

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3953
Summary Calendar

ROGER ALLEN,

Plaintiff-Appellant,

VERSUS

NEW YORK LIFE SECURITIES, INC., ET AL.,

Defendants-Appellees,

ROGER ALLEN,

Plaintiff-Appellant,

VERSUS

DEAN TRICHE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(91-CV-2583 c/w 91-CV-3908)

July 22, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion

Roger Allen, *pro se* and *in forma pauperis* (IFP), appeals the dismissal of these actions. We **AFFIRM**.

I.

Allen, a resident of Orleans Parish, Louisiana, was discharged as a registered representative for New York Life Insurance Company and NYLIFE Securities on May 15, 1990. On June 12, he filed a charge against New York Life with the EEOC, alleging race discrimination and retaliation. He was issued a right to sue letter on August 17, and instructed that, should he decide to sue, he was required to do so within 90 days or lose that right. That November, Allen filed a second charge of discrimination against New York Life, alleging age discrimination. On April 29, 1991, the EEOC again issued Allen a right to sue letter and reminded him that any suit must be filed within 90 days.

On July 18, Allen filed a *pro se* and IFP "class action suit ... for breach of contract" in federal district court against NYLIFE Securities and New York Life Insurance Company. He sought \$2,000,000 in damages, but his complaint did not include claims for race or age discrimination.² On September 18, he filed suit in state court against Dean Triche (office manager) and Marques Jones (general manager). The complaint asserted that the action was brought pursuant to 42 U.S.C. §1983 and sought \$4,000,000 in damages from each defendant for injuries caused by their defamatory

should not be published.

² The magistrate judge recommended that this action be dismissed without prejudice for lack of jurisdiction. However, the district court concluded that it had diversity jurisdiction.

statements about Allen. Again, there were no allegations of discrimination. The state court action was removed to federal district court, where it was consolidated with the pending action against the corporate defendants.

In December, Allen amended his complaint against Triche and Jones, asserting federal jurisdiction based upon both diversity of citizenship and a letter he received from the EEOC confirming his right to sue on his age discrimination claim. He also added four additional defendants: New York Life Insurance Company, New York Life Security Corp., and John and Jane Doe, "persons ... domiciled in the Parish of Orleans, State of Louisiana ... [and] officers and/or agents of the New York Life Insurance Company". No new claims were made against the additional defendants, but Allen sought an additional \$20,000,000 in punitive damages for the previously alleged defamation.

A preliminary conference was held on March 19, 1992, and Allen stated that "the center of his claims against the defendants concerns allegations of defamation which occurred on account of his race and resulted in termination of his employment with New York Life Securities, Inc.". The magistrate judge ordered that dispositive motions be filed by April 21. On April 20, the defendants moved for dismissal or, in the alternative, summary judgment. After a hearing before the magistrate judge, the motions were taken under submission. On September 10, he entered a report and recommended dismissal. Allen filed objections to the report and recommendation, but the district court dismissed the suits,

adopting the magistrate judge's report and recommendation. Allen's motion to vacate or reconsider was denied.

II.

Allen seeks reversal of the dismissals and makes numerous claims of fraud and misconduct against the appellees' attorney.³ Finding the record devoid of any evidence of such misconduct, any allegations of misconduct, or any objections or pleadings by Allen which might preserve such an error for appeal, we consider only the appropriateness of the dismissals.

The district court concluded that it lacked jurisdiction over Allen's claims and that, in any event, most were time-barred. It dismissed both actions with prejudice. We agree that there is no federal jurisdiction over these consolidated cases. Therefore, they were properly dismissed; but the dismissals should have been without prejudice.⁴

A.

Allen's claim against NYLIFE Securities and New York Life Insurance Company is for breach of contract. He made no claims of discrimination which might invoke jurisdiction under the Age Discrimination in Employment Act, 29 U.S.C. § 623, or the Equal Employment Opportunities Act, 42 U.S.C. 2000e-2(a)(1). Indeed, in

³ Allen also argues that his motion to reconsider should have been decided by the same judge who initially decided the case. It was. Though he adopted the magistrate judge's report and recommendation, the district court rendered the judgment from which Allen appeals. The same judge denied Allen's motion to reconsider.

⁴ Because we affirm the dismissals for lack of subject matter jurisdiction, the dismissal should have been without prejudice, because it was not a ruling on the merits.

his objection to the magistrate judge's recommendation that the suit be dismissed, Allen stated that his suit was "not about race discrimination". In that same objection, Allen conceded that New York Life is considered a citizen of Louisiana.⁵ Because Allen is also a Louisiana citizen, jurisdiction cannot be based upon diversity of citizenship. Therefore, there is no jurisdiction over Allen's claims against the corporate defendants.

B.

1.

Allen's claim against Triche and Jones was brought pursuant to 42 U.S.C. § 1983. A § 1983 claim requires a showing that the plaintiff's constitutional rights were violated by a person acting under color of state law. Allen does not assert in his original state court complaint, or in the amendment, that Triche or Jones acted under color of state law. In fact, in his original complaint, he stated that the defendants were employed by the New York Life Insurance Company. In short, we see nothing which might even be interpreted as an allegation that Triche or Jones acted under color of state law.

⁵ As noted, the magistrate judge had previously recommended that this suit be dismissed, because New York Life Insurance Company and New York Life (NYLIFE) Securities, Inc. were incorporated in Louisiana and, under 28 U.S.C. 1332(c)(1), considered Louisiana citizens. The magistrate judge explained that he referred to New York Life Insurance Company and NYLIFE Securities, collectively, as "New York Life". Likewise, in his objection to that recommendation, Allen seems to adopt that collective reference. He lists both defendants in the style of his pleading, but never refers to them separately. He, too, seems to refer to them collectively as "New York Life" and states that "New York Life is considered a citizen of Louisiana".

2.

Nor could federal jurisdiction for this claim be premised on diversity of citizenship, as Allen alleged in his amended complaint. In his original complaint, Allen stated that Triche and Jones "work in Orleans Parish, employed by New York Life Insurance Company" and made no assertions that they were domiciled elsewhere. Moreover, in his amended complaint, he added defendants John and Jane Doe, "domiciled in the Parish of Orleans, State of Louisiana". Even if Allen had been diverse from all of the original defendants, complete diversity was clearly destroyed by this amendment.

This amendment also asserted that the July 19 letter from the EEOC to Allen provided an additional basis for federal jurisdiction. It did not. That letter did explain the proscription period for certain claims. However, it was written in response to Allen's questions about the EEOC's adverse determination in regard to his age discrimination claim. Neither the original nor amended claims against Triche and Jones included any age discrimination claims. We therefore conclude that jurisdiction was lacking for Allen's claims against Triche and Jones.

III.

Accordingly, the dismissal of these actions, but without prejudice, is

AFFIRMED.⁶

⁶ The appellant's motion to expedite the appeal and the appellees' motions to strike the optional contents of the appellant's record excerpts and exclude exhibits 45-47 from his brief are **DENIED** as moot. The appellees' motion to dismiss and for award of damages and double costs is **DENIED**.