

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10847
(Summary Calendar)

HENRY MITCHELL, Next of Friend for
William Devon Mitchell, a Minor o/b/o
William Devon Mitchell, ET AL.,

Plaintiffs-Appellants,

versus

CENTRAL BANK & TRUST, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(4:94-CV-449-Y)

(March 1, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges:

PER CURIAM:*

Henry and Donna Mitchell on, behalf of their son, William Devon Mitchell, appeal the judgment of the district court dismissing their complaint without prejudice because of a lack of subject matter jurisdiction. For the following reasons, the judgment of the district court is affirmed. Moreover, because the Mitchells have filed a frivolous appeal, sanctions are imposed.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

Henry and Donna Mitchell, on behalf of their minor child William Devon Mitchell, filed a complaint against Central Bank & Trust and bank officer Celena M. Michael, alleging that the defendants failed to comply with a federal subpoena issued in a prior case in violation of Fed. R. Civ. P. 45, 42 U.S.C. § 1983, and the Equal Protection and Due Process clauses. The Mitchells alleged that the district court had jurisdiction under Fed. R. Civ. P. 8 and 28 U.S.C. § 1331 because the bank charter was issued by "federal authority," the bank had been "designated by a Court for the placement of money thereby creating contract between bank and depositors," and the bank is "supervise[d] by Federal authority having supervision over banks and which is acting as custodian for a clearing corporation."

The Mitchells mailed a copy of the complaint and summons to the defendants and the defendants allegedly filed an acknowledgment of receipt of the summons and complaint with the court. In an amended complaint, the Mitchells also alleged that the district court had jurisdiction because the defendants had failed to comply with a federal subpoena. Because the defendants failed to file an answer to the original or amended complaints, the Mitchells moved for the clerk to enter a default judgment pursuant to Fed. R. Civ. P. 55(b)(1). The clerk entered the default judgment on August 9, 1994.

On August 16, 1994, the district court sua sponte determined that the Mitchells' complaint failed to invoke the jurisdiction of

the district court and ordered them to file a second amended complaint pleading a proper jurisdictional basis. In their second amended complaint the Mitchells again invoked §§ 1331, 1983, 1985, Rule 8, and the Equal Protection and Due Process clauses as the basis of the district court's jurisdiction. The district court dismissed without prejudice the complaint for lack of subject matter jurisdiction. The Mitchells filed a motion for reconsideration arguing that the district court should have entered a default judgment because the defendants had failed to respond to any of the complaints. The district court denied the motion because it was improper to enter a default judgment if the court did not have jurisdiction.

DISCUSSION

The plaintiff has the initial burden of establishing that the district court has jurisdiction over the claims asserted. Fed. R. Civ. P. 8(a)(1); Castillo v. Spiliada Maritime Corp., 937 F.2d 240, 244 (5th Cir. 1991). "Only if the federal statute or constitutional provision invoked is clearly immaterial and is solely invoked for the purpose of obtaining jurisdiction or if the claim is wholly unsubstantial and frivolous will subject matter jurisdiction be found lacking." Holland/Blue Streak v. Barthelemy, 849 F.2d 987, 989 (5th Cir. 1988). As our analysis will show, the Mitchells have not alleged a valid basis for federal jurisdiction, and the district court properly dismissed the complaint without prejudice.

Federal Rules of Civil Procedure

The Mitchells apparently invoke Rules 8¹ and 45² of the Federal Rules of Civil Procedure as a basis for the district court's jurisdiction because the basis of their claim is the defendants alleged failure to comply with a federal subpoena in a prior lawsuit. The Federal Rules of Civil Procedure implement the exercise of jurisdiction otherwise conferred on the district court, but do not provide an independent basis for jurisdiction. Port Drum Co. v. Umphrey, 852 F.2d 148, 149-50 (5th Cir. 1988); see Fed. R. Civ. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."). This is not a valid jurisdictional basis.

Section 1343

Section 1343 is the jurisdictional basis for civil rights cases under 42 U.S.C. §§ 1983, 1985. 28 U.S.C. § 1343. To obtain relief under § 1983, a plaintiff must prove that he was deprived of a right under the Constitution or laws of the U.S. and that the person depriving him of that right acted under color of state law. Resident Council of Allen Parkway Village v. U.S. Dep't of Housing & Urban Dev., 980 F.2d 1043, 1050 (5th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 75 (1993). Individuals are acting under color of state law "only when it can be said that the State is

¹Fed. R. Civ. P. 8 describes the general pleading requirements.

²Fed. R. Civ. P. 45 covers the issuance and enforcement of subpoenas.

responsible for the specific conduct of which the plaintiff complains." Daigle v. Opelousas Health Care, Inc., 774 F.2d 1344, 1349 (5th Cir. 1985) (internal quotations and citation omitted). The Mitchells have alleged no facts to establish that Central Bank & Trust and Michael are state actors; they cannot recover under § 1983.

To state a claim under § 1985 a plaintiff must make allegations of a conspiracy to interfere with civil rights. See 42 U.S.C. § 1985. The Mitchells have alleged no facts to establish that Central Bank & Trust and Michael conspired to deprive him of his civil rights, and therefore they do not have a § 1985 claim.

Equal Protection and Due Process

The Mitchells also argue that the district court had jurisdiction under the Equal Protection and Due Process clauses of the Fourteenth Amendment. The Fourteenth Amendment applies to acts of governmental entities, not to acts of private persons. See Rendell-Baker v. Kohn, 457 U.S. 830, 837, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). Central Bank & Trust and Michael are private actors and therefore the Equal Protection and Due Process clauses cannot provide a basis for jurisdiction.

Diversity Jurisdiction

The Mitchells also argue that this Court has diversity jurisdiction because the amount in controversy exceeds the jurisdictional amount. In order for diversity jurisdiction to lie, plaintiffs must be citizens of a different state than the defendants. See 18 U.S.C. 1332. The Mitchells, Michael, and

Central Bank & Trust are all citizens of Texas. Thus, there is no diversity jurisdiction.

Section 1331

The district court has jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A case "arises under" federal law if the basis of the claim is a federally created right or the validity of the plaintiff's state-law claim depends on the resolution of a substantial federal question. Chuska Energy v. Mobil Exploration & Producing North America, Inc., 854 F.2d 727, 730 (5th Cir. 1988). Besides the Due Process and Equal Protection claims discussed and dismissed above, the Mitchells have alleged no facts to support the position that their claims present a federal question.

Federally Chartered Bank

The Mitchells contend that the district court had jurisdiction because Central Bank & Trust is a federally chartered bank. However, this court has already held that being a federally chartered does not confer jurisdiction over the bank. Southern Electric Steel Co. v. First National Bank of Birmingham, 515 F.2d 1216, 1217 (5th Cir. 1975). Thus, this contention has no merit.

Default Judgment

The Mitchells argue that the district court should have entered a default judgment or should have withdrawn the entry of default issued by the clerk of court. The district court may set aside an entry of default for "good cause shown." See Fed. R. Civ.

P. 55(c). As discussed above, the district court properly determined sua sponte that it lacked subject matter jurisdiction over the Mitchells' complaint, see United States v. De Los Reyes, 842 F.2d 755, 757 (5th Cir. 1988) (federal courts have the obligation to examine sua sponte the basis of their jurisdiction), and the failure of Central Bank & Trust and Michael to answer the complaint cannot waive the jurisdictional requirement. See Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 288 n.6 (5th Cir. 1989). We find this contention to be without merit.

Motions

The Mitchells have filed motions for an ex parte hearing, to expedite the appeal, and for rehearing on the order granting appellees' motion for extension of time to file brief. These motions are denied as moot.

Sanctions

This court has the power to impose sanctions--including attorney's fees and single or double costs--when an appeal is "frivolous." See 28 U.S.C. §§ 1912, 1927; Fed. R. App. P. 38. "An appeal is frivolous if the result is obvious or the arguments are wholly without merit." Coghlan v. Starkey, 852 F.2d 806, 811 (5th Cir. 1988).

The Mitchells have previously filed four other federal lawsuits. These other lawsuits were all dismissed for lack of subject matter jurisdiction. See Mitchell v. Lucus, No. 92-1293 (5th Cir. Aug. 28, 1992)(unpublished); Mitchell v. Wagner, No. 91-7054 (5th Cir. Aug. 14, 1991)(unpublished); Mitchell v.

Metropolitan Life Ins. Co., No. 91-1441 (5th Cir. Oct. 28, 1991);
Mitchell v. Keith, No. 91-7172 (5th Cir. Apr. 22, 1992)
(unpublished).

CONCLUSION

Given the apparent propensity of the Mitchells to file frivolous petitions, no attempted filings by or on behalf of the Mitchells will be accepted by the Clerk of Court without express written authorization of an active judge of this court. Additionally, the Mitchells are hereby warned that any further attempts to submit for filing any item that is determined to be frivolous will result in more severe sanctions.

JUDGMENT AFFIRMED; MOTIONS DENIED; SANCTIONS IMPOSED.