

IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-50514
Summary Calendar

BOBBY MICHAEL DENNIS,
Plaintiff-Appellant,
versus
DR. GWEN OWEN, UNIT PHYSICIAN, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CA-413)

(January 10, 1995)
Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Bobby Michael Dennis filed a civil rights complaint under 42 U.S.C. § 1983 alleging that prison officials conspired together to bring a false disciplinary action against him, were deliberately indifferent to his medical needs, and retaliated against him for his legal activities. The magistrate judge reviewed Dennis's complaint and ordered him to amend it to state specific facts to support his allegations. Dennis filed an amended complaint.

Following the amendment, the magistrate judge ordered Dennis to submit a more definite statement of the facts by answering

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

thirteen specific questions. Dennis filed responses to the questions. The magistrate judge subsequently ordered Dennis to submit another more definite statement of the facts by answering five specific questions. Dennis did not answer these questions, but filed a motion for continuance of his case pending a full criminal investigation at his request by the U.S. Department of Justice, Federal Bureau of Investigation into conspiracies related to his suit.

The district court construed Dennis's motion for continuance as a request for voluntary dismissal under Fed. R. Civ. P. 41(a). The district court granted the motion and dismissed the case without prejudice. Additionally, the district court sanctioned Dennis \$100 for his contumacious conduct in alleging that the Court was conspiring against him. The district court found that

[a] review of this action as well as other actions filed by Plaintiff reveal that this is not the first time Plaintiff has impugned the integrity of this Court by alleging that adverse rulings are the result of racial prejudice, conspiracy with TDCJ [Texas Department of Criminal Justice] officials, or other reprehensible conduct. At no time, however, has Plaintiff ever substantiated these conclusory allegations with any specific facts. Such behavior cannot and will not be tolerated. In light of Plaintiff's propensity to abuse the members of this Court with unsubstantiated allegations of criminal or otherwise unlawful activities, the undersigned hereby [orders] that Plaintiff be and hereby is sanctioned \$100 for his contumacious conduct, and his abuse of the judicial system and the members of this Court. (Footnote omitted).

The district court directed the clerk of court not to accept any pleadings from Dennis until the sanctions were paid. Dennis timely filed a notice of appeal.

DISCUSSION

Dennis argues that the district court abused its discretion in construing his motion for continuance as a motion to dismiss under Fed. R. Civ. P. 41(a) and in imposing a \$100 sanction. A reading of Dennis's request for continuance reveals that it contains nothing which would allow a court to construe it as a motion to dismiss.

Further, the order of the district court shows that the interpretation of this motion as a request for voluntary dismissal was, at least in part, motivated by Dennis's accusation that members of the district court were involved in a criminal conspiracy. In imposing sanctions, the district court characterized these accusations as "contumacious conduct." The action of the district court in dismissing Dennis's suit without prejudice and imposing a \$100 sanction is more akin to an involuntary dismissal under Fed. R. Civ. P. 41(b) than it is to a voluntary dismissal under Rule 41(a). The district court's order should be reviewed accordingly.

The question presented on appeal is whether the district court abused its discretion in dismissing without prejudice Dennis's claims because of his accusations against the district court. We conclude that it did. Although the district court dismissed the case without prejudice, given the \$100 sanction imposed and

Dennis's status as a pauper, the case would almost certainly be time-barred under the Texas two-year statute of limitations by the time Dennis was able to refile it. See Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989). "Where further litigation of [a] claim will be time-barred, a dismissal without prejudice is no less severe a sanction than a dismissal with prejudice, and the same standard of review is used." Berry v. CIGNA/RSI-CIGNA, 975 F.2d 1188, 1191 (5th Cir. 1992) (internal quotations and citation omitted). This Court views "dismissal with prejudice for failure to prosecute [as] an extreme sanction which is to be used only when the plaintiff's conduct has threatened the integrity of the judicial process [in a way which] leave[s] the court no choice but to deny that plaintiff its benefits.'" McNeal v. Papasan, 842 F.2d 787, 790 (5th Cir. 1988) (quoting Rogers v. Kroger Co., 669 F.2d 317, 321 (5th Cir. 1982)). This Court will find an abuse of discretion unless "there is a clear record of delay or contumacious conduct by the plaintiff . . . the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile." Berry, 975 F.2d at 1191 (footnote omitted).

In this case, it is not altogether clear from a reading of defendant's "request for continuance," taken alone, that Dennis actually was accusing the district court of wrongdoing.¹ He merely

¹Dennis' brief on appeal does contain conclusory allegations of bias, prejudice, or wrongdoing on the part of the district court.

asked the court for a continuance of his case pending an investigation by the Department of Justice. The request for continuance does not indicate the target(s) of the alleged investigation. Taken alone, this does not seem to constitute a clear record of contumacious conduct. However, as authorized by FED. R. EVID. 201, the district judge took judicial notice of the fact that defendant has been a "frequent filer" of various complaints and motions in the district court urging the recusal of judges, alleging all manner of racial prejudice, conspiracy, and reprehensible conduct on the part of the Court, etc.. In fact, the district court listed these cases in a footnote of his order and noted that defendant had been repeatedly warned about the possible imposition of sanctions in the future. Thus, there is a cumulative record of contumacious conduct on the part of this defendant.

The district court, however, did not determine that a sanction less severe than dismissal would have been ineffective. The district court imposed a \$100 sanction on Dennis in the same order that dismissed his suit. The district court did not allow any time to determine whether the imposition of a lesser sanction would have been futile. As a result, the district court abused its discretion in dismissing Dennis's claim. Thus, we vacate the dismissal and remand the case for further proceedings.

With respect to the imposition of the \$100 sanction, it was presumably imposed under Fed. R. Civ. P. 11. A district court's imposition of sanctions under Fed. R. Civ. P. 11 is also reviewed under the abuse-of-discretion standard. Mendoza v. Lynaugh, 989

F.2d. 191, 195 (5th Cir. 1993). The district court should impose the least-severe sanction adequate to curb litigant's abusive tendencies. Id. at 196. This Court has noted "the most stringent sanction" against a pro se litigant is a requirement that the litigant must obtain judicial permission to file further complaints. Id. The sanctions in this case are more severe than the ordinary judicial-permission sanction. The monetary sanction of \$100, with its provision that the clerk of court may accept no filings from Dennis until he pays the monetary sanction, effectively forecloses Dennis from litigating in the district court. The monetary sanction is not accompanied by a provision allowing the clerk's office to accept Dennis's pleadings without payment of the sanction if he obtains judicial permission. Dennis therefore may not pursue any lawsuit until he pays the monetary sanction. As Dennis is proceeding in forma pauperis, it is unlikely that he will obtain \$100 with which to pay the sanction. Although, it is beyond question that the district court could have sanctioned Dennis for a violation of Fed. R. Civ. P. 11(b)(3), the \$100 sanction is excessive and an abuse of discretion.² We VACATE the district court's imposition of the \$100 sanction and REMAND for consideration of an appropriate sanction.

² In Mendoza, the Court discussed the comparative severity of sanctions. Mendoza, 989 F.2d at 195-97.