



IN THE CIRCUIT COURT OF MONTGOMERY COUN

THOMAS, MEANS, GILLIS & SEAY,)
 P.C.,)
)
 Plaintiff,)
)
 v.)
)
 THOMAS L. WHITE, JR.,)
)
 Defendant.)

CV-10-900394

ORDER
 DENYING DEFENDANT’S MOTION TO DISMISS

This matter comes before the Court upon Defendant Thomas L. White, Jr.’s Motion to Dismiss. This matter originates from the Paragon Source matter, Holmes v. Department of Finance, CV-09-901275 (Montgomery Co., Ala. 2009) in which the Contract Review Permanent Legislative Oversight Committee of the Alabama Legislature (hereinafter “the Committee”) filed suit against the Governor and Executive Branch to prevent execution of a no-bid contract. The undersigned presided over the Paragon Source matter and granted the defendants’ Motion to Dismiss on December 23, 2009. This matter specially arises from the dispute over the execution of payment to the Legislature’s attorney; after the Legislature made the appropriation for attorney’s fees, the Executive Branch refused to issue payment for the plaintiff law firm’s litigation efforts against the Executive Branch.

The plaintiff filed its Complaint and First Amended Complaint seeking mandamus relief and the defendant moves to dismiss both. The Court, upon considering the pleadings, motions, and oral arguments of August 17, 2010, deems that the plaintiff could prove that the Executive Branch’s actions offend traditional notions of separation of powers and, accordingly, Defendant’s motion is due to be denied.

This Court is charged with the Sisyphean task of interpreting a constitution with the prolixity of a legal code. Even the highest court of this state, however, must be mindful that it is a constitution upon which we expound and not a legal code. The matter before this Court requires delicate consideration of the political philosophies which bequeathed our traditional notions of separation of powers between co-equal branches of government. Much of the authority before the Court is archaic and equally applicable to the modern Constitution of Alabama as early interpretations of the Articles of the Confederation are to the United States Constitution.

This, the least dangerous branch of the government, must now defend our constitution against the greatest threat to state sovereignty. History has proven that the King can, indeed, do immense wrong and the omnipotence of The Supreme Executive Power, The Governor of the State of Alabama, The Chief Magistrate must now yield to its constitutional bounds. This

Court's honorable role is to exercise its mere judgment whether to deploy constitutional safeguards against the force and will of Executive encroachment into the Legislative realm. True to that purpose, this Court must deny the defendant's motion to dismiss for the prosperity of our constitution.

I. STANDARD OF REVIEW

The appropriate standard of review for a Rule 12(b)(6) motion is “whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [it] to relief.” Ex parte Troy Univ., 961 So. 2d 105, 180 (Ala. 2006) (quoting Knox v. W. World Ins. Co., 893 So.2d 321, 322 (Ala. 2004)). This Court shall “not consider whether the plaintiff will ultimately prevail, but only whether [it] may possibly prevail.” Id. Further, “a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” Id.

II. ANALYSIS

A. The Legislature Acted with Authority

The defendant claims that the Committee did not have the authority to enter into a contract with the plaintiff nor did it have the authority to bring suit against the Governor. The true issues seem to be (1) does the Legislature have the authority to enter into a contract and (2) does the legislature have the authority to hire legal counsel. This Court answers both in the affirmative and finds that the authority derives from the Legislature's plenary powers.

i. Authority to Enter into a Contract

The ultimate question before this Court is whether the Legislature—particularly one chamber—has the authority to enter into a binding contract. While the Legislature may act without interference from the two other branches of government, a legislative action repugnant to the Alabama Constitution is void. A legislative action must be expressly prohibited by the Constitution to inhibit the legislature from exercising such a power. The Alabama Constitution “confers on the legislature plenary power to legislate except as restricted by the Constitution, State and Federal.” Schoenvogel v. Venator Group Retail, Inc., 895 So. 2d 225, 232 (Ala. 2004). Because the Legislature's power is plenary, powers not enumerated in the Alabama Constitution are not presumed to be prohibited.¹ No provision within the Alabama Constitution exists to

¹ This is within the traditional conception of government with a tripartite division of powers. Political philosophers have observed that the legislature may possess more equality in a government of co-equal powers. James Madison precisely observed:

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is

prohibit the Legislature from entering into a contract. “There are no limits to the legislative power . . . save those written into its constitution. All that the legislature is not forbidden to do by the organic law, state or federal it has full power to do.” County Bd. of Educ. v. Taxpayers & Citizens, 163 So. 2d 629, 634 (Ala. 1964). Without an express prohibition, and one is not before the Court, the contract at issue was entered into with proper authority derived from the Legislature’s plenary power. This Court finds, accordingly, that the Legislature has the authority to enter into a contract and the plaintiff could prove a set of circumstances that would entitle it to relief. The defendant’s motion is due to be denied on this basis.

ii. Authority to Hire Legal Counsel

The defendant argues that the plaintiff’s claim is due to be rejected under Lyons v. Norris, 829 So. 2d 748 (Ala. 2002), because it is based on expenses not permitted by law. Lyons, however, is distinguishable from the instant matter because the authority permitting the expense in Lyons derived its authority from statute. In the dispute before the Court, the plaintiff’s right to payment is contractual and derives from the plenary power of the Legislature to freely contract. Statutory interpretation requires this Court to prohibit the exercise of any power not expressly delegated. The power of the Legislature to hire an attorney derives not from statute but from its plenary power. The authority to hire an attorney, therefore, must not be expressly forbidden by the Alabama Constitution. Defense counsel has not submitted any such prohibition to the Court. Therefore, this Court is of the opinion that the Committee, acting on behalf of both chambers of the Legislature, acted within its plenary power in hiring the plaintiff.²

In reaching this conclusion, this Court is cognizant of the reasoning in Opinion of the Justices No. 380, 892 So. 2d 332 (Ala. 2004). In Opinion of the Justices No. 380, the Alabama Supreme Court commented that a bill authorizing unicameral approval or veto of a “contract entered into by the executive branch for the purpose of carrying out its executive function. . . . would impermissibly interfere with the core executive power and, therefore, would be unconstitutional.” Id. at 337–38. While Opinion of the Justices No. 380 holds that a single house veto would be repugnant to the Constitutional requirement of separation of powers, it is well within the province of checks and balances—and in accord with notions of separation of powers—for the legislature, bicameral through a joint committee, to seek a Court’s equitable jurisdiction to preclude the executive from executing a contract contrary to State law and policy. Accord The Federalist No. 48 (James Madison) (The notion of separation of powers “does not require that the legislative, executive, and judiciary departments should be wholly unconnected

not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere.

The Federalist No. 48 (James Madison); The Federalist No. 51 (James Madison) (“In republican government, the legislative authority necessarily predominates.”).

² Notably, in Riley v. J. Fiscal Comm. of the Ala. Leg., 26 So. 3d 1150 (Ala. 2009), the Executive Branch did not challenge the authority of a legislative committee to hire an attorney for litigation.

with each other.”). Although the legislature may not veto a contract, the judiciary may enjoin or void the execution of a contract.

The Defendant in oral arguments abundantly misconstrued this Court’s prior opinion in Holmes v. Department of Finance (issued December 23, 2009) to hold that the Committee may never sue to enjoin or void a contract. However, the outcome of Holmes may have been different had the Committee filed for a temporary restraining order within the forty-five day review period. In Holmes, the Paragon Source contract was submitted to the committee for review, the contract was stamped “reviewed,” the contract was signed by the Governor, and then the statutory forty-five day review period lapsed before the Committee filed suit. If this Court had allowed the Committee to seek judicial relief voiding a contract executed by the Governor after the forty-five day review period, it would have raised serious separation of powers concerns. The undersigned, having presided over and issued the opinion in Holmes, is adamant in its disagreement with the defendant’s contention that the Committee lacked authority to hire counsel to commence litigation.³ If the action had been commenced within the statutory forty-five day review period, the Committee may have exercised the Legislature’s plenary powers to do an act that did not conflict with the Alabama Constitution. The Court emphasizes that the Code of Alabama was the authority which substantiated the Court’s prior Order on the Committee’s standing to bring the prior suit, however, this Court’s decision allowing this action to proceed to a hearing as to payment pursuant to a contract is based upon interpretation of the Alabama Constitution.

This Court finds, accordingly, that the Legislature has the authority to enter into a contract with legal counsel and the plaintiff could prove a set of circumstances that would entitle it to relief. The defendant’s motion is due to be denied on this basis.

B. The Comptroller’s Actions Were Not within His Discretion

The defendant contends that without a showing that the Committee had authority to commence the lawsuit and without a secondary showing that the litigation expenses were approved in advance, the Comptroller may not issue a voucher. This Court disagrees.

The Comptroller’s statutory functions and duties are: “To preaudit and determine the correctness and legality of every claim and account submitted for the issuance of a warrant and to determine that funds have been appropriated and allotted and are then available in the State Treasury for the payment of such claim or account before any warrant on the State Treasury shall be issued.” Ala. Code § 41-4-50(4) (2000). The Alabama Supreme Court has streamlined the

³ The Court’s sentiment is more adequately expressed by Chief Justice Marshall: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” McCulloch v. Maryland, 17 U.S. 316, 421 (1819). In the matter which led to this litigation, the Executive Branch entered into a no-bid contract and the Committee filed a lawsuit to enjoin and void the contract. This is precisely the type of legislative action that Marshall thought conducive toward the common good of the sovereign people.

statutory language to limit the comptroller to only make a determination that “the claim is funded, correct, and legal.” *Lyons v. Norris*, 829 So. 2d 748, 753 (Ala. 2002). While the state legislature vests in the comptroller very limited authority to make an “administrative determination” whether the “proposed expenditure of state funds is authorized by law,” *id.* at 753–54, “[w]here there has been a funded, correct, and lawful appropriation, *the comptroller has no authority to disallow payment*,” *id.* at 754 (emphasis added).

i. The Comptroller Is without Authority to Exercise Discretion over the Legislature

The Alabama Supreme Court has promulgated that “The Comptroller has no authority to supervise the operation of *other state officers* or *state agencies* . . . Neither does he have the power to veto their action in the performance of their legal duties,” *Lyons v. Norris*, 829 So. 2d at 753. This Court deems that traditional notions of separation of powers also obstruct the Comptroller (and, thus, the Executive Branch) from assuming the authority to supervise the operation of other branches of government (i.e., the state legislature and its individual chambers) and officers of the two other branches.

Indeed, the legislature has granted the comptroller limited authority to make administrative determinations whether the law authorizes proposed expenditures; such determinations simply serve as an operational check and balance within the Executive Branch. Our government’s division of powers creates within the Legislative Branch a bicameral structure which consists of numerous representatives in each chamber to serve as a check and balance on force and will in the Legislature;⁴ the Executive Branch, however, consists only of a chief magistrate restrained in his omnipotence solely by the constitution. By establishing an officer with authority to make administrative decisions over state officers and state agencies—both of which exist only in the Executive Branch—the Comptroller serves as a check and balance upon the will of the Executive⁵.

The Comptroller’s only permissible course of action when he disagrees with an expenditure is to seek an opinion of the Attorney General as to the validity of the expenditure or “to refuse to be a party to a disbursement of public funds which he considers illegal until there has been a judicial determination of the validity of the proposed expenditure.” *Lyons v. Norris*, 829 So. 2d at 754. The pleadings before the Court indicate that White did not take either of these actions. White’s refusal to be a party to disbursement is impermissible because he did not first ask for an opinion from the Attorney General. Secondly, since White did not follow protocol, his action is effectively a veto upon the Legislative prerogative and this Court is unyielding in its opinion that the Comptroller is without the authority to supervise and veto the Legislature.

⁴ Cf. *The Federalist No. 51* (James Madison) (The proper check and balance “is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.”).

⁵ Whereas a numerous Legislature is the proper check on legislative will, plurality in the Executive serves as a similar check. See generally *The Federalist No. 70* (Alexander Hamilton) (discussing plurality in the Executive).

This lack of authority to exercise discretion over the Legislature supports the plaintiff's contention that mandamus is appropriate. The Court, therefore, deems that it is possible for the plaintiff to prove a set of facts which would entitle it to relief and, thus, the defendant's motion is due to be denied on this basis.

ii. *The Comptroller Is without Authority to Make a Legal Judgment*

The Comptroller, under its empowering statute, may only make a legal determination that the claim submitted for issuance of a warrant is authorized by law. See Ala. Code § 41-4-50(4) (2000); *Lyons v. Norris*, 829 So. 2d 753–54. The comptroller's authority to determine whether the appropriation is legal is not a charge to make a determination whether the executing agency had the authority to do an act, but rather, whether the expenditure is authorized by state law. In the instant matter, White refused to issue a warrant because his office could not "find support in the law for the legal authority of [the Committee] to cause a lawsuit to be brought in its own name" (Pl.'s Ex. 3).

This Court deems that White acted beyond the scope of his authority to determine the legality of the claim. As noted *supra*, an opinion as to the legality must come from the Attorney General. The law authorizes the plaintiff's claim because payment is pursuant to service performed in satisfaction of a state contract with the plaintiff. This Court has discussed, *supra*, the authority of the Legislature to enter into a contract. The defendant's inquiry should have ended there. The undersigned previously decided the question of whether the Committee, under the facts presented, had standing to bring the lawsuit in the *Holmes* matter and the Comptroller should not have revisited or expounded upon that reasoning. The undersigned stresses that the opinion issued was based upon the facts that were presented in that specific matter; had the facts been different, the outcome may have been different.

The Comptroller's lack of authority to make a legal judgment supports the plaintiff's contention that mandamus is appropriate. The Comptroller imprudently denied the plaintiff's claim without an effective and bona fide supporting legal opinion. The Court, therefore, deems that it is possible for the plaintiff to prove a set of facts which would entitle it to relief and, thus, the defendant's motion is due to be denied on this basis.

iii. *White Already Made His Judgment*

The question whether White is acting within his discretion—and, thus, entitled to immunity from a mandamus action—is one which this Court grants the utmost gravity. Even if the Alabama Constitution does not bar the Comptroller from exercising this duty over the co-equal legislative branch, White may have waived his right to disallow payment when he made the original determination that the claim was funded, correct, and legal and, pursuant to that determination, issued the first installation payment. White, therefore, may be estopped from making a new determination on his judgment as to the legality of the claim, which was already determined to be legal. Once the discretionary aspect of the comptroller's duty has been exercised, the residual act is merely ministerial. The pleadings before the Court indicate that the claim for payment could be legal. The Court, therefore, deems that it is possible for the plaintiff

to prove a set of facts which would entitle it to relief and, thus, the defendant's motion is due to be denied on this basis.

iv. The Comptroller's Duties are Merely Ministerial

This Court believes it is possible for the plaintiff to show that White's duties in this matter are merely ministerial. Discretionary functions have been defined by the Alabama Supreme Court as functions which are "planning tasks" and involve "policy-level decision-making." Ex parte Cranman, 792 So. 2d 392, 403 (Ala. 2000). The term "ministerial functions," on the other hand, refers to conduct "characterized by operational tasks and minor decision-making." Id. at 404. Functions are ministerial even "in instances where the actor, even though he may be making a complex decision beyond the range of the lay person, is not involved at the time in decision-making that directly relates to the exercise of a governmental-policy judgment." Id.

The only instance in which the Comptroller may exercise his judgment is in determining whether a proposed expenditure is legal; and using the term "judgment" to describe that function may very well be a misnomer as the function requires no individual thought greater than administering a checklist. The defendant's brief, perchance, best illustrates this point: "More important is that Ala. Code § 41-4-50(4) calls for the judgment of the Comptroller for approval before warrant for payment is available, like the accounts to be approved by the Governor for the issuance of warrants under the statute construed in State ex rel. Daly v. Henderson." (Def.'s Reply Mem. ¶ 3.) The defendant further argues that the Comptroller's statutory functions and duties imply "the need for judgment—at least for the kind of "extraordinary expenditures" that the attorney litigation invoices are." (Def.'s Reply Mem. ¶ 3.)

This Court is not persuaded. Every case in which the defendant cites to support its proposition that attorney's fees must have advance approval derives from an express statutory provision. In State ex rel. Daly v. Henderson, the Comptroller's "judgment" as to whether the expenditure was legal was a function to ensure that the claimant satisfied the condition precedent that the expense be approved by the governor. Lyons v. Norris presents a situation similar to State ex rel. Daly where the Comptroller's "judgment" was merely determining whether conditions precedent to payment, as expressly set out in statute, were met. Lyons v. Norris, 829 So. 2d at 754. While this Court maintains that the determination made by the Comptroller exceeded his statutory authority, this Court also deems that the "judgment" the Comptroller is authorized to exercise is merely a ministerial duty.

In the instant action, the governmental-policy judgment was made by the Legislative Branch and, thus, White's administrative determination is classified, at best, as minor decision-making. White's lack of actual judgment and refusal to perform a ministerial function demonstrates the propriety of a mandamus petition. The Court, therefore, deems that it is possible for the plaintiff to prove a set of facts which would entitle it to relief and, thus, the defendant's motion is due to be denied on this basis.

C. Plaintiff's Claim Was Denied in Bad Faith and Arbitrarily

The plaintiff claims that “White’s failure and refusal to pay the contract amount owed to Plaintiff was made in bad faith [and] was a willful action contrary to State law.” (1st Am. Compl. ¶ 18). This Court believes, given the current political climate, that the plaintiff could prove a set of circumstances that would entitle it to relief on this basis. For example, in oral arguments, the Plaintiff supports its allegation in its Complaint with:

The Comptroller operated in the normal way he did in the beginning. They made the first payment. No question. It was only when issues started arising in various newspapers about this contract that all of a sudden . . . if we’re allowed to go forward, we expect the evidence to show [the Governor’s office demanded to] “stop payment to this black law firm.” And we have a deposition, several of them that we want to take that we think we’re going to be able to prove that. So, bang, they stopped [payment].

(Hr’g Tr. 19:4–13, Aug. 17, 2010). The plaintiff has shown a set of circumstances which would implicate the Governor’s office of an act beyond the bounds of decency in any civilized society: “Alvin Holmes was arguing that the Comptroller told somebody . . . on the Oversight Committee that the Governor’s office called and said ‘Stop any more payments to that black law firm.’” (Hr’g Tr. 33:13–17, Aug. 17, 2010). This Court deems that, with this showing, the plaintiff has met its burden at the Motion to Dismiss stage.

While the Court must make the finding that the allegations in the plaintiff’s Complaint show a set of circumstances which would entitle it to relief, it is the fervent hope of the Court that the honor and integrity of this State remain unsoiled by these allegations.

III. CONCLUSION

The days of political retaliation and institutional racism in Alabama should remain only on the silver screens of Hollywood. The Governor of this Great State should treat all races and ethnicities equally be they majority or minority, favored or disfavored. Although this Court truly hopes these allegations prove to be false, only depositions and inquiry into the facts will show the truth. The pleadings before the Court indicate that the plaintiff had a contract with the Committee that appeared valid pursuant to a legitimate act of the Legislature. A citizen of this state should always remain confident that it could take a contract with all state formalities and ornamentations to the treasury. A citizen who, pursuant to a state contract, gives a day’s work should be paid for a day’s work. Our system of checks and balances sometimes requires that government outsiders be employed to ensure fair dealings within our government. Legitimate inquiries into the propriety of dealings within the Governor’s office must be met with transparency and not silenced through non-payment for honest work. Those who persist to ensure fair dealings within our government in spite of retaliation are the true heroes of our Constitution.

It is no secret that the Great Recession has plagued our State and forced our citizens to make prudent fiscal decisions and cut unnecessary expenses. Alabamians have the right to expect that our state government abide by the same financial frugality. The plaintiff in this case

has made a significant threshold showing: it appears that the plaintiff could prove a set of circumstances that would entitle it to relief. That is, it appears that Thomas, Means, Gillis & Seay, P.C. could prove it is entitled to be issued payment by the Executive Branch for its services in the Paragon Source matter. Prolonged litigation is expensive. The Executive Branch will likely spend more money in employing Wallace, Jordan, Ratliff & Brandt, L.L.C. to defend this action than the amount to which the plaintiff claims it is entitled. Every day the Executive Branch continues to withhold payment, the plaintiff would be entitled to interest on the amount of \$78,355.05 pursuant to Ala. Code § 41-16-3(a) and has requested attorney's fees, if it proves it is entitled to mandamus relief. The Comptroller and the Governor should carefully consider whether the political battle is worth the expenditure of a considerable amount of taxpayer dollars to prolong this litigation.

In the spirit of economic frugality, the Court shall limit depositions to four per party to be completed by September 20, 2010. Further, a hearing is hereby SET FOR September 30, 2010 at the Phelps-Price Justice Center in Montgomery, Alabama.

This Court is committed to giving both parties a fair and impartial hearing. Should the defense prove that the plaintiff is not entitled to relief, this Court will so rule. Should the plaintiff prove that it is entitled to mandamus relief, this Court will so rule. Regardless, this matter shall be quickly quelled.

This Court hereby finds that it appears the plaintiff could prove a set of circumstances that would entitle it to mandamus relief. The defendant's Motion to Dismiss, therefore, is due to be DENIED.

It is hereby ORDERED, ADJUDGED, and DECREED that Defendant Thomas L. White, Jr.'s Motion to Dismiss is hereby DENIED.

DONE and ORDERED this the 30th day of August, 2010.


Tom King, Jr.
Circuit Judge