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IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STANLEY HAMBRICK,
Plaintiff,

v.

KASIM REED in his official capacity as MAYOR OF THE CITY OF ATLANTA and GEORGE N. TURNER, in his official capacity as CHIEF OF THE ATLANTA POLICE DEPARTMENT,
Defendants.

CIVIL ACTION FILE NO:

2013CV235965

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ORDER

This matter is before the Court on PLAINTIFF'S MOTION FOR INJUNCTION and PLAINTIFF'S MOTION FOR CRIMINAL CONTEMPT. Having considered the record, the briefs of the parties, and the applicable law, the Court hereby DENIES both of Plaintiff's motions.

Plaintiff has once again moved for the Court to issue an injunction ordering Defendants to grant him a vending permit (under the now-repealed ordinance) and to prevent "Defendants or their agents from arresting, fining, forcing to vacate, or confiscating the goods of any person who was 1) permitted to vend on public property in 2012, and 2) resumes operating at the vending locations to which they were assigned during that year." (Pl.'s Mot. Inj. 1–2, Dec. 4, 2013). "The granting and continuing of injunctions shall always rest in the sound discretion of the judge, according to the circumstances of each case. This power shall be prudently and cautiously exercised and, except in clear and urgent cases, should not be resorted to." O.C.G.A. § 9-5-8. The Court finds no clear or urgent reason to issue an injunction ordering Defendants to issue vending permits in accordance with a lawfully repealed vending ordinance and hereby DENIES Plaintiff's Motion for Injunctive Relief.

The Court will now turn to Plaintiff's Motion for Criminal Contempt. A finding of criminal contempt requires "a showing of willful disregard or disobedience of the order or

command of the court." Lee v. Envtl. Pest & Termite Control, Inc., 243 Ga. App. 263, 264, 533 S.E.2d 116, 118 (2000). Plaintiff's Motion alleges that Defendants "intentionally refused to comply" with this Court's Order granting a mandamus absolute from the date the Order was issued (October 8, 2013) until the date the vending ordinance was repealed and replaced (November 4, 2013). (Pl.'s Mot. Criminal Contempt 1, 9–10). Conversely, Defendants contend that the automatic stay provision of O.C.G.A. § 9-11-62 and their notice of appeal of the Mandamus Order, which they claim served as a superseadeas in light of O.C.G.A. § 5-6-36, allowed them to disregard the specific command in the Order. (Defs.' Resp. to Pl.'s Mot. Inj. & Criminal Contempt 4–8).

Whether or not Defendants were required to abide by the Mandamus Order from the day that it was issued is an important question that this Court does not take lightly. As Justice Carley stated in Adams v. Georgia Department of Corrections:

> The three branches of Georgia's government have separate and distinct public duties to perform. The General Assembly enacts the laws. The judiciary interprets those laws and, when it is necessary to do so, determines the constitutionality of legislative enactments. Those in the executive branch, such as appellees, enforce the statutes passed by the General Assembly until such time as they are amended or held to be unconstitutional by the courts.

Adams v. Ga. Dep't of Corr., 274 Ga. 461, 462, 553 S.E.2d 798, 799–800 (2001). Although the matter before the Court today deals with a city ordinance, and not a legislative enactment, Justice Carley's statement of our state government's separation of powers is no less applicable.

As it had done in two prior Orders,[1] this Court very clearly interpreted the law in the Mandamus Order: "Article XXIII [, the vending ordinance,] as it existed prior to the date of the passage of Ordinance 08-O-1220 was not repealed and remains in effect." (Order 3, Oct. 8, 2013). The Court was also clear in its command: "Defendants are hereby ORDERED to accept, review, and process applications for vending permits according to Article XXIII of Chapter 30 of the Code of Ordinances of the City of Atlanta as it existed prior to the date that Atlanta City Ordinance No. 08-O-1220 was passed." (Order 5, Oct. 8, 2013). As discussed, both Plaintiff

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[1] See Miller v. City of Atlanta, No. 2011CV203707 (Ga. Super. Ct. 2012) for this Court's order and subsequent clarification finding the city's vending ordinance unconstitutional.

and Defendants agree that Defendants ignored this command—for close to a month—before the vending ordinance was repealed and replaced.

In describing the unique characteristics of a writ of mandamus, the Georgia Supreme Court in Bankers Life & Casualty Co. v. Cravey commented:

> [A writ of mandamus] is, by its very nature, a solemn command from the judicial department and carries with it the authority vested in the court by the Constitution. Unless that command is obeyed promptly and completely, the object of the writ is defeated, the authority of the judiciary is defied, and the power of the judge is discredited.

Bankers Life & Cas. Co. v. Cravey, 209 Ga. 274, 277, 71 S.E.2d 659, 662 (1952). In the syllabus of this same case, the court also explained that "a judgment of mandamus absolute may not be superseded without such an order of the court, and a willful failure to obey promptly and fully the mandamus order until it has been superseded in the above manner constitutes contempt of court." Id. at 274. Thirty years earlier, the Georgia Supreme Court issued a similar ruling in Smith v. Lott, holding that "plaintiffs in error willfully took chances in disobeying the mandamus absolute. As held in one of our earliest cases, the pendency of a writ of error does not impair or affect the judgment of the superior court. It is binding until reversed, and, when affirmed, is binding ab initio." Smith v. Lott, 156 Ga. 590, 590, 119 S.E. 400, 401 (1923) (citing Allen v. Savannah, 9 Ga. 286 (1851)).

Against this historical backdrop, Defendants point to the more recent Georgia Supreme Court decision of City of Homerville v. Touchton. In that case, which also involved an application for discretionary review of an order granting mandamus, the court stated that "[t]he filing of an application for discretionary review acts as a supersedeas." City of Homerville v. Touchton, 282 Ga. 237, 239, 647 S.E.2d 50, 52 (2007) (internal quotation marks omitted). Furthermore, neither O.C.G.A. § 9-11-62 nor O.C.G.A. § 5-6-46 (both of which were enacted after the decisions in Lott and Bankers Life) contain any express exceptions for mandamus actions.

At the end of the Bankers Life decision, and after a lengthy discussion as to why the Mandamus Order should have been complied with from the day it was issued, the Georgia Supreme Court held as follows with regard to the lower court's denial of the petitioner's

contempt motion: "[I]n view of the condition of the law relating to supersedeas, which causes good lawyers to differ and even the trial judge to erroneously construe it, we will not reverse the judgment excepted to because the defendant in the circumstances is not shown to have willfully defied it." Bankers Life, 209 Ga. at 278, 71 S.E.2d at 662–63. Over sixty years have passed since Bankers Life was decided, but this area of law still seems to create confusion. Defendants appear to have relied, in good faith, on current case law and current statutory law in deciding how to proceed after this Court's Mandamus Order. Thus, it cannot be said that Defendants willfully disregarded or disobeyed this Court's Order. The Court hereby DENIES Plaintiff's Motion for Criminal Contempt.

SO ORDERED this the 10th day of Feb., 2014.

SHAWN ELLEN LaGRUA, JUDGE
Fulton County Superior Court
Atlanta Judicial District

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