

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

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M. LINDA PIERCE
MUSCOGEE COUNTY
SUPERIOR COURT

GREGORY D. COUNTRYMAN, SR.,)
individually and as Elected Marshal of)
Muscogee County, Georgia and,)
VIVIAN BISHOP, individually and as)
Elected Clerk of the Municipal Court of)
Columbus, Georgia,)

CIVIL ACTION FILE NO. SU14CV3468-94

Plaintiffs,)

v.)

COLUMBUS, GEORGIA, TERESA P.)
TOMLINSON, individually and as Mayor,)
JERRY "POPS" BARNES, individually)
and as District 1 Councilor, GLENN)
DAVIS, individually and as District 2)
Councilor, BRUCE HUFF, individually)
and as District 3 Councilor, EVELYN)
TURNER PUGH, individually and as)
District 4 Councilor, MIKE BAKER,)
individually and as District 5 Councilor,)
GARY ALLEN, individually and as)
District 6 Councilor, EVELYN "MIMI")
WOODSON, individually and as)
District 7 Councilor, JUDY THOMAS,)
individually and as District 9 Councilor,)
and BERRY "SKIP" HENDERSON,)
individually and as District 10 Councilor,)
ISAIAH HUGLEY, individually and as)
City Manager, PAMELA HODGE,)
individually and as Finance Director, and)
CLIFTON C. FAY, individually and as)
City Attorney,)

Defendants.)

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

COME NOW, Defendants COLUMBUS, GEORGIA, TERESA P. TOMLINSON, individually and as Mayor, JERRY “POPS” BARNES, individually and as District 1 Councilor, GLENN DAVIS, individually and as District 2 Councilor, BRUCE HUFF, individually and as District 3 Councilor, EVELYN TURNER PUGH, individually and as District 4 Councilor, MIKE BAKER, individually and as District 5 Councilor, GARY ALLEN, individually and as District 6 Councilor, EVELYN “MIMI” WOODSON, individually and as District 7 Councilor, JUDY THOMAS, individually and as District 9 Councilor, and BERRY “SKIP” HENDERSON, individually and as District 10 Councilor, ISAIAH HUGLEY, individually and as City Manager, PAMELA HODGE, individually and as Finance Director, and CLIFTON C. FAY, individually and as City Attorney (collectively, “Defendants”) and files this their Reply in support of Motion to Dismiss. Plaintiffs’ Complaint¹ should be dismissed in its entirety pursuant to O.C.G.A. §9-11-12(b)(6), as it is legally insufficient and must fail as a matter of law.

I. INTRODUCTION

Plaintiffs’ Amended Complaint and Response to Defendants’ Motion to Dismiss are nothing more than budget negotiation tactics employed in an effort to re-appropriate monies, taking from the other departments and offices of the Columbus Consolidated Government (“CCG”) in order to increase their own budgets. Nothing significantly differed in the budgeting process this year when compared to the budgeting process in prior years and Plaintiffs have failed to plead facts to demonstrate that any relief is warranted. Plaintiffs have not and cannot show that there was a defect in the budgetary process and have insufficiently alleged such in

¹ As Plaintiffs filed their Amended Complaint after Defendants filed their Motion to Dismiss, Defendants have not been afforded an opportunity to answer Plaintiffs’ Amended Complaint and this Court is not required to consider the allegations contained there within in deciding this Motion to Dismiss. Nonetheless, reserving the right to respond to any and all new allegations and reserving all defenses, Defendants aver that Plaintiffs’ Amended Complaint still has not alleged sufficient facts to state a claim and should be dismissed.

their pleadings. As established herein, Plaintiffs have failed to state a claim upon which relief can be granted.

As an initial matter, Plaintiffs' claims should be dismissed on immunity grounds. This is evidently clear not only to Defendants, but to Plaintiffs as well, who acknowledge such in their Response. Plaintiffs have attempted to amend their Complaint in a last-ditch attempt to circumvent the immunity defenses raised in this pending Motion. However, the Court should not accept inferences or legal conclusions drawn by Plaintiffs on the facts in their Complaint. See Chisolm v. Tippens, 289 Ga. App. 757 (2008).

Sovereign immunity bars Plaintiffs' claims against Defendant CCG, as well as its officers and employees sued in their official capacities. This is clear and has been acknowledged by Plaintiffs. (Pls.' Resp. Br. at 6). Furthermore, Plaintiffs' claims against Defendants in their individual capacities are barred under the application of official or legislative immunity. The actions contemplated in Plaintiffs' Complaint are discretionary in nature, and as such Plaintiffs must demonstrate malice or intent to harm to waive Defendants' immunity. While Plaintiffs have attempted to plead around Defendants' immunity defenses, Plaintiffs can make only cursory, conclusory allegations against Defendants as a collective unit, pleading with no specificity. Plaintiffs have not and cannot plead actual malice or intent to harm that would waive Defendants' immunity. All of Plaintiffs' claims fail as Defendants' actions during the budgetary process are protected on immunity grounds alone.

However, assuming *arguendo*, that Plaintiffs could plead around the immunity defenses, Plaintiffs' claims must still be dismissed for failure to state a claim upon which relief can be granted. Plaintiffs continue to attempt to persuade this Court to allow them to circumvent both

the legislative process for modifying a budget and their contractual obligations under their Purchasing Card User Agreements. Plaintiffs are asking this Court to do something for which it has no jurisdiction; there is no jurisdiction for this Court to order any budgeted funds to Plaintiffs from "other" funds. See Lowe v. State, 267 Ga. 754 (1997). Plaintiffs are asking this Court to act in a legislative function.

Furthermore, injunctive relief is improper in this case under Georgia law, as there are no allegations justifying such an extraordinary remedy, and an adequate legislative remedy exists. Plaintiffs have an adequate remedy available to them through the legislative processes of the CCG Council and can show no irreparable injury on the face of their complaint. See O.C.G.A. § 23-1-4 (“Equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law”). Additionally, Plaintiffs have not shown any grave danger that would necessitate injunction, and the law does not support or recognize such relief. Likewise, Plaintiffs’ request for declaratory judgment fails as Plaintiffs have not and cannot plead any current or future uncertainty in the budget process necessitating judicial declaration. Plaintiffs cannot go running to the judiciary when they did not get what they asked for in the approved deliberative legislative budgetary process. Finally, as all of Plaintiffs’ allegations fail to state a claim upon which relief can be granted, Plaintiffs are not entitled to attorney’s fees.

II. ARGUMENT AND CITATION OF AUTHORITY

- 1. Plaintiffs’ Complaint should be dismissed as the Defendants’ actions complained of are protected by the doctrines of sovereign, official and legislative immunity.**

(A) Setting the budget for the Columbus Consolidated Government is a discretionary task, and as such sovereign immunity bars these injunctive allegations against all Defendants in their official capacity.

As Plaintiffs have acknowledged in their response brief, Defendant Columbus, Georgia, as well as all other Defendants in their official capacity are immune from claim in Plaintiffs' Complaint based on the doctrine of sovereign immunity. (Pls.' Resp. Br. at 6). As all of Plaintiffs' claims arise in equity, sovereign immunity protects the acts of the Defendants in their official capacity and is fatal to Plaintiffs' claims. See Gilbert v. Richardson, 264 Ga. 744 (1994); Saleem v. Snow, 217 Ga. App. 883,886 (1995) ("Individuals acting in a legislative capacity are absolutely immune from suit"). While Plaintiffs can attempt to circumvent immunity by amending their pleadings to allege ministerial and malicious actions, Plaintiffs cannot get around the doctrine of immunity in the context of a legislative body determining the allocation of budget funds as it is clearly a discretionary process.

A discretionary act calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. Grammens v. Dollar, 287 Ga. 618, 619 (2010). Plaintiffs ignore consistent Georgia case law that clearly demonstrates the discretionary nature of the budgetary process. Defendant Councilors are not bound by budgets or budget requests submitted by officials (if they are submitted at all), but rather have the discretion to implement a budget as part of an overall deliberative process, taking into consideration the needs of the government as a whole. See, e.g., Chaffin v. Calhoun, 262 Ga. 202, 203 (1992) ("This does not mean, however, that county commissioners must approve the budget that a sheriff proposes.")

Plaintiffs attempt to define the deliberative, discretionary budget process as “ministerial” because suit against public officials in their individual capacity is barred when a public official has engaged in discretionary acts within the scope of his/her authority, and the official has not acted with actual malice. Butler v. Carlisle, 299 Ga. App. 815 (2009).² However, Plaintiffs' Complaint only describes official and discretionary actions taken, i.e., budget appropriation decisions, denial of outside counsel and payment thereof, and allegations of control over the funding provided to their Offices. (Examples in Complaint in ¶ 61-66, ¶ 67, and ¶72-74).

(B) Plaintiffs can establish neither specific intent to harm nor malice as a waiver of official or qualified immunity for the discretionary action of adopting a budget.

As for Plaintiffs' claims against Defendants in their individual capacity, because the actions involved are legislative and discretionary in nature, Defendants are entitled to official or qualified immunity unless Plaintiffs can show malice or an intent to harm. Saleem v. Snow, 217 Ga.App. 883, 886 (1995) (Individuals acting in a legislative capacity are immune from suit); and *see also* Village of North Atlanta v. Cook, 219 Ga. 316, 319 (1963) (Georgia Supreme Court recognizing immunity provided to members of the General Assembly from suit for actions taken in an official capacity) *and* Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998) (Supreme Court recognizing immunity for a city mayor who introduced and signed a budget into law, as those actions were integral steps in the legislative budget process). Plaintiffs' claims can only survive a motion to dismiss if Plaintiffs allege malice or an intent to harm. Common Cause of Georgia v. City of Atlanta, 279 Ga. 480, 482 (2005). None of Plaintiffs' allegations in their original

²Immunity may not be available to an official for the negligent performance of a ministerial act, i.e. a common one that requires merely the execution of a specific duty with no discretion. Butler, *supra*. No such ministerial act or negligence allegation is at issue in Plaintiffs' Complaint.

Complaint are sufficient to waive the application of qualified immunity for these individual Defendants.

The discretionary nature of establishing the budget is clear under Georgia law, as the abuse of discretion standard is required for judicial review of board budget decisions. See, e.g., Bd. of Comm'rs of Dougherty County v. Saba, 278 Ga. 176, 177 (2004) (county commission's changes to the budget "may only be reviewed for abuse of discretion"); Griffies v. Coweta County, 272 Ga. 506, 507-08 (2000) ("changes may only be reviewed for abuse of discretion"); Lovett v. Bussell, 242 Ga. 405 (1978)(Supreme Court recognized discretion inherent in the administration of county affairs to deny raises in Sheriff's budget for extra pay, and stated no interference shall be had unless it is clear and manifest that an abuse of discretion is present). Furthermore, Plaintiffs admit that Defendants exercise discretion in the budget process:

"The Council must consider these budget requests submitted by the Plaintiffs and these officers and agencies, and either approve them, or modify them **in the exercise of reasonable discretion** The Council may not abuse its discretion, or act arbitrarily, in adopting an, annual budget appropriation for these offices and agencies. To the contrary, the Council must gather and evaluate sufficient facts to exercise a reasonable, educated, and informed discretion."

(Complaint ¶ 57) (emphasis added).

2. Injunctive Relief

(A) Injunctive Relief is an improper remedy in the case at bar.

While the Court's analysis of this Motion to Dismiss should end at this point because Plaintiffs' claims fail on the basis of Defendants' sovereign and official immunity, Plaintiffs' claims also fail for the separate and independent reason that injunctive relief is an improper remedy in the current case. Plaintiffs' seek injunctive relief for three separate reasons:

1. Injunction to restrain Defendants from threatening civil or criminal action for the misuse of the purchasing cards;
2. Injunction to restrain Defendants from making any motion, action or vote that interferes with their Council-allocated budgets; and
3. Injunction to restrain Defendants from violating the budget process and requesting adequate funding.

(Complaint at ¶¶ 86, 90 & 91). As shown herein, all three equitable remedies requested are inappropriate because adequate remedies at law exist, namely, the legislative budgetary process. Additionally, Plaintiff claims for injunction should be dismissed for failure to state a claim as the law clearly disfavors permanent injunctions in the absence of *grave* danger of impending injury. Thomas v. Mayor of Savannah, 209 Ga. 866 (1953).

(B) Plaintiffs' request for injunction cannot properly be granted because an adequate remedy is available.

Plaintiffs' claim of equitable relief seeks to enjoin Defendants from allegedly violating the budgetary process and requesting additional funding. As a preliminary matter, requesting additional funding is not an equitable remedy and thus fails to state a claim upon which relief could be granted. Georgia and local law clearly set forth the budgetary process and Plaintiffs' remedy is through this legislative process. *See* O.C.G.A. §36-5-22.1(a) and Charter §§ 7-400, 7-401, 7-402, and 8-105. Plaintiffs have sought to improperly involve this Court, asking the Court to act in a legislative function, simply because Plaintiffs are upset they were not appropriated as much money as they would like to have. The process is legislative, and under the circumstances of this litigation, that legislative process is Plaintiffs' remedy.