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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



BLAND FARMS, LLC,

Plaintiff,

v.

GARY BLACK, in His Official Capacity as
Georgia Commissioner of Agriculture, and the
GEORGIA DEPARTMENT OF
AGRICULTURE,

Defendants.

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CIVIL ACTION
FILE NO. 2013CV236894

**FINAL ORDER GRANTING PLAINTIFF’S MOTION FOR JUDGMENT ON THE
PLEADINGS AND DENYING DEFENDANTS’ MOTION TO DIMISS AND MOTION
FOR SUMMARY JUDGMENT**

The above-captioned matter is before the Court on the following Motions: (1) the Motion to Dismiss of Defendants Gary Black, in His Official Capacity as Georgia Commissioner of Agriculture (the “Commissioner”), and the Georgia Department of Agriculture (the “Department”) (hereinafter collectively “Defendants”); (2) Plaintiff Bland Farms, LLC’s (“Plaintiff”) Cross-Motion for Judgment on the Pleadings; and (3) Defendants’ Motion for Summary Judgment. On March 12, 2014, the Court held a hearing on the Motions, and both sides were given an opportunity for oral argument. Michael J. Bowers, Esq. and Joshua M. Moore, Esq. appeared on behalf of Plaintiff, and Elizabeth A. Monyak, Esq. appeared on behalf of Defendants. Now, having considered the Motions before the Court, the Responses in opposition thereto, the materials submitted in support of the Motions and opposition, the arguments of counsel, the entire record in this matter, and applicable Georgia law, the Court herein finds as follows:

This lawsuit involves a question as to the validity of certain regulations governing the packing of Vidalia onions that were adopted by the Commissioner in August 2013. The regulations – Ga. Comp. R. & Regs. § 40-7-8-.02 and § 40-7-8-.17 – prohibit Vidalia onion growers from packing Vidalia onions prior to April. Plaintiff contends that the regulations are unlawful, invalid and exceed Defendants’ statutory authority, and in furtherance thereof, seeks declaratory judgment and an injunction preventing the Commissioner from taking any action to enforce the regulations. Defendants assert that the regulations are valid because they are reasonable and authorized by statute.

In 1986, the Georgia General Assembly passed the Vidalia Onion Act of 1986, O.C.G.A. § 2-14-130, *et seq.* (the “Onion Act”). The Onion Act permits only those onions which are of the “Vidalia onion variety” and “are grown within the Vidalia onion production area” to be “identified, classified, packaged, labeled, or otherwise designated for sale inside or outside this state” as “Vidalia” onions. O.C.G.A. § 2-14-132.

In furtherance thereof and in order to protect and promote the “Vidalia” trademark, the Onion Act gives the Commissioner the following authority: (1) to take all actions necessary and appropriate to create, register, license, promote, and protect a trademark for use on or in connection with the sale or promotion of Vidalia onions and products containing Vidalia onions; (2) to impose and collect a royalty or license fee for the use of such trademark on products containing Vidalia onions or the packaging containing such onion products; (3) to retain and use funds derived from such royalties and license fees to promote Vidalia onions and to pay costs associated with monitoring the use of such trademark, prohibiting the unlawful or unauthorized use of the trademark, and enforcing rights in the trademark; (4) to prescribe rules and regulations which may include, but not necessarily be limited to, quality standards, grades, packing,

handling, labeling, marketing practices for the marketing of onions in Georgia; (5) to prescribe rules and regulations establishing a registration, inspection, and verification program for the production and marketing of Vidalia onions in Georgia, and such other regulations as are necessary to administer properly the Onion Act; (6) to grant variances in the production area requirements of the Onion Act to any producer who has produced in Georgia, marketed, and labeled onions of the Vidalia onion variety as Vidalia onion prior to January 31, 1986; (7) to enter any premises or other property where onions are produced, stored, sold, offered for sale, packaged for sale, transported, or delivered to inspect such onions; (8) to determine whether any person has engaged in or is about to engage in any act or practice which constitutes or will constitute a violation of the Onion Act and to impose civil penalties and take court action in furtherance thereof; (9) to determine and announce a shipping date¹ each year for the Vidalia onion marketing season upon the recommendation of the Vidalia Onion Advisory Panel;² and (10) to appoint a Vidalia Onion Advisory Panel, to consist of individuals involved in growing, packing, or growing and packing Vidalia onions; at least one county cooperative extension agent from the Vidalia onion production area; and any other person or persons selected by the Commissioner, for the purpose of rendering advice upon his or her request regarding the exercise of his or her authority. See O.C.G.A. §§ 2-14-132.1 through 2-14-138.

In 2013, in light of concerns that consumer confidence in Vidalia onions was decreasing based upon the poor quality of certain shipments of Vidalia onions and the belief that the quality was due to premature harvesting, the Commissioner conducted informal meetings with growers to obtain their input regarding this issue. Following these informal discussions, the

¹ The Onion Act defines “shipping date” as “the first day on which Vidalia onions may be shipped for sale.” O.C.G.A. § 2-14-131(2).

² The Onion Act also provides that Vidalia onions may be shipped prior to the date announced by the Commissioner with a mandatory U.S. No. 1 grade certificate. O.C.G.A. § 2-14-136.

Commissioner determined that the best option to remedy the concerns would be to amend certain of the Department's rules and regulations to establish a late April "pack date" before which no onion could be packed.

Thereafter, on June 27, 2013, the Department issued a Notice of Intent and mailed it to all interested persons proposing to amend Ga. Comp. R. & Regs. § 40-7-8-.02 ("Rule 40-7-8-.02") and Ga. Comp. R. & Regs. § 40-7-8-.17 ("Rule 40-7-8-.17") (hereinafter collectively the "New Rules"). The proposed amendment to Rule 40-7-8-.02, entitled "Definitions," was to delete the defined term "Shipping Date" and add a new term, "Packing Date," establishing when Vidalia onions may first be packed and shipped. The Commissioner also proposed rewriting Rule 40-7-8-.17 as follows:

The Commissioner is authorized to determine and announce a packing date each year for the Vidalia Onion® marketing season which shall commence no sooner than 12:01 AM on the Monday of the last full week of April, each year. Vidalia Onions® shall not be packed or put into commerce, at any time prior to the announced packing date. Once the packing date is established, Vidalia Onions may be packed in containers and shipped from that day forward. The Commissioner may, depending on crop conditions and with the recommendation of the Vidalia Onion® Advisory Panel, specify a packing date other than the Monday of the last full week in April. Drying and other forms of onion preparation may take place prior to the packing date.

The Notice of Intent solicited written comments from affected growers and/or packers and also scheduled a public hearing on the proposed amendments. The Commissioner held the public hearing on July 30, 2013. After considering the written comments received, as well as the positions expressed at the hearing, the Commissioner determined that Rule 40-7-8-.17 and Rule 40-7-8-.02 (i.e. the new packing date regulation and the corresponding definitional change) should be adopted. The Commissioner believed that by promulgating the New Rules and setting a late April date before which any onions could be packed, much less shipped, growers would be

prevented from prematurely harvesting Vidalia onions resulting in a lost opportunity for the onions to fully develop to maximize flavor and quality.

Defendants adopted the New Rules on August 7, 2013, and same went into effect on August 23, 2013.

Plaintiff initiated this litigation on September 23, 2013 by filing its Complaint for Declaratory Judgment and Injunctive Relief pursuant to O.C.G.A. §§ 9-4-2, 9-4-3, 9-5-3, and 50-13-10. In its Complaint, Plaintiff seeks a judicial declaration from this Court that the New Rules are contrary to law, void *ab initio*, and unenforceable. Plaintiff also seeks injunctive relief barring Defendants from enforcing the New Rules.

On November 15, 2013, Defendants filed their Answer and Defenses to Plaintiff's Complaint, raising the affirmative defenses of failure to state a claim, failure of process, improper service of process, insufficiency of service of process, failure to comply with O.C.G.A. § 50-13-10(b) to serve the Attorney General, lack of subject matter jurisdiction, sovereign immunity, and lack of standing, among other defenses.

On December 27, 2013, Defendants filed a Motion to Dismiss, asserting that Plaintiff's lawsuit should be dismissed for lack of subject matter jurisdiction based upon (1) sovereign immunity for Plaintiff's failure to serve the Attorney General in accordance with O.C.G.A. § 50-13-10(b); and (2) Plaintiff's lack standing to bring the lawsuit under O.C.G.A. § 50-13-10.

On January 28, 2014, Plaintiff responded to Defendants' Motion to Dismiss and filed a Cross-Motion for Judgment on the Pleadings, seeking judgment as a matter of law that the New Rules exceed Defendants' statutory authority and are contrary to law, void *ab initio*, and unenforceable.

On March 10, 2014, Defendants filed a Motion for Summary Judgment, seeking judgment as a matter of law that the challenged regulations are valid because they are reasonable and authorized by statute.

On March 12, 2014, the parties appeared before the Court for a hearing on Defendants' Motion to Dismiss, Plaintiff's Cross-Motion for Judgment on the Pleadings, and Defendants' Motion for Summary Judgment. After consideration of the Motions presently before the Court, as well as the pleadings and evidence of record, the Court concludes as follows:

I. Defendants' Motion to Dismiss

a. Sovereign Immunity

The Court will first address Defendants' assertion that this lawsuit should be dismissed for lack of subject matter jurisdiction based upon sovereign immunity for Plaintiff's failure to serve the Attorney General in accordance with O.C.G.A. § 50-13-10(b). At the time of the March 12, 2014 hearing before the Court, the record demonstrated that Plaintiff had not yet complied with O.C.G.A. § 50-13-10(b) in serving a copy of the Complaint upon the Attorney General. However, after finding this to be a curable defect, the Court entered an Order for Service on March 12, 2014, ordering Plaintiff to serve the Attorney General as required by law no later than March 17, 2014 at 5:00 p.m. The record reflects that Plaintiff personally served the Attorney General as directed on March 13, 2014 at 1:00 p.m.

Therefore, Defendants' claim that the Complaint should be dismissed on the basis of sovereign immunity is denied as moot.

b. Lack of Standing

The Court will now address Defendants' assertion that this lawsuit should be dismissed for lack of subject matter jurisdiction based on the fact that Plaintiff's does not have standing to

bring its claims. Defendants argue that in Plaintiff's Complaint, Plaintiff fails to allege (1) that Plaintiff is in a position of uncertainty; (2) that Plaintiff faces the risk of taking future, undirected action; and (3) sufficient facts to show that Plaintiff has suffered any certain actual or imminent harm as a result of the challenged regulations. Defendants further argue that even if Plaintiff raised such allegations in its Complaint, the allegations would be without merit as the New Rules are clear on their face and provide Plaintiff with clear direction as to what will be required with respect to the packing of Vidalia onions. The Court disagrees.

Plaintiff, a limited liability company engaged in the business of growing and selling Vidalia onions, set forth sufficient facts and circumstances in its Complaint and subsequent pleadings to demonstrate that Plaintiff is in a position of uncertainty which requires judicial guidance to protect Plaintiff from potential liability resulting from undirected action. *See* O.C.G.A. § 9-4-1 ("The purpose of this chapter is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and this chapter is to be liberally construed and administered."); *see City of Atlanta v. City of College Park*, 311 Ga. App. 62, 72 (2011).

Plaintiff asserts it has the right to pack and ship Vidalia onions in accordance with the statute governing same, O.C.G.A. § 2-14-136. O.C.G.A. § 2-14-136 provides: "The Commissioner may determine and announce a shipping date each year for the Vidalia onion marketing season in this state upon the recommendation of the Vidalia Onion Advisory Panel. Vidalia onions may be shipped prior to such date with a mandatory U.S. No. 1 grade certificate...."

Plaintiff regularly ships its Vidalia onions before the Commissioner's announced shipping date because its Vidalia onions are certified U.S. No. 1 grade. Plaintiff asserts that the

New Rules restrict Plaintiff's statutory right to pack and ship onions in accordance with the above statute, and because the New Rules conflict with O.C.G.A. § 2-14-136, Plaintiff could potentially incur liability for violation of the New Rules if Plaintiff ships its Vidalia onions prior to the last Monday in April.

Undoubtedly, the controversy herein justifies Plaintiff to seek a declaratory judgment from this Court to determine whether Plaintiff has the statutory right to ship in accordance with O.C.G.A. § 2-14-136 as Plaintiff claims, or whether the New Rules implemented by Defendants abolish this right. If Plaintiff acts without direction, Plaintiff could be subject to liability for violating the New Rules, despite Plaintiff's belief that the New Rules are invalid and exceed Defendants' statutory authority.

Therefore, Defendants' claim that the Complaint should be dismissed on the basis of lack of standing is denied on its merits.

Based upon the above, IT IS HEREBY ORDERED AND ADJUDGED that Defendants' Motion to Dismiss is DENIED.

II. Plaintiff's Cross-Motion for Judgment on the Pleadings and Defendants' Motion for Summary Judgment

a. Standards of Review

Having denied Defendants' Motion to Dismiss, the Court now reaches and will simultaneously address the dispositive motions before the Court, namely, Plaintiff's Cross-Motion for Judgment on the Pleadings and Defendants' Motion for Summary Judgment.

As to Plaintiff's Cross-Motion for Judgment on the Pleadings, the Standard of Review to be applied by the Court in consideration thereof is as follows:

"A motion for judgment on the pleadings is authorized where the undisputed facts that appear from the pleadings establish that the movant is entitled to judgment as a matter of law."

Lapolla Indus., Inc. v. Hess, 750 S.E.2d 467, 471 (Ga. Ct. App. 2013), reconsideration denied (Dec. 5, 2013). In considering a motion for judgment on the pleadings under O.C.G.A. § 9-11-12(c), “all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party’s favor.” Sherman v. Fulton County Bd. of Assessors, 288 Ga. 88, 89 (2010) (citations omitted).

For the purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the opposing party’s pleading are to be taken as true, and all allegations of the moving party which have been denied are taken as false. A motion for judgment on the pleadings should be granted only if the moving party is clearly entitled to judgment.

Id. at 90 (citations omitted); *see* Lapolla Indus., Inc., 750 S.E.2d at 471 (Ga. Ct. App. 2013), (holding that “[a]ll well-pleaded facts are to be accepted as true”).

In reviewing the pleadings, the Court may consider any written instrument attached as an exhibit to a pleading, as such is considered to be a part thereof for all purposes. O.C.G.A. § 9-11-10(c). Thus, Plaintiff’s Complaint and any exhibits attached thereto, which were explicitly incorporated and referenced in Plaintiff’s Complaint, will be considered by the Court for purposes of its ruling herein.

As to Defendants’ Motion for Summary Judgment, the Standard of Review to be applied by the Court in consideration thereof is as follows:

Pursuant to O.C.G.A. Section 9-11-56, for a party to prevail on a Motion for Summary Judgment, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, must show that there is no genuine issue as to any material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c); *see also* Creeden v. Fuentes, 296 Ga. App. 96 (2009).

The standard for summary judgment is familiar and settled: Summary judgment is warranted when any material fact is undisputed, as shown by the pleadings and record evidence, and this fact entitles the moving party to judgment as a matter of law. So, to prevail on a motion for summary judgment, the moving party must show that there is no genuine dispute as to a specific material fact and that this specific fact is enough, regardless of any other facts in the case, to entitle the moving party to judgment as a matter of law.

Whitlock v. Moore, 312 Ga. App. 777, 780-81 (2011) (citing Strength v. Lovett, 311 Ga. App. 35, 39-40 (2011)).

b. Plaintiff is entitled to Judgment as a Matter of Law on its Claims

In its Motion for Judgment on the Pleadings, Plaintiff asserts that it is entitled to judgment as a matter of law because the New Rules promulgated by Defendants effectively repeal a lawful statute and exceed Defendants' statutory authority. Having considered Plaintiff's Motion for Judgment on the Pleadings, as well as Defendants' Motion for Summary Judgment and accompanying evidence, and for the reasons set forth below, the Court agrees.

As stated above, O.C.G.A. § 2-14-136 provides: "The Commissioner may determine and announce a shipping date each year for the Vidalia onion marketing season in this state upon the recommendation of the Vidalia Onion Advisory Panel. Vidalia onions may be shipped prior to such date with a mandatory U.S. No. 1 grade certificate. The Vidalia Onion Advisory Panel shall survey the conditions of the Vidalia onion crop and recommend a shipping date for the marketing season to the Commissioner."

Former Rule § 40-7-8-.17 was a verbatim recitation of O.C.G.A. § 2-14-136, granting the Commissioner authority to determine and announce a "shipping date each year" for Vidalia onions grown in Georgia. The evidence before the Court demonstrates that in compliance with O.C.G.A. § 2-14-136 and Rule § 40-7-8-.17, the Commissioner in fact announced a shipping

date each year, and Plaintiff frequently, if not always, shipped prior to the announced shipping date because Plaintiff had “a mandatory U.S. No. 1 grade certificate.” O.C.G.A. § 2-14-136.

The New Rule § 40-7-8-.17 entirely eliminates the shipping authorization language, and instead, gives the Commissioner authority “to determine and announce a packing date each year for the Vidalia Onion® marketing season which shall commence no sooner than 12:01 AM on the Monday of the last full week of April, each year.” Rule § 40-7-8-.17 then expressly directs that “Vidalia Onions® shall not be packed or put into commerce, at any time prior to the announced packing date. Once the packing date is established, Vidalia Onions may be packed in containers and *shipped from that day forward.*” (Emphasis added).

Prior to the adoption of the New Rules, Vidalia onion growers and/or packers could either (1) ship on or after the ship date announced by the Commissioner, (2) ship before the announced ship date with a mandatory U.S. No. 1 grade certificate, or (3) ship at their discretion in the event the Commissioner declined to announce the ship date.³

Following the adoption of the New Rules, Vidalia onion growers and/or packers cannot ship before the Monday of the last full week in April, regardless of whether they possess a mandatory U.S. No. 1 grade certificate or not.⁴ In other words, the New Rules attempt to change existing or establish new law, which clearly exceeds Defendants’ authority in the absence of clear legislative authority permitting same.

³ The record does not reflect that the Commissioner ever declined to announce a shipping date. The Commissioner’s decision to annually announce a ship date is consistent with Defendants’ assertions that Vidalia onion growers could not ship without this directive from the Commissioner.

⁴ Rule § 40-7-8-.17 also provides that the Commissioner may, “depending on crop conditions and with the recommendation of the Vidalia Onion® Advisory Panel,” specify a packing date other than the Monday of the last full week in April (i.e. an earlier or later date), but the Commissioner will only do so with the requisite recommendation and if crop conditions warrant such change.

Defendants argue they had authority to adopt the New Rules under O.C.G.A. § 2-14-133, which permits the Commissioner to establish rules and regulations governing the packing of Vidalia onions. O.C.G.A. § 2-14-133 provides:

The Commissioner is authorized to prescribe rules or regulations which may include, but not necessarily be limited to, quality standards, grades, packing, handling, labeling, and marketing practices for the marketing of onions in this state, including the requirements that all Vidalia onions be initially packed only in the Vidalia onion production area and that no Vidalia onion may be shipped from the Vidalia onion production area in bulk except as may be authorized by rule, and such other regulations as are necessary to administer properly this article.

The Court agrees that the Commissioner can prescribe rules or regulations regarding “packing,” but by Defendants’ own indirect admissions, the Court finds the New Rules do not truly intend to regulate “packing,” such as determining the materials or containers to be used in packing Vidalia onions, the manner in which Vidalia onions are packed, and/or the location in which Vidalia onions are packed. It is apparent to the Court that in issuing the New Rules, Defendants actually intended to regulate premature shipping of Vidalia onions by dictating the date upon which Vidalia onions can first be packed (and then shipped). Such intent is clear in the Notice of Intent preceding the issuance of the New Rules, as well as in Defendants’ Brief in Support of Their Motion for Summary Judgment, wherein Defendants state:

Packing precedes shipping, and by setting a late April date before which no onions can even be packed (much less shipped), the new regulation better accomplished the regulatory goal of preventing growers from prematurely harvesting Vidalia onions and thereby shortchanging the critical time period necessary for the onions to fully develop so as to maximize flavor and quality.

The Onion Act defines “ship date” as “the first day on which Vidalia onions may be shipped for sale.” O.C.G.A. § 2-14-131(2). In enacting the Onion Act, the legislature vested the Commissioner with discretion to announce this “ship date,” following a recommendation by the

Vidalia Onion Advisory Panel (the “Panel”) as to an appropriate shipping date for the marketing season. As for the Panel, the Panel is required by the Onion Act to “survey the conditions of the Vidalia onion crop and recommend a shipping date for the marketing season to the Commissioner.” O.C.G.A. § 2-14-136. Thus, even if the Commissioner ultimately decides not to announce a “ship date,” which arguably has never occurred, the Panel must still recommend such date based upon “the conditions of the Vidalia onion crop.” Id.

Despite the fact that the Onion Act and, in particular, O.C.G.A. §§ 2-14-131(2) and 2-14-136 remain in effect, the New Rules wholly abolish the term “ship date,” and direct that the timing of shipments of Vidalia onions will now be based on a “pack date.” Ga. Comp. R. & Regs. § 40-7-8-.02 and § 40-7-8-.17. The new version of Rule § 40-7-8-.17 is clear that in accordance with its terms, no Vidalia onions can be shipped prior to the Monday of the last full week in April, but Vidalia Onions “may be packed in containers” and “shipped from that day forward.” Ga. Comp. R. & Regs. § 40-7-8-.17. The New Rules, which were not established by a legislative authority and have not been codified, improperly attempt to amend a governing statute.

Under Georgia law, “administrative agencies ... are not authorized to enlarge the scope of, or supply omissions in, a properly-enacted statute. Nor may administrative agencies change a statute by interpretation, or establish different standards within a statute that are not established by a legislative body.” North Fulton Medical Center v. Stephenson, 269 Ga. 540, 543-44 (1998). “The test of the validity of an administrative rule is twofold: whether it is authorized by statute and whether it is reasonable. A valid administrative rule has the same force and effect as the statutory scheme upon which it is predicated. However, an administrative rule which exceeds the scope of or is inconsistent with the authority of the statute upon which it is predicated is

invalid.” Department of Human Resources v. Anderson, 218 Ga. App. 528, 529 (1995) (quotations omitted).

Defendants’ desire to regulate Vidalia onions to further the goal of preventing premature harvesting is certainly commendable; however, to reach this end, Defendants are not authorized to “enlarge the scope of” O.C.G.A. § 2-14-136, to “change [this] statute by interpretation,” or to “establish different standards” than those set forth within this statute without the involvement of the legislature. North Fulton Medical Center, 269 Ga. at 544.

The Commissioner’s general authority to regulate “packing,” as codified in O.C.G.A. § 2-14-133, does not permit Defendants to adopt rules that essentially establish a new method for determining ship dates for Vidalia onions in contravention of O.C.G.A. § 2-14-136. Therefore, the Court finds that the New Rules exceed “the scope of ... the authority of [O.C.G.A. § 2-14-133] upon which [they are] predicated,” and as such, they are invalid. Department of Human Resources, 218 Ga. App. at 529.

Based upon the above, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff’s Motion for Judgment on the Pleadings is GRANTED, and Defendants’ Motion for Summary Judgment is DENIED.

This Order is hereby made the Final Judgment of this Court in the above matter in accordance with O.C.G.A. § 9-11-54(b).

SO ORDERED, this 19th day of March, 2014.



CYNTHIA D. WRIGHT, JUDGE
SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT

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