicant.*** The Department of Public Safety shall furnish application forms and license forms required by this Code section. The forms shall be furnished to each judge of each probate court within the state at no cost.

OCGA §16-11-129(a) (emphasis supplied).

In addition to the citizenship or lawful resident alien status requirements, both OCGA §16-11-129 and 18 U.S.C. § 922 make it illegal for felons to carry firearms. Therefore, for both these purposes, it is the duty of the probate court to have a background check performed. Both the social security number and confirmation of employment assist in confirming citizenship or lawful immigrant status because, presumably, an applicant's employer has complied with the law and confirmed citizenship at the time of hiring. Further, there is simply no legal requirement in statute or case law that any particular form published by the Department of Public Safety or any other agency is *mandated* and must be used by the probate court. See: §16-11-129(a), supra.

The threshold determination then is whether the voluntary request for social security number or employment information is "pertinent" to the background check required for the application pursuant to OCGA § 16-11-129. The emphasized section of the statute above reveals that the intent of the General Assembly in not allowing the eliciting of "nonpertinent" information is so that the carry permit cannot become a *de facto* registration of firearms owned by the applicant. There is no case law defining "pertinent" in the context of OCGA §16-11-129, although Plaintiffs have raised this issue in litigation currently pending against other probate court judges. *Black's Law Dictionary* defines pertinent as:

> Applicable; relevant. Evidence is called "pertinent" when it is directed to the issue of the matters in dispute, and legitimately tends to prove the allegations of the party offering it; otherwise it is called "impertinent."

Black's Law Dictionary, Sixth Edition, 1990.

Defendant submits that in light of the mandates of both OCGA §16-11-129 and 18 U.S.C. § 922, she is required to determine the citizenship of applicants for a GFL. Moreover, O.C.G.A. §16-11-129(d)(4) requires that "[n]ot later than 60 days after the date of the application the judge of the probate court shall issue the license if no facts establishing ineligibility have been reported and the judge determines the applicant has met all the qualifications, is of good moral character, and has complied with all the requirements contained in this Code section."

With the public safety mandates of the above state and federal statutes interposed with the time constraint of subsection (d)(4) above, it becomes apparent that the probate court judge has a delicate balancing act. She must ensure that GFL's are not issued to those who should not receive them, while preserving the rights or privileges of qualified applicants to have their applications processed in a timely manner. Therefore, the use of whatever pertinent information is available and at her disposal is of the utmost importance in assuring that eligibility is verified correctly within 60 days of the application date. Accordingly, Plaintiffs fail to state a claim that Defendant has violated O.C.G.A. §16-11-129 by asking for employment information or seeking information other than identity of the actual firearms owned by an applicant so long as it is pertinent to the eligibility of a GFL applicant for receipt of such a license.

D. Plaintiffs Fail To State A Claim For Attorney Fees Under 42 U.S.C. § 1988 Because Plaintiff Is A Judicial Official And Defendant Has Sued Her In Her Official Capacity.

42 U.S.C. § 1988 (b) provides as follows:

Attorney's fees

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A.

> § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs***, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.***

42 U.S.C. § 1988 (b) (emphasis supplied).

There does not appear to be case law determining just what sort of act constitutes a judicial officer taking action clearly exceeding their jurisdiction. However, in the case at bar, the action is clearly styled as being brought against Defendant in her official capacity and Plaintiffs' Complaint does not allege at any point that Defendants' actions were "clearly in excess" of her jurisdiction. Accordingly, any and all claims for attorneys' fees fail to state a claim upon which relief can be granted and should be dismissed.

IV. CONCLUSION

For all these reasons, Defendant Kipling L. McVay in her official capacity as Probate Judge of Cherokee County, Georgia respectfully requests this Honorable Court to grant her Motion Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) and dismiss Plaintiffs' Complaint, with prejudice.

Respectfully submitted this 15th day of October, 2007.

JARRARD & DAVIS, LLP

/s/ Mark E. Scott
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	)	**CIVIL ACTION FILE**
Plaintiff,	)	**NO. 1:07-CV-2128**
v.	)	
KIPLING L. MCVAY in her official Capacity as Probate Judge for Cherokee County, Georgia	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I certify that on the date shown below, I electronically filed **DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6)** with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

John R. Monroe, Esq.
Attorney for Plaintiff
9640 Coleman Road
Roswell, Georgia 30075

It is further hereby certified that the above pleading meets the requirements

set forth in L.R. 5.1 and has been prepared in Times New Roman (14 point) font.

This 15th day of October, 2007.

/s/ Mark E. Scott
Mark E. Scott
Georgia Bar No. 141849