

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8625
Summary Calendar

JULIUS DREW, SR.,

Plaintiff-Appellant,

versus

PATRICIA OTT, Individually,
ET AL.,

Defendants,

EDWARD J. DWYER, Individually,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(A-92-CA-265-SS)

(July 6, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Julius Drew, Sr., *pro se*, appeals from the dismissal of his civil rights claims under 42 U.S.C. § 1983. We **AFFIRM**.

I.

In April 1991, Drew rented a house in Austin, Texas, from Network Properties of Austin, as agent for the owner, appellee Dr.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Edward Dwyer. He was evicted for nonpayment of rent in 1992. That May, Drew filed a civil rights action against Dr. Dwyer; Ronna Young, Dr. Dwyer's assistant; John Bigham, a broker with Network Properties who filed the forcible entry and detainer suit against Drew; Jo Wilhelm, an employee of Network Properties; Carole Wannamaker, an attorney retained by Network Properties to represent it in the eviction proceeding; and Justice of the Peace Patricia Ott, who presided over that proceeding. Drew alleged that the defendants conspired and committed perjury while depriving him of due process and equal protection, and demanded \$5,000,000 for court costs in the eviction proceeding, mental stress, harassment, abuse, and punitive damages.

The district court ordered Drew to file an amended complaint containing the factual basis for each cause of action against each defendant. In his amended complaint, Drew alleged that the defendants conspired to evict him and to prosecute him maliciously for nonpayment of rent, and that they committed perjury in a "vain attempt to confer jurisdiction to Defendant Ott when all Defendants knew that no jurisdiction existed". Drew alleged that Wannamaker, as counsel for Network Properties, and Judge Ott conspired to violate his due process rights by assessing attorney's fees and sanctions² against him and setting an excessive appeal

² In the eviction proceeding, Drew was sanctioned for \$2,000, plus \$460 for attorney's fees, after a hearing regarding his pauper's affidavit. In the sanction order, Judge Ott warned Drew to "refrain from filing any additional Pleadings, Motions, or other paper brought in bad faith or groundless and brought for the purpose of delaying the appeal process".

bond in the eviction proceeding. Drew alleged that Judge Ott arbitrarily ordered him to stop filing objections to her orders and threatened him with jail for contempt; verbally abused him by following him into the parking lot of the courthouse and screaming at him for parking in a handicapped parking space; and harassed him and had the license numbers for his cars investigated.

Dwyer, Young, Wannamaker, and Judge Ott filed motions to dismiss, on the ground that Drew's first amended complaint failed to state a claim upon which relief could be granted. In December 1992, the district court granted Judge Ott's motion to dismiss, on the ground that she was entitled to judicial immunity. In January 1993, Drew moved for summary judgment against Wannamaker, Dwyer, and Young, and moved for the entry of default judgments against Bigham and Wilhelm. Dwyer and Wannamaker also filed summary judgment motions that January and February, to which Drew responded.

In April 1993, the district court entered an order denying Drew's motion for default judgment against Bigham and Wilhelm, holding that he had not served them with process within 120 days of filing his complaint. With respect to the defendants' motions for summary judgment, the district court stated that Drew had shown no factual basis for his claims; but, because Drew was proceeding *pro se*, the district court gave him 10 days in which to respond to the

defendants' motions for summary judgment³ by amending his complaint, submitting affidavits, or submitting other evidence.

On April 19, 1993, Drew filed a second amended complaint, naming only Dwyer, Wannamaker, and Young as defendants. Drew alleged that Dwyer filed eviction proceedings against him in retaliation for his suing Dwyer for breach of contract; that Wannamaker filed erroneous pleadings; that Young gave false testimony; and that all three conspired with Judge Ott to deprive him of due process and equal protection rights. The district court granted summary judgment in favor of Dwyer, Wannamaker, and Young, because Drew had failed to present a factual basis to support his allegations of conspiracy with a state official, or any other cause of action. The district court dismissed Drew's claims against Bigham and Wilhelm, because Drew did not properly serve them with process within 120 days of the filing of his complaint, and because Drew had failed to state a claim against them.

II.

A.

Drew contends that the district court erred in dismissing his claims against Judge Ott because she was not entitled to judicial immunity. "In reviewing a Rule 12(b)(6) dismissal, this Court accepts all well pleaded averments as true and views them in the light most favorable to the plaintiff". *Mitchell v. McBryde*, 944 F.2d 229, 230 (5th Cir. 1991) (internal quotations, brackets, and

³ The district court stated that it would treat Young's earlier motion to dismiss as a motion for summary judgment.

citations omitted). "The dismissal will not be upheld unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Id.* (internal quotation marks and citation omitted).

Judicial immunity from civil actions extends to all judicial acts which are not performed in the clear absence of all jurisdiction, even when done maliciously or corruptly. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978); *Mitchell v. McBryde*, 944 F.2d at 230. Whether an act is a "judicial act" depends on the nature of the act and the expectations of the parties. *Stump*, 435 U.S. at 362. Judges are entitled to immunity if the acts complained of (1) were normal judicial functions that (2) occurred in their courtrooms or in "appropriate adjunct spaces such as the judge's chambers", (3) that were done in connection with a case pending before them, and (4) that arose directly out of a visit to the judge in her official capacity. *Adams v. McIlhany*, 764 F.2d 294, 297 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

Drew alleged that Judge Ott violated his constitutional rights by ruling against him. Needless to say, Judge Ott was acting in her judicial capacity when making those rulings, and thus is entitled to judicial immunity for those acts. *Mitchell*, 944 F.2d at 230. The fact that Drew alleged that Judge Ott acted in furtherance of a conspiracy is not sufficient to overcome that immunity. *Id.*

Drew's allegation that Judge Ott screamed at him in the courthouse parking lot was properly dismissed, because (obviously)

it does not state a claim of constitutional dimension. See, e.g., **McFadden v. Lucas**, 713 F.2d 143, 146 (5th Cir.), cert. denied, 464 U.S. 998 (1983) (state prisoner's allegation that guard used threatening language did not raise a constitutional violation).⁴

B.

Drew's contention that the district court erred by dismissing his claims against Bigham and Wilhelm is frivolous. "[A]n amended complaint ordinarily supersedes the original and renders it of no legal effect, unless the amended complaint specifically refers to or adopts the earlier pleading". **Boelens v. Redman Homes, Inc.**, 759 F.2d 504, 508 (5th Cir. 1985). Drew's conclusory Second Amended Complaint contains no allegations against Bigham and Wilhelm, and it neither refers to, nor purports to adopt, the original complaint or first amended complaint. Accordingly, the district court did not err in concluding that Drew failed to state a claim against these defendants.⁵

⁴ Drew abandoned on appeal his claim that Judge Ott harassed him by having the license numbers of his cars investigated. See **Cooper v. Sheriff, Lubbock County, Tex.**, 929 F.2d 1078, 1081 n.1 (5th Cir. 1991) (issues not raised on appeal are deemed abandoned).

⁵ As noted, the district court dismissed Drew's claims against Bigham and Wilhelm on the alternative ground that he had not served them with process within 120 days of filing the complaint, as required by Fed. R. Civ. P. 4(m) (providing for dismissal without prejudice unless plaintiff shows good cause for the failure to timely serve the summons and complaint). Because we hold that the claims against these defendants were properly dismissed with prejudice pursuant to Rule 12(b)(6), we need not address this alternate ruling.

C.

Finally, Drew contends that the district court erred by awarding summary judgment to Wannamaker, Dwyer, and Young. We review a summary judgment *de novo*, using the same standards that govern the district court's determination, viewing the evidence and any inferences in the light most favorable to the non-movant. **King v. Chide**, 974 F.2d 653, 655-56 (5th Cir. 1992).

A private attorney who conspires with state officials may be liable under § 1983, even though the state officials are immune. **Mills v. Criminal Dist. Court #3**, 837 F.2d 677, 679 (5th Cir. 1988). Drew testified at his deposition that the allegedly conspiratorial acts committed by Wannamaker consisted of asking for and receiving sanctions. Drew conceded at the deposition that Wannamaker acted only as an attorney representing a client in a civil suit. This evidence falls far short of that necessary to preclude summary judgment.

Drew did not mention Dr. Dwyer in his appellate brief and did not raise an issue regarding the grant of summary judgment in favor of Young, Dwyer's assistant. Any issues that could have been raised as to them are, therefore, deemed abandoned. **Cooper**, 929 F.2d at 1081 n.1.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.