

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 5, 2019

Elisabeth A. Shumaker
Clerk of Court

JEROME L. GRIMES,

Plaintiff - Appellant,

v.

MIKE MOLISH; CARLOS SANCHEZ;
OFFICE DEPOT,

Defendants - Appellees.

No. 19-1038
(D.C. No. 1:18-CV-02935-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

Plaintiff Jerome Grimes, appearing pro se, appeals from the district court's dismissal of his second amended complaint. The district court dismissed Grimes's constitutional claims as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B), and it declined to exercise supplemental jurisdiction over his state law tort claims.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

On November 14, 2018, Grimes initiated this action by filing a pro se complaint against defendants Mike Molish, Carlos Sanchez, and Office Depot. The complaint alleged that on the evening of November 5, 2018, Grimes visited an Office Depot store in Colorado Springs, Colorado, and that defendant Molish, who worked at the store, falsely claimed that Grimes was criminally trespassing in the store. Although it is not entirely clear, the complaint also appears to have alleged that defendants Molish and Sanchez contacted the Colorado Springs Police Department to have Grimes removed from the store. The complaint alleged claims for “Defamation of Character, First Amendment Rights Violation, U.S. Constitution,” “Abuse of Authority,” and “Invasion of Privacy With Terror INTENT.” ROA at 5. The complaint sought actual and punitive damages totaling \$201,000.00. The case was docketed by the district court clerk’s office as a civil rights action brought pursuant to 28 U.S.C. § 1983.

On October 15, 2018, the district court issued an order directing Grimes to submit a 28 U.S.C. § 1915 motion and affidavit, and to submit his complaint on the court’s approved complaint form. Grimes complied with this directive by first filing an application to proceed in the district court without prepayment of fees or costs, and then filing two amended complaints on court-approved complaint forms.

The second and final amended complaint named the same three defendants. Under a section entitled “JURISDICTION,” Grimes checked the “Federal question” box and stated in support that he was alleging violations of the First and Fourteenth

Amendments of the United States Constitution. Id. at 64. Grimes also checked the “Diversity of citizenship” box and stated in support that both he and defendant Molish were citizens of Colorado, and that defendant Home Depot was a citizen of Florida. Id. at 65–66. In the “STATEMENT OF CLAIMS” section of the complaint, Grimes repeated the allegations that were contained in his original complaint and added additional allegations. Included were new allegations that defendants Molish and Sanchez wrongfully captured Grimes’s likeness on store surveillance cameras and used “illegal deers, dogs, and cats/(canine feline) tracking device[s]” against Grimes. Id. at 72.

On January 10, 2019, the district court granted Grimes’s application to proceed without prepayment of fees or costs. Id. at 96–97.

On January 15, 2019, the district court issued an order of dismissal. The district court noted at the outset that, “[u]nder [28 U.S.C.] § 1915(e)(2)(B)(i),” it was required to “dismiss the action if [Grimes’s] claims [we]re frivolous or malicious.” Id. at 99. The district court in turn “construe[d] [Grimes’s] constitutional claims as arising under 42 U.S.C. § 1983,” but it concluded that “Grimes fail[ed] to state an arguable claim for relief under § 1983 against any of the named Defendants” because the second amended complaint alleged “solely private conduct and d[id] not allege any specific facts to show that the private Defendants were acting under color of state law.” Id. at 100. The district court further concluded that it “lack[ed] diversity jurisdiction over the state tort claims asserted in th[e] case” because there was not “complete diversity of citizenship between [Grimes] and each Defendant.” Id. at

101. Ultimately, the district court ordered “that the federal constitutional claims asserted in the ‘Second Amended’ Complaint” be dismissed with prejudice as legally frivolous, and it “decline[d] to exercise supplemental jurisdiction over the state law tort claims because the federal claims ha[d] been dismissed.” Id.

Final judgment was entered on January 15, 2019. Grimes filed a notice of appeal on January 30, 2019. Grimes has since filed a motion for leave to proceed in forma pauperis on appeal.

II

Where, as here, a plaintiff was allowed by the district court to proceed in forma pauperis, his complaint is governed by the requirements of 28 U.S.C. § 1915. Section 1915(e)(2)(B) requires a district court to “dismiss the case at any time if the court determines,” in pertinent part, “that . . . the action . . . is frivolous.” 28 U.S.C. § 1915(e)(2)(B)(ii).

Generally speaking, we review for an abuse of discretion a district court’s order dismissing claims as frivolous under § 1915(e)(2)(B)(i). See Fogle v. Pierson, 435 F.3d 1252, 1259 (10th Cir. 2006). That said, if the district court based its frivolousness determination on a legal issue, we review that underlying legal issue de novo. Id.

Having carefully examined and liberally construed Grimes’s second amended pro se complaint, we agree with the district court that the purported constitutional claims alleged in the second amended complaint are frivolous. As the district court noted, all of the named defendants are private actors, and there is no allegation in the

second amended complaint that any of the defendants were “act[ing] together with or ha[d] obtained significant aid from state officials,” or that their “conduct [wa]s otherwise chargeable to the State.” Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Consequently, the complaint fails to allege a legitimate basis for subjecting the named defendants to constitutional litigation by filing a § 1983 action. See id.

We also conclude that the district court did not abuse its discretion in refusing to exercise supplemental jurisdiction over Grimes’s state law tort claims. See Koch v. City of Del City, 660 F.3d 1228, 1248 (10th Cir. 2011) (outlining standard of review). A district court “may decline to exercise supplemental jurisdiction over a” state claim “if . . . the district court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). Consistent with this statutory language, we have stated that “[w]hen all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims.” Smith v. City of Enid ex rel. Enid City Comm’n, 149 F.3d 1151, 1156 (10th Cir. 1998). Having dismissed Grimes’s constitutional claims as frivolous, and having also correctly determined that the second amended complaint failed to allege a valid basis for diversity jurisdiction, the district court acted well within its discretion in declining to exercise supplemental jurisdiction over Grimes’s state law claims.

The judgment of the district court is AFFIRMED. Grimes's motion for leave to proceed on appeal in forma pauperis is DENIED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge