IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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Nos. 94-50605 & 94-50666
Summary Calendar

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JEFFREY BALAWAJDER,

Plaintiff-Appellant,

versus

DEBORAH A. PARKER, ET AL.,

Defendants-Appellees.

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Appeals from the United States District Court for the
Western District of Texas
(W-93-CA-277)

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(May 24, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

PER CURIAM:

Plaintiff-appellant Jeffrey Balawajder (Balawajder), a Texas Department of Criminal Justice (TDCJ) inmate, filed this *pro se* and *in forma pauperis* civil rights suit against seventeen defendants alleging assorted violations of his constitutional rights. The district court assigned the case to Magistrate Judge Dennis Green

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

"for disposition of all non-dispositive pre-trial matters and recommendations regarding case dispositive motions."

Thereafter, on October 20, 1993, the magistrate judge conducted a hearing under *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). During that hearing, the magistrate judge voiced concern that some of Balawajder's claims might be barred by the pertinent Texas statute of limitations. Accordingly, the magistrate judge on January 12, 1994, entered an order directing Balawajder to submit a more definite statement of his claims and show cause why those claims would not be time-barred by the appropriate statute of limitations. The order required Balawajder's response within thirty days of its entry and warned, in bold print and capital letters: "FAILURE TO COMPLY WITH THIS ORDER IN A TIMELY MANNER SHALL RESULT IN A RECOMMENDATION THAT THIS ACTION BE DISMISSED." Balawajder never even attempted to comply with this order.

Rather than complying with the magistrate judge's order, Balawajder on February 11, 1994, filed a "motion, affidavit, and brief for recusal of magistrate for bribery and animosity" dated February 8, 1994. In his affidavit, sworn under penalty of perjury, Balawajder stated he had observed Green being "bribed by TCDCJID personnel with special foods that were misappropriated, converted or stolen from State of Texas property[.]" Balawajder stated that he believed this "BRIBERY FESTIVAL was made to illegally influence GREEN's decision in my lawsuit and other lawsuits filed by TDCJID prisoners." In his motion, Balawajder referred to the magistrate judge as "cruel, evil and mean to

prisoners[.]"

In light of the seriousness of Balawajder's accusations, the magistrate judge on June 21, 1994, ordered the case transferred to the district court, and the court on July 22, 1994, held a hearing on the recusal motion. At the hearing, Balawajder testified that he had observed preparations for a "special meal" but that he did not actually see the magistrate judge or his staff eating that meal. Balawajder's own witness, Merwin Nellis, testified that, to his knowledge, neither the magistrate judge nor his staff had ever been served special meals. He further testified that the special meal in question had been prepared for a group of visiting directors from other prisons. Nellis also testified that he had informed Balawajder of the circumstances surrounding that meal.

After examining the record, the district court concluded that Balawajder had brought the charges against the magistrate judge in retaliation for the magistrate judge's order that Balawajder file a more definite statement. The court therefore determined "that this case should be dismissed with prejudice as a sanction due to the vexatious and harassing nature of Plaintiff's charges." The court also ordered the district court clerk not to accept any further pleadings from Balawajder without prior approval of a judge or magistrate judge.

Balawajder contends that the district court abused its discretion in dismissing his suit with prejudice. He argues that his conduct in filing the motion to recuse the magistrate judge was not contumacious. In the alternative, he contends that, even assuming *arguendo* that a sanction was in order, the court should

have imposed a less stringent sanction than dismissal.[1]

A district court may dismiss an action *sua sponte* for failure to prosecute or to comply with any order of the court. Fed. R. Civ. P. 41(b); *McCullough v. Lynaugh*, 835 F.2d 1126, 1127 (5th Cir. 1988). A reviewing court will reverse the district court only on finding an abuse of discretion. *McCullough*, 835 F.2d at 1127.

A reviewing court will ordinarily affirm a dismissal with prejudice only "(1) upon a showing of 'a clear record of delay *or* contumacious conduct by the plaintiff' and (2) when 'lesser sanctions would not serve the best interests of justice.'" *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154, 1159 (5th Cir. 1985) (citations omitted). "[I]t is not a party's negligencesQregardless of how careless, inconsiderate, or understandably exasperatingsQthat makes conduct contumacious; instead it is the stubborn resistance to authority which justifies a dismissal with prejudice." *McNeal v. Papasan*, 842 F.2d 787, 792 (5th Cir. 1988) (internal quotation and citation omitted). Dismissal with prejudice is "[t]he ultimate sanction for the litigant," and "should be imposed only after full consideration of the likely effectiveness of less-stringent measures." *Hornbuckle v. Arco Oil & Gas Co.*, 732 F.2d 1233, 1237 (5th Cir. 1984), *cert. denied*, 475 U.S. 1016 (1986).

There is a clear record of contumacious conduct here. The magistrate judge, faced with Balawajder's rambling list of accusations against multiple defendants, ordered him to submit a

[1] Balawajder does not challenge the sanction requiring that he obtain judicial permission to file future complaints.

more definite statement of his claims and show cause why those claims would not be time-barred by the appropriate statute of limitations. Although expressly warned that failure to comply in a timely fashion would result in a recommendation of dismissal, Balawajder chose to ignore the court's order. Rather, he filed a totally baseless, bad faith motion to recuse the magistrate judge for "bribery and animosity." In this abusive document, Balawajder referred to the magistrate judge as "cruel and evil" and accused him of, among other things, engaging in a "bribery festival."

The magistrate judge and the district court did not act rashly in this matter, but gave Balawajder the opportunity to explain his allegations at the hearing on the motion to recuse. This resulted in an expenditure of a significant amount of the district court's time and resources. In dismissing this lawsuit with prejudice, the district court also pointed to Balawajder's involvement in other frivolous lawsuits and concluded that "lesser sanctions have not been effective in halting [his] recreational litigation and attempted manipulation of the federal judiciary.[2] Under these circumstances evincing "delay or contumacious conduct," the only

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[2] Balawajder is no stranger to this Court. In 1992, this Court ordered that sanctions of $50 be imposed against him for filing a frivolous appeal after having been warned by the district court against future frivolous lawsuits. *See Balawajder v. Collins*, No. 91-6028, slip op. at 2 (5th Cir. Feb. 21, 1992) (unpublished). Balawajder alleged at that time that he had filed eighty cases over a six-year period. *Id.,* slip op. at 1. In 1994, this Court affirmed the dismissal, with prejudice, under Rule 41(b), of another suit brought by Balawajder. *Balawajder v. Carpenter*, No. 93-1849, slip op. at 3 (5th Cir. May 18, 1994) (unpublished). In that case, Balawajder ignored district court orders, as well as a warning from this Court not to use his lawsuit to "harass or vex the courts." *Id*.

reasonable alternative available to the court was dismissal, with prejudice.[3]

AFFIRMED

[3] Balawajder continues to demonstrate his utter contempt for the federal judiciary in his brief. He makes insulting references to the district judge, calling him "malicious, biased, prejudice [sic], and vindictive" and accusing him of acting "in bad faith." He insists that "[t]he facts is [sic] that Green accepted a bribe, yes a small bribe, but a bribe nonetheless." Although a *pro se* appellant's pleadings are entitled to a liberal construction, "[t]his court simply will not allow liberal pleading rules and pro se practice to be a vehicle for abusive documents." *Theriault v. Silber*, 579 F.2d 301, 303 (5th Cir. 1978), *cert. denied*, 440 U.S. 917 (1979). "Any complaint the appellant has about the conduct of the trial judge can be adequately addressed in a civil manner in appellant's brief." *Id*.