

Rel: October 25, 2019

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180324

Darrio Melton, as Mayor of the City of Selma

v.

Corey D. Bowie, in his official capacity as a member of the
Selma City Council, et al.

Appeal from Dallas Circuit Court
(CV-18-900256)

BRYAN, Justice.

Darrio Melton ("the mayor"), as mayor of the City of Selma ("the city"), appeals from a judgment entered in favor

1180324

of the members of the Selma City Council ("the council"). We affirm.

In September 2018, the council adopted Ordinance No. 0108-17/18 ("the ordinance"). The ordinance gives the council the power to appoint the city's tax collector, chief of police, and chief of the fire department "in accordance and pursuant to [§] 11-43-5, [Ala. Code 1975]." In relevant part, § 11-43-5, Ala. Code 1975, provides that "[t]he council may provide for a ... tax collector, chief of police, and chief of the fire department and shall specifically prescribe their duties." The mayor vetoed the ordinance shortly after it was passed by the council. However, the council later overrode the mayor's veto, making the ordinance a part of the city's municipal code.

In October 2018, the mayor sued the members of the council in their official capacities. Named as defendants were council members Corey D. Bowie, Angela Benjamin, Samuel Randolph, Michael Johnson, Johnnie Leashore, Miah Jackson, Susan Youngblood, Jannie Thomas, and Carl Bowline (hereinafter referred to collectively as "the defendants"). In his complaint, the mayor alleged that the ordinance violates §

1180324

11-43-81, Ala. Code 1975, which provides, in part, that the mayor "shall have the power to appoint all officers [of the city or town] whose appointment is not otherwise provided for by law." The mayor sought a judgment declaring the ordinance invalid; the complaint also sought preliminary and permanent injunctions preventing the implementation of the ordinance.

The defendants filed a motion to dismiss under Rule 12(b)(6), Ala. R. Civ. P., asserting that the complaint failed to allege a claim on which relief may be granted. The mayor did not file a response to the motion to dismiss. Following a hearing, the trial court entered a judgment granting the motion to dismiss, without providing a specific reason for its ruling. Shortly thereafter, the mayor filed a motion to stay the judgment pending an appeal to this Court, and the trial court denied the motion to stay. In its order denying the motion to stay, the trial court stated, in part, that the law "is very clear on the issue presented in this case. The Court finds that the [mayor] will not be successful on the merits of an appeal, unless the Alabama Supreme Court decides to break with years of precedent." The mayor then appealed.

"The appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the

complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [him] to relief. Raley v. Citibanc of Alabama/Andalusia, 474 So. 2d 640, 641 (Ala. 1985); Hill v. Falletta, 589 So. 2d 746 (Ala. Civ. App. 1991). In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether [he] may possibly prevail. Fontenot v. Bramlett, 470 So. 2d 669, 671 (Ala. 1985); Rice v. United Ins. Co. of America, 465 So. 2d 1100, 1101 (Ala. 1984). We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. Garrett v. Hadden, 495 So. 2d 616, 617 (Ala. 1986); Hill v. Kraft, Inc., 496 So. 2d 768, 769 (Ala. 1986)."

Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993).

The parties disagree about which statutory provision governs the council's adoption of the ordinance. The council argues that this case is governed by § 11-43-5, which is found in Chapter 43 of Title 11. Chapter 43 is titled "Mayor and Council, Other Officers, Employees, Departments, etc." In his complaint challenging the ordinance, the only pertinent substantive statutory provision the mayor referenced was § 11-43-81, Ala. Code 1975, also found in Chapter 43. At the hearing on the motion to dismiss, the parties continued to focus on Chapter 43, arguing about how § 11-43-5 and § 11-43-81 should be read. However, during the hearing, the

1180324

mayor's attorney shifted gears at some point by arguing briefly, for the first time, that a provision found in Chapter 43D should apply in this case. The mayor's attorney also mentioned, without explanation, that Chapter 43C "relates to a Class 5 municipality" (the parties agree that the city is a Class 5 municipality).

However, the trial court here granted a Rule 12(b)(6) motion to dismiss, which tests the allegations made in the complaint. Nance, supra. The complaint referenced Chapter 43, not Chapter 43C or Chapter 43D. As we will explain below, we have no basis on which to believe that Chapter 43C or Chapter 43D applies to this case. However, we will first address the allegations in the complaint concerning provisions in Chapter 43, which are the only relevant allegations.

Viewing the allegations in the complaint most strongly in the mayor's favor, as we must, see Nance, we conclude that the trial court did not err in dismissing the mayor's action. The complaint alleges that the ordinance giving the council the power to appoint the city's tax collector, chief of police, and chief of the fire department "is in direct violation of § 11-43-81." Section 11-43-81 provides, in part:

1180324

"The mayor shall be the chief executive officer, and shall have general supervision and control of all other officers and the affairs of the city or town, except as otherwise provided in this title. He shall have the power to appoint all officers whose appointment is not otherwise provided for by law."

(Emphasis added.) As noted, the ordinance states that it was passed "in accordance and pursuant to [§] 11-43-5," a provision the council relied on in moving to dismiss. In relevant part, § 11-43-5 provides that "[t]he council may provide for a ... tax collector, chief of police, and chief of the fire department and shall specifically prescribe their duties." Thus, the issue presented by the complaint and the motion to dismiss was whether the mayor's general appointment power granted by § 11-43-81 is limited by the specific provision in § 11-43-5 granting the council the power to "provide for" a tax collector, chief of police, and chief of the fire department. That issue turns on the interpretation of what the term "provide for" in § 11-43-5 means, and this Court touched on that issue in Beasley v. McCorkle, 237 Ala. 4, 184 So. 904 (1938).

Like this case, Beasley essentially involved a power struggle between a mayor and a city council. Tuscumbia's city

1180324

council adopted an ordinance creating the office of chief of police, and the city council then appointed someone to that office. However, the mayor refused to approve the warrant issued by the city clerk for the police chief's salary, which led to the police chief suing the mayor. The Court in Beasley first quoted statutory provisions regarding the broad powers of the city council:

"Section 1908 of the [1923 Alabama] Code provides, inter alia: 'All legislative powers and other powers granted to cities and towns shall be exercised by the council, except those powers conferred on some officers by law or ordinance. They shall perform the duties required in this chapter, including, the following: ... 9. They shall prescribe by an ordinance the powers to be exercised and the duties to be performed by the officers appointed or elected so far as such duties and powers are not prescribed by law.

"'10. Except as otherwise provided, they shall have power to establish a police force and to organize the same under the general supervision of the chief of police, and to provide one or more station houses, and to require all things necessary for the maintenance of an efficient police department.'"

Beasley, 237 Ala. at 6, 184 So. at 905. The above sections of the 1923 Alabama Code are now found in § 11-43-43, Ala. Code 1975, § 11-43-47, Ala. Code 1975, and § 11-43-55, Ala. Code 1975. The current versions of those Code sections indicate

1180324

that the pronoun "they" used in the above-quoted sections from the 1923 Code refers to the antecedent "council." See, e.g., § 11-43-47 ("The council shall prescribe by an ordinance the powers to be exercised and the duties to be performed by the officers appointed or elected").

Of particular relevance here, the Court in Beasley then quoted part of § 1951, Ala. Code of 1923: "'The council may provide for a tax assessor, tax collector, chief of police'" 237 Ala. at 6, 184 So. at 905. Section 1951 is the predecessor to the Code section in question here, § 11-43-5. Importantly, the relevant language of the two sections is the same (§ 1951 also stated that the council may provide for a chief of the fire department, although that part of § 1951 was not quoted in Beasley).

The Court in Beasley concluded that the city council, not the mayor, had the power to appoint the chief of police:

"Practically the entire argument made on this appeal, on behalf of [the mayor], is directed to the invalidity of the appointment of [the chief of police], taking the point that the council exhausted its power with the adoption of the ordinance creating the office, fixing the term of office, and the salary to be paid. That the power to appoint the chief of police was in the mayor, not in the council. There is no approach to merit in such a contention. Ingram v. Evans et al., 227 Ala. 14,

1180324

148 So. 593 [(1933)]; Peinhardt v. West et al., 212 Ala. 83, 101 So. 736 [(1924)]; [Ala.] Code [1923], Sections 1908, 1951 and 1887."

237 Ala. at 6, 184 So. at 905-06.

Given that the relevant statutory language, especially the language now found in § 11-43-5, has remained unchanged, Beasley indicates that the council has the statutory power to appoint a tax collector, chief of police, and chief of the fire department.¹ In his principal brief on appeal, the mayor does not address Beasley. Instead, he argues, among other things, that the language in § 11-43-5 authorizing the council to "provide for" the positions should not be interpreted to allow the council to appoint individuals to those positions. However, that argument conflicts with the holding of Beasley, which the defendants discussed in their brief. The mayor briefly addressed Beasley in his reply brief, but he did not ask this Court to overrule Beasley. Rather, he dismissed the analysis in Beasley as dicta and argued that this case is governed not by Chapter 43 but by Chapter 43C or Chapter 43D,

¹The provision that is now codified at § 11-43-81, concerning the mayor's appointment power, was also found in the 1923 Alabama Code at § 1895. The Court in Beasley did not mention that provision. The relevant language found in § 11-43-81 is substantially the same as the language found in § 1895.

1180324

which we discuss more fully below. However, those newer statutory provisions, i.e., Chapters 43C and 43D, were not referenced in the allegations of the complaint, which is what this Court examines in reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief may be granted. Nance, supra. Given the allegations in the complaint, the trial court did not err in granting the Rule 12(b)(6) motion to dismiss.

We note briefly that the parties also discuss Scott v. Coachman, 73 So. 3d 607 (Ala. 2011), a decision argued in the trial court. However, that decision does not seem to be on point. The Court in Scott observed that § 11-43-81 gives a mayor "'the power to appoint all officers whose appointment is not otherwise provided for by law.'" 73 So. 3d at 609. The issue in Scott was whether a city ordinance that gave a council appointing power that a mayor would otherwise have would, by itself, be sufficient to trigger the "otherwise provided for by law" exception to § 11-43-81. That is not the situation here, where the council grounds its right to appoint on § 11-43-5. However, in what appears to be dicta, the Scott Court did note that a council has the appointing power at

1180324

issue here: "The legislature has granted city councils appointing authority with regard to certain officers of a town. See, e.g., ... § 11-43-5, Ala. Code 1975 ('The council may provide for a tax assessor, tax collector, chief of police, and chief of the fire department and shall specifically prescribe their duties.')." Scott, 73 So. 3d at 610. Although that observation appears to be dicta, it is consistent with Beasley, which the Scott Court did not mention.

Out of an abundance of caution, we will now discuss the mayor's arguments concerning Chapters 43C and 43D of Title 11. The mayor's primary argument in his principal brief is that this case is governed not by Chapter 43 but by the provisions in Chapter 43C. Initially, we note that this argument was not preserved. In the proceedings below, the mayor first mentioned Chapter 43C at the hearing. At that hearing, the mayor's attorney had begun arguing briefly for the first time that Chapter 43D applies when the defendants' attorney asked the trial court: "What is the statute that he's relying on, because it's not in his complaint?" The mayor's attorney answered: "11-43D -- that chapter [at section] 14. And

1180324

there's also another one that relates to municipalities and that is 11-43C which relates to a Class 5 municipality."

(Emphasis added.) That passing reference to Chapter 43C -- which was not an actual argument -- appears to be the only reference made to that chapter before the trial court dismissed the case. After the dismissal, the mayor did present an argument regarding Chapter 43C in moving for a stay of the judgment; however, no such argument was made before the judgment was entered or in any postjudgment motion asking the trial court to set aside the judgment. Because the trial court was not given the opportunity to consider the argument regarding Chapter 43C when deciding the case, the mayor's argument regarding Chapter 43C is not properly before us.

Moreover, there is no indication that Chapter 43C applies in this case. Chapter 43C is titled "Mayor-Council Form of Government in Class 5 Municipalities." Section 11-43C-1 provides that Chapter 43C "shall apply to any Class 5 municipality in the State of Alabama," and, as the mayor notes and the defendants do not dispute, the city is a Class 5 municipality. However (although the mayor disagrees), other provisions in Chapter 43C indicate that, in order for the

1180324

provisions of Chapter 43C to govern, a Class 5 municipality has to have adopted the mayor-council form of government in a special election held in 1987. Section 11-43C-2 provides, in part: "After May 21, 1987, the mayor or chief executive officer of any city to which this chapter applies may call a special election to be held in 1987, for the purpose of determining whether such city shall adopt the mayor-council form of government" Section 11-43C-5 provides further: "If a majority of the qualified electors voting in the election provided herein vote in favor of a mayor-council form of government, the following provisions of this chapter shall be applicable." (Emphasis added.) See also Ala. Op. Att'y Gen. No. 2007-051 (Feb. 26, 2007) ("The authority to adopt the mayor-council form of government under section 11-43C-2 ... existed only in the year 1987 and expired before January 1, 1988."). The remainder of Chapter 43C contains detailed provisions governing the functioning of municipalities whose electors voted to adopt such provisions in 1987. As the mayor notes, one of those provisions, § 11-43C-37(2), provides that the mayor has the power to "[a]ppoint ... all officers and employees of the city except those appointed by the council";

1180324

§ 11-43C-21 allows the council to appoint certain officials and employees but does not include the officials at issue in this case.

We have before us nothing indicating that the city ever held an election contemplated by Chapter 43C. Our research reveals opinions indicating that the City of Prichard is subject to that chapter. See, e.g., Trenier v. City of Prichard, 168 So. 3d 22 (Ala. 2014). However, we have found no opinions associating any other city with Chapter 43C. The mayor, latching onto that part of the standard of review stating that a Rule 12(b)(6) dismissal is proper only if it is beyond doubt that a plaintiff cannot establish facts in support of the claim that would entitle the plaintiff to relief, see Nance, supra, contends that he "might" prevail under his theory that Chapter 43C applies here. However, as noted, any allegation regarding Chapter 43C was not presented in the complaint, and a Rule 12(b)(6) motion tests the sufficiency of the complaint. Further, it seems remarkable that, if the city had held an election pursuant to Chapter 43C, the mayor would not have brought that to the trial court's attention. His argument regarding Chapter 43C, which

1180324

was developed only after the judgment had been entered, is therefore irrelevant.

In some ways, the mayor's argument regarding Chapter 43D suffers a similar problem. Unlike the argument regarding Chapter 43C, the mayor's attorney did raise an argument regarding 43D -- albeit briefly -- at the hearing in the trial court. The mayor noted that § 11-43D-14, Ala. Code 1975, provides that "the mayor shall have the power to appoint all officers and employees of the city subject to the rules and regulations of any civil service or merit system that may be applicable to said city." However, as was the case with Chapter 43C, there is no indication that Chapter 43D applies here. Section 11-43D-1, Ala. Code 1975, indicates that Chapter 43D applies only to certain Class 5 municipalities operating under a particular federal-court consent decree:

"The governing body of any Class 5 municipality operating under a United States district court consent decree approved by the court in the case of Tolbert and Petty vs. the City of Bessemer, Civil Action No. 75-297, by a majority vote of the members thereof may adopt an ordinance establishing a mayor-council form of government pursuant to the terms and conditions of this chapter."

There is no indication here that the city is subject to the consent decree approved in Tolbert v. City of Bessemer. As he

1180324

argued concerning Chapter 43C, the mayor contends that a dismissal was improper because the city "might" be subject to Chapter 43D. However, as noted, any allegation regarding Chapter 43D was not presented in the complaint, and a Rule 12(b)(6) motion tests the sufficiency of the complaint. Further, as with Chapter 43C, it seems remarkable that, if the city had met the requirements of § 11-43D-1, the mayor would not have presented evidence of that to the trial court. His argument regarding Chapter 43D is without merit.

Accordingly, we affirm the judgment of the trial court.

AFFIRMED.

Parker, C.J., and Bolin, Shaw, Wise, Sellers, Mendheim, and Stewart, JJ., concur.

Mitchell, J., concurs in the result.