

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTEENTH DIVISION

PRATT REMMEL, GALE STEWART,
GLEN HOOKS, ROBERT B. LEFLAR,
ELAINE DUMAS, MICHAEL B. DOUGAN,
HARVEY JOE SANNER, AND
JACKIE SIMPSON

PLAINTIFFS

v.

CASE NO. 60CV-21-341

LESLIE RUTLEDGE, Individually
and as Attorney General of the
State of Arkansas

DEFENDANT

AMENDED AND SUBSTITUTED
ORDER DENYING MOTION TO DISMISS

I. BACKGROUND AND PROCEDURAL HISTORY

On January 15, 2021, eight Arkansas citizens (whose alleged taxpayer status is not contested) brought suit against the State Attorney General, Leslie Rutledge in her official and individual capacities. The Complaint alleges that General Rutledge engaged in activities constituting misuse of taxpayer funds amounting to an “illegal exaction”, engaged in “highly partisan” litigation in an “ultra vires”, “illegal, and improper”, series of acts, “exceeding her authority”, in derogation of the “interests of the State”. *See: Amended Complaint, ¶¶ 36 & 37.*

The Attorney General filed a timely Answer and Motion to Dismiss, which was denied, in part¹, by Judge Alice Gray on June 10, 2021, without prejudice to renew. Subsequently, Plaintiff filed an Amended Complaint, and the Defendant again made a timely Answer, renewing her Motion to Dismiss the Amended Complaint.

The Court heard new argument on September 22, 2021, taking the matter under advisement. This Court now Denies the Motion to Dismiss pursuant to ARCP 12(b)(1)(2) and (6), for reasons which address Defendant’s arguments in the following:

¹ Judge Gray granted the Motion as to any claim that advertising the services of the Attorney General’s office constituted an ultra vires or unlawful act, or constituted an illegal exaction.

II. FINDINGS AND ORDER

a. In General

In *Board of Trustees of University of Arkansas v. Burcham*, 2014 Ark. 61, 2014 WL 585981, Justice Danielson held for the Majority:

“In reviewing the circuit court's decision on a motion to dismiss under Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *See: Arkansas Tech Univ. v. Link*, 341 Ark. 495, 17 S.W.3d 809 (2000). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *See id.* However, our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *See: id.* Furthermore, because sovereign immunity is jurisdictional immunity from suit, jurisdiction must be determined entirely from the pleadings. *See: id....*”

b. Individual and Official Capacity

Defendant argues the Plaintiffs didn't properly sue General Rutledge in her “Official” and “Individual” capacities. Viewing the Complaint in the light most favorable to all well-pleaded facts (as a Court reviewing Motion to Dismiss must do), this Court FINDS that Plaintiffs' Complaint sufficiently pleads both the “Official” and “Individual” capacities of the Defendant. *See: Case Style, Amended Complaint, first sentence, ¶¶ 11, 34, 35, 37, among other references. Ark. R. Civ. P. 12(b)(1)(2) and (6)*

The Motion to Dismiss as to Official and Individual Capacity is DENIED.

c. Standing

In the first prong of her Motion to Dismiss, Defendant argues that Plaintiffs' claims should fail for lack of standing. Plaintiffs are all alleged to be tax paying citizens, and residents of the State of Arkansas. Defendant makes no allegations to the contrary.

Furthermore, Article 16, § 13 of the Arkansas Constitution provides: “Any citizen of any county, city or town may institute suit, in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatsoever.”

Defendant rhetorically conflates issues of standing with the issue of whether the acts alleged are “ultra vires”; thereby combining taxpayer standing with the second prong of her Motion to Dismiss (whether the act is “ultra vires” or otherwise wrongful).

For Rule 12(b) Motion purposes, Defendant questions the sufficiency of standing allegations in the Amended Complaint. At this stage, the only issue, in that regard, is whether sufficient standing for jurisdictional grounds are *alleged*. Whether sufficient facts are alleged the Attorney General committed “ultra vires” acts are discussed, *infra*.

Defendant argues that taxpayers have no standing to contest her expenditures of funds. This Court disagrees. The Court FINDS Plaintiffs have SUFFICIENTLY PLEADED STANDING through alleging the use of public, state and taxpayer funds; some established by the legislature, some from monies collected by the Attorney General’s office through settlements, and money judgments collected in favor of the State, in cases wherein the State was a party, but all of which involve the use of staff, and resources of the Attorney General of Arkansas, as funded by taxpayers.

The Motion to Dismiss for Lack of Standing is DENIED.

d. Sovereign and Qualified Immunity

Defendant next moves for dismissal alleging, “the Attorney General is entitled to various doctrines of immunity including, but not limited to, absolute and qualified immunity....”

i. Sovereign Immunity

Our Supreme Court recently discussed sovereign immunity in *Monsanto Co. v. Arkansas State Plant Bd.*, 2019 Ark. 194, 9, 576 S.W.3d 8, 13 (2019), saying:

“...Since *Andrews*, this court issued its opinion in *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509, which makes our decision in this case a simple one. In *Haas*, a voter brought a declaratory-judgment action against the Arkansas Secretary of State and others, seeking to declare a legislative act regarding voter identification unconstitutional and to enjoin its enforcement. *Id.* The Arkansas Secretary of State responded by arguing that sovereign immunity barred the voter’s suit. *Id.* at 7-8, 556 S.W.3d at 514-15. We disagreed, reiterating that the sovereign immunity defense is not available against claims of ultra vires conduct that only seek declaratory or injunctive relief. *Id.* This court held,

“...Here, appellee challenged the constitutionality of Act 633. “We view our [sovereign immunity] cases as allowing actions that are illegal, are unconstitutional or are ultra vires to be enjoined.” *Cammack v. Chalmers*, 284 Ark. 161, 163, 680 S.W.2d 689, 689 (1984);

see also *Bd. of Trustees of Univ. of Ark. v. Burcham*, 2014 Ark. 61, at 4, 2014 WL 585981 (“[T]he scope of the exception to sovereign immunity for unconstitutional acts or for acts that are ultra vires, arbitrary, capricious or in bad faith, extends only to injunctive relief.”)....”

And, as alluded to, *Board of Trustees of the University Of Ark. v. Burcham*, 2014 WL 585981, the Court articulated when, and under what circumstances the bar of sovereign immunity can apply:

“This court has recognized three ways in which a claim of sovereign immunity may be surmounted: (1) where the State is the moving party seeking specific relief, (2) where an act of the legislature has created a specific waiver of sovereign immunity, and (3) where the state agency is acting illegally or if a state-agency officer refuses to do a purely ministerial action required by statute. *See id.* Additionally, a state agency may be enjoined if it can be shown 1) that the pending action of the agency is ultra vires or without the authority of the agency, or (2) that the agency is about to act in bad faith, arbitrarily, capriciously, and in a wantonly injurious manner. *See Arkansas Tech Univ., supra; Arkansas State Game & Fish Comm'n v. Eubank*, 256 Ark. 930, 512 S.W.2d 540 (1974) ...

...However, the scope of the exception to sovereign immunity for unconstitutional acts or for acts that are ultra vires, arbitrary, capricious or in bad faith, extends only to injunctive relief. *See: Arkansas Lottery Comm'n v. Alpha Mktg.*, 2013 Ark. 232, — S.W.3d ——. The exception does not apply to suits seeking money damages, and we have never recognized the exception to allow a claim for damages to proceed. *See id....*”

ii. Qualified Immunity

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established; at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982)); *Banks v. Jones*, 2019 Ark. 204, at *6, 575 S.W.3d 111, 116.

The Arkansas Supreme Court has held:

“...We have consistently held that section 21–9–301 provides city employees with immunity from civil liability for negligent, but not intentional, acts. *City of Farmington v. Smith, supra. Sullivan v. Coney*, 2013 Ark. 222, 6, 427 S.W.3d 682, 685 (2013)...”

Arkansas Code Annotated section 21–9–301 (Supp.2011), which governs qualified immunity, states as follows:

“(a) It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, public charter schools, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.

(b) No tort action shall lie against any such political subdivision because of the acts of its agents and employees....”

iii. Findings

1. The Court FINDS that facts alleged in the Amended Complaint, viewed in the light most favorable to Plaintiffs, as required under the Rule, support the determination 1) that the past and pending actions of the Attorney General are *ultra vires* or without the authority of law, and (2) that the Attorney General is about to (and continuing to) act in bad faith, arbitrarily, capriciously, and in a wantonly injurious manner, which would justify injunctive and declaratory relief.

Accordingly, the Motion to Dismiss on grounds of Sovereign Immunity is DENIED.

2. Plaintiff has sufficiently alleged “Acts in bad faith, arbitrarily, capriciously pursued, in a wantonly injurious manner”, which would further justify overcoming the defense of Qualified Immunity. *See* factual allegations discussed elsewhere in this order.

For example, Plaintiffs cite, among other acts, Defendant’s invocation of the imprimatur of the State of Arkansas in defense of the National Rifle Association in New York, and the U.S. Bankruptcy Court for the Northern District of Texas. This is an exercise of power under the ‘color of law’, where the Attorney General is alleged to have intentionally acted in her capacity as a State actor for her own gain.

The Court also FINDS that facts alleged in the Amended Complaint, viewed in the light most favorable to Plaintiffs, overcome Qualified Immunity at this stage.

The Motion to Dismiss on Qualified Immunity Grounds is DENIED.²

² See also: *Steinbuch v. University of Ark*, 589 SW 3d 350 (2019); Sovereign immunity does not bar an injunction against the state or state officials acting arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner.

e. “Illegal Exaction”

Article 16, § 13 of the Arkansas Constitution provides: “Any citizen of any county, city or town may institute suit...against the enforcement of any illegal exactions whatsoever.”

The Arkansas Supreme Court has held that such a suit is *not barred* by the Constitution's “sovereign-immunity provision”, article 5, § 20, because article 16, § 13, as a more specific provision, controls over the more general prohibition in article 5, § 20. McGhee v. Ark. State Bd. of Collection Agencies, 360 Ark. 363, 201 S.W.3d 375 (2005); Carson v. Weiss, 333 Ark. 561, 972 S.W.2d 933 (1998); Streight v. Ragland, 280 Ark. 206, 209-10 n. 7, 655 S.W.2d 459, 461 n. See: Prince v. Arkansas State Highway Comm'n, 2019 Ark. 199, 4, 576 S.W.3d 1, 3 (2019) [*Emphasis added*]

The Motion to Dismiss the Complaint’s prayer for relief for an “illegal exaction” as to Defendant's involvement in filing amicus briefs concerning the 2020 election, and as to Defendant’s “consumer” TV Commercials is a close question as to the application of Sovereign Immunity. Defendant’s action in these discrete cases concerned matters of arguable public interest (to Arkansans).

However, the discrete acts, as distinguished from others (*See*: the NRA Bankruptcy, *supra*), are of evidentiary value when viewed in the light of the totality of additional specific actions alleged elsewhere in the Amended Complaint. A pattern or course of conduct, (*See, inter alia*: discussion regarding NRA Bankruptcy, *supra*) of using the public persona of the Attorney General as an adjunct to a gubernatorial campaign (again, considering, as the Court must, ‘well-pleaded facts’) emerges supporting the conclusion that the Motion to Dismiss should fail at this stage³.

For example, Plaintiffs also question Defendant’s invocation of the imprimatur of the State of Arkansas acting in defense of the National Rifle Association in New York, and the U.S. Bankruptcy Court for the Northern District of Texas. This is a more troubling exercise of power under the ‘color of law’, where the Attorney General allegedly acted in her capacity as a State actor for the benefit of a citizen and “person”⁴, in a private bankruptcy, in a foreign state, allegedly for political gain.

³ See also, Plaintiff’s First Amended Complaint Paragraphs 34-36, alleging Defendant has engaged in highly partisan political organizations in her “official capacity” as Attorney General of Arkansas, including “Lawyers” for Trump! And “The Rule of Law Defense Fund” which helped organize and sponsor the January 6, 2021 rally held on the grounds of the U.S. Capitol.

⁴ Corporations are regarded as “persons”, with the same political rights. *See: Citizens United v. Federal Election Comm.*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

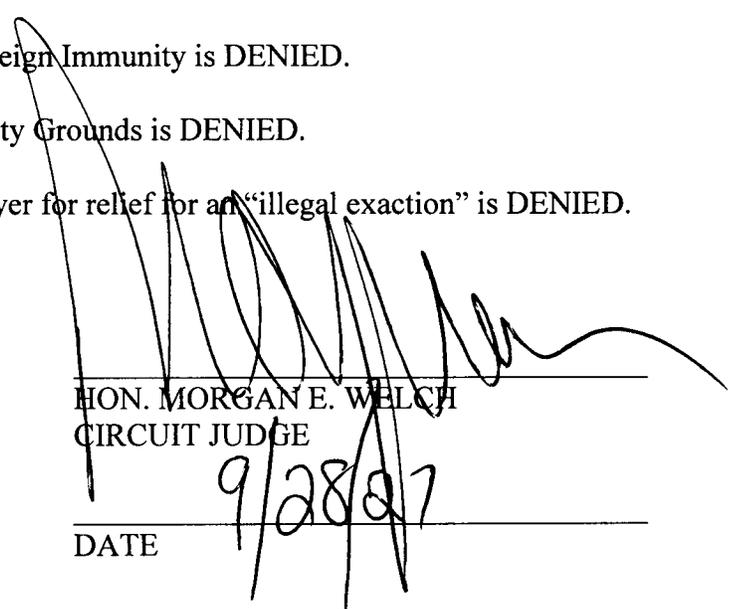
Plaintiff avers the NRA related acts of Rutledge used state funds to court a potential political donor. To be sure, these are allegations-not proof, but they are ‘well-pleaded’ for Rule 12(b)(1), (2), and (6) purposes, implicating the foundations for an *intentional* “ultra vires” act or certainly one which might prove to be “arbitrary, capricious, or in bad faith”.

The Motion to Dismiss, at this stage of the litigation, is DENIED. *See: Monsanto Co. v. Arkansas State Plant Bd.*, 2019 Ark. 194, 9, 576 S.W.3d 8, 13 (2019).

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED:

- 1.The Motion to Dismiss as to Official and Individual Capacity is DENIED.
- 2.The Motion to Dismiss for Lack of Standing is DENIED.
3. The Motion to Dismiss on grounds of Sovereign Immunity is DENIED.
- 4.The Motion to Dismiss on Qualified Immunity Grounds is DENIED.
5. The Motion to Dismiss the Complaint’s prayer for relief for an “illegal exaction” is DENIED.

IT IS SO ORDERED.



HON. MORGAN E. WELCH
CIRCUIT JUDGE

DATE

9/28/17