UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KAREN MCPETERS, individually, and on Behalf of those individuals, persons and entities who are similarly situated, Plaintiff,	§	
V.	§	CIVIL ACTION NO. 4:10cv1103
THE HONORABLE FREDERICK E. EDWARDS, BARBARA GLADDEN ADAMICK, DISTRICT CLERK; MONTGOMERY COUNTY, TEXAS, and REED ELSEVIER, INC., d/b/a LexisNexis, Defendants.	§	

APPENDIX TO DEFENDANTS', MONTGOMERY COUNTY, TEXAS AND BARBARA GLADDEN ADAMICK, MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM AND FOR LACK OF SUBJECT MATTER JURISDICTION AND BRIEF IN SUPPORT

1: *McPeters v. Montgomery County*, 2010 WL 2171664 (Tex. App. – Beaumont, May 27, 2010, reh'g denied).

2: *Pan American Maritime, Inc. v. Esco Marine*, 2005 WL 11155149 (S.D.Tex. 2007).

3: *Cronen v. Davis*, 2007 WL 765453 (Tex. App. – Corpus Christi 2007, pet. denied).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing has been forwarded to the following counsel of record in accordance with the District's ECF service rules on July 14, 2010.

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2010 WL 2171664
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
Beaumont.

Karen McPETERS, Appellant

v.

MONTGOMERY COUNTY, Texas, Appellee.

No. 09-09-00451-CV. Submitted on
April 15, 2010. Decided May 27, 2010.

West KeySummary

1 **Pretrial Procedure** Inadvertence or Neglect; Delay Attributable to Counsel

Plaintiff's failure to appear for trial was reasonably explained, and thus trial court erred in denying the plaintiff's motion to reinstate her case after dismissing it for want of prosecution. The plaintiff explained that the reason for her failure to appear was because her attorney believed the case had been dismissed and that the dismissal vacated a trial setting. There was evidence that the court coordinator contacted the plaintiff's attorney about the trail and that the attorney advised her that he would not be there because he did not think that the unsigned order vacating a previous dismissal order was sufficient to reinstate the case on the docket. The record reflected that the trial court attempted to withdraw its original order of dismissal by writing vacated on the dismissal order and not producing a written order. Vernon's Ann.Texas Rules Civ.Proc., Rule 165a(3).

Cases that cite this headnote

On Appeal from the 9th District Court, Montgomery County, Texas, Trial Cause No. 07-09-09142 CV.

Attorneys and Law Firms

Robert L. Mays, for Karen McPeters.

Rayborn C. Johnson, for Montgomery County, Texas.

Before GAULTNEY, KREGER, and HORTON, JJ.

Opinion

MEMORANDUM OPINION

HOLLIS HORTON, Justice.

*1 This appeal concerns whether the trial court abused its discretion in failing to reinstate a case after it had been dismissed for want of prosecution.

In her appeal, Karen McPeters raises seven issues. McPeters's first five issues raise various complaints that relate to the trial court's dismissal of her case for want of prosecution and her last two issues concern discovery rulings. In her fifth issue, McPeters requests that we reverse the trial court's order refusing to reinstate her case. We reverse the trial court's order dismissing the case, and we remand the case to the trial court with instructions to reinstate the case. As we have ordered the case reinstated, we need not address McPeters's other issues, as they afford her no greater relief. TEX.R.APP. P. 47.1.

Background

The trial court had set McPeters's case for trial on June 8, 2009, but then postponed the trial until September 14, 2009, due to a scheduling conflict. On August 11, 2009, the trial court inadvertently signed an order dismissing McPeters's case for want of prosecution, but it failed to first provide the parties with notice of its intent to dismiss. On August 31, 2009, the trial court, attempting to correct its mistake, caused the word "VACATED" to be written across the face of the order it previously had entered dismissing McPeters's case, but the document does not include an additional signature by the trial court judge or his initials evidencing that the judge approved vacating the court's August 11 order of dismissal.

On September 8, 2009, McPeters filed a motion to vacate the August 11 dismissal order, and she also requested that the trial court reinstate her case. On September 9, 2009, the court coordinator informed McPeters's counsel, Robert L. Mays, Jr., that the trial court would consider the matter "on the submission docket for September 25, 2009," and further advised that on that date "no one needs to appear." Since the case was on the court's trial docket for a September 14 trial, and because the case had been dismissed as of August 11, on September 11, 2009, Mays notified the court coordinator that neither he nor McPeters would appear for trial on September 14. The court coordinator informed Mays that the court would probably dismiss the case again if he failed to appear.

On September 14 Mays and McPeters did not appear for trial. On that same date, the trial court granted McPeters's motion to vacate the August 11 dismissal order and also granted her motion to reinstate. Then, after reinstating the case, the trial court again dismissed McPeters's case for want of prosecution.

After she learned that the trial court had again, as of September 14, dismissed her case, McPeters filed a timely motion to reinstate. The trial court conducted a hearing on the motion, and following the hearing, the trial court made written findings of fact and conclusions of law. In its findings, the trial court concluded that McPeters's failure to appear for trial had been "intentional and was the result of conscious indifference, was without adequate justification, and was not

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due to an accident or mistake and ... [had] not been otherwise reasonably explained." The trial court denied McPeters's motion to reinstate her case.

Standard of Review

*2 Where a trial court has dismissed a case for want of prosecution because an attorney failed to appear for trial, and then refuses to reinstate the case, we review the trial court's decision under an abuse of discretion standard. *Smith v. Babcock & Wilcox Const. Co ., Inc.*, 913 S.W.2d 467, 467 (Tex.1995) (per curiam). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner, or when it acts without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc. .*, 701 S.W.2d 238, 241-42 (Tex.1985).

Analysis

In her fifth issue, McPeters argues that trial courts are required to reinstate cases when the party's failure to appear "has been otherwise reasonably explained." *See* TEX.R. CIV. P. 165a(3). Mays explained the reasons for his failure to appear for the September 14 trial at a hearing that occurred on October 2, 2009. At that hearing, Mays explained that he believed that McPeters's case "had been dismissed since August 11, 2009," and that the dismissal had "eliminated everything[.]" Mays further explained that he thought that "the dismissal of a case vacate[ed] a trial setting[.]" In his brief, Mays argues that "McPeters did not appear for the September 14, 2009 purported trial setting, because there cannot be a trial in a dismissed lawsuit[.]"

There was also evidence at the hearing that the court coordinator contacted Mays about the September setting, and that Mays advised her that he would not be there because he did not think that the unsigned order vacating the August 11 dismissal order was sufficient to reinstate the case on the docket. Relying on Rule 165a [1] of the Texas Rules of Civil Procedure and case law, McPeters also advances an argument about the effectiveness of the trial court's attempt to vacate the August dismissal order, arguing that to be effective, the order of reinstatement had to be signed. *See Emerald Oaks Hotel/Conference Ctr., Inc. v. Zardenetta*, 776 S.W.2d 577, 578 (Tex.1989) (holding that an order of reinstatement must be written and signed during the period of the trial court's plenary power and jurisdiction).

From the trial judge's comments at the hearing, it is apparent that the trial court felt that Mays's failure to appear had been intentional. At the conclusion of the hearing on McPeters's motion to reinstate, the trial court stated: "So you've done this to yourself. Either you overthought this or you think you know more than anybody else about how things should be done. You were aware of the trial setting. I am not reinstating this case. This matter is over with."

Nevertheless, Rule 165a(3) contemplates that a party's case should be reinstated if the failure to appear was due to an accident, a mistake, or is otherwise reasonably explained. TEX.R. CIV. P. 165a(3). "The operative standard is essentially the same as that for setting aside a default judgment." *Smith*, 913 S.W.2d at 468; *see Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939). "A failure to appear is not intentional or due to conscious indifference within the meaning of the rule merely because it is deliberate; it must also be without adequate justification." *Smith*, 913 S.W.2d at 468. "Proof of such justification-accident, mistake or other reasonable explanation-negates the intent or conscious indifference for which reinstatement can be denied." *Id.* (citing *Bank One, Tex., N.A. v. Moody*, 830 S.W.2d 81, 84 (Tex.1992)). A mistake of law is a sufficient excuse to negate intent or conscious indifference. *See Bank One*, 830 S.W.2d at 84.

*3 Although deliberate, it appears that Mays's decision not to appear for the September 14 trial setting was based on Mays's mistaken belief about a court's power to make further rulings on a case after entering an *interlocutory* order of dismissal. It is clear that Mays's mistake was in his failure to consider that a court maintains plenary power to modify, correct, or reform its judgment. *See* TEX.R. CIV. P. 329b(d). In this case, the trial court voided the August order of dismissal in its written order of September 14, 2009. As McPeters had filed a verified motion to reinstate, her motion served to extend the trial court's plenary power to reinstate the case "until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first." TEX.R. CIV. P. 165a(3). Thus, on September 14, 2009, the date the trial court signed the written order reinstating McPeters's case, the trial court had plenary power to correct its prior August 11, 2009 order and to reinstate the case as of September 14. TEX.R. CIV. P . 329b(d).

The record reflects that the trial court's attempt to withdraw its order of dismissal without signing a written order of dismissal contributed to Mays's confusion about whether he was required to appear for the trial setting of September 14. While it may have been clear to the trial court that having the word "VACATED" written on the order of dismissal was effective, Rule 165a(3) requires a motion to reinstate to be decided by a "signed written order." TEX.R. CIV. P. 165a(3); *see also Wallingford v. Trinity Universal Ins. Co.*, 253 S.W.3d 720, 726 (Tex.App.-Amarillo 2007, pet. den'd) (holding that an oral pronouncement on motion to reinstate, printed docket entry, submission of proposed order, and conduct of parties after hearing "are not a substitute for the rule's requirement of a signed written order").

We conclude that the record demonstrates that McPeters failed to appear for trial on September 14 because her attorney, Mays, mistakenly believed the court could act no further on her case in light of its prior entry of an order of dismissal. Even if Mays deliberately decided not to appear, we conclude that McPeters's failure to appear was sufficiently "otherwise reasonably explained" as a mistake of law to come within Rule 165a(3). *See* TEX.R. CIV. P. 165a(3); *see also Bank One*, 830 S.W.2d at 84. While the trial court might have considered sanctions against Mays because he mistakenly believed the trial court no longer had any power to enter further orders on McPeters's case, a court imposing a sanction

of dismissal "must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both." *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917, 918-19 (Tex.1991) (finding that trial court's dismissal with prejudice was unjust where party failed to appear for its deposition).

*4 The record before us provides nothing to indicate that McPeters was personally responsible for or even aware about Mays's decision not to appear for trial on September 14. The trial court's action in dismissing McPeters's case on the same date it was reinstated cannot be affirmed on this record as a just sanction for McPeters's failure to appear because "a party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation." *Id* at 917.

Conclusion

Because the record demonstrates that McPeters's failure to appear on September 14 was otherwise reasonably explained, we reverse the order of the trial court denying McPeters's motion to reinstate and remand the case to the trial court with instructions to reinstate the case. Once the case is reinstated, the trial court can further consider the parties' requests for additional discovery as it may allow or as may be required under the provisions of Rule 190.5 of the Texas Rules of Civil Procedure. TEX.R. CIV. P. 190.5 (Modification of Discovery Control Plan).

REVERSED AND REMANDED.

Footnotes

1 Rule 165a(3) provides, in pertinent part: "In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the judgment is signed, or, within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law."

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2005 WL 1155149
Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas, Brownsville Division.

PAN AMERICAN MARITIME, INC., Plaintiff,

v.

ESCO MARINE, INC., et al. Defendants.

No. C.A. B-04-188. May 10, 2005.

Attorneys and Law Firms

Lynne C. Rentfro, Dallas, TX, for Plaintiff.

Jose Rolando Olvera, Jr., Brownsville, TX, for Defendants.

Opinion

OPINION AND ORDER

TAGLE, J.

*1 BE IT REMEMBERED that on May 10, 2005, the Court GRANTED Defendant's Motion to Dismiss [Dkt. No. 14]; and DENIES Defendant's Motion to Reconsider the Court's order granting Plaintiff leave to file a late response to Defendants' Motion to Dismiss.

I. Factual Background

Plaintiff brings this civil action under 18 U.S.C. § 1962(a) and (c) [1] of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *See* 18 U.S.C. § 1961, *et seq.* The sole basis for federal jurisdiction rests with Plaintiff's RICO claims, *see* 18 U.S.C. § 1964(a), and neither diversity jurisdiction nor any other form of jurisdiction exists that would grant this Court authority to hear this action. Plaintiff additionally brings state causes of action for conversion and tortious interference with contracts. *See* Pl's Cmplt. ¶¶ 48-57. Accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff, *see Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir.1996), the Court provides the following factualrecitation.[2] Plaintiff Pan American Maritime, Inc. ("Plaintiff" or "Pan American"), is a Texas corporation that leases and uses land at the Port of Brownsville ("the Port") for the salvaging and breaking-up of barges and other vessels. Pan American subleases the land from Gulmar, Inc. Gulmar, in turn, leases the land from the Brownsville Navigational District ("BND"). Defendant Esco Marine, Inc. ("Defendant" or "Esco") is also a Texas corporation. Esco leases from the BND the land adjacent to Pan American's land. Defendants Richard Jaross, Andrew Jaross, and Emilio Sanchez are employees of Esco.

Plaintiff alleges that in mid 2004, Esco began to deposit substantial amounts of soil on its land, which it subleased from Gulmar. Plaintiff contends Defendant Andrew Jaross trespassed on Gulmar's land in an attempt to threaten Gulmar and Plaintiff. This alleged trespass was apparently part of Defendants' efforts to warn Plaintiff against interfering with Esco's business and expansion onto the land leased by Gulmar and subleased by Pan American. According to Plaintiff, Defendants sent surveyors onto its land who placed markers delineating the land boundaries. Andrew Jaross informed Gulmar that Esco owned light poles, two buildings that were living quarters, and other materials located on the land occupied by Gulmar and Pan American.

Plaintiff attaches three fax letters as exhibits to its complaint. In essence, these letters outline a dispute between the parties concerning both the land boundaries between the tenants and the ownership of personal property located on the disputed land. According to these fax letters, Esco took over the 8.56 acres of land adjoining the western section of Plaintiff's land. The letters attached to Plaintiff's complaint explain Esco's position on the land dispute and state Esco expanded onto Plaintiff's land after the Port of Brownsville provided notification to Plaintiff or Gulmar and after the Board of Directors approved the expansion. *See* Ex. A. Esco indicated in its second fax letter that BND had previously asked Plaintiff, or Gulmar, to remove certain items from the property. These items, according to Esco, were never removed, and Esco understood that everything on the property would convey to them. Esco indicated that several items, such as pieces of iron, were removed from Esco's property and placed on Pan American's property, and conversely that pieces of fiber glass and other waste were moved from Pan American's side of the property and placed on Esco's property. Esco indicated in the letters that it would allow Plaintiff to remove two modules[3] if Plaintiff removed them within 10 days, gave Esco the option to buy the modules at $15,000.00 each, with the offer remaining open for 12 months, and removed all other materials and debris from Esco's property. In a final fax letter, Esco requested that Plaintiff immediately stop removing the light towers located on the 8.56 acres of land adjoining Plaintiff's property. Esco stated the towers are fixed improvements that cannot be removed under the terms of Gulmar's former lease with the Port of Brownsville. Esco understood that when Gulmar abandoned the property, the land and all the improvements reverted to the Port of Brownsville, and Esco is now the legal tenant of both the land and the property affixed to it.

*2 In response to the above described controversy, Pan American filed suit alleging five causes of action under the RICO statute. Plaintiff cites seven predicate acts as the basis of its RICO suit: (1) theft of the living quarter modules and light poles in violation of Texas Penal Code §§ 31.03(e)(6) and (e)(5); (2) the intentional and knowing operation of heavy equipment dangerously close to an occupied building warehouse, which caused damages of $1,000,000.00 in violation of Texas Penal Code § 28.03; (3) the knowing and intentional digging in an area known to have water lines and intentional destruction of water lines on the property in violation of Texas Penal Code § 28.03; (4) the attempted assault of Plaintiff's employee by using a bulldozer as a deadly weapon in an attempt to kill, maim, or seriously injure the employee in violation of Texas Penal Code § 15.01(b)(d);

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(5) the knowing and intentional flooding of Plaintiff's land by elevating Esco's land, causing damage in the amount of $2,000,000.00 in violation of Texas Penal code § 28.03; (6) the intentional acting in concert and conspiring to carry on criminal activities in violation of Texas Penal Code § 71.01(a)(b); and (7) the intentional acting in concert and conspiring to engage in deadly conduct by attempting assault on Plaintiff's employee with a bulldozer in violation of Texas Penal Code § 71.02(a)(1). *See* Pl's Cmplt. ¶¶ 2-8.

II. Rule 12(b)(6) and 12(b)(1) Standards

A motion to dismiss for failure to state a claim is "viewed with disfavor and is rarely granted." *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 365 (5th Cir.2000); *Lowrey v. Texas A & M University System*, 117 F.3d 242, 247 (5th Cir.1997), quoting *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir.1982). Fifth Circuit law dictates that a district court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *See Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir.1996); *see also Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir.2000). A complaint will not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *See also Baton Rouge Bldg. & Constr. Trades Council AFL-CIO v. Jacobs Constructors, Inc.*, 804 F.2d 879, 881 (5th Cir.1986). The Fifth Circuit has held, however, that dismissal is appropriate "if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir.1995) (citation omitted).

The standard governing a motion to dismiss under Rule 12(b)(1) is similar to that of 12(b)(6). Pursuant to 12(b)(1), district courts have "the power to dismiss for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981). *See also Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir.2001); *Kelly v. Syria Shell Petroleum Development*, 213 F.3d 841, 845 (5th Cir.2000) (citations omitted); *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir.1996).

III. Parties' Arguments-Failure to State a Claim and Lack of Subject Matter

Jurisdiction

*3 Defendant asserts this Court lacks subject matter jurisdiction because Plaintiff fails to allege facts that constitute racketeering activity, nor has Plaintiff pled facts listed as offenses in 18 U.S.C. § 1961. Additionally, Defendant argues Plaintiff's causes of action are centered on disputes related to real and personal property to which Plaintiff believes it is entitled because it is a sublessee of a prior tenant. Moreover, Defendant argues the Plaintiff lacks standing because its failure to allege conduct constituting racketeering activity means Plaintiff also cannot allege an injury stemming from a violation of RICO. Alternatively, Defendant argues Plaintiff failed to state a claim for which relief may be granted because it has not alleged facts supporting the elements of a RICO claim. Furthermore, any statements made in the complaint alleging racketeering activity are legally conclusory, and do not sufficiently allege a pattern of racketeering.

Plaintiff's response addresses Defendant's arguments in a cursory manner. Rather than respond to Defendant's arguments, Plaintiff simply states 18 U.S.C. § 1964(c) provides district courts jurisdiction to hear civil RICO actions. Plaintiff does not, for example, address whether the predicate acts it alleges qualify as underlying state offenses for the purpose of a RICO claim. Plaintiff merely cites to various sections of its complaint for support that Defendant's alleged illegal actions have damaged its business. Plaintiff neglects, however, to address whether based on the factual allegations made, its claims fail as a matter of law. For example, if the predicate acts alleged do not constitute criminal offenses for the purpose of a RICO claim, the complaint must be dismissed.

IV. Standard for Alleging a RICO Claim

Congress enacted RICO to eliminate the infiltration of organized crime and racketeering activities into legitimate business. *See Beck v. Prupis*, 529 U.S. 494, 496, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000) ("Congress enacted ... RICO ... for the purpose of seek[ing] the eradication of organized crime in the United States.") (internal quotations omitted); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (D.C.Cir.1990) (providing legislative history). "[E]very act of corruption or petty crime committed in a business setting" does not give rise to a claim under RICO. *Yellow Bus Lines*, 913 F.2d at 954. Instead, the RICO statute was intended to address criminal activity that is repetitive and long-term such as the use of force, threats, enforcement of illegal debts, and corruption in the operation of business. *Id.*

Plaintiff asserts violations of §§ 1962(a), (c), and (d) of RICO. The Fifth Circuit "reduced th[ese] subsections to their simplest terms:"

(a) a person who has received income from a pattern of racketeering activity cannot invest that income in an enterprise;

...

(c) a person who is employed by or associated with an enterprise cannot conduct the affairs of the enterprise through a pattern of racketeering activity; and

*4 (d) a person cannot conspire to violate subsections (a), (b), or (c).
St. Paul, 224 F.3d at 439 (citing *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir.1995)).

RICO imposes civil and criminal liability on persons who use or invest income derived from, acquire or maintain control of, or engage in the conduct of an enterprise through a pattern of racketeering activity, or who conspire to do any of these acts. *See* 18 U.S.C. § 1962. "To state a civil RICO claim under section 1962, a Plaintiff must allege: (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 606 (5th Cir.1998) (citing *Elliot v. Foufas*, 867 F.2d 877, 880 (5th Cir.1989); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985)).

Preliminarily, however, a Plaintiff must establish standing by alleging a violation of the RICO statute, an injury to its business or property and a causal connection to the injury by the violation of section 1962. *See* 18 U.S.C. § 1964(c); *See also Price*, 138 F.3d at 606 (citing *In re Taxable Mun. Bond Sec. Litig. v. Kutak*, 51 F.3d 518, 521 (5th Cir.1995) ("The standing provision of civil RICO provides that '[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor ... and shall recover threefold the damages he sustains." '). Only persons injured "by reason of" the commission of certain predicate acts have standing to bring suit. *See Sedima*, 473 U.S. at 496. Additionally, in the Fifth Circuit, a person is considered injured "by reason of" a RICO violation if the predicate acts constitute factual (but for) causation and legal (proximate) causation of the alleged injury. *See Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir.1989).

"Racketeering activity includes the commission of specified state-law crimes, conduct indictable under various provisions within Title 18 of the United States Code, including mail and wire fraud, and certain other offenses." *Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp.*, 101 F.3d 900, 903-04 (2d Cir.1996). Section 1961(1) enumerates the various state offenses that qualifying as predicate acts to a RICO claim: murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene material, or drug offenses. *See* 18 U.S.C. § 1961(1). Thus, only crimes prohibited in state statutes and listed in section 1961(1) can serve as predicate offenses for the purpose of a RICO claim. *See Ennis v. Edwards*, 2003 WL 1560113, at *4 n. 16 (E.D.La. Mar.25, 2003). Moreover, " '[a] pattern of racketeering activity requires two or more predicate acts and a demonstration that the racketeering predicates are related and amount to or pose a threat of continued criminal activity." ' *See In re Mastercard Int'l, Inc.*, 313 F.3d 257, 261 (5th Cir.2002) (quoting *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir.2000)) (other citations omitted).

V. Analysis

*5 Plaintiff's complaint fails for two main reasons. First, the predicate acts alleged do not involve one of the predicate acts listed in the RICO statute. *See S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (holding that standing to sue under RICO only exists if Plaintiff's business or property has been injured by specified predicate acts, and Plaintiff may only recover to the extent he has been injured by the conduct constituting the violation). Second, Plaintiff does not adequately allege a pattern of racketeering activity.

A. Racketeering Activity-Predicate Acts

Plaintiff alleges various violations of state law as predicate offenses to its RICO claim: theft of living quarters modules and light poles, *see* Tex. Penal Code §§ 31.03(e)(5) & (e)(6); criminal mischief for the damage, destruction, and tampering of property, *see* Tex. Penal Code § 28.03; criminal attempt to commit an aggravated offense, *see* Tex. Penal Code § 15.01(b); and conspiracy to commit a criminal offense, *see* Tex. Penal Code § 71.01(b). Defendant argues that none of these offenses constitute predicate acts under RICO, and thus Plaintiff has failed to state a claim upon which relief may be granted. The Court agrees.

Predicate acts for racketeering purposes must involve certain specified crimes. As previously mentioned, section 1961(1) enumerates the various state offenses that can serve as predicate offenses for the purpose of a RICO claim. A racketeering activity means any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or drug offenses. *See* 18 U.S.C. § 1961(1). Plaintiff provides no response to Defendant's argument that the alleged acts do not qualify as racketeering activity, except to state "[t]he two or more criminal acts that constitute a pattern of racketeering activity within the meaning of RICO are outlined in ¶¶ 2-8 of the Original Complaint." Pl's Response, at p. 4 [Dkt. No. 17].

Courts have consistently held that "acts that constitute theft under state law are not predicate acts for racketeering activity." *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F.Supp. 995, 1002 (S.D.Tex.1995) (citing *Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 793 F.Supp. 1114, 1136 (E.D.N.Y.1992)); *Jordan v. Berman*, 758 F.Supp. 269, 274 (E.D.Pa.1991); *see also Toms v. Pizzo*, 4 F.Supp.2d 178, 183 (W.D.N.Y.1998) ("[s]imple theft is not one of the crimes constituting a predicate act for purposes of establishing a pattern of racketeering activity."); *United States v. Napoli*, 54 F.3d 63, 68 (2d Cir.1995). Plaintiff's other allegations of criminal mischief, attempted assault, and conspiracy to commit these acts also do not constitute predicate offenses for the purpose of establishing racketeering activity. Nor do Plaintiff's allegations involve bribery or extortion. "A Plaintiff may not convert state law claims into a federal treble damage action simply by alleging that wrongful acts are a pattern of racketeering activity related to an enterprise."

Bonton, 889 F.Supp. at 1002 (citing *King v. Lasher*, 572 F.Supp. 1377, 1382 (S.D.N.Y.1983). Without any predicate acts, Plaintiff cannot establish a pattern of racketeering activity.

B. Pattern of Racketeering Activity

*6 Notwithstanding the fact that Plaintiff has failed to allege any qualifying predicate acts to support its RICO claim, the Court discusses whether Plaintiff has adequately alleged a pattern of racketeering activity. As stated, a "pattern of racketeering activity" requires the Plaintiff to establish at least two predicate acts of racketeering that are related and pose a threat of continued criminal activity. *See, e.g., H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 241, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Although two predicate acts are the minimum number of acts required to demonstrate a pattern of racketeering activity, two acts may not be sufficient. *See Sedima*, 473 U.S. at 496 n. 14. Additionally, "[t]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *HJ*, 492 U.S. at 239.

Of the two requirements, relatedness and continuity, the former is the least cumbersome. A Plaintiff must simply show that predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240. The continuity requirement is more difficult to define.

In *H.J., Inc. v. Northwestern Bell Telephone*, the Supreme Court held the Plaintiff sufficiently stated a RICO claim when it alleged Northwest Bell sought to influence, in the performance of their duties, members of a state board responsible for determining the rates Northwestern Bell could charge. Plaintiff alleged that over a period of six years, Northwestern Bell in fact caused the commissioners on the board to approve rates for the company in excess of a fair and reasonable amount by making cash payments, and paying for parties, meals, tickets to sporting events, etc. Plaintiff alleged these actions constituted predicate acts under the state's anti-bribery statute and state common law. *See H.J., Inc.*, 492 U.S. at 250. The Supreme Court held the alleged acts, if proven, could satisfy the relationship and continuity requirements of a RICO claim. The Court elaborated:

> The acts of bribery alleged are said to be related by a common purpose, to influence commissioners in carrying out their duties in order to win approval of unfairly and unreasonably high rates for Northwestern Bell. Furthermore, petitioners claim that the racketeering predicates occurred with some frequency over at least a 6-year period, which may be sufficient to satisfy the continuity requirement. Alternatively, a threat of continuity of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting Northwestern Bell's ongoing business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise....

Id. at 250.

Thus, continuity is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. " 'The term 'pattern' itself requires the showing of a relationship' between the predicates, ... and of 'the threat of continuing activity." ' *H.J., Inc.*, 492 U.S. at 240 (citations omitted). " 'It is this factor of *continuity plus relationship* which combines to produce a pattern." ' *Id.* (citations omitted). As illustrated in the quoted excerpt above, at least three examples of activity that would establish a threat of continued racketeering are: (1) predicate acts inherently involving a distinct threat of long-term criminal activity; (2) an entity that exists for the purpose of engaging in the criminal activity; or (3) predicate acts that constitute the regular way of conducting an ongoing legitimate business. *Id.* at 242-43.

*7 In the present case, Plaintiff mentions in a conclusory manner that the relevant time frame for this action is "on or about 2003 through on or about October 26, 2004." Pl's Cmplt. ¶ 16. Plaintiff does not, however, specify when the predicate acts occurred during that time. Plaintiff has alleged only predicate acts or offenses that were discrete acts or isolated events related to a specific property dispute with no threat of continuity. Nor does Plaintiff present any facts that allude to continued, repeated conduct forming the basis for its RICO claim. In fact, the three fax letters Plaintiff attaches to its complaint only reference the property disputes between the parties in October 2004. Nor does Plaintiff allege the predicate acts repeatedly occurred during a closed period of time. The alleged theft of the living quarter modules and light poles occurred once, and the alleged act was completed. As for the other predicate acts, Plaintiff has not adequately alleged they occurred over the course of a period of time or that they are sufficiently related to one another to constitute a pattern of racketeering. "Short-term criminal conduct is not the concern of RICO." *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1464 (5th Cir.1991); *see also, e.g., H.J.*, 492 U.S. at 241 ("Predicate acts extending over a few weeks or months do not satisfy [the continuity] requirement."); *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139-40 (5th Cir.1992).

Thus, even assuming Plaintiff has sufficiently alleged "racketeering activity," it has failed to allege the second essential element of a RICO claim-a *pattern* of racketeering activity. The Court finds Plaintiff's allegations of a pattern of racketeering activity, all of which involve Defendants' actions surrounding their alleged taking of certain personal property and assaults, to lack the element of continuity and threat of future criminal activity.

C. Fraud

Plaintiff alleges a scheme to defraud separate from the predicate acts discussed in this opinion and divorced from the

causes of action listed in the complaint. In essence, Plaintiff alleges Defendants devised and participated in "a scheme and artifice to defraud and to steal, and for obtaining property by means of false and fraudulent pretenses, representations, and theft, and to conceal thefts by false and fraudulent pretenses, representations, false declarations, obstructions or justice and perjury." Pl's Cmplt. ¶ 17.

If Plaintiff intends to assert a generic fraud claim as a predicate act to its RICO claim, it has failed: "[i]n all averments of fraud, or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9(b). Rule 9(b)'s particularity requirement applies with equal force to a predicate act in a RICO claim. *See Tel-Phonic Servs.*, 975 F.2d at 1138; *Elliot*, 867 F.2d at 880. Plaintiff must allege at a minimum the " 'time, place, and contents of the false representations, as well as the identity of the person making the misrepresentations and what he obtained thereby." ' *Tel-Phonic Servs.*, 975 F.2d at 1139 (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1297, at 590 (1990)).

*8 Plaintiff's allegations utterly fail to meet the particularity requirements of Rule 9(b).

D. Conspiracy

Plaintiff alleges in its first and second causes of action that Defendants violated 18 U.S.C. § 1962(d), which is a conspiracy violation of RICO. A conspiracy to violate RICO has three elements: "(1) knowledge by the defendant of the essential nature of the conspiracy; (2) the defendant's objective manifestations of an agreement to participate in the conduct of the affairs of an enterprise; and (3) an overt act, which need not be a crime, in furtherance of the conspiracy." Bonton, 889 F.Supp. at 1005 (citing *United States v. Sutherland*, 656 F.2d 1181, 1187 n. 4 (5th Cir.1981)).

Plaintiff has failed to adequately allege a violation of 18 U.S.C. § 1962(c), which makes it unlawful for "a person ... employed by or associated with an enterprise [to] conduct the affairs of the enterprise through a pattern of racketeering activity." "[I]njury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO ... is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d)." *Beck v. Prupis*, 529 U.S. 494, 505, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000). Plaintiff's failure to allege a violation of § 1962(c) is fatal to Plaintiff's conspiracy claim under section 1962(d). Moreover, Plaintiff fails to allege there was an agreement to commit the predicate acts, which is a core element of a RICO civil conspiracy claim. *See Tel-Phonic Servs.*, 975 F.2d at 1140 (citations omitted).

VI. Lack of Subject Matter Jurisdiction-Standing

Standing is generally a threshold consideration for the court to consider before addressing the merits of a motion to dismiss. As some courts have discussed, however, the RICO standing provision is unique because a "civil plaintiff has standing to assert a civil cause of action only if a violation of § 1962 proximately caused his injuries." *In re Mastercard Int'l, Inc.*, 132 F.Supp.2d 468, 495 (E.D.La.2001). Section 1964(c) lays out the civil Rico standing requirement and provides that only persons who have been injured "by reason of" the commission of predicate acts have standing to bring suit. *See Sedima*, 473 U.S. at 496. In the Fifth Circuit, an injury "by reason of" a RICO violation can only exist if the predicate act constitutes a factual (but for) causation of the alleged injury and the legal (proximate) causation of the alleged injury. *See Price*, 138 F.3d at 607 (holding plaintiffs failed adequately to allege the causation element of RICO standing because "[s]ection 1964(c) requires that a compensable injury be 'by reason of' the defendant's substantive violations ..."); *Ocean Energy II*, 868 F.2d at 744; *Whalen v. Carter*, 954 F.2d 1087, 1091 (5th Cir.1992) ("a plaintiff has statutory standing to bring a claim so long as the defendants' predicate acts constitute both a factual and proximate cause of the plaintiff's alleged injury.").

*9 Normally, whether the Court has subject matter jurisdiction and whether the Plaintiff has failed to state a claim upon which relieve may be granted are separate and distinct matters for the Court to decide. *See, e.g., Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 759 (5th Cir.1989). Moreover, where the Plaintiff has clearly presented claims based in federal law and the allegations are not "clearly concocted for the sole purpose of obtaining federal jurisdiction" or "wholly insubstantial and frivolous," the Court has subject matter jurisdiction over the claims, even if the Court dismisses the claims for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946)). Many courts, however, have determined that "lack of RICO standing does not divest the district court of jurisdiction over the action, because RICO standing, unlike other standing doctrines, is sufficiently intertwined with the merits of the RICO claim that such a rule would turn the underlying merits questions into jurisdictional issues." *Lerner v. Fleet Bank*, 318 F.3d 113, 116-17 (2d Cir.2003) (affirming "the district court's dismissal of plaintiffs' civil RICO claim because the alleged pattern of racketeering activity was not the proximate cause of plaintiffs' injuries," but doing so "not under Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction, ... but rather under Fed.R.Civ.P. 12(b)(6), for failure to state a claim.").

In light of the above standard, it was more expeditious for the Court to first determine whether a § 1962 violation occurred. Plaintiff failed to state a cause of action under §§ 1962(a), (c), and (d) because it did not allege predicate acts supporting an injury "by reason of" a RICO violation. Without such predicate acts leading to an injury, Plaintiff lacks standing to bring this RICO claim. Although this deficiency would normally lead the Court to determine it lacks subject matter jurisdiction to entertain the claim, the Court will instead dismiss the RICO claim under Federal Rule of Civil Procedure 12(b)(6).

VII. Supplemental Jurisdiction

Judicial economy, convenience, fairness to litigants, federalism, and comity are all factors the district court

must consider in determining whether it should exercise supplemental jurisdiction over remaining state claims. *See Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir.1992) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)); *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 & n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (citations omitted). Dismissing state claims after federal claims are dismissed is the general rule. *See id.* at 585.

In *Parker & Parsley Petroleum Co. v. Dresser Indus.*, the Fifth Circuit held a district court abused its discretion when it dismissed federal RICO claims, but refused to surrender jurisdiction over supplemental state claims. 972 F.2d 580 (5th Cir.1992). There, the district court reasoned that "dismissal would be a tremendous financial drain to all the parties as well as a waste of judicial resources." *Id.* at 584. Despite substantial development in the case, the district court's ruling on a number of discovery matters, and a trial that was only weeks away, the Fifth Circuit determined the district court should not have exercised supplemental jurisdiction because discovery had not been completed, they were not on the eve of trial, and the parties were not ready for trial. *Parker & Parsley Petroleum Co.*, 972 F.2d at 587. The Fifth Circuit noted that "when the single federal-law claim is eliminated at an 'early stage' of the litigation, the district court has a 'powerful reason to choose not to continue to exercise jurisdiction." ' *Parker & Parsley Petroleum Co.*, 972 F.2d at 585 (citing *Carnegie-Mellon*, 484 U.S. at 351).

*10 In *Newport Ltd. v. Sears, Roebuck, and Co.*, the Fifth Circuit determined a district court abused its discretion in not retaining jurisdiction after the federal Rico claims were dismissed. In that case, "after four years of litigation produced 23 volumes and thousands of pages of record, the preparation of a pretrial order exceeding 200 pages, over a hundred depositions, and according to counsel nearly two hundred thousand pages of discovery production, the declining to hear [that] case on the eve of trial constituted an abuse of discretion." 941 F.2d 302, 307-08 (5th Cir.1991).

In the present case, the Court is dismissing Plaintiff's only federal claim, and no diversity jurisdiction exists. At such an early stage of the proceedings-the Court has not held an initial pretrial conference, nor has it entered a scheduling order-the Court should dismiss without prejudice the state law claims, and thus not exercise its supplemental jurisdiction over the state law claims.

VIII. Conclusion

Plaintiff has failed to sufficiently plead the requisite predicate acts or a pattern of racketeering activity as a basis of its RICO claim. Moreover, Plaintiff failed to plead a conspiracy claim under the RICO statute. As a result, the Court DISMISSES Plaintiff's claims under 18 U.S.C. §§ 1962(a), (c), & (d), and thus GRANTS Defendant's Motion to Dismiss [Dkt. No. 14]. Additionally, the Court DENIES Defendant's Motion to Reconsider the Court's order granting Plaintiff leave to file a late response to Defendants' Motion to Dismiss.

Footnotes

1 Plaintiff's complaint references 18 U.S.C. §§ 1964(a) and (c). Section 1964(a) grants this Court jurisdiction to entertain violations of section 1962, and 1964(c) enumerates the remedies available for violations of RICO and grants any injured person the right to bring a private cause of action against the alleged offender(s).

2 Plaintiff mentions in its response that Defendants provide an alternative factual recitation. In this opinion, the Court only considers Plaintiff's allegations contained in its complaint and attached letter exhibits.

3 The Court presumes these two modules are the same modules referenced in Plaintiff's complaint as living quarters valued at $100,000.00. *See* Pl's Cmplt. ¶¶ 2(i) and (ii).

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2007 WL 765453
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MEMORANDUM OPINION
Court of Appeals of Texas,
Corpus Christi-Edinburg.

Charles D. CRONEN, Appellant,

v.

Patricia A. DAVIS and The City of Houston, Texas, Appellees.

No. 13-05-087-CV. March 15, 2007. Rehearing Overruled April 26, 2007.

On appeal from the 129th District Court of Harris County, Texas, S. Grant Dorfmann, J.

Attorneys and Law Firms

Charles D. Cronen, Houston, pro se.

Andrea Chan, Senior Asst. City Atty., Houston, for Appellees.

Before Chief Justice VALDEZ and Justices RODRIGUEZ and GARZA.

Opinion

MEMORANDUM OPINION

Memorandum Opinion by Justice RODRIGUEZ.

*1 This appeal arises from a plea to the jurisdiction and summary judgment granted in favor of appellees, the City of Houston (the City) and Patricia A. Davis (Officer Davis), a City police officer. On appeal, pro se appellant, Charles D. Cronen, contends that (1) the trial court erred in granting appellees' plea to the jurisdiction and motion for summary judgment and (2) the application of sovereign immunity in this case violates the Open Courts provision of the Texas Constitution because it deprives him of just compensation. We affirm.

I. Background

Officer Davis arrested appellant on three separate occasions for panhandling on the City's streets. *See* Act approved June 18, 1947, 50th Leg., R.S., ch. 421, 1947 Tex. Gen. Laws 967, *repealed by* Act approved May 23, 1995, 74th Leg., R.S., ch. 165, § 24(a), 1995 Tex. Gen. Laws 1870. After each arrest appellant was held in the City's detention facility until appearing before a magistrate. Each of the charges against appellant was dismissed.

Appellant subsequently filed the underlying suit against appellees, asserting claims for false arrest and false imprisonment.[1] Appellees filed a plea to the jurisdiction and motion for summary judgment. In the plea to the jurisdiction, the City argued, among other things, that appellant failed to state a claim against the City that fell within the limited waiver of governmental immunity under the Texas Tort Claims Act (the Act). *See* Tex. Civ. Prac. & Rem.Code Ann. §§ 101.021, 101.0215 (Vernon 2005). In the motion for summary judgment, Officer Davis asserted, among other things, that she was entitled to official immunity, and therefore was immune from liability against appellant's claims. The trial court granted the plea to the jurisdiction in part and the motion for summary judgment. Appellant filed a motion for new trial, which the trial court denied. This appeal ensued.

II. Plea to the Jurisdiction

By issues one and three, appellant contends the trial court erred in granting the plea to the jurisdiction in favor of the City.

A. Standard of Review

A plea to the jurisdiction is a dilatory plea, the purpose of which is to "defeat a cause of action without regard to whether the claims asserted have merit." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex.2000). The plea challenges the trial court's jurisdiction over the subject matter of a pleaded cause of action. *Tex. Parks & Wildlife Dep't v. Morris*, 129 S.W.3d 804, 807 (Tex.App.-Corpus Christi 2004, no pet.). Whether a trial court has subject matter jurisdiction is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004); *Morris*, 129 S.W.3d at 807. Therefore, we review a trial court's ruling on a plea to the jurisdiction de novo. *Miranda*, 133 S.W.3d at 226; *Morris*, 129 S.W.3d at 807.

B. Analysis

Appellant specifically asserts that because he brought his false arrest and false imprisonment claims under the common law rather than under the Act, the trial court erred in granting the plea to the jurisdiction in favor of the City based on the Act.[2] We disagree.

*2 Under the common law doctrine of sovereign immunity, a municipality, such as the City, is immune from suit for the performance of its governmental functions. *See City of Corpus Christi v. Absolute Indus.*, 120 S.W.3d 1, 3 (Tex.App.-Corpus Christi 2001, pet. denied). Governmental functions are "those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public" and include police protection and control. Tex. Civ. Prac. & Rem.Code Ann. § 101.0215. The Act provides a limited waiver of a municipality's sovereign immunity with respect

APPENDIX
3

to performance of its governmental functions for claims involving the use of motor-driven vehicles or motor-driven equipment and injuries arising out of conditions or use of property. *See id.* §§ 101.021, 101.0215. However, the Act does not apply to claims for intentional torts, such as false arrest and false imprisonment. *See id.* § 101.057(2). As a result, a municipality retains its common law immunity from suit for the performance of its governmental functions with respect to false arrest and false imprisonment claims. *See id.* §§ 101.057(2), 101.025 (providing that sovereign immunity to suit is waived and abolished to the extent of liability created by the Act); *see also Absolute Indus.*, 120 S.W.3d at 3; *City of Hempstead v. Kmiec*, 902 S.W.2d 118, 122 (Tex.App.-Houston [1st Dist.] 1995, no writ) (providing that the common law doctrine of governmental immunity shields a city from liability except to the extent the immunity is waived by the Act).

Here appellant sued the City for the intentional torts of false arrest and false imprisonment for actions taken by Officer Davis, thus implicating the City's governmental functions of police protection and control. *See* Tex. Civ. Prac. & Rem.Code Ann. § 101.0215. Although the Act provides a limited waiver of the City's immunity based on its governmental functions, it does not extend this limited waiver to claims against the City for false arrest and false imprisonment. *See id.* §§ 101.025, 101.057(2). As a result, the City retained its common law immunity from suit on these grounds. *See id.* §§ 101.025, 101.057(2); *see also Absolute Indus.*, 120 S.W.3d at 3; *Kmiec*, 902 S.W.2d at 122. Therefore, we conclude that the trial court properly granted the City's plea to the jurisdiction on this basis. We overrule appellants' first and third issues.

III. Summary Judgment

By issues two, four, five, and six, appellant asserts the trial court erred in granting summary judgment in favor of Officer Davis.[3] Specifically, appellant contends the trial court erred in finding that Officer Davis was entitled to official immunity because her arrest of appellant was a ministerial act, rather than a discretionary one, and she did not act in good faith in arresting appellant.[4] *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex.1994) (providing government employees, such as police officers, are entitled to official immunity from suit arising from "the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority").

*3 However, pursuant to rule 166a(c), issues not expressly presented to the trial court by written answer or response to a motion for summary judgment shall not be considered on appeal as grounds for reversal. Tex.R. Civ. P. 166a(c); *see City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678-79 (Tex.1979). Appellant did not expressly present these arguments to the trial court in response to the motion for summary judgment. Therefore, we may not consider these grounds as a basis for reversing the trial court's grant of summary judgment in favor of Officer Davis. Tex.R. Civ. P. 166a(c); *see Clear Creek Basin Auth.*, 589 S.W.2d at 678-79. Accordingly, we overrule appellant's second, fourth, fifth, and sixth issues.

IV. Open Courts Provision

By issues seven, eight, and fourteen, appellant contends that the application of sovereign immunity in this case violates the Open Courts provision of the Texas Constitution because it deprives him of just compensation for his alleged injuries. *See* Tex. Const. art. 1, § 13. We disagree.

The Open Courts provision provides that "[a]ll courts shall be open, and every person for any injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *Id.* The Texas Supreme Court has held that the Open Courts provision affords individuals three distinct protections. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 410 (Tex.1997). First, courts must actually be open and operating. *Id.* (citing *Runge & Co. v. Wyatt*, 25 Tex. 291, 294 (1860)). Second, citizens must have access to the courts unimpeded by unreasonable financial barriers. *Id.* (citing *LeCroy v. Hanlon*, 713 S.W.2d 335, 342 (Tex.1986)). Third, the law must afford meaningful legal remedies to our citizens, so the Legislature may not abrogate the right to assert a well-established common law cause of action. *Id.* (citing *Tex. Ass'n of Bus. v. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex.1993); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355-57 (Tex.1990)). In addition, the Texas Supreme Court has held that the Open Courts provision "applies only to statutory restrictions of a cognizable common law cause of action." *Id.* (quoting *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 499 (Tex.1995); *Moreno*, 787 S.W.2d at 355-56).

Here, appellant does not assert that the courts are not open and operating, nor does appellant contend that his access to the courts has been impeded by unreasonable financial barriers. *See id.* Rather, appellant asserts that the doctrine of sovereign immunity has operated to deprive him of a meaningful legal remedy. Thus, appellant attempts to implicate the third protection of the Open Courts provision. *See id.; see also Cronen v. Ray*, Nos. 14-05-00788-CV and 14-05-00789-CV, 2006 Tex.App. LEXIS 7952, at *14, 2006 WL 2547989 (Tex.App.-Houston [14th Dist.] Sept. 5, 2006, no pet.) (mem.op.). Nevertheless, appellant fails to identify any legislative action or statute that has abrogated or restricted his right to assert a well-established common law cause of action under this third protection. *See Fed. Sign*, 951 S.W.2d at 410; *see also Cronen*, 2006 Tex.App. LEXIS 7952, at *14, 2006 WL 2547989. Instead, appellant centers his complaint around the doctrine of sovereign immunity, which is a common law creation, not a creation of the Legislature. *Tex. A & M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 520 (Tex.2002) (citing *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847); *Bd. of Land Comm'rs v. Walling*, Dall. 524, 1843 Tex. LEXIS 16, 1843 WL 3919 (Tex.1843); *City of Amarillo v. Martin*, 971 S.W.2d 426, 427 (Tex.1998)). Moreover, by waiving sovereign immunity in certain instances under the Act, the Legislature has expanded, not restricted, the claims that may be brought against governmental entities. *See* Tex. Civ. Prac. & Rem.Code § 101.021, 101.0215, 101.025. Thus, because appellant does not challenge a legislative act or

statute that abridges a cognizable common law claim, we conclude that his Open Courts challenge is without merit. *See Fed. Sign*, 951 S.W.2d at 410; *see also Cronen*, 2006 Tex.App. LEXIS 7952, at *14, 2006 WL 2547989. We overrule appellant's seventh, eighth, and fourteenth issues.[5]

V. Conclusion

*4 Accordingly, we affirm the judgment of the trial court.

Footnotes

1 We note that appellant appeared to raise numerous causes of action in his pleadings below. However, both in the trial court and on appeal, appellant characterizes his suit as one for false arrest and false imprisonment, and so we do the same herein.

2 To the extent appellant asserts that the trial court erred in granting the plea to the jurisdiction because it was based on misrepresentations of fact and law, we conclude that the briefing is inadequate because appellant failed to fully develop and support his arguments. *See* Tex.R.App. P. 38.1(h) (providing that appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record); *see also Green v. Kaposta*, 152 S.W.3d 839, 841 (Tex.App.-Dallas 2005, no pet.) (providing that a pro se litigant is held to the same standards as licensed attorneys and must comply with applicable laws and rules of procedure). Therefore, we will not consider such contentions.

3 Appellant also challenges the trial court's grant of summary judgment in favor of the City. However, having determined that the trial court properly granted the City's plea to the jurisdiction, we need not determine the propriety of the trial court's grant of summary judgment in favor of the City. *See* Tex.R.App. P. 47.1. Therefore, we will limit our summary judgment analysis to its application to Officer Davis.

4 To the extent appellant contends that the trial court erred in granting appellees' motion for summary judgment because (1) it was based on misrepresentations of fact and law, (2) fact issues remained, and (3) Officer Davis did not prove her entitlement to summary judgment as a matter of law, we conclude that the briefing is inadequate because appellant failed to fully develop and support his arguments. *See* Tex.R.App. P. 38.1(h); *see also Green*, 152 S.W.3d at 841. Therefore, we will not consider such contentions.

5 By issues nine, ten, and eleven, appellant asserts that although his claims are for false arrest and false imprisonment, he should be given the opportunity to amend his pleadings to state a claim that falls within the limited waiver of the Act. By issue twelve, appellant contends the trial court erred in dismissing the suit against the City and Officer Davis because the dismissal left no defendant from whom he could recover. By issues thirteen and fifteen, appellant asserts the trial court erred in denying his motion for new trial and motion for default judgment, respectively. However, appellant fails to fully develop these arguments and to support them with authority. *See* Tex.R.App. P. 38.1(h); *see also Green*, 152 S.W.3d at 841. Therefore, we conclude appellant has waived these issues on appeal.

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