TAB D

Liptak v. Former State Judge Paul Banner,
No. CIV. A. 301CV0953M
2002 WL 378454 (N.D. Tex. Mar. 7, 2002)

McPeters v. Edwards et al Doc. 56 Att. 13

Only the Westlaw citation is currently available.

United States District Court, N.D. Texas, Dallas Division.
Virgil LIPTAK, Plaintiff,
v.
FORMER STATE JUDGE PAUL BANNER, et al., Defendants.
No. CIV.A. 301CV0953M.

March 7, 2002.

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

LYNN, District J.

*1 The Court has under consideration the Findings, Conclusions and Recommendations of United States Magistrate Judge Paul D. Stickney dated January 18, 2002 on *Defendants Elizabeth Thornhill, Kerry Thornhill and Daniel Sheehan & Associates, L.L.P.'s Motion to Dismiss, or, in the Alternative, Motion for a More Definite Statement and Motion for Order Determining Plaintiff Virgil Liptak to be a Vexatious Litigant and for Order Requiring Plaintiff to Furnish Security.* Plaintiff filed objections, and the District Court has made a de novo review of those portions of the proposed Findings, Conclusions and Recommendation to which objection was made. The objections are overruled, and the Court accepts the Findings, Conclusions and Recommendation of the United States Magistrate Judge. The Court also concludes that Plaintiff's suit is, in effect, an attempt to litigate and relitigate matters over which this Court does not have jurisdiction, either because they have already been adjudicated in state or federal court or should have first been presented to state court. *See* Owen Equipment & Erection Co. Kroger, 437 U.S. 365 (1978); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); *Musslewhite v. State Bar of Texas,* 39 F.3d 942 (5th Cir.1994), *cert. denied,* 515 U .S. 1103 (1995). *See also Liptak v. Strasburger & Price,* No. 3:98-CV-0897-G (Fish, J.), Opinions of April 10, 1998 and April 24, 1998.

Defendants Elizabeth Thornhill, Kerry Thornhill and Daniel Sheehan & Associates, L.L.P.'s Motion to Dismiss, or, in the Alternative, Motion for a More Definite Statement and Motion for Order Determining Plaintiff Virgil Liptak to be a Vexatious Litigant and for Order Requiring Plaintiff to Furnish Security, filed September 12, 2001, is GRANTED in part and DENIED in part. Plaintiff's claims against Elizabeth Thornhill, Kerry Thornhill, and Daniel Sheehan & Associates, L.L.P. are hereby DISMISSED WITH PREJUDICE, with costs taxed against Plaintiff. Defendant may file future suits in federal court in this District only after receiving permission of a District Court in this District.

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

By Order of Reference, the United States District Court referred *Defendants Elizabeth Thornhill, Kerry Thornhill and Daniel Sheehan & Associates, L.L.P.'s Motion to Dismiss, or, in the Alternative, Motion for a More Definite Statement and Motion for Order Determining Plaintiff Virgil Liptak to be a Vexatious Litigant and for Order Requiring Plaintiff to Furnish Security,* filed September 12, 2001, to the undersigned United States Magistrate for findings and recommendation.

Background

This lawsuit arises from the state court litigation of various causes of action to which the plaintiff was a party. In his forty-seven page First Amended Complaint, the plaintiff alleges *inter alia* that he was the victim of a conspiracy carried out by a group of state court judges, local law firms, and private individuals including Defendant Daniel Sheehan & Associates ("Sheehan"), Elizabeth Thornhill, and Kerry Thornhill. Defendant Sheehan represented the plaintiff's ex-wife Elizabeth Thornhill and her current husband Kerry Thornhill in three lawsuits against the plaintiff.

Standard of Review

Tab "D"
Appendix of Authorities to Defendant The Honorable Frederick E. Edwards's Motion To Dismiss Plaintiff's Second Amended Complaint Under Rules 12(b)(6), 12(b)(1), and 9(b)

*2 A motion to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6) is viewed with disfavor and is rarely granted. *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir.1997). A district court cannot dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir.1995). In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir.1996). In ruling on such a motion, the court cannot look beyond the face of the pleadings. *Baker*, 75 F.3d at 196; *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir.1999), *cert. denied*, 530 U.S. 1229 (2000). A plaintiff, however, must plead specific facts, not mere conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir.1992).

Analysis

Mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss. *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir.1982), quoting *Slotnick v. Staviskey*, 560 F.2d 31, 33 (1st Cir.1977).

The jurisdiction of federal courts is limited. *Owen Equipment and Erection* Co. *v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L .Ed.2d 274 (1978). In the federal context, the Supreme Court of the United States is the only court that can conduct an appellate review of state court decisions. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 486, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). Thus, federal District Courts may not adjudicate attacks on the validity of earlier state trial and appellate court decisions. *Id.*

I. The Claims Against Daniel Sheehan & Associates, L.L.P.

In his First Amended Complaint, the plaintiff asserts blanket accusations against a variety of state judges, law firms, and private individuals. He makes general allegations regarding Defendant Sheehan, including an assertion that the firm has an "undisclosed continuity of financial interest with Elizabeth Thornhill, and the other defendants that defies reasonable and customary bounds of attorney scope of employment." [FN1] The plaintiff also states that he "suspects that such interests, and an 'indemnification' for their acts by the other defendants is patently illegal and is evidence of the conspiracy complained of." [FN2] Further, the plaintiff complains that Elizabeth Thornhill and her "cohort" lawyer co-defendants attacked a judgment made by the "255th State Court," [FN3] and that "a former Judge Sheehan, of the same last name as opposing co-defendant Sheehan caused Liptak to be dispossessed (for obvious purpose of destruction) of twenty boxes of Liptak's property evidence." [FN4] Nowhere in the text of the complaint does the plaintiff describe how or when Sheehan met with the other co-conspirators, or how the Defendants orchestrated the alleged scheme to deprive him of his rights. Instead, he sets forth mere conclusory allegations of improper financial relationships and nepotism between Sheehan, a judge sharing the same surname, and the Thornhills, failing to adequately explain their relation to the subsequent judgments rendered against him. As such, the plaintiff's claims cannot survive the defendants' 12(b)(6) motion, and are subject to dismissal by the Court. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir.1992).

FN1. Plaintiff's First Amended Complaint, p. 9.

FN2. Id.

FN3. Plaintiff's First Amended Complaint, p. 14.

FN4. Plaintiff's First Amended Complaint, p. 24.

II. The Claims Against Elizabeth Thornhill

*3 The plaintiff claims that Elizabeth Thornhill has conspired with various co-defendants, including Defendant Sheehan, to deprive the plaintiff of his rights and property by engaging in collusion during the litigation of several lawsuits. As is true of his allegations against Defendant Sheehan, the plaintiff's allegations against Defendant Elizabeth Thornhill are merely conclusory and insufficient to survive a motion for summary judgment. *Arsenaux v. Roberts*, 726 F.2d at 1024, quoting *Slotnick v. Staviskey*, 560 F.2d at 33. Furthermore, as a result of the adverse outcome of prior litigation involving Elizabeth Thornhill and the alleged collusion between the Thornhills, the law firms, and the state court judges, the plaintiff is now demanding that the issues raised in those lawsuits be revisited by this Court, and that the propriety of the sitting state judges' decisions be

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reviewed. Clearly, such review is prohibited by settled law. It is not within the jurisdiction of the United States District Court to declare a state court decision void. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. at 482, 486 (1983). Therefore, the plaintiff's claims against Defendant Elizabeth Thornhill should be dismissed.

III. The Claims Against Kerry Thornhill

There are no specific allegations as to how the actions of Kerry Thornhill have any bearing on the plaintiff's claims listed in the First Amended Complaint. It appears as though the plaintiff is including Mr. Thornhill as a party to this lawsuit simply by virtue of the fact that he is currently married to the plaintiff's ex-wife, Elizabeth Thornhill. Therefore, since the plaintiff's allegations against Defendant Elizabeth Thornhill are without merit, the plaintiff's claims against Kerry Thornhill should likewise be dismissed.

IV. The Vexatious Litigant Statute

As a result of repeated litigation, the plaintiff has been labeled a "vexatious litigant" in accordance with Texas Civil Practice and Remedies Code section 11.051 et seq. Plaintiff claims that the statute is unconstitutional, and that it is designed to deprive pro se litigants of their right of access to the courts because it is "overbroad, vague, indefinite, and by design...it fosters and promotes capricious, arbitrary and unreasonable application, so as to be a foreseeable tool to chill the exercise of [First] Amendment rights to redress the government." [FN5] The plaintiff also asserts that the Vexatious Litigant Statute is "patently repugnant" [FN6] to his Seventh Amendment right to jury trial. And finally, the plaintiff contends that the statute is violative of the equal protection clause of the Fourteenth Amendment.

FN5. Plaintiff's First Amended Complaint, p. 11.

FN6. Id.

A. The First Amendment

In considering a challenge to a statute based on vagueness and overbreadth, the Court must first consider whether the statute is overbroad, and assuming it is not, then whether it is unconstitutionally vague. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). As the Supreme Court has noted, a statute need not fail *in toto* merely because it is capable of some unconstitutional applications. *Broadrick v. Oklahoma*, 413 U.S. 601, 614, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973). In order to invalidate a statute on overbreadth grounds, the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2918. Thus, a statute should not be invalidated unless it reaches a substantial number of permissible activities. *New York v. Ferber*, 458 U.S. 747, 771, 102 S.Ct.3348, 3362, 73 L.Ed.2d 1113 (1982). The constitutional defect of an overbroad restraint on speech lies in the risk that the wide sweep of the restraint may chill protected expression. *E.g., CISPES (Committee in Solidarity with the People of El Salvador) v. F.B.I.*, 770 F.2d 468, 472 (5th Cir.1985). Conversely, invalidation of a statute on overbreadth grounds brings about total judicial abrogation of even the legitimate regulation at the core of the overbroad statute. *Id.* To avoid this result, where there are a substantial number of situations to which a statute may validly be applied, the Court eschews reliance on the overbreadth doctrine. *E.g. Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir.) *cert. denied*, 488 U .S. 982, 109 S.Ct. 531, 102 L.Ed.2d 563 (1988); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908.

*4 The plaintiff makes no clear allegations regarding which constitutionally protected activities are "swept in" by the alleged overbreadth of the statute. In reading section 11.054 of the Civil Practice and Remedies Code, which sets out in detail those criteria that must be met in order to find a plaintiff to be a vexatious litigant, it is abundantly clear that the statute is sufficiently specific to prevent arbitrary or capricious application . [FN7] It is certainly true that the subject matter covered by the statute-- an individual's right to petition the court--is of paramount constitutional importance. However, the plaintiff has not made any specific arguments as to which constitutionally protected activities will be unnecessarily swept into the category of proscribed conduct, nor has the plaintiff alleged the manner in which the statute will reach more broadly than is reasonably necessary to protect the legitimate state interest involved. *See Beckerman v. City of Tupelo, Miss.*, 664 F.2d 502, 516 (5th Cir.1981). On its face, the statute appears to be sufficiently specific to prevent the "sweeping in" of activities that are beyond the scope of those which the government is intending to regulate. It is difficult to conceive of an

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undeserving individual being improperly labeled a vexatious litigant, given the specificity of the criteria listed in the statute. Moreover, the statute can be validly applied to a substantial number of situations in which restrictions upon vexatious litigants are necessary. As such, the plaintiff's claims as to the statute's overbreadth must fail. *Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2918.

> FN7. Section 11.054 states:
> A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:
> (1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under section 11.051, has commenced, prosecuted, or maintained in propia persona at least five litigations other than in a small claims court that have been:
> (A) finally determined adverse to the plaintiff;
> (B) permitted to remain pending at least two years without having been brought to trial or hearing; or
> (C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure;
> (2) after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, in propia persona, either: (A) the validity of the determination against the same defendant as to whom the litigation was finally determined; or
> (B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant as to whom the litigation was finally determined; or
> (3) the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.

A statute is vague when it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972), or when "no standard of conduct is outlined at all; when no core of prohibited activity is defined." *Margaret S. v. Edwards*, 794 F.2d 994, 997 (5th Cir.1986).

Clearly, a rule allowing a litigant to be labeled as "vexatious," thereby prohibiting him from proceeding with future lawsuits in the absence of some form of security or approval of the court is somewhat prohibitive in nature. Essentially, such a statute prohibits relitigation of previously adjudicated or frivolous claims, thereby facilitating the execution of the Court's "power and obligation to protect [its] jurisdiction from conduct which impairs [its] ability to carry out Article III functions." *Procup v. Strickland*, 792 F.2d 1069, 1073 (11th Cir.1986). Section 11.051 et seq. clearly outlines, by setting specific criteria that must be present to effect a vexatious litigant declaration, which actions could potentially lead to an individual being labeled as such. Any person of reasonable intelligence would be able to discern that if he were to file five lawsuits in seven years, all of which were decided in favor of the opposing party, were determined to be frivolous, or met a series of other standards, he may be subject to being labeled a vexatious litigant. There is no other practical reading of the subject statute. A standard of conduct has been sufficiently outlined in the statute, and a core of prohibited activity is well defined therein. *Margaret S. v. Edwards*, 794 F.2d at 997. Therefore, the statute cannot be considered vague.

B. The Seventh Amendment

*5 With respect to the Seventh Amendment claim, it is first important to point out that the Seventh Amendment right to jury trial for civil cases does not apply to state proceedings. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 2222, 135 L.Ed.2d 659 (1996); *Walker v. Sauvinet*, 92 U.S. 90, 92, 23 L.Ed. 678 (1876). Moreover, under § 11.055, an individual is merely required to "furnish security for the benefit of the moving defendant" if the court determines that individual to be a vexatious litigant under the terms of § 11.054. Therefore, the plaintiff is indeed allowed to commence and proceed with litigation as long as he is willing to furnish some assurance that his current claim is valid, and not just a repeated attempt to harass the parties subject to litigation. For these reasons, the plaintiff's Seventh Amendment claims are without merit.

C. The Fourteenth Amendment

Finally, the plaintiff argues that the subject statute

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violates the equal protection clause of the Fourteenth Amendment. The plaintiff asserts that "self representation is unfairly stigmatized" [FN8] by sections 11.051 et seq. It is important to note that § 11.054 does single out "in propria persona" filings in setting forth the criteria that is to be followed by the court in determining whether an individual is to be deemed a vexatious litigant. However, assuming *arguendo* that pro se litigants are indeed treated differently in making such a determination, the fact remains that pro se litigants do not constitute a suspect class for purposes of equal protection. Thus, the constitutional inquiry is limited to whether the effect of the statute bears a rational relation to the state's objective. *Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Certainly, preventing vexatious litigants from filing frivolous and harassing claims is rationally related to the goal of preserving judicial expediency. Therefore, the plaintiff's equal protection claims are without merit and should be dismissed.

FN8. Plaintiff's First Amended Complaint, p. 11.

V. Motion for Order Determining Plaintiff to be a Vexatious Litigant

Having determined that the subject statute is indeed constitutional, the Court now turns to the defendants' Motion for Order Determining Plaintiff to be a Vexatious Litigant pursuant to Texas Civil Practice and Remedies Code section 11.051 et seq.

Because the substance of the Texas law is subsumed by Rule 11 of the Federal Rules of Civil Procedure, the Court will treat the defendants' request as a Motion for Sanctions pursuant to Rule 11. The defendants have presented evidence of a pattern of frivolous lawsuits brought by the plaintiff against various judges, attorneys and individuals who are in some form associated with the litigation that has ensued as a result of the divorce between the plaintiff and Elizabeth Thornhill. [FN9] All of these lawsuits have been resolved in a manner adverse to the plaintiff. It appears as though, by this lawsuit, the plaintiff is again seeking to harass the many parties involved, and to assert frivolous arguments for the modification of existing law. Such behavior is expressly prohibited by Rule 11. Thus, sanctions would be appropriate in this case.

FN9. Defendants' Brief p. 8-12.

*6 The defendants have requested that the plaintiff be required to furnish security for this suit, and that the Court prevent Plaintiff from filing new lawsuits in this district without prior permission in accordance with the provisions of the Texas Civil Practice and Remedies Code.

Rule 11(c)(1)(2) states: "A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated," and the Fifth Circuit has held that requiring a plaintiff to receive the permission of the Court before filing a lawsuit is appropriate where plaintiffs are "abusing the judicial process by such filings and [are] delaying the consideration of meritorious claims." *Murphy v. J.A. Collins,* 26 F.3d 541, 544 (5th Cir.1994); *see also Balawajder v. Scott,* 160 F.3d 1066, 1067 (5th Cir.1999). It appears that the only possible way to deter the plaintiff from filing frivolous suits in the future is to require that he receive the Court's permission prior to such filings. Therefore, this Court recommends that the District Court order the plaintiff to obtain the Court's permission before filing any future litigation in this district. As to the defendant's request that the plaintiff be required to furnish security, this Recommendation encourages the dismissal of the plaintiff's claims, therefore disposing of the need for any such security.

Conclusion

Mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss. *Arsenaux v. Roberts,* 726 F.2d at 1024, quoting *Slotnick v. Staviskey,* 560 F.2d at 33. The plaintiff has alleged no facts sufficient to show that Defendants Daniel Sheehan & Associates, L.L.P., Elizabeth Thornhill, or Kerry Thornhill were or are currently participants in a conspiracy among several state court judges, law firms, and individuals to violate his civil rights. Furthermore, federal District Courts may not adjudicate attacks on the validity of earlier state trial and appellate court decisions. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482, 486, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). Therefore, the plaintiff has failed to state a claim upon which relief can be granted, and his claims against Defendants Sheehan and Elizabeth and Kerry Thornhill should be dismissed.

RECOMMENDATION

This Court recommends that the Defendants' Motion be GRANTED in part and DENIED in part. Defendants' *Motion to Dismiss* should be GRANTED, and the plaintiff should be required to receive the Court's permission before filing future

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lawsuits in this district. However, the *Motion for a More Definite Statement and Motion for Order Requiring Plaintiff to Furnish Security* should be DENIED, as this Recommendation encourages the dismissal of the plaintiff's claims, therefore disposing of the need for any such security or a more definite statement.

Not Reported in F.Supp.2d, 2002 WL 378454 (N.D.Tex.)

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