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IN THE SUPERIOR COURT OF BIBB COUNTY
STATE OF GEORGIA

LINDSAY D. HOLLIDAY, Plaintiff, v. GEORGIA DEPARTMENT OF TRANSPORTATION Defendant.	CIVIL ACTION NO. 12-CV-58472

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND GRANTING INTERLOCUTORY INJUNCTION

I. BACKGROUND

In the above-captioned case, Plaintiff Lindsay Holliday ("Dr. Holliday") challenges a plan to widen a section of Forest Hill Road in Macon, spanning from Wimbish Road to Northside Drive, from two lanes to three lanes.[1] He and his mother own property abutting this part of Forest Hill Road. Dr. Holliday alleges that Defendant Georgia Department of Transportation ("GDOT") has acted arbitrarily and capriciously by approving the project because its stated purposes for undertaking the project—to improve safety and operational efficiency on the road—are unsupported by the data relied upon by GDOT. In fact, Dr. Holliday contends that GDOT's plan will result in *less safe* road conditions than currently exist because the widened road will encourage speeding. Finally, Dr. Holliday opposes the removal of tree canopy along Forest Hill Road because of the aesthetic and environmental impact on the surrounding properties and corresponding decrease in property values. Dr.

[1] The Forest Hill Road project actually includes two stages. The first is the portion just described. The second is a plan to widen Forest Hill Road from Forsyth Road to Wimbish Road from two lanes to five lanes. The second phase of the project is not being challenged; GDOT has only acquired right-of-way with respect to properties affected by the first phase and has only let a contract for the first phase of the project.

Holliday seeks injunctive relief to prevent GDOT from undertaking the Forest Hill Road project.

On January 18, 2013, GDOT filed a Motion to Dismiss on the ground that the Court lacks subject matter jurisdiction over the instant case because Dr. Holliday's suit is barred by the doctrine of sovereign immunity.[2] The Court set a hearing on the Motion for March 21, 2013. Shortly before the hearing, Dr. Holliday, who initially filed this case pro se, retained counsel. At the hearing, the Court granted Plaintiff's counsel's request to permit limited discovery relating to the issue of subject matter jurisdiction. The Court set a twenty-one day discovery period. The Court heard evidence regarding whether the instant suit is barred by sovereign immunity on April 19, 2013.[3]

II. ANALYSIS

A. Motion to Dismiss and Hearing

In its Motion to Dismiss, GDOT argues that "This action must be dismissed under the doctrine of sovereign immunity because Plaintiff cannot meet his burden to show that there has been an express waiver of sovereign immunity for its [sic] claim for an injunction; therefore, this Court has no subject matter jurisdiction to hear the claims." Def.'s Mot. Dismiss 12. Under Georgia's Constitution, sovereign immunity extends to GDOT unless immunity is specifically waived by the General Assembly. *See* Ga. Const. Art. I, § II, ¶ IX. Where sovereign immunity applies and has not been waived, courts do not have subject matter jurisdiction over claims asserted against the state. *Dep't of Transp. v. Dupree*, 256 Ga.

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[2] The Motion also alleged that Dr. Holliday had failed to state a claim upon which relief could be granted as to Project Engineer Clinton Ford, P.E., who was previously a defendant in this action, but was voluntarily dismissed by Plaintiff. Def.'s Mot. Dismiss 1. Additionally, GDOT moved to dismiss under 12(b)(6) "Plaintiff's claims of alleged future violations of state and federal environmental laws because such claims are not ripe for adjudication." Def.'s Mot. Dismiss 1. Finally, GDOT argued that the Complaint should be dismissed based on improper process and service of process, but this issue was resolved by the parties at the first hearing.

[3] The hearing was initially scheduled for April 18, 2013, but was rescheduled.

App. 668, 671 (2002). The burden of establishing a waiver of sovereign immunity rests on the party seeking to benefit from the waiver. *Id.*

Next, GDOT cites, among other cases, *IBM v. Ga. Dep't of Admin. Servs.*, 265 Ga. 215, 217 (1995), for the proposition that "a court may interfere with an exercise of the State's statutory and regulatory authority only where the state has acted wholly outside its authority; has acted arbitrarily and capriciously in its decision-making; has rendered a decision that is clearly erroneous; or has acted in violation of constitutional rights." GDOT then concludes, "Such a suit is barred by sovereign immunity[,]" citing *Evans v. Just Open Gov't*, 242 Ga. 834, 839 (1979).

At the April 19 hearing, Plaintiff conceded that under the law cited by GDOT in its Motion to Dismiss, Plaintiff has the burden of demonstrating that GDOT has "waived" sovereign immunity by acting arbitrarily and capriciously.[4] Both parties rely substantially on *Dep't of Transp. v. Dupree*, 256 Ga. App. 668 (2002). In that case, a pedestrian was struck by a motorist and killed while trying to cross a highway. 256 Ga. App. at 668–69. Dupree, the administratrix of her estate, filed a negligent design malpractice wrongful death suit, alleging that the road should have included a traffic control device at the intersection where the decedent attempted to cross and that the road did not have sufficient sight distance. *Id.* at 669. A primary issue before the Court of Appeals was the trial court's decision on GDOT's motion to dismiss under O.C.G.A. § 12(b)(1) on the grounds of sovereign immunity. *Id.* at 671. After holding a hearing and considering evidence pursuant to O.C.G.A. § 9-11-12(d), the trial court denied the motion. *Id.*

[4] Along with raising this point at the beginning of the hearing, Plaintiff's closing argument brief states that "GDOT has waived any sovereign immunity by proceeding with the Project without adequate justification- *i.e.* arbitrarily and capriciously."

The existence of sovereign immunity in *Dupree* was dependent on whether the suit fell under an exception to the Georgia Tort Claims Act's statutory waiver of immunity. Georgia's Tort Claims Act provides that sovereign immunity will *not* be waived for suits alleging injuries caused by road plans or design "where such plan or design is prepared in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design[.]" Thus, in *Dupree*, the Court of Appeals held that "the questions of malpractice and of waiver of sovereign immunity are intertwined, because a final determination by the trial court of waiver of sovereign immunity also is a final determination of DOT's liability for malpractice, which constituted the waiver." 256 Ga. App. at 674. In such cases, the Court of Appeals held that a trial court "in determining subject matter jurisdiction must make a preliminary determination[,]" but not a final decision on the merits, "that there exists a material issue of fact for jury determination that malpractice may have occurred, which waives sovereign immunity if the jury finds, in fact, malpractice by DOT." *Id.* The Court of Appeals then elaborated on the appropriate procedure under a 12(d) hearing for making a determination regarding subject matter jurisdiction. *See id.* at 675. Finally, the Court noted that the trial court is authorized under the Civil Practice Act to defer the determination until trial. *Id.*

At the request of the parties, the Court held the April 19, 2013, 12(d) hearing pursuant to the procedure outlined in *Dupree*. GDOT has argued, and Plaintiff has conceded, that Plaintiff has the burden of proving that GDOT has acted arbitrarily and capriciously in order to survive GDOT's Motion to Dismiss.[5] Upon further review of the case law cited by both

[5] Plaintiff requests that the Court defer ruling on sovereign immunity until further discovery has progressed because of the extent to which the sovereign immunity issue and the merits of the case apparently coincide.

parties, the Court finds that *Dupree* is not applicable to the case at bar because Dr. Holliday seeks injunctive relief based on GDOT's allegedly arbitrary and capricious conduct.

B. IBM/Suits for Injunctive Relief

In *Int'l Bus. Mach. Corp. v. Evans*, 265 Ga. 215, 215 (1995)("*IBM*"), IBM sought to enjoin the Department of Administrative Services ("DOAS") and its Commissioner, David Evans, from awarding a contract for a computer system to another company. IBM alleged that DOAS violated the terms of its own Request for Proposal for the computer system and that had DOAS followed the correct procedure, IBM would have been awarded the contract. *Id.* at 215–16. DOAS and Evans argued that IBM's suit was barred by sovereign immunity. *Id.* at 216. The Supreme Court rejected this argument, holding that the court had "long recognized an exception to sovereign immunity where a party seeks injunctive relief against the state or a public official acting outside the scope of lawful authority." *Id.* (*citing Chilivis v. Nat'l Distrib. Co.*, 239 Ga. 651, 654 (1977); *Irwin v. Crawford*, 210 Ga. 222, 224 (1953)).

The Court explained that, historically, it had sought to "avoid the harsh results sovereign immunity would impose" in various ways, such as by finding suits for injunctive relief were suits against a state official, rather than against the state itself. *Id.* In another line of cases, the Court sought to remedy the problem by finding that sovereign immunity was applicable if the challenged act was legal, but inapplicable if the challenged act was illegal. *Id.* (*citing Evans v. Just Open Gov't*, 242 Ga. 834, 84344 (1979)). In fact, the Court cited Justice Hill's concurring opinion in *Just Open Gov't* which found that the holding in that case that the suit was barred by sovereign immunity "was dicta because it depended upon the analysis that officials had not violated any laws[.]" *Id.*

The Court found that these prior holdings were based on the premise that the state "cannot cloak itself in the mantle of sovereign immunity when an injured party seeks to enjoin an illegal action." *Id.* The Court, however, explicitly rejected its prior approaches: "the use of such legal fictions and circular reasoning has contributed greatly to the confusion that exists regarding the proper application of sovereign immunity." *Id.* Rather, the Court determined that "[r]ecognizing a suit for injunctive relief to restrain an illegal act as an *exception* to sovereign immunity will permit a more logical analysis." *Id.* (emphasis added).

Finally, another case cited by the parties demonstrates that, under *IBM*, claims for injunctive relief are not barred by the doctrine of sovereign immunity. In *Ctr. for a Sustainable Coast, Inc. v. Ga. Dep't of Natural Res.*, 319 Ga. App. 205, 209 (2012), the Court of Appeals held that a trial court erred by finding that sovereign immunity barred the plaintiff's claim for injunctive relief on the grounds that no statute expressly waived sovereign immunity as to the suit. The Court of Appeals found that the question of whether a statute permitted the claim was irrelevant because suits for injunctive relief are an exception to the doctrine of sovereign immunity. *See id.* (*quoting IBM* at 216). The Court held that the plaintiff's claim should only have been dismissed if the petition would not have entitled the plaintiff to relief "under any set of facts that could be proven in support of the plaintiff's claim."[6] 319 Ga. App. at 208–09. Because the petition "clearly allege[d]" ultra vires conduct, the trial court erred in dismissing the petition for injunctive relief. *Id.* at 209.

In the instant case, GDOT relies on Georgia's constitutional provision regarding sovereign immunity to contend that Dr. Holliday must establish a waiver of sovereign

[6] It is particularly telling that the Court of Appeals examined the plaintiff's claim under the 12(b)(6) standard. This makes it all the more clear that suits for injunctive relief do not implicate sovereign immunity issues under *IBM*. Otherwise, because sovereign immunity is an issue of subject matter jurisdiction, the Court would have applied 12(b)(1) and may have required a 12(d) hearing for a determination by the trial court whether a waiver had occurred.

immunity in order to pursue his claim for injunctive relief. However, the holding in *IBM* contradicts that argument. The Supreme Court specifically addressed the constitutional provision at issue, which was enacted through an amendment in 1991, Ga. Const. Art. I, § II, ¶ IX, and held that the amendment did not affect the longstanding exception to sovereign immunity for suits for injunctive relief. *IBM* at 217. The amendment merely affected how the state *waives* sovereign immunity. *Id.* The Court held that the 1991 amendment was "not implicated in this case because sovereign immunity has *never* applied to bar this type of action seeking injunctive relief." *Id.* "Therefore, sovereign immunity does not stand as a bar to IBM's complaint . . . ." *Id.*

The holdings in *IBM* and *Center for a Sustainable Coast* make clear that the *Dupree* analysis—which applies when the trial court must determine whether sovereign immunity has been *waived*—is inapplicable to suits for injunctive relief. The waiver analysis stems from the 1991 constitutional amendment, which, under *IBM*, is not implicated in suits for injunctive relief. The 1991 amendment simply does not apply to such suits. Moreover, examining suits for injunctive relief under the *Dupree* framework would entail precisely the same analysis used in cases such as *Just Open Government* that the *IBM* Court explicitly rejected. In *IBM*, the Court held that it would no longer "scrutinize[] the challenged act and if the act is legal, [find] sovereign immunity applies" and that, if illegal, sovereign immunity does not bar the suit. *See IBM* at 216. The parties in the instant case have contended that this Court must make a determination, as the finder of fact, whether or not GDOT has acted arbitrarily and capriciously and that sovereign immunity has been "waived" only if it has. This would

directly contravene the holding in *IBM* that such confusing methods are no longer to be employed.[7] *See id.*

Under *IBM*, the question of whether GDOT has acted arbitrarily and capriciously, thus entitling Dr. Holliday to the relief he seeks, is a matter related to whether injunctive relief is warranted. It is *not* germane to the issue of whether Dr. Holliday may pursue his suit, or whether the suit is barred by sovereign immunity. The *IBM* Court explained that the trial court's power to interfere with the state's authority is limited and that the "burden on the party seeking to challenge a decision of the state or one of its officials is a heavy one." *IBM* at 217. However, the Court's holding makes clear that while the trial court's authority to *grant* injunctive relief is limited, its authority to *hear* suits for injunctive relief is not curtailed by the doctrine of sovereign immunity. *See id.* ("Therefore, sovereign immunity *does not stand as a bar* to IBM's complaint, and injunctive relief *may be granted if* DOAS acted without lawful authority and beyond the scope of its official power in the manner in which it evaluated IBM's proposal.")(emphasis added).

III. RULING

A. GDOT's Motion to Dismiss

As the analysis above demonstrates, sovereign immunity is simply inapplicable to the instant case and, thus, the Court's subject matter jurisdiction is not in doubt. Therefore, GDOT's Motion to Dismiss on those grounds is **DENIED**. As to GDOT's 12(b)(6) Motion to

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[7] Another problem with the use of the "waiver" terminology with respect to suits for injunctive relief is that the Constitution explicitly provides that the exclusive manner in which sovereign immunity may be waived is by an act of the General Assembly specifically providing for waiver. Ga. Const. Art. I, § II, ¶ IX. Both parties agree that Plaintiff can point to no statute which specifically provides for a waiver of sovereign immunity in Plaintiff's case. Yet, both parties contend that Plaintiff may somehow establish that GDOT has "waived" sovereign immunity if Plaintiff can establish that GDOT has acted arbitrarily and capriciously. Under Georgia's Constitution, it would be improper for the Court to find a "waiver" on any basis other than a statute. Nevertheless, the case law makes clear that the Court need not even reach the question of whether a statute provides for waiver because sovereign immunity is not at issue in cases such as Plaintiff's.

Dismiss on the grounds that Dr. Holliday's claims are based on "alleged future violations of state and federal environmental laws," GDOT's Motion is also **DENIED**. GDOT's characterization of Dr. Holliday's *pro se* Complaint as alleging merely "future violations" is unavailing upon a fair review of the Complaint. The Complaint sufficiently alleges that GDOT has acted arbitrarily and capriciously in using the methodology it has chosen to justify the Forest Hill Road Project. *See* Pl.'s Compl. 1 (alleging that "[t]he methodology used by GDOT to project traffic volumes to justify this particular road design is . . . arbitrary and capricious . . . ." and that "GDOT's plan, if implemented, would result in an Unsafe [sic] road (hazard to public safety) [and] negative impact to a U.S. waterway . . . .").

At the hearing and in its closing argument brief, GDOT has argued that Dr. Holliday's Complaint is essentially a challenge under the federal National Environmental Policy Act of 1969 (NEPA), and that Dr. Holliday cannot proceed with this suit until he has exhausted his administrative remedies before the Federal Highway Administration. Although GDOT has cited several authorities for the proposition that challenges to NEPA must be brought under the federal Administrative Procedure Act, and that GDOT is not subject to the federal APA, it has cited no case law suggesting that the Court must construe Dr. Holliday's Complaint as a challenge to NEPA and the actions of the Federal Highway Administration. Rather, Georgia law is clear that Georgia citizens are entitled to seek injunctive relief against the state and its officials to prevent them from taking actions outside the scope of their authority. *See Int'l Bus. Mach. Corp. v. Evans*, 265 Ga. 215, 215 (1995). Thus, GDOT's challenge on the grounds that Dr. Holliday has failed to exhaust administrative remedies is **DENIED**.

Finally, in its closing argument brief, GDOT raises for the first time the argument that Dr. Holliday's claim is moot because his Complaint sought to enjoin GDOT from letting the

contract for the Forest Hill Road project, and that this has already taken place. Initially, the argument that Dr. Holliday's Complaint should be dismissed as moot because GDOT has *already done* the act that Dr. Holliday sought to enjoin on the grounds that it is arbitrary and capricious strikes the Court as somewhat incongruous. Moreover, although the Complaint refers several times to "letting the contract," it is clear that Dr. Holliday's primary goal is to prevent GDOT from undertaking the Forest Hill Road project.[8] Rather, Dr. Holliday sought to enjoin letting the contract to prevent the Forest Hill Road project from moving forward. Although the contract has already been let, Dr. Holliday's Complaint is not moot because the harm he seeks to prevent has not yet occurred. Therefore, GDOT's argument that the Complaint should be dismissed as moot is **DENIED**.

B. PLAINTIFF'S CLAIM FOR INTERLOCUTORY INJUNCTION

The Court may grant an interlocutory injunction "to prevent irreparable damage to one of the parties and to maintain the status quo until a final determination is made" if there is "some vital necessity for the injunction so that one of the parties will not be damaged and left without an adequate remedy." *Prince v. Empire Land Co.*, 218 Ga. 80, 85 (1962). The Court must balance the equities of the parties, *see, e.g.*, *Outdoor Adver. Ass'n, Inc. v. Garden Club of Ga., Inc.*, 272 Ga. 146, 147 (2000), and may consider the merits of the case and the likelihood that a plaintiff will prevail in determining where the equities lie, *Lee v. Environ. Pest & Termite Control, Inc.*, 271 Ga. 371, 373 (1999). "If the trial court determines that the law and facts are so adverse to a plaintiff's position that a final order in his favor is unlikely, it

[8] For instance, this is not, like *IBM*, a case where it is alleged that the process used to let the contract was faulty. There, IBM was not alleging that the decision to acquire a computer system, which the purpose of letting the contract, was outside the authority of DOAS or made arbitrarily and capriciously. Rather, the *contract itself* was challenged as being entered into outside the scope of DOAS's authority.

may be justified in denying the temporary injunction because of the inconvenience and harm to the defendant if the injunction were granted." *Id.*

As the Court noted at the April 19 hearing, Plaintiff has been able to present little evidence that GDOT's actions were arbitrary or capricious; however, the Court had imposed an abbreviated discovery schedule in order to determine the matter of subject matter jurisdiction as expeditiously as possible. At this juncture, it appears that the primary basis of Plaintiff's argument is that Plaintiff's expert on road safety and design disagrees with GDOT's plan for Forest Hill Road and the data GDOT has relied on to support its plan. Nevertheless, the Court acknowledges that Plaintiff has contended that GDOT has not, thus far, satisfied its discovery obligations and has failed to produce witnesses on critical topics. GDOT has filed a Motion for Protective Order and contends it has met or exceeded its discovery obligations; clearly, the State appears to be actively seeking shelter from Plaintiff's requests.

Furthermore, there is substantial evidence that, should the Court refuse to grant an interlocutory injunction, the status quo will be immediately and irreparably disrupted. Orange construction barrels have already been placed along the section of Forest Hill Road from Wimbish Road to Northside Drive. GDOT filed a letter to the Court on April 2, 2013, asking the Court to reconsider and vacate its March 22, 2013, Order temporarily restraining the project in order to permit construction on Forest Hill Road to proceed. And, the first phase of the project, according to the testimony of GDOT representatives, is clearing trees and other vegetation from the area. Plaintiff's opposition to the plan rests, in large part, on the fact that

the tree canopy over Forest Hill Road is effectively irreplaceable.[9] This is not a loss for which Plaintiff would have an adequate remedy at law.

While GDOT contends that it faces a potential financial loss due to the fact that it has already let the contract for the Forest Hill Road project. However, particularly given GDOT's contention Dr. Holliday's Complaint is now "moot" because GDOT has already let the contract, its complaint now that it will suffer damages if an injunction is issued is less compelling. GDOT evidently chose to enter into the contract despite pending litigation challenging the project.[10]

The evidence presented at the hearing established that, unless the Court grants injunctive relief, GDOT and its contractors intend to pursue the Forest Hill Road project immediately and in earnest. Should that occur, the relief Plaintiff seeks will be permanently denied him regardless of the ultimate merits of the case. The Court is unwilling and unable at this time to conclude that the likelihood of Plaintiff's success on the merits is so low that denial of injunctive relief is warranted in the face of the irreparable harm that will occur. Particularly given the constraints of the compressed discovery period prior to the initial hearing, the Court is not able to say with confidence that Plaintiff's allegations are without merit. Because Plaintiff has no adequate remedy at law, his request for an interlocutory injunction is **GRANTED** so that the status quo may be preserved between now and the eventual trial on the merits of this case.

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[9] Although trees certainly could be planted and the canopy may grow back, this will take many, many years to occur.

[10] In its closing argument brief, GDOT contends that the contract was let "on or about December 14, 2012." Dr. Holliday filed his Complaint on December 14, 2012. It is, therefore, conceivable that GDOT was unaware of the lawsuit at the time it let the contract. Nevertheless, GDOT notes in its closing brief that the contract was not actually executed until January 2013.

The Court is mindful of the potential drain on taxpayer funds and the potential loss of federal funds for this project due to the pending litigation. This matter being in need of expedited disposition, the Court finds that the discovery period in this case should be accelerated in order to balance the substantial competing interests in this case. Therefore, it is hereby **ORDERED** that the parties complete discovery no later than July 31, 2013, and that this matter be set down for trial as shortly thereafter as the schedules of the parties and the Court permit.

SO ORDERED, this 13 day of May, 2013.

Edgar W. Ennis, Jr.
Judge, Superior Courts of Georgia
Macon Judicial Circuit