FILED
United States Court of Appeals
Tenth Circuit

January 30, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KENT VU PHAN,

Plaintiff - Appellant,

v.

NATIONAL JEWISH HEALTH; METRO COMMUNITY PROVIDER NETWORK (MCPN); P.A. MEGHANN DEVITO; DR. MICHAEL NGUYEN; ATTORNEY TRACY L. ZUCKETTE; ATTORNEY CHRISTOPHER M. ROBBINS; and STATE FARM INSURANCE COMPANY,

Defendants - Appellees.

No. 18-1344
(D.C. No. 1:17-CV-02353-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BRISCOE, HOLMES**, and **MATHESON**, Circuit Judges.

Pro se Plaintiff-Appellant Kent Vu Phan alleges that he found standing water in his condominium's crawlspace. He further alleges that the subsequent

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

APPENDIX: A

conduct of his insurance agency, his medical providers, and two attorneys gave rise to claims under 42 U.S.C. §§ 1981, 1983, 1985, and 1986, as well as under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, and various state laws. The district court dismissed Mr. Phan's amended complaint as legally frivolous and for failure to comply with Rule 8 of the Federal Rules of Civil Procedure. On appeal, Mr. Phan fails to explain why the district court erred, and so we conclude that Mr. Phan has waived his challenge to the district court's order. Exercising jurisdiction under 28 U.S.C. § 1291, we thus **affirm** the district court's order, **deny as moot** Mr. Phan's motion for summary reversal, and **deny** Mr. Phan's motion to proceed in forma pauperis.

I

Mr. Phan's original complaint alleged that his condominium's crawlspace had been contaminated with standing water. A magistrate judge ordered Mr. Phan to file an amended complaint because Mr. Phan had "merely typed out a narrative of events in numbered paragraphs" without providing any "indication of what violation has been committed by which of the Defendants." R. at 29 (Order Directing Pl. to File Am. Compl., dated Oct. 10, 2017).

Mr. Phan's amended complaint again alleged that standing water contaminated his condominium's crawlspace. He alleged that his insurance

agency denied a claim related to this contamination, that two attorneys defended a related lawsuit Mr. Phan apparently brought against his homeowner's association, and that various medical providers declined to conclude that Mr. Phan's medical problems were caused by the standing water. While the amended complaint invoked 42 U.S.C. §§ 1981, 1983, 1985, 1986, as well as the ADA, the Rehabilitation Act, and various state laws, it did not clearly tie these legal provisions to actions by the individual defendants.

The district court dismissed "the Amended Complaint in part as legally frivolous and in part for failure to comply with Rule 8 of the Federal Rules of Civil Procedure." R. at 99 (Order of Dismissal, filed July 31, 2018). Construing Mr. Phan's filings liberally, the court discerned and dismissed four claims. First, it dismissed any claims arising under 42 U.S.C. § 1981 because Mr. Phan failed to plausibly allege that any defendant intended to discriminate against him based on his race. Second, the court dismissed any claims arising under 42 U.S.C. § 1983 as frivolous because Mr. Phan failed to plausibly allege that any defendants were state actors. Third, the court dismissed claims arising under 42 U.S.C. §§ 1985 and 1986 because the allegations of conspiracy were conclusory and the complaint failed to identify a right protected by these statutes. Fourth, the court dismissed the claims under the ADA and the Rehabilitation Act because Mr. Phan failed to allege that he was denied the benefit of public services or that any defendants

were public entities. The court declined to exercise supplemental jurisdiction over Mr. Phan's remaining state-law claims.

Mr. Phan filed a timely notice of appeal. He later filed motions with this court to proceed in forma pauperis and for summary reversal.

II

We affirm the district court's order because Mr. Phan's appellate briefing does not point to any specific error in the court's ruling or respond to the deficiencies that the court identified.* Instead, Mr. Phan recounts his factual allegations, Aplt.'s Opening Br. at 1–4, summarizes the district court's order, *id.* at 4–8, and then provides conclusory language and allegations related to the claims at issue, *id.* at 9–16. Although we construe Mr. Phan's filings liberally, *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007), we "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005); *see United States v. Fisher*, 805 F.3d 982, 991 (10th Cir. 2015) ("[T]he appellant must present his claims in a way that does not compel us to scavenge through his brief for traces of argument."); *Nixon v. City & County of*

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* We note that Mr. Phan's appellate brief is expressly styled "Appellant's Combined Opening Brief and Application for a Certificate of Appealability." If Mr. Phan believes that he requires a certificate of appealability to pursue this appeal, he is mistaken; this certificate requirement is inapposite here. *See* 28 U.S.C. § 2253(c). Therefore, we **deny as moot** Mr. Phan's nominal request for a certificate of appealability.

Denver, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong. Recitation of a tale of apparent injustice may assist in that task, but it cannot substitute for legal argument."). Thus, we conclude that Mr. Phan's failure to explain why the district court's order was wrong waives any argument for reversal. *See Utah Envtl. Cong. v. Bosworth*, 439 F.3d 1184, 1194 n.2 (10th Cir. 2006) ("An issue mentioned in a brief on appeal, but not addressed, is waived."); *Garrett*, 425 F.3d at 841 ("[T]he inadequacies of Plaintiff's briefs disentitle him to review by this court.").

III

Because Mr. Phan has failed to demonstrate "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues," *Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) (quoting *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 812 (10th Cir. 1997)), we deny his application to proceed in forma pauperis on appeal and direct him to make full and immediate payment of the outstanding appellate filing fee.

IV

For the foregoing reasons, we **AFFIRM** the district court's order dismissing the case. In light of our ruling, we **DENY AS MOOT** Mr. Phan's motion for summary reversal. Finally, we also **DENY** the motion to proceed in

forma pauperis on appeal.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-02353-GPG

KENT VU PHAN,

Plaintiff,

v.

NATIONAL JEWISH HEALTH,
METRO COMMUNITY PROVIDER NETWORK (MCPN),
P.A. MEGHANN DEVITO,
DR. MICHAEL NGUYEN,
ATTORNEY TRACY L. ZUCKETTE,
ATTORNEY CHRISTOPHER M. ROBBINS, and
STATE FARM INSURANCE COMPANY,

Defendants.

ORDER OF DISMISSAL

Plaintiff Kent Vu Phan commenced this action *pro se* on September 27, 2017 (ECF No. 1). The Court granted him leave to proceed *in forma pauperis* (ECF No. 6). Due to legal deficiencies in the Complaint, the Court directed Plaintiff to file an amended pleading (ECF No. 7). On November 20, 2017, Plaintiff filed a document titled "Motion to Amended and Adding Defendant for Case 17-cv-0235[3]-GPG" [sic] (ECF No. 10). The Court construes this filing as the Amended Complaint, which is the operative pleading.

The Court must construe Plaintiff's filings liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not act as an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110. For the reasons discussed below, the

APPENDIX: B

Court dismisses the Amended Complaint in part as legally frivolous and in part for failure to comply with Rule 8 of the Federal Rules of Civil Procedure.

I. Amended Complaint

The allegations relate to an alleged contamination of Plaintiff's condominium apartment and subsequent dispute with his Homeowner's Association. (ECF No. 10 at 7). Plaintiff invokes 42 U.S.C. §§ 1981, 1983, 1985, and 1986, and the Americans with Disabilities and Rehabilitation Acts. He alleges four claims for relief: 1) in March 2016, Defendant National Jewish Health intentionally misdiagnosed Plaintiff's health conditions in favor of the Homeowner's Association; 2) Defendants Metro Community Providers Network, DeVito, and Nguyen also intentionally misdiagnosed Plaintiff's health conditions in favor of the Homeowner's Association; 3) Defendants Robbins and Zuckette discriminated against Plaintiff during a state court case related to the contamination, because Plaintiff "is Asian, disabled on both physical and mental"; 4) Defendant State Farm Insurance Company denied Plaintiff's claim arising from the contamination, which constituted racial discrimination. Plaintiff requests declaratory judgment and money damages.

Plaintiff has filed nine cases in this District, which the Court summarizes as follows:[1]

1. *Phan v. State Farm Insurance Company*, Case No. 16-cv-02728-RJB: this case concerned a state court lawsuit arising from a 2012 automobile accident and was dismissed without prejudice for failure to prosecute.

2. *Phan v. Hipple, Smith, Nelson, Lobato, Beaudoin, and State Farm Insurance Company*, Case No. 16-cv-03111-LTB: this case concerned the

[1] "[A] court may take judicial notice of its records and files." *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).

alleged contamination of Plaintiff's condominium apartment. He alleged claims under the Americans with Disabilities Act as well as based on alleged racial discrimination. The Court entered an Order of Dismissal dismissing certain claims with prejudice as legally frivolous and other claims without prejudice for failure to comply with Fed. R. Civ. P. 8.

3. *Phan v. American Family Insurance Company*: Case No. 17-cv-00196-LTB: this case also concerned the state court lawsuit arising from the 2012 automobile accident and was dismissed without prejudice for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine.

4. *Phan v. Cross, et al.*, Case No. 17-cv-01067-LTB: in this case, Plaintiff attempted to sue the judges who presided over his state court actions and opposing counsel involved in those actions. The Court dismissed this case as legally frivolous, which was affirmed by the U.S. Court of Appeals for the Tenth Circuit.

5. *Phan v. National Jewish Health, et al.*, Case No. 17-cv-02353-GPG: this is the instant matter, again concerning the alleged contamination of Plaintiff's condominium apartment.

6. *Phan v. Hipple, Smith, State Farm Insurance Company, Najanjo, Kennedy Brokerage, Lobato, and Beaudoin*, Case No. 17-cv-02830-LTB: this case also concerned the alleged contamination of Plaintiff's condominium apartment. Plaintiff raised claims under the same federal authorities at issue in the instant matter. The Court dismissed most of this action based *on res judicata*, which was affirmed by the U.S. Court of Appeals for the Tenth Circuit.

7. *Phan v. State Farm Insurance Company, et al.*, Case No. 17-cv-03073-GPG: this case concerned the 2012 automobile accident.

8. *Phan v. Hammersmith Management, Inc.*, Case No. 18-cv-01351-GPG: this case also concerns the alleged contamination and remains pending.

9. *Phan v. Colorado Legal Services*, Case No. 18-cv-01403-LTB: the Court dismissed this matter with prejudice as legally frivolous.

II. 42 U.S.C. § 1981

Plaintiff alleges in conclusory fashion that Defendants' conduct is racially discriminatory because he is Asian. (ECF No. 10 at 18). More specifically, he claims defendants "ignored" his state court complaint arising from the contamination and alleged

air pollution despite his protected class. (*Id.*). He asserts defendants somehow "exploited" his impairments for their benefit. (*Id.* at 23).

To establish a claim under § 1981, Plaintiff must show that he is "(1) [a] member[ ] of a protected class; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination interfered with a protected activity as defined in § 1981." *Shawl v. Dillard's Inc.*, 17 F. App'x 908, 911 (10th Cir. 2001). "By its language, Section 1981 establishes four protected interests: (1) the right to make and enforce contracts; (2) the right to sue, be parties, and give evidence; (3) the right to the full and equal benefit of the laws; and (4) the right to be subjected to like pains and punishments." *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1267 (10th Cir. 1989). Section 1981 protects against nongovernmental discrimination, as well as discrimination "under color of State law." 42 U.S.C. § 1981(c).

Plaintiff does not allege any facts to suggest that any Defendant intended to discriminate against him on the basis of his race. Rather, it appears Plaintiff disagrees with the medical Defendants' medical conclusions, the attorney defendants' approach to defending against Plaintiff's lawsuit regarding the contamination, and Defendant State Farm's denial of his insurance claim. Plaintiff offers only his speculation as to Defendants' conduct being motivated by race, without other indication. These allegations are insufficient to meet the requirements of Rule 8 in setting forth plausible factual allegations supporting a claim of racial discrimination. Fed. R. Civ. P. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.). Thus, these claims will be dismissed

without prejudice for failure to meet the Rule 8 pleading standard.

III. 42 U.S.C. § 1983

As noted above, the Court granted Plaintiff leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 (ECF No. 6). Therefore, the Court must dismiss any claims that are frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i); *see also Judy v. Obama*, 601 F. App'x 620, 621 (10th Cir. 2015) (28 U.S.C. § 1915(e)(2) applies to actions filed by nonprisoners). "[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also id.* at 328 ("To the extent that a complaint filed *in forma pauperis* which fails to state a claim lacks even an arguable basis in law, Rule 12(b)(6) and § 1915(d) both counsel dismissal."). "[T]he frivolousness standard is intended to apply to claims based on an indisputably meritless legal theory or claims describing fantastic or delusional scenarios." *Johnson v. Doe*, No. 18-1038, -- F. App'x --, 2018 WL 3359670, at *2 (10th Cir. July 10, 2018) (unpublished) (internal punctuation and citation omitted).

To state an arguable claim for relief under § 1983, "a plaintiff must 'allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.'" *Bruner v. Baker*, 506 F.3d 1021, 1025-26 (10th Cir. 2007) (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988)). "The elements necessary to establish a § 1983 . . . violation will vary with the constitutional provision at issue." *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) (internal quotation marks omitted).

"Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks omitted). A private actor may be subject to liability under § 1983 if "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n.*, 531 U.S. 288, 295 (2001) (quotation marks and citations omitted). State action is not established merely because a private individual or entity receives government funding or is subject to extensive government regulation. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542-47 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1003-11 (1982). The "nexus" test is only satisfied "when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004.

All of the defendants are non-state private individuals or entities. Plaintiff does not allege any plausible facts that defendants acted in concert with governmental officials to violate his constitutional rights. Instead, this case, like many of Plaintiff's other cases in this District, concern a private dispute arising from the alleged contamination of his condominium apartment. Thus, the allegations do not support an arguable claim for relief under § 1983 and will be dismissed as legally frivolous.

IV. 42 U.S.C. §§ 1985, 1986

Section 1985 prohibits a conspiracy to interfere with civil rights. *See* 42 U.S.C. § 1985. Though Plaintiff includes this provision in his pleading, he provides no

non-conclusory allegation to support a § 1985 claim in this case. It appears Plaintiff attempts to assert a violation of 42 U.S.C. § 1985(3). "The essential elements of a § 1985(3) claim are: (1) a conspiracy; (2) to deprive plaintiff of equal protection or equal privileges and immunities; (3) an act in furtherance of the conspiracy; and (4) an injury or deprivation resulting therefrom." *Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993). Section 1985(3) applies only to conspiracies motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus" and not "to all tortious, conspiratorial interferences with the rights of others." *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971). To the extent a § 1985(3) claim can be based on a non-racially motivated private conspiracy, it is necessary to plead, *inter alia*:

> 1. that the conspiracy is motivated by a class-based invidiously discriminatory animus; and
>
> 2. that the conspiracy is aimed at interfering with rights that by definition are protected against private, as well as official, encroachment.

Tilton, 6 F.3d at 686.

Plaintiff's allegations do not state an arguable claim for relief based on § 1985(3). He alleges in conclusory fashion that Defendants conspired with each other, but toward the apparent end of causing him to not be successful in his insurance claim arising from the contamination of his condominium apartment. Even if Plaintiff sufficiently alleged a conspiracy based on a class-based invidiously discriminatory animus, there is no public/private right at issue. Thus, this claim is premised on a meritless legal theory and will be dismissed as legally frivolous.

Plaintiff's § 1986 claims are similarly deficient because liability under § 1986 is

derivative of § 1985 liability. See *Wright v. No Skiter, Inc.*, 774 F.2d 422, 426 (10th Cir. 1985).

V. Americans with Disabilities and Rehabilitation Acts

As explained in the Order Directing Plaintiff to File Amended Complaint (ECF No. 7), the Americans with Disabilities Act ("ADA") forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III. *Tennessee v. Lane,* 541 U.S. 509, 516-17 (2004). Under the Rehabilitation Act, the Plaintiff must allege facts to show that (1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was because of the disability. *See Robertson v. Las Animas County Sheriff's Dept.*, 500 F.3d 1185, 1193 (10th Cir. 2007) (citation omitted); *see also Swenson v. Lincoln Cty. Sch. Dist. No. 2*, 260 F.Supp.2d 1136, 1145 (D. Wyo. 2003) (noting that "[t]he elements of a cause of action under Title II of the ADA and section 504 of the Rehabilitation Act are the same because Congress has directed courts to construe the ADA as giving at least the same amount of protection as the Rehabilitation Act") (citations omitted).

Plaintiff alleges defendants have violated Title II and III of the ADA, as well as Section 504 of the Rehabilitation Act. (ECF No. 10 at 25-26). Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a *public entity,* or be subjected to discrimination *by any such entity.*" *Phillips*

v. Tiona, 508 F. App'x 737, 747 (10th Cir. 2013) (citing 42 U.S.C. § 12132) (emphasis in original). Plaintiff does not allege any fact to suggest he was somehow denied the benefits of public services, programs, or activities. (*See id.*). None of the defendants appear to be public entities or governmental instrumentalities. (*See id.*). Thus, Title II does not apply here.

Plaintiff makes only a conclusory reference to Title III and does not offer any factual development to his invocation of this statutory section. (*See* ECF No. 10 at 26). In any event, Plaintiff requests money damages in relation to his ADA claims, thus Title III of the ADA does not provide the relief he seeks. *Phillips*, 508 F. App'x at 754 (under 42 U.S.C. § 12188(a), the "sole remedy for a Title III claim is injunctive relief"); *see also Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 86 (2d Cir. 2004) ("A private individual may only obtain injunctive relief for violations of a right granted under Title III; he cannot recover damages.").

Plaintiff's allegations of discrimination based on a disability arise from his disagreement with the outcome of his medical treatment, insurance claim, and state court proceedings related to the alleged contamination of his crawl space. The facts as alleged do not support an arguable claim for relief under the ADA or Rehabilitation Act, thus these claims will be dismissed with prejudice as legally frivolous.

VI. State Law Claims

The federal claims will be dismissed as legally frivolous and for failure to meet the Rule 8 pleading standard, as set forth above. To the extent Plaintiff asserts this Court's supplemental jurisdiction over a state law claims of medical malpractice or bad faith insurance practices, the Court declines to exercise supplemental jurisdiction over such

claims because the federal claims over which the Court has original jurisdiction will be dismissed. *See* 28 U.S.C. § 1367(c)(3).

VII. Conclusion

Accordingly, it is

ORDERED that the amended pleading titled "Motion to Amended and Adding Defendant for Case 17-cv-0235[3]-GPG" [sic] (ECF No. 10) and this action are DISMISSED as set forth herein. The claims alleged under 42 U.S.C. §§ 1983, 1985, and 1986, and the Americans with Disabilities and Rehabilitation Acts are dismissed with prejudice as legally frivolous; the claims alleged under 42 U.S.C. § 1981 are dismissed without prejudice for Plaintiff's failure to meet the Rule 8 pleading standard; and the state law claims are dismissed without prejudice because the Court declines to exercise supplemental jurisdiction over such claims. It is

FURTHER ORDERED leave to proceed *in forma pauperis* is denied for the purpose of appeal. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Plaintiff files a notice of appeal he must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24. It is

FURTHER ORDERED that all pending motions are denied as moot.

DATED at Denver, Colorado, this 30th day of July, 2018.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK
U.S. Senior District Judge