UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

WESLEY C. SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:07-CV-1002
	)	
GAYLORD L. FINCH, JR., et. al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS, JUDGE GAYLORD L. FINCH, JR., OFFICE OF PUBLIC DEFENDER and DAWN BUTORAC

Defendants, Gaylord L. Finch, Jr. ("Judge Finch"), Office of Public Defender ("OPD") and Dawn Butorac ("Butorac"), submit this Memorandum in Support of their Motion to Dismiss.

The nature of his action is difficult to discern. Construing the complaint liberally, see, e.g., *Ransom v. Danzig*, 69 F. Supp. 2d 779, 787 (E.D. Va. 1999), plaintiff is attempting to state a claim for violation of protected rights. Assuming this to be the case, defendants move to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Defendants point this Court to the fairly recent case of *Bell Atlantic Corp. v. Twombly* 127 S.Ct. 1955, 1964-1965 (2007), 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. Plaintiff is required to provide more than labels and conclusions, and formulaic recitation of elements of a cause of action will not do. *Id.* A plaintiff now must present sufficient facts to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true. A constitutional tort is not described by plaintiff's bald allegations.

When a defendant moves to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1), the burden is on plaintiff, as the party asserting jurisdiction, to prove that federal jurisdiction is proper. *White v. CMA Const. Co., Inc.*, 947 F. Supp. 231, 233 (E.D. Va. 1996). Defendants may assert affirmative defenses to be resolved on the merits under Fed. R. Civ. P. 12(b)(6) where the affirmative defenses are apparent from a fair reading of the complaint. 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 herein failed to state a claim entitling him to relief. Nowhere in his complaint does plaintiff inform this Court how defendants' alleged acts, if they occurred at all, are a violation of his constitutional rights. Plaintiff believes defendants demonstrated a particular bias when it came to his cases. Beyond conclusory statements, nothing is said about how defendants' conduct violated plaintiff's constitutional rights. Plaintiff failed to allege facts necessary to support his federal claims. Defendants also enjoy sovereign immunity. This Court does not have personal jurisdiction over these defendants. Moreover, this Court does not have subject matter jurisdiction by virtue of the Rooker-Feldman doctrine.

JUDGE FINCH IS ENTITLED TO JUDICIAL AND SOVEREIGN IMMUNITY

The doctrine of judicial immunity is expansive. Judge Finch is entitled to absolute immunity from all claims based on the doctrine of judicial immunity, which must be construed broadly and shields judges from suit even when a judge is accused of having acted maliciously or corruptly or in excess of jurisdiction. *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 *Bradley v. Fisher*, 80 U.S. 335, 349 (1872), the Supreme Court held that the purpose of judicial immunity is to protect people who benefit from having judges exercise judicial functions independently without fear of the consequences, and it applies however erroneous the act and however injurious its consequences.

Judge Finch herein was acting at all times in a judicial capacity. A judicial officer cannot be called to account in a civil action for acts in his judicial capacity. Any acts by Judge Finch were judicial in nature. A fair reading of the complaint makes clear that Judge Finch was acting in a judicial capacity with respect to the proceedings involving plaintiff; he was exercising judicial authority when he issued rulings. Plaintiff pleads why he believes Judge Finch issued certain rulings. Even if Judge Finch acted maliciously or corruptly, the doctrine of judicial immunity still shields this suit. Even assuming Judge Finch's orders violated plaintiff's rights, he still is entitled to immunity because he had subject matter jurisdiction. See *Green v. Maraio*, 722 F.2d 1013, 1017 (2d Cir. 1983); *Fields v. Soloff*, 920 F.2d 1114, 1119 (2d Cir. 1990); *Marshall v. Bowles*, 92 Fed. Appx. 283, 284-85 (6th Cir. 2004). Plaintiff has not alleged acts that deprive Judge Finch of judicial immunity.

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 v. Florida*, 517 U.S. 44, 54-58 (1996). The states' sovereign immunity

operates to bar claims against states, state agencies that act as arms of the state and individuals such as Judge Finch and Butorac, who were acting in their official capacity.

A state is not a person. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Moreover, the Supreme Court recognized that sovereign immunity applies not only to states but also state agencies and instrumentalities. See, e.g., *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997); *Florida Dep't. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982); see also *Ram Ditta v. Maryland Na'tl. Capital Park & Planning Comm'n.*, 822 F.2d 456, 457 (4th Cir. 1987). To the extent suit is against Judge Finch in his official capacity, OPD or Butorac in her official capacity, 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. Neither the state official acting in an official capacity or OPD, a Commonwealth instrumentality, is a person. *Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Will* at 70.

OPD is an arm of the Commonwealth, and Judge Finch and Butorac sued in their official capacity are shielded from this action by immunity. The Virginia General Assembly chooses judges, who are charged with administering the Commonwealth's judicial system and adjudicating issues relating thereto. See Virginia Constitution Article VI, § 1 and §§ 17.1-300-29 and §§ 17.1-500-24 of the Code of Virginia (1950, as amended). Judge Finch thus is subject to control of the Commonwealth, is involved with statewide concerns and is entitled to protection under the Eleventh Amendment. Moreover, all salaries and expenses of OPD and Butorac are audited and paid out of the state treasury.

Judge Finch, OPD and Butorac did not waive immunity from claims. To the extent plaintiff here sues Judge Finch or Butorac for acts performed in their official capacity or OPD, his suit seeks damages that would be paid from the state treasury. Suit against a state official in their official capacity is not a suit against the official but against the office. Accordingly, this Court is without jurisdiction to hear any complaint against Judge Finch or Butorac in their official capacity or OPD.

BUTORAC, AS A PUBLIC DEFENDER, ALSO HAS NO INDIVIDUAL LIABILITY

A public defender does not act under color of state law or engage in state action when performing as counsel to a defendant in a state criminal proceeding. Because the claims herein against Butorac are based on such activities, the complaint against her must be dismissed. See *Polk County v. Dodson*, 454 U.S. 312 (1981). It is the ethical obligation of any lawyer, privately retained or publicly appointed, not to clog courts with frivolous motions or arguments. Plaintiff has no legitimate complaint that Butorac failed to prosecute arguments on his behalf. Nowhere can plaintiff point to a case that suggests the right to counsel turns on what a defendant and his attorney discuss.

If this Court were to find that Butorac, a public defender, acted under color of state law or engaged in state action when she undertook acts complained of in the course of legal representation relating to court proceedings, she still is immune from liability because of qualified immunity. Suits entail substantial costs, including that fear of litigation will inhibit discharge of duties. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). These concerns are balanced by affording qualified immunity from civil liability, which protects insofar as conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Trulock v. Freeh*, 275 F.3d 391, 399 (4th Cir. 2001); *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998).

While inquiry into whether conduct violated a clearly established right is fact specific, see, e.g., *Saucier v. Katz*, 533 U.S. 194, 201 (2001), determination of whether a right was clearly established is a purely legal question. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Qualified immunity is an entitlement to immunity from suit rather than a mere defense to liability. *Saucier* at 200. Any right asserted by plaintiff was not clearly established. It could not have been clear to Butorac that her actions, if they occurred at all, were unconstitutional, and the law requires a grant of qualified immunity. Plaintiff can point to no analogous case. When legality of a particular act is open to dispute, there is no liability. "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciarello v. Sumner*, 973 F.2d 295, 298 (4th Cir.), cert. denied, 506 U.S. 1080, 113 S. Ct. 1048 (1992).

Before liability will attach, the right must be clearly established in a particularized sense so unlawfulness of the conduct would have been apparent. *Zepp v. Rehrmann*, 79 F.3d 381, 387 (4th Cir. 1996). Plaintiff herein does not allege violation of a clearly established right in a particularized sense. This standard requires plaintiff to plead specific facts that he suffered violation of a clearly established right and serves the important purpose of weeding out non-meritorious claims before discovery. Even if plaintiff had alleged a violation, his claim must fail because he cannot show that a reasonable person in Butorac's position would have known she was violating federal law. See *McWaters v. Cosby*, 54 Fed. Appx. 379 (4th Cir. 2002).

Officials are not compelled to predict enlargement or clarification of constitutional rights. "Faced with such uncertainty, it may be preferable to err on the side of caution and . . . find qualified immunity where [the court] cannot confidently state that the right was clearly established or that the officials must have known their acts were proscribed by law." *Pounds v. Griepenstroh*, 970 F.2d 338, 342 (7th Cir. 1992).

In light of existing law in the specific context at issue here, the contours of any constitutional right that arguably could have existed did so only at a certain level of generality and were insufficiently clearly-established and apparent that a reasonable person in Butorac's position would have understood that her acts violated a right and were unlawful. To hold Butorac accountable on the facts alleged would expand liability well beyond where the United States Supreme Court or the Fourth Circuit has taken it.

THE FEDERAL COURT IS PRECLUDED FROM HEARING THIS CASE UNDER THE ROOKER-FELDMAN DOCTRINE

Moreover, assuming *arguendo* that plaintiff alleged deprivation of a federally protected right, his claim is nevertheless barred. Any claim he may have not only is barred by immunity but also the Rooker-Feldman doctrine, and this Court lacks jurisdiction. The Rooker-Feldman doctrine makes clear that a United States District Court has no authority to review judgments of a state court in judicial proceedings. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). Rooker-Feldman precludes federal district court review of decisions of state courts. *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192, 199 (4th Cir. 1997). Jurisdiction to review state judicial proceedings lies exclusively with superior state courts and, ultimately, the United States Supreme Court. *Plyler v. Moore*, 129 F.3d 728, 731 (4th Cir. 1997).

Despite his conclusory allegations to the contrary, plaintiff asks this federal Court to reverse Judge Finch's state court rulings and decisions and take action that calls all of those rulings and decisions wrong. Rooker-Feldman prohibits this Court from awarding such relief. The doctrine is implicated whenever, in order to grant the federal plaintiff the relief sought, the federal court must take action that would render an "inextricably intertwined" state judgment ineffectual.

Plaintiff is seeking to collaterally attack the rulings and decisions before the state court. Plaintiff is a state court loser complaining of injuries caused by a state court judgment and inviting this Court's rejection of that judgment. See *Exxon Mobil Corp. v. Saudi Basic Indust.*, 544 U.S. 280, 284 (2005). Rooker-Feldman will not permit him to do so.

PLAINTIFF DID NOT ADEQUATELY ALLEGE A CLAIM

Plaintiff's mere allegations standing alone are insufficient to state a claim as a matter of law. There is nothing in the complaint which adequately explains the nature of plaintiff's constitutional claims. Plaintiff's conclusory allegations with no supporting factual averments are legally insufficient. Plaintiff must specifically present facts but fails in that his complaint is bereft of a detailed account, for example, to establish the very high threshold requirement that allows a claim under Section 1985.

To the extent that plaintiff's claims rest on a *respondent superior* theory of liability as to OPD for the alleged acts of Butorac, they fail to present a claim. A public defender is not amenable to administrative direction in the same sense as other state employees. Plaintiff failed to allege a policy of OPD that arguably violates his rights.

PLAINTIFF IS NOT ENTITLED TO DECLARATORY OR INJUNCTIVE RELIEF

Plaintiff seeks injunctive 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.

With regard to judges, the immunity is even stronger. 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).

§ 1983 precludes the claim against Judge Finch. 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 relief against judicial officers). Also, see *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000); *Johnson v. McCuskey*, 72 Fed. Appx. 475, 477 (7th Cir. 2003).

Plaintiff also seeks declaratory relief. Article III of the United States Constitution limits the power of Federal Courts to hear only cases involving an actual case or controversy. *Jones v. Poindexter*, 903 F.2d 1006, 1009 (4th Cir. 1990). This requirement is met where facts show substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant judgment. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); see *Golden v. Zwickler*, 394 U.S. 103 (1969); *Natural Resources Defense Council v. Watkins*, 954 F.2d 974 (4th Cir. 1992); *Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73 (4th Cir. 1991). As the Fourth Circuit has explained, the very nature of Article III standing is whether granting relief would be meaningful. *Id.* at 75.

The granting of 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, Inc. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992). Federal courts, however, 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, Defendants, Gaylord L. Finch, Jr., Office of Public Defender and Dawn Butorac, request that this Court grant the Motion to Dismiss the complaint with prejudice and grant other relief deemed appropriate.

GAYLORD L. FINCH, JR.
OFFICE OF PUBLIC DEFENDER
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, and I hereby certify that I mailed the document by U.S. mail to the following non-filing user:

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