IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

GEORGIA CARRY ORG., INC. and MAHLON THEOBALD,	*
Plaintiffs	*
v.	* Case Number: 2:12-cv-171-LGW-JEG
BRIAN KABLER,	*
Defendant	*

RESPONSE OF DEFENDANT BRIAN KABLER TO PLAINTIFFS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

COMES NOW Brian Kabler, defendant in the above-styled action, and files this his response to plaintiffs' Motion for Partial Judgment on the Pleadings, and shows the Court as follows:

I. INTRODUCTION

Initially, defendant Kabler notes that it is somewhat difficult to determine exactly what relief the plaintiff is asking for in the above referenced motion (*see* Docket Number 9). The defendant notes that the relief being sought by the plaintiffs, and more particularly, the alleged constitutional violation referenced in plaintiffs' motion, is not contained in the plaintiffs' Complaint (Docket Number 1). Accordingly, it is difficult for the defendant to specifically respond to the plaintiffs' motion. Nevertheless, the defendant will point out one quick reason why plaintiffs' motion must be denied, and several additional reasons supporting denial.

With regard to the first reason for denial, defendant notes that plaintiffs' motion is not only due to be dismissed, it is frivolous since it seeks relief based upon a claim not even alleged in plaintiffs' complaint. Though plaintiff accuses defendant of raising a frivolous defense, it is actually

plaintiff who has filed a frivolous motion (Docket Number 9, p. 3). Plaintiffs' motion appears to be an example of not letting the facts or law get in the way of plaintiffs' zealotry.

II. LEGAL STANDARD

A court takes "a three step approach to cases wherein a motion for judgment on the pleadings is filed by a plaintiff and grounded solely on the insufficiency of a defendant's answer. First, the court must evaluate whether or not the materials brought forward by a plaintiff satisfy plaintiff's burden of allegation - - essentially, whether or not a plaintiff has stated a cause of action upon which relief could be granted, assuming all facts are true as pled. The court will not grant a motion for judgment on the pleadings in favor of a plaintiff whose pleadings fail to state a cause of action, no matter how insufficient a defendant's response may be." In Re Mabbott, 55 B.R. 787, 789 (U.S.Bruptcy Ct., M.D. Fla. 2000).

"Second, the court must inquire into whether a defendant has sufficiently addressed a plaintiff's factual assertions. If a defendant effectively denies any of the essential facts of a plaintiff's complaint, then motion for judgment on the pleadings in favor of a plaintiff, . . . is inappropriate. Because the court must give the non-movant's assertions substantial deference, a defendant need only 'deny' in good faith to avoid judgment on the pleadings on inadequate response grounds. If the court finds that a defendant failed to so deny any one of the essential facts asserted by a plaintiff, then the allegations of a plaintiff are deemed established, the court proceeds to the third step." Id.

"The court must finally inquire into whether or not defendant pled a legally viable affirmative defense, assuming all facts as alleged by defendant are true. If such a legally tenable defense has

been alleged, then motion for judgment on the pleadings is inappropriate, because evidence must be heard on the defense." Id.

Further, no technical form of pleading is required and it is appropriate for either plaintiff or defendant to set forth alternative statements of claim or defense, regardless of consistency. *See* Federal Rule of Civil Procedure 8(d). Plaintiffs did not even bother to address the defendant's affirmative defenses in plaintiffs' motion. Rather, plaintiffs decided to pick out portions of matters set out in the defendant's answer and defenses, to the exclusion of everything else set forth therein.

Using the appropriate legal standard, set forth above, plaintiffs' motion is due to be denied.

1. Plaintiffs' Complaint does not contain a request for the relief sought in plaintiff's Motion for Judgment on the Pleadings.

While accusing defendant of pleading frivolous defenses, plaintiffs have apparently not even bothered to review their own complaint before zealously venturing out to file a motion for judgment on the pleadings.

First, defendant notes that plaintiffs' Motion for Partial Judgment on the Pleadings asks the court to enter declaratory relief based solely upon what plaintiffs' claim is a Fourth Amendment violation. Fatal to the relief being requested in the Motion for Partial Judgment on the Pleadings (Docket Number 9) is the fact that there is no Fourth Amendment claim in the plaintiffs' complaint (pleading) in this action. Plaintiffs make three claims in the "Verified Complaint." (Docket Number l). In Count I, plaintiffs seek to redress for violations of the Fourteenth Amendment. In Counts II and III, they seek redress for alleged violations of Georgia statutes. There is no Fourth Amendment claim in the plaintiffs' complaint. However, the plaintiffs' allegation does not really fall within purview of the Fourteenth Amendment and must, therefore, be "analyzed under the Fourth

Amendment and its 'reasonableness' standard." Graham v. Connor, 490 U.S. 386, 396 (1989). Nevertheless, the only pleading filed by the plaintiffs to this point claims violation of plaintiff Theobald's Fourteenth Amendment rights. Presumably, the plaintiffs are referring to the Fourteenth Amendment's due process clause. However, pursuant to Graham, plaintiffs' current motion must be denied. Graham considered whether alleged excessive force used during arrest could constitute a deprivation of the arrestee's due process rights. The Supreme Court held:

> [A]ll claims that law enforcement officers have used excessive force -- deadly or not - - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than a 'substantive due process' approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.

Graham, 490 U.S. at 395 (emphasis added).

The Supreme Court subsequently made clear that Graham's holding not only applied in force cases, but also in any case wherein a more specific constitutional provision exists. "The 'more specific provision' rule of Graham v. Connor . . . requires that if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under substantive due process." County of Sacramento v. Lewis, 523 U.S. 833 (1998).

Simply, since the only federal claim in plaintiffs' complaint is a claim under the Fourteenth Amendment, plaintiffs' motion must be denied.

2. The applicable legal standard require denial of plaintiffs' motion.

The three step approach of evaluating a motion for judgment on the pleadings set forth previously illustrates denial of plaintiffs' motion is required at this time, even if it did contain a Fourth Amendment claim. Frankly, defendant is not sure plaintiffs can satisfy the first step of that approach, i.e., stating a cause of action.

However, with regard to the second step of the approach since "a defendant need only use the word 'deny' in good faith to avoid judgment on the pleadings" it is clear defendant has sufficiently pled factual matters to defeat plaintiffs' motion at this time. Plaintiffs point to defendant's response to paragraph 12 of the plaintiffs' complaint and appears concerned with defendant's description of applicable law as described in certain appellate decisions by Georgia courts. However, as a factual matter, defendant specifically stated "[w]ith regard to paragraph 12 of plaintiffs' complaint, the allegations are denied, as worded because defendant had a legal basis to stop plaintiff . . .." Under the aforementioned legal principles, even if the court were to consider plaintiffs' requested relief, it would have to be denied at this point because defendant has specifically denied the allegations. Further, with regard to paragraph 6 of plaintiffs' complaint the defendant admitted only that "at one point on August 3, 2012, plaintiff was wearing a handgun in his waistband holster . . .." Though defendant is not required to provide additional information regarding such matters in his answer, it is the case that plaintiff's handgun did not remain visible to the law enforcement officers present the entire time.[1]

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[1] Defendant notes that he believes denial of plaintiffs' motion is appropriate based upon applicable legal standards. However, in the unlikely event that the Court believes that plaintiffs' motion was due to be granted, as pled, rather than granting such motion, defendant requests, in the alternative, that the Court permit defendant to file a Motion to Amend his pleadings, since the time has not passed in order to provide additional detail about the events of that evening. *See*, Scheduling Order.

Overall, looking at the second step of the analysis, the defendant's denials within his answer are sufficient to require denial of plaintiffs' motion at this time. Assuming that plaintiffs prevailed on the second step of the approach, the court must then inquire into whether or not defendant pled legally viable affirmative defenses.

Plaintiffs did not bother the address that portion of the Motion for Judgment on the Pleadings standard in their motion. However, the defendant did set forth a number of defenses to plaintiffs' complaint. "If such a legally tenable defense has been alleged, then motion for judgment on the pleadings is inappropriate, because evidence must be heard on the defense." In Re Mabbot, 55 B.R. at 789.

Accordingly, plaintiffs motion must be denied.

3. Declaratory relief is not available in this case.

Specifically, plaintiffs seek a "declaration that Kabler's assertion is incorrect and that a law enforcement officer may not stop and detain a person seen carrying a firearm for the sole purpose of ascertaining if the person possesses a license to do so." (Docket Number 9, p. 7). A basic flaw in plaintiffs' requested relief is that he wants a declaration that a single defendant made an incorrect assertion of law, but obtain from the court a declaration that essentially no law enforcement officer in the state can investigate any person seen carrying a firearm to determine whether the person possesses a license. At most, plaintiff could obtain a declaration of rights vis-a-vis Deputy Kabler. That is the only defendant in this action.

Nevertheless, there does not appear to be any issue to be decided with respect to declaratory relief. The Federal Declaratory Judgment Act states: "In a case of actual controversy . . . any court of the United States . . . may declare the rights and other legal relations of any interested party

seeking such declaration." 28 U.S.C. § 2201 (emphasis supplied). Based upon the few facts in the complaint and answer, there is no "actual controversy" of "sufficient immediacy and reality" to provide declaratory relief. Golden v. Zwickler, 394 U.S. 103, 108 (1969). Simply, at this point, plaintiffs have not established that the threshold for obtaining declaratory relief has been met.

Under such circumstances, defendant suggests that plaintiffs' request for declaratory relief, by virtue of his Motion for Judgment on the Pleadings, should be treated as a similar request by this very plaintiff in Georgia Carry.Org. v. Marta, U.S.D.C., Northern District of Georgia, Atlanta Division, Case Number 109-CV-594, Docket Number 55. Therein, Judge Thrash noted, as follows:

> It is not, however, necessary to decide whether MARTA'S firearms policy as applied to any person openly carrying a firearm is unconstitutional. In addition to standing, the court must also determine for itself whether declaratory and injunctive relief are appropriate remedies. For this case they are not. C. L. Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 498, n. 11 (1st Cir. 1992); Eccles v. Peoples Bank of Lakewood Village, 333 U.S. 426, 431 (1948). First, to grant the plaintiff's declaratory and injunctive relief would require the court to decide uncertain questions of state and constitutional law. C. L. Dia, 963 F.2d at 494 ('declaratory judgments concerning the constitutionality of government conduct will almost always be inappropriate when the constitutional issues are freighted with uncertainty and the underlying grievance can be remedied for the time being without gratuitous exploration of unchartered constitutional terrain.') State Auto Ins. Companies v. Summy, 234 F.3d 131, 135 (3rd Cir. 2000)('where the applicable state law is uncertain or undetermined, district courts should be particularly reluctant to entertain declaratory judgment actions.') Second, plaintiffs never clearly distinguish their claims for compensatory damages from their claims for declaratory and injunctive relief so the parties have not adequately discussed the issues of general declaratory and injunctive relief. *See* Eccles, 333 U.S. at 434 ('judgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous.') Third, because case law interpreting the Fourth Amendment requires highly case specific determinations of reasonableness of particular searches and seizures, general declaratory and injunctive relief may not provide significant guidance to any party. C. L. Dia, 963 F.2d at 494, ('courts should

> withhold declaratory relief as a matter of discretion if such redress is unlikely to palliate, or not needed to palliate, the fancied injury . . ..'). Fourth, if any members of Georgia Carry.Org suffer a constitutional violation in the future, they will have an adequate remedy at law under § 1983, just as [plaintiff] would have had if his constitutional rights had been violated. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 113 (1983); Daniels v. Southfort, 6 F.3d 484, 486 (7th Cir. 1993). Taken as a whole, these four reasons demonstrate that declaratory and injunctive relief are not appropriate remedies for this case.

Georgia Carry.Org. v. Marta, supra at 16 - 17. Simply, once discovery has been conducted, defendant believes that issues pertinent to Mr. Theobald can then be properly adjudicated by the court.

4. Defendant did not violate plaintiff's constitutional rights in any event.[2]

Significantly, not contained in plaintiffs' complaint, is any allegation that plaintiff's firearm was taken from him, that the plaintiff was handcuffed, arrested, or even asked to step out of his vehicle. Plaintiff was asked for information; once the information was obtained and verified, his engagement with defendant ended. Defendant acknowledged in his answer that he did mistakenly express to the plaintiff that there were differences in the types of permits under Georgia law, which he acknowledges is not the case. Although there are differences between the conditions for carrying a weapon openly and carrying a weapon in a concealed fashion, defendant acknowledges that there are not separate licenses.

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[2] Defendant notes that plaintiffs' complaint does not contain a claim under the Fourth Amendment. Nevertheless, because plaintiffs' motion (Docket Number 9) in various places mentions both the Fourth Amendment and the Second Amendment, the defendant will address the lawfulness of his action based upon the allegations of the complaint. Again, defendant notes that the factual record in this case has not been developed at this point, and plaintiff's description in the complaint does not contain all of the material facts regarding the inquiry about plaintiff's license. Nevertheless, defendant will address the lawfulness of his actions.

Further, there is a video of a majority of the action between plaintiff Theobald and defendant Kabler so there is no real dispute regarding what occurred during that time.

Defendant believes that Georgia law does allow a law enforcement officer to inquire about a license if a person is carrying a firearm. However, even if there is not specific permission for such inquiry, neither Georgia law nor the Constitution appear to clearly prevent it.[3]

Realistically, this case is really about the zealotry of co-plaintiff Georgia Carry Org., Inc. and its attempt to prohibit what it perceives as interference with guns rights by law enforcement authorities. Georgia Carry.Org has generated a number of published decisions rejecting quite a few of its novel theories. In this particular case, they want to obtain a ruling saying that law enforcement can never inquire about a person carrying a gun. Georgia Carry.Org attempts to latch onto the red herring regarding Deputy Kabler's mistaken belief that there were different types of licenses under Georgia law. He acknowledges that he was mistaken, but that is not the issue in this case, nor is that related to the relief requested by plaintiff.

Frankly, without some minimal discovery being conducted, it would be impossible to put the real issue in this case properly before the court. In his answer to the complaint, defendant was not required, nor did he, detail all of the aspects of law enforcement's interaction with plaintiff on the night in question. It is important to note that the plaintiff was not charged with any offense on the night in question and the interaction with law enforcement was quite brief. His gun was never taken from him, he was not required to exit his vehicle, and Deputy Kabler simply asked him some questions and verified that he had a valid weapons' permit. The encounter certainly did not rise to the level of anything beyond a Terry v. Ohio, 392 U.S. 1 (1968) stop. In light of the fact that

[3] That in and of itself will entitle Deputy Kabler to qualified immunity regarding plaintiff Theobald's damages claims, an issue that is not currently before the Court.

defendant denied paragraph 12 of the plaintiffs' complaint (upon which this motion hinges), it is clear that the plaintiffs are not entitled to relief at this point.

Frankly, the additional information set forth in paragraph 12 of the defendant's answer, was gratuitous, in light of the denial of the factual allegation. Nevertheless, the issue in this case is not where the burden rests with respect to proof of a license, at a criminal trial, but whether there was reasonable suspicion to believe plaintiff might not possess such a license.

Despite plaintiffs' protestations to the contrary, Georgia law is not exactly crystal clear regarding the burden of proof in cases involving carrying a weapon without a license. Well after the cases cited in plaintiffs' brief, Georgia courts continue to note that "a prima facie case is established by proof that the defendant carried a pistol in a public place and he bears the burden of proof that he has a valid license." Jordan v. State, 166 Ga.App. 417 (1983)("conviction for both carrying a concealed weapon and of carrying a pistol without a license"). *See*, *also,* Patterson v. State, 196 Ga.App. 754 (1990). Simply, it does not appear that Georgia law has specifically addressed the question of whether a law enforcement officer may inquire of a person whether they have a license when they are carrying a gun on their person in public. As plaintiffs well know, in order to carry a handgun openly, in a convenience store not owned by plaintiffs, they must have a license pursuant to O.C.G.A. § 16-11-126(h). Frankly, it does not appear that any Georgia court, or the Eleventh Circuit Court of Appeals, has addressed, directly, whether an inquiry regarding a license is permissible or impermissible. In fact, this very court has noted that at least one Georgia decision touching on the issues herein does not "state that an officer is not permitted to investigate a weapon or pat down an armed suspect." *See* Belt v. Nolan, U.S.D.C., Southern District of Georgia, Brunswick Division, 2:10-cv-146, Docket Number 36, pp. 18 - 19, n. 8 (emphasis supplied).

Defendant believes that, at a minimum, he will be entitled to immunity with respect to the plaintiffs' various claims, even if there was a violation of his rights under federal or state law (which defendant does not believe to be the case). *See*, U.S. v. Lewis, 674 F.3d 1298, 1305 - 1306 (11th Cir. 2012).

"But, as the Supreme Court has also made crystal clear, individualized suspicion is not an absolute prerequisite for every constitutional search or seizure. Id. at 1306 (emphasis supplied). [Cit.] "'The touchstone the Fourth Amendment is reasonableness not individualized suspicion.' [Cit.] . . .. "'[W]hile this court's jurisprudence has often recognized that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure, we have also recognized that the Fourth Amendment imposes no irreducible requirement of such suspicion.'" [Cit.] "'The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, and therefore its proper application requires careful attention to the facts and circumstances of each particular case . . .."" U.S. v. Lewis, 674 F.3d at 1306. (Observing that officers could lawfully detain an individual in order to inquire further regarding weapon officers had observed).

The court should deny plaintiffs' Motion for Judgment on the Pleadings. At this point, the only relief sought therein is a declaratory judgment regarding a claim not alleged in plaintiffs' Complaint.

CONCLUSION

For the reasons set forth herein, plaintiffs' Motion for Judgment on the Pleadings should be denied.[4]

[4] Based upon the current posture of the case, and reviewing the general litigation practice of plaintiff Georgia Carry Org., Inc. in other cases, defendant's counsel anticipates the filing

This seventh day of December, 2012.

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of Cross-Motions for Summary Judgment at the conclusion of discovery, at which time the court can resolve all issues in this matter in a fully developed record, and then determine whether either party is entitled to judgment as a matter of law on the actual facts in the record.

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Defendant	*

CERTIFICATE OF SERVICE

This is to certify that I have this day served all parties in this case in accordance with the directives from the Court Notice of Electronic Filing ("NEF"), which was generated as a result of electronic filing.

Submitted this seventh day of December, 2012.

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