

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

17-2692

WILLIAM M. USCHOCK,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 2-17-cv-00516)
District Judge: Honorable David S. Cercone

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
December 21, 2017

Before: CHAGARES, GREENAWAY, Jr., and GREENBERG, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on December 21, 2017. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered July 19, 2017, be and the same hereby is affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: February 13, 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2692

WILLIAM M. USCHOCK,
Appellant

VS.

COMMONWEALTH OF PENNSYLVANIA

(W.D. Pa. Civ. No. 2-17-cv-00516)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and GREENBERG,^{*} *Circuit Judges*

The petition for rehearing filed by Appellant William M. Uschock in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

^{*} Judge GREENBERG's vote is limited to panel rehearing only.

BY THE COURT,

s/ Joseph A. Greenaway, Jr.
Circuit Judge

Dated: March 14, 2018
tmm/cc: William M. Uschock

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

WILLIAM M. USCHOCK,)
vs.)
Plaintiff,) 2:17cv516
vs.) Electronic Mail
COMMONWEALTH OF)
PENNSYLVANIA,) Judge David Stewart Cercone/
Defendant.) Chief Magistrate Judge Maureen P. Kelly

ORDER

The above-captioned civil rights complaint was received by the Clerk of Court on April 21, 2017, and was referred to Chief United States Magistrate Judge Maureen P. Kelly for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Rule 72 of the Local Rules for Magistrate Judges.

Chief Magistrate Judge Kelly, in a Report and Recommendation (the “Report”), ECF No. 4, filed on May 5, 2017, recommended that the Complaint be dismissed pre-service pursuant to 28 U.S.C. § 1915(e) for failure to state a claim upon which relief can be granted. Service of the Report was made on the Plaintiff at his address of record. Plaintiff was given until May 22, 2017 to file any objections. Plaintiff’s objections were docketed on May 15, 2017, ECF No. 5. After review, the Court finds that none of the objections merits rejection of the Report or extended comment.

Plaintiff attempts to sue the Commonwealth of Pennsylvania for an alleged due process and takings clause violation based upon the so-called “Dunham Rule.” The Report found that Plaintiff failed to state a claim based upon at least two independent grounds. First, the Dunham

Rule does not deprive Plaintiff of property and so does not violate either procedural or substantive due process or the takings clause. Second, the Commonwealth may not be sued in federal court based upon Eleventh Amendment immunity and/or because the Commonwealth does not constitute a “person” for purposes of Section 1983. Plaintiff does not object to the first ground. Furthermore, he does not contend that the Commonwealth is a person. Rather, Plaintiff solely complains that he may sue the Commonwealth in federal Court because his research reveals that the “the 14th Amendment trumps the 11th Amendment.” ECF No. 5.

Plaintiff's objections are misplaced. First, while the United States Congress does have the ability to promulgate legislation pursuant to the Fourteenth Amendment that can subject a state to regulation, plaintiff has failed to identify any such statutory authority here and as a result he may not rely on vague notions of a due process violation to obtain a recovery. See Jones v. Hashagen, 512 F. App'x 179, 182 (3d Cir. 2013) (“This immunity, afforded by the Eleventh Amendment, can only be abrogated by Congress or by state consent. Congress has not abrogated the immunity regarding Jones' claims, nor has Pennsylvania consented to suit.”)(citations omitted); Lavia v. Pennsylvania, Dep't of Corrections, 224 F.3d 190, 195 (3d Cir. 2000) (“the type of relief sought is irrelevant to the question of Eleventh Amendment immunity.”). Moreover, even if Plaintiff's objections had any merit as to the Eleventh Amendment immunity, the alternative grounds relied upon in the Report and not challenged in the Objections, are sufficient to dismiss the Complaint.

Accordingly, after *de novo* review of the pleadings and the documents in the case, together with the Report and Recommendation, the following order is entered:

AND NOW, this 18th day of July, 2017;

IT IS HEREBY ORDERED that the Complaint is dismissed with prejudice pursuant to 28 U.S.C. §1915(e) for failure to state a claim upon which relief can be granted.

IT IS FURTHER ORDERED that the Report and Recommendation, ECF No. 4, filed on May 5, 2017, by Chief Magistrate Judge Kelly, is adopted as the opinion of the Court. The Clerk is to mark the case closed.

Lastly, the Court certifies pursuant to 28 U.S.C. § 1915(a) that any appeal from this order would not be taken in good faith.



David Stewart Cercone
United States District Judge

cc: The Honorable Maureen P. Kelly
Chief United States Magistrate Judge

William M. Uschock
314 Weavers Road
Greensburg, PA 15601
(Via First Class Mail)

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

WILLIAM M. USCHOCK,)	
)	Civil Action No. 17-516
Plaintiff,)	Judge David Stewart Cercone/
)	Chief Magistrate Judge Maureen P. Kelly
vs.)	
)	
COMMONWEALTH OF)	
PENNSYLVANIA,)	
)	
Defendant.)	

REPORT AND RECOMMENDATION

I. RECOMMENDATION

For the reasons that follow, it is respectfully recommended that, pursuant to the screening provisions of 28 U.S.C. § 1915(e), the Complaint be dismissed before being served because it fails to state a claim upon which relief can be granted.

II. REPORT

A. Background

William M. Uschock (“Plaintiff”) has been granted leave to proceed in forma pauperis to pursue a civil rights action against the Commonwealth of Pennsylvania. He claims that his Fifth and Fourteenth Amendment rights to due process have been violated by a Pennsylvania common law rule of evidence or burden of proof. Specifically, Plaintiff challenges the Pennsylvania common law rule known as the “Dunham Rule.” The so-called Dunham Rule simply provides a rebuttable presumption that if, in connection with a conveyance of land, there is a reservation or an exception of “minerals” without any specific mention of natural gas or oil, then the word “minerals” was not intended by the parties to include natural gas or oil. See, e.g., Butler v. Charles Powers Estate ex rel. Warren, 65 A.3d 885, 898 (Pa. 2013) (“The *Dunham* Rule is clear,

dating back to *Gibson*, that the common, layperson understanding of what is and is not a mineral is the only acceptable construction of a private deed. Notwithstanding different interpretations proffered by other jurisdictions, the rule in Pennsylvania is that natural gas and oil simply are not minerals because they are not of a metallic nature, as the common person would understand minerals. *Gibson*, 5 Watts at 41–42; *see also Dunham*, 101 Pa. at 44. The *Highland* decision made clear that the party advocating for the inclusion of natural gas within the deed reservation (here Appellees) bears the burden of pleading and proving by clear and convincing evidence that the intent of the parties who executed the reservation was to include natural gas. 161 A.2d at 398–99. Critically, however, such intention may only be shown through parol evidence that indicates the intent of the parties at the time the deed was executed—in this case, 1881. *Id.*”).

Plaintiff asserts in the instant Complaint that “by declaring that the Dunham Rule is valid in Pennsylvania that gas is not a mineral and unique to Pennsylvania blocks renegotiation [sic] of Shale gas ownership as opposed to other states in the USA. The Dunham Rule is unconstitutional...” ECF No. 3, ¶ III. The sole defendant named is the Commonwealth of Pennsylvania.

We deem Plaintiff to be making a claim under 42 U.S.C. § 1983 because he is claiming a violation of his rights under the United States Constitution and he does not have a direct cause of action under the United States Constitution. Rather, he must utilize Section 1983 as a vehicle to bring his claims. See, e.g., Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001)(“a litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must utilize 42 U.S.C. § 1983.”).

B. Discussion

1. Pre-service dismissals of Complaints proceeding IFP.

Because Plaintiff has been granted IFP status, ECF No. 2, the screening provisions of 28 U.S.C. §1915(e) apply to his Complaint. See Atamian v. Burns, 2007 WL 1512020, *1-2 (3d Cir. 2007) (“the screening procedures set forth in [Section] 1915(e) apply to [IFP] complaints filed by prisoners and non-prisoners alike”) (citations omitted); 28 U.S.C. §1915(e) (“the court shall dismiss the case [of a plaintiff granted IFP status] at any time if the court determines that – (A) the allegation of poverty is untrue; or (B) the action or appeal – (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.”). In performing the Court’s mandated function of *sua sponte* review of complaints under 28 U.S.C. § 1915(e), to determine if the complaint fails to state a claim upon which relief can be granted, a federal district court applies the same standard applied to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). See, e.g., Brodzki v. Tribune Co., 481 F. App’x 705 (3d Cir. 2012) (applying Rule 12(b)(6) standard to claim dismissed under 28 U.S.C. § 1915(e)(2)).

2. The *Dunham* Rule does not take property or deprive liberty.

Conducting a procedural due process analysis involves a two step inquiry: the first question to be asked is whether the complaining party has a protected liberty/property interest within the contemplation of the due process clause and, if so, the second question to be asked is whether the process afforded the complaining party prior to taking away the liberty/property comported with constitutional requirements. Shoats v. Horn, 213 F.3d 140, 143 (3d Cir. 2000).

Instantly, the *Dunham* Rule does not deprive Plaintiff of any property or liberty. Rather, it is simply an evidentiary device or a burden allocation device under the common law of

Pennsylvania that provides whenever, in a private conveyance “mineral” rights are granted or reserved, such granting or reservation of “mineral” rights presumptively does not include gas rights unless the individual, asserting otherwise, rebuts the presumption by clear and convincing evidence that the conveying parties, in fact, intended “mineral” to include “gas.” This rule self-evidently does not, of its own force, deprive or grant any property or liberty rights, it simply allocates who has the burden to prove that gas rights were included in the conveyance where the term “mineral” is used in the conveyance.

Accordingly, because the Dunham Rule does not deprive anyone of property or liberty, the Complaint fails to state a claim under either the Fourteenth Amendment procedural due process clause or the Fifth Amendment’s taking clause.

3. The Dunham Rule does not offend substantive due process.

To the extent that Plaintiff is arguing the Dunham Rule violates substantive due process, the claim fails as a matter of law.

As cogently explained by the Honorable Sean McLaughlin of this Court:

The constitutional right to “substantive due process” protects individuals against arbitrary governmental action, regardless of the fairness of the procedures used to implement them. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). See also *Collins v. Harker Heights*, 503 U.S. 115, 126, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (the Due Process Clause was intended to prevent government officials from abusing power, or employing it as an instrument of oppression); *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government.”).

A substantive due process claim based upon alleged arbitrary and capricious action is not easily mounted, because the relevant level of arbitrariness required in order to find a substantive due process violation involves not merely action that is unreasonable, but rather, something more egregious, which the United States Court of Appeals for the Third Circuit has termed “conscience shocking.” *Hunteman v. DiSabato*, 308 F.3d 236, 246–47 (3d Cir. 2002). It has made clear that “only the most egregious conduct will be considered arbitrary in the constitutional sense.” *Id.* at 247–48.

Sloan v. Brooks, No. CIV.A. 08-163 ERIE, 2010 WL 3620392, at *1–2 (W.D. Pa. Sept. 10, 2010).

Nothing about the Dunham Rule shocks this Court’s conscience or is arbitrary or capricious. Rather, the Dunham Rule is simply a rule of evidence or rule of burden allocation concerning the meaning of the word “minerals” as contained in real property conveyances, and merely utilizing the common meaning of “mineral” so as to presumptively exclude oil or gas. See, e.g., Sisson v. Stanley, 109 A.3d 265, 274 (Pa. Super. 2015), *appeal granted in part*, 121 A.3d 956 (Pa. 2015), and *appeal dismissed as improvidently granted*, 141 A.3d 1238 (Pa. 2016) (“The rationale behind the Dunham Rule is that oil is not included in a reservation of mineral rights because oil is not commonly understood to be a mineral.”). Pennsylvania’s use of the common understanding of “minerals” to presumptively exclude gas and/or oil (subject to the presumption being rebutted by the party asserting otherwise) is not conscience shocking or arbitrary and capricious. Cf. Kovach v. Zurich Am. Ins. Co., 587 F.3d 323, 347 (6th Cir. 2009) (McKeague, J., dissenting) (“In any event, it was certainly not arbitrary and capricious for Zurich to follow this ordinary meaning, and to determine that Kovach’s injuries were not caused by accidental means under the ordinary meaning or dictionary definition of the word.”).

Accordingly, Plaintiff’s Complaint fails to state a substantive due process claim.

4. The Commonwealth cannot be sued.

Plaintiff has named only one Defendant in the Complaint, namely, the Commonwealth of Pennsylvania. However, the Commonwealth of Pennsylvania is entitled to Eleventh Amendment immunity and cannot be sued in a federal court under Section 1983 for any alleged violations of Plaintiff’s constitutional rights, regardless of the relief sought. See, e.g., Jones v. Hashagen, 512 F. App’x 179, 182 (3d Cir. 2013) (“This immunity, afforded by the Eleventh Amendment, can

only be abrogated by Congress or by state consent. Congress has not abrogated the immunity regarding Jones' claims, nor has Pennsylvania consented to suit.”)(citations omitted); Lavia v. Pennsylvania, Dep't of Corrections, 224 F.3d 190, 195 (3d Cir. 2000) (“the type of relief sought is irrelevant to the question of Eleventh Amendment immunity.”). At the least, Plaintiff fails to allege anything which demonstrates that Eleventh Amendment immunity does not bar this suit against the Commonwealth. See, e.g., Rodriguez v. California Attorney Gen.'s Office, No. SA CV 09-1149, 2010 WL 3447895, at *3 (C.D. Cal. Aug. 31, 2010) (“Plaintiffs have failed to demonstrate that the Eleventh Amendment immunity does not apply to these claims. As such, Plaintiffs' Section 1983 claims against Defendants, State agencies, are barred by the Eleventh Amendment.”); Patel v. Georgia Dep't of Behavioral Health & Developmental Disabilities, No. 1:12-CV-158-TCB, 2012 WL 12903130, at *1 (N.D. Ga. July 9, 2012) (“Patel otherwise fails to show that this action is timely or that Eleventh Amendment immunity does not apply to his ADEA claim.”).

In the alternative, the Commonwealth is not a “person” as is required in order to state a claim for relief under Section 1983. Walker v. Pennsylvania, 580 F. App'x 75, 78 (3d Cir. 2014) (“As ‘a State is not a person within the meaning of § 1983,’ *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), the Commonwealth was not a proper party to Walker's lawsuit, and the District Court correctly dismissed the claims against it.”), *abrogated on other grounds as recognized in, Sanchez v. Cidambil*, Civ.A. No. 14-7093, 2015 WL 1815522, at *3 (D.N.J. April 20, 2015).

Accordingly, the Complaint should be dismissed for failure to state a claim upon which relief can be granted against the Commonwealth of Pennsylvania.

III. CONCLUSION

For the reasons set out in this Report and Recommendation, it is respectfully recommended that Plaintiff's Complaint be dismissed for failure to state a claim upon which relief can be granted.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rule 72.D.2, the parties are permitted to file written objections in accordance with the schedule established in the docket entry reflecting the filing of this Report and Recommendation. Objections are to be submitted to the Clerk of Court, United States District Court, 700 Grant Street, Room 3110, Pittsburgh, PA 15219. Failure to timely file objections will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n. 7 (3d Cir. 2011). Any party opposing objections may file their response to the objections within fourteen (14) days thereafter in accordance with Local Civil Rule 72.D.2.

Respectfully submitted:

/s/ Maureen P. Kelly
MAUREEN P. KELLY
CHIEF UNITED STATES MAGISTRATE JUDGE

Date: May 5, 2017

cc: The Honorable David Stewart Cercone
United States District Judge

WILLIAM M. USCHOCK
314 Weavers Road
Greensburg, PA 15601

**Additional material
from this filing is
available in the
Clerk's Office.**