

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

GEORGIACARRY.ORG, INC.)	
<i>et. al.</i> , Plaintiffs)	
)	CIVIL ACTION FILE NO.
)	
v.)	1:08-CV-2141-CC
)	
PINKIE TOOMER, <i>et. al.</i>)	
)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR
RECONSIDERATION**

Plaintiff files this Memorandum in support of its motion for reconsideration pursuant to LR 7.1(A)(1) and 7.2(E).

Introduction

Because the Court did not accept as true the facts alleged in the Amended Complaint, because Defendant is authorized by law to delegate her GFL authority (which she did), because Plaintiffs cannot ripen their claim with this Defendant by applying in another county, and because Plaintiffs seek only to be allowed to have their applications processed on the merits without regard to their residency, the Court

should grant Plaintiff's Motion for Reconsideration and deny Defendant's Motion to Dismiss.

A brief recap of facts plead in the Complaint and procedural history

On June 19, 2008, Plaintiffs' counsel inquired of Defendant's office if a non-resident of Georgia (such as Plaintiff Goyke) would be permitted to apply for a Georgia firearms license ("GFL"). James Brock, the Clerk of the Probate Court informed Plaintiff's counsel that such a person would not be permitted to apply. Plaintiff's counsel advised Mr. Brock that his clients likely would commence litigation to address this matter, and requested that Defendant be made aware of that fact. On June 27, 2008, Plaintiff's counsel sent a copy of the Complaint (Doc. 1) via email to Mr. Brock, and advised Mr. Brock that the Complaint would be filed that day. Later that day, but after filing of the Complaint and service of the summons and complaint upon Defendant, Mr. Brock replied that the "only thing wrong [with the Complaint] is we would allow an applicant to file, but we would tell them they [sic] it would be denied if they did file." On October 23, 2008, Goyke attempted to apply for a GFL at Defendant's office. The clerk who waited on him refused to let him apply and would not even give him an application form, solely on account of his lack of residency. Because the refusal to allow Goyke to apply for a GFL infringes on his

Second Amendments and Privileges and Immunities Clause rights, Goyke commenced this action.

On March 13, 2009, the Court entered an order granting Defendant's motion to dismiss on the ground that the case is not ripe. The Court found as a matter of law that Defendant did not take "any action as to this matter herself" and that she may not delegate her authority to issue GFLs. This finding is clearly erroneous, as will be shown below. Because the conclusion regarding delegability is contrary to law, Plaintiffs move for reconsideration.

This Court also determined that Plaintiff Goyke could have applied in a different county, where this Defendant is not a probate judge, *to ripen his controversy with this Defendant*. While an application with another county's probate court might hypothetically,¹ result in a ripe controversy against some other potential defendant, having Plaintiff Goyke make another trip from Wisconsin to, say, Turner County or Webster County, Georgia, could never ripen Plaintiff Goyke's controversy against the Probate Judge of *Fulton* County (i.e., the Defendant in this case). Because Plaintiff's

¹ The word "hypothetically" is used here because, presumably, any other probate court in Georgia could use the same successful, obstructive tactics used in Fulton County, i.e., simply refuse to permit Plaintiff even to see the firearms license application, much less fill one out, after he ignores the Clerk of Probate Court's categorical statement that he will be refused, travels 900 miles, and presents himself at the desk to beg permission merely to apply.

case against the instant Defendant cannot be ripened by creating a case against a different, hypothetical defendant, Plaintiffs move for reconsideration.

Argument

(A) The Court Did Not Accept As True the Facts Alleged in the Complaint

In its Order [Doc. 26, p. 5], the Court correctly noted that it must “accept as true all material allegations of the complaint, and must construe the complaint in the favor of the complaining party.” *Citing Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 219, 45 L.Ed.2d 343 (1975). The Court observed that the Amended Complaint alleges that Defendant “has largely delegated the authority to receive and process GFL applications, to make decisions regarding issuance and denial of GFLs and even to sign GFLs,” [Doc. 26, p.6], but the Court nonetheless dismissed this allegation on the grounds that Georgia law does not support such delegation. *Id.*

Whether Defendant’s actions in delegating her authority are proper is not before this Court. This is a civil rights case where Plaintiffs allege Defendant has deprived them of their civil rights. A defendant law enforcement officer in an excessive force claim cannot get the case dismissed on the grounds that no statute authorizes excessive force, ergo it must not have happened. For the purposes, of Defendant’s Motion to

Dismiss, this Court *must* accept as true Plaintiff's allegation that Defendant delegated her authority.

Defendant raised for the first time in her Reply Brief [Doc. 16, p. 5] that she is not permitted to delegate her authority. This representation by Defendant was not true. O.C.G.A. § 15-9-13(b) authorizes the clerk of the probate court to act in the place of the judge of the probate court. O.C.G.A. § 15-9-13(a) authorizes the judge of the probate court to appoint any member of the State Bar to act in her place. Finally, O.C.G.A. § 15-9-36(c) authorizes the clerk of the probate court to act in all uncontested matters to "exercise all the jurisdiction of the judge of the probate court." Application for a firearms license is not a contested matter.

Not only is Defendant authorized by Georgia law to delegate her authority, the complaint unequivocally states that she did so. The Court must accept this fact to be true. Defendant is responsible for the conduct of the clerk. O.C.G.A. § 15-9-36(a). As such, the Clerk's refusal to allow Plaintiff Goyke to apply for a GFL can be imputed directly to Defendant, and she can be sued for the Clerk's actions.

Once it is acknowledged, for the sake of the motion to dismiss, that Defendant delegated her authority, it no longer matters what interaction Plaintiffs did or did not have with Defendant "herself." Plaintiffs interacted with the Clerk of the Probate

Court and his subordinates who were vested with the authority to receive applications for and to issue GFLs. They refused to let Plaintiff Goyke apply, both in writing and when he traveled from Wisconsin to Georgia and applied in person at two different Fulton County probate court offices, solely on account of his non-residency, and that is the basis of his Amended Complaint.

(B) Plaintiffs Cannot Ripen Their Case with Defendant By Applying in Another County

The Court suggested in its Order that Plaintiffs could have ripened their case had they applied for a GFL in a different county. Doc. 26, p. 7. While this suggestion describes a theoretical case Plaintiffs could bring against a *different defendant*, it says nothing about ripeness of the case against the instant Defendant. One cannot ripen a case with one defendant by developing a case against a different one. Ripeness depends, in part, on injury *caused by Defendant*. The failure of the probate judge in a different county to allow Plaintiffs to apply for GFLs would not affect the ripeness of the case against the Fulton County Probate Judge. Because Defendant delegated her authority over GFLs to her clerk, and because the clerk refused to let Plaintiff apply, the case is ripe.

(C) Plaintiffs Seek Different Relief from that Presumed by the Court

Lastly, the Court dismissed this case on the grounds that it has no way of knowing if Plaintiffs might ultimately be denied a GFL on grounds other than their residency. Doc. 26, p. 8. While this may be true, the relief sought by Plaintiffs in this case is the right to have their GFL applications accepted regardless of their residency. If their applications were accepted, but denied on other (valid) grounds, Plaintiffs would have no objection. The relief they seek from this Court is an order requiring Defendant to accept their applications regardless of their residency. Doc. 10, p. 15. It therefore is irrelevant whether Plaintiffs might be denied their GFLs on other, unrelated grounds.

Moreover, the Amended Complaint clearly alleges that Plaintiff was otherwise eligible for a firearm license. [Doc. 10, p. 7, ¶ 33]. Again, this Court must take the allegations in the Amended Complaint as true for purposes of a motion to dismiss.

Conclusion

Because the Court did not accept as true the facts alleged in the Amended Complaint, because Defendant is authorized by law to delegate her GFL authority (which she did), because Plaintiffs cannot ripen their claim with this Defendant by applying in another county, and because Plaintiffs seek only to be allowed to have their applications processed on the merits without regard to their residency, the Court

should grant Plaintiff's Motion for Reconsideration and deny Defendant's Motion to Dismiss.

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Memorandum of Law was prepared using Times New Roman 14 point, a font and point selection approved in LR 5.1B.

 /s/ John R. Monroe
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Memorandum of Law on March 26, 2009 using the CM/ECF system which automatically will send email notification of such filing on the following:

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