

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

VOYA INSTITUTIONAL TRUST
COMPANY,

Plaintiff,

v.

UNIVERSITY OF PUERTO RICO et al.,

Defendants.

CIVIL NO. 16-2519 (FAB)

REPLY TO OPPOSITION TO MOTION TO DISMISS

TO THE HONORABLE COURT:

COMES NOW, co-defendant Hon. Alejandro García Padilla, in his official capacity as Governor of Puerto Rico (hereinafter the “Governor”), specially appearing and without submitting to the jurisdiction or venue of this Court, and hereby states and prays as follows:

1. On August 22, 2016 plaintiff filed a “Complaint for Declaratory Relief” against the University of Puerto Rico (“UPR”), the UPR’s President, Celeste Freytes, in her official capacity, and the Governor of Puerto Rico, in his official capacity. Docket No. 1. Plaintiff brings this action as alleged trustee for the UPR’s deferred compensation plan (“Plan”). Plaintiff is seeking declaratory judgment to the effect that certain actions taken or to be taken by plaintiff upon its removal as trustee do not violate the recently enacted Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), Pub. Law 114-187, or the trust agreements that govern the trusts established to hold Plan assets (the “Trust Agreements”).

2. On September 12, 2016, UPR and its President filed a Motion to Dismiss. Docket No. 14. On the same date, the Governor filed a separate Motion to Dismiss (Docket No. 15), joining the arguments raised by UPR and separately demonstrating that (1) the Governor is entitled to

Eleventh Amendment immunity; and (2) in the alternative, the complaint fails to state a cause of action against the Governor.

3. On September 26, 2016, plaintiff filed a “Memorandum in Opposition to Defendants’ Motions to Dismiss.” Docket No. 18 (the “Opposition”).

4. In its Opposition, plaintiff argues briefly, and in a footnote, that the Governor is a proper party to this lawsuit because the complaint requests declarations involving the “Puerto Rico Emergency Moratorium and Rehabilitation Act,” PR Act No. 21-2016 (the “Moratorium Act”) and an Executive Order issued pursuant to it. See Docket No. 18 at 11 n. 7.

5. The only form of relief requested in the complaint involving the Moratorium Act is a declaration to the effect that certain actions or omissions of the plaintiff do not violate Section 201(b) of the Moratorium Act, and do not give rise to liability to any party under applicable law. See Docket No. 1 at 16.¹

6. Plaintiff is not challenging the constitutionality of the Moratorium Act or any Executive Order issued pursuant to it. Plaintiff is also not claiming that the Governor is trying to enforce the Moratorium Act against plaintiff in any way, or that its enforcement would harm plaintiff. To the contrary, plaintiff’s complaint merely seeks a declaration that its actions or omissions are in conformity with the Moratorium Act.

7. “The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute.” Shell Oil Co. v. Noel, 608 F.2d 208, 211 (1st Cir. 1979). *A fortiori*, when the constitutionality of the relevant statute is not even at issue, the mere fact that the Governor has a general duty to

¹ Although page 16 of the Complaint cites Section 201(a) of the Moratorium Act, it is obvious that plaintiff’s request for declaratory relief involves Section 201(b), not 201(a) of the Moratorium Act. See, Docket No. 1 at ¶43 (quoting Section 201(b)).

enforce the laws of Puerto Rico does not automatically make him a necessary party in an action for declaratory relief concerning the legality of plaintiff's actions or omissions.

8. Plaintiff has not even alleged what would be the Governor's role, if any, in the event plaintiff's actions are found to be in violation of Puerto Rico law.

9. Section 201(c) of the Moratorium Act provides as follows:

Any act found to violate subsection (b) of this Section shall be void and punishable by contempt of court. Any person or entity found to violate this Section may also be liable **to such government entity** for damages, costs, and attorneys' fees incurred by the Governor or such government entity in defending against actions taken in violation of this Section, and punitive damages for intentional or knowing violations, and upon determining that there has been a violation of this section, the court may order additional appropriate remedies.

(Emphasis added.)

10. As provided by section 201(c) of the Moratorium Act, any violation of Section 201(b) of the Act may subject the person found to be in violation to liability vis-à-vis the relevant government entity. In this case, the relevant contractual relationship is between plaintiff and UPR. Any liability for acts or omissions in violation of Section 201(b) of the Moratorium Act is twice removed from the Governor, and the fact that the Governor is generally empowered with the authority to enforce laws, or that he signed Executive Orders pursuant to the Moratorium Act, does not set forth a plausible claim for relief against the Governor in his official capacity. See Shell Oil Co., 608 F.2d at 213 ("If a complaint fails to allege, or plaintiff fails to prove, that defendant state officers have ever taken or threatened to take any action with respect to a state statute then there is no "actual controversy" within the Declaratory Judgment Act, and there is "no case or controversy" within Article III. The principle applies regardless of whether ... the state statute sought to be attacked provides criminal penalties. No matter what the type of case, federal courts are not

empowered to give plaintiff advisory opinions where there is no actual controversy.”) (internal citations omitted).

11. In the absence of any plausible claim for declaratory relief against the Governor that could somehow fall within an exception to the protections of the Eleventh Amendment, the Governor, in his official capacity, is entitled to immunity from this lawsuit. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); Collazo-Perez v. Puerto Rico, 100 F. Supp. 3d 88, 93 (D.P.R. 2015). See also Waste Mgt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 331 (4th Cir. 2001) (“We agree with the Defendants that Governor Gilmore should be dismissed as a party. *Ex parte Young* requires a ‘special relation’ between the state officer sued and the challenged statute to avoid the Eleventh Amendment’s bar. ‘General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law.’”).

WHEREFORE, defendant respectfully requests that the Court dismiss plaintiff’s complaint against the Governor.

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

In San Juan, Puerto Rico, this 6th day of October, 2016.

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