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APPENDIX A

Case: 18-56549 01/24/2019 DktEntry: 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES G. KINNEY

Appellant,

No. 18-56549

D.C. No. 2:18-cv-07321-PSG

v.

Central Dist. of Cal., LA

MICHELE RENEE CLARK,

Appellee.

FILED

JAN 24 2019

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

ORDER

Before: THOMAS, Chief Judge, GOULD and
PAEZ, Circuit Judges.

This court has reviewed the notice of appeal filed November 19, 2018 in the above-referenced district court docket pursuant to the pre-filing review order entered in docket No. 17-80256. Because the appeal is so insubstantial as to not warrant further review, it shall not be permitted to proceed. See *In re Thomas*, 508 F.3d 1225 (9th Cir. 2007). Appeal No. 18-56549 is therefore dismissed.

This order, served on the district court for the Central District of California, shall constitute the mandate of this court.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions regarding this order shall be filed or entertained.

DISMISSED.

APPENDIX B

Case 2:18-cv-07321-PSG Doc. 44 Filed 11/07/18

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIF.

CIVIL MINUTES - GENERAL

Case No. CV 18-07321 PSG

Date November 7, 2018

Title In re MICHELE RENEE CLARK

Present: The Honorable Philip S. Gutierrez,
United States District Judge

Wendy Hernandez Not Reported

Deputy Clerk Court Reporter

Attorneys Present for Plaintiff(s):

Not Present

Attorneys Present for Defendant(s):

Not Present

**Proceedings (In Chambers): The Court
GRANTS Defendant-Appellee's motions to
dismiss**

Before are Defendant-Appellee Michele Clark's ("Clark") motions to dismiss Plaintiff-Appellant Charles Kinney's ("Kinney") appeals of the bankruptcy court's orders denying his motion to vacate, reconsider, alter and/or amend (1) the order dismissing his counterclaim, (2) the order denying his removal, and (3) the order denying his motion to reopen. *See* CV 18-7303 ("*Counterclaim Appeal*"), Dkt. # 21; CV 18-7307 ("*Removal*

Appeal”), Dkt. # 37; CV 18-7321 (“*Reopen Appeal*”), Dkt. # 32. Clark concurrently filed a motion to consolidate the three appeals. See *Counterclaim Appeal*, Dkt. # 20. Kinney filed an opposition to each motion. See *Counterclaim Appeal*, Dkts. # 28–29; *Removal Appeal*, Dkts. # 47–48; *Reopen Appeal*, Dkts. # 42–43. Finally, Clark filed an ex parte application for each appeal seeking (1) relief from the Local Rule 7-3 requirement and (2) an order staying the briefing schedule until after the Court rules on the motions to dismiss. See *Counterclaim Appeal*, Dkt. # 26; *Removal Appeal*, Dkt. # 43; *Reopen Appeal*, Dkt. # 38.

The Court finds the matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78(b); L.R. 7-15. Having considered the moving and opposing papers, the Court **GRANTS** all three motions to dismiss and **RENDERS MOOT** the motion to consolidate and the ex parte applications.

I. Background

A full recitation of Kinney’s litigation history against Clark is set out in the Court’s prior orders and need not be repeated here. See *Kinney v. Cooper*, CV 15-8910 PSG (JCx), Dkts. # 44, 70. Thus, the Court will only provide background information specifically relevant to this order.

A. The Pre-filing Orders

On May 13, 2016, this Court declared that “Kinney is a vexatious litigant because he has been using the Central District of California to file frivolous and harassing litigation” against Michele Clark, David Marcus, and Eric Chomsky. *Vexatious Litigant Order, id.*, Dkt. # 70, at 14. Accordingly, the Court imposed the following pre-filing restrictions on Kinney in this district:

- Charles Kinney and any person acting on his behalf must obtain written authorization from a Judge of this Court before initiating a new action, where the pleading asserts claims against Michele R. Clark, David Marcus, or Eric Chomsky or any of the law firms with which David Marcus or Eric Chomsky are associated.

- As a condition of being allowed to file any such action, Charles Kinney or anyone acting on his behalf must persuade the Court that the lawsuit against Michele R. Clark, David Marcus, or Eric Chomsky or any of the law firms with which David Marcus or Eric Chomsky are associated is neither frivolous, duplicative, nor harassing.

Id. at 15.

In June 2017, Kinney filed a request to file a new action against Clark, Marcus, and Chomsky titled *Kinney v. Rothschild*. See *id.*, Dkt. # 87. The Court denied the request. *Id.* Kinney then re-filed the case in the Northern District of California. See *Kinney v. Rothschild*, CV 17-5342, Dkt. # 1. The Northern District transferred the case to the

Central District, and the case was assigned to Judge George H. Wu. *Id.*, Dkt. # 24. Judge Wu subsequently dismissed the case because Kinney failed to comply with this Court's pre-filing order. *Id.*, Dkt. # 44.

B. Present Appeals of the Bankruptcy Court Rulings

Unperturbed by these pre-filing orders, on May 22, 2018, Kinney (1) filed a "Counter- Claim and Third Party Complaint" (hereinafter "Counterclaim") against Clark, Marcus, and Chomsky seeking declaratory and injunctive relief with respect to the state court action, (2) removed Los Angeles Superior Court case BC 354136 to the Central District Bankruptcy Court, and (3) filed a motion to reopen Clark's bankruptcy that closed in 2013. *See Counterclaim Appeal*, Dkt. # 1; *Removal Appeal*, Dkt. # 1; *Reopen Appeal*, Dkt. # 1. Bankruptcy Judge Barry Russell dismissed Kinney's new claims, remanded the state court case, and denied the motion to reopen. *See id.* With respect to Kinney's new claims, the Bankruptcy Court held that they were "improperly filed by Mr. Kinney in violation of the District Court's vexatious litigant order, in a matter that has been remanded to the Superior Court, in a closed bankruptcy case which this Court has declined to reopen, and as part of a continuing abuse of the legal system by Mr. Kinney." *Counterclaim Appeal*, Dkt. # 1. Kinney subsequently filed a motion to reconsider for each order, and Judge Russell denied all three. *See*

Counterclaim Appeal, Dkt. # 1; *Removal Appeal*, Dkt. # 1; *Reopen Appeal*, Dkt. # 1.

Kinney appealed each of Judge Russell's three orders to the Bankruptcy Appellate Panel ("BAP"), see *Counterclaim Appeal*, Dkt. # 1; *Removal Appeal*, Dkt. # 1; *Reopen Appeal*, Dkt. # 1, and Clark elected to have the District Court for the Central District of California hear the appeals, see *Counterclaim Appeal*, Dkt. # 2; *Removal Appeal*, Dkt. # 4; *Reopen Appeal*, Dkt. # 4.

The appeals were subsequently transferred to this Court, upon which Kinney filed motions to disqualify, recuse and/or self-recuse Judge Philip S. Gutierrez. See *Counterclaim Appeal*, Dkt. # 14; *Removal Appeal*, Dkt. # 27; *Reopen Appeal*, Dkt. # 20. Judge Michael W. Fitzgerald determined Kinney's arguments were without merit and denied the motions. See *Counterclaim Appeal*, Dkt. # 25; *Removal Appeal*, Dkt. # 33; *Reopen Appeal*, Dkt. # 28.

Clark now moves to dismiss all three of Kinney's appeals.

II. Discussion

A. Violations of the Court's Pre-filing Order

The Court declared Kinney to be a vexatious litigant and issued a pre-filing order because of Kinney's use of the Central District of California to file an inordinate amount of frivolous

and harassing filings against Clark, Marcus, and Chomsky, despite having been repeatedly told by courts that his legal positions lacked merit. *See generally Vexatious Litigant Order*. Each of Kinney's filings in the Bankruptcy Court was a violation of this pre-filing order.

i. The "Counter-claim and Third Party Complaint"

Filing the Counterclaim against Clark in Bankruptcy Court clearly constitutes a new action. Because Kinney failed to first obtain a written permission to file his new claims from a judge in the Central District pursuant to this Court's order, Judge Russell was correct in dismissing the case.

The fact that Kinney filed the action in Bankruptcy Court rather than a District Court makes no difference here. The Bankruptcy Court is subject to review by and bound by the decisions and rulings of the District Court. Further, the difference between the courts is immaterial here in that "the same considerations of comity, consistency of treatment, and orderly administration of justice support a dismissal here." *In re Fillbach*, 223 F.3d 1089, 1091 (9th Cir. 2000) (upholding a district court's dismissal of a petition that was filed in an attempt to circumvent a vexatious litigant order entered by a bankruptcy court).

ii. The Removal

The removal of the state court case to Bankruptcy Court is a “new action” within the purview of the Court’s order. The Court’s pre-filing order was based on Kinney’s extensive litigation history, including the fact that Kinney frivolously removed state court cases *five times* and that the Court remanded every time. See *Vexatious Litigant Order* at 3–6. Kinney should be well aware of this fact given that he was sanctioned two separate times for those removals. See *id.* Therefore, Kinney’s removal of the state court case to Bankruptcy Court was a violation of the Court’s order.

iii. The Motion to Reopen

Finally, Kinney’s motion to reopen Clark’s 2010 bankruptcy violates the pre-filing order because it is a thinly veiled attempt to file a new proceeding against Clark. Kinney states in his motion that he wants to reopen Clark’s bankruptcy because he is unhappy that the state court is granting Clark’s motions to enforce previous awards of costs and fees against Kinney that resulted from his frivolous lawsuits and appeals. See *Notice of Appeal, Reopen Appeal*, Dkt. # 1, 6:10–7:8. According to Kinney, the “reopening of Clark’s bankruptcy is necessary to stop these violations of bankruptcy law.” *Id.* 7:7–8. This falls right into Kinney’s pattern, where he repeatedly files frivolous and vexatious suits in one court until the court issues a pre-filing order, and then moves onto a new venue to recycle arguments that have already been found to be baseless. Judge Russell put it aptly when he ruled that the motion

to reopen was “the latest in a continuing abuse of the judicial system by Mr. Kinney and is totally without merit.” *Id.* 7:18–19.

Kinney’s motion to reopen must also be dismissed for the separate reason that this Court lacks subject matter jurisdiction over the matter. Under the *Rooker-Feldman* doctrine, lower federal courts lack subject matter jurisdiction in “cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Here, Kinney is challenging Clark’s entitlement to the fees and costs awards against him, despite having previously lost the argument in state court. In *Kinney v. Clark*, 12 Cal. App. 5th 724 (2017), the California appellate court ruled on this specific issue, holding that Clark may collect attorneys’ fees and costs against Kinney. Here, Kinney was essentially asking the Bankruptcy Court, and now asks this Court, to reverse the decision in *Kinney v. Clark*, which the courts do not have the authority to do.

In summary, because each of Kinney’s filings in Bankruptcy Court was in violation of this Court’s pre-filing order, the Court **GRANTS** Clark’s motions to dismiss Kinney’s appeals.

B. Clarification of the Pre-filing Order

Given Kinney's repeated attempts to circumvent the pre-filing order, the Court finds it necessary to clarify its scope as follows:

- Charles Kinney and any person acting on his behalf must obtain written authorization from a Judge of this Court before initiating a new action, where the pleading asserts claims against Michele R. Clark, David Marcus, or Eric Chomsky or any of the law firms with which David Marcus or Eric Chomsky are associated. *This requirement applies to any removals from state court and motions for relief asserting claims that have already been adjudicated in prior cases against Clark, Marcus, or Chomsky. This order applies to actions taken in Bankruptcy Court in this district.*

The Court has already warned Kinney that additional restrictions "may be necessary if he attempts to get around this order by using other lawsuits to continue his harassment of [Clark, Marcus, and Chomsky]." *Vexatious Litigant Order* at 14. While at this stage the Court finds that clarifying the scope of the order is enough, the Court again warns Kinney that additional restrictions, such as requiring a security prior to commencing a new action, may be imposed if he tries to get around this order again.

III. Conclusion

For the foregoing reasons, the Court **GRANTS** all three of Clark's motions to dismiss Kinney's bankruptcy appeals and **RENDERS**

MOOT Clark's motion to consolidate and the ex parte applications.

This order closes the three appeals.

IT IS SO ORDERED.