IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Boyd N. Boland

Civil Action No. 04-cv-02455-REB-BNB

CHARLES C. CLEMENTS,

Plaintiff,

v.

THOMAS C. MILLER,
JANIS E. CHAPMAN, and
KATHERINE GRIER,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before me on the following motions:

(1) **Defendant Katherine Grier's Motion to Dismiss**, filed January 19, 2005; and

(2) Defendant Thomas C. Miller's Concurrence with Defendant Katherine Grier's Motion to Dismiss and Motion for Judgment on the Pleadings Re: Counterclaim, filed January 26, 2005.

For the following reasons, I respectfully RECOMMEND:

(1) That defendant Grier's Motion be GRANTED and all federal claims against defendant Grier be DISMISSED WITH PREJUDICE;

(2) That defendant Miller's Concurrence with Defendant Katherine Grier's Motion to Dismiss be GRANTED and all federal claims against defendant Miller be DISMISSED WITH PREJUDICE;

(3) That the Court decline to exercise supplemental jurisdiction over Defendant Miller's counterclaims and over the plaintiff's state-law claims, and these claims be DISMISSED WITHOUT PREJUDICE; and

(4) That defendant Miller's Motion for Judgment on the Pleadings be DENIED AS MOOT.

I. STANDARD OF REVIEW

The plaintiff is proceeding *pro se*. I must liberally construe the pleadings of a *pro se* plaintiff. Haines v. Kerner, 104 U.S. 519, 520-21 (1972). Nevertheless, I cannot act as advocate for a *pro se* litigant, who must comply with the fundamental requirements of the Federal Rules of Civil Procedure. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

The standard of review for dismissal on the basis of lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) is described as follows:

> Generally, Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms. First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true.
>
> Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.
>
> However, a court is required to convert a Rule 12(b)(1) motion to

> dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case. The jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case.

Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995) (citations omitted).

In ruling on a motion to dismiss, the court must accept the plaintiff's well-pleaded allegations as true and must construe all reasonable inferences in favor of the plaintiff. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 493 (1986); Mitchell v. King, 537 F.2d 385, 386 (10th Cir. 1976). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A claim should be dismissed only where, without a doubt, the plaintiff could prove no set of facts in support of his claims that would entitle him to relief. Id.

II. BACKGROUND

The plaintiff filed his Complaint with Jury Demand (the "Complaint") on November 26, 2004. The plaintiff's claims arise out of an Adams County domestic relations proceeding wherein defendant Chapman was the presiding magistrate judge, defendant Miller was the attorney for the plaintiff, and defendant Grier was the opposing counsel. The Complaint is confusing, at best, and is replete with conclusory and self-serving allegations. Most of the allegations center around defendants Grier and Miller's actions against the plaintiff in connection with the domestic relations proceeding.

The Complaint asserts numerous frivolous claims under the plaintiff's laundry list of authorities: "R.C. 1979"; 42 U.S.C.A. § 1983; 42 U.S.C.A. § 1985; 42 U.S.C.A. § 1986; 18

U.S.C.A. § 241; 18 U.S.C.A. § 242; 18 U.S.C.A. § 872; 18 U.S.C.A. § 1621; 18 U.S.C.A. § 1001; 18 U.S.C.A. § 572; 18 U.S.C.A. § 1512; 18 U.S.C.A. § 1951(B)(2); 18 U.S.C.A. § 1341; 18 U.S.C.A. § 1343; 18 U.S.C.A. § 875(c); C.R.S. 18-8-704; C.R.S. 18-8-707; C.R.S. 18-3-207; C.R.S. 18-5-114; and C.R.S. 18-3-207. *Complaint*, ¶ 6. The plaintiff seeks monetary damages from the defendants.

III. ANALYSIS

A. Rooker-Feldman Doctrine

Defendants Grier and Miller do not raise the issue of whether the plaintiff's claims are barred by the Rooker-Feldman doctrine. However, because the doctrine operates as a bar to subject matter jurisdiction, Kenmen Engineering v. City of Union, 314 F.3d 468 (10th Cir. 2002), I may determine its applicability *sua sponte*. Fed.R.Civ.P. 12(h)(3) (stating that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action").

The Rooker-Feldman doctrine is derived from 28 U.S.C. § 1257 which provides that federal review of state court judgments can be obtained only in the United States Supreme Court. Kenmen, 314 F.3d at 473. The Rooker-Feldman doctrine "prohibits a lower federal court from considering claims actually decided by a state court and claims inextricably intertwined with a prior state-court judgment." Id. (internal quotations and citations omitted).

The allegations against defendants Grier and Miller are largely unintelligible. However, it appears that some of the plaintiff's claims may seek redress for injuries caused by a judgment in the state court proceeding. For example, the plaintiff alleges that the defendants conspired to "suborn perjury and false documentation" to "deprive Plaintiff of parenting time with his

progeny." *Complaint*, ¶ 23. To the extent the Complaint seeks redress for injuries actually and proximately caused by the state court judgment, the claims are barred by the Rooker-Feldman doctrine. As discussed in the remainder of this Recommendation, to the extent the Complaint seeks redress for injuries other than those caused by the state court judgment, the plaintiff fails to state a claim upon which relief can be granted.

B. Claims for Violations of 42 U.S.C. § 1983

The defendants argue that the claims asserted against them under 42 U.S.C. § 1983 must be dismissed because they are not state actors. "Under Section 1983, liability attaches only to conduct occurring under color of law. Thus, the only proper defendants in a Section 1983 claim are those who represent the state in some capacity, whether they act in accordance with their authority or misuse it." Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995) (internal quotations omitted).

The Complaint contains conclusory allegations that defendants Grier and Miller, private attorneys, acted in concert with defendant Chapman, a Magistrate Judge for the "Adams County Family Court." A private citizen can be liable for state action where the "private party is a willful participant in joint action with the State or its agents." Id. at 1453 (internal quotations omitted). The focus of the inquiry is "whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." Id. The state and private actors "must share a specific goal to violate the plaintiff's constitutional rights by engaging in a particular course of action." Id. at 1455. A state official's mere acquiescence in the actions of a private citizen are not sufficient to impose liability. Id. at 1453. "When a plaintiff in a § 1983 action attempts to assert the necessary state action by implicating state officials or judges in a

conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action." Scott v. Hern, 216 F.3d 897, 907 (10th Cir. 2000) (internal quotations omitted).

The Complaint's only factual allegations of behavior involving all three defendants are that Grier and Miller threatened to use Magistrate Chapman's alleged bias toward "common law parties" to their advantage and against the plaintiff. There are no factual allegations to support a reasonable inference that Magistrate Chapman shared a specific goal with Grier and Miller to violate the plaintiff's constitutional rights by engaging in a particular course of action. Accordingly, the plaintiff has failed to allege that defendants Grier and Miller acted in concert with defendant Chapman and, therefore, were state actors as contemplated by section 1983.

C. Claims for Violations of 42 U.S.C. §§ 1985 and 1986

The defendants further argue that the claims asserted against them under 42 U.S.C. §§ 1985 and 1986 must be dismissed because they are not state actors. Section 1985 provides in pertinent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to

> injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(1).

Claims under section 1985(3) can apply to private conspiracies under certain circumstances. Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993). However, I need not reach this issue because the plaintiff has failed to state a claim under section 1985. This statute is narrowly construed, as explained by the circuit court:

> The case law has defined the elements of a claim under this statute. The essential elements of a § 1985(3) claim are: (1) a conspiracy; (2) to deprive plaintiff of equal protection or equal privileges and immunities; (3) an act in furtherance of the conspiracy; and (4) an injury or deprivation resulting therefrom. The evolving law has clarified these elements. Firstly, a valid claim must, of course, involve a conspiracy. Secondly, however, § 1985(3) does not apply to all tortious, conspiratorial interferences with the rights of others, but rather, only to conspiracies motivated by some racial, or perhaps otherwise class-based, invidiously discriminatory animus. The other class-based animus language of this requirement has been narrowly construed and does not, for example, reach conspiracies motivated by an economic or commercial bias. In fact, the Supreme Court has held that it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause.

Id. (internal quotations and citations omitted).

The Complaint is void of any allegations of racial or class-based discriminatory animus. Therefore, the Complaint fails to state a claim for relief under section 1985.

Section 1986 provides:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. § 1986.

As with section 1985, the Complaint does not contain any allegations pertaining to the substance of section 1986. Therefore, the Complaint fails to state a claim for relief under section 1986.

D. Claims Under "R.C. 1979"

The plaintiff asserts claims under "R.C. 1979." *Complaint*, ¶¶ 6, 22, 23, 27, 28, 32, 35, 37, 40, 43, 46, and 49. The plaintiff does not explain the origin of "R.C. 1979," and my research reveals no legal support for a civil action based on "R.C. 1979."

E. Claims Under Title 18 of the United States Code

The Complaint asserts that "[t]he neglects of each of the Defendants" violated the following statutes: 18 U.S.C.A. § 241; 18 U.S.C.A. § 242; 18 U.S.C.A. § 872; 18 U.S.C.A. §

1621; 18 U.S.C.A. § 1001; 18 U.S.C.A. § 572; 18 U.S.C.A. § 1512; 18 U.S.C.A. § 1951(B)(2); 18 U.S.C.A. § 1341; 18 U.S.C.A. § 1343; 18 U.S.C.A. § 875(c). *Complaint*, ¶ 6. The plaintiff does not have a private right of action under these statutes.

Section 241 criminalizes conspiracies to violate a person's rights under the Constitution or the laws of the United States. 18 U.S.C. § 241. Section 242 makes it a crime to wilfully deprive persons under color of law of their rights under the constitution or laws of the United States. 18 U.S.C. § 242. These sections do not form a basis for civil liability. Kelly v. Rockefeller, 69 Fed.Appx. 414, 415-16, 2003 WL 21386338 (10th Cir. June 17, 2003).

Section 872 makes extortion by officers or employees of the United States a federal offense. This section applies only as against officers or employees of the United States. 18 U.S.C. § 872. The plaintiff does not allege that the defendants are officers or employees of the United States. Moreover, section 872 does not provide a private cause of action. Gipson v. Callahan, 18 F.Supp. 662, 668 (W.D. Tx. 1997).

Section 1621 makes perjury a federal crime. 18 U.S.C.§ 1621. There is no implied right of action under section 1621. Roemer v. Crow, 993 F.Supp. 834, 837 (D.Kan. 1998), *aff'd* 162 F.3d 1174, 1998 WL 777064 (10th Cir. Oct. 27, 1998).

Section 1001 criminalizes certain fraudulent acts. 18 U.S.C. § 1001. There is no private right of action under section 1001. Federal Sav. & Loan Ins. Corp. v. Reeves, 816 F.2d 130, 138 (4th Cir. 1987).

Section 1512 criminalizes the obstruction of justice. 18 U.S.C. § 1512. Section 1512 does not provide a private cause of action. Gipson v. Callahan, 18 F.Supp. 662, 668 (W.D. Tx. 1997).

Section 572, 18 U.S.C., does not exist.

Section 1951 prohibits extortion. 18 U.S.C. § 1951. Sections 1341 and 1343 prohibit mail fraud and wire fraud. 18 U.S.C. § 1341; 18 U.S.C. § 1343. None of these statutes provide an implied private right of action. Wisdom v. First Midwest Bank of Poplar Bluff, 167 F.3d 402, 409 (8th Cir. 1999); Creech v. Federal Land Bank of Wichita, 647 F.Supp. 1097, 1099 (D.Colo. 1986).

Section 875(c) makes it a crime to transmit "in interstate or foreign commerce any communication containing any threat" to kidnap or injure another. 18 U.S.C. § 875(c). There is no private right of action under section 875. See Weiss v. Sawyer, 28 F.Supp.2d 1221, 1227 (W.D.Okla. 1997).

F. Claims Under Title 18 of the Colorado Criminal Code and Defendant Miller's Counter Claims

The plaintiff's remaining claims and defendant Miller's counter claims are all brought pursuant to Colorado state law.[1] *Complaint*, ¶ 6; *Defendant Thomas C. Miller's Answer with Counterclaims*, filed December 15, 2004, ¶¶ 67, 79. This Court has original jurisdiction over the state-law claims only if the parties can show that complete diversity of citizenship exists between the parties and that the amount in controversy exceeds $75,000.00. 28 U.S.C. § 1332; Radil v. Sanborn Western Camps, Inc., 384 F.3d 1220, 1225 (10th Cir. 2004).

The Complaint summarily alleges many grounds for jurisdiction including 28 U.S.C. § 1332. *Complaint*, ¶ 5. Defendant Miller's pleading does not allege any grounds for jurisdiction.

[1]I note that the plaintiff's remaining claims are all brought pursuant to Title 18 of the Colorado Criminal Code--specifically sections 18-8-704, 18-8-707, 18-3-207, 18-5-114, and 18-3-207. These claims likely would fail for the same reasons the plaintiff's claims under Title 18 of the United States Code failed.

Neither the Complaint nor defendant Miller's pleading allege any facts to support diversity jurisdiction as required by the federal rules of civil procedure. Fed.R.Civ.P. 8(a) (stating that "[a] pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain . . . a short and plain statement of the grounds upon which the court's jurisdiction depends").

"The party seeking to invoke the jurisdiction of a federal court must prove that the case is within the court's subject matter." Henry v. Office of Thrift Supervision, 43 F.3d 507, 512 (10th Cir. 1994). Neither the plaintiff nor defendant Miller have demonstrated that their state-law claims are subject to diversity jurisdiction.

In the absence of diversity jurisdiction, the state-law claims are before this Court pursuant to supplemental jurisdiction. 28 U.S.C. § 1367(a). The Court may decline to exercise supplemental jurisdiction over the parties' state-law claims when it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Because I have recommended dismissal of all claims over which this Court has original jurisdiction,[2] I respectfully RECOMMEND that the Court decline to exercise supplemental jurisdiction over the plaintiff's remaining state-law claims and over defendant Miller's counterclaims.

IV. CONCLUSION

I respectfully RECOMMEND that Defendant Katherine Grier's Motion to Dismiss be GRANTED and that all federal claims against defendant Grier be DISMISSED WITH PREJUDICE.

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[2]By separate Recommendation, I have recommended that all claims against defendant Chapman be dismissed for lack of subject matter jurisdiction.

I further RECOMMENDED that Defendant Thomas C. Miller's Concurrence with Defendant Katherine Grier's Motion to Dismiss be GRANTED and that all federal claims against defendant Miller be DISMISSED WITH PREJUDICE.

I further RECOMMENDED that the Court decline to exercise supplemental jurisdiction over Defendant Thomas C. Miller's counterclaims and over the plaintiff's state-law claims, and that these claims be DISMISSED WITHOUT PREJUDICE.

I further RECOMMENDED that Defendant Thomas C. Miller's Motion for Judgment on the Pleadings Re: Counterclaim be DENIED AS MOOT.

FURTHER, IT IS ORDERED that pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the parties have 10 days after service of this recommendation to serve and file specific, written objections. A party's failure to serve and file specific, written objections waives *de novo* review of the recommendation by the district judge, Fed. R. Civ. P. 72(b); Thomas v. Arn, 474 U.S. 140, 147-48 (1985), and also waives appellate review of both factual and legal questions. In re Key Energy Resources Inc., 230 F.3d 1197, 1199-1200 (10th Cir 2000). A party's objections to this recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review. United States v. One Parcel of Real Property, 73 F.3d 1057, 1060 (10th Cir. 1996).

Dated June 17, 2005.

BY THE COURT:

Boyd N Boland

United States Magistrate Judge

UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

BOYD N. BOLAND
U.S. Magistrate Judge

CERTIFICATE OF MAILING
Civil Action No. 04-cv-2455-REB-BNB

I hereby certify that a copy of this **RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** dated June 17, 2005, entered by Magistrate Judge B.N. Boland was served by (*) delivery to or (**) depositing the same in the United States mail, postage prepaid, this 11 day of June, 2005, to the following persons:

CHARLES H. CLEMENTS**
1741 DALLAS STREET
AURORA, CO 80010

KEVIN C. MASSARO, ESQ.**
3780 SOUTH BROADWAY, SUITE 111
ENGLEWOOD, CO 80113

TRACI L. VAN PELT, ESQ**
MEGHAN E. POUND**
MCCONNELL SIDERIUS FLEISCHNER
HOUGHTALING & CRAIGMILE, LLC
DENVER CORPORATE CENTER, TOWER I
4700 S. SYRACUSE ST., STE 200
DENVER, CO 80237

PATRICK L. SAYAS, ESQ.*
ASSISTANT ATTORNEY GENERAL
TORT LITIGATION, LITIGATION SECTION
D.C. BOX NO. 20

GREGORY C. LANGHAM, CLERK

Deputy Clerk