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

SARA CARTER, ET.AL.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION FILE NO.
	)	
v.	)	1:20-CV-01517-SCJ
	)	
	)	
BRIAN KEMP, ET.AL.,	)	
	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION TO DISMISS BY DEFENDANT PINKIE TOOMER

Plaintiffs commenced this action against Defendants for violations of Plaintiffs' Due Process and Second Amendment rights. Defendant Pinkie Toomer, the judge of the Probate Court of Fulton County, ("Toomer") has filed a Motion to Dismiss [Docs. 40, 41] pursuant to Fed.R.Civ.P. 12(b)(6)[1]. Plaintiffs will show that Toomer is not entitled to dismissal and her Motion should be denied.

[1] Toomer filed a brief in support of a motion [Doc. 40] without a motion, and then filed a motion with a brief [Doc. 41, 41-1], the second brief appearing to be identical to the first brief. The Motion states that it is filed under Fed.R.Civ.Proc. 12(b)(1) and 12(b)(6), but it only claims that Plaintiffs failed to state a claim for which relief may be granted (i.e., Rule 12(b)(6)). The argument section also only mentions Rue 12(b)(6). Because there are no arguments that this Court lacks

Factual Background

In deciding a motion to dismiss under Fed.R.Civ.Proc. 12(b)(6), the Court must not consider matters outside the pleadings without converting the motion to one for summary judgment with notice to the parties. Fed.R.Civ.Proc. 12(d). Because Plaintiffs have not received notice the motion is being treated as one for summary judgment, the Court may not consider matters outside the pleadings, including, for example, Toomer's affidavit and other extrinsic documents she references in her Briefs.

The Court must accept as true all well-pleaded factual allegations in the complaint, construed in the light most favorable to the non-moving parties (i.e., Plaintiffs). *Dacosta v. Nwachukwa*, 304 F.3d 1045 (11th Cir. 2002). The Court looks to see whether the complaint contains sufficient factual matter to state a claim that is plausible on its face. *Surtain v. Hamlin Terrace Foundation*, 789 F.3d 1239 (11th Cir. 2015). The following facts are therefore taken from the Complaint and must be assumed to be true for the purposes of Toomer's Motion:

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subject matter jurisdiction, Plaintiffs are responding to this Motion as only one for failure to state a claim under Rule 12(b)(6).

1. Plaintiff Sara Carter ("Carter") is a natural person who is a resident and citizen of Fulton County, Georgia and of the United States. Doc. 1, ¶ 4.
2. Plaintiff GeorgiaCarry.Org, Inc. ("GCO") is a non-profit corporation organized under the laws of the State of Georgia. *Id.*, ¶ 5.
3. The mission of GCO is to foster the rights of its members to keep and bear arms. *Id.*, ¶6.
4. Toomer is the Judge of the Fulton County Probate Court. *Id.*, ¶ 12.
5. Toomer is responsible for the issuance of Georgia weapons carry licenses ("GWLs") in Fulton County. *Id.*, ¶ 13.
6. For the purposes of this case, Toomer was at all times acting under color of state law. *Id.*, ¶ 14.
7. On March 14, 2020, Gov. Kemp declared a public health state of emergency in Georgia on account of the COVID-19 pandemic. *Id.*, ¶ 19.
8. That same day, Chief Justice Harold Melton of the Supreme Court of Georgia declared a state of judicial emergency. *Id.*, ¶ 20.
9. Melton's declaration directed the courts of Georgia to maintain essential functions during the emergency. *Id.*, ¶ 21.

10. Toomer has concluded that issuing GWLs is not an essential function. *Id.*, ¶ 22.

11. Toomer has posted on her web site that applications for GWLs will not be accepted until further notice. *Id.*, ¶ 23.

12. During the emergency Toomer has refused to accept or process applications for GWLs. *Id.*, ¶ 24.

13. Carter meets all the qualifications of a GWL and is entitled to one upon payment of the applicable fee. *Id.*, ¶ 32.

14. Carter desires to exercise her right to keep and carry a handgun in case of confrontation. *Id.*, ¶ 33.

15. Carter desires to comply with the law and obtain a GWL, but she is unable to do so because Toomer will not accept or process an application. *Id.*, ¶ 34.

16. Carter is in fear of arrest and prosecution if she carries a handgun outside her home, motor vehicle, or place of business without a GWL. *Id.*, ¶ 35.

17. GCO has other members that would like to obtain GWLs but are unable to do so because Toomer and other probate judges will not accept or process applications. *Id.*, ¶ 36.

18. The State of Georgia Routinely enforces O.C.G.A. § 16-11-126. *Id.*, ¶37.

Argument

1. Plaintiffs' Declaratory Judgment Claim is Not Barred by Sovereign Immunity.

Toomer's first ground for dismissal is that Plaintiffs' declaratory judgment claim is barred by sovereign immunity. In order to assess this ground, it first is necessary to review the Complaint to see what the declaratory judgment claims are. Plaintiffs sued Toomer in her individual capacity for declaratory judgment for state law claims. Doc. 1, ¶ 15 ("Toomer is sued in her individual capacity for declaratory and injunctive relief for state law claims.") Plaintiffs also sued Toomer in her official capacity for declaratory judgment for federal law claims. Doc. 1, ¶ 17 ("Toomer is sued in her official capacity for declaratory and injunctive relief for federal law claims.") The applicability of sovereign immunity to declaratory judgment for state and federal claims will be addressed in turn.

A. State Law

Under Georgia law, the State may not be sued without its consent. Ga. Const. Art. 1, § 2, ¶ 9. The General Assembly has authority to waive the immunity and provide such consent. Ga.Const. Art. 1, § 2, ¶ 9(e). In the present case, sovereign immunity has been waived by the General Assembly in enacting O.C.G.A. § 16-11-

129(j). That Code section explicitly authorizes actions against probate judges for failing to issue GWLs. In addition, the Supreme Court of Georgia has ruled that a party may bring an action against a state official in her individual capacity for declaratory or injunctive relief without implicating sovereign immunity. *Lathrop v. Deal*, 301 Ga. 408, 434, 801 S.E.2d 867, 885 (2017) ("[A]s we have explained at some length, the doctrine of sovereign immunity usually poses no bar to suits in which state officers are sued in their individual capacities for ***official acts*** that are alleged to be unconstitutional.") [Emphasis supplied]. Thus, Plaintiffs' state law declaratory judgment claim against Toomer in her individual capacity is not barred by sovereign immunity.

Despite the clear language of *Lathrop*, which Toomer herself cites, she nevertheless argues that because the claims against her are for things she did as the Probate Judge, the claims are really against her in her official capacity. Unfortunately for her, that is not what the Supreme Court of Georgia has ruled. Just the opposite. The Court ruled that individual capacity claims, for ***official acts,*** are permitted under state law.

B. Federal Law

Under federal law, a State and its officials likewise may not generally be sued. There is an exception, however, for suing state officials in their official capacities for prospective (i.e., declaratory and injunctive) relief. *Alabama v. PCI Gaming Autority*, 801 F.3d 1278, 1288 (11th Cir. 2015), *citing ex Parte Young*, 209 U.S. 123, 155, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (There is an "exception to sovereign immunity in lawsuits against state officials for prospective declaratory or injunctive relief to stop ongoing violations of federal law.") Toomer does not address federal sovereign immunity principles at all in her Motion.

Because Plaintiffs sued Toomer in her individual capacity for state law declaratory relief and in her official capacity for federal law declaratory relief, just as the respective supreme courts have instructed litigants to do, there is no sovereign immunity for Plaintiffs' declaratory judgment claims.

2. There is no Official Immunity for Plaintiffs' Declaratory Judgment Claim

Toomer next argues that she has official immunity against Plaintiffs' declaratory judgment claim. Official immunity is another Georgia constitutional immunity. Ga.Const. Art.1, § 2, ¶ 9(d). It protects state officials from suits for damages in their individual capacities for discretionary functions. There are several

reasons why official immunity does not apply to Plaintiffs' declaratory judgment claims.

First, it should be noted that, because official immunity is a state law concept, it does not and cannot apply to Plaintiffs' federal law claim for declaratory relief.[2] Second, *Lathrop* once again supplies the applicable law, against Toomer. 301 Ga. 434 ("[O]fficial immunity generally is no bar to claims against state officers in their individual capacities for injunctive and declaratory relief….")

Third, official immunity does not protect officials for failure to perform a ministerial function. Ga.Const. Art. 1, § 2, ¶ 9. Processing GWL applications is a ministerial function for which Toomer has no discretion:

> The ordinary[3], under our laws, is an official charged with the performance of duties judicial, ministerial, and clerical. Not by his title, but only by his acts, can the exact capacity in which he appears ever be known upon any special occasion. In admitting a will to probate, he acts as a judicial officer… In issuing a marriage license, he for the moment becomes a ***ministerial*** officer.

[2] Toomer obliquely mentions qualified immunity in her Motion, but she does not elaborate on it and it is therefore waived, at least for the purposes of the present Motion.

[3] The predecessor to the current probate judge was the county "ordinary."

Comer v. Ross, 100 Ga. 652, 28 S.E. 387 (1897). [Emphasis supplied]. *Comer* was decided some 13 years before the General Assembly created a licensing requirement and assigned the task of issuing Georgia firearms licenses (the predecessor to the current GWLs) to the probate judges ("ordinaries"). 1910 Ga.L. 134. Presumably, the General Assembly knew from *Comer* that it was assigning yet another ministerial task to the probate judges.

It would be difficult to explain why issuing a GWL is a discretionary function, when issuance of a marriage license is not. It is clear in O.C.G.A. § 15-9-30(b)(11) that probate judges "[p]erform such other judicial and ***ministerial*** functions as may be provided by law." (Emphasis supplied).

The GWL statute itself, O.C.G.A. § 16-11-129, does not confer any discretion upon the probate judges. A probate judge is required to issue a license to all eligible applicants. *Moore v. Cranford*, 285 Ga.App. 666, 670, 647 S.E.2d 295 (2007) ("The use of the term 'shall' means that the probate judge has no discretion…."); Op.Atty.Gen. U89-21 ("Generally speaking, the current statutory provisions do not provide for the exercise of discretion by the probate judge in passing upon an application for a firearms permit").

Finally, the Court of Appeals of Georgia ruled last year that probate judges are not immune from suits for declaratory relief pertaining to issuance of GWLs. *GeorgiaCarry.Org, Inc. v. Bordeaux,* 834 S.E.2d 895, 901 (2019) ("Thus, the trial court erred in finding that the appellants' claim for declaratory relief against [the probate judge] in his individual capacity is barred by judicial immunity.")

3. Plaintiffs Have Shown a Clear Legal Right to Mandamus

Toomer next argues that mandamus is not available to Plaintiffs because they have not shown a clear legal right to the relief sought. She raises three separate issues in this argument: 1) The limited carrying of firearms permitted without a GWL is "good enough;" 2) this Court cannot compel the outcome of a GWL application; and 3) there is an adequate remedy at law. Plaintiffs will address each issue in turn.

A. The Constitution Is Not Satisfied With "Good Enough"

Toomer makes the outlandish claim that Plaintiffs can carry loaded handguns in their homes, motor vehicles, and places of business, and that satisfies the Second Amendment right to keep and bear arms. She compounds this ludicrous position by saying any infringement on the right is only temporary until the pandemic ends.

It is not Toomer's place to decide what is "good enough" for Plaintiffs' exercise of enumerated constitutional rights. Toomer calls Plaintiffs' homes, automobiles, and places of business "the places they will be frequenting." Doc. 40, p. 10. Georgia has no shelter in place restrictions, at least not for the majority of the state's residents. There is nothing in the record indicating what places Plaintiffs will be frequenting. We do know, however, that the Supreme Court has ruled that the Second Amendment protects a right to keep and carry arms "in case of confrontation." *District of Columbia v. Heller,* 554 U.S. 570 (2008). The thing about confrontation is one cannot know ahead of time where it will occur. In Toomer's world, Plaintiffs are just fine as long as they confine their confronters to their homes, motor vehicles, and places of business. It is not clear how Toomer thinks the Second Amendment applies anywhere else.

Fortunately, the Supreme Court already has determined that Toomer may not arbitrarily restrict licenses she issues for constitutionally protected rights. Toomer may not, for example, determine that she will not issue marriage licenses to mixed-race couples. *Loving v. Virginia,* 388 U.S.1 (1967). She also may not refuse to issue marriage licenses to same-sex couples. *Obergefell v. Hodges*, 135 S.Ct. 2071 (2015). It would be beyond silly for her to say to the mixed-race couple that they

are free to marry people of their own races, and that is "good enough." Likewise, she cannot tell the same-sex couple that they are free to marry people of opposite genders, and that is "good enough." Interestingly enough, Toomer continues to issue marriage licenses during the pandemic.

B. At This State of the Proceeding, It is Premature to Speculate On Outcome

In their request for mandamus, Plaintiffs asked that this Court order Toomer to accept and process GWL applications, ***and*** issue a GWL to Carter. Toomer does not apparently object to being ordered to accept and process applications, but she does object to being ordered to issue a GWL to Carter. After all, she says, Carter may not be eligible for one.

Toomer overlooks, however, that this is just a motion to dismiss. This is not a motion for summary judgment. At this stage of the proceeding, it is only necessary for Carter to ***allege***, as she did, that she is eligible for a GWL. The Court must accept that allegation as true. Thus, for the purposes of the present Motion, the Court must accept that Carter ***may*** be able to prove that she is eligible and that Carter ***may*** be entitled to mandamus to compel issuance of the GWL.

C. Adequate Remedy at Law

Toomer next argues that there is an adequate remedy at law, to wit, declaratory and injunctive relief. She bases this argument on the fact that Plaintiffs requested declaratory and injunctive relief. There is, of course, no authority that says that a person cannot ask for other forms of relief while also requesting mandamus. There also is no logic in assuming that such other forms of relief are adequate substitutes for mandamus.

Toomer seems to assume that if Plaintiffs received the other forms of relief they requested, they would have no need for mandamus. Not true. First, Plaintiffs do not request any injunctive relief against Toomer (they only requested injunctive relief against Gov. Kemp). Second, the declaratory relief they seek against Toomer would not be tantamount to receiving a GWL. She does not elaborate on why such other relief would be "adequate,"

Toomer next argues, incorrectly, that "Plaintiffs admit that the Chief Justice of the Supreme Court issued a judicial order that suspended all non-essential acts and the processing and issuance of GWLs is not an essential activity." Doc. 40, p. 13. Virtual everything in that statement is untrue. It is true the Chief Justice declared a judicial emergency. It is not true, however, that the Chief Justice suspended anything (other than tolling/extending deadlines). The Chief Justice encouraged

courts to remain open to the extent feasible. Plaintiffs also disagree with Toomer's conclusion that processing and issuing GWLs is a "not an essential activity." Indeed, given the State's requirement that a person obtain a GWL in order to exercise an enumerated constitutional right, it most certainly is essential that such GWLs be readily available.

Toomer's point appears to be that adequate relief would have been available against the Chief Justice. The declaration of judicial emergency, however, has no bearing on whether the State enforces O.C.G.A. § 16-11-126 (it does) and whether Toomer issues GWLs (she does not). No relief is available through the Chief Justice.

4. Plaintiffs Meet Declaratory Judgment Standards

Toomer's next argument is that Plaintiffs do not meet the standard for a declaratory judgment under Georgia law. It should be noted at the outset that Toomer only raises this issue with respect to state law declaratory judgments. She says nothing at all about federal law declaratory judgments.

As for a state law declaratory judgment, Toomer argues that Plaintiffs have no need for a declaratory judgment because there is no uncertainty in the status quo. Toomer misses the point. There is no uncertainty that Toomer is refusing to issue GWLs right now. But there apparently is uncertainty as to whether Toomer is acting

lawfully. Plaintiffs claim she is not. She seems to think she is. Therein lies the discrepancy and the uncertainty Plaintiffs seek resolved. Declaratory judgment is appropriate in this circumstance.

5. Insufficiency of Service of Process Has Been Waived.

Toomer argues that the case should be dismissed because of insufficient service of process. This argument is both disingenuous and has been waived.

On April 11, 2020, Toomer's chief clerk and associate judge of the Probate Court, Barbara Koll ("Koll"), advised Plaintiffs' counsel via email that Koll would accept service of process on behalf of Toomer at Toomer's office. Toomer was copied on the email from Koll and did not object to or correct Koll's assertion. Plaintiffs' process server thereafter served the summons and complaint on Koll at Toomer's office. Doc. 15. Toomer now implicitly asserts that Koll was not authorized after all to receive service on Toomer's behalf. It was disingenuous for Toomer to acquiesce in this arrangement if she intended to refute it later.

Moreover, the issue of sufficiency of ***service*** of process has been waived. Pursuant to Fed.R.Civ.Proc. 12(h)(1) requires that insufficient service (Rule 12(b)(5)) is waived if not raised in the first pleading. *Vax-D Medical Technologies v. Texas Spine Medical Center,* 485 F.3d 593, 597 (11th Cir. 2007) ("[Defendant]

waived the defenses of insufficiency of … service of process … when they submitted their Answer without raising these defenses.") In the present case, Toomer filed her Answer [Doc. 39] before filing her Brief [Doc. 40] or subsequent Motion [Doc 41] in which she raised the issue of insufficient service of process.

In her Answer, Toomer raised the issue of ***insufficient process,*** but she said nothing about insufficient ***service*** of process. Doc. 39, pp. 2, 3 ("Fourth Defense – The Court lacks jurisdiction of this matter as to Judge Toomer due to ***insufficiency of process***"; "Defendant Toomer denies that this Court has jurisdiction because of ***insufficiency of process***.") [Emphasis supplied]

Thus, Toomer adequately raised in her Answer the sufficiency of the process itself (i.e., some unstated but alleged defect in the summons), but she did not raise at all any issues with the ***service*** of the process. The process and the service are two separate issues in Rule 12(b). Fed.R.Civ.Proc. 12(b)(4) and (5). They are not interchangeable. Because Toomer failed to raise insufficiency of ***service*** when she filed her Answer, she has waived the issue.

Finally, Toomer does not explain why service on the Clerk of the Probate Court was inadequate. Fed.R.Civ.Proc. 4(e) allows service in accordance with state law. Georgia law allows service on governmental entities by service upon the clerk

of that entity. O.C.G.A. § 9-11-4(e)(5) permits service "against any other public body or organization subject to an action" by service "to the chief executive officer ***or clerk*** thereof." [emphasis supplied]. Because service was made on the clerk of the probate court and Toomer is sued in her official capacity as clerk of the probate court, service was adequate.

In an abundance of caution, however, Plaintiff will continue to try to effect personal service upon Toomer at her residence until service is accomplished.

6. Toomer Has Violated Plaintiffs' Second Amendment Rights

Toomer next argues she has not violated Plaintiffs' Second Amendment rights. In support of this argument, she resurrects her "good enough" discussion. She recites how Georgia law permits carrying a firearm in one's home, motor vehicle or place of business without a license, carrying a long gun without a license, and carrying an encased, unloaded handgun without a license. That, she implies, is ***good enough.*** That argument was raised in, and rejected by, the Supreme Court in *Heller*.

In *Heller*, the District of Columbia prohibited keeping a loaded, operable handgun in one's home. The District argued that a long gun, or an unloaded, inoperable handgun was ***good enough.*** Finding the handgun to be the quintessential

arm for self defense, and finding an inoperable, unloaded gun to be inadequate "in case of confrontation," the Supreme Court rejected the ***good enough*** argument.

Toomer also says the deprivation of an enumerated, fundamental right is only temporary, implying that Plaintiffs should just "suck it up." Well, no, that is not how the Constitution works. *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866):

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

If the Second Amendment, which is indeed part of the Constitution, shields Plaintiffs "at all times, and under all circumstances," and if it cannot "be suspended during any of the great exigencies of government," then Toomer is hard-pressed to explain how she can unilaterally declare that carrying certain weapons in certain places under certain conditions is ***good enough*** and how a temporary deprivation of an enumerated, fundamental constitutional right will only hurt a little bit.

Toomer fails in her arguments to mention even one reference to the Second Amendment from any context. She only mentions the Amendment itself in her subject heading. She does not quote its text and she does not mention even in passing a single case or a single federal law. She has abandoned this issue by failing to develop any meaningful argument to support it.

7. It is Premature to Address Attorney's Fees.

Toomer's final issue is that she asks this Court to dismiss Plaintiffs' claims for attorney's fees. As grounds for this argument, Toomer asserts that Plaintiffs are not "prevailing parties" and thus are not entitled to attorney's fees.

It is not clear why Toomer is bothering with this argument at this point in the litigation. Unless and until this Court dismisses all Plaintiffs' claims, it would be premature to say that Plaintiffs are not and cannot be entitled to attorney's fees at the conclusion of this case.

Conclusion

For the reasons stated above, Toomer's Motion to Dismiss should be denied.

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RULE 7.1 CERTIFICATE

I certify that this brief was prepared with one of the font and point selections approved in Rule 5.1(B).

/s/ John R. Monroe
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