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

JOHN DOE,	)	**Civil Action**
Plaintiff,	)	**File No. 2:03-CV-0156-WCO**
v.	)	
BARROW COUNTY, GEORGIA; WALTER E. ELDER, in his official capacity as Chairman of the Barrow County Board of Commissioners and in his individual capacity,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND TO STRIKE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

FACTUAL BACKGROUND

On September 16, 2003, "John Doe" filed a complaint in the above-entitled case, alleging that he "is proceeding anonymously because his 'religion is perhaps the quintessentially private matter,' and because he fears 'public reaction and retaliation' that may result in 'extensive harassment — and perhaps even violent reprisals.'" Compl. ¶ 6. Plaintiff failed, however, to allege that he had filed a motion for leave to file by fictitious name. He also failed in any other manner to seek this Court's permission

to proceed anonymously at the time of the filing of the Complaint, or at any time up to the date of the filing of this Motion. *See* Compl. and Docket Report, a copy of which is attached hereto as Exhibit A.

On or about September 17, 2003, counsel for the anonymous Plaintiff mailed to Defendant Walter E. Elder a signed and sealed Summons dated September 17, 2003, and directed to "Walter E. Elder, Chairman, Barrow County Board of Commissioners, 233 E. Broad Street, Winder, Georgia 30680," along with a "Notice of Lawsuit and Request for Waiver of Service of Summons" directed to "Walter E. Elder, in his individual and official capacity as ... Chairman of ... the Barrow County Board of Commissioners," and a "Waiver of Service of Summons" identifying "Walter E. Elder" as Defendant in the above-entitled case. *See* Exhibit B.

On October 8, 2003, Walter E. Elder signed the Waiver of Service "[a]s Chairman of the Barrow County Board of Commissioners," which was forwarded to Plaintiff's counsel for filing with the court. *See* Exhibit B. On October 22, 2003, the signed Waiver of Service was entered on the docket of this Court with the notation: "Returned executed as to Walter E. Elder, mailed 9/15/03; Answer due by 11/14/03 for Walter E. Elder." *See* Exhibit A. As of the date of the filing of this Motion, there has been no service on Defendant Barrow County, and no waiver of service with respect to

the Defendant County. *See* Exhibit A. On November 6, 2003, Plaintiff filed his Motion for Preliminary Injunction with a supporting Memorandum and Affidavit. *See* Exhibit A.

ARGUMENT

I. No Process Has Issued Against Defendant Barrow County and, Pursuant to Rules 12(b)(2), 12(b)(4), and 12(b)(5), F.R.Civ.P., the Proceedings Against it Should Be Dismissed.

In the Complaint, Plaintiff has named two defendants: Barrow County, Georgia and Walter E. Elder, in both his official capacity, as Chairman of the Barrow County Board of Commissioners, and his individual capacity. Yet, in attempting service, Plaintiff mailed only a Summons directed to Defendant Elder, providing only Defendant Elder with a "Notice of Lawsuit and Request for Waiver of Service of Summons," which waiver Defendant Elder executed. Thus, as to the filing of the waiver with the Court, the docket entry properly reflects service having effectuated "as to Walter E. Elder," and reflects no service as to Barrow County Georgia. *See* Exhibit A. According to the docket, then, Defendant Barrow County has not been served, as required by Rule 4, F.R.Civ.P.

Rule 4(a) of the Federal Rules of Civil Procedure, provides that a summons shall be directed to "the defendant." In the case of multiple defendants, as in this case, a summons "shall be issued

for each defendant to be served." Rule 4(b), F.R. Civ. P. No summons of which defendants are aware has been issued to defendant Barrow County. Furthermore, no copies of the Summons and the Complaint have been served upon defendant Barrow County as required by Rule 4(j), F.R.Civ.P. As Rule 4(j)(2) expressly provides, service upon a governmental organization "shall be effected" either by delivering a copy of the summons and complaint to its chief executive officer or by serving those documents in the manner prescribed by state law. "Delivered," as used in Rule 4(j)(2), does not include merely mailing a copy of the summons and complaint to a county's chief executive officer. *See, e.g.*, Cambridge Mut. Fire Ins. Co. v. City of Claxton, Georgia, 720 F.2d 1230, 1232 (11th Cir. 1983); Prisco v. Frank, 929 F.2d 603, 604 (11th Cir. 1991). And service of process upon a county, under Georgia law, must be made by personal service. O.C.G.A. §9-11-4(e)(5). Moreover, the waiver-of-service provision of Rule 4(d), F.R.Civ.P., is inapplicable to actions against governments subject to service of process under Rule 4(j). Federal Rule of Civil Procedure 4(j), *Advisory Committee Notes*, 1993 amendments (subdivision j). Hence, Plaintiff could not successfully contend that the summons mailed to Defendant Elder in his official capacity somehow constituted service upon Defendant Barrow County. *See* Clark v. City of Zebulon, 156 F.R.D. 684, 694 (N.D. Ga. 1993).

It would appear, then, that no summons has been directed to Defendant Barrow County, and Plaintiff has failed to effect service of process upon Defendant Barrow County in this case. Yet, despite complete failure of process and service of process, Plaintiff has undertaken to litigate this case against Defendant Barrow County as if it has been served, as Plaintiff's Motion for Preliminary Injunction seeks the entry of an injunction against "Defendants ... from making any further expenditures of public funds and taking any further action to maintain or display the Ten Commandments." Because the Motion has been filed prior to this Court's having jurisdiction of Defendant Barrow County, the Complaint and Motion should be dismissed as to Defendant Barrow County pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5), F.R.Civ.P. Plaintiff, having failed to bring Barrow County into this case as a Defendant, the litigation against Defendant Barrow County cannot proceed, and the Motion for Preliminary Injunction should be stricken.

II. Plaintiff Has Not Commenced a Civil Action in this Court and, pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6), F.R.Civ.P., his Complaint Should be Dismissed.

Without having sought leave of this Court, Plaintiff has filed the Complaint in this case anonymously. Compl. ¶ 6. Also, without having sought leave of this Court to proceed anonymously, Plaintiff

has filed a Motion for Preliminary Injunction supported only by an anonymous affidavit. *See* Plaintiff's Memorandum of Law In Support of Motion for a Preliminary Injunction p. 3, n.1 (hereinafter "Plaint. Prelim. Injunct. Memo") and attached Affidavit ¶ 6. (hereinafter "Plaint. Aff."). Because of Plaintiff's failure to seek leave of court, and because the Complaint herein does not state the true name of the Plaintiff (*see Compl.* ¶¶ 4, 6), and is not otherwise accompanied by a document containing the true name and address of the Plaintiff, Plaintiff has not "commenced" a civil action in this Court. *See* Roe v. State of New York, 49 F.R.D. 279, 281 (S.D.N.Y. 1970).

Rule 10(a) of the Federal Rules of Civil Procedure requires "the names of all the parties" to be included in the title of any action brought in federal court. Although the court may permit a party to file a Complaint in a fictitious name, and thereafter to proceed anonymously (*see, e.g.,* Javier H. v. Garcia-Botello, 211 F.R.D. 194 (W.D. N.Y. 2002), and W.G.A. v. Priority Pharmacy, Inc., 184 F.R.D. 616 (E.D. Mo. 1999)), such court approval has not been sought, much less obtained, here.

Instead, Plaintiff has presumed that, pursuant to his "John Doe" Complaint, he may proceed with a Motion for a Preliminary Injunction, subject only to having made allegations that he "believes that an anonymous affidavit is appropriate" to support

that motion, or "if the Court deems it more appropriate, [subject] to ... a protective order [hiding from the public] the name of the Plaintiff" on the affidavit. *See* Plaint. Prelim. Injunct. Memo. at 3, n.1. A party may not proceed with any motion or other action under a fictitious name without **first** having sought leave to proceed anonymously, and without having obtained such leave of court. *See, e.g.,* Doe v. Frank, 951 F.3d 320, 322 (11th Cir. 1992); National Commodity & Barter Ass'n. v. Gibbs, 886 F.2d 1240, 1245 (10th Cir. 1989). *See also* 2 Moore's Federal Practice §10.02[2][c][iv], p. 10-14 (3d Ed. 2003) ("A party seeking to proceed anonymously must request permission from the court.") The decision to proceed under a pseudonym, then, is within the discretion of the court, not of the Plaintiff. *See* James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993) ("[T]here is a judicial duty to inquire into the circumstances of particular cases to determine whether the dispensation [of allowing a plaintiff to proceed anonymously] is warranted.").

According to Plaintiff, however, he may unilaterally decide that he is entitled to file his Complaint in a fictitious name, based solely upon his representation of the holdings in three selected cases. Thus, in support of his claim to anonymity in Paragraph 6 of his Complaint, Plaintiff chose Doe v. Frank, 951 F.2d at 323, n. 5; Doe v. Stegall, 653 F.2d 180, 186 (5th Cir.

1981); and Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294, & n. 1 (2000). *See* Compl. ¶ 6. **None** of the cases cited by the Plaintiff supports the proposition that a party may file a "John Doe" complaint and proceed to litigate his case anonymously without seeking and obtaining permission from the court. To the contrary, all three cases demonstrate that courts, not parties, "decide under what circumstances a plaintiff may proceed under a fictitious name." Doe v. Frank, 951 F.2d at 322; Doe v. Stegall, 653 F. 2d at 181 ("This interlocutory appeal requires us to decide whether a mother and her two children may proceed under fictitious names ...."); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. at 294 ("The District Court permitted respondents (Does) to litigate anonymously...."). It is the court, then, not the Plaintiff which makes the decision whether the "strong public interest militating against pseudonymity" is outweighed by the interest of the Plaintiff to maintain a lawsuit in a fictitious name. *See* Doe v. Providential Life and Acc. Ins. Co., 176 F.R.D. 464, 466-67 (E.D. Pa. 1997).

Since Plaintiff has not sought leave to file anonymously, Plaintiff may not proceed with his Motion for a Preliminary Injunction pursuant to his "John Doe" Complaint, because this Court has no jurisdiction over this case. *See, e.g.,* National Commodity

& Barter Ass'n v. Gibbs. 886 F.2d at 1245[1] (10th Cir. 1989), citing Doe v. Stegall, 653 F.2d at 183, and Doe v. United States Dept. of Justice, 93 F.R.D. 483, 484 (D. Colo. 1982); *see also* Estate of Rodriquez v. Drummond Co., Inc., 256 F. Supp. 2d 1250, 1255-57 (N.D. Ala. 2003); Roe v. State of New York, 49 F.R.D. at 281; and 2 Moore's Federal Practice § 10.02[2][c][iv] at 10-14. ("Absent ... permission [from the court], the court lacks jurisdiction over the fictitiously named parties.").

This jurisdictional defect in the Complaint cannot be cured by permitting Plaintiff to file a motion for leave to proceed anonymously in response to this motion to dismiss. *See* Drummond, 256 F. Supp. 2d at 1255-57. And the absence of jurisdiction certainly cannot be resolved by the suggestion in Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction (Plaint. Prelim. Injunct. Memo at 3, n.1), that Plaintiff "submit a motion for a protective order and file the affidavit [supporting his motion for a preliminary injunction] in the name of the Plaintiff." Such an offer bears only on the

[1] Although defendants in the National Commodity case did not "raise this issue in their brief," the court "consider[ed] it sua sponte," because "it is jurisdictional." Id. at 1245, n.3.

sufficiency of the Affidavit, not on the sufficiency of the Complaint. Indeed, the offer is no different from the one rejected by the court in Doe, Roe and Woe v. Rostker, 89 F.R.D. 158 (N.D. Calif. 1981) wherein "plaintiffs ... offered to reveal their names to the court in camera and proceed unnamed as they wish[ed], [an] approach [that] would not address the issue of whether they have a right to do so under the circumstances of this case." Id. at 162, n.14.

Rather, according to the rule in Drummond, unless a plaintiff files a motion to proceed under a fictitious name contemporaneously with the filing of his complaint, a "'federal court lacks jurisdiction over the unnamed part[y] as a case **has not been commenced with respect to [him]**.'" W.N.J. v. Yocom, 257 F.3d 1171, 1172 (10th Cir. 2001) (emphasis added). *See also* Roe v. State of New York, 49 F.R.D. at 281. Thus, an order issued *nunc pro tunc* cannot cure the jurisdictional defect because "the only proper office of a *nunc pro tunc* order is to correct a mistake in the records; it cannot be used to rewrite history." *See* Central Laborer's Pension, Welfare & Annuity Funds v. Griffee, 198 F.3d 642, 644 (7th Cir. 1999).

This jurisdictional barrier to filing a complaint without identifying **all** of the parties is based, primarily, upon Rule

10(a), F.R.Civ.P., which requires that all parties be named in order that "the public's legitimate interest in knowing all of the facts involved [in a case filed in federal court], including the identities of the parties." Doe v. Frank, 951 F.2d at 322. As observed by the court of appeals in Doe v. Frank, Rule 10(a)'s "presumption of openness" has established that "[l]awsuits are public events [wherein] [a] plaintiff should be permitted to proceed anonymously only in ... exceptional cases." Id. at 324. It is, therefore, not for parties to make exceptions to the general rule of full disclosure, as Plaintiff has maintained in this case, it is for the courts. After all, the "prevailing public policy favors disclosure" of all parties to an action (2 Moore's Federal Practice § 10.02[2][c][i] at 10-10), necessitating "careful [judicial] review [of] *all* the circumstances of a given case and then [a judicial] deci[sion] whether the customary practice of disclosing the plaintiff's identity should yield to the plaintiff's ... concerns." Doe v. Frank, 951 F.2d at 323 (emphasis original).

The public policy favoring full disclosure, including the identity of all of the parties, rests upon more than the presumption of openness embodied in Rule 10(a). It has also been stated to rest upon a "First Amendment ... public right of access to civil trials." Doe v. Santa Fe Indep. Sch. Dist., 933 F. Supp. 647, 649-50 (S.D. Tex. 1996), and cases cited therein. *See also* Doe

v. Blue Cross & Blue Shield, 112 F.3d 869, 872 (7th Cir. 1997). As the Fifth Circuit Court of Appeals stated in Doe v. Stegall, "[p]ublic access to th[e] information [required by Rule 10(a)] is more than a customary procedural formality; First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings." Stegall, 653 F.2d at 185. Thus, in reliance upon Stegall, it is the rule in this Circuit that "[i]t is the exceptional case in which a plaintiff may proceed under a fictitious name." Doe v. Frank, 951 F.2d at 323. *See also* Doe v. Santa Fe Indep. Sch. Dist., 933 F. Supp. at 650-51 (likening the burden upon a party who seeks to sue anonymously to the burden upon a government to show a "compelling government interest" to withstand a First Amendment claim of public access to court proceedings.)

Not only is a plaintiff's right to file a complaint in federal court constrained by the public's right to know, it is also limited by the need of defendants to know "who their opponents are." Doe v. Shakur, 164 F.R.D. 359, 360 (S.D.N.Y. 1996). Otherwise, a defendant may be "prejudiced" by the strictures placed upon discovery and trial to protect a plaintiff's anonymity. *See* Does I Thru XXIII v. Advance Textile Corp., 214 F.3d 1058, 1068 (9th Cir. 2000); Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1125 (10th Cir.), *cert. denied,* 444 U.S. 856 (1979); Doe v. Shakur, 164

F.R.D. at 361, and cases cited therein.

By bringing this lawsuit, the Plaintiff has put his "credibility in issue" (*see* Doe v. Shakur, 164 F.R.D. at 361), in that he must both allege and prove that he has "standing" to sue. *See, e.g.,* Glassroth v. Moore, 335 F.3d 1285, 1292-93 (11th Cir. 2003). To sustain his burden, even Plaintiff has acknowledged that he must allege and prove by his personal testimony that he has been "injured" by the alleged action of Defendants with respect to the Ten Commandments display at issue in this case. *See* Compl. ¶¶ 4, 5, 19, 20 and Plaint. Prelim. Injunct. Memo at 6-7 and n.3. Additionally, counsel for Plaintiff has publicly stated that the very fact that Plaintiff is proceeding anonymously provides substantive proof of the constitutional violations alleged in Plaintiff's Complaint. *See* Copies of Documents from the A.C.L.U., Georgia, Website, attached hereto as Exhibit C. Clearly, Plaintiff's attempt to end-run the Court on the issue of anonymity should not be permitted in that it would violate the principles undergirding the presumption that a plaintiff may not file a lawsuit in federal court without first seeking permission of the court, permission which is granted only in exceptional cases. *See* Doe v. Frank, 951 F.2d at 323; Femedeer v. Haun, 227 F.3d 1244, 1246-47 (10th Cir. 2000). *See also* Buxton v. Ullman, 147 Conn. 48, 60, 156 A.2d 508 (1959), appeal dismissed, 367 U.S. 497 (1961)

("The privilege of using fictitious names in actions should be granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest.").

CONCLUSION

For the reasons stated above, the Complaint should be dismissed, and Plaintiff's Motion for a Preliminary Injunction should be stricken.

This 14th day of November, 2003.

Respectfully submitted,

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