IN THE SUPERIOR COURT OF COWETA COUNTY

STATE OF GEORGIA

CRAIG MOORE,	)	
Plaintiff,	)	
	)	Civil Action No. 06-V-589
vs.	)	
	)	
MARY T. CRANFORD,	)	
Judge of the Coweta	)	
County Probate Court ,	)	
	)	
Defendant	)	

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Craig Moore, by counsel, John R. Monroe, submits the following as his Plaintiff's Brief in Support of Motion for Summary Judgment[1]:

Introduction

Plaintiff applied to Defendant for a Georgia Firearms License ("GFL"). The controlling statute requires that GFLs be issued not later than 60 days from the date of application, with no discretion on the part of the issuing authority (Defendant). Defendant took over 120 days to issue a GFL to Plaintiff, and Defendant admits that she routinely takes that long to issue GFLs to applicants. Plaintiff seeks declaratory and injunctive relief. Because there are no issues of material fact, and the law mandates that the judge of the probate court "shall issue" the applicant a license within 60 days, Plaintiff is entitled to judgment as a matter of law.

Background

[1] All factual assertions in this Brief are supported by the accompanying Plaintiff's Statement of Undisputed Facts ("PSUF"). References to numbered paragraphs in the PSUF are footnoted in this Brief after the first instance of each factual assertion.

Defendant is the Judge of the Coweta County Probate Court.[2] Among her other duties, Defendant is responsible, pursuant to O.C.G.A. § 16-11-129, for receiving and processing applications for Georgia Firearms Licenses ("GFLs") from residents of Coweta County. A person who carries a valid GFL is exempt from the criminal prohibitions against 1) carrying a concealed firearm;[3] 2) some provisions regarding carrying a firearm in a school safety zone;[4] and 3) carrying a pistol without a license.[5]

On December 13, 2005, Plaintiff applied to Defendant for a GFL.[6] Because O.C.G.A. § 16-11-129 requires issuance of a GFL to a qualified applicant within 60 days of the application, Plaintiff expected to receive a GFL by February 11, 2006.[7] While waiting for his GFL to be issued, however, Defendant's staff told Plaintiff that Defendant did not believe she was required to obey the 60-day requirement of O.C.G.A. § 16-11-129(d).[8] Moreover, Defendant's staff told Plaintiff that Defendant routinely tells applicants for GFLs that it may take several months to receive a GFL.[9]

By the date the Complaint was prepared and signed in this case (April 17, 2006), Plaintiff had not yet received his GFL from Defendant.[10] Because the elapsed time from application to that date was 125 days, more than double the maximum time of 60 days permitted by statute to issue a GFL, Plaintiff commenced this action. In his Complaint,

[2] PSUF ¶1
[3] O.C.G.A. § 16-11-126
[4] O.C.G.A. § 16-11-127.1
[5] O.C.G.A. § 16-11-128
[6] PSUF ¶2
[7] PSUF ¶ 3
[8] PSUF ¶ 4
[9] PSUF ¶ 5
[10] PSUF ¶ 6

Plaintiff sought a writ of mandamus, compelling Defendant to issue Plaintiff's GFL,[11] a declaratory order finding that Georgia law requires issuance of GFLs to qualified applicants within 60 days of application, and a permanent injunction requiring Defendant to comply with the statutory timeline.

Defendant admitted virtually all the factual allegations contained in the Complaint. Based on those admissions, with supplemental facts contained in Plaintiff's affidavit and Defendant's discovery responses, there are no material facts in dispute. Plaintiff therefore brings his motion for summary judgment, and shows below that there are no issues of material fact and that Plaintiff is entitled to judgment as a matter of law.

Discussion

I. Grounds for Summary Judgment

Summary judgment is available to a plaintiff at any time 30 days after the complaint is filed. Plaintiff is entitled to summary judgment when there is no genuine issue of material fact and those facts show that Plaintiff is entitled to judgment as a matter of law. O.C.G.A. § 9-11-56.

II. A. Plaintiff's Application

The process by which probate judges receive and process GFL applications is controlled by O.C.G.A. § 16-11-129. In that statute, probate judges are directed 1) to have applicants complete an application form prepared by the Department of Public Safety, 2) to have applicants submit fingerprints taken by a law enforcement agency, 3) to

[11] As discussed below, Plaintiff received a GFL from Defendant on April 19, 2006. The GFL bore an issue date of April 18, 2006. Because Defendant now has issued Plaintiff a GFL, Plaintiff's request for a writ of mandamus no longer is necessary. Plaintiff is abandoning his request for that relief.

direct the law enforcement agency to submit the fingerprints to the Georgia Crime Information Center for a background investigation, and 4) to issue a license to every applicant (unless the applicant is disqualified on account of one or more specified exceptions). The most pertinent statutory language is:

> (d) *Investigation of applicant; issuance of license.* Each law enforcement agency, upon receiving such applications and obtaining such fingerprints, shall promptly conduct a thorough search of its records and records to which it has access and shall notify the judge of the probate court within 50 days, by telephone and in writing, of any findings relating to the applicant which may bear on his eligibility for a license under the terms of this Code section. When no derogatory information is found on the applicant bearing on his eligibility to obtain a license, a report shall not be required. The law enforcement agency shall return the application and the blank license form with the fingerprint thereon directly to the judge of the probate court within such time period. ***Not later than 60 days after the date of the application the judge of the probate court shall issue the applicant a license to carry any pistol or revolver*** if no facts establishing ineligibility have been reported and if 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.[12]

Of particular note is the legislature's use of the word "shall" in the emphasized portion of the statute shown above. The Supreme Court of Georgia has said repeatedly, "in its ordinary signification, 'shall' is a word of command, and the context ought to be very strongly persuasive before that word is softened into a mere permission." See, for example, *Termnet Merchant Services, Inc. vs. Phillips*, 277 Ga. 342, 344, 588 S.E.2d 745, 747 (2003). "'Shall' is generally construed as a word of mandatory import." *O'Donnell vs. Durham*, 275 Ga. 860, 861, 573 S.E.2d 23, 25 (2002).

There is nothing in the context of the statute that would lead one to infer that the legislature intended the word "shall" to be permissive. Indeed, the use of the word in the context of a time frame would lead to just the opposite conclusion. It would be awkward

[12] O.C.G.A. § 16-11-129(d) [emphasis supplied]

phrasing, if not useless surplusage, for the legislature to tell Defendant that she is ***permitted*** to issue a GFL ***not later than*** 60 days of the application

There are cases where exceptions have been made for statutory deadlines that use the word "shall." Such cases tend to be those where a deadline was narrowly missed ("substantial compliance"), and a strict adherence to the deadline would work a hardship on the party charged with compliance. In *Classic City Bonding Company vs. State*, 256 Ga. App. 577, 578, 568 S.E.2d 834, 835 (2002), the state was excused from a requirement to provide notice to a bonding company within 10 days of the principal's (i.e., the criminal defendant's) failure to appear. In that case, the state provided the notice only 3 days after the statutory time period lapsed, and the court deemed that to be substantial compliance (the penalty to the state for failure to comply is loss of the bond). In the case at bar, Defendant issued Plaintiff's GFL on April 18, 2006,[13] 126 days after he applied, and more than twice the 60-day timeframe prescribed by the statute. Defendant has no argument that she substantially complied with the § 129(d)'s 60-day requirement. In addition, there is no hardship or penalty to Defendant in having to comply with the 60-day requirement.

II. B. Defendant's Violation of O.C.G.A. § 16-11-129

Plaintiff established above that O.C.G.A § 16-11-129(d) requires issuance of a GFL to qualified applicants within 60 days of application. In Plaintiff's case, however, Defendant did not issue it until 126 days after Plaintiff applied. Defendant appears to justify her violation of O.C.G.A. § 16-11-129(d) on her belief that, despite the plain languge of the statute, she should not issue a license until after she receives background

[13] PSUF ¶ 7

reports from the Georgia Bureau of Investigation's Georgia Crime Information Center ("GCIC") and the Federal Bureau of Investigation's National Crime Information Center ("NCIC"). Defendant's belief is misplaced.

II.B.1 The Background Check Required by O.C.G.A. § 16-11-129

The background check required by O.C.G.A. § 16-11-129 is to be done locally – not by the GCIC and the NCIC. While the placement of the language in the statute is a bit confusing, a look at the legislative history confirms this conclusion.

In 1978, the statute (then codified as Code of Georgia 26-2904) required a GFL applicant to take the completed application from the probate judge to a local law enforcement agency. There, the applicant was to be fingerprinted. The local law enforcement agency then conducted a search of its records, and the records to which it had access, of the applicant's background. The agency was required to report the results of its search to the probate judge, and also to return the application to the probate judge, within 50 days. The judge then was required to issue the license not later than 60 days from the application date.[14]

In 1983, the legislature changed the law, requiring the probate judge to direct the local law enforcement agency to send a set of fingerprints to the FBI.[15] In 1986, the law was changed once again to require the probate judge to direct the local agency to send a copy of the fingerprints to the Georgia Crime Information Center, for a check of FBI

[14] Code of Georgia § 26-2904(a)(3) and (b), 1978.
[15] O.C.G.A. § 16-11-129(c)(2), as enacted by Ga. L. 1983, pp. 1431-1436.

records,[16] which is the present-day requirement. It is important to note that the current requirement does not include sending a set of fingerprints to the FBI.

The 1983 and 1986 changes did not alter the wording of the requirement for the law enforcement agency, "***upon receiving such applications*** and obtaining such fingerprints," to conduct a records search. To reiterate the statutory process, only the local law enforcement agency receives the GFL application. The process in the current statute requires an applicant to apply to the probate judge. The judge directs the applicant to take the complete application to a local law enforcement agency, and to be fingerprinted there. The judge is to direct the local law enforcement agency to send [only] a set of fingerprints to the GCIC for a check of FBI records [the application is not sent to the GCIC]. Then, the ***agency receiving the application and obtaining fingerprints*** [i.e., the local law enforcement agency] is to conduct a search of its records and the records to which it has access. The [local law enforcement] agency is to report its findings, ***if there are any derogatory findings***, within 50 days, and to ***return the application to the probate judge***.[17] Clearly, the GCIC never receives the application for a GFL. It only receives a set of fingerprints. It is, therefore, the local law enforcement agency that receives the application that does a records check, reports to the judge within 50 days (if there is derogatory information to report), and returns the application to the judge within 50 days.

Returning now to the application of the facts of the instant case to the attorney general's unofficial opinion, Plaintiff was fingerprinted by the Coweta County Sheriff's

[16] Ga. L. 1986, p. 305.
[17] O.C.G.A. § 16-11-129(c)(1)&(2), O.C.G.A. § 16-11-129(d).

Department.[18] The sheriff's department was, therefore, required to check its records and records to which it has access, for any information bearing on Plaintiff's GFL application.[19] The sheriff's department was required to report any derogatory information that it found, and to return the application, to Defendant within 50 days. Defendant, however, states in her Answer that "she has not yet received the necessary report from the Federal Bureau of Investigation/National Crime Information Center within 50 days after the date of Plaintiff's application and was therefore unable to determine Plaintiff's eligibility…."[20] As mentioned above, the current process does not involve sending anything to the NCIC. There is no reason for Defendant to believe that she should receive a report from the NCIC. Nowhere does Defendant contend that she was waiting for anything from the Coweta County Sheriff's Department, the only agency listed in the statute that should be sending Defendant a report, ***if it finds derogatory information***.

Moreover, Defendant has a GCIC terminal in her office.[21] She is able to run a GCIC background check on a GFL applicant at any time, without waiting on any other agency. She ran such a background check on Plaintiff on April 17, 2006, 125 days after Plaintiff applied for a GFL, and received her answer the ***same*** day.[22]

Finally, if the legislature had intended the meaning that Defendant assigns to O.C.G.A. § 16-11-129, it easily could have enacted the statute to say just that. It would have been an easy matter to say "but in no event before receiving background check reports from the GCIC" in the sentence where the statute requires issuing a GFL "not

[18] PSUF ¶ 11
[19] O.C.G.A. § 16-11-129(d).
[20] Answer, ¶ 4.
[21] PSUF ¶ 12
[22] PSUF ¶ 12

later than 60 days" after application. The statute contains no such provision. In fact the statute specifically states, "When no derogatory information is found on the applicant bearing on [the applicant's] eligibility to obtain a license, ***a report shall not be required***." [emphasis supplied. If Defendant were to wait for a report from the GCIC (which, again, is not the report discussed in the statute), and no report is required, she could wait forever for a report that is not coming.

II.B.2 The 1978 Unofficial Attorney General's Opinion (U78-45)

Plaintiff called Defendant's office on February 10, 2006, 59 days after he applied, to inquire about the status of his GFL application.[23] In spite of the 60-day requirement in O.C.G.A. § 16-11-129(d), Defendant's office staff told Plaintiff that it would take at least two additional months before his GFL would be issued.[24] Upon hearing this news, Plaintiff wrote Defendant a letter, on February 10, 2006, pointing out the 60-day requirement of O.C.G.A. § 16-11-129(d).[25] Defendant replied with a letter to Plaintiff on February 14, 2006.[26] In her letter, Defendant relies entirely on Unofficial Attorney General Opinion U78-45 (from 1978) as authority for her apparent belief that she is not bound by the 60-day requirement. In fact, Defendant claims that the attorney general "ruled" that she is ***prohibited*** from issuing a GFL within 60 days of application if she has not received a background investigation report.[27]

Defendant's reliance on U78-45 is misplaced, for several reasons. First, the opinion on which Defendant relies is an ***unofficial*** opinion from 1978. The bound

[23] PSUF ¶ 4
[24] PSUF ¶ 4
[25] PSUF ¶ 8
[26] PSUF ¶ 9
[27] PSUF ¶ 10

volume of attorney general opinions from 1978 says, "Each 'unofficial opinion' bears the following notation: 'The views expressed herein are completely unofficial views of the writer only, and should be considered as information only.'" Thus, even the attorney general affords the opinion no authoritative status. The court of appeals has called unofficial opinions of the attorney general "advisory." *Atlanta J'S, Inc. vs. Houston Foods, Inc.*, 237 Ga. App. 415, 417, 514 S.E.2d 216, 218 (1999).

Second, it is settled law in Georgia that attorney general opinions are not binding on appellate courts. *State vs. Durr*, 274 Ga. App. 438, 442, 618 S.E.2d 117, 120 (2005). If the rule were otherwise, the attorney general would be a "super supreme court." Contrary to Defendant's apparent belief, the attorney general is not empowered to "rule" on matters via his opinions.

Third, the attorney general's unofficial opinion itself is not particularly helpful in evaluating the matter. The opinion lacks any meaningful legal analysis, and it does not discuss the legal history or standards to be used in interpreting statutes in general or the word "shall" in particular. As discussed above, the word "shall" is to be accorded mandatory meaning unless the context clearly indicates otherwise. The attorney general's unofficial opinion makes broad policy pronouncements and ascribes them to the intent of the legislature ("I believe the General Assembly ***felt***….") [emphasis supplied]. It does not discuss how the context of the statute could lead one to conclude that "shall" is not mandatory.

Finally, the attorney general's unofficial opinion has no bearing on the facts of this case. Recalling the statutory analysis of the background check requirements in Section II.B.1 above, only the background check performed by the local law enforcement

agency (in this case the Coweta County Sheriff's Department) is required. Defendant does not contend that she was waiting on a report from the Sheriff. Plus, because she has a GCIC terminal in her office, she really need not wait on any agency at all for a report. She can obtain one at any time, in real time, in her own office. There simply is no reason for Defendant to wait for any reports.

II.C. Relief

Plaintiff seeks a declaratory judgment that the time provisions of O.C.G.A. § 16-11-129(d) are mandatory, and that applicants for GFLs not found to be ineligible must be granted a GFL not later than 60 days after application. Plaintiff also seeks a permanent injunction, requiring Defendant to adhere to the requirements of O.C.G.A. § 16-11-129(d) for future applications and renewals, including Plaintiff's own renewal.

Declaratory judgments are authorized in O.C.G.A. § 9-4-2, and should be granted without regard to the existence or availability of other remedies. The "purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and the Act is to be liberally construed." *Georgia Casualty & Surety Co. vs. Turner*, 71 S.E.2d 773, 86 Ga. App. 418 (1952).

Under O.C.G.A. § 9-5-1:

> Equity, by a writ of injunction, may restrain proceedings in another or the same court, a threatened or existing tort, or any other act of a private individual or corporation which is illegal or contrary to equity and good conscience and for which no adequate remedy is provided at law.

Defendant has admitted that she routinely issues GFLs well beyond the 60-day requirements of O.C.G.A. § 16-11-129(d). The only way to ensure that Plaintiff, when he applies to renew his GFL, and that future applicants to Defendant for GFLs, will receive the benefits of the law is to issue the injunction sought by Plaintiff.

There is no remedy at law for the wrong Plaintiff has suffered and likely will suffer again. ***Defendant admits that Plaintiff had a clear legal right to obtain a GFL***.[28] She also admits that she routinely tells GFL applicants that it will take several months to process their applications.[29] Denial of a clear legal right, and admission that such denials are routine, and therefore are likely to continue, are good and sufficient grounds for an injunction to enforce that right.

III. Defendant's Affirmative Defenses

Defendant has raised, in her Answer, several affirmative defenses: 1) failure to state a claim upon which relief can be granted, 2) failure to join necessary and indispensable parties, and 3) judicial immunity. Although Defendant has not yet had occasion to elaborate on these theories of defense, Plaintiff will establish here why they are not available.

III.A. Failure to State a Claim for Which Relief May be Granted

Pleading that a plaintiff has failed to state a claim for which relief can be granted has become a tiresome cliché in defensive pleading. Defendants commonly plead it as a matter of course, without regard to its legal basis. The defense of failure to state a claim

[28] PSUF ¶ 17
[29] PSUF ¶ 5

only is available if the plaintiff "would not be entitled to relief under any state of provable facts" and the defendant establishes that the plaintiff "could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." *Smith vs. Germania of America*, 249 Ga. App. 587, 588, 549 S.E.2d 423 (2001). Doubts about the complaint are to be resolved in favor of the plaintiff. *Ibid.*

In response to a discovery request, Defendant explained the basis for this defense as "Defendant states that she has not violated any law or duty relative to O.C.G.A. § 16-11-129 or relative to Plaintiff. Defendant further states that she is or may be further protected by the doctrine of judicial immunity." [30] Defendant makes no attempt to explain how the complaint is lacking. Instead, she asserts that she did not violate the law. Defendant's insistence that she is not liable to Plaintiff does not constitute a failure of Plaintiff to state a claim. Her claim of judicial immunity is a separate defense that will be discussed below. Plaintiff has put Defendant on notice in his Complaint that she did not follow the requirements of O.C.G.A. § 16-11-129 when processing his application for a GFL. His Complaint is sufficient.

III.B. Failure to Join Necessary and Indispensable Parties

Defendant also claims Plaintiff failed to join necessary and indispensable parties pursuant to O.C.G.A. § 9-11-19. Failure to join is not an affirmative defense. The remedy for failure to join is stated in the joinder statute: an order to join. Defendant is free to join anyone she chooses as a defendant and file a cross-complaint against such person or entity. Given that no damages are sought in this case, however, there does not seem to be any reason for doing so.

[30] PSUF 13

III.C. Judicial Immunity

Judicial immunity does not apply to claims for declaratory and injunctive relief. Judicial immunity applies only in claims for damages. In *Earl vs. Mills*, 275 Ga. 503, 570 S.E.2d 282 (2002), the Supreme Court of Georgia ruled that a superior court judge was immune against claims for damages, but the court let stand claims for declaratory and injunctive relief. In the case at bar, Plaintiff is not seeking any damages against Defendant. Rather, he is seeking only declaratory and injunctive relief.

Moreover, judicial immunity is not available when a judge is not acting in a judicial capacity. *Wilson vs. Moore,* 275 Ga. App. 493, 494, 621 S.E.2d 507, 508 (2006). A judicial act is one that is "normally performed by a judge" when the plaintiff "dealt with the judge in his judicial capacity." *Stump vs. Sparkman*, 435 U.S. 349, 362 98 S.Ct. 1099, 1107 (1978). The types of activities that have been found to be judicial acts, and hence entitled to immunity from suits for damages, include ordering a defendant arrested and brought to court (*Mireles, 502 U.S. 9),* approving a petition for forced sterilization (*Stump*, 435 U.S. 349), and presiding over a criminal trial (*Wilson*, 275 Ga. App. 493).

The issuance of a license generally, and of a license to carry a firearm specifically, is not a function normally performed by a judge. In Georgia, the state issues licenses to drive, licenses to fish, licenses to hunt, and licenses to engage in a wide variety of professions, all without the involvement of a judge.

While it is true that the Georgia legislature has vested the power to issue GFLs to the various probate judges, this power could just have easily been vested in any of several other offices not occupied by judges. Of the five states bordering Georgia, licenses to

carry concealed weapons are issued by sheriffs (Alabama[31] and North Carolina[32]), the state Department of Safety (Tennessee[33]), the state Department of Agriculture (Florida[34]), and the state Law Enforcement Division (South Carolina[35]). Indeed, according to an internet site dedicated to documenting the licensing procedure for carrying handguns, of the 44 other states besides Georgia that issue licenses to carry handguns, only two, New York and New Jersey, issue them through a judge.[36] It is quite clear that the issuance of any kind licenses is not normally a judicial function, and that the issuance of licenses to carry handguns is almost never done by a judge.

In addition, none of the trappings of a judicial function are present in issuance of GFLs by probate judges in Georgia. GFL applications are not adversarial proceedings (there is not even a mechanism by which a party could intervene). The probate judge does not hold a hearing, open a docket, take evidence, or issue any opinions, findings of facts, conclusions or law, orders or judgments. The GFL, when signed by a judge, does not have the effect of a court order, and is not enforceable by the contempt powers of the court.

The GFL 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

[31] Alabama Code 13A-11-75
[32] North Carolina Statutes 14-415
[33] Tennessee Code 39-17-1351
[34] Florida Statutes 790.06
[35] South Carolina Code 23-31-215
[36] www.packing.org. Judges in some counties in New York issue licenses. In New Jersey, applications are to the local police, with licenses issued by a superior court judge if the police approve the application. According to the New Jersey state police, as of December 30, 2003, only 3000 permits have been issued in a state of 8 million people, and most of those are held by retired law enforcement officers.

required to issue a license to all applicants, except for an applicant with a disqualifying characteristic.

Conclusion

Plaintiff has shown that there are no disputes of material fact and that he is entitled to judgment as a matter of law. He has shown that Defendant violated O.C.G.A. § 16-11-129(d) by failing to issue his GFL not later than 60 days after his application, and that Defendant admits she routinely commits such violations. He has shown that he is therefore entitled to a declaratory judgment that O.C.G.A. § 16-11-129(d) requires Defendant to issue GFLs to eligible applicants not later than 60 days after application, and to a permanent injunction requiring Defendant to abide by such requirements.

Dated the 8th day of June, 2006.

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