UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF VIRGINIA

Roanoke Division

WESLEY C. SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 7:07-CV-00117
	)	
CHERI SMITH, et. al.,	)	
	)	
Defendants.	)	

SUPPLEMENTAL MEMORANDUM OF DEFENDANT JUDGES LON FARRIS, LEROY MILLETTE, JR., ROSSIE ALSTON, JR., WILLIAM HAMBLEN, RICHARD POTTER and H. LEE CHITWOOD and PRINCE WILLIAM CIRCUIT COURT IN RESPONSE TO PLAINTIFF'S SUPPLEMENTAL SUBMISSIONS

Defendant Judges Lon Farris, Leroy Millette, Jr., Rossie Alston, Jr., William Hamblen, Richard Potter and H. Lee Chitwood ("the Judges") and Prince William Circuit Court ("the Circuit Court") submit this Supplemental Memorandum in Response to plaintiff's supplemental submissions, which defendants understand this Court authorized so as to permit plaintiff to specify his factual allegations. Plaintiff's submissions in response to this Court's Order of May 15, 2007, while long on additional personal opinion couched as legal argument, still fails to present adequate factual allegations to allow this case to go forward. Instead, plaintiff repeatedly asks this Court simply to set new precedent.

Defendants point this Court to the fairly recent case of *Bell Atlantic Corp. v. Twombly* (2007 U.S. LEXIS 5901), wherein the United States Supreme Court made 12(b)(6) motions more "user friendly" for defendants. Specifically, the Court rejected the old standard (that essentially allowed a Motion to Dismiss to be granted only when it appeared certain that the plaintiff could not prove any set of facts in support of his claim entitling him to relief) in favor of a "plausibility" standard. In other words, a plaintiff now must put in the complaint sufficient factual allegations to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.

Defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). A Motion to Dismiss tests the sufficiency of the complaint. Legal conclusions couched as factual allegations need not be taken as true. *Estate Construction Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 217-18 (4th Cir. 1994); *Assa' Ad-Faltas v. Commonwealth*, 738 F. Supp. 982, 985 (E.D. Va. 1989) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); see also *District 28, United Mine Workers of Am., Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085 (4th Cir. 1979). Neither must the Court accept as true allegations that are merely conclusory, unwarranted deductions of fact or unreasonable inferences. *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002). The presence of a few conclusory legal terms does not insulate a complaint from dismissal where the facts alleged cannot support the claim. See *Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir. 2001). Dismissal is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense. See *Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996). Plaintiff believes defendants demonstrated a particular bias when it came to his cases.

THIS COURT LACKS JURISDICTION UNDER THE DOMESTIC RELATIONS EXCEPTION

In *Ankenbrandt v. Richards*, 504 U.S. 689, 112 S. Ct. 2206, 119 L. Ed. 2d 468 (1992), the Supreme Court reaffirmed adherence to the domestic relations exception to federal court jurisdiction. As a result, federal courts abstain from exercising jurisdiction over claims involving "the issuance of a divorce, alimony, or child custody decree...." *Id.*, 504 U.S at 703. In this case, despite conclusory allegations to the contrary, plaintiff clearly challenges the Judges' orders from state court and seeks to have this Court nullify them and declare them void. His prayer for relief specifically asks, among other things, that this Court require that the Judges grant him additional parenting time and enjoin the Judges from applying law that prohibits him from exercising custody of his son. The child custody issues that underlie this entire suit genuinely go the core of the domestic relations exception.

THE JUDGES ARE ENTITLED TO JUDICIAL AND SOVEREIGN IMMUNITY

The Judges are entitled to absolute immunity from all claims based on the doctrine of judicial immunity, which shields a judge from suit even when a judge is accused of having acted maliciously or corruptly in the performance of judicial acts. *Stump v. Sparkman*, 435 U.S. 349, 356-357 (1978). Judges enjoy absolute immunity for acts in their judicial capacities. *Dennis v. Sparks*, 449 U.S. 24, 26-27 (1980). The doctrine grants judges immunity from suit, not just damages, and allegations of bad faith or malice are insufficient to defeat its protections. See *Mireles v. Waco*, 502 U.S. 9, 11 (1991).

In Virginia, a circuit court may speak only through written orders. *Berean Law Group, P.C. v. Cox*, 259 Va. 622, 528 S.E.2d 108 (2000). The Judges were acting at all times relevant in a judicial capacity. Plaintiff pleads why he believes the Judges issued certain rulings. Plaintiff has not alleged acts that deprive the Judges of judicial immunity.

THE FEDERAL COURT IS PRECLUDED FROM HEARING THIS CASE UNDER THE YOUNGER ABSTENTION DOCTRINE

The Court should abstain from hearing this case under the *Younger* abstention doctrine, which precludes federal courts from hearing cases regarding concurrent state court proceedings. See *Younger v. Harris,* 401 U.S. 37 (1971). State remedies are available to address the allegations in plaintiff's pleading. If this Court does not abstain from hearing this case, it will open federal courts to hear complaints about state proceedings before they are reviewed on appeal in the state court system.

Believing there is particular bias when it comes to his cases, plaintiff argues there is no "practical" state remedy, yet, as a matter of law, it is well-settled federal jurisprudence that allegations of state trial court error involving matters such as due process, jurisdiction and service of process must go through the state appellate proceedings, then to the United States Supreme Court, not to a federal district court.

THE FEDERAL COURT IS PRECLUDED FROM HEARING THIS CASE UNDER THE ELEVENTH AMENDMENT

Plaintiff's complaint also is barred by the Eleventh Amendment, which prohibits suits in federal court against states and state agencies. The Supreme Court of the United States has explained the judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent - not

one brought by citizens of another state because of the Eleventh Amendment and not one brought by its own citizens because of the rule of which the Amendment is an exemplification. *Ex Parte New York*, 256 U.S. 490, 497 (1921) (citations omitted); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

A state is not a person. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). To the extent suit is against the Judges in their official capacity or against the Circuit Court, this Court is without subject matter jurisdiction over such an action. It is well settled that only a person can be held liable for depriving another of rights. The state official acting in an official capacity or the Circuit Court is not a person. *Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Will* at 70.

PLAINTIFF DID NOT ADEQUATELY ALLEGE A DUE PROCESS CLAIM

42 U.S.C. § 1983 protects only against violations of the United States Constitution or federal statutory rights. *Baker v. McCollan*, 443 U.S. 137, 146 (1979). Even assuming a protected liberty interest at stake in this case, all that procedural due process requires is opportunity to be heard. *Matthews v. Eldridge*, 424 U.S. 319 (1972). Plaintiff's mere allegations standing alone are insufficient to state a claim as a matter of law.

Not only must a plaintiff show grossly arbitrary and capricious governmental action to support a substantive due process claim, the conduct alleged must rise to such a level that it shocks the conscience. *Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir. 1990), *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980).

With regard to the facial challenge to the Commonwealth's statutory scheme, particularly with respect to any jury trial "right," state court proceedings are not governed by the Seventh Amendment of the United States Constitution but, rather, by corresponding provisions in state constitutions. *Boyd v. Bulala*, 672 F. Supp. 915 (W.D. Va. 1987). The Constitution of Virginia does not guarantee a right to a jury trial in this case.

PLAINTIFF DID NOT ADEQUATELY ALLEGE AN EQUAL PROTECTION CLAIM

Plaintiff must show that class-based, discriminatory animus lay behind defendants' acts. Here, the complaint fails to allege that plaintiff, as a divorced father, is a member of a class that would entitle him to protection. Accordingly, his equal protection claim is without merit and must fail.

PLAINTIFF DID NOT ADEQUATELY ALLEGE A CONSPIRACY CLAIM

Plaintiff alleges only that defendants conspired to prevent him from exercising his civil rights. The complaint fails to state a claim.

42 U.S.C. § 1985 requires plaintiff to allege facts showing defendants shared unity of purpose or common design to injure him. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). For example, where a plaintiff failed to allege who, when, how or where individuals conspired to deprive him of rights, his complaint failed to state a claim. See *Thompson v. Wise General Hosp.*, 707 F. Supp. 849 (W.D. Va. 1989), aff'd, 896 F.2d 547 (4th Cir. 1990), cert. denied, 498 U.S. 846 (1990). Here, the complaint alleges no specific facts setting forth the role each defendant supposedly

played, and it pinpoints no overt acts by defendants indicating a conspiracy. The complaint fails to allege when, how or where defendants conspired to violate plaintiff's rights.

To avoid evisceration of the purposes of immunity, courts require plaintiffs alleging unlawful intent in conspiracy claims to plead specific facts in a non-conclusory fashion to survive a motion to dismiss. *Simmons v. Poe*, 47 F.3d 1370, 1377 (4th Cir. 1995). Because of the high threshold that a plaintiff must meet to establish a prima facie case, courts often grant motions of dismissal. *Id.* ("This Court . . . has rarely, if ever, found that a plaintiff has set forth sufficient facts to establish a section 1985 conspiracy, such that the claim can withstand a summary judgment motion. Indeed, we have specifically rejected 1985 claims whenever the purported conspiracy is alleged in a merely conclusory manner, in the absence of concrete supporting facts."). For all these reasons, the complaint fails to state a claim for conspiracy.

PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE OR DECLARATORY RELIEF

The availability of injunctive relief against state officers is limited to prospective relief. Plaintiff does not seek prospective relief despite his conclusory allegations to the contrary. Plaintiff, rather, seeks remedial relief for prior acts allegedly depriving him of constitutional rights, such as Judge Farris' order of September 23, 2004, which plaintiff did not appeal though he believed it abridged the First Amendment (A reading of that order clarifies that it was not a gag order regarding plaintiff's ability to criticize the Judges but rather aimed at keeping plaintiff from defaming the opposing litigant, his former wife. Any belief by plaintiff that the Judges punished him through court rulings

for publishing material on his website is without any factual nexus, is wholly conclusory and completely is his mere personal conjectural and speculative opinion). Again, this would be remedial, not prospective in nature, and such relief is unavailable.

With regard to Judges, the immunity from injunctive relief is even stronger. In violation of 42 U.S.C. § 1983, plaintiff seeks injunctive relief against the Judges. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, *injunctive relief shall not be granted* unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (Emphasis added).

Because plaintiff's claims against the Judges are based on acts in their judicial capacity, § 1983 by its very terms precludes the claims. See *Willner v. Frey*, 421 F. Supp.2d 913, 926, n.18 (E.D. Va. 2006)(noting that 1996 amendments to § 1983 preclude even prospective injunctive relief against judicial officers).

Plaintiff seeks declaratory relief. There is no actual controversy to justify declaratory relief. In addition, the granting of declaratory relief is discretionary in nature. *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Continental Cas. Co., v. Fuscardo*, 35 F.3d 963, 966 (4th Cir. 1994); *Richmond Tenants Organization v. Kemp*, 956 F.2d 1300 (4th Cir. 1992). Federal courts should be particularly circumspect in granting relief against a state, must be cognizant of comity and reluctant to intervene in internal operations of state agencies (see *Rizzo v. Goode*, 423 U.S. 362, 378-90 (1976)) and should intervene only where there is a clear need for extraordinary remedy. *Id.*; see *Fuscardo*, 35 F.3d at 966. Declaratory relief would serve no purpose in this case and would conflict with unquestionably applicable mandates of federalism and comity.

CONCLUSION

WHEREFORE, for the reasons set forth above, Defendant Judges Lon Farris, Leroy Millette, Jr., Rossie Alston, Jr., William Hamblen, Richard Potter and H. Lee Chitwood and Prince William Circuit Court respectfully request that this Court grant the Motion to Dismiss the complaint with prejudice and grant any other relief deemed appropriate.

LON FARRIS
LEROY MILLETTE, JR,
ROSSIE ALSTON, JR,
WILLIAM HAMBLEN
RICHARD POTTER
PRINCE WILLIAM CIRCUIT COURT
H. LEE CHITWOOD

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system this 1st day of June, 2007, and mailed a copy to:

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By: s/ James V. Ingold