UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-8428
Summary Calendar

TERRY KIRKENDALL, ET AL.,

Plaintiffs-Appellants,

VERSUS

GRAMBLING & MOUNCE, INC., ET AL.,

Defendants-Appellees.

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

EP 91 CA 450 B

(August 23, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Terry Kirkendall, his wife Myra Kirkendall, and their three minor children filed this civil RICO suit against twenty individual and corporate defendants. Proceeding pro se, the Kirkendalls alleged that the Grambling & Mounce law firm engaged in a criminal

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conspiracy with the other defendants to infiltrate and to control the state and federal court systems in Texas. As part of the conspiracy, they alleged that the defendants, inter alia, had caused the Kirkendalls to be evicted from their apartment; had engaged in racketeering activities against the Kirkendalls' interstate business, the Centurion Arms Anarchy Gazette; and had conspired to assassinate Terry Kirkendall. As predicate acts to the RICO violation, the Kirkendalls alleged illegal campaign contributions, bribery, mail and wire fraud, and obstruction of justice.

The district court granted summary judgment in favor of all defendants. The court noted that, with the exception of the claim that defendant Pelletier was hired to assassinate Terry Kirkendall (a claim which is facially frivolous), the Kirkendalls had already raised the identical claims against eight of the defendants in an unsuccessful civil rights suit. This Court affirmed the district court's dismissal of that prior suit on motion for summary judgment. Kirkendall v. Lara, No. 92-8140 (5th Cir. Feb. 24, 1993, unpublished).

The Kirkendalls' notice of appeal, signed by Terry Kirkendall, states that the "Plaintiffs Kirkendalls et al [sic]" appeal the judgment. This notice invoked the Court's jurisdiction as to Terry Kirkendall and any minor children only. See Colle v. Brazos County, Tex., 981 F.2d 237, 241-42 (5th Cir. 1993). The phrase "et al." in the notice of appeal was insufficient to secure appellate jurisdiction over the appeal of Myra Kirkendall. Fed. R. App. P.

3(c); Colle, 981 F.2d at 241. Terry Kirkendall and his children will be collectively referred to herein as "Kirkendall."

OPINION

This Court conducts a de novo review of a district court's grant or denial of summary judgment. Reese v. Anderson, 926 F.2d 494, 498 (5th Cir. 1991). For summary judgment to be granted, the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, must demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); L & B Hospital Ventures, Inc. v. Healthcare Int'l, Inc., 894 F.2d 150, 151 (5th Cir.), cert. denied, 498 U.S. 815 (1990). Although fact questions are considered with deference to the non-movant, Rule 56 "requires the entry of a summary judgment against the party failing to make a showing sufficient to establish the existence of an element essential to that party's case." Id.

Opportunity to amend complaint

Kirkendall argues that the district court should not have granted summary judgment without first notifying him of the deficiencies in his complaint and giving him an opportunity to amend. Although a district court should generally "freely permit amendments" to pleadings (James by James v. Sadler, 909 F.2d 834, 836 (5th Cir. 1990)), no error exists here because Kirkendall never filed a motion to amend his complaint. There is no law requiring the district court to review his complaint and offer suggestions for improvement before entering judgment.

Kirkendall also suggests that the district court erred by relying on Fed. R. Civ. P. 9(b) to dismiss the claims. Rule 9(b) requires that in all averments of fraud or mistake, "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b).

In detailed reasons for its judgment, the district court cited Rule 9(b) only with regard to the Kirkendalls' allegations against defendants Diaz and Piper. Diaz supervises the internal affairs division of the El Paso Police Department and Piper is an El Paso assistant city attorney. Kirkendall alleged that Diaz committed mail fraud when he wrote a letter responding to a complaint that Kirkendall had filed about Detective Carrillo, another alleged member of the conspiracy. According to Kirkendall, this letter was part of a "fraudulent 'cover-up and white-wash' scheme" to obstruct his interstate business. Piper allegedly joined the illegal conspiracy when she filed, in the civil rights suit, a motion to quash Kirkendall's subpoena of Detective Carrillo's internal police records. Kirkendall's conclusional allegations concerning these two defendants fail to allege fraud with the particularity required by Rule 9(b).

Allegations concerning discovery

Kirkendall charges that the district court committed constitutional error by entering summary judgment before he was able to complete discovery and by entering summary judgment without the benefit of additional unidentified evidence that he "could have" produced.

On motion for summary judgment, a non-moving party who needs more time to obtain discovery may request a continuance pursuant to Fed. R. Civ. P. 56(f). International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1266 (5th Cir. 1991), cert. denied, 112 S.Ct. 936 (1992); Fed. R. Civ. P. 56(f). The court has no obligation to grant additional time for discovery absent a request from the non-moving party. International Shortstop, 939 F.2d at 1266 (citation omitted). The party seeking additional time to conduct discovery must show how the additional discovery will create a genuine dispute as to a material fact and "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." Id. at 1267.

We reject this argument because Kirkendall not only failed to request a continuance for additional discovery in the district court, but on appeal he has offered only "vague assertions" that additional discovery opportunities would have produced discrepancies of material fact.

Judicial and quasi-judicial immunity

Three of the defendants are state judges[1] and a fourth is the secretary to one of the judges. Kirkendall's rambling allegations against all three judges relate solely to acts taken in their judicial capacities. Kirkendall alleged that the secretary was liable because she made two telephone calls to inform him of the

[1] The district court dismissed one of the judges because he was never served with the suit. Kirkendall has not appealed the dismissal.

dates for hearings and because she helped to process a request for a replacement judge to preside at one hearing.

The district court held that the three judges were entitled to absolute judicial immunity and that the secretary had quasi-judicial immunity for her actions. Kirkendall argues that the doctrines of judicial and quasi-judicial immunity do not apply in civil RICO suits, but he does not suggest that any of these defendants acted outside a judicial or quasi-judicial capacity.

A judge has absolute immunity from monetary liability for all judicial acts that are not performed in clear absence of jurisdiction. Johnson v. Kegans, 870 F.2d 992, 995 (5th Cir.), cert. denied, 492 U.S. 921 (1989). Other "necessary participants in the judicial process" are entitled to absolute quasi-judicial immunity. Id. at 996. Kirkendall's argument that there is no judicial or quasi-judicial immunity in a civil RICO action is frivolous. The cases that he has cited as authority for this proposition are inapplicable because they are criminal RICO prosecutions.

Capacity for suit of El Paso Police Department

Citing § 1.1 of the El Paso City Charter and Tex. Local Gov't. Code Ann. § 341.003, the district court found that the City of El Paso was a home rule municipality authorized by Texas law to organize a police force. The district court therefore concluded that the El Paso Police Department was not subject to suit under § 1962 because it did not have a separate legal existence from the municipality itself. See Darby v. Pasadena Police Dept., 939 F.2d

311, 313 (5th Cir. 1991). Although the relevant section of the city charter is not included in the record on appeal, Kirkendall does not suggest that the police department is a legal entity separate from the City of El Paso.

A plaintiff cannot sue a city department unless the department "enjoy[s] a separate legal existence." Darby, 939 F.2d at 313. We affirm the dismissal of the El Paso Police Department from the suit because there has been no showing that the department has a legal existence separate from the City of El Paso.

Alleged predicate acts

Kirkendall challenges the district court's determination that he failed to establish the alleged predicate acts of mail fraud and obstruction of justice.

The elements of mail fraud as a predicate offense in a civil RICO suit are:

> (1) A scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises.
>
> (2) Interstate or intrastate use of the mails for the purpose of furthering or executing the scheme or artifice to defraud.
>
> (3) The use of the mails by the defendant connected with the scheme artifice [sic] to defraud.
>
> (4) Actual injury to the business or property of the plaintiff.

Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 428 (5th Cir.), cert. denied, 498 U.S. 895 (1990).

Although Kirkendall identified numerous mailings by various defendants as fraudulent, the district court found that he had not pleaded the elements of mail fraud with regard to any defendant. The court held that the conclusional allegations that the documents mailed by defendants Diaz and Piper were part of a "cover-up and white-wash scheme" did not meet the particularity requirements of Rule 9(b) and that there was no showing that any mailing by any defendant deprived the Kirkendalls of money or property or permitted a defendant to obtain something of value.

In his appellate brief, Kirkendall again makes only generalized allegations of mail fraud. He has not established predicate acts of mail fraud because he has not explained how any of the defendants' communications advanced their allegedly fraudulent scheme or how the communications violated federal law. See Elliott v. Foufas, 867 F.2d 877, 881-82 (5th Cir. 1989).

With regard to the alleged predicate acts of obstruction of justice, Kirkendall has appealed only the district court's determination that defendants Diaz and Piper did not obstruct justice. Kirkendall alleges that Diaz's letter about the internal affairs investigation was part of a "cover-up" and that Piper became a part of the conspiracy when she filed a motion to quash in federal court. As a matter of law, neither of these activities constitutes obstruction of justice. See 18 U.S.C. §§ 1501-1515.

Res judicata and collateral estoppel

The district court noted that, in the litigation of their eviction proceedings in state court, a jury had determined that the

Kirkendalls' eviction did not result from a retaliatory conspiracy. The district court held that relitigation of this issue was barred by the doctrine of collateral estoppel, and that the finding that the eviction was not retaliatory undermined the factual basis of the entire RICO cause of action. The district court also determined that principles of res judicata applied to this suit because Kirkendall's RICO claims presented the same cause of action as the 42 U.S.C. § 1983 suit.

Kirkendall cites both of these rulings as error, but he has presented no comprehensible argument concerning the applicability of collateral estoppel. This argument is therefore waived. Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987).

The bar of res judicata applies only if four requirements are met: "(1) the parties must be identical in both suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must be a final judgment on the merits; and (4) the same cause of action must be involved in both cases." Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 188 (5th Cir. 1990) (citation omitted). For purposes of res judicata analysis, "cause of action" is defined to include all claims that were or could have been brought in a prior action based on the same transaction. See Nilsen v. City of Moss Point, Miss., 701 F.2d 556, 560 (5th Cir. 1983).

Kirkendall points out that only seven[2] of the twenty defendants in this suit were named as defendants in the civil rights suit. Defendants Kessler, Robbins, Colescott Haran, Paxson, Rugge, Grambling & Mounce, El Paso Apartment Association, and Cooper were defendants in the original § 1983 suit. The factual allegations made in the civil rights suit are for all practical purposes identical to the RICO claims. For example, in the civil rights suit, Kirkendall alleged that the § 1983 defendants had engaged in a retaliatory conspiracy under "Color of Law" and "Color of Office" to violate their civil rights by evicting them because the Kirkendalls had reported unlawful activities that occurred at their apartment complex. Kirkendall also argued in the § 1983 suit that the defendants had obtained the eviction by means of a widespread conspiracy to corrupt the state judicial system in the Western District of Texas. Although Kirkendall has expanded the allegations in this suit to include as targets of the conspiracy all members of the state and federal judiciary in Texas, the charges remain conclusional and devoid of factual support.

Kirkendall does not dispute that on appeal of the state eviction proceeding, the jury specifically found that the eviction was not retaliatory; therefore, the retaliatory eviction claim (the crux of the alleged conspiracy) is barred by the doctrine of collateral estoppel. See Allen v. McCurry, 449 U.S. 90, 94-95, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). A plaintiff cannot file suit in

[2] Eight of the present defendants were actually named in the civil rights suit.

federal court to relitigate an unfavorable state court ruling. See Howell v. Supreme Court of Texas, 885 F.2d 308, 311-13 (5th Cir. 1989), cert. denied, 496 U.S. 936 (1990); Hale v. Harney, 786 F.2d 688, 690-91 (5th Cir. 1986) (both § 1983 suits filed by parties seeking relief from unfavorable state court judgments).

Kirkendall's claims against the defendants named in their civil rights suit are barred because their eviction was not retaliatory, and also because Kirkendall could have brought the RICO claims in the prior civil rights suit. Allen, 449 U.S. at 94-95; Nilsen, 701 F.2d at 560.

"A non-party is in privity with a party for res judicata purposes in three instances: (1) if he is a successor in interest to the party's interest in the property; (2) if he controlled the prior litigation; or (3) if the party adequately represented his interests in the prior proceeding." Howell Hydrocarbons, 897 F.2d at 188 (citation omitted).

Kirkendall's claims against some of the other defendants are barred because those defendants are in privity to the named defendants in the civil rights suit. At all times relevant to this lawsuit, defendants Sparks and Carr were partners in the firm of Grambling & Mounce. The Centurion Arms apartment complex is wholly owned by defendant Kessler, and there is no indication that it is a corporation.

The record is insufficient to support the district court's apparent determination that the other defendants named in this suit could impose the bar of res judicata because they were in privity

with the original defendants in the civil rights suit. The error is harmless because, for the following reasons, none of the other defendants are liable to Kirkendall under the RICO statute.

The El Paso Police Department is not a legal entity subject to suit; defendants Diaz and Piper are not alleged to have committed any actions that would subject them to RICO liability; defendants Galvan and Robbins were never served with the suit; defendants Peca and Massey are entitled, respectively, to judicial and quasi-judicial immunity.

The Court should also affirm the district court's dismissal of defendants Pelletier, Carrillo, and Sanchez, as Kirkendall's appellate brief does not address the dismissal of those defendants. Brinkmann, 813 F.2d at 748. Dismissal is appropriate because, as discussed below, Kirkendall "did not allege or point to sufficient evidence of a pattern of racketeering to create a genuine issue of material fact for trial. Howell Hydrocarbons, 897 F.2d at 193.

Issues of material fact

Finally, Kirkendall urges that the district court should not have granted summary judgment because of the existence of genuine issues of material fact. Other than his conclusional allegations of conspiracy, however, Kirkendall has failed to identify any disputed material fact in either his response to the motions for summary judgment or his appellate brief. Brinkmann, 813 F.2d at 748.

Kirkendall has filed a number of motions in this Court, including a motion to submit additional evidence (in the form of

unrelated newspaper articles), a motion to "interplead" [sic] and sanction the defendants' attorneys, a request for oral argument, and a motion for appointment of counsel. The El Paso Apartment Association, has moved to strike Kirkendall's motion for "interpleader" and sanctions and has requested that sanctions be imposed on Kirkendall. We grant the motion to strike the motion to implead and sanction the defendants' attorneys because that motion is frivolous. Kirkendall's other motions are denied as moot. Because Kirkendall appears to have limited financial means the Court will not on this occasion issue any sanction against Kirkendall; however, the Court warns Kirkendall that sanctions will be imposed for any future frivolous litigation.

Judgment of the trial court is AFFIRMED.