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

CHRISTOPHER PUCKETT, Plaintiff v. KELLEY S. POWELL in her Official capacity as Probate Judge for Henry County, Georgia Defendant.	)	CIVIL ACTION FILE NO. 1:06-CV-2382-BBM

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

Plaintiff, Christopher Puckett, files this Memorandum of Law in Opposition to Defendant's Motion to Alter or Amend Judgment.

Summary

Defendant seeks amendment of the Court's "judgment" [Doc. 36] on the grounds that there has been "intervening legal authority." Because the Court has not yet entered a judgment, Defendant's Motion is premature. Moreover, there has not been any intervening authority, and the authority cited by Defendant is inapposite. Finally, Defendant's Motion is an improper attempt to introduce new arguments. Defendant's Motion should therefore be denied.

I. There Has Been No Intervening Change in the Controlling Law

Not only does the case relied upon by Defendant not support her position, ***it supports Plaintiff and is consistent with this Court's Order.*** "Thus the legislature expressly provided that the probate court *shall* issue a license to a qualified applicant within 60 days of the date of application. O.C.G.A. § 16-11-129(d)(4). The use of the term "shall" means that ***the probate court judge has no discretion to extend the 60-day time period.***" *Moore v. Cranford,* 2007 Fulton County D. Rep. 1633, p. 9, *cert. pending* (decided May 25, 2007) [emphasis in original in first sentence, supplied in second sentence].[1]

[1] Defendant complains [Brief, FN 2] that Plaintiff's counsel did not inform the Court of the holding in *Moore.* Because the holding in *Moore* supports Plaintiff's position, and because Plaintiff's Motion for Summary Judgment was fully briefed at the time the *Moore* opinion was published, Plaintiff's counsel had neither an opportunity nor a reason to inform the court of the opinion. Moreover, as will be mentioned later in this Brief, the *Moore* decision is not final.

The Court of Appeals of Georgia found one narrow exception to the general rule expressed above. In those instances where a local law enforcement agency has not "notified" the probate court that background checks were performed on the GFL applicant, "the 60-day period is implicitly extended by the statute…." *Id.,* pp. 14-15. Importantly, the Court of Appeals again agreed with this Court, holding that no background checks are required to be "reported" if there is no derogatory information. *Id.* Thus, a "notification" that background checks have been conducted is required, but a "report" on the substance of those background checks is not required (if no derogatory information is uncovered).

In order to understand the distinction drawn by the Court of Appeals, it is necessary to examine closely the words of the statute. O.C.G.A. § 16-11-129(d)(4) says:

> The law enforcement agency 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 or her eligibility for a license or renewal license under the terms of this Code section. When no derogatory information is found on the applicant bearing on his or her eligibility to obtain a license or renewal 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

> or renewal 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.

[emphasis supplied]. It is the "notification" in the first sentence that the Court of Appeals of Georgia ruled is required. The "report" in the second sentence is not required.

In the instant case, there is nothing in the record to indicate that the local law enforcement agency had not "notified" Defendant that the background checks were not performed. Moreover, Defendant never even argued that she had not received the "notification."

Defendant mistakenly relies on ¶¶ 14-15 of the Stipulated Facts [Doc. 31] to support her position. She argues that the Stipulated Facts support her claim that she "did not receive any report from law enforcement concerning the result of Plaintiff's criminal background check within 60 days of the date of Plaintiff's application." Defendant's Brief, p. 2. As noted above, however, the Court of Appeals found that a "notification" is required, but the "report" is not. The Stipulated Facts do not support Defendant's position because they clearly state that the probate judge did not receive a report, which both this

court and the Georgia Court of Appeals have held is not required.

II. The *Moore* Opinion is not Final

While it is true that the *Moore* opinion supports ***Plaintiff's*** position, the opinion is not controlling authority. The Court of Appeals of Georgia implements its opinions by issuing "remittiturs." Rules of the Court of Appeals of Georgia, Rule 39. The issuance of a remittitur is stayed, however, when a petition for certiorari is pending before the Supreme Court of Georgia. *Id.* Because such a petition is pending[2], the Court of appeals of Georgia has not issued a remittitur, and its opinion still is subject to its own revisions and revisions of the Supreme Court of Georgia.

This Court has held that Rule 39 (formerly Rule 36) has the effect of creating a single appeal process through to certiorari from the Supreme Court of Georgia (for federal constitutional purposes). *Moye v. Georgia,* 330 F. Supp. 290, 294 (N.D. Ga. 1971). The plaintiff in *Moore* is still appealing his case.

[2] Plaintiff notes that Defendant neglected to inform this Court that a petition for certiorari is currently pending.

Thus, the *Moore* opinion is not yet binding on the parties to that case, let alone parties to other cases.[3]

III. Defendant's Motion Really is an Attempt to Introduce New Arguments

Rule 59(e) motions are available in only certain limited circumstances.[4] "The function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory or to give the moving party another 'bite at the apple' by permitting the arguing of issues and procedures that could and should have been raised prior to judgment." *Mincey v. Head,* 206 F.3d 1106, 1137 n.69 (11th Cir. 2000).

In her Motion, Defendant is presenting her defense under a new theory, raising new arguments, and attempting to have that

[3] Ironically, even the defendant in the Moore case was unwilling to rely upon the Court of Appeals' faulty reasoning, informing the Supreme Court in its response to the Petition for Certiorari that it should "lay aside" the reasoning while still affirming on other grounds.

[4] Rule 59(e) motions also are for alterations or amendments of judgments, not orders. Until a judgment is entered, it is premature to seek to amend or alter it.

forbidden second bite. Nowhere in her Brief [Doc. 33] in opposition to Plaintiff's Motion for Summary Judgment [Doc. 32] does Defendant attempt to argue that she should be excused from complying with the requirements of O.C.G.A. § 16-11-129(d)(4) because she did not receive the "notification." She briefly mentioned that she had not received the "report" [Doc. 33, p. 17], but she did not argue for an extension of the mandatory timeline contained in the statute. She did not even claim that the lack of a "report" contributed to her violation.[5] To the contrary, ***the only defense she presented was lack of harm from her violation***. This Court rightly rejected that defense.

The essence of Defendant's Motion is that she found a case with a different set of facts, that worked for a different defendant, using a different argument. Defendant now wishes those facts were present in her case and that she had raised that argument. Under the Consent Order Stipulating to Facts [Doc. 31], the parties are restricted to use only the stipulated facts (and the record as of March 23, 2007) for motions for

[5] Such a claim would not have helped her, as both this Court and the Court of Appeals of Georgia ruled that the report is not required, but at least it would have been an indication that she believed her violation was not of her own doing.

summary judgment. The stipulated facts do not indicate that Defendant was waiting for "notification" before she issued Plaintiff's GFL, and she is barred from claiming so now.

CONCLUSION

The grounds to alter or amend a judgment have not been established, as the law Defendant claims to be intervening is neither final nor helpful for Defendant's case. Defendant merely seeks to raise new arguments based on facts not supported by the record. For the foregoing reasons, Defendant's motion should be denied.

JOHN R. MONROE, ATTORNEY AT LAW

__/s/ John R. Monroe_____
John R. Monroe
Georgia State Bar No. 516193

9640 Coleman Road
Roswell, GA 30075
Telephone: (678) 362-7650
Facsimile: (770) 552-9318

ATTORNEY FOR PLAINTIFF

Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Memorandum of Law in Opposition to Defendant's Motion to Alter or Amend Judgment was prepared using Courier New 12 point, a font and point selection approved in LR 5.1B.

_____/s/ John R. Monroe_____
John R. Monroe

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2007, I electronically filed the foregoing PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

Patrick D. Jaugstetter, Esq.
Attorney for Defendant Kelley S. Powell
140 Henry Parkway
McDonough, GA 30253
Telephone (770) 898-7591
Facsimile (770) 898-7593
pjaugstetter@co.henry.ga.us

_____/s/ John R. Monroe____

John R. Monroe
Attorney at Law
9640 Coleman Road
Roswell, GA 30075
Ph: 678-362-7650
Fax: 770-552-9318