UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5462
Summary Calendar

ARTHUR W. CARSON,

Plaintiff-Appellant,

VERSUS

CYNTHIA STEVENS KENT, Judge, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:92 CV 752)

(May 25, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Arthur W. Carson, a Texas state prisoner and all too frequent litigator in this court,[2] appeals, *pro se*, the summary judgment

---

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 Pursuant to that rule, the court has determined that this opinion should not be published.

[2] Carson has filed at least eight other suits in this court in the past three years. *See* ***Carson v. Perry***, 93-4375 (5th Cir. Oct. 22, 1993) (unpublished) (summary judgment affirmed in part, vacated and remanded in part); ***Carson v. Collins***, 93-4019 (5th Cir. Sep. 23, 1993) (unpublished) (affirming dismissal of civil rights case as frivolous); ***Carson v. Collins***, 92-1772 (5th Cir. Mar. 3, 1993) (unpublished) (single-judge order) (denying certificate of probable cause); ***Carson v. Waldron***, 92-4375 (5th Cir. Oct. 21, 1992) (unpublished) (affirming dismissal of civil rights case as frivolous); ***Carson v. Collins***, 92-1086 (5th Cir. May 20, 1992) (unpublished) (single-judge order) (denying certificate of probable cause); ***Carson v. Pustka***, 91-4611 (5th Cir. Mar. 9, 1992)

granted Terri Neal in this § 1983 action. We **DISMISS** the appeal. *See* Loc. R. 42.2.[3]

I.

One of the persons sued by Carson was Texas state court clerk Terri Neal. He alleged that she refused to file his motions for habeas corpus ad testificandum and for recusal of state court Judge Cynthia Stevens Kent in a state court malpractice action, instead returning the motions to Carson on the alleged false pretext that his state court action had been dismissed in November 1991.[4] Carson claimed a conspiracy to deny his right of access to the courts. He attached a June 1992 letter from Neal informing him that his case had been dismissed; a copy of the November 1991 order dismissing it; and an order setting a telephone hearing for May 21, 1992.

The magistrate judge ordered Carson to file a more definite statement of his claims. Carson responded with an amended

---

(unpublished) (affirming dismissal of civil rights case); ***Carson v. Hernandez***, 91-1528 (5th Cir. Nov. 22, 1991) (unpublished) (same); ***Carson v. Peterson***, 91-2618 (5th Cir. Nov. 20, 1991) (unpublished) (same).

[3] That rule provides:

> ***Frivolous and Unmeritorious Appeals***. If upon the hearing of any interlocutory motion or as a result of a review under Loc.R. 34 [providing for summary calendar disposition of cases], it shall appear to the Court that the appeal is frivolous and entirely without merit, the appeal will be dismissed.

[4] Carson also sued Judge Kent, alleging that she refused to rule on his motions, circumvented a scheduled telephone hearing, and refused to answer questions regarding the status of his case. The case against Judge Kent was dismissed with prejudice as frivolous; Carson does not appeal that dismissal.

complaint, reiterating his allegations and alleging that the order setting the telephone hearing showed that his case had not been dismissed, so that Neal's subsequent letter regarding the dismissal was false. Carson also contended that Neal was not immune from suit.

The magistrate judge granted Carson leave to proceed in forma pauperis (IFP), and ordered Neal to answer the complaint. In her answer, Neal requested dismissal of Carson's complaint, pursuant to Fed. R. Civ. P. 12(b), for failure to state a claim. She contended that she had filed Carson's motions; and that she had sent Carson notice of dismissal on a judge's order, so that she was absolutely immune from suit in any action arising from the letter she sent Carson regarding the dismissal. She attached copies of: (1) the recusal motion (stamped as filed March 5, 1992); (2) the habeas motion (stamped as filed April 6, 1992); (3) Judge Kent's May 28, 1992 order recusing herself; and (4) state court Judge Gene Ater's June 1992 order that Carson be notified that his case was dismissed in November 1991.

Carson filed a "traverse" to Neal's answer, stating, *inter alia*, that she had not proved that she served him with copies of the recusal order and Judge Ater's order; that he should be allowed discovery; that Neal's copies of the recusal and habeas motions indicate that his case was not dismissed; that Neal never informed him that his state court case was dismissed; and that prison mail logs could verify Carson's receipt or non-receipt of mail from Neal. Carson requested: (1) that he be allowed to depose Judge

Pat McDowell, who appointed Judge Ater to preside over his case; (2) that he be allowed to submit interrogatories to Neal; and (3) copies of the state court docket sheet, prison mail log, and transcript of the January 24, 1992, hearing on his motion to reinstate his state court case.

Carson also asserted that "summary judgment" was inappropriate until after the completion of discovery. He alleged that he had produced sufficient evidence (*i.e.*, the attachments to his complaint) to avoid summary judgment. And, he contended there was a genuine issue of material fact whether Neal sent copies of orders to Carson as ordered by Judge Ater.

The magistrate judge denied Carson's discovery motions and recommended granting summary judgment for Neal.

Carson objected to the magistrate judge's report, contending that he received no notice that the magistrate judge would consider summary judgment, and that recommending summary judgment was improper because he had not been allowed discovery. The district court adopted the magistrate judge's report, granting summary judgment for Neal.

II.

A.

Carson contends first that the magistrate judge improperly recommended summary judgment without notifying him that Neal's request for Rule 12(b)(6) dismissal would be treated as a summary judgment motion. This contention is meritless. The district court (and magistrate judge) could, and did, properly consider Neal's

request for Rule 12(b)(6) dismissal as a motion for summary judgment, because it considered matters outside the pleadings, and the parties were on notice of this fact. *See* Fed. R. Civ. P. 12(b) (motion asserting failure to state claim considered summary judgment motion when parties include material outside of pleadings not excluded by court; 12(b)(6) dismissal request may be made in pleadings or by motion); Fed. R. Civ. P. 56; ***Washington v. Allstate Ins. Co.***, 901 F.2d 1281, 1283-84 (5th Cir. 1990).

Under Rule 56, the parties must have at least ten days to submit additional evidence from the time that they receive notice that a 12(b)(6) motion may be treated as a summary judgment motion -- *i.e.*, from the time they have notice that the court is considering matters outside the pleadings. *E.g.*, ***Washington***, 901 F.2d at 1284 (citing ***Clark v. Tarrant County***, 798 F.2d 736, 746 (5th Cir. 1986)); ***Martin v. Harrison County Jail***, 975 F.2d 192, 193 (5th Cir. 1992) (*pro se* litigants not entitled to additional or different warnings regarding possible summary judgment). Here, as noted, in his "traverse", Carson treated Neal's request for Rule 12(b)(6) dismissal as a motion for summary judgment; thus, he obviously was on notice that summary judgment was possible. Further, he prepared his "traverse" on May 11, 1993; the magistrate judge's report and recommendation was issued July 15, 1993, over two months later. Thus, Carson not only knew summary judgment was possible, but also had ample time to respond.

B.

Carson contends next that summary judgment was improper (1) on the merits, and (2) because he was not allowed discovery. He contends also that Neal does not enjoy absolute immunity regarding the June 1992 letter, because she wrote the letter on June 12, five days before Ater's order was filed. We deal first with the latter contention.

1.

A clerk of court enjoys absolute immunity for actions taken at the direction of a judge; and qualified immunity for other clerical acts. ***Williams v. Wood***, 612 F.2d 982, 985 (5th Cir. 1980). Neal's letter of June 12, 1992, reads:

> [e]nclosed you will find a copy of the Order notifying you that the 114th District Court no longer has jurisdiction over the above cause. Enclose[d] you will also find a copy of the order of dismissal signed and entered on November 14, 1991, final disposition of the matters involved.

The November 14 order accompanied the letter.

Unquestionably, Carson received Neal's June 12, 1992 letter; he submitted a copy of it with his complaint. And, as the letter and its attachment reflect, it was written pursuant to Judge Ater's June 11, 1992 order; thus, Neal is absolutely immune for any constitutional charges arising from it.

Moreover, Carson's apparent assertion that Neal's letter is bogus -- because it was written on June 12, before Judge Ater's order was filed on June 17, but after it was signed and entered -- is patently meritless. Additional discovery of the state court's

docket sheet to discover whether Neal informed Carson of Judge Ater's order would not have helped Carson.

2.

With regard to Carson's other contentions, summary judgment is proper if the movant establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); ***Abbott v. Equity Group, Inc.***, 2 F.3d 613, 618 (5th Cir. 1993), *cert. denied*, ___ U.S ___, 114 S. Ct. 1219 (1994). To defeat a summary judgment motion, the non-movant must go beyond its pleadings and point to specific facts demonstrating a material fact issue for trial. Fed. R. Civ. P. 56(e). We review a grant of summary judgment *de novo*, examining the record in the light most favorable to the non-movant. ***Abbott***, 2 F.3d at 618; Fed. R. Civ. P. 56(c).

The summary judgment evidence demonstrates clearly that Neal filed Carson's recusal and habeas motions. Neal submitted certified copies of both motions stamped "filed." Moreover, Judge Kent evidently granted the recusal motion, because she recused herself from Carson's case. Further, although Carson alleges that Neal did not file the motions and that she returned them to him, he refers in his "traverse" to the copies of those motions -- marked "filed" -- which were submitted by Neal as attachments to her answer. Thus, Carson's "traverse" implicitly contradicts the allegations in his complaint. Neither Carson's pleadings, nor any evidence he submitted, demonstrate a genuine issue of material fact sufficient to withstand summary judgment on whether Neal filed

Carson's recusal and habeas motions. *See* ***Isquith ex rel. Isquith v. Middle S. Utilities, Inc.***, 847 F.2d 186, 194 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988); Fed. R. Civ. P. 56(e). Thus, summary judgment was proper on Carson's claim that Neal did not file the motions.

Finally, the state court order attached to Carson's "traverse" shows that he filed a motion to reinstate his case, which was to be heard on January 24, 1992. Obviously, Carson would not have moved to reinstate his case had he not known that it had been dismissed. Discovery of the transcript of the January 24 reinstatement hearing therefore would not have helped Carson in his action against Neal, insofar as it was based on his claim that she did not notify him of the dismissal.

In sum, Carson's case is an exercise in recreational litigation. He has made disingenuous, meritless, and contradictory allegations and contentions in his district court pleadings and appellate brief. Needless to say, "[f]ederal courts do not exist to indulge the recreational whims of litigious prisoners." ***Birdo v. Logan***, No. 93-1650 (5th Cir. Feb. 23, 1994) (per curiam) (unpublished) (citing ***Gabel v. Lynaugh***, 835 F.2d 124, 125 n.1 (5th Cir. 1988) (per curiam) ("[P]ro se civil rights litigation has become a recreational activity for state prisoners in our Circuit.... We give notice that future frivolous or malicious appeals will call forth like sanctions.")). Carson is warned that future frivolous, unmeritorious litigation will subject him to sanctions.

III.

For the foregoing reasons, Carson's appeal is **DISMISSED**. *See* Loc. R. 42.2.