TAB B

***Dockeray v. Francis*,**
No. 3:03–CV–2862–K
2004 WL 2187118 (N.D. Tex. Sept. 28, 2004)

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Only the Westlaw citation is currently available.
United States District Court, N.D. Texas, Dallas Division.

William J. DOCKERAY, Jr., ID # 563357,
Plaintiff,
v.
Molly FRANCIS, et al., Defendants.
No. 3:03-CV-2862-K.

Sept. 28, 2004.

William J. Dockeray, Jr., Huntsville, TX, pro se.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

RAMIREZ, Magistrate J.

*1 Pursuant to the provisions of 28 U.S.C. § 636(b) and an Order of the Court in implementation thereof, subject cause has previously been referred to the United States Magistrate Judge. The findings, conclusions, and recommendation of the Magistrate Judge follow:

I. BACKGROUND

Plaintiff, a prisoner incarcerated in the Texas prison system, commenced this action in the Southern District of Texas by filing a complaint under 42 U.S.C. § 1983 on November 1, 2002.[FN1] (*See* Compl. at 1, 5.) Because plaintiff aggregated numerous claims against various defendants located throughout the state of Texas, the Court in the Southern District of Texas severed four defendants located in this district from that original action (Judge Molly Francis, Bill Long, Jim Hamlin, and John C. Vance) and transferred the claims related to such defendants to this Court. (*See* Order of Nov. 4, 2003.) After receiving the transferred action on November 26, 2003, this Court issued a Notice of Deficiency and Order (NOD) which directed plaintiff to file an amended complaint to address only his claims against the four defendants severed from the Southern District case and transferred here. (*See* NOD dated Dec. 15, 2003.)

FN1. Under the prison mailbox rule, an action under 42 U.S.C. § 1983 is deemed filed when the prisoner delivers the pleadings to prison authorities for mailing to the court. *See Cooper v. Brookshire,* 70 F.3d 377, 379 (5th Cir.1995). The record does not reflect when plaintiff gave his pleadings to the prison authorities for mailing, but it was "filed" sometime between November 1, 2002, when he signed the complaint, and November 12, 2002, when the Southern District received it. *See id.* Giving plaintiff the benefit of the doubt, the Court uses the date he signed the complaint as the date of filing.

On January 20, 2004, this Court received an amended complaint from plaintiff in which he names only three of the four defendants in this district (Judge Molly Francis and District Clerks, Bill Long and Jim Hamlin) [FN2] as well as three new defendants from other districts or divisions (Troy C. Bennett, Clerk, Austin, Texas; Judge Michael L. McCormic, Austin, Texas, and Judge Mary Lou Robinson, Amarillo, Texas). (Am. Compl. at 1-2.) Plaintiff claims that defendants Long and Hamlin refused to docket and send copies of filings or orders to plaintiff. (*Id.* at 2; Resp. to Court Order attached to Am. Compl.) The bulk of these claims concern acts and omissions which allegedly occurred in 1998 and 1999. (*See* Resp. to Court Order.) One claim, however, concerns a delayed mailing in October 2000. (*Id.*) His claims related to Judge Francis concern acts and omissions related to "Findings of Fact and Conclusions of Law" the judge signed on October 16, 2000. (Am. Compl. at 2; Resp. to Court Order.) His claims against defendants Bennett, McCormic, and Robinson concern alleged refusals to follow appellate rules and

Supreme Court precedent. (Am. Compl. at 2; Resp. to Court Order.)

> FN2. Because plaintiff omitted defendant Vance from his amended complaint, plaintiff has abandoned his claims against such defendant.

On March 22, 2004, the Court granted plaintiff permission to proceed *in forma pauperis* in this action. (*See* Filing Fee Order.) On March 25, 2004, the Court received a "Motion for Class Action" from plaintiff. On June 1 and June 16, 2004, it received two documents entitled "Permissive Joinder of Parties" wherein another individual seeks to join this action by naming distinct and additional defendants. On June 16, 2004, the Court also received a response from that individual which purports to respond to an order for more definite statement. On July 29, 2004, the Court received a request from plaintiff for a hearing. On August 23, 2004, it received a motion from plaintiff wherein plaintiff seeks to provide argument regarding tolling of the statute of limitations. No process has been issued in this case.

II. CLASS ACTION

*2 By his motion for class action, plaintiff seeks to pursue his varied claims in one court. This Court has previously denied a motion by plaintiff to consolidate his various actions in this Court. (*See* Order of Mar. 22, 2004.) At that time, plaintiff attempted to consolidate his actions pursuant to 28 U.S.C. § 1407, entitled "multidistrict litigation." The Court found that it had no authority under § 1407 to order re-consolidation of the claims severed by the Southern District of Texas. Plaintiff's motion for class action is merely another attempt to re-consolidate the claims that were severed and transferred by the Southern District of Texas.

Fed.R.Civ.P. 23(a) sets forth the prerequisites to a class action. Because plaintiff's complaints concern various acts and omissions relevant only to him, he does not satisfy the first prerequisite-that "the class is so numerous that joinder of all members is impractical."That plaintiff has numerous claims against numerous defendants does not satisfy the numerosity requirement for a class action. The members of the class must be numerous, not the claims asserted by a single plaintiff against numerous defendants. For these reasons, the Court should deny the motion for class action.

III. JOINDER OF PLAINTIFFS

In June 2004, an individual named James Brewer filed documents in an attempt to join this action. However, he seeks to sue completely different defendants from those named by plaintiff. Fed.R.Civ.P. 20(a) provides in pertinent part that

[a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Because the claims of Mr. Brewer and plaintiff do not arise out of the same transaction, occurrence, or series of transactions or occurrences, Mr. Brewer may not be properly joined as a plaintiff. The Court should thus deny his request for joinder.

IV. JOINDER OF DEFENDANTS

The Court next addresses whether plaintiff has properly joined parties as defendants in his amended complaint. Plaintiff asserts various claims in this action against defendants arising out of events in three different cities-Dallas, Texas; Austin, Texas; and Amarillo, Texas.

Federal Rule of Civil Procedure 21 governs misjoinder of parties. It provides that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of

the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."To determine whether a party is properly joined, the Court looks to the standards of Fed.R.Civ.P. 20(a). With respect to joinder of defendants, that rule provides:

All persons ... may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

*3 After a thorough review of the amended complaint, the Court finds that plaintiff has sued unrelated defendants in violation of Fed.R.Civ.P. 20(a). The claims against each group of defendants are separate and distinct. Despite the severance and transfer order of the Southern District of Texas, plaintiff has again attempted to improperly join diverse groups of defendants in the same action. Not only is such attempt in contravention of Fed.R.Civ.P. 20(a), it is in direct violation of the NOD issued in this case in which the Court directed plaintiff to file an amended complaint "addressing only his claims against the four defendants severed from the Southern District action and transferred to this Court."

The court has broad discretion when deciding whether to sever parties or claims and may do so when they are "misjoined or might otherwise cause delay or prejudice." *Applewhite v. Reichhold Chem. ., Inc.,* 67 F.3d 571, 574 (5th Cir.1995). Because plaintiff has improperly joined Robinson, Bennett, and McCormic as defendants in this action on unrelated claims, the Court may sever the claims against them or drop them as parties [FN3] under Fed.R.Civ.P. 21. However, because plaintiff is entitled to no relief against the improperly joined defendants, the Court recommends summary dismissal of the claims against these defendants through the judicial screening process.

FN3. To the extent that improperly joined parties are dropped, and if plaintiff desires to pursue litigation against them, he must pursue such litigation in a separate action filed in the proper court. As found by the Southern District of Texas in its transfer order, venue would properly lie in the United States District Court for the Western District of Texas, Austin Division, for claims arising out of events or omissions that occurred in Austin, Texas. (*See* Order of Nov. 5, 2003, at 2.) Additionally, venue would properly lie in the United States District Court for the Northern District of Texas, Amarillo Division, for claims arising out of events or omissions that occurred in Amarillo, Texas. (*Id.* at 4-5.)

V. PRELIMINARY SCREENING

Plaintiff proceeds *in forma pauperis* in this action. His complaint is thus subject to screening under 28 U.S.C. § 1915(e)(2). As a prisoner seeking redress from an officer or employee of a governmental entity, plaintiff's complaint is also subject to preliminary screening pursuant to § 1915A. *See Martin v. Scott,* 156 F.3d 578, 579-80 (5th Cir.1998). Both of these sections provide for *sua sponte* dismissal of the complaint, or any portion thereof, if the Court finds it is frivolous or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary relief against a defendant who is immune from such relief. *See id.*

A complaint is frivolous when it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams,* 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). A claim lacks an arguable basis in law when it is "based on an indisputably meritless legal theory." *Id.* at 327.A claim lacks an arguable basis in fact when it describes "fantastic or delusional scenarios." *Id.* at 327-28.A complaint fails to state a claim upon which relief may be granted when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would en-

title him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Smith v. Winter,* 782 F.2d 508, 511-12 (5th Cir.1986); *Henrise v. Horvath,* 94 F.Supp.2d 768, 769 (N.D.Tex.2000).

VI. RELIEF UNDER 42 U.S.C. § 1983

Pursuant to 42 U.S.C. § 1983, plaintiff sues three judges and three court clerks for injunctive and declaratory relief. (*See* Am. Compl. at 2-3; Resp. to Court Order; Mot. Class Action (clarifying that this action is only for declaratory and injunctive relief).) FN4 Section 1983"provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw,* 512 U.S. 107, 132, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994). It "afford[s] redress for violations of federal statutes, as well as of constitutional norms."*Id.*

> FN4. In an abundance of caution, the Court will also consider the possibility that plaintiff also seeks monetary relief.

A. *Relief Against Judges*

*4 Plaintiff specifically sues Judge Francis for acts and omissions related to "Findings of Fact and Conclusions of Law" the judge signed on October 16, 2000. (Am. Compl. at 2; Resp. to Court Order.) He also sues Judges McCormic and Robinson for acts and omissions related to judicial proceedings. (Am. Compl. at 2; Resp. to Court Order.)

The United States Supreme Court has recognized absolute immunity for judges acting in the performance of their judicial duties. *See Nixon v. Fitzgerald,* 457 U.S. 731, 745-46, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982). Judges are immune from suit for damages resulting from any judicial act, unless performed in "the clear absence of all jurisdiction." *Mireles v. Waco,* 502 U.S. 9, 11-12, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991); *Stump v. Sparkman,* 435 U.S. 349, 356-357, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); *Young v. Biggers,* 938 F.2d 565, 569 n. 5 (5th Cir.1991). Allegations of bad faith or malice do not overcome judicial immunity. *Mireles,* 502 U.S. at 11. "The fact that it is alleged that the judge ... committed grave procedural errors is not sufficient to avoid absolute judicial immunity." *Mitchell v. McBryde,* 944 F.2d 229, 230 (5th Cir.1991).

Plaintiff alleges no facts that suggest that any of the three named judges acted without jurisdiction. The complained-of actions by these judges all fall within the parameters of judicial functions. Consequently, Judges Francis, McCormic, and Robinson are absolutely immune to monetary damages under § 1983.

In addition, as amended in 1996, § 1983 provides judicial immunity in actions for injunctive relief, unless the judge has violated a prior declaratory decree or declaratory relief is unavailable. In this instance, plaintiff alleges no facts which suggest that a prior declaratory decree has been violated or that declaratory relief is unavailable. Moreover, the record does not show that a declaratory decree was violated or that declaratory relief was unavailable. Consequently, the three named judges are thus immune to injunctive relief.

Although neither monetary nor injunctive relief may be had against the defendant judges, declaratory relief remains available under § 1983. However, in this instance, plaintiff has stated no viable claim for declaratory relief against the defendant judges. He merely seeks a declaration that his constitutional rights were violated. (*See* Am. Compl. at 3.) "Before a federal court may issue a declaratory judgment, the Federal Declaratory Judgement Act, 28 U.S.C. § 2201, requires that there be 'a substantial controversy between parties having adverse legal interests." ' *Johnson v. Onion,* 761 F.2d 224, 225 (5th Cir.1985) (citation and footnote omitted). There is no actual ongoing controversy between plaintiff and Judges Francis, McCormic, or Robinson. Plaintiff has made no factual allegation that the complained-of conduct of these judges has contin-

ued or will be repeated in the future. Any "declaration that [the judge's] past conduct violated [the plaintiff's] constitutional rights ... would be nothing more than a gratuitous comment without any force or effect." *Id.* (citation and internal quotation marks omitted).

*5 For all of these reasons, plaintiff may obtain no relief against Judges Francis, McCormic, or Robinson under 42 U.S.C. § 1983, and the claims against them should be dismissed.

B. *Relief Against Clerk Courts*

While there is also some immunity from relief under 42 U.S.C. § 1983 for court clerks, the immunity accorded them is not as broad as that accorded judges. Court clerks "have absolute immunity from actions for damages arising from acts they are specifically required to do under court order or at a judge's discretion." *Tarter v. Hury,* 646 F.2d 1010, 1013 (5th Cir.1981). They "enjoy[ ] only qualified immunity[, however,] for those routine duties not explicitly commanded by a court decree or by the judge's instructions." *Clay v. Allen,* 242 F.3d 679, 682 (5th Cir.2001). The current state of the record does not permit adequate consideration of whether the court clerks are entitled to absolute or qualified immunity in this case. Thus, the Court proceeds to examine the timeliness of the claims against them.

VII. STATUTE OF LIMITATIONS

In this instance, plaintiff bases the instant § 1983 litigation on various events and omissions which occurred between 1998 and October 2000. (*See* Am. Compl. at 2; Resp. to Court Order.) The lengthy delay between the alleged events and omissions and the date plaintiff filed his original complaint in the Southern District of Texas in November 2002, prompts consideration of the timeliness of this action. "Where it is clear from the face of a complaint filed *in forma pauperis* that the claims asserted are barred by the applicable statute of limitations, those claims are properly dismissed," pursuant to § 1915(e)(2)(B). *Gartrell v. Gaylor,* 981 F.2d 254, 256 (5th Cir.1993). In such circumstances, courts may also dismiss the claims under § 1915A when it applies. *Gonzales v. Wyatt,* 157 F.3d 1016, 1019-21 (5th Cir.1998). The Court "may raise the defense of limitations *sua sponte.*" *Harris v. Hegmann,* 198 F.3d 153, 156 (5th Cir.1999).

"The statute of limitations for a suit brought under § 1983 is determined by the general statute of limitations governing personal injuries in the forum state." *Piotrowski v. City of Houston,* 237 F.3d 567, 576 (5th Cir.2001). In view of Texas' two-year statute of limitations for personal injury claims, plaintiff had two years from the date that his § 1983 claims accrued to file suit. *Id.; accord Hatchet v. Nettles,* 201 F.3d 651, 653 (5th Cir.2000).

Accrual of a § 1983 claim is governed by federal law:

Under federal law, the [limitations] period begins to run 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'A plaintiff's awareness encompasses two elements: '(1) The existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions.'A plaintiff need not know that she has a legal cause of action; she need know only the facts that would ultimately support a claim. Actual knowledge is not required 'if the circumstances would lead a reasonable person to investigate further.'

*6 *Piotrowski,* 237 F.3d at 576 (citations omitted). In other words, "[t]he cause of action accrues, so that the statutory period begins to run, when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Gonzales v. Wyatt,* 157 F.3d 1016, 1020 (5th Cir.1998).

Under the facts presented by plaintiff, all claims against defendants Hamlin, Long, and Bennett-except one-accrued in 1998 or 1999. The one exception accrued no later than October 23, 2000, when

plaintiff received the mailing that he alleges was intentionally delayed. Plaintiff's amended complaint establishes that, no later than October 2000, he knew of the facts upon which he based his claims against the court clerks. Despite such knowledge, he did not file his original complaint until November 2002. It is clear that the claims against the court clerks are time-barred. The Court may thus summarily dismiss the claims against the court clerks. *See Gartrell v. Gaylor,* 981 F.2d 254, 256 (5th Cir.1993) (holding that court may summarily dismiss a complaint filed *in forma pauperis* if it is "clear" that claims asserted are barred by limitations).

VIII. TOLLING

Although the claims against the court clerks appear time-barred, the applicable limitations period may be equitably tolled in appropriate circumstances. *See Rotella v. Pederson,* 144 F.3d 892, 897 (5th Cir.1998)."Because the Texas statute of limitations is borrowed in § 1983 cases, Texas' equitable tolling principles also control."*Id.*"[W]hen state statutes of limitation are borrowed, state tolling principles are to be the 'primary guide' of the federal court. The federal court may disregard the state tolling rule only if it is inconsistent with federal policy."*See FDIC v. Dawson,* 4 F.3d 1303, 1309 (5th Cir.1993) (citations omitted).

If not tolled, limitations generally continue "to run until the suit is commenced by the filing of the plaintiff's complaint in the clerk's office." *Gonzales v. Wyatt,* 157 F.3d 1016, 1020 (5th Cir.1998). Plaintiff filed his original complaint after the applicable statute of limitations had expired. He provides no basis for equitable tolling under Texas or federal law.[FN5] Consequently, his claims should be dismissed as frivolous under 28 U.S.C. §§ 1915(e)(2) and 1915A for his failure to file them within the statutory periods of limitations.

> FN5. In an attachment to his motion seeking leave to provide argument regarding the tolling of the statute of limitations, plaintiff relies upon *Ruiz v. Johnson,* 154 F.Supp.2d 975, 1000 (S.D.Tex.2001) and *Gillespie v. Crawford,* 858 F.2d 1101, 1103 (5th Cir.1988) for finding a basis to equitably toll the statute of limitations. The Court grants plaintiff's motion to provide such argument regarding tolling. Those cases, however, provide no basis to equitably toll the statute of limitations.

IX. EVIDENTIARY HEARING

Plaintiff requests that the Court conduct an evidentiary hearing in this case. Because the Court can resolve the action on the submitted briefing there is no need for a hearing. The Court thus denies the request for hearing.

X. RECOMMENDATION

For the foregoing reasons, it is recommended that the District Court DISMISS this action with prejudice as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). The named judicial defendants enjoy absolute immunity from monetary and injunctive relief under 42 U.S.C. § 1983, and plaintiff has stated no viable claim for declaratory relief against them. Furthermore, the claims against the court clerks are barred by the applicable statute of limitations. The dismissal of this action will count as a "strike" or "prior occasion" within the meaning of 28 U.S.C. § 1915(g).[FN6]

> FN6.Section 1915(g), which is commonly known as the "three-strikes" provision, provides:
>
> > In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section, if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that

> was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

*7 The United States District Clerk shall serve a copy of these findings, conclusions, and recommendation on plaintiff by mailing a copy to him. Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to these findings, conclusions and recommendation must file and serve written objections within ten days after being served with a copy. A party filing objections must specifically identify those findings, conclusions, or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory, or general objections. Failure to file written objections to the proposed findings, conclusions, and recommendation within ten days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *Douglass v. United Servs. Auto Ass'n,* 79 F.3d 1415, 1428-29 (5th Cir.1996) (*en banc*).

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