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MAY 28 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

by: *Chencher*
Deputy Clerk

SARA LARIOS, et al.,)	
)	
Plaintiffs,)	CIVIL ACTION
)	NO. 1:03-CV-0693 (CAP)
v.)	
)	
GEORGE E. "SONNY" PERDUE,)	
et al.,)	
)	
Defendants.)	
)	

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS PERDUE, COLEMAN AND COX'S MOTION TO DISMISS COMPLAINT AGAINST THE REDISTRICTING PLAN FOR THE GEORGIA STATE SENATE OR, IN THE ALTERNATIVE, TO JOIN A PARTY PURSUANT TO FED. R.CIV. P. 12(b)(7)

COME NOW PLAINTIFFS in the above-styled case and file their Brief in Opposition to the Motion to Dismiss the Complaint Against the Redistricting Plans for the Georgia State Senate or, in the Alternative, to Join a Party, filed by Defendants Perdue, Coleman and Cox ("Movants") under Federal Rule of Civil Procedure Fed. R. Civ. P. 12(b)(7), showing the Court as follows:

I. STATEMENT OF THE CASE

On March 13, 2003, Plaintiffs filed their complaint regarding the redistricting plans for Georgia's Congressional and state legislative districts.

22

Plaintiffs named as Defendants: Governor Sonny Perdue, the Chief Executive Officer of the State of Georgia; Senator Eric Johnson and Representative Terry Coleman, the highest ranking officers elected by the Georgia Senate and House of Representatives, respectively; and Cathy Cox, the Secretary of State and executive officer charged with the responsibility of conducting elections.

In their motion to dismiss or, in the alternative, to add Lieutenant Governor Mark Taylor as a defendant, Movants argue that the Lieutenant Governor is a necessary and indispensable party and should have been named as a Defendant, rather than Senator Eric Johnson. Movants deem Plaintiffs' decision to name Senator Johnson, rather than Lieutenant Governor Taylor, a political strategy because most of the Plaintiffs are Republicans, as is Senator Johnson. Movants' Brief, p. 5.

Movants argue that the Senate portion of the Complaint must be dismissed or Lieutenant Governor Taylor must be joined under Rule 19(a) because, in their opinion, Lieutenant Governor Taylor is a necessary party. In addition, Movants ask the Court to dismiss the Senate portion of the Complaint under Rule 19(c) because Plaintiffs did not include a statement in the Complaint explaining they were not naming Lieutenant Governor Taylor, and Movants believe Plaintiffs should have done so.

Both arguments are predicated on Movants' conclusions that Lieutenant Governor Taylor is a necessary party. For the reasons set forth below, Lieutenant Governor Taylor is not a party needed for just adjudication of Plaintiffs' claims under Fed. R. Civ. P. 19(a). Therefore, Movants' motion to dismiss under Fed. R. Civ. P. 12(b)(7) for failure to join a party need for just adjudication should be denied. Likewise, Movants' motion to dismiss under Fed. R. Civ. P. 19(c) for failure to explain why Lieutenant Governor Taylor was not named should also be denied. As he is not a necessary party, his absence from the list of defendants does not require an explanation and therefore, does not warrant dismissal under Rule 19(c).

In the event that the Court concludes that Lieutenant Governor Taylor is a necessary party under Rule 19(a), the appropriate remedy is to allow Plaintiffs to add him as a defendant, not dismissal of the Senate portion of the complaint. Movants concede that he can feasibly be joined. Movants' Brief, p. 9.

II. ARGUMENT AND CITATION OF AUTHORITIES

In deciding a motion for dismissal under Rule 12(b)(7) for failure to join a party under Rule 19, the court must undertake a two-step analysis. The court must first determine whether the absent person is a person needed for just adjudication and who therefore should be joined under Rule 19(a), i.e. a necessary party. *Laker*

Airways, Inc. v. British Airways, 182 F.3d 843, 847 (11th Cir. 1999) (emphasis added). If the person should be joined under Rule 19(a), then the Rule instructs that “the court shall order that the person be made a party.” Fed. R. Civ. P. 19(a) (emphasis added).

In the second step of the analysis, the court must determine what to do if the person should be joined but cannot be; the court must decide if the person is “indispensable,” such that the case cannot, “in equity and good conscience,” proceed without the person. Fed. R. Civ. P. 19(b). Because Movants concede that there is no obstruction to adding Lieutenant Governor Taylor if the Court concludes he is a necessary party, Plaintiffs’ response is directed to whether the Lieutenant Governor is a necessary party.

A. Lieutenant Governor Taylor is Not a Necessary Party under Fed. R. Civ. P. 19(a)

Rule 19(a) clearly provides the test for determining whether the presence of a party asserted to be “necessary” is, in fact, required. Under the Rule, a party is necessary only if

- (1) in the person's absence complete relief cannot be accorded among those already parties, or
- (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a

substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

“There is no precise formula for determining whether a person is a necessary party. Whether a particular nonparty is necessary to an action is heavily influenced by the facts and circumstances of each case.” *Shibata v. Lim*, 133 F.Supp.2d 1311, 1315-16 (M.D. Fla. 2000), citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968).

In light of the facts and circumstances of this case, Lieutenant Governor Taylor does not qualify as a necessary party under Rule 19(a) requirements. First, his presence is not necessary for complete relief to be accorded. The relief Plaintiffs seek is a declaration that the current Senate plan is unconstitutional, the imposition of an interim plan and, if necessary, an injunction to prohibit further use of the current Senate plan. Thus, the relief sought is primarily action by the Court, and, if an injunction is necessary, then the Secretary of State is restrained from holding qualifying or elections. This Court can order all of that relief without Lieutenant Governor Taylor as a defendant in this case.

Movants correctly note that (1) the law of a state in which a district court action is held determines the capacity to be sued, Fed. R. Civ. P. 17(b), and (2) the

Georgia Constitution provides that Lieutenant Governor is the presiding officer of the Senate, Ga. Const., Art. V, §3, ¶1(a). However, Movants incorrectly connect those two principles to conclude that the Lieutenant Governor is the proper representative of the state Senate in this case. He is not.

Instead, the proper representative of the state Senate is Senator Johnson, who holds the highest office elected by the members of that body. Ga. Const. Art. 3, §3, ¶4; 2003 Rules of the Georgia State Senate (“Senate Rules”) 4(b). While the Constitution provides that the Lieutenant Governor presides over the Senate, the 2003 Senate Rules make clear that the President Pro Tem actually controls the Senate. For example, “all questions of priority of business shall be decided by the President of the Senate, with the concurrence of the President Pro Tempore. . . .” Senate Rule 19. Thus, the order of business requires the approval of the President Pro Tem. Furthermore, Senate Rule 25 requires that committees, their officers and members are appointed by the Committee on Assignments, which is composed of “the President Pro Tempore as Chair, the President of the Senate and the Majority Leader.” Senate Rule 25(b)(emphasis added). All bills are assigned to committee by Lieutenant Governor, but only with the concurrence of the President Pro Tem. Senate Rule 115. All motions for reconsideration of bills are set by the President Pro Tem. Senate Rule 94(d). If a Committee of the Whole is formed, the

Lieutenant Governor appoints a Chairman to preside, but only with the concurrence of the President Pro Tem. Senate Rule 122. In Senate Rule 218, it is clear that the President Pro Tem, not the Lieutenant Governor, has power over the Senate confirmation process.

Thus, while the Lieutenant Governor presides over the Senate, he cannot undertake any of the real functions of the Senate without the President Pro Tem's approval. That fact means that the President Pro Tem, not the Lieutenant Governor, is the leader of the Senate and thus the proper representative of the Senate in this case.

A representative of the Senate is needed to speak for the Senate's position and, if necessary, participate in any form of alternative dispute resolution, i.e., the drawing of a new plan by the General Assembly, that might occur, as happened in 1995 during *U.S. v. State of Georgia*, 1996 WL 480861 (N.D.Ga.,1996). While Movants claim a political conspiracy in the naming of Senator Johnson rather than Lieutenant Governor Taylor, the reality is that Plaintiffs named as state legislative defendants two people who could actually speak for the bodies.¹ Those people are Senator Johnson in the Senate and Speaker Coleman in the House.

¹ Movants argue that if Plaintiffs named the President Pro Tem of the Senate, they should have named the Speaker Pro Tem of the House. However, Plaintiffs' decision was to name the highest officers elected by each body and who control

The redistricting cases cited by Movants in which a state's Lieutenant Governor was named do not stand for the proposition that Georgia's Lieutenant Governor is only proper Senate representative in this case. While the plaintiffs in those cases elected to name the Lieutenant Governor, plaintiffs in other cases have elected the President Pro Tem. See e.g., *Colleton County Council v. McConnell*, 201 F. Supp.2d 618(D.S.C. 2002) (representative defendant for South Carolina state Senate was McConnell, the President Pro Tem); *Morris v. Gressette*, 425 F. Supp. 331 (D.S.C. 1976), aff'd, *Morris v. Gressette*, 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977).

In short, to the extent that the representative defendant of the state Senate should have the authority to speak for that body and to be able to lead the body if it were to take up another redistricting plan in a timely fashion. That is the person needed for complete relief under Fed. Rule Civ. P. Rule 19(a), and that person is Senator Johnson.

The next part of Rule 19(a) requires the Court to make a determination whether the person alleged to be a necessary party "claims an interest relating to

their respective bodies – the President Pro Tem of the Senate and the Speaker of the House. The Speaker Pro Tem of the House is the second highest officer elected by that body and does not control the House. Therefore, there is nothing inconsistent in Plaintiffs' decision to name the highest the President Pro Tem of the Senate and the Speaker of the House.

the subject of the action.” Fed. Rule Civ. P. 19(a)(1). Lieutenant Governor Taylor himself has not claimed any legal interest in this proceeding; certainly if he believed he had one, it would seem that he would move to intervene under Fed. R. Civ. P. 24.

Instead, Movants assert that Lieutenant Governor Taylor has an interest, predicated solely on their argument that he is the proper legal representative of the state Senate. For the reasons set forth above, he is not. Therefore, no cognizable interest is claimed.

Even if the Court determines that a sufficient interest is stated, Movants must still show that the interested person “is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.” Fed. R. Civ. P. 19(a)(2). Because neither Lieutenant Governor Taylor nor Movants have established what his interest may be, there has been no showing that his absence will impair or impede that purported interest. Similarly, there is no danger that the current parties will be adversely affected in any way by his absence.

For these reasons, Lieutenant Governor Taylor is not a necessary party under Fed. Rule Ci. P. 19(a). If Movants wish to move to add Lieutenant Governor Taylor, there are a variety of mechanisms by which they may attempt to do so. See Dr. Fred Hatfield's Sportstrength Training Equip. Co. v. Balik, 174 F.R.D. 496, 501 (M.D. Fla. 1997). However, because Lieutenant Governor Taylor is not a necessary party under Rule 19(a), plaintiffs should not be forced to add him as a defendant.

B. Because Lieutenant Governor Taylor is Not a Necessary Party to This Action, Dismissal Under Fed. R. Civ. P. 19(c) is Not Appropriate

For the reasons set forth above, Lieutenant Governor Taylor is not a necessary party under Rule 19(a). Therefore, Plaintiffs were not required under Rule 19(c) to provide his name and the reasons he was not joined. Fed. R. Civ. P. 19(c). Contrary to the motivations Movants ascribe to Plaintiffs, as discussed above, nothing in the law designates Lieutenant Governor as the representative of the Senate. Plaintiffs named the person they believed authorized to speak for the Senate and to lead the Senate in any alternative dispute mechanisms, such as the General Assembly's creation of a new Senate plan.

C. Assuming *Arguendo* that the Court Deems Lieutenant Governor Taylor a Necessary Party, Plaintiffs Should Be Allowed to Amend Their Complaint to Add Him

In the event that the Court deems Lieutenant Governor Taylor a necessary party, the Court should, in accordance Rule 19(a), order Plaintiffs to add him as a party. Movants concede that the addition of Lieutenant Governor Taylor will not destroy subject matter jurisdiction and venue is proper as to him. Movants' Brief, p. 10. Therefore, if he is necessary, the proper remedy under Rule 19(a) is to order Plaintiffs to add him as a defendant.

III. CONCLUSION

As the defendant for the State Senate, Plaintiffs named Senator Eric Johnson, who, as the President Pro Tem, is the highest officer elected by that body and its leader. While the Lieutenant Governor may preside over the Senate, he does not control it. No business of any substance can be conducted without Senator Johnson's approval. To the extent that any action from the Senate is needed in this case, it is Senator Johnson, not Lieutenant Governor Taylor, who has the authority to take steps to effectuate that action. He is therefore the necessary party, rather than Lieutenant Governor Taylor.

However, if the Court deems Lieutenant Governor Taylor a necessary party, Plaintiffs will amend their Complaint to add him.

For these reasons, Movants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(7) should be denied, as should Movants' alternative motion to add Lieutenant Governor Taylor as a party.

Local Rule 7.1.D Certification:

By signature below, counsel certifies that the foregoing was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this day served or caused to be served a copy of the within and foregoing **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS PERDUE, COLEMAN AND COX'S MOTION TO DISMISS COMPLAINT AGAINST THE REDISTRICTING PLAN FOR THE GEORGIA STATE SENATE OR, IN THE ALTERNATIVE, TO JOIN A PARTY PURSUANT TO FED. R.CIV. P. 12(b)(7)** by first class U.S. mail, properly addressed to counsel for Plaintiffs and Defendants as follows:

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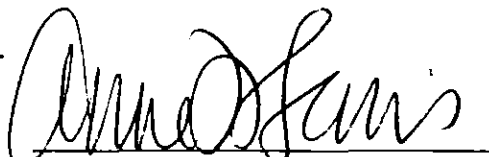
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This 28th day of May, 2003.



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