IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30013
(Summary Calendar)

ROMERO ROUSER,

Plaintiff-Appellant,

versus

TOMMY JOHNSON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 92-3716 I)

(September 9, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant Romero Rouser, proceeding pro se, appeals the dismissal of his civil rights claims filed under 42 U.S.C. § 1981 and his RICO claim filed under 18 U.S.C. § 1961. In

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

addition to general claims of error in the dismissal of those claims, Rouser asserts that the court abused its discretion in (1) denying his motions for default judgment, (2) granting defendants' motion to stay discovery and denying his motions for sanctions against the attorney for some of the defendants, and (3) denying his motions for recusal of the district judge and the magistrate judge. Additionally, Rouser has filed motions in this court to strike the appellees' briefs for failure to list interested parties or to include a Certificate of Service. Finding all of Rouser's claims and motions to be wholly without merit, we affirm all dismissals and denials of the district court, we deny Rouser's motion filed with this court, and we sanction Rouser for his grossly improper actions in this court.

I

FACTS AND PROCEEDINGS

A federal grand jury charged Rouser with conspiring to launder drug proceeds and money laundering in five counts of a 16-count indictment. In April 1991, Rouser pleaded guilty to one count of money laundering (Count XI), in violation of 18 U.S.C. § 1956(a)(1)(B)(i) & (2), and was sentenced to five years in prison. The facts of the offense are set forth in our opinion affirming Rouser's sentence. United States v. Smith, 91-3315, slip op. at 2-3 (5th Cir. Nov. 14, 1991) (unpublished; copy attached). Thereafter, Rouser filed a 28 U.S.C. § 2255 motion to vacate the conviction and sentence, alleging numerous grounds for relief. The district court denied the motion and we affirmed that denial.

United States v. Rouser, 93-3583 (5th Cir. April 13, 1994) (unpublished; copy attached).

While his § 2255 motion was pending in the district court, Romero commenced this action against the following defendants: DEA agents Tommy Johnson and Ronald Stark; FBI agent Ricky Hill; former United States Attorneys John Volz and Harry Rosenberg; Assistant United States Attorneys Michael McMahon, Jan Maselli Mann, John O. Braud, and Constantine D. Georges; IRS agent Phillip Reed; United States Probation Officers Charlotte P. Birdsong and Emile J. Fallo (collectively, the federal defendants); and his defense attorney, Martin Regan. Rouser alleged civil rights claims under "42 U.S.C. § 1981 et. [sic] seq." and a RICO claim under "18 U.S.C. § 1961 et. [sic] seq." He alleged that the federal defendants' actions during the course of his criminal investigation and prosecution violated his Fourth, Fifth, Sixth and Fourteenth Amendment rights.[1] Rouser also claimed that the federal defendants conspired with Regan to deprive Rouser of his Sixth Amendment right to effective assistance of counsel and his right to equal protection by coercing him to waive his right to conflict-free representation and by coercing him to plead guilty.

Rouser also asserted that all defendants acted in concert with Birdsong and Fallo to include a reference in Rouser's presentence report (PSR) to illegally seized weapons for the purpose of

[1]Because the civil rights claims are asserted against federal defendants, they will be construed as actions pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

depriving Rouser of his liberty. Finally, Rouser asserted that the Office of the United States Attorney for the Eastern District of Louisiana is an "enterprise" under the RICO statute. Rouser claimed that the office had conspired to take assets from the black community and had violated a number of criminal statutes during the course of his criminal prosecution. He sought five million dollars in damages from each defendant, an injunction against a forfeiture sale of his property, a declaratory judgment stating that the defendants' acts violated the Constitution, costs and attorney's fees, and punitive damages.

Thereafter, the federal defendants moved to dismiss or, in the alternative, for summary judgment, arguing, among other things that: (1) the complaint failed to allege sufficient facts to state a claim; (2) absolute quasi-judicial immunity barred the claims against prosecutors and probation officers; (3) the law enforcement officers were entitled to qualified immunity from suit; (4) as Rouser's claims challenged the legality of his confinement, he must first pursue a motion for post-conviction relief; (5) the complaint failed to state a RICO claim; and (6) Rouser's request to enjoin the forfeiture sale should be denied because it was a collateral attack on a final judgment.[2] Defendants attached a number of documents to their motion; they also sought sanctions against Rouser for filing a frivolous lawsuit.

[2]Pursuant to the plea agreement in the criminal case, Rouser agreed to forfeit a number of properties he had obtained with the proceeds of drug money. The government obtained a default judgment of forfeiture on some of the properties and a consent judgment of forfeiture on other properties.

Rouser opposed the federal defendants' motion, arguing that his allegations stated a claim for relief. He also sought sanctions against the attorney for the federal defendant for advancing frivolous defenses, moved for summary judgment against Regan, moved to recuse Magistrate Judge Alma Chasez for bias and prejudice, and requested a temporary restraining order to prevent a forfeiture sale.

In a lengthy memorandum, the magistrate judge recommended denying relief. She observed that, to the extent Rouser's complaint could be construed as a request for post-conviction relief, it should be dismissed without prejudice to enable him to seek such relief. In all other respects, the magistrate judge recommended granting the federal defendants' motion, for the reasons set forth in her memorandum. The magistrate judge, sua sponte, recommended dismissing the complaint against Regan because it contained only conclusional allegations rather than specific facts and failed to state a claim against him. Finally, notwithstanding the clearly frivolous and vexatious nature of Rouser's complaint, the magistrate judge recommended denying the federal defendants' request for sanctions against him.

In response, Rouser moved for the recusal of Magistrate Judge Chasez and District Judge Mentz, arguing that their actions and rulings in the case exhibited bias against him. Rouser objected to the magistrate judge's report and recommendation, accusing the magistrate judge of "screw[ing] this case up." The district court denied the recusal motions and adopted the magistrate judge's

report and recommendation. Rouser timely filed a notice of appeal.

II

ANALYSIS

A. Dismissals

Rouser argues that the district court erred by dismissing his claims against the federal defendants and against Regan. With regard to the federal defendants, Rouser maintains that his complaint set forth valid civil rights and RICO claims. Rouser further contends that the court erred by denying his motion for summary judgment as to Regan because Regan failed to submit a statement of material facts as to which there remained a genuine issue for trial, as required by local rules of court. These arguments are wholly without merit.

We review de novo a district court's dismissal of an action for failure to state a claim. See FDIC v. Ernst & Young, 967 F.2d 166, 169 (5th Cir. 1992). As here the district court relied on matters outside the pleadings to dispose of Rouser's claims, we review the order of dismissal as one granting defendants' motion for summary judgment. See Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 283 n.7 (5th Cir. 1993). We review de novo a grant of summary judgment. See Abbott v. Equity Group, 2 F.3d 613, 618-19 (5th Cir. 1993), cert. denied, 114 S.Ct. 1219 (1994). Summary judgment is proper if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Campbell v. Sonat Offshore Drilling, 979 F.2d 1115, 1118-19 (5th Cir. 1992).

The law governing claims of this type has changed since the district court disposed of Rouser's complaint. In Heck v. Humphrey, ____ U.S. ____, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383 (1994), the Supreme Court held that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

(footnote omitted). Heck requires courts to "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Id.

It matters not that Heck involved a state prisoner's § 1983 action and Rouser is a federal prisoner bringing Bivens and RICO claims; for we recently applied Heck to a similar claim by a federal prisoner. See Stephenson v. Reno, ___ F.3d ___ (5th Cir. Aug. 8, 1994). Like Rouser, the plaintiff in that case alleged that law enforcement officials violated his constitutional rights during a federal criminal investigation and prosecution, that his court-appointed counsel provided ineffective assistance, and that all the named defendants conspired to deprive him of his

constitutional rights and to commit RICO violations. We determined that the plaintiff's claims challenged the fact or duration of his confinement and necessarily called into question the constitutional validity of his conviction and confinement. Accordingly, we held that the plaintiff could not state a claim because his conviction had not been invalidated as required by Heck.

Stephenson is controlling and mandates dismissal of Rouser's civil rights claims against the federal defendants and Regan. A judgment in favor of Rouser on these claims would necessarily imply the invalidity of his conviction and sentence; yet Rouser's conviction has not been invalidated. In fact, as previously noted, we earlier denied his claim for relief under § 2255. Thus, under Heck and Stephenson, Rouser cannot maintain the civil rights actions against either the federal defendants or Regan. Even though Heck did not directly involve a civil RICO claim and the opinion in Stephenson is unclear as to whether the plaintiff there brought a separate RICO action, the reasoning of both cases supports the conclusion that Rouser's RICO action should be dismissed. Otherwise, henceforth plaintiffs like Rouser would simply couch their allegations under RICO in order to avoid the bar of Heck and Stephenson. We are satisfied to affirm the judgment of the district court dismissing Rouser's claims on this basis. See Sojourner T. v. Edwards, 974 F.2d 27, 30 (5th Cir. 1992), cert. denied, 113 S.Ct. 1414 (1993).

Moreover, even if we assume arguendo that Heck and Stephenson would not preclude Rouser's RICO claim, we conclude that the

magistrate judge correctly determined that Rouser's RICO allegations fail to state a claim. To state a civil RICO claim the plaintiff must allege "1) a person who engages in 2) a pattern of racketeering activity, 3) connected to the acquisition, establishment, conduct, or control of an enterprise." In re Burzynski, 989 F.2d 733, 741 (5th Cir. 1993) (internal quotations and citation omitted). To establish a "pattern of racketeering activity" a plaintiff must show "at least two predicate acts of racketeering that are related and amount to or pose a threat of continued criminal activity." Tel-Phonic Services, Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1139-40 (5th Cir. 1992). The plaintiff must plead the elements of the criminal offenses that comprise the predicate acts. Elliott v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989). Rouser alleged that defendants' acts violated a number of federal statutes, but only two were relevant offenses under the RICO statute, 18 U.S.C. § 1951 and 18 U.S.C. § 1503. See 18 U.S.C. § 1961(1)(B). Rouser failed to plead the elements of those offenses, however. Likewise, his claim is deficient because it fails to satisfy the continuity requirement. See Burzynski, 989 F.2d at 742-43. The alleged acts took place during the course of Rouser's criminal prosecution, which is now over, and do not threaten long-term criminal activity. Finally, while Rouser alleged in conclusional terms a massive RICO conspiracy, he failed to plead facts sufficient to establish the existence of an agreement among the defendants to commit at least two predicate acts. See Tel-Phonic, 975 F.2d at 1140-41. For these alternative

reasons too, his RICO claim was correctly dismissed.

B. Denial of Default Judgment

Rouser next argues that the district court erred by denying his motions for default judgment against the defendants for their failure to file timely answers. He insists that the federal defendants were properly served on November 23 and 24, 1992, and thus had 60 days from that date to file a response. As for Regan, Rouser contends that he was properly served on November 24, 1992, and had 20 days from that date to answer.

Federal Rule of Civil Procedure 55(a) provides that the clerk shall enter default when a party "has failed to plead or otherwise defend as provided by these rules." "Generally, the entry of default judgment is committed to the discretion of the district judge." Mason v. Lister, 562 F.2d 343, 345 (5th Cir. 1977). Courts typically refuse to enter default against the government for failure to plead. Id. Moreover, Rule 55(e) precludes entry of judgment by default against the government, or its officers or agencies, unless the plaintiff establishes a right to relief by evidence satisfactory to the court. Id.

The United States Marshal's Service attempted to serve the federal defendants at their offices on November 23 and 24, 1992. Between December 18 and 23, 1992, the attorney for the federal defendants filed a series of motions requesting the court to acknowledge that, under Dickens v. Lewis, 750 F.2d 1251 (5th Cir. 1984), they were entitled to 60 days to file an answer following proper service. The district court granted these motions. Then,

on February 22, 1993, the federal defendants filed a motion to stay discovery. The federal defendants asserted that the return of service forms failed to indicate that proper personal service and institutional service had been effected; thus, the court lacked jurisdiction. But, as Rouser had already made discovery requests of the federal defendants, they requested a stay of discovery, arguing that once Rouser effected proper service, they planned to assert immunity defenses. All this occurred well before Rouser filed his motion for default judgment on March 29, 1993. Then, on April 6, 1993, the federal defendants filed an answer and response to Rouser's motion, preserving therein the challenge to sufficiency of service of process. Rouser had requested that a hearing on his motion be held by April 14, 1993.

This sequence of events indicates that in fact the federal defendants were defending the action, that they did not willfully fail to answer, and that Rouser suffered no prejudice from the delay. Moreover, the district court ultimately determined that Rouser's claim could not withstand the federal defendants' motion for summary judgment. Therefore, the court did not abuse its discretion by denying Rouser's motion. See Mason, 562 F.2d at 345.

Likewise, with regard to the motion for default judgment against Regan, the record indicates that he moved for and obtained an extension of time in which to file an answer before Rouser moved for default judgment. Regan thereafter filed his answer within the period extended by the order. Accordingly, the district court did not abuse its discretion by denying the motion for default against

Regan.

C. Stay of Discovery

Rouser next argues that the district court erred by granting the federal defendants' motion to stay discovery. We review a district court's discovery orders for abuse of discretion. McKethan v. Texas Farm Bureau, 966 F.2d 734, 738 (5th Cir. 1993), cert. denied, 114 S.Ct. 694 (1994). We are here convinced that the district court did not abuse its discretion by granting the federal defendants' motion to stay discovery while they asserted immunity defenses. The federal defendants' motion indicates that they planned to assert defenses of qualified and absolute immunity. "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." Siegert v. Gilley, 500 U.S. 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). Thus, until the threshold immunity question is resolved, discovery generally should not be allowed. Id. at 231.

D. Sanctions

Rouser contends that the district court erred by denying his motion for sanctions against the attorney for the federal defendants for asserting frivolous defenses in the motion to dismiss. In his response to the federal defendants' motion to dismiss or for summary judgment, Rouser argued that the immunity defenses, the exhaustion defenses, and the statute of limitations defense were all frivolous because he had alleged a RICO claim

rather than a Bivens claim. We review a district court's decision to grant or deny sanctions under Fed. R. Civ. P. 11 for abuse of discretion. See Elliott v. The M/V LOIS B, 980 F.2d 1001, 1006 (5th Cir. 1993). We conclude that here the district court did not abuse its discretion in denying Rouser's request for sanctions. The defenses were valid and, as the magistrate judge observed, provided a basis for dismissing some or all of Rouser's complaints.

E. Recusals

Rouser argues that Judge Mentz and Magistrate Judge Chasez should have recused themselves because they were biased against him. In support of his claim, however, he points to nothing more than adverse rulings and unremarkable language in the magistrate judge's report and recommendation.

We review the denial of a motion for recusal for an abuse of discretion. United States v. MMR Corp., 954 F.2d 1040, 1044 (5th Cir. 1992). "[J]udicial rulings alone almost never constitute [a] valid basis for a bias or partiality motion." Liteky v. United States, ___ U.S. ___, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994). Recusal may be required "where pervasive bias or prejudice manifests itself only through judicial conduct." MMR Corp., 954 F.2d at 1045. Rouser has failed to make such a showing. In fact, in an act of virtual charity, the magistrate judge declined to grant the federal defendants' motion for sanctions against Rouser despite the patently frivolous and vexatious nature of this lawsuit. There is nothing in the record or in Rouser's allegations to suggest the slightest possibility that either the district court

or the magistrate judge committed an abuse of discretion by denying Rouser's motions for recusal.

F. Motion to Strike

Rouser filed a motion in this court to strike the appellees' briefs on two grounds: (1) neither brief contains a list of interested parties as required by Fifth Circuit Rule 28.2.1; and (2) neither brief contains a certificate of service as required by Fed. R. App. P. 28 and Fifth Circuit Rule 28.2.1. Rouser correctly points out that neither Regan nor the federal defendants have filed a certificate of interested parties; however, Rule 28.2.1 exempts governmental parties, such as the federal defendants, from filing that certificate. Thus, the motion to strike the federal defendants' brief is without merit and is therefore denied. Regan, on the other hand, should have filed the certificate as required by the rule, but his failure to do so does not justify striking his brief at this stage of the proceedings.

Rouser cites the incorrect rule as the second ground for his motion to strike. Federal Rule of Appellate Procedure 25(d) requires papers presented for filing to contain a proof of service form. Both the federal defendants' brief and Regan's brief contain such forms. Rouser's motion to strike is therefore denied.

The federal defendants have requested permission to file a supplemental brief to address matters raised for the first time in Rouser's reply brief. That reply brief raises two issues not raised in the opening brief: whether the stay of discovery and cancellation of oral arguments concerning discovery issues was

proper; and whether the federal defendants abandoned defenses to Rouser's claims under "42 U.S.C. § 1981 et. [sic] seq." by not addressing the claims in their appellate brief. We discern no need, however, for supplemental briefing. To the extent Rouser raises new claims in his reply brief, we need notSQand therefore do notSQconsider them. See United States v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989).

IV

APPELLATE SANCTIONS

We take note, sua sponte, that the suits filed, claims made, defendants named, and motions proffered long ago by Rouser surpassed "frivolous and without merit." They are totally irresponsible, groundless, vexatious, contumacious, dilatory, harassing, andSQabove allSQcynically abusive of the entire civil justice system of the United States. Persons, like Rouser, who so stridently and contemptuously seek to use and abuse the system for no valid purpose but rather to assuage unquenchable desires to cause expense, damage, nuisance and waste of time and resources of others should not, and therefore shall not, enjoy access to the very system thus misused and abused. Consequently, the Clerk of this court and the clerks of all federal courts within the Fifth Judicial Circuit shall henceforth refuse to accept for filing any complaints, motions or other pleadings and documents of any nature whatsoever by or on behalf of Rouser even remotely related to, connected with or arising from the criminal or civil matters comprising the litigation addressed or referred to in this opinion

or in any civil or criminal litigation within this circuit in which Rouser has been involved previously. Neither shall any of said clerks of court accept unrelated filings of any nature whatsoever by or on behalf of Rouser without first obtaining the express written consent of a judge of this court. Finally, Rouser is sternly cautioned that any future efforts by him or on his behalf to extend, continue, revive or maintain this case or any aspect hereof shall expose him to the full panoply of sanctions at the disposal of this court.

For the reasons set forth above, all judgments and orders of the district court are AFFIRMED, all motions filed with this court are DENIED, and the foregoing sanctions are imposed.