UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-4341
Summary Calendar

John K. Boyd, Sr.,

Plaintiff-Appellant,

VERSUS

Carl E. Stewart, Etc., Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Louisiana
88 CV 0206

(April 22, 1993)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge*:

Plaintiff brought Section 1983 action against Defendants for violation of due process associated with alleged ineffective notice of an amended state court petition. The district court dismissed

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*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the action for failure to show state action and failure to substantiate the allegations in the complaint. We affirm the dismissal of Plaintiff's claim.

Facts and Prior Proceedings

John K. Boyd, Sr., proceeding pro se, brought a civil rights action pursuant to 42 U.S.C. 1983 against his one-time divorce attorney (Campbell), his ex-wife (Chandler), her mother (Brookins), his ex-wife's attorney (Brown), and the estate of another of his ex-wife's attorneys (Wells). The focus of Boyd's federal action centers on an action brought in the Louisiana state courts by his ex-wife to challenge the community property settlement and to pursue part of his military pension.

The voluminous record before us clearly shows that John Boyd's petition for separation was filed September 23, 1981; the community property settlement was filed July 20, 1982; the petition for divorce was filed by John Boyd on October 5, 1982; Cecilia Boyd's (Chandler) petition to set aside transfer on account of lesion beyond moiety was filed November 9, 1982;[1] Boyd's answer to the petition to set aside the community property settlement was filed on May 19, 1983; the divorce was final on May 27, 1983; and Cecilia Boyd's (Chandler) first amended petition to set aside the community property settlement was filed on July 18, 1986. The instant § 1983 action concerns Chandler's attempt in 1986 to amend her original

[1] "Lesion" is a legal term used in Louisiana. A contract may be annulled on grounds of lesion only in those cases provided by law. La. Civ. Code Ann. art. 1965 (West 1993). Hereafter, Chandler's petition will be referred to as the petition to set aside the community property settlement.

complaint involving the community property settlement.

The record indicates that Boyd was notified by his former divorce attorney, Mr. Campbell, of the initial attempt to attack the community property settlement in 1982. In addition, the record is replete with correspondence between Boyd and his attorney pertaining to this litigation until about October 1985. No correspondence between October 1985 and October 1987 about this matter was placed in the record by Boyd; however, Campbell's affidavit states that in 1986, Boyd was sent a letter informing him about the amended petition filed in July 1986 seeking a pro-rata share of his military retirement benefits. Campbell's affidavit indicates that his office also attempted leaving a message on Boyd's answering machine. Boyd did not respond. Because Campbell was unable to notify Boyd of the amended petition, he filed an exception to the service of process. The exception was overruled and the state court judge appointed Campbell to represent Boyd pursuant to La. Code Civ. Proc. Ann. art. 5091.[2] The proceedings continued in Boyd's absence although he was represented by Campbell. The Louisiana state court ultimately declared that Boyd's military pension was community property under Louisiana law and subsequently awarded 40% of the pension to Chandler. In

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[2] La. Code Civ. Proc. Ann. at. 5091 provides that:

> When the court has jurisdiction over the person or property of the defendant...on the petition or ex parte written motion of the plaintiff, it shall appoint an attorney at law to represent the defendant if he is: (1) A nonresident or absentee who has not been served with process, either personally or through an agent for the service of process, and who has made no general appearance.

Mr. Boyd is not a resident of Louisiana.

addition, the judge awarded $25,000 to Chandler for her part of the community estate. This judgment was entered on July 27, 1987. Mr. Campbell then wrote to Boyd at the same address where he previously sent the notice about the amended petition and recommended that Boyd appeal the judgment. He also informed Boyd that the appeal had to be filed by October 27, 1987. Boyd responded by notifying Campbell that he was outraged that Campbell was representing him without his permission.[3] Rather than appeal the judgment in state court, Boyd chose to file suit in federal court.

The instant civil rights action followed in which Boyd has accused his former wife, her mother, her attorneys, and Mr. Campbell of conspiring to keep him from finding out about the proceeding involving the pro rata division of his military retirement pay and reformation of the community property settlement.

The district court sua sponte ruled on a motion for summary judgment as to the merits of Boyd's § 1983 claim.[4] The district court reviewed the entire record then dismissed Boyd's claim holding that: (1) Boyd's claim was "limited" because Boyd did not exercise the post-deprivation remedy of appeal from the state judgment, (2) the Louisiana statute was constitutionally valid, (3) Boyd failed to state a claim for relief because there was no "state

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[3] Boyd apparently thought that the original community property settlement action had been dismissed or withdrawn.

[4] Boyd's original complaint, filed in January 1988, contained causes under several different statutes, but the only theory to survive dismissal thus far has been the present § 1983 claim.

action," and (4) the record failed to substantiate that the defendants conspired or acted to insure that Boyd was deprived of notice of the state proceedings. Boyd timely appeals to this Court.

Discussion

Our review of summary judgment proceedings is de novo. **U.S. v. 1988 Oldsmobile Supreme**, 983 F.2d 670, 673 (5th Cir. 1993). Summary judgment is appropriate when "there is no genuine issue as to any material fact." Fed. R. Civ. Pro. 56(c). In **Celotex Corp. v. Catrett**, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), the Court explained that:

> Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. In such a situation there can be no `genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

If Boyd has failed to make a sufficient showing on an essential element of his cause of action, the district court may dismiss the action pursuant to Rule 56(c). **Judwin Properties, Inc. v. United States Fire Insurance Company**, 973 F.2d 432 (5th Cir. 1992).[5]

Boyd argues that the Defendants conspired to use La. Code Civ. Proc. Ann. art. 5091 to deny him the notice and opportunity to be heard on Chandler's 1986 amended complaint. He argues that because

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[5] A district court may grant a motion for summary judgment sua sponte provided that it gives proper notice to the adverse party. **Id.** Boyd was entitled to receive 10 days notice before the district court granted summary judgment. Boyd does not raise any complaint regarding the 10 day notice requirement on appeal.

he had no notice of the amended complaint, the state court deprived him of property, consisting of $25,000 and 40% of his military retirement, without due process.

There are two essential elements of a section 1983 action: (1) the conduct in question must be a product of state action; and (2) the conduct must deprive the plaintiff of a right secured by the Constitution or the laws of the United States. **Martin v. Thomas**, 973 F.2d 449, 453 (5th Cir. 1992). The focus in this case centers on the second element of a § 1983 action: whether the Defendant's conduct deprived the Plaintiff of the constitutional right to due process. It is in this respect that Boyd has failed to make a sufficient showing on an essential element of his cause of action.

The federal courts deny § 1983 relief and relegate a plaintiff to state law relief for violations of procedural due process if state statutory post-deprivation relief is available and (1) the initial deprivation is unpredictable; (2) predeprivation process is impossible; and (3) the conduct of the state actor is unauthorized. **Charbonnet v. Lee**, 951 F.2d 638, 642 (5th Cir. 1992)(citing **Zinermon v. Burch**, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed 2d 100 (1990)). A finding that the alleged state action was random and unauthorized usually establishes that the state could not have predicted the deprivation and that further procedural safeguards would have been unable to prevent the conduct. **Charbonnet**, 951 F.2d at 644; **Augustine v. Doe**, 740 F.2d 322, 327 (5th Cir. 1984)("random and unauthorized" equate with "unpredictable"); **Thibodeaux v. Bordelon**, 740 F.2d 329, 336 (5th Cir. 1984)("a

predeprivation hearing is **always** impracticable and unfeasible for random and unauthorized acts"). The conduct of a state official is random and unauthorized when the state has instituted a policy forbidding such conduct. **Charbonnet**, 951 F.2d at 644. Clearly the state of Louisiana forbids the institution of final judgments without notice as exemplified by the protections set out in La. Code Civ. Proc. Ann. arts. 5091-5095. Therefore, in the instant case, the alleged deprivation, lack of notice, is not the result of an established state procedure but the result of an unauthorized random act. Specifically, Boyd alleges that Chandler knowingly withheld information relevant to the service of process which concerned Boyd's recent relocation from Oklahoma to Idaho. Boyd points out that Chandler knew that he and some of their children had relocated. The state could not anticipate Chandler deliberately withholding such information, thus Boyd's loss of notice was not the result of some established state procedure or the result of behavior that the state could predict. **Charbonnet**, 951 F.2d at 644. Therefore, in this case, the existence of an adequate post-deprivation remedy would provide the due process required by the Fourteenth Amendment. **Charbonnet**, 951 F.2d at 641. Indeed, an adequate post-deprivation remedy was available to Boyd: the opportunity to appeal the state court judgment or the use of La. Code Civ. Proc. Ann. art. 2002. [6] If the actions of the

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[6]**Art. 2001. Grounds in General**

The nullity of a final judgment may be demanded for vices of either form in substance, as provided in Articles 2002 through 2006.

Art. 2004. Annulment for vices of substance; peremption of action

A final judgment obtained by fraud or ill

Defendants had been the result of some established procedure, or if the state had not offered an adequate remedy elsewhere, then the doors to the federal court house would have remained open to Boyd. However, there is a post-deprivation remedy and Chandler's actions were both "unauthorized" and "unforeseeable". The district court properly decided that it was not the proper forum and § 1983 was not the proper source of liability for Boyd's case against Chandler and the others.

Conclusion

For the foregoing reasons we affirm the decision of the district court.

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practices may be annulled.

An action to annul a judgment on these grounds must be brought within one year of the discovery by the plaintiff in the nullity action of the fraud or ill practices.