UNITED STATES DISTRICT COURT

for the
SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

GEORGIACARRY.ORG, INC., *et.al.*,	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	Civil Action No. 2:12-CV-171-LGW
BRIAN KABLER,	)	
	)	
Defendant	)	
	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Pursuant to Fed.R.Civ.Proc. 12(c), Plaintiffs move for partial judgment on the pleadings.

Introduction

Defendant raises several collateral issues in his Response [Doc. 13] to Plaintiffs' Motion for Summary Judgment [Doc. 9]. What he does not do, however, is actually defend against the Motion. At bottom, he fails to address the crux of the Motion: The parties are in agreement on sufficient facts for the court to rule on the major legal issue between the parties. Plaintiffs will show that the collateral issues raised by Defendant are insufficient to overcome Plaintiffs Motion and that Plaintiffs' Motion must be granted.

Argument

I. Defendant is Confused Between the Fourteenth and the Fourth Amendments

Defendant makes much of the fact that Plaintiffs alleged violations of the Fourteenth Amendment in their Complaint and then discussed the Fourth Amendment in their Motion.

There is no mystery here. When dealing with state actors and constitutional civil rights violations, one technically should be talking about the Fourteenth Amendment. The Fourth Amendment, for example, does not directly apply to the states. *See, e.g., Weeks v. U.S.*, 232 U.S. 383, 398 (1914). ("The 4th Amendment is not directed to the individual misconduct of [state] officials"). Instead, the ***provisions*** of the 4th Amendment apply to the states via the Due Process Clause of the 14th Amendment. *Mapp v. Ohio*, 367 U.S. 643, 656-657 (1961). Thus, while one might commonly say that his 4th Amendment rights were violated by a state, in reality he is saying that his 14th Amendment due process rights, incorporating the provisions of the 4th Amendment, were violated.

For this reason, Plaintiffs put in their Complaint that Defendant violated their 14th Amendment rights. In their Motion, when the substance of the law was being discussed, Plaintiffs used the common shorthand of speaking directly about the provisions of the 4th Amendment that were violated. Defendant attempts to distract the Court with this meaningless distinction, when he might better have served himself by addressing the merits of Plaintiffs' claims.

Ironically, Defendant insists that this Court analyze Plaintiffs' claims under 4th Amendment jurisprudence and not under generalized 14th Amendment jurisprudence. Doc. 13, p. 4. He fails, however, to make more than the most cursory defense using 4th Amendment case law.

Of course, even if there were a real, meaningful distinction, for the purposes of Plaintiff's Motion, between talking about 14th Amendment violations (incorporating the 4th Amendment) and 4th Amendment violations, Defendant's point still would be without merit. Under

Fed.R.Civ.Proc. 54(c), a party need not demand relief at all. Courts are to "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."

II. Defendant Raises No Disputes of Fact

Defendant asserts, incorrectly, that any mention of the word "deny" in his Answer is sufficient to thwart a motion for judgment on the pleadings. That just is not true. Plaintiffs carefully limited their Motion to matters admitted in Defendant's Answer. Defendant did not dispute, in his Response, any of the facts that Plaintiffs asserted in their Motion were undisputed. Either those undisputed facts are sufficient for a judgment on the pleadings or they are not. The fact that other facts are or may be disputed is irrelevant.

III. There Are No Viable Affirmative Defenses

Defendant also claims that no judgment on the pleadings may be had where legally viable affirmative defenses are pled, "assuming all facts as alleged by defendant are true." Defendant did not elaborate on what affirmative defenses he thinks are viable, so Plaintiff will address them all to allay Defendant's concern.

Defendant's first alleged defense is the failure to state a claim for which relief may be granted. While often stated as an affirmative defense, this is not really an affirmative defense at all. It is merely grounds for denial of relief to Plaintiffs. Said another way, if Plaintiffs did fail to state a case for which relief may be granted, then they cannot succeed on their Motion, anyway.

Defendant's second alleged defense is 11th Amendment immunity. This defense is not viable, however, because Plaintiffs filed this case is state court. It is Defendant who invoked the jurisdiction of this Court by removing the case. A defendant who removes a case from state

court to federal court waives his 11th Amendment immunity. *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002).

Defendant's third defense is that Defendant is not, in his official capacity, a "person." This defense, while dubious in all contexts in this case, has no bearing in the instant Motion. Plaintiffs are not seeking damages against Defendant in this Motion. They only are seeking declaratory relief. Defendant is a "person" in this context for § 1983 purposes. *Younger v. Harris*, 401 U.S. 37 (1971).

Defendant's fourth defense is that he has sovereign immunity in his official capacity for Plaintiffs' state law claims. Again, however, Plaintiffs are not seeking damages in their instant Motion. They seek only declaratory relief. The declaratory relief against Defendant in his official capacity is in reality against his agency. The Georgia legislature has waived sovereign immunity for declaratory judgment actions against practices of agencies. O.C.G.A. § 50-13-10.

Defendant's fifth defense is that he has official immunity in his individual capacity against Plaintiffs' state law claims. Once again, Plaintiffs are not seeking damages in this Motion. There is no official immunity for individuals in cases seeking declaratory relief. Because Defendant did not elaborate on any of his defenses, including this one, Plaintiffs cannot address it more directly. They are unable, however, to find any authority for official immunity in this Motion.

Defendant's sixth defense is qualified immunity. Again, however, qualified immunity does not apply in matters seeking declaratory relief, such as the instant Motion. *D'Aguanno v. Gallagher*, 50 F.3d 877, 879 (11th Cir 1995) ("Because qualified immunity is a defense only to claims for monetary relief, the district court erred in granting summary judgment on plaintiff's

claims for injunctive and declaratory relief.")

Defendant's seventh defense is "defendant Kabler acted lawfully at all times." This is not an affirmative defense, but a generalized statement that Defendant committed no wrong.

Defendant's eighth defense is that Plaintiff GeorgiaCarry.Org, Inc. ("GCO") lacks standing. Defendant does not claim that Plaintiff Theobald lacks standing. An organization such as GCO has standing to sue if its members have standing and if the matter is related to the purpose of the organization. There can be little question that this case relates to GCO's purpose, as Defendant has cited several other cases in which GCO was a party over its members gun rights. Moreover, standing goes to the jurisdiction of the court. Defendant has asserted the jurisdiction of this Court, not Plaintiffs. If the Court lacks jurisdiction, then the Court has no alternative but to remand this case to the Superior Court of McIntosh County.

Defendant's ninth defense is that O.C.G.A. § 16-11-173 does not provide a private right of action for damages. Plaintiffs are not seeking damages for a violation of the cited statute, so that defense is not viable.

Defendant's tenth defense is that the Fourteenth Amendment does not provide a cause of action. This apparently is a reference to Defendant's confusion over the 4th Amendment/14th Amendment matter already discussed above. In any event, it does state an affirmative defense. It merely is a variation on the "failure to state a claim" theme.

Defendant's eleventh defense is that "no factual or legal pleading … sets forth any basis upon which plaintiff's are entitled to attorney's fees." While Plaintiffs are not seeking attorney's fees directly in this Motion, they still will address the issue. Their Complaint raises issue of deprivation of civil rights, redressable under 42 U.S.C. § 1983. Attorney's fees in § 1983 cases

are available pursuant to 42 U.S.C. § 1988.

Defendant's twelfth defense is that injunctive and declaratory relief is not available because there are adequate legal remedies. A review of the Complaint reveals that Plaintiffs have not requested and injunction in this case. Declaratory relief is available irrespective of the availability of other relief. 28 U.S.C. § 2201.

Defendant's thirteenth defense is not a defense at all, but is a response to the Complaint's allegations.

Thus, Plaintiffs have addressed each and every one of Defendant's "affirmative defenses," and have shown that none of them is a "viable" defense. The assertion of the defenses is not an impediment to the grant of the relief sought in Plaintffs' Motion.

IV. Defendant Raises Several "Straw Men"

Defendant points to missing "facts" in this case, for unknown reasons. For example, Defendant says there are no allegations that "plaintiff's firearm was not taken from him, that the plaintiff was handcuffed, arrested, or even asked to step out of his vehicle." Doc. 13, p. 8. Apparently Defendant is trying to show that he could have violated Theobald's more severely than he did. Point taken. Plaintiffs are not suing, however, because Defendant could have done worse. They are suing for what Defendant actually did do.

Defendant next says, "GeorgiaCarry.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." Doc. 13, p. 9. Frankly, Plaintiffs are puzzled by what Defendant is talking about.

First, neither Plaintiff "latched on" to any mistaken belief about different types of licenses. Until now, Plaintiffs had no idea Defendant believed there were two different types of licenses. If he had that belief, Plaintiffs agree with Defendant that Defendant was mistaken. In any event, however, Defendant notes that such mistaken belief has nothing to do with the case.

V. Defendant's Detention of Theobald Was Unjustified

Defendant claims that discovery is necessary "to put the real issue in this case properly before the court." Doc. 13, p. 9. This is not, however, a motion for summary judgment. No discovery is necessary in order to evaluate a motion for judgment on the pleadings. The operative facts for this Motion are not in dispute. Defendant observed Theobald wearing a gun at a convenience store, then chased him down and pulled him over to see if he had a license to carry the gun. That is all there is to it. Defendant freely admits his sole purpose in detaining Theobald was to see if Theobald had a license, and Defendant still, even in opposing Plaintiffs' Motion, cannot articulate a single crime he suspected Theobald of violating.

Nonetheless, Defendant asserts that "The encounter certainly did not rise to the level of anything beyond a [Terry] stop." Defendant continues by claiming that his denial that he lacked reasonable articulable suspicion of a crime is sufficient to defeat the Motion. He then implies, without asserting, that he suspected that Theobald "might not possess … a license." A defendant cannot avoid judgment on the pleadings by playing coy with the Court. Either he had such a suspicion, or he did not.

Defendant finally devotes a single paragraph to the merits of the case. He asserts that Georgia law is not clear on whether a person carrying a gun has the burden to prove he has a license to do so. Plaintiffs cited, in their opening brief, a Supreme Court of Georgia case that is

very clear:

> [T]he State introduced no evidence which shows appellant did not have a license for the pistol…. Therefore, the trial court's judgment of conviction … must be reversed…. Those cases … which hold that whether an accused has a license to carry a pistol is a matter of defense and not an element of the offense are hereby overruled.

Head v. State, 235 Ga. 677, 679 (1975).

Defendant cites to Court of Appeals of Georgia cases that appear to conflict with the Supreme Court. It should be apparent to Defendant that the Court of Appeals is without authority to substitute its own judgment for that of the Supreme Court. Without further information on the genesis of the discrepancy, the only explanation is that the Court of Appeals erred in failing to take into account the binding precedent of the Supreme Court.

Conclusion

There was no basis for Kabler's stop and detention of Theobald. Kabler's assertion that he is authorized to detain anyone seen carrying a firearm is contrary to the Fourth Amendment and unsupported by Georgia law. Plaintiffs therefore 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.

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CERTIFICATE OF SERVICE

I certify that on December 7, 2012, I served a copy of the foregoing using the ECF system upon:

Richard K. Strickland
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/s/ John R. Monroe
John R. Monroe