Howard v. United States District Court For Southern District of Ohio et al Doc. 13

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Gregory T. Howard,	:	
Plaintiff,	:	
v.	:	Case No. 2:10-cv-757
United States District Court for Southern District of Ohio, et al.,	:	JUDGE MARBLEY
	:	MAGISTRATE JUDGE KEMP
Defendants.	:	

ORDER AND REPORT AND RECOMMENDATION

Plaintiff, Gregory T. Howard, a frequent and persistent litigator in this Court - he has filed at least five cases here within the last four years, and in the course of those proceedings has filed literally hundreds upon hundreds of documents, to the point where several judges have conditionally barred him from making additional filings - has now filed a case in which he seeks damages for the way in which the Court handled one of those cases, Case No. 2:07-cv-514. He initially filed his complaint in the United States District Court for the District of Columbia, but the case was transferred here based on the venue provisions contained in 28 U.S.C. §1402(b). Mr. Howard moved for leave to proceed *in forma pauperis* initially, and has filed two more such motions once the case arrived in this district.

From a financial point of view, it is apparent that Mr. Howard cannot afford to pay the required filing fee. Therefore, his motions for leave to proceed *in forma pauperis* (## 3,9, & 12) are granted. The next step in the process is to screen Mr. Howard's complaint to determine if it is malicious, frivolous, or fails to state a viable legal claim. 28 U.S.C. §1915(e)(2).

It should be apparent to even the most casual student of the American legal system that a dissatisfied litigant cannot, after

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having a case dismissed, turn around and sue the United States or the federal judiciary for damages. There would be no end to that type of proceeding, and it would make a mockery of the orderly administration of justice, which depends on the finality of judgments rendered in prior proceedings, and which protects both the United States and individual judges from being sued by unhappy litigants (and there are many of them - usually at least one in each case) so long as the court system properly, or even arguably, has functioned like a court when it dealt with the case. There is clearly no legal basis for Mr. Howard's suit, but the exact explanation for why that is takes a somewhat circuitous route simply because of the way he filed this case. The Court will, of necessity, lay out the legal particulars of why this case is baseless, although the end result is obvious, and it is likely that Mr. Howard knew that before he filed suit.

I. Screening a Complaint

28 U.S.C. §1915(e)(2) provides that in proceedings in forma pauperis, "[t]he court shall dismiss the case if ... (B) the action ... is frivolous or malicious [or] fails to state a claim on which relief can be granted...." The purpose of this section is to prevent suits which are a waste of judicial resources and which a paying litigant would not initiate because of the costs involved. See Neitzke v. Williams, 490 U.S. 319 (1989). A complaint may be dismissed as frivolous only when the plaintiff fails to present a claim with an arguable or rational basis in law or fact. See id. at 325. Claims which lack such a basis include those for which the defendants are clearly entitled to immunity and claims of infringement of a legal interest which does not exist, see id. at 327-28, and "claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar." Id. at 328; see also Denton v. Hernandez, 504 U.S. 25 (1992). A complaint may not be

dismissed for failure to state a claim upon which relief can be granted if the complaint contains "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U. S. 544, 570 (2007). Pro se complaints are to be construed liberally in favor of the pro se party. Haines v. Kerner, 404 U.S. 519 (1972). The complaint will be evaluated under these standards.

II. Mr. Howard's Claim

Mr. Howard's complaint relates to the way in which Judge Algenon L. Marbley, a United States District Judge for the Southern District of Ohio, handled Case No. 2:07-cv-514, a case captioned "Howard v. Supreme Court of Ohio" and which was filed on June 4, 2007. In that case, Mr. Howard sued not only the Supreme Court of Ohio, but the Franklin County, Ohio Court of Common Pleas, the Franklin County, Ohio Court of Appeals, the Industrial Commission of Ohio, the Ohio Bureau of Workers' Compensation, and a private law firm, Eastman & Smith, Ltd. After extensive motions practice, this Magistrate Judge filed a Report and Recommendation which concluded that all of Mr. Howard's claims - most of which related to his having been declared a vexatious litigator by the state courts - were frivolous or otherwise legally insufficient. See Doc. #167, filed on November 8, 2007. After more motions practice, including objections to the Report and Recommendation, the tendering of amended complaints, and the filing of a motion to disqualify the Magistrate Judge, Judge Marbley, in an Opinion and Order filed on January 14, 2008 (Doc. #193) dismissed the case.

The dismissal of his case - and the conclusion of two judicial officers that his case lacked merit - did not deter Mr. Howard from continuing to litigate the issue. After judgment was entered, he promptly filed a Rule 59 motion and several other motions to reconsider. While those were pending, he filed a

notice of appeal. After the Court denied all of his post-judgment motions, Mr. Howard filed a bevy of additional motions, leading the Court, in an order filed on June 9, 2008, not only to deny all of those motions but to prohibit the filing of additional motions without leave of court. This, of course, prompted Mr. Howard simply to file a number of motions for leave to file motions or other documents, all of which were denied. The Court of Appeals for the Sixth Circuit then affirmed the dismissal of the case in an order which also barred him from filing anything else in connection with his appeal other than properly filed motions for rehearing or rehearing en banc. See Doc. #241.

As the Court of Appeals opinion also notes, Mr. Howard had not limited his efforts to overturn the decision in Case No. 2:07-cv-514 to filing a host of motions to reconsider and taking an appeal. While the appeal was pending, he filed a new lawsuit in this Court, Case No. 2:08-cv-313, assigned to Judge Gregory L. Frost, which Judge Frost construed as a "lateral appeal" and which was dismissed on that basis. Apparently, on appeal, Mr. Howard argued that his complaint had been misconstrued, and that he was actually seeking damages under the Federal Tort Claims Act based on Judge Marbley's rulings in Case No. 2:07-cv-514. The Court of Appeals characterized this claim as "a thinly veiled attempt to obtained unauthorized peer review of the rulings in his prior case" and agreed that the district court lacked jurisdiction to conduct such a review. Doc. #241.

The Court of Appeals' decision was issued on July 28, 2009. Less than two months later, Mr. Howard filed this case in the District of Columbia District Court. His complaint is simply another (and not even thinly veiled) attempt to relitigate the issues raised and rulings made in Case No. 2:07-cv-514. Mr. Howard alleges that Judge Marbley improperly granted motions to

dismiss his claims in that lawsuit "and otherwise acted with malice, bad faith, in a wanton or reckless manner against plaintiff because he was acting without the assistance of legal counsel." Complaint ¶4. Mr. Howard asserts that Judge Marbley is an employee of the United States for purposes of the Federal Tort Claims Act, and he apparently made an administrative claim for damages to the Administrative Office of the United States Courts, which is a jurisdictional prerequisite to filing an FTCA action. In his administrative claim, he asked for compensation in the amount of $27,519,203.43.

Mr. Howard's complaint names as defendants the United States District Court for the Southern District of Ohio, the United States Department of Justice, the United States Attorney General, the Administrative Office of United States Courts, and the United States Department of the Treasury (although not the United States itself). The complaint also seeks money damages in the amount of $27,519,203.43, as well as injunctive relief. His requests for injunctive relief include a demand that the Administrative Office of the United States Courts transfer the money damages to the Treasury Department pursuant to the Judgment Fund statute, 31 U.S.C. §1304, and a demand that the United States be prohibited from asserting any defenses based upon judicial or legislative immunity, as those terms are used in 28 U.S.C. §2671.

III. Legal Analysis

The Court will first address a technical issue raised by the identity of the parties named as defendants. All of the defendants Mr. Howard has sued are federal agencies. Under the FTCA, a plaintiff cannot sue a government agency in its own name, but must bring the action against the United States. 28 U.S.C. §2679; Hughes v. United States, 701 F.2d 56, 58 (7th Cir. 1982). Mr. Howard's failure to name the United States, the only proper defendant, could justify the dismissal of his case, or at least

an order that he file an amended complaint that complies with the requirements of the FTCA. Nevertheless, in light of his status as a pro se litigant, and because any amendment would be an exercise in futility, the Court will treat this case as if it had been filed against the United States.

The Court first observes that the filing of this case may be precluded under the Court of Appeals' prior order. Mr. Howard has had one chance to argue that he can get another district judge to review how Judge Marbley conducted the proceedings in Case No. 2:07-cv-514 by filing an FTCA complaint, and that is what he argued he did when he filed Case No. 2:08-cv-313. The judgment dismissing that case is now final, so *res judicata* probably bars this action. Further, in order to resolve Mr. Howard's claims, a district judge would clearly have to decide that Judge Marbley wrongly decided the issues in Case No. 2:07-cv-514, which is a function reserved to the Court of Appeals. It does not matter that Mr. Howard has presented these issues in the guise of an action for damages, because the end result would be the same, and there is no district court which would have jurisdiction to re-decide the issues Judge Marbley ruled on (other than this Court, in the context of a properly-filed motion to vacate the judgment). However, the Court is willing to give Mr. Howard the benefit of the doubt on these issue, and will conduct a thorough analysis of why, even if this jurisdictional question were not present, the FTCA is not available to Mr. Howard to keep litigating the issues raised in Case No. 2:07-cv-514.

As noted, the only proper defendant in an FTCA case is the United States. However, sovereign immunity precludes suit against the United States without its consent. The FTCA waives sovereign immunity for certain tort actions by giving district courts exclusive jurisdiction over these types of civil actions.

Premo v. United States, 599 F.3d 540, 544 (6th Cir. 2010). Under the FTCA, the United States may be liable

> for money damages ... for injury ... caused by the negligent or wrongful act or omission of any employee of the Government while acting in the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §1346(b).

District courts must undertake a two-step analysis when reviewing the sufficiency of FTCA claims. Premo, 599 F.3d at 545. Because the phrase "law of the place," as used in §1346(b), means law of the State, the court first applies state law to determine liability and assess damages. The court then looks to the FTCA, see 28 U.S.C. §2674, to see if any remedies which might be otherwise available under state law, such as pre-judgment interest and punitive damages, may not be awarded under the FTCA. The negligent and wrongful actions or omissions of Judge Marbley are alleged to have taken place in Columbus, Ohio. Therefore, this Court must look to Ohio law to see if a state court judge could be held liable for damages under the same legal theories which Mr. Howard advances in this case. Id.

Mr. Howard has identified Ohio Revised Code §§9.86 and 2921.45 as the Ohio law which would allow him to sue a state judge under comparable circumstances. The latter of these two statutes is clearly inapplicable, however. Ohio Rev. Code §2921.45 is an Ohio criminal statute which prohibits a public servant, acting under color of his or her office, employment, or authority, from knowingly depriving, or from conspiring or attempting to deprive, any person of a constitutional or statutory right. The Ohio courts have held that a plaintiff may not assert a civil claim based upon an alleged violation of a criminal statute because "[c]riminal violations are brought not

in the name of an individual party but rather by, and on behalf of, the state of Ohio or its political subdivisions." Biomedical Innovations, Inc. v. McLaughlin, 103 Ohio App.3d 122, 126 (1995). To the extent Mr. Howard's claim is predicated on §2921.45, no relief can be granted. See Brunson v. City of Dayton, 163 F.Supp.2d 919, 928 (S.D. Ohio 2001).

The other state statute identified by Mr. Howard, Ohio Rev. Code §9.86, provides that

> no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

The terms "officer or employee" refer to a person who is serving in an elected office or position with the state or is employed by the state. See Ohio Rev. Code §§9.85 and 109.36(A)(1). It is at least plausible, from the language of this statute, that a state judge who acts with the requisite state of mind might be held liable under §9.86. However, state statutory law is not the exclusive source of law here.

Ohio common law recognizes that "[w]hen a judge acts in an official judicial capacity and has personal and subject-matter jurisdiction over a controversy, the judge is exempt from civil liability even if the judge goes beyond, or exceeds, the judge's authority and acts in excess of authority." Borkowski v. Abood, 117 Ohio St.3d 347, syllabus (2008). Only if the judge acts in the absence of all jurisdiction does civil liability arise. Id. Because no state court judge could be held liable under Ohio law simply for presiding over and ruling on issues presented in a case which clearly falls within that judge's jurisdiction, state law would not provide Mr. Howard with a remedy for the actions

alleged in the complaint, and there is no corresponding liability under the FTCA.

The same result occurs if federal law is examined. The FTCA provides unequivocally that the United States is "entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim ..." 28 U.S.C. §2674. This means that the United States would be entitled to assert the defense of absolute judicial immunity because that defense would have been available to Judge Marbley.

Here, the complaint specifically states that the alleged wrongful or negligent conduct identified in paragraphs 2, 3 and 4 of the complaint occurred in the context of Judge Marbley's presiding over Case No. 2:07-cv-514. Mr. Howard does not (and could not credibly) allege that Judge Marbley lacked either personal or subject-matter jurisdiction over that proceeding. Because Judge Marbley unquestionably acted in an official judicial capacity when he made his ruling in that case, he (and, thus, the United States) is immune from suit based on his actions in that case. See Dennis v. Sparks, 449 U.S. 24, 27 (1980); Stump v. Sparkman, 435 U.S. 349, 357 (1978). Under either state or federal law, there is simply no tort liability that can be premised on a judge's rulings in a case over which the judge even arguably had jurisdiction.

This does not completely end the Court's analysis. First, it is not entirely clear that Mr. Howard is relying just on Ohio law as the source of the United States' alleged liability in this case. The Court has already observed, however, that state law is the sole source of liability under the FTCA. Consequently, Mr. Howard cannot use any federal law, including federal common law, as the basis for his substantive claim. The Supreme Court held, in Federal Deposit Ins. Co. v. Meyer, 510 U.S. 471, 478 (1994),

that because federal law, by definition, provides the source of liability for a claim alleging the deprivation of a federal constitutional right, the United States cannot be sued on such a theory because it has not waived its sovereign immunity under §1346(b) for constitutional tort claims. This decision precludes any reliance on Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), a case to which Mr. Howard refers, because a Bivens action can only be brought to redress violations of federal constitutional law. See Brown v. United States, 653 F.2d 196, 201 (5th Cir. 1981).

Next, the Complaint alleges, in paragraph five, that, in addition to Judge Marbley's having made bad faith or illegal rulings, all of the named defendants "conspired against him, invaded his privacy, slandered him, and subjected him to extreme emotional distress." To the extent that this allegation goes beyond rulings made in the prior case and alleges conduct of persons or entities other than Judge Marbley, judicial immunity may not completely preclude relief on such claims. That does not mean they are viable, however.

Not all state tort claims fall within the terms of the FTCA. See 28 U.S.C. §2680. One of the exceptions is any claim arising out of libel or slander. 28 U.S.C. §2680(h). Claims that are expressly excluded from coverage under the Act must be dismissed for lack of subject matter jurisdiction. Edmonds v. United States, 436 F.Supp.2d 28, 35 (D.D.C. 2006). As a result, this Court lacks jurisdiction to consider any slander-based claims.

Claims involving conspiracy, invasion of privacy, and the intentional or negligent infliction of emotional distress are not categorically excluded by §2680. However, if the essence of the Complaint is a defamation claim, the fact that it is labeled something else is not determinative of whether the exception applies. Edmonds, 436 F.Supp.2d at 36. In that case, a district

court must still dismiss the action for lack of subject matter jurisdiction and failure to state a claim. Id.; see also Borawski v. Henderson, 265 F.Supp.2d 475, 484 (D.N.J. 2003).

Because Mr. Howard's claims of conspiracy, invasion of privacy or infliction of emotional distress are so vague, the Court is unable to determine whether the essence of these claims is some type of defamation, the adverse rulings in Case No. 2:07-cv-514, or something else. Even assuming that the Court has jurisdiction over these claims, the obvious question is whether, with respect to such claims, the Complaint contains "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U. S. 544, 570 (2007). If not, the Court must dismiss the Complaint for failure to state a claim.

More than bare assertions of legal conclusions are required to satisfy the notice pleading standard of Fed. R. Civ. P. 8. Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). "In practice, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." Id. (emphasis in original, quotes omitted).

> We are not holding the pleader to an impossibly high standard; we recognize the policies behind rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.

Id.

Mr. Howard's complaint fails to contain factual allegations regarding any of the material elements of his common law tort claims. It does not even set forth the various elements needed to sustain a claim of conspiracy, invasion of privacy, and

intentional or negligent infliction of emotional distress. For these reasons, his complaint fails to state claims of conspiracy, invasion of privacy, or infliction of emotional distress that are plausible on their face. See Twombly, supra. Consequently, Mr. Howard's complaint, and his various claims, are subject to dismissal based on lack of jurisdiction, immunity (both judicial and sovereign), and for failure to state a claim that would survive a motion to dismiss under Rule 12(b)(6).

IV. Recommended Disposition

Based on the foregoing reasons, it is recommended that this case be dismissed under 28 U.S.C. §1915(e)(2)(B), and that, if this recommendation is accepted, a copy of the complaint and any dismissal order be mailed to the defendants. It is further recommended that if the case is dismissed, the dismissal order certify that any appeal would not be taken in good faith, because the claims made in the complaint are completely and unarguably without merit.

V. Procedure on Objections

If any party objects to this Report and Recommendation, that party may, within fourteen days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. §636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the

right to have the district judge review the Report and Recommendation de novo, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. See Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d 947 (6th Cir.1981).

/s/ Terence P. Kemp
United States Magistrate Judge