

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

CITY OF WESTON, FLORIDA, et al.,

Plaintiffs,

v.

THE HONORABLE RICHARD “RICK”

SCOTT, et al.,

Defendants.

**Consolidated Case Nos. 2018 CA
000699, 2018 CA 001509, 2018
CA 000882**

APPLICABLE TO ALL CASES

**ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS’ MOTION
TO DISMISS**

A hearing was held on September 28, 2018, on the motion to dismiss of Defendants (1) the State of Florida, (2) the Florida Attorney General, (3) the Florida Commissioner of Agriculture, (4) the Florida Department of Law Enforcement (FDLE) Commissioner, (5) the Florida Auditor General, (6) the Broward County State Attorney, and (7) the Broward County Sheriff. The Governor was not a party to the motion. The above-styled cases were consolidated and the motion sought dismissal in all three cases.

The court has considered the motion and related memoranda, argument of counsel, the complaints, and the law. Based upon those considerations, the court denies the motion to dismiss as to the Attorney General, the Commissioner of Agriculture, the FDLE Commissioner, and the State of Florida. The court grants the motion as to the Auditor General, the Broward County State Attorney, and the Broward County Sheriff. Again, the Governor was not a party to the motion to dismiss.

The court is restricted to reviewing only the four corners of the complaint in ruling on a motion to dismiss. A complaint should be dismissed only if the movant can establish beyond any

doubt that the claimant could prove no set of facts whatever in support of his claim that would entitle the claimant to relief. *Johnson v. Gulf County*, 965 So.2d 298 (Fla. 1st DCA 2007). In ruling on a motion to dismiss the court must assume all allegations in the complaint are true. All reasonable inferences must be construed in favor of the non-moving party. *Felder v. State of Florida, Department of Management Services, Division of Retirement*, 993 So. 2d 1031, 1034 (Fla. 1st DCA 2008). In declaratory judgment actions, the inquiry on a motion to dismiss is limited to reviewing the sufficiency of the complaint, not the likelihood of success on the merits. *Meadows Community Association, Inc. v. Russell-Tutty*, 928 So. 2d 1276, 1279-80 (Fla. 2d DCA 2006).

Plaintiffs have challenged the various penalty provisions in sections 790.33 and 790.335, Florida Statutes. Defendants argue that to establish standing Plaintiffs must show they have been charged with violating the preemption or actually threatened with prosecution. Such a rule, however, would be inconsistent with the Declaratory Judgment Act. The Act “affords relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations, and it should be liberally construed.” *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991) (citing § 86.101, Fla. Stat.).

To establish standing, Plaintiffs must demonstrate they “reasonably expect to be affected by the outcome of the proceedings, either directly or indirectly.” *Public Defender, Eleventh Judicial Circuit of Florida*, 115 So.3d 261, 282 (Fla. 2013). Further on page 283 that case states “standing to bring...a particular legal proceeding often depends on the nature of the interest asserted.” Plaintiffs in the present case have asserted very important interests. Taking Plaintiffs’ allegations as true, for purposes of this motion to dismiss, they have sufficiently alleged standing.

Defendants' also contend section 790.33 may be enforced only by private individuals or private entities adversely affected by a violation of the preemption and who file suit under section 790.33(3)(f). Although such plaintiffs may sue government entities for declaratory and injunctive relief and actual damages and attorney's fees, section 790.33(3)(f) does not allow claims to be asserted against the individual local officials who would be subject to fines under subsection (3)(c), the prohibition against expenditures of public funds for defense purposes as set forth in subsection (3)(d), or removal from office under subsection (3)(e).

Section 790.33(3)(f) limits any private cause of action to local governmental entities, not individuals. Because private litigants cannot enforce the penalties in subsections (3)(c), (3)(d) and (3)(e) against individual governmental officials, the enforcement authority must rest elsewhere. The court does not believe the Legislature would have created penalties to be imposed against individual governmental officials and then failed to create an enforcement mechanism. Such enforcement authority must rest with some of the named Defendants. So who are the proper defendants?

"The determination of whether a state official is a proper defendant in a declaratory action challenging the constitutionality of a statute is governed by three factors." *Scott v. Francati*, 214 So.3d 742, 745 (Fla. 1st DCA 2017). "The determination begins with ascertaining whether the named state official is charged with enforcing the statute." *Id.* If, however, "the named official is not the enforcing authority, then courts must consider two additional factors: (1) whether the action involves a broad constitutional duty of the state implicating specific responsibilities of the state official; and (2) whether the state official has an actual, cognizable interest in the challenged action." *Francati*, 214 So. 3d at 746.

Again, the first step is to determine whether the named defendant has authority to enforce the statute. Because the purpose of section 790.33 is to reach any violation of the preemption set forth in section 790.33(1), enforcement of the penalty provisions is implicated whenever any aspect of the State's regulation of firearms is affected by local governmental action. Several Defendants meet this test.

The Attorney General has enforcement authority with respect to multiple aspects of the State's comprehensive scheme for regulation of firearms, specifically sections 790.251 and 790.335, Florida Statutes. A violation of either of those statutory provisions would result in a violation of the broad preemption set forth in sections 790.33(1) and 790.33(3)(a). In enforcing either section 790.251 or 790.335, the Attorney General would also have the authority to invoke the penalties in sections 790.33(3)(c) and (3)(d). The Attorney General could seek the imposition of fines against individual officials and obtain injunctive relief to preclude those officials from expending public funds in their defense. As such, the Attorney General satisfies the first test for proper defendant status under *Francati*.

The FDLE Commissioner satisfies the same enforcement test. The FDLE is designated to enforce and administer a portion of Chapter 790 to which the preemption and penalties in section 790.33 apply—specifically, the sale and delivery of firearms pursuant to subsection 790.065(1)(a), Florida Statutes. The FDLE's duties include investigating alleged misconduct, in connection with their official duties, of public officials and employees subject to suspension or removal by the Governor. Section 943.03(2), Florida Statutes. Because officials who violate the preemption in section 790.33 are subject to removal from office by the Governor pursuant to section 790.33(3)(e), the FDLE is charged with investigating their misconduct under the statute

and is responsible for its enforcement. Because of the broad scope of the preemption set forth in section 790.33, this enforcement authority is sufficient to satisfy the first Francati test.

The Auditor General is not charged with authority to enforce any relevant statute or section 790.33 specifically. The Auditor General is charged with conducting audits, and while it may, in the course of conducting an audit, discover an expenditure of funds in violation of section 790.33, the Auditor General has no authority to take corrective action. The motion to dismiss is granted as to the Auditor General.

Some Plaintiffs contend the Broward County State Attorney and the Broward County Sheriff are proper defendants. However neither is charged with authority to enforce the relevant statutes nor does any other law make them proper defendants in this case. The motion to dismiss is granted with regard to the Broward County State Attorney and the Broward County Sheriff.

As stated earlier, even if a state official is not charged with enforcing the statute, the official is a proper party if there is a constitutional duty that implicates the official's duties and the defendant has an actual and cognizable interest in the challenged action. The Florida Constitution states: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, *except that the manner of bearing arms may be regulated by law.*" Art. I, § 8(a), Fla. Const. (emphasis added). This provision imposes a constitutional duty on the State and its officials to engage in the regulation of arms "by law." It applies with equal force to the Attorney General, the FDLE Commissioner, and the Agriculture Commissioner..

The State has created a regulatory scheme to regulate the manner of bearing arms. The scheme addresses (i) the sale and delivery of firearms administered and enforced by the FDLE pursuant to section 790.065(1)(a)); (ii) concealed weapons (administered and enforced by the

Agriculture Commissioner, pursuant to section 790.06, and as to background investigations, the FDLE pursuant to section 790.0655(1)(b)); (iii) the registry/listing of gun owners (administered and enforced by the Attorney General pursuant to section 790.335(4)(c)); and (iv) firearms in motor vehicles (administered and enforced by the Attorney General pursuant to section 790.251(6)). Accordingly, the constitutional duty to regulate the manner to bear arms – which lies at the heart of this dispute – implicates duties of the Attorney General, the Agriculture Commissioner, and the FDLE Commissioner.

The State of Florida is a proper defendant in this case. As stated in *State of Florida v. Florida Consumer Action Network*, 830 So.2d 148, 153 (Fla. 1st DCA), “the state may be made a party pursuant to section 86.091, Florida Statutes (1999) allowing the attorney general to be served with a copy of the complaint whenever a statute is alleged to be unconstitutional.” The State has a great interest in defending its firearms regulatory scheme. The State would appear in the suit and be represented by the Attorney General.

The Attorney General, the FDLE Commissioner, and the Agriculture Commissioner are the State officials who administer and enforce the State’s regulatory scheme for firearms, which is protected by the preemption and penalty provisions. The relief sought in these cases – to preclude the position of the penalties in section 790.33 – would have direct consequences on the performance of these Defendants’ duties. Thus, each has an actual, cognizable interest in this matter.

CONCLUSION

For the reasons stated in this order, the motion to dismiss is denied with regard to the State of Florida, the Attorney General, the FDLE Commissioner, and the Agriculture Commissioner. Those Defendants shall file an answer to the complaint within 20 days of the date

of this order. The motion is granted, with prejudice, as to the Auditor General, the Broward County State Attorney, and the Broward County Sheriff.

DONE and ORDERED in chambers in Tallahassee, Leon County, Florida, this 18th day of October, 2018.



THE HONORABLE CHARLES DODSON
CIRCUIT COURT JUDGE

Copies furnished to counsel of record via E-Portal: