IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
October 11, 2018
Lyle W. Cayce
Clerk

No. 18-30616
Summary Calendar

BRUCE ALEXANDER,

Plaintiff - Appellant

v.

DONALD TRUMP, President; CHRISTOPHER GRAY, Federal Bureau of Investigations Director; HENRY COTTON, Mayor, City of Bastrop; JOHN B. EDWARDS, Louisiana Governor,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Louisiana
USDC 3:17-CV-1081

Before KING, SOUTHWICK, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Bruce Alexander appeals the district court's dismissal of his lawsuit, arising out of an alleged violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution. He argues that the district court erred in dismissing his complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted. Alexander further contends that the district court committed various procedural errors in

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

dismissing his complaint, and he challenges the district court's award of attorney's fees. For the following reasons, we AFFIRM the district court's dismissal of the claims against President Trump and Mayor Cotton. We AFFIRM the district court's dismissal of the claims against Director Wray and Governor Edwards, as modified below.

I.

Around November 2006, Bruce Alexander testified in a murder trial. In retaliation for his unfavorable testimony, the defendant's father allegedly put a "hit" on him, hiring the Sheriff of Morehouse Parish, Louisiana, the Chief of Police for the City of Bastrop, Louisiana, and members of the local division of the Federal Bureau of Investigation ("FBI") to murder him. Alexander contends that the alleged conspirators have continuously poisoned, surveilled, and kidnapped him over the past eight or nine years.

Alexander brought suit in the Western District of Louisiana against President Donald Trump, FBI Director Christopher Wray,[1] Mayor of Bastrop, Louisiana, Henry Cotton, and Louisiana Governor John B. Edwards, alleging that the officials failed to investigate and stop the harm that he suffered. Alexander expressly named the defendants "in their official capacit[ies]." He asked the court to "restore" his Fourth and Fourteenth Amendment rights, and to investigate his alleged harm.

After initiating the lawsuit, Alexander properly served Mayor Cotton, President Trump, and Director Wray, in accordance with Federal Rule of Civil Procedure 4(c) and 4(i). The district court did not recognize Alexander's attempts to serve Governor Edwards by certified mail as proper service, noting

[1] Construing Alexander's pro se complaint liberally, *see Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir. 1993), we assume, as the district court did, that his references to "FBI Director Christopher Gray" are in fact references to Director Wray, the current director of the FBI.

that service by certified mail is not permitted by the Federal Rules of Civil Procedure or Louisiana Rules of Civil Procedure. Although the clerk entered default against Mayor Cotton for failing to timely respond to the complaint, the district court later set aside the default on the Mayor's motion.

When Alexander had served the majority of the parties, the district court entered a civil case management order, instructing the parties to meet "to develop a case management plan and discuss the issues in Fed. R. Civ. P. 26(f)," by March 15, 2018. Before the conference could take place, Mayor Cotton, President Trump, and Director Wray moved to dismiss the complaint. The three defendants also moved for a continuance of the civil case management order deadlines until the motions to dismiss were decided.

The court granted the motion to continue, delayed the Rule 26 conference by two months, and referred the motions to dismiss to the magistrate judge. Before the Rule 26 conference occurred, the magistrate judge issued her report, recommending that Alexander's claims against President Trump and Director Wray be dismissed without prejudice for lack of subject-matter jurisdiction, and that his claims against Mayor Cotton be dismissed with prejudice for failure to state a claim upon which relief can be granted. Additionally, the magistrate judge recommended granting Mayor Cotton's request for fees pursuant to 42 U.S.C. § 1988, finding the suit to be frivolous.

The next day, the magistrate judge issued a supplemental report, recommending that the district court sua sponte dismiss plaintiff's claims against Governor Edwards for failure to state a claim, even though Governor Edwards had not yet been served. Both recommendations informed the parties of their right to file written objections.

Alexander timely objected to the magistrate judge's recommendations, largely reiterating the arguments he made in opposition to the motions to dismiss. He also contested the court's ability to dismiss his claims against

Governor Edwards, arguing that the case should not be dismissed until all parties had responded to his complaint.

The district court, after considering Alexander's objections de novo, adopted the magistrate judge's recommendations in their entirety, dismissed the lawsuit without prejudice as to President Trump and Director Wray and with prejudice as to Mayor Cotton and Governor Edwards, and awarded attorney's fees to Mayor Cotton.

II.

"The district court must dismiss [an] action if it finds that it lacks subject matter jurisdiction." *Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011) (citing Fed. R. Civ. P. 12(h)(3)). We review a district court's dismissal for lack of subject-matter jurisdiction de novo. *Id.* We likewise review a dismissal for failure to state a claim upon which relief may be granted de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." *Id.* at 763 (quoting *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009)). In contrast, we review a district court's enforcement of a scheduling order, denial of a motion to enter default judgment, and award of statutory attorney's fees for an abuse of discretion. *See Versai Mgmt. Corp. v. Clarendon Am. Ins. Co.*, 597 F.3d 729, 735 (5th Cir. 2010); *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001); *Riley v. City of Jackson*, 99 F.3d 757, 759 (5th Cir. 1996).

III.

We conclude that the district court correctly dismissed Alexander's claims against President Trump for lack of subject-matter jurisdiction, and against Mayor Cotton for failure to state a claim upon which relief could be granted. We further conclude that the district court had subject-matter jurisdiction over Alexander's claims against Director Wray, but the claims should be dismissed with prejudice for failure to state a claim, and that the claims against Governor Edwards should be dismissed without prejudice for

lack of subject-matter jurisdiction.[2] Finally, we find that the court did not abuse its discretion in rescheduling the Rule 26 conference, declining to enter default judgment against Mayor Cotton, or in awarding attorney's fees to the Mayor.

A.

The district court properly dismissed Alexander's claims against President Trump for lack of subject-matter jurisdiction. We find that the district court had jurisdiction over Alexander's claims against FBI Director Wray, but nonetheless, Alexander's complaint should be dismissed for failure to state a claim upon which relief could be granted.

Generally, a lawsuit against an officer of the United States in his official capacity is considered a lawsuit against the United States. *See Danos v. Jones*, 652 F.3d 577, 581 (5th Cir. 2011). Because the United States is sovereign, it is generally immune from suit—and courts are without jurisdiction to hear a suit against the United States—unless it has waived its immunity. *Id.* "A waiver must be unequivocally expressed in statutory text and will not be implied." *Lundeen v. Mineta*, 291 F.3d 300, 304 (5th Cir. 2002) (quoting *Peña v. United States*, 157 F.3d 984, 986 (5th Cir. 1998)).

The Administrative Procedure Act ("APA") waives the United States' sovereign immunity in suits against federal agencies requesting nonmonetary relief. *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014) (citing 5 U.S.C. § 702). To establish a wavier of sovereign immunity, a plaintiff must (1) identify an agency action affecting him in some way; and (2) show that he has "suffered legal wrong because of the challenged agency action, or is adversely affected or aggrieved by that action within the

[2] This court has held that we may "affirm on any ground supported by the record, including one not reached by the district court." *Gilbert v. Donahoe*, 751 F.3d 303, 311 (5th Cir. 2014) (quoting *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012)).

meaning of a relevant statute." *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990)).

Alexander's complaint does not seek damages—just a "restor[ation]" of his constitutional rights and an investigation into his harm. Thus, Alexander only seeks nonmonetary relief. Even so, the President is not an "agency" under the APA. *See Dalton v. Specter*, 511 U.S. 462, 470 (1994) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992)). Thus, § 702's waiver does not apply to Alexander's claims against President Trump. Nor has Alexander identified any other waiver of sovereign immunity as to his claims against the President.[3] Therefore, Alexander's claims against President Trump were properly dismissed without prejudice for lack of subject-matter jurisdiction.

In contrast, the district court had subject-matter jurisdiction over Alexander's claims against FBI Director Wray. The APA defines "agency action" broadly to include the "failure to act." 5 U.S.C. § 551(13). Thus, Alexander identified an agency action when he alleged that the FBI failed to investigate and prevent his harm. And he alleged bodily harm and violations of his constitutional rights as a result of the FBI's failure to act, thereby asserting that he has been aggrieved by the agency's action. *Cf. Doe v. United States*, 853 F.3d 792, 800 (5th Cir. 2017), *as revised* (Apr. 12, 2017) (finding § 702 waiver where plaintiff alleged that Department of Justice failed to act in violation of plaintiff's Fifth Amendment rights); *Alabama-Coushatta Tribe of Tex.*, 757 F.3d at 488 ("Congress intended to waive immunity for non-statutory causes of action against federal agencies arising under 28 U.S.C. § 1331."); *id.*

[3] In his reply brief on appeal, Alexander argues that the Federal Torts Claim Act ("FTCA") includes a waiver of sovereign immunity. But his complaint does not state a claim under the FTCA, instead seeking redress for alleged violations of his constitutional rights. Because "[t]he Federal Tort Claims Act does not encompass federal constitutional torts," *Davis v. United States*, 961 F.2d 53, 57 (5th Cir. 1991), Alexander cannot argue that his claims arise under the FTCA or that its waiver applies to his claims against President Trump.

at 489 (citing favorably *Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006) (finding § 702's waiver of sovereign immunity permitted First Amendment claim, but even assuming plaintiff stated a cause of action, claim was barred by Rule 12(b)(6))).

Still, we conclude that Alexander's claims against Director Wray may properly be dismissed for failure to state a claim upon which relief can be granted. Alexander's complaint seems to assert a direct cause of action against the FBI for violations of his Fourth and Fourteenth Amendment rights. "Although there have been a few notable exceptions, the federal courts, and this Circuit in particular, have been hesitant to find causes of action arising directly from the Constitution." *Hearth, Inc. v. Dep't of Pub. Welfare*, 617 F.2d 381, 382 (5th Cir. 1980) (citations omitted). Thus, the claims against Director Wray should be dismissed with prejudice for failure to state a claim upon which relief can be granted.[4]

B.

Alexander's claims against Mayor Cotton are also without merit. The complaint expressly states that Alexander intends to sue Mayor Cotton in his official capacity. Thus, this suit is effectively a suit against the City of Bastrop. *See Bennett v. Pippin*, 74 F.3d 578, 584 (5th Cir. 1996) (finding that suit against sheriff in in his official capacity "is a suit against Archer County directly in everything but name."). And although not expressly pleaded as such,

[4] To the extent it could be argued that Alexander has alleged a direct cause of action under the APA, we disagree. In order to bring a claim directly under the APA, a plaintiff must challenge *final* agency actions. *See* 5 U.S.C. § 704. "Final agency actions are actions which (1) 'mark the consummation of the agency's decisionmaking process,' and (2) 'by which rights or obligations have been determined, or from which legal consequences will flow.' *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotations omitted)). "The final action must be 'an identifiable action or event.'" *Id.* (quoting *Lujan*, 497 U.S. at 899). Alexander's complaint does not allege that the FBI has undergone a decisionmaking process or otherwise made a final determination. Thus, any argument that he has stated a cause of action under the APA is without merit.

Alexander's claims for violations of his constitutional rights would typically arise under 42 U.S.C. § 1983. But a city "is not vicariously liable under § 1983 for the constitutional torts of its agents: it is only liable when it can be fairly said that the city itself is the wrongdoer." *Collins v. City of Harker Heights*, 503 U.S. 115, 122 (1992). To establish that the city is the wrongdoer, and therefore liable under § 1983, "[a] plaintiff must identify: '(1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose "moving force" is that policy or custom.'" *Valle v. City of Houston*, 613 F.3d 536, 541-42 (5th Cir. 2010) (quoting *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002)).

In this case, Alexander's complaint is devoid of any allegation that the City of Bastrop has an official policy of not investigating citizens' complaints or of failing to stop corruption and organized crime. Thus, we find that Alexander's claims were properly dismissed with prejudice as against Mayor Cotton.

C.

We conclude that Alexander's claims against Governor Edwards warranted dismissal without prejudice. The magistrate judge's supplemental report and recommendation, adopted by the district court, found that Governor Edwards was entitled to dismissal with prejudice "on the same basis as Mayor Cotton." The claims against Mayor Cotton were dismissed on theories of municipal liability. The claims against Governor Edwards, on the other hand, should be dismissed for lack of subject-matter jurisdiction.

A claim against a state's governor, in his official capacity, is typically viewed as a claim against the state itself. *See Okpalobi v. Foster*, 244 F.3d 405, 412-13 (5th Cir. 2001). "The Eleventh Amendment bars suits by private citizens against a state in federal court . . . . A plaintiff may not avoid this bar

simply by naming an individual state officer as a party in lieu of the State." *Id.* at 411 (citation omitted). This immunity is subject to an exception: a state officer may be sued in his official capacity in federal court where the complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Fontenot v. McCraw*, 777 F.3d 741, 752 (5th Cir. 2015) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002)). To use the exception, "a plaintiff must demonstrate that the state officer has 'some connection' with the enforcement of the disputed act." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (quoting *Ex Parte Young*, 209 U.S. 123, 157 (1908)).

Even assuming arguendo that Alexander has alleged a violation of federal law, Alexander's complaint fails to allege a connection between the Louisiana Governor and the local sheriff and police officers he accuses of having violated his rights. Therefore, Alexander's claims against Governor Edwards should be dismissed without prejudice for lack of subject-matter jurisdiction.

Alexander also argues that the district court erred by entering judgment before all parties had been served. He contends that he properly served Governor Edwards, and Governor Edwards was obligated to plead or otherwise respond to the complaint.

Generally, a district court may dismiss a plaintiff's claim for failure to state a claim sua sponte, "as long as the procedure employed is fair to the parties." *Century Sur. Co. v. Blevins*, 799 F.3d 366, 372 (5th Cir. 2015) (quoting 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004)). A litigant must "have the opportunity to be heard before a claim is dismissed, except where the claim is patently frivolous." *Id.* (citing *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986)). Fairness requires

"both notice of the court's intention and an opportunity to respond." *Id.* at 373 (quoting *Davoodi v. Austin Indep. Sch. Dist.*, 755 F.3d 307, 310 (5th Cir. 2014)).

Here, Alexander had both notice and an opportunity to respond. The magistrate judge issued its recommendation that the court dismiss Alexander's claims against the Governor and clearly stated that Alexander had fourteen days to object to its recommendation. *See Magouirk v. Phillips*, 144 F.3d 348, 359 (5th Cir. 1998) (finding that magistrate judge's recommendation put habeas petitioner on notice of procedural default issue, and objection period allowed petitioner opportunity to respond, such that district court could raise issue sua sponte). Thus, the district court did not err in dismissing Alexander's claims against the Governor before the Governor had been served.[5]

D.

Alexander's additional arguments are similarly without merit. Although he contends that the district court erred by postponing the parties' Rule 26 meeting, a district court considering "the demands on counsel's time and the court's [time]," has broad discretion to enforce its scheduling order. *Versai Mgmt. Corp.*, 597 F.3d at 740 (alteration in original) (quoting *HC Gun & Knife Shows, Inc. v. City of Houston*, 201 F.3d 544, 549-50 (5th Cir. 2000)). The district court therefore acted within its discretion when it rescheduled the Rule 26 conference, anticipating that the need for the conference could be mooted by a ruling on the motions to dismiss.

Nor did the district court abuse its discretion by declining to enter default judgment against the Mayor. "A defendant's default does not in itself warrant the court in entering a default judgment. There must be a sufficient basis in the pleadings for the judgment entered." *Nishimatsu Constr. Co. v.*

[5] Alexander also argues that he properly served the Governor. Even if the Governor had been properly served, his service would not affect the district court's authority to dismiss Alexander's complaint sua sponte.

Hous. Nat. Bank, 515 F.2d 1200, 1206 (5th Cir. 1975). Given the deficiencies in the complaint addressed above, it was not an abuse of discretion for the district court to refrain from entering a default judgment against Mayor Cotton.

We also affirm the district court's award of attorney's fees to Mayor Cotton. A court may award reasonable attorney's fees to the prevailing party in a § 1983 action. 42 U.S.C. § 1988(b). A prevailing defendant may be awarded fees where the plaintiff's action was "frivolous, unreasonable, or without foundation." *Walker v. City of Bogalusa*, 168 F.3d 237, 240 (5th Cir. 1999) (quoting *White v. S. Park Indep. Sch. Dist.*, 693 F.2d 1163, 1169-70 (5th Cir. 1982)). This court has held that a defendant is the prevailing party for the purposes of § 1988 when it receives a dismissal with prejudice. *Anthony v. Marion Cty. Gen. Hosp.*, 617 F.2d 1164, 1169-70 (5th Cir. 1980). And "[a] suit is frivolous if it is 'so lacking in arguable merit as to be groundless or without foundation.'" *Walker*, 168 F.3d at 240 (quoting *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1140 (5th Cir. 1983)). Having achieved a dismissal with prejudice, Mayor Cotton was a prevailing party. We agree with the magistrate judge's reasoning in her report and recommendation, and find that the suit was frivolous. Therefore, we find no abuse of discretion in the district court's award of attorney's fees to Mayor Cotton.

IV.

For the foregoing reasons, we AFFIRM the district court's dismissal without prejudice of the claims against President Trump and dismissal with prejudice of the claims against Mayor Cotton. We AFFIRM the district court's dismissal of the claims against Director Wray, except that the dismissal is modified to be with prejudice, and we AFFIRM the district court's dismissal of the claims against Governor Edwards, except that the dismissal is modified to

be without prejudice. We further AFFIRM the district court's award of attorney's fees to Mayor Cotton.