Strangmeier v. City Of Houston et al Doc. 19

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN STRANGMEIER,	§	
	§	
Plaintiff,	§	
	§	**Civil Action No.: 4:11-CV-3463**
v.	§	**(Jury Trial Demanded)**
	§	
CITY OF HOUSTON, ET AL.	§	
Defendants.	§	

CITY OF HOUSTON'S AND MAYOR ANNISE PARKER'S RULE 12(b)(6) AND 12(b)(1) MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT

John Strangmeier filed this suit alleging that his receipt of a red light citation from the City of Houston violated his rights under the United States Constitution. On October 14, 2011, the Court held an initial conference and, after reviewing the allegations in Strangmeier's Complaint and the defendants' Rule 12(b) motion to dismiss, indicated that there was no valid legal or factual basis for the claims asserted. Strangmeier sought to amend the complaint, and the Court issued an order indicating that if Strangmeier "does not accomplish anything useful by amending" he must pay the City's defense costs. (DE 11).

Strangmeier has now filed a First Amended Original Complaint which contains the same infirm claims and adds additional claims for which there is no valid factual or legal basis. Plaintiff's claims should be dismissed with prejudice and costs awarded to the City.

I. Background Facts and Plaintiff's Pleadings

In Plaintiff's First Amended Complaint, he adds additional facts that provide no additional support for his legally infirm claims. Most prominently, he has added copious

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allegations to support a new claim that the ATS contract with the City of Houston violates the Texas Transportation Code. (First Amended Complaint pp. 3-5; ¶¶ 11-17). Counsel for Strangmeier actually states in the Complaint that he has essentially borrowed this claim, verbatim, from an attorney named David Furlough who has asserted it in another case (First Amended Complaint, p. 3, n. 2). However, nowhere in the First Amended Complaint does Strangmeier assert any basis for his standing to bring such a claim.

This case concerns a citation issued to Strangmeier under the City of Houston's red light camera program, which is the subject of litigation before this Court in *City of Houston v. American Traffic Solutions, Inc.,* Civil Action No. 4:10-CV-4545. The program was instituted by Houston's City Council in 2004, and in November 2010, a citizen-initiated Charter amendment passed which purported to prohibit the City from using red light cameras to issue traffic citations. On June 17, 2011, this Court issued an interlocutory order voiding the charter election and the amendment. *City of Houston v. American Traffic Solutions, Inc.,* 2011 WL 2462670 (S.D.Tex. June 17, 2011) (slip copy).

Strangmeier alleges in his amended complaint, as he did in the original complaint, that Mayor Parker unilaterally turned the cameras back on following this Court's ruling that the charter amendment was void, although he has now added that the cameras were turned on "with no notice whatsoever." (First Amended Complaint, p. 6, ¶ 22). Strangmeier alleges that he received a red light camera citation on September 9, 2011 "that alleged he ran a red light at the City of Houston intersection on the service road of the Gulf Freeway at El Dorado

Boulevard on August 18, 2011, and ordering that he pay $75 to the City of Houston." (First Amended Complaint, p. 7, ¶ 24). He states that he had to travel to meet his lawyer and to the hearing to challenge the ticket which cost him gas money and wear and tear on his car. (First Amended Complaint, p. 7, ¶ 25). He does not allege that he did not run the red light or that the citation was otherwise issued in error, but contends that the affidavit used as evidence in the hearing was conclusory and that the red light ordinance was void (again attempting to ignore this Court's ruling on the charter amendment election). (First Amended Complaint, p. 8, ¶ 26). Interestingly, he specifically notes that the municipal court judges have dismissed tickets based on insufficient affidavits (First Amended Complaint, p. 8, ¶ 27), demonstrating by his own allegations that the process afforded is sufficient to address his complaints.

II. Argument and Authorities

A. Strangmeier has failed to state a claim.

In reviewing a motion to dismiss under Rule 12(b)(6), the court must accept the well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed. 517 (1993). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Alt. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus, plaintiff must "'raise a right to relief above the speculative level.'" *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.,* 512 F.3d 137, 140 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 570).

1. Strangmeier's receipt of a traffic citation does not implicate the Fourth Amendment.

To state a claim under the Fourth Amendment of the United States Constitution, a person must allege that he was subjected to an illegal search or seizure. Plaintiff's Original Complaint was devoid of any such allegation, and none has been added in the First Amended Complaint. Plaintiff's Fourth Amendment claim, as set out in its entirety in his First Amended Complaint, (with the new language indicated in bold), is as follows:

> Defendants violated John Strangmeier's Fourth Amendment rights, at least, when they sent him notice of a violation causing him to at least have to read the notice, go on-line to see the alleged violation, and then contact the City of Houston to schedule a hearing. **To then actually drive many miles to hire a lawyer and attend the hearing paying for gas and the wear and tear on his vehicle.** These acts John did not want to do and they violated his liberty interests.

(First Amended Complaint, p. 8, ¶ 29, emphasis added). As the Court noted at the initial conference, such allegations relating to the costs of responding to a civil citation are no different than any of the costs associated with everyday life and do not transform his complaint about the citation into a Fourth Amendment violation.

Strangmeier does not allege that he was subjected to any illegal search – nor could he – since a motorist has no privacy interest in his license plate number or other information in the pubic view. *See, e.g., Olabisiomotosho v. City of Houston,* 185 F.3d 521, 529 (5th Cir. 1999)). It is also well-established that issuance of a citation does not constitute a seizure. "[T]he issuance of a citation, even under threat of jail if not accepted, does not rise to the level of a Fourth Amendment seizure." *Martinez v. Carr,* 479 F.3d 1292, 1299 (10th Cir.

2007); *See, e.g., Karam v. City of Burbank,* 352 F.3d 1188, 1194 (9th Cir. 2003). In cases similar to this one, courts have specifically held that the issuance of a traffic ticket as a result of a photo enforcement system does not implicate the Fourth Amendment:

> Plaintiff claims that his Fourth Amendment rights were violated when he was served with a falsely certified traffic ticket. Plaintiff argues that the was seized without probable cause because defendants did not compare the image of the driver on the ticket to the picture on his driver's license before issuing the ticket, serving process, and haling him into court. . . . [P]laintiff did not suffer a Fourth Amendment violation. A traffic citation is not a seizure under the Fourth Amendment.

Gutenkauf v. City of Tempe, 2011 WL 1672065, *2 (D.Ariz. May 4, 2011) (unpublished opinion) (citing *McNeill v. Town of Paradise Valley,* 44 Fed. Appx. 871, *1 (9th Cir. 2002) (unpublished opinion) ("sending a traffic citation to the registered owner of a vehicle based on the photo radar system does not constitute a seizure under the Fourth Amendment.")).

Strangmeier merely received the civil citation in the mail, and alleges that he had to look at it and spend money and time responding to it. These allegations do not state any Fourth Amendment violation and should be dismissed under Rule 12(b)(6) for failure to state a claim. *See DePiero v. City of Macedonia,* 180 F.3d 770, 789 (6th Cir. 1999), *cert. denied,* 528 U.S. 1105, 120 S.Ct. 844, 145 L.Ed.2d 713 (2000) (issuance of parking ticket does not amount to a seizure).

2. Strangmeier has failed to state any claim under the Fifth or Fourteenth Amendments.

Strangmeier has also entirely failed to articulate any cognizable Fifth or Fourteenth Amendment claims. His Fifth and Fourteenth Amendment claims are unchanged in the First

Amended Complaint:

> The red light camera system was nullified by the Houston voters yet John is still required to defend himself against the ticket, attend hearings and this violates due process as does many other elements of Houston's red light camera ordinance and procedure including that the affidavits used to enforce the citations are conclusory.

(First Amended Complaint, pp. 8-9, ¶ 30). As an initial matter, the Fifth Amendment's due process protection applies only to federal actors, and is thus inapplicable to Plaintiff's allegations. *Jones v. City of Jackson,* 203 F.3d 875, 880 (5th Cir. 2000) (citing *Morin v. Caire,* 77 F.3d 116, 120 (5th Cir. 1996)). And, Strangmeier does not allege a Fifth Amendment taking of property. (he does not allege that his appeals process has been completed or that he has paid the $75.00 fee).[1] Thus, he has not stated any claim under the Fifth Amendment.

Even assuming Strangmeier had alleged deprivation of a cognizable property interest, Strangmeier's Fourteenth Amendment due process claim, if any, also fails because – taking his allegations as true – he has been afforded all the process which he is due. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Although Strangmeier may not agree with this Court's decision invalidating the voters' "nullification" of the red light camera system, his disagreement is not of constitutional dimension and he does not articulate

[1] Even if Strangmeier had alleged a taking of is property, Fifth Amendment takings claims under the federal Constitution are not ripe for consideration until all state law remedies have been exhausted. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed.2d 126 (1985).

what due process deficiencies are associated with it.

His only other specific complaint about the process is that the affidavit used in the proceeding is conclusory.[2] However, Strangmeier affirmatively alleges in the First Amended Complaint that there is process in place to contest the citation (which he is taking advantage of with the assistance of counsel) that includes a hearing by an administrative official and a subsequent appeal to a municipal court judge who has the power to determine whether or not an affidavit in support of the citation is sufficient. (First Amended Complaint, p. 8, ¶ 27). Chapter 707 of the Texas Transportation Code sets out the required appeal process which involves both a hearing before an Administrative Adjudication Officer and a subsequent appeal to a municipal court judge. *See* Tex. Transp. Code, § 707.014-707.016. Strangmeier has affirmatively alleged a constitutionally adequate process, and has not stated any other basis for a claim that the process afforded is constitutionally inadequate, and thus, has failed to state a claim for a violation of due process.

3. Strangmeier has failed to state a First Amendment Claim

In his original complaint, Strangmeier merely referenced the First Amendment. In the Amended Complaint, he states his First Amendment Claim as follows:

> The First Amendment guarantees everyone the right to petition the government for redress of grievances." [sic] *U.S. Const. amend. I.* First Amendment violations are actionable under 42 U.S.C. Section 1983. The red light camera system was nullified by the Houston voters and turned off and then without

[2] The Transportation Code provides that an affidavit of a municipal employee that alleges a violation based on an inspection of the applicable recorded image is admissible and constitutes evidence of the facts contained in the affidavit. Tex. Transp. Code, § 707.014(f).

> any chance to be heard or petition by anyone were turned back on by the Mayor and tickets were commanded to be issued.

(First Amended Complaint, p. 9, ¶ 30). It is difficult to ascertain in what way Strangmeier is alleging that his First Amendment right to petition the government for redress of grievances was violated. As noted above, this Court determined that the charter election and amendment was void. Strangmeier is not alleging that he is a resident of the City of Houston or that he participated in any way in the election, and even if he did, he does not allege how his right to petition has been in any way restricted or denied. He seems to allege that the general public should have been given prior notice of the decision to turn the cameras back on and been allowed to complain prior to that action having been taken. This claim is frivolous at best. The First Amendment's protection of the right to petition the government for redress of grievances requires that the government not prohibit someone from speaking or punish them for doing so, but "the Constitution does not require public bodies making policy decisions to listen to the views of members of the public." *Helmet Law Defense League v. California Highway Patrol*, 122 F.3d 1071 (table) 1997 WL 547956 (9th Cir. 1997) (unpublished opinion) (citing *Minnesota Bd. for Community Colleges v. Knight,* 465 U.S. 271, 283-85 (1984)). *See, e.g., American Bus Association v. Rogoff,* 649 F.3d 734, 739-40 (D.D.C. 2011). Strangmeier has failed to state a claim under the First Amendment and the claim should be dismissed with prejudice.

4. **Strangmeier has failed to state any claims against Mayor Annise Parker in her individual capacity.**

Strangmeier's claims against Mayor Parker in her individual capacity are also devoid of merit. Government officials acting within their discretionary authority are entitled to qualified immunity, and are liable in their individual capacities only for conduct that violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Courts undertake a two-step analysis to determine if a defendant is entitled to qualified immunity: (1) did the defendant violate a constitutional right; and (2) was the right clearly established. *Pearson,* 129 S.Ct. at 818.

Strangmeier's claims against Mayor Parker are essentially unchanged from the Original Complaint (added language is in bold) and are merely an undisguised attempt to seek punitive damages:

> Mayor Parker is sued individually and is liable for punitive damages as The Mayor was consciously indifferent to the plaintiff's constitutional rights and she did the acts knowingly, such acts being extreme and outrageous and shocking to the conscious. **To cause over 15,000 void RLC tickets to go out and have people pay them after a certified election voided the RLC law is unconscionable, extreme and outrageous and shocking to the conscious.**

(First Amended Complaint, p. 12, ¶ 42). The **only** factual allegation in the complaint that involves Mayor Parker is that – after this Court invalidated the charter amendment that required the red light camera program be discontinued – Mayor Parker "unilaterally, with no

notice whatsoever, turned the RLCs cameras back on without Houston City Council input . . . " (First Amended Complaint, p. 6, ¶ 22). Strangmeier alleges that this act was *ultra vires,* because the people voted in favor of the Charter Amendment to discontinue use of the cameras. (First Amended Complaint, p. 11, ¶ 41). However, as was discussed at length at the initial conference before this Court, the act of turning the cameras back on following this Court's invalidation of the charter election and amendment was not a violation of any conceivable constitutional right possessed by Strangmeier, much less a clearly established right of which a reasonable person would have known. Despite the Court's admonition that Strangmeier's claims are essentially frivolous, Strangmeier has reasserted the claim in the First Amended Petition without attempting to articulate how "turning the cameras on" in accordance with the existing state and local laws could possibly be construed as a constitutional violation by the Mayor, much less one that is extreme or outrageous. Because Strangmeier has again failed to articulate any valid constitutional claim in his complaint, his claims against Mayor Parker in her individual capacity should be dismissed for failure to state a claim.

B. The Court lacks subject matter jurisdiction over Strangmeier's contract claim and conversion claim.

1. Strangmeier lacks standing to assert any claims concerning the contract between the City and ATS.

Whether the court has subject matter jurisdiction to hear a case may be raised by a Rule 12(b)(1) motion, and the party asserting jurisdiction carries the burden of proof.

Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001). A facial attack to subject matter jurisdiction simply requires the court to determine whether the allegations of the complaint, which are presumed to be true, provide a basis for jurisdiction. *See, e.g., Williamson v. Tucker,* 645 F.2d 404, 413 (5th Cir.), *cert. denied,* 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981); *Paterson v. Weinberger,* 644 F.2d 521, 523 (5th Cir. 1998).

To adequately show Article III standing, a plaintiff must allege an injury in fact that is fairly traceable to the defendant's conduct and likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130; 119 L.Ed.2d 351 (1992). The Fifth Circuit also applies a prudential principle that bars the adjudication of "generalized grievances" against allegedly illegal government conduct. *Walker v. City of Mequite,* 169 F.3d 973, 978 (5th Cir. 1999). Thus, if the alleged harm is shared in equal measure by all or a large class of citizens, there is no standing. *Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

Strangmeier has asserted a claim, admittedly copied verbatim from another lawsuit, that the ATS contract with the City violates the Texas Transportation Code. He does not allege any injury to him flowing from the alleged illegality nor does he explain how a favorable ruling on the claim would affect his traffic citation. Strangmeier lacks standing to assert any claims arising from the contract between the City and ATS.

2. The City is immune from Plaintiff's state law claim of conversion and the City moves to dismiss any such claim against the Mayor under Section 101.106(e) of the Tort Claims Act.

Under Texas state law, a defendant invoking governmental immunity from suit does so by filing a plea to the jurisdiction, but in federal court a Rule 12(b)(1) motion is the appropriate vehicle for a defendant who seeks dismissal based on immunity grounds. *Mariscal v. Ochoa,* 2010 WL 466710 (S.D. Tex., Feb. 9, 2010) (unpublished opinion).

Under the facts alleged, there is no basis for a state law tort claim of conversion against the City or the Mayor. However, even if Strangmeier had stated a claim, the City is immune from claims of intentional torts when performing its governmental functions under Section 101.057(2) of the Texas Civil Practice and Remedies Code. Traffic enforcement and regulation is a statutorily defined governmental function. Tex. Civ. Prac. and Rem. Code § 101.0215(a)(21) & (31). Because Strangmeier sued both the City and the Mayor, the claim against the Mayor must be dismissed under Section 101.106(e), which provides that when a governmental entity and its employee are both sued under the Act, the employee shall be dismissed on motion by the governmental entity. *City of Corpus Christi v. Eby,* 2011 WL 1437002 (Tex.App.– Corpus Christi April 14, 2011, no pet.) (unpublished opinion) (holding that City was immune from suit on claim of conversion arising out of impound of vehicle by police officer, and dismissing claim against the officer under 101.106(e)). In addition, "a claim that a public employee committed an ultra vires act may not be brought for monetary damages." *Id.* (citing *City of El Paso v. Heinrich,* 284 S.W.3d 366, 374 (Tex. 2009)). Thus,

this Court lacks jurisdiction over the state law conversion claim and should dismiss it with prejudice.

III. Conclusion

Plaintiff's First Amended Original Complaint against the City of Houston and Mayor Annise Parker should be dismissed in its entirety for failure to state any valid claim against either defendant and costs should be awarded to the City.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was served in accordance with the Federal Rules of Civil Procedure on this the 27th day of October, 2011.

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Via efiling

/s/ Elizabeth Stevens
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