

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11042
Conference Calendar

WILLIAM STEVE MCGREW,

Plaintiff-Appellant,

versus

SYLVIA M. RODRIGUEZ ET AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 7:94-CV-095-X
- - - - -

(January 26, 1995)

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS,
Circuit Judges.

PER CURIAM:*

William Steve McGrew challenges the district court's
dismissal of his complaint for lack of subject matter
jurisdiction.

A dismissal for lack of subject matter jurisdiction is
reviewed de novo. Hobbs v. Hawkins, 968 F.2d 471, 475 (5th Cir.
1992). The dismissal will not be affirmed "unless it appears
certain that the plaintiff[s] cannot prove any set of facts in
support of [their] claim which would entitle [them] to relief."

* 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that this opinion should not be published.

Id. (citation omitted). The plaintiff has the initial burden of establishing that the court has jurisdiction over the claims asserted. Fed. R. Civ. P. 8(a)(1).

"[F]ederal courts are courts of limited jurisdiction. They are empowered to hear only those cases that are within the constitutional grant of judicial power, and that have been entrusted to them by a jurisdictional grant enacted by Congress." Sarmiento v. Texas Bd. of Veterinary Medical Examiners By and through Avery, 939 F.2d 1242, 1245 (5th Cir. 1991). The lack of subject matter jurisdiction may not be waived and may be recognized by the court sua sponte. Id.; see Fed. R. Civ. P. 12(h)(3).

McGrew alleged in his complaint that the district court had federal question jurisdiction. However, McGrew's complaint did not even arguably allege a federal question or civil rights claim. Nor did McGrew allege that the district court had diversity jurisdiction.

The district court did not have subject matter jurisdiction over the claim concerning the state consumer protection act because it did not present a federal question. Further, the complaint reflected that the plaintiff and the defendants were all citizens of the State of Texas at the time that the complaint was filed. Thus, there was no basis for the district court's exercise of diversity jurisdiction. See 28 U.S.C. § 1332.

McGrew did not allege that Rodriguez was acting in concert with a state official in making the allegedly false report, and, thus, his complaint does not arguably state a 42 U.S.C. § 1983

violation. See Brummet v. Camble, 946 F.2d 1178, 1184-85 (5th Cir. 1991), cert. denied, 112 S. Ct. 2323 (1992). McGrew's state law claim of malicious prosecution "provides no colorable basis for the assertion of federal question jurisdiction" Sarmiento, 939 F.2d at 1246. In the absence of federal question or diversity jurisdiction, the district court properly dismissed the case for lack of subject matter jurisdiction. See Fed. R. Civ. P. 12(h)(e).

Because McGrew has failed to raise an issue of arguable merit, the appeal should be dismissed as frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983); 5th Cir. Rule 42.2.

APPEAL DISMISSED.