

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CITY OF COLLEGE PARK, GEORGIA, :

Plaintiff, :

vs. :

CLAYTON COUNTY, GEORGIA; :
MACK II, INCORPORATED: :
GENERAL WHOLESALE COMPANY; :
JEFFREY E. TURNER; RAMONA :
THURMAN BIVINS and PATRICK :
EJIKE, :

Defendants. :

CIVIL ACTION
FILE NO. 2015-CV-257958

**ORDER GRANTING DEFENDANT CLAYTON COUNTY, GEORGIA'S
SECOND MOTION FOR JUDGMENT ON THE PLEADINGS**

This case came before the Court on Friday, June 1, 2018 for a hearing on Defendant Clayton County, Georgia's Second Motion for Judgment on the Pleadings. In its Motion, the County addressed those issues raised by the Georgia Supreme Court on remand to this Court regarding the applicability of sovereign immunity in suits between local governments. Clayton County v. City of College Park, 301 Ga. 653 (2017). Having read and considered the briefs of the parties¹ and after hearing the argument of counsel, Defendant Clayton County, Georgia's Second Motion for Judgment on the Pleadings is hereby GRANTED.

¹On June 1, 2018, this Court entered an Order for Interpleader of Excise Taxes, requiring Taxpayer Defendants, Mack II, Incorporated and General Wholesale Company to pay all excise taxes into the registry of the court and dismissing Mack II and General Wholesale Company from the action.

This case involves issues related to the allocation of excise revenues from the distribution and sale, both wholesale and by the drink, of alcoholic beverages at the Hartsfield-Jackson Atlanta International Airport. The City of College Park claims that the alcohol taxes from wholesalers and retail vendors at the Airport have not been properly collected and allocated as between Clayton County and the City and that, as a result, the City has not been paid amounts allegedly due under O.C.G.A. § 3-8-1(e). The City of College Park filed suit against Clayton County seeking injunctive relief, declaratory judgment, equitable accounting, unjust enrichment, mandamus, inverse condemnation, and a recovery of damages and attorney's fees and costs from the County.

On June 23, 2015, Clayton County filed a Motion for Judgment on the Pleadings based, in part, on the County's sovereign immunity from suit. On June 26, 2015, the City filed a Motion for Partial Summary Judgment. The Superior Court denied Clayton County's Motion for Judgment on the Pleadings and granted College Park's Motion for Partial Summary Judgment on October 28, 2015. Clayton County appealed the ruling to the Supreme Court of Georgia and on June 30, 2017, the Supreme Court issued its opinion in this case. The Supreme Court found that the City failed to meet its burden to establish a waiver of sovereign immunity for its claims. Clayton County v. City of College Park at 656. However, the Supreme Court questioned the applicability of sovereign immunity in lawsuits between governmental entities and remanded the case to this Court for consideration of the issues. The County filed its Second Motion for Judgment on the Pleadings addressing the Supreme Court's inquiry in the context of the facts of this case and contending that sovereign immunity bars the City of College Park's claims against Clayton County.

The doctrine of sovereign immunity has been a part of the law of Georgia since the adoption of the common law in 1784. Gilbert v. Richardson, 264 Ga. 744, 745, 452 S.E. 2d 476,

478 (1994). The principle was initially given Constitutional status in 1974 by an amendment to the 1945 Georgia Constitution. That status remained in the 1976 and 1983 Constitutions. Gilbert, supra, n. 2,3. In 1991, the Georgia Constitution was amended to authorize the State Tort Claims Act. That amendment provided that sovereign immunity was extended to the state and all of its departments and agencies. Ga. Const. Of 1983, Art. I, Sec. II, Par. IX (e).² In construing the 1991 amendment, the Supreme Court in Gilbert followed its prior decisions in Toombs County v. O'Neal, 254 Ga. 390, 391, 330 S.E. 2d 95 (1982) and Nelson v. Spalding County, 249 Ga. 334, 290 S.E. 2d 915 (1982) and expressly found that constitutional sovereign immunity extended to the counties of this state.

The vitality of a county's sovereign immunity remains a fixture in the law today. See, e.g. Marshall v. McIntosh County, 327 Ga. App. 416, 759 S.E. 2d 269 (2014); Effingham v. Rhodes, 307 Ga. App. 504, 705 S.E. 2d 856 (2010); Kordares v. Cowdett County, 220 Ga. App. 848, 470 S.E. 2d 479 (1996). In recent years, the Supreme Court has decided a number of cases involving sovereign immunity. In Department of Natural Resources v. Center for a Sustainable Coast, Inc., the Supreme Court held that sovereign immunity barred suits for injunctive relief, in the absence of a legislative act waiving sovereign immunity and authorizing such suits. 294 Ga. 593, 599-600 (2014). In S.J.N. Properties v. Fulton County Board of Assessors, 296 Ga. 793, 770 S.E.2d 832 (2015), the Supreme Court found that claims for injunctive relief in that case were barred by the county's sovereign immunity and also clearly indicated that the county's sovereign immunity

²The 1991 Amendment provides: "Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver."

would likewise bar an action for declaratory judgment in the absence of specific legislative waiver. See also, Olvera v. Regents of the University System of Georgia, 298 Ga. 425, 427-8, 782 S.E. 2d 436 (2016) (Declaratory judgment action barred by sovereign immunity). Prior to its decision in this case, the Supreme Court decided Lathrop v. Deal, holding that sovereign immunity bars claims against the State involving alleged constitutional violations, other than takings claims. 301 Ga. 408 (2017).

Counties and cities each hold a very different legal status under Georgia law. Counties are established by the Georgia Constitution and are subdivisions of the State. Ga. Const. Art. 9, §1, ¶ I; Ga. Const. Art. 9, §1, ¶ II; GA. CONST. Art. § I, 2, ¶ IX.

'Counties are subdivisions of the state government to which the state parcels its duty of governing the people. Scales v. Ordinary, 41 Ga. 225; Butts County v. Jackson Banking Co., 129 Ga. 801, 60 S.E. 149, 15 L.R.A. (N.S.) 567, 121 Am. St. R. 244. They are local, legal, political subdivisions of the state, created out of its territory, and are arms of the state, created, organized, and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the state. 15 C.J. 388 (s1) A.'

Troup County Elec. Membership Corp. v. Georgia Power Co., 229 Ga. 348, 352 (1972), quoting Hines v. Etheridge, 173 Ga. 870, 875, 162 S.E. 113, 116. Alternatively, cities are established by the legislature "and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the legislature." Id.

Each entity also holds a different source and type of sovereign immunity. The Constitution affords counties sovereign immunity as subdivisions of the state. Gilbert v. Richardson, 264 Ga. 744, 745 (1995); Toombs County v. O'Neal, 254 Ga. 390, 391 (1982). The Constitution of the State of Georgia provides that "sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and

agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.” Art. I, §2, ¶ IX. On the other hand, O.C.G.A. §36-33-1 provides for the immunity afforded a city. For most purposes under Georgia law, municipal corporations have the same status, standing, and rights as individuals and corporations.

Sovereign immunity is not a mere defense to liability. Georgia Dept. Of Human Resources v. Poss, 263 Ga. 347, 348 (1993). “Instead, immunity from suit is a privilege that is subject to waiver by the State, and the waiver must be established by the party seeking to benefit from the waiver.” Id. at 348. (citing, Kelleher v. State of Ga., 187 Ga. App. 64 (1998)). In order to demonstrate a waiver of sovereign immunity, Plaintiff must show “specific statutory language providing for (1) a waiver of sovereign immunity and (2) the extent of such waiver.” Currid v. Dekalb State Court Probation Dept., 285 Ga. 184, 186 (2009)(citing, Ga. Const. of 1983, Art. I, Sec. II, Par. IX(e)). Further, the courts cannot modify or abrogate the sovereign immunity of the County. Upper Oconee Basin Water Authority v. Jackson County, 305 Ga. App. 409, 412 (2010); Sawnee Elec. Membership Corp. v. Ga. Dept. of Revenue, 279 Ga. 22, 23(2)(2005); Bonner v. Peterson, 301 Ga. App. 443, 450-451 (2009). Instead, there must be express legislative action providing for a waiver of sovereign immunity and the extent of such waiver.

The City of College Park has not shown any legislative act establishing a waiver of sovereign immunity with regard to claims filed by a city government against a county government. The City of College Park has not met its burden to establish a waiver of sovereign immunity in this case.

This Court finds that the fact that the Plaintiff is a municipal corporation does not change

the privilege of constitutional immunity held by counties and barring claims against them. In a recent decision, which the Court finds controlling here, the Supreme Court of Georgia considered sovereign immunity in the context of claims filed by a city government against a county government. City of Union Point v. Greene County, 2018 WL 1324184 (March 15, 2018). The Court found certain claims under the Service Delivery Strategy Act, O.C.G.A. § 36-70-25.1, and those for breach of contract were not barred because of an express statutory waiver of sovereign immunity. *Id.* at 3-4. However, the Court held that the other claims in the case brought by the City against the County, for which a statutory waiver of sovereign immunity did not exist, were barred by sovereign immunity. *Id.* at 4.

The Court hereby finds that the City of College Park's claims against Clayton County are barred in their entirety by sovereign immunity, excluding only the City's takings claim. The Court further rules on Plaintiff's mandamus claims against Jeffrey E. Turner, Ramona Thurman Bivins and Patrick Ejike and finds that Plaintiff's mandamus claims against said Defendants are barred by sovereign immunity.³ Defendant Clayton County's Second Motion for Judgment on the Pleadings is GRANTED.

SO ORDERED, this 12th day of June, 2018.


Hon. Henry M. Newkirk, Judge
Superior Court of Fulton County

³Plaintiff raised the issue of mandamus in its responsive brief and argued at the June 1, 2018 hearing that the Court should rule on the mandamus issue in addition to Plaintiff's other claims. Accordingly, this Order includes the Court's ruling on Plaintiff's pending mandamus claims.

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