

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 92-4990
(Summary Calendar)

ROBERT JOSEPH ZANI,

Plaintiff-Appellant,

versus

CRAIG A. RAINES, Etc.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas

(6:91-CV-108)

(March 24, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Robert Joseph Zani, a prisoner in the Institutional Division of the Texas Department of Criminal Justice (TDCJ) appeals the dismissal of his civil rights suit under 42 U.S.C. § 1983. He complains that the district court erred 1) in dismissing his case with prejudice for his

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

failure to comply with an order of the magistrate judge, and 2) in failing to recuse itself. He also urges that we transfer this appeal to another circuit; and he seeks appointment of appellate counsel. First, we deny appointment of appellate counsel for the reasons hereinafter specified. Next, we refuse to transfer this case to another circuit, and in connection with Zani's continued attempts in that regard, we sanction him as set forth below. Similarly, we refuse to order recusal of the district judge and magistrate judge because Zani's motions were untimely. Finally, we affirm the district court's dismissal of Zani's case in part, but reverse and remand in part for further proceedings consistent herewith.

I

FACTS AND PROCEEDINGS

Zani alleges that officials of the TDCJ and prisoners working for them are involved in a continuing conspiracy to take away his life and his access to the courts. Zani alleges that the conspiracy against him began with his arrest in 1980 and was intensified after he brought a habeas corpus action in 1988.

Zani avers that he was transferred to the Michael Unit of the TDCJ facility at Tennessee Colony, Texas, on February 5, 1990. Michael Unit officials immediately initiated what Zani labels the "Michael Unit Blueprint Conspiracy." That alleged conspiracy involved placing Zani in cells with informers; placing him in the "hoe squad" despite the knowledge that he was physically unable to perform the work, then punishing him for failure to work by placing him in "loss-of-privileges" administrative segregation; seizing and ruining his typewriter; physically attacking him; retaliating against him for using the prison grievance procedure; and staging disciplinary hearings in which the hearing officers were biased against him, and in which hostile or unprepared counsel substitutes were forced on him.

Zani filed a complaint under 42 U.S.C. § 1983 against the prison officials and prisoners active in the alleged conspiracy against him. He attached to his complaint grievance forms for two incidents that formed part of the purported conspiracy. The district court granted Zani leave to proceed in

forma pauperis (IFP).

Zani states further that while he was standing in the prison mess line on December 31, 1990, he was approached from behind by prisoner Ignacio Beltran and hit three times; and that Zani's eyeglasses fell to the ground and were broken. Zani alleges that officers William B. Cox and Aurlio Angel blamed Zani for the incident, handcuffed him, and took him to the prison infirmary.

On January 11, 1991, Captain Carl Green presided over a disciplinary hearing for an incident that occurred on January 3 or 4, 1991. Zani alleges that Beltran again attacked him while Officer Albert P. Quintero, who should have been standing guard, was absent. Zani states that he walked away from the attack but was handcuffed and taken to the infirmary, where he overheard four prison officers discuss placing him in administrative segregation. He was in fact placed in administrative segregation following the predicate incident. Zani complained that Green unfairly conducted the hearing by not allowing certain testimony to be heard. Zani also complained about the testimony of one witness and about TDCJ forcing substitute counsel on him. Zani appealed the resulting adverse verdict.

Zani contended in his complaint that he need not exhaust prison administrative remedies before bringing a § 1983 action. He also contended that the TDCJ's grievance procedure had been improperly certified and was stacked against him.

The district court dismissed Zani's case on finding that Zani failed to prove that he had exhausted state administrative remedies. On appeal, we held that Zani had satisfied the magistrate judge's order to provide proof of exhaustion regarding the incidents of December 31, 1990, and January 11, 1991, and remanded Zani's case for further consideration of those incidents. We did affirm the district court's dismissal of the remainder of Zani's contentions, however.

Following our remand, the magistrate judge held a hearing on Zani's contentions pursuant to Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985). At that Spears hearing, Zani asserted that a magistrate judge in Houston had found in his favor regarding the January 11, 1991, disciplinary hearing. The magistrate judge in the instant case told Zani that he would allow the Houston

magistrate judge's report into the record. Zani responded that he possessed only one copy of the report and that he was attempting to obtain another copy. Zani was advised by the magistrate judge that he would place the report in the record if Zani would obtain another copy and submit it to the district court.

Zani and the magistrate judge later discussed the December 31, 1990, incident. According to Zani, Officer Cox inspired Beltran to hit Zani, presumably because Zani had named Cox as a defendant in an earlier legal action. According to Zani, he was grabbed by Officer Angel and thrown against a wall, keeping Zani from defending himself. An Officer Baker allegedly failed to run the prison videocamera during the incident.

Zani and the magistrate judge then discussed the January 11, 1991, disciplinary hearing. Zani referred the magistrate judge to his grievance form regarding the hearing for the substance of his contention. Zani then told the magistrate judge why he had named certain defendants but did not detail his allegations against them. When asked if the gist of his claim was that the hearing was not to his satisfaction, Zani responded, "[t]he gist is that the hearing itself was dishonest and was not in accordance with the TDC guidelines, or rules and procedures." The magistrate judge then told Zani:

What I am going to do with you Mr. Zani, I am just going to have Officer Cox and Beltran -- (inaudible) -- Officer Cox answer your lawsuit to see what his side of this controversy is. How much time do you need to put in writing and send to the court in Tyler, the specific in how you think he January 11 disciplinary hearing was conducted improperly. Could you do that in 30 days?

Zani assured the magistrate judge that he could prepare a new pleading within 30 days. The magistrate judge told Zani that he should discuss his claims regarding the January 11 hearing in the amended complaint. He told Zani, "I am going to give you 30 days to go ahead and mail it. I want whatever you -- (inaudible) -- to that amendment is what I am going to rely upon -- (inaudible) -- what you filed so far." The magistrate judge also told Zani, "[t]he use of force, we got that covered."

Zani did not file an amended complaint within 30 days. Instead, he filed a motion for the

magistrate judge and district judge to recuse themselves and transfer his case to another district court in Texas. In his motion, Zani alleged that the magistrate judge had mistakenly told him that Beltran could not be sued under § 1983 and had indicated that nothing was relevant to Zani's complaint other than the December 31 and January 11 incidents themselves. Zani contended that the magistrate judge's limited view of his complaint differed from the view of the district court in Houston, which he alleges found that TDCJ retaliated against him with disciplinary actions.

Zani then listed numerous rulings against him by the district court. He alleged that the court in one case evidently destroyed evidence that resulted in a \$50 sanction against him; that the life of Drug Enforcement Administration (DEA) Agent Enrique Camarena Salazar (Camarena) somehow might have been spared, and large quantities of drugs kept out of the United States, had the district court granted him relief in one case; that the court was covering up the murder of former DEA Agent Sante Bario (Bario) by Soviet agents; that the district court was biased against him; that the State of Texas acted as a Soviet proxy when it prosecuted him; and that "the decisions of this court have been of great assistance to the Soviet/Russian government and their fellow travellers, in their nefarious activities and coverups." Zani appended to his motion an affidavit in which he discussed nothing regarding the district court's or magistrate judge's actions. He also appended to his motion three bizarre letters.

He addressed the first of those letters to the United States Attorney. In that letter, he repeated his allegations of a Soviet plot that resulted in Bario's death and his own prosecution. He addressed his second letter to the then-clerk of this court. In that letter, he alleged that this court has demonstrated bias against him; that a judge of this court has demonstrated malice towards him; that Camarena might still be alive had Zani been allowed to testify at his state trial; that Bario was murdered, and Zani prosecuted, by agents of the Soviet Union; that "had it not been for [Zani's] quick and decisive actions in the past, either one or two Article III judges would have been dead long ago"; and that he had testified in an Oklahoma court that judges and magistrates had taken bribes in Central America. Zani addressed his third letter to the then-Director of Central Intelligence. In that letter,

Zani briefly discussed his legal difficulties and stated that, "Stalin, Brezhnev, etc.[,] must be laughing in their graves."

The magistrate judge recommended that the district judge dismiss Zani's complaint for failure to file an amended complaint and deny Zani's motion for recusal and transfer to another judicial district. In response Zani contended that he could not submit a copy of the decision in his Houston case to the district court because TDCJ would not copy it for him. He reiterated that the Houston court had found his January 11, 1991, hearing illegal. He alleged that "[t]he court is so biased and prejudiced against this plaintiff that it cannot see straight." He then listed actions of the court that he believed demonstrated bias against him. In conclusion, Zani reiterated his allegation that the magistrate judge and district court somehow were involved in a coverup of Soviet misdeeds.

The district court adopted the report and recommendations of the magistrate judge. The court dismissed Zani's complaint with prejudice and denied his motion for recusal and transfer of his case to another judicial district.

Subsequently, we denied Zani's motion for recusal of the judges of this court from considering his case and for transfer of his case to another circuit. In so doing, we warned Zani that further frivolous appellate pleadings would result in sanctions.

II

ANALYSIS

A. Dismissal with Prejudice

Zani contends that the district court erred by dismissing his complaint for failure to comply with the magistrate judge's order to file an amended complaint. He states that he attempted to comply by requesting a copy of the Houston court judgment, but that the Houston court did not send him a copy and the district court did not seek a copy sua sponte. Zani also contends that the magistrate judge failed to serve any defendants and erroneously found that Beltran could not be sued under § 1983.

A district court may dismiss an action sua sponte for failure to prosecute or to comply with

any order of the court. A reviewing court will reverse the district court only on finding an abuse of discretion. McCullough v. Lynaugh, 835 F.2d 1126, 1127 (5th Cir. 1988). A reviewing court will find no abuse of discretion in a dismissal with prejudice only "(1) upon a showing of `a clear record of delay or contumacious conduct by the plaintiff and (2) when `lesser sanctions would not serve the best interests of justice.'" Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, 1159 (5th Cir. 1985) (emphasis original) (citations omitted). Dismissal with prejudice is "[t]he ultimate sanction for the litigant," and "should be imposed only after full consideration of the likely effectiveness of less-stringent measures." Hornbuckle v. Arco Oil & Gas Co., 732 F.2d 1233, 1237 (5th Cir. 1984). Generally, the reviewing court will remand the case for express findings on the efficacy of lesser sanctions when the district court does not make such findings. Id. The reviewing court, however, will not remand a case for such findings when dismissal "was plainly the only reasonable alternative available to the court." Hooper v. Leon, No. 90-3292, 9 (5th Cir. Sept. 11, 1991) (unpublished; copy attached).

We affirm the dismissal of Zani's complaint concerning the January 11, 1991, disciplinary hearing. Under the circumstances, dismissal was the only reasonable alternative available to the court. Zani failed to file an amended complaint as ordered by the magistrate judge. Neither did he seek more time in which to file such a complaint. Instead, he filed the motion for recusal in which he implied that the magistrate judge and district court were providing aid and comfort to the Soviet Union.

Zani complains that he was unable to obtain a copy of the judgment of the Houston court. Yet Zani read from the Houston magistrate judge's report in that case at the instant Spears hearing, and told the magistrate judge that he had a copy of that report. He could have submitted his own copy of that report and the subsequent judgment to the magistrate judge for inclusion in the record, but chose not to do so. See, e.g., Tindel v. Collins, 92-4631, 4-5 (5th Cir. Oct. 20, 1992) (unpublished; copy attached) (dismissal proper when plaintiff chose not to submit his own copies of grievance forms and failed to seek continuance for compliance with magistrate judge's order).

Dismissal of Zani's claim that he was beaten on December 31, 1990, however, was error. The magistrate judge's order to submit an amended complaint pertained only to the January 11, 1991, disciplinary hearing and not to the December 31, 1990, incident. Zani was told by the magistrate judge that he would serve Cox, and perhaps Beltran, regarding the December 31, 1990, incident. The magistrate judge did not find, as Zani contends, that Beltran could not be held liable under § 1983. As the magistrate judge was undoubtedly aware, private individuals may be liable under § 1983 if they conspire with state actors to deprive a person of his civil rights. See Mills v. Criminal District Court No. 3, 837 F.2d 677, 679 (5th Cir. 1988). We have no choice but to reverse this part of the judgment of dismissal and remand for further proceedings.

B. Recusal; Sanctions

Zani contends that "the central issue" in his appeal is the district court's denial of his motion to recuse itself from hearing his case. He also asks us to transfer his case to another circuit or remand his case to another district court and order service of process.

Zani lists as reasons for the district court to recuse itself 1) that the court has ruled wrongly against him on six occasions; 2) that had the court granted him relief on one occasion, Camarena's life might have been spared, the treasury spared millions of dollars, and the United States spared "tons of drugs"; and 3) that the "court has exhibited a pattern-history of bias, prejudice, antipathy and hostility toward this plaintiff, and is decidedly dedicated, as exemplified by actions, to keeping plaintiff/petitioner wrongfully locked up and from appearing fully, fairly[,] openly and public[ly] in front of a jury."

A motion for recusal must be filed in timely fashion. Delesdernier v. Porterie, 666 F.2d 116, 121-23 (5th Cir.) (addressing 28 U.S.C. § 455), cert. denied, 459 U.S. 839 (1982); 28 U.S.C. § 144. Zani waited until after the Spears hearing to file his motion for recusal. He could have and should have moved for recusal as soon as he learned of the decisions that he alleges form a pattern of bias and prejudice. Zani's letter to the former clerk of this court reflects that Zani knew of some of those decisions prior to the Spears hearing. Zani's motion for disqualification of the magistrate judge and

the district court therefore was untimely. We previously denied as facially frivolous Zani's motion to disqualify this court and transfer his case to another circuit. We also warned Zani "that any further frivolous appellate pleadings will result in appellate sanctions." Despite that warning, Zani renews his request for us to transfer his case to another circuit. Consequently, we hereby sanction Zani for renewing his transfer request. It is not only frivolous but is the same request that resulted in a warning that sanctions were imminent. Hereafter, Zani must obtain the written permission of a judge of this court before he may prosecute an appeal. Further, he is hereby taxed with all costs of this appeal and, until he pays those costs, he must obtain certification of a district court that any appeal is taken in good faith before he may prosecute an appeal in forma pauperis. See Lay v. Anderson, 837 F.2d 231, 233 (5th Cir. 1988), mandamus denied, 493 U.S. 806 (1989).

C. Appointment of Counsel

Finally, Zani seeks appointment of counsel on appeal. "This Court may appoint counsel in civil rights suits presenting `exceptional circumstances.'" Cooper v. Sheriff, 929 F.2d 1078, 1084 (5th Cir. 1991) (citing Ulmer v. Chancellor, 691 F.2d 209, 212-13 (5th Cir. 1982)). Among the factors we consider when deciding whether to appoint counsel are

the type and complexity of the case; the petitioner's ability adequately to present and investigate his case; the presence of evidence which largely consists of conflicting testimony so as to require skill in presentation of evidence and in cross-examination; and the likelihood that appointment will benefit the petitioner, the court, and the defendants by `shortening the trial and assisting in a just determination.'

Cooper, 929 F.2d at 1084 (quoting Ulmer, 691 F.2d at 213).

Zani has not presented "exceptional circumstances" that warrant appointment of counsel. Despite his wild allegations of a Soviet plot, his obsession with Barrio and Camarena, and his baseless and abusive allegations of bias and prejudice, this case is a routine prisoner's rights case that is determinable by application of well-settled law to a simple set of factual allegations. Zani thus far has presented his factual allegations effectively, despite the interspersing of wilder allegations. Appointment of counsel would not benefit the court or any party in disposing of Zani's case on appeal.

III

CONCLUSION

For the foregoing reasons we deny Zani's request for appointment of counsel; impose appellate sanctions as set forth above; deny Zani's requests to transfer this appeal to another circuit and to force recusal of the district judge and magistrate judge; and affirm the district court's dismissal of Zani's case except as to the claim based on the alleged beating of December 31, 1990, which we reverse and remand for further consistent proceedings.

SO ORDERED.