

IN THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY
FLORIDA
CIVIL DIVISION

WILLIAM A. ARMELLINI, *pro se*,
Plaintiff

v.

Case No.: 06-19391-CA-06

JAMES ZINGALE, EXECUTIVE DIRECTOR,
FLORIDA DEPARTMENT OF REVENUE
(In his official capacity)
Defendant

**PLAINTIFF'S MOTION AND MEMORANDUM OF LAW
TO DENY MOTION TO DISMISS**

“The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.” Parenthood v. Casey, 505 U.S. 833, (1992)

Plaintiff, *pro se* with assistance of counsel, moves this court to deny Defendant's motion to dismiss because he is the proper Defendant; the plaintiff is in imminent real threat of loss of liberty interest and constitutional rights, i.e. loss of property and at imminent risk of incarceration month to month; and venue is proper under the sword wielder exception to the common law principle of state agency venue.

Wherefore this court must deny Defendant's motion to dismiss and move forward with proceedings consistent with that finding.

Respectfully submitted,

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474 Falcon Avenue
Miami Springs, Florida 33166

October 17, 2006

MEMORANDUM OF LAW

Introduction

The nature of the state's implementation of the permanent alimony statute (§61.08) by the requirement of monthly money payments places the Plaintiff in repeated real and active on going loss of his constitutional rights, i.e. loss of his monetary property, as well as placing him in imminent threat of incarceration should he not comply with the court order implementing the statute. The statutory safeguards to protect against these losses of constitutional rights do not operate timely and are insufficient, thus the need for this lawsuit seeking judicial protection.

A. Proper Defendant

The Defendant's motion misstates the complaint's named Defendant. The Director of the Department of Revenue, not the agency, is the named Defendant. (*Walker v. President of the Senate*, 658 So. 2d 1200, 1200 (Fla. 5th DCA 1995) "it is the state official designated to enforce (it) who is the proper defendant, even when that party has made no attempt to enforce (it)."; *American Civil Liberties Union v. The Florida Bar*, 999 F. 2d 1486, 1491 (11th Cir. 1993) "Under the Supreme Court precedent, when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant, even when that party has made no attempt to enforce the rule.[Citing] *Diamond v. Charles*, 476 U.S. 54, 64, 106 S. Ct. 1697, 1704, 90 I.Ed. 2d 48 (1986).")

United States Constitutional, Eleventh Amendment, precludes the Florida Department of Revenue from being sued.

B. The Defendant is Statutorily Charged to Enforce the Challenged Statute

The Defendant incorrectly argues that “The Florida Department of Revenue does not have enforcement powers regarding alimony issues pursuant to Chapter 61, Fla. Stat.”

On the contrary, §§ 61.046 (4)(19)(20), 61.13, Fla. Stat. indicates the Department of Revenue is designated to enforce the alimony statute (§ 61.08 Fla. Stat.).

61.046 Definitions.--As used in this chapter:

(4) "Department" means the Department of Revenue.

(19) "Support order" means a judgment, decree, or order, whether temporary or final, issued by a court of competent jurisdiction or administrative agency for the support and maintenance of a child which provides for monetary support, health care, arrearages, or past support. *When the child support obligation is being enforced by the Department of Revenue, the term "support order" also means a judgment, decree, or order, whether temporary or final, issued by a court of competent jurisdiction for the support and maintenance of a child and the spouse or former spouse of the obligor with whom the child is living which provides for monetary support, health care, arrearages, or past support.*

(20) "Support," unless otherwise specified, means:

(a) Child support and, *when the child support obligation is being enforced by the Department of Revenue, spousal support or alimony for the spouse or former spouse of the obligor with whom the child is living.*

(b) Child support only in cases not being enforced by the Department of Revenue.

61.13

2.a. A support order enforced under Title IV-D of the Social Security Act which requires that the obligor provide health care coverage *is enforceable by the department* through the use of the national medical support notice, and an amendment to the support order is not required. The department shall transfer the national medical support notice to the obligor's union or employer.

The reading of the above statutes independently and in para materia indicates the Defendant is designated to enforce alimony (spousal maintenance, § 61.0 Fla. Stat.)

Chapter 61, Fla. Stat. is replete with poor structure, lack of necessary definitions, difficult to discern authority and often an impermissible delegation of exclusive

legislative law making authority given to the judiciary. The circumlocution in the above statutes (§§ 61.046, 61.13 Fla. Stat.), obfuscates the designation of the DOR as the state official with enforcement power of the alimony statute. Regardless, upon careful reading the DOR's enforcing designation becomes apparent.

C. Venue is Proper under the Sword Wielder Exception

1. Sword Wielder Exception

Florida Dept., Ch. & Fams. V. Sun-Sentinel, 865 So.2d 1278 (Fla. 2004), as all the other common law venue cases provides exception to the common law venue principle. The sword wielder exception applies to this case to make venue proper before this court.

Utilizing the framework of *Fla. Dept. Ch. & Fam* 865 So. 2d at 1287, the instant case falls squarely within the second type frequently termed sword wielder exception. Here the Plaintiff seeks judicial protection (injunctive relief claim) from the unlawful invasion (alimony statute §61.08 Fla. Stat.) of a constitutional right (alter his associational interest by changing his marital status) because he monthly has the real loss of property, i.e. his money as alimony. He is also threatened with enforcement of the statute via incarceration taking place at his home or work or where he lives, i.e. this court's jurisdiction, should he not comply.

Fla. Dept. Ch. & Fam 865 So. 2d at 1287 commenting on the exception to the common law venue rule,

“The second type is those suits in which the primary purpose of the litigation is to obtain direct judicial protection from an alleged unlawful invasion of the constitutional rights of the plaintiff within the county where the suit is instituted, because of the enforcement or threatened enforcement by a state agency of rules and regulations alleged to be unconstitutional as to the plaintiff, and where the validity or invalidity of

the rules and regulations sought to be enforced comes into question only secondarily and as incidental to the main issue involved.”

“The second exception, known as the ‘sword wielder’ exception, ‘applies only where direct judicial protection is sought from an unlawful invasion of a constitutional right of the plaintiff, directly threatened in the county where the suit is instituted.’ Triple ‘A’ Enters., 387 So.2d at 942.” Id at 1287

Judicial protection is precisely what is sought in this lawsuit because of the Plaintiff’s ongoing monthly injury resulting in his loss of property, i.e. money as alimony.

2. No monetary Damages Sought

Fla. Dept. Ch. & Fam 865 So. 2d at 1287 also cites the district court ruling that,

“The court observed that cases applying the home venue privilege ‘almost universally . . . involve actions seeking judgment directly against the agency for money damages or for declaratory relief binding the agency in regard to some policy or practice of the agency itself.’”

Here no monetary damages are sought, merely injunctive relief when this court finds the challenged statute is unconstitutional. Further, no binding policy or practice of the agency (DOR) is at issue.

3. The Threat to the Plaintiff is Imminent, Real and in This County

Florida Public Serv. Triple “A” Enterprises, 387 So.2d 940, 942 (Fla. 1980),

“In *Carlile* [*Carlile v. Game and Fresh Water Fish Commission*, 354 So.2d 362 (Fla. 1977)], this Court stated:

The so called ‘sword-wielder’ doctrine applies only in those cases where the official action complained of has in fact been or is being performed in the county where the suit is filed, or when the threat of such action in said county is both real and imminent.”

The complaint need only satisfy one of those two elements—it satisfies both. It states the injuries, repeated monthly money payments of alimony (predicated upon § 61.08 Fla. Stat.) have occurred, are occurring and will continue to occur to cause injury to

the plaintiff in this Dade County where he resides, works and this court has jurisdiction. Also, should he become vulnerable to this court's enforcement action of incarceration it, too, will be here.

This lawsuit and the plaintiff meet the criteria for the sword wielder exception to § 47.011 Fla. Stat. to make this court proper venue for this lawsuit.

Prayer for Relief

Wherefore the Plaintiff prays this court rule that the Defendant is the proper Defendant because he is designated to enforce the statute at issue even though he is not enforcing it and the venue is proper before this court under the sword wielder exception to the common law venue

Respectfully submitted,

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October 17, 2006

Certificate of Service

I hereby certify that a true and accurate copy of this motion has been send by U.S. mail to Jill D. Ghini, Esquire, Counsel for James Zingale, Executive Director, Florida Department of Revenue, P.O. Box 6668, Tallahassee, Florida 32314-6668, (850.488.0712, fax 850.410.2397) on this 17th day of October, 2006.

Respectfully submitted,

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