

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1256
Summary Calendar

LEE STEARMAN,

Plaintiff-Appellant,

VERSUS

CITY OF GREENVILLE, TEXAS, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:91-CV-1064-X)

(February 17, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Lee Stearman appeals a summary judgment against him in this civil rights action brought pursuant to 42 U.S.C. §§ 1983 and 1985. Finding no error, we dismiss as frivolous.

* 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Stearman was convicted in August 1991 of destroying property affecting interstate commerce by means of fire or an explosive; we affirmed. United States v. Stearman, No. 91-7127 (5th Cir. Dec. 22, 1992) (unpublished). In June 1991, Stearman sued the City of Greenville, Texas, for destroying evidence contained in a structure at 4716 Wesley in Greenville.

Stearman alleged that an arson fire at that address caused damage to the building in September 1986. He asserted that the records of the business at that location, the Floor Store and More, were placed in protective storage after the first fire and were later returned to the building in early 1990.¹ Stearman also maintained that in October 1990, a second fire completely destroyed the building. Stearman alleged that the second fire caused destruction of "boxes of files and accounting records which were pertinent" to his defense and that the City of Greenville destroyed all available evidence by razing the building and removing the debris in June 1991. Stearman amended his complaint and named Greenville City Manager Edward Thatcher, Fire Chief Dorsey Driggers, Mayor William Morgan, and Joe Rutherford, the Chairman of the Substandard Structures Rehabilitation Board, as defendants in their individual capacities.

The defendants moved for summary judgment, alleging (1) that Stearman had admitted that the City of Greenville was not a proper

¹ Stearman was the treasurer of the Floor Store and More; Damon Stearman, his brother, was the president.

party for suit; (2) that the individual defendants had qualified immunity from Stearman's suit; (3) that the defendants' actions did not constitute a violation of federal law; (4) that the defendants acted in accordance with the municipal ordinances of the City of Greenville, which provided due process to Stearman; (5) that Stearman, Stearman's brother (the owner of the building), and Stearman's sister (the prior owner of the building) had failed to avail themselves of the process available to challenge the demolition of the building; (6) that no defendant misled a federal investigator; and (7) that plaintiff failed to state a claim pursuant to § 1985 or TEX. CONST. art. I, §§ 3 and 3a. The court granted summary judgment on the ground that Stearman failed to demonstrate the deprivation of a protected property interest.

II.

A.

This court's review of summary judgment proceedings in de novo. United States v. 1988 Oldsmobile Cutlass Supreme 2 Door, 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. P. 56(c). In Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), the Court explained the following:

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 that 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.

Qualified immunity shields government officials performing discretionary functions from civil damages liability if their actions were objectively reasonable in light of clearly established constitutional law. Fraire v. Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). Evaluation of a defendant's right to qualified immunity requires a two-step inquiry. See King v. Chide, 974 F.2d 653, 656-57 (5th Cir. 1992). The first step is whether the plaintiff has alleged the violation of a clearly established constitutional right. Siegert v. Gilley, 500 U.S. 226, ___, 111 S. Ct. 1789, 1793 (1991); King, 974 F.2d at 656. The next step is to determine the reasonableness of the officials' behavior. See id. at 657. The objective reasonableness of the officials' conduct must be measured with reference to the law as it existed at the time of the conduct. Id.; see Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

Stearman's allegation before the district court gave rise to a claim that he was deprived of property without due process. The analysis of a claim of the denial of procedural due process requires, first, that the court determine whether state action has deprived the plaintiff of life, liberty, or property, and, if such a deprivation is found, the court must then determine whether state procedures for challenging the deprivation satisfy due process. Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984).

The district court determined that Stearman failed at the first step in the analysis because he did not demonstrate the

deprivation of a protected interest. The court found, and Stearman does not dispute, that the building belonged to his brother. The court further found that Stearman had stated in sworn pleadings that the business records of the Floor Store and More were destroyed in the second fire and not in the demolition ordered by the city. Stearman failed to meet the first requirement in the Siegert analysis; he did not demonstrate a violation of a clearly-established constitutional right.

Assuming arguendo that Stearman has standing to assert an entitlement of due process and that he could state a deprivation, the district court found that the owners of the building (Stearman's brother and sister) were provided with due process prior to the demolition of the building:

The charred building remains and debris presented a demonstrated health and safety hazard to the citizens of Greenville. The purported owner of the property, Plaintiff's sister, was given numerous written notices of city actions and the SSRB [Substandard Structures Rehabilitation Board] hearing. When the city discovered that Damon Stearman was the subsequent owner, the lengthy hearing process was repeated in its entirety, with numerous written notices to Damon Stearman. Neither Damon Stearman nor Plaintiff chose to attend either of the SSRB hearings to raise any objection to the City's plans. Damon Stearman was informed in writing of the right to appeal to the state district court, but no court intervention was sought by him or by Plaintiff. The City permitted an additional two months to elapse between the time of the final SSRB Order and the demolition, and still no intervention action was taken by Plaintiff.

"[D]ue process requires notice which is calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." Gustafson v. Board of Governors, 717 F.2d 242, 246-47 n.5 (5th Cir. 1983), cert. denied,

467 U.S. 1242 (1984).

Damon Stearman, the owner, received notice and was given an opportunity to be heard; therefore, he received all the process that was due. See Darlak v. Bobear, 814 F.2d 1055, 1062 (5th Cir. 1987). Damon Stearman may have breached a fiduciary duty to Lee Stearman, as treasurer, failing to provide him with notice, but that issue has no bearing on the sufficiency of the notice provided by the defendants. See Gustafson, 717 F.2d at 247. Summary judgment was appropriate.

B.

On December 2, 1992, Stearman sought leave to file a second amended complaint to join Damon Stearman as a plaintiff and Jeff Starling and Jeff Thomas as defendants. The district court denied the motion to amend as untimely.

After an answer has been filed, a party may amend its complaint "only by leave of court . . .; and leave shall be freely given when justice so requires." FED. R. CIV. P. 15(a). Rule 15(a) "evinces a bias in favor of granting leave to amend" and "severely restricts the judge's freedom." Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 (Former 5th Cir. Nov. 1981). We review the denial of a motion to amend for abuse of discretion. Id. We affirm the denial of a motion to amend when the motion is untimely filed or if amendment would be futile. Avatar Exploration, Inc. v. Chevron, U.S.A., Inc., 933 F.2d 314, 321 (5th Cir. 1991).

On July 20, 1992, the district court granted the parties'

agreed motion to modify the pretrial scheduling order and set September 1, 1992, as the deadline for filing an amended complaint. Stearman's second amended complaint was untimely. So, the district court did not abuse its discretion in denying the motion to amend.

C.

Stearman has raised the issue of the denial of Damon Stearman's motion to intervene. The district court denied the motion because Damon Stearman did meet the requirements of FED. R. CIV. P. 24(a). Denial of intervention of right is an immediately appealable collateral order. Valley Ranch Dev. Co. v. FDIC, 960 F.2d 550, 555 (5th Cir. 1992). Damon Stearman has not filed an appeal of the denial, and Lee Stearman does not have standing to raise the issue on his behalf. See Sierra Club v. Babbitt, 995 F.2d 571, 574 (5th Cir. 1993) (holding that intervenors must establish standing to appeal separately).

D.

Stearman raises several issues for the first time on appeal: (1) whether the district court should have ordered an investigation of the demolition site by the EPA, whether the defendants deceived the EPA, whether the defendants omitted items from their pleadings, and whether the district court considered Stearman's corrections to the defendants' false statements. These issues need not be addressed. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990) (holding that this court ordinarily will not

enlarge the record on appeal to include matters not presented to the district court).

III.

This pro se appeal is frivolous. The district court amply set forth its reasons for entering summary judgment, all of which are plainly meritorious. The appeal, accordingly, is DISMISSED pursuant to 5TH CIR. R. 42.2. We sua sponte assess double costs, plus attorneys' fees of \$500. See FED. R. APP. P. 38; Coghlan v. Starkey, 852 F.2d 806 (5th Cir. 1988) (per curiam).