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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 10 2006
Phil Lombardi, Clerk
U.S. DISTRICT COURT

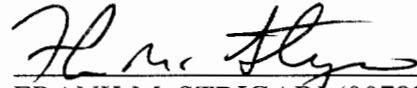
EDDIE ANDREWS, et al.,	:	
	:	
Plaintiffs,	:	CASE NO. 06-CV-460-TCK-PJC
	:	
v.	:	JUDGE KERN
	:	
UNITED STATES, et al.,	:	MAGISTRATE JUDGE CLEARY
	:	
Defendants.	:	

**MOTION TO DISMISS OF DEFENDANTS STATE OF OHIO,
GOVERNOR BOB TAFT, OHIO ATTORNEY GENERAL JIM PETRO, AND
AUDITOR OF STATE BETTY MONTGOMERY**

Defendants State of Ohio, Governor Bob Taft, Ohio Attorney General Jim Petro, and Auditor of State Betty Montgomery hereby move this Court to dismiss Plaintiffs' complaint pursuant to Fed. R. Civ. Proc. 12(b)(1) for lack of jurisdiction, and Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim against the Defendants. The reasons for this motion are more fully set forth in the attached memorandum of law, which is incorporated herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND STATEMENT OF THE FACTS

On September 6, 2006, *pro se* plaintiffs Eddie Andrews, Rodney D. Class and others (“Plaintiffs”) filed this complaint against numerous states and state officials based on their belief that the named defendant’s have violated several federal laws. In their complaint, Plaintiffs name twenty-four individuals and states from all across the country as defendants in an effort to try and establish that they have violated Plaintiffs constitutional rights’ by allegedly engaging in a conspiracy and corrupt activities. Among the numerous defendants named are the State of Ohio, Ohio Governor Bob Taft, Ohio Attorney General Jim Petro and Auditor of State Betty Montgomery (“Ohio Defendants”).

The facts surrounding Plaintiffs’ claims are extremely vague and difficult to ascertain as the complaint is exceedingly long and incoherent. In fact, Plaintiffs’ allegations consist mainly of numerous conclusory statements on how the defendants violated federal law. Specifically, Plaintiffs assert that the Ohio Defendants are “thugs” and have led “a life of crime” (Complaint, at p. 70); the Ohio Defendants have committed fraud and extortion by participating in the “extralegal” system (Complaint, at p. 82), and that the Ohio Defendants routinely violate 18 U.S.C. 1341, 1961 and 1962 (Complaint, at p. 114). Despite this lengthy list of claims, Plaintiffs do not offer *any* facts in the complaint that support the conclusions that any of the Ohio Defendants have in fact violated any law.

As a result, the complaint should be dismissed against the Ohio Defendants for two reasons. First, the Ohio Defendants are immune from suit in this court under the Eleventh Amendment. Second, the complaint should be dismissed because it fails to state a claim upon which relief can be granted. In particular, the complaint does not allege a single fact that

implicates any involvement that the Ohio Defendants have in this case. Therefore, the Ohio Defendants respectfully request that they be dismissed from this case.

II. STANDARD OF REVIEW

Review of a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) requires a court to “accept as true all material factual allegations in the complaint.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Furthermore, the allegations of the complaint should be construed in favor of the pleader. *Id.* at 237. A court, however, is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286 (1986). When the question to be considered is one involving the jurisdiction of federal courts, “jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.” *Norton v. Larney*, 266 U.S. 511, 515 (1925). The plaintiff bears the burden of proving that subject matter jurisdiction exists. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

Review of a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) allows a district court to dismiss any complaint that fails “to state a claim upon which relief can be granted.” In applying this standard, a court must presume all factual allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. *Housing Auth. of Kaw Tribe of Indians v. City of Ponca City*, 952 F.2d 1183, 1187 (10th Cir. 1991). The Court need not, however, presume the truth of any legal conclusion, opinion or deduction, even if it is couched as a factual allegation. *Sexton v. Barry*, 233 F.2d 220, 223 (6th Cir. 1956), *cert. denied*, 352 U.S. 870 (1956).

Generally, a *pro se* litigant’s complaint is afforded a liberal interpretation and construction. See *Haines v. Kerner*, 404 U.S. 519 (1972). However, a district court is not

required “to assume the role of advocate for the pro se litigant.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Consequently, “[t]he broad reading of the plaintiff’s complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based,” and “conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be granted.” *Id.*

As explained below, the allegations in Plaintiffs’ complaint fail to state any actionable claim against the Ohio Defendants, and even when the allegations are construed in favor of Plaintiffs, the case must be dismissed against the Ohio Defendants.

III. LAW AND ARGUMENT

A. The Ohio Defendants should be dismissed due to their Eleventh Amendment Immunity.

All claims against the Ohio Defendants should be dismissed because they are immune from suit in this case. The Eleventh Amendment to the United States Constitution states that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or citizens or subjects of any foreign state.

Thus, the Eleventh Amendment renders states immune from any suit commenced by citizens of another State. Eleventh Amendment immunity is enjoyed not only by the state, but also its instrumentalities and officers acting in their official capacities. *Mount Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). The reason for this is because a suit brought against a state official in his official capacity is the same as a suit brought against the state. *Russ v. Uppah*, 972 F.2d 300, 303 (10th Cir. 1992).

Even with the Eleventh Amendment’s explicit prohibition against suits being filed against unconsenting states, the Supreme Court has held that Congress may abrogate a State’s

Eleventh Amendment immunity. *Tennessee v. Lane*, 541 U.S. 509, 517 (U.S. 2004). Congress can validly abrogate state sovereign immunity, however, only as a legitimate exercise of Congress's powers under Section 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Seminole Tribe v. Fla.*, 517 U.S. 44, 72-73; *College Savings Bank v. Fla. Prepaid Post Secondary Ed. Expense Bd.*, 527 U.S. 666, 672.

Applying these fundamental standards to this case, the allegations against the Ohio Defendants are barred by the Eleventh Amendment. None of the Plaintiffs in this case are a citizen of the State of Ohio. However, the Plaintiffs have named the State of Ohio and its officers as defendants in this case. The Eleventh Amendment explicitly bars such an action because the State of Ohio has not consented to being sued in this case, and Congress has not abrogated the State's Eleventh Amendment immunity. Accordingly, the Ohio Defendants are immune from this lawsuit under the Eleventh Amendment, and the Court should dismiss the Ohio Defendants under Fed. R. Civ. P. 12(b)(1).

B. Plaintiffs have failed to state a claim upon which relief can be granted.

Because Plaintiffs have failed to identify a single action directly taken by any of the Ohio Defendants that led to the filing of this complaint, the Ohio Defendants should be dismissed. It is well settled that personal participation is an essential element of a Section 1983 claim against a public official. *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996); see also, *Mee v. Ortega*, 967 F.2d 423, 430-31 (10th Cir. 1992). An official is not individually liable unless an affirmative link exists between that official's personal conduct and the alleged constitutional deprivation. *Grimsley v. MacKay*, 93 F.3d 676, 679 (10th Cir. 1996).

After construing all the claims in Plaintiffs' favor, the contentions in this complaint are baseless and without any evidence of specific acts of wrongdoing by the Ohio Defendants. In this case, Plaintiffs have asserted only conclusory allegations against the Ohio Defendants. These allegations, and the remainder of the complaint, are not substantiated by any facts that show any personal involvement that any of the Ohio Defendants had with the allegations in this case. Accordingly, Plaintiffs have not, and cannot, state a claim against the Ohio Defendants, and the claims against them must be dismissed.

C. Plaintiffs allegations of conspiracy and corrupt activities are without merit and should be dismissed.

Plaintiffs allege that the Ohio Defendants conspired with the other defendants and violated a number of federal statutes by doing so. However, Plaintiffs' claims of conspiracy are deficient and must be dismissed. In order to recover under a civil conspiracy theory, a plaintiff must plead and prove not only a conspiracy between individuals but also an actual deprivation of federally protected rights. *Dixon v. City of Lawton, Oklahoma*, 898 F.2d 1443, 1449 (10th Cir. 1990). Furthermore, mere conclusory allegations of conspiracy are insufficient. *Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983).

Plaintiffs' conspiracy claims are fundamentally flawed for a couple reasons. First, they have failed to allege any specific facts reflecting any agreement or concerted action between any of the defendants. In addition, they have failed to demonstrate the deprivation of any of their federally protected rights. Because they have offered only unsupported statements regarding a conspiracy, their conspiracy cause of action must be dismissed.

For virtually identical reasons, Plaintiffs' RICO claim against the Ohio Defendants must be dismissed pursuant to Fed. R. Civ. P. 9(b). Under Rule 9(b), a RICO claim must be plead with particularity in order to provide the Ohio Defendants and the court with clear notice of the

factual basis of the claim. *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989). Vague and conclusory allegations are insufficient to allege a RICO cause of action. *Ad-X International, Inc. v. Kolbjornsen*, 97 Fed.Appx. 263, 265 (10th Cir. 2004) (unpublished). Dismissal is proper in a RICO claim where insufficient facts have been plead. *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989-990 (10th Cir. 1992).

Plaintiffs have not pled their RICO claim with particularity because they have failed to allege any facts supporting a RICO claim against the Ohio Defendants. Instead, only vague and conclusory allegations have been made against the Ohio Defendants that are entirely insufficient to provide any of them with clear notice of the factual basis of the Plaintiffs' claims. Because Rule 9(b) prohibits such insufficient claims, the Plaintiffs' RICO cause of action against the Ohio Defendants should be dismissed.

D. Plaintiff Rodney Class' filing in this case is in direct violation of an injunction issued by the United States District Court for the Northern District of Ohio.

The Northern District of Ohio has previously dealt with the same allegations brought against the Ohio Defendants. In *Class v. Gwin, et al.*, 5:06-CV-1465 (N.D. Ohio), the Northern District dismissed Plaintiff Class' complaint against the Ohio Defendants, labeled him a "vexatious litigator", and enjoined him from filing the type of complaint he filed in this case without meeting certain requirements of the Northern District of Ohio. See Memorandum of Opinion and Order (attached as Exhibit A). Most notable in that opinion, the Northern District of Ohio imposed the following requirements on any future filing made by Class:

1. He must file a "Motion Pursuant to Court Order Seeking Leave to File" with any document he proposes to file and he must attach a copy of this Order to it (any such motion should be filed in a miscellaneous case).
2. As an exhibit to any motion seeking such leave, he must also attach a declaration which has been prepared pursuant to 28 U.S.C. § 1746 or a sworn affidavit certifying that (1) the document raises a new issue which has never

been previously raised by his in this or any other court, (2) the claim or issue is not frivolous, and (3) the document is not filed in bad faith.

3. By means of a second exhibit to the motion, he must provide a copy of each complaint identified and listed in accordance with the foregoing paragraph 3 and a certified record of its disposition.
4. As a third exhibit to the motion, he must provide a copy of each complaint identified and listed in accordance with the foregoing paragraph 3 and a certified record of its disposition.

Id., at pp. 6-7.

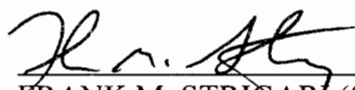
These requirements were meant to ensure that Plaintiff Class will not continue to file a myriad of baseless litigation, such as the complaint that he has filed with the other Plaintiffs in this case. However, by filing this complaint, Plaintiff Class failed to comply with any of the requirements set forth by the Northern District of Ohio. Instead of complying, he disregarded the injunction order of a federal court judge and filed the present lawsuit without a motion to seek “Leave of Court” or a document certifying that this claim is not frivolous and raises new issues. Consequently, this Court should dismiss this complaint for failing to comply with a standing order of the Northern District of Ohio that prohibits Plaintiff Class from filing the complaint in this case against the Ohio Defendants.

IV. CONCLUSION

For the foregoing reasons, Defendants State of Ohio, Governor Bob Taft, Ohio Attorney General Jim Petro and Auditor of State Betty Montgomery respectfully request that this Court dismiss this case against them in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2006, a true copy of the foregoing *Motion to Dismiss* was sent via regular U.S. mail, postage prepaid, to the following:

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