

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50558

United States Court of Appeals
Fifth Circuit

FILED

March 11, 2019

Lyle W. Cayce
Clerk

THOMAS TINER,

Plaintiff-Appellant

v.

DANELLA COCKRELL, Executor; JIMMY PEACOCK, Attorney; JAMES
MCDONALD, Attorney; CYNTHIA JACKSON, CPA,

Defendants-Appellees

Appeals from the United States District Court
for the Western District of Texas
USDC No. 7:18-CV-87

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Thomas Tiner, Texas prisoner # 706290, seeks leave to proceed in forma pauperis (IFP) on appeal from the dismissal of his civil rights complaint for lack of subject matter jurisdiction. The district court denied Tiner's motion to proceed IFP and certified pursuant to 28 U.S.C. § 1915(a)(3) and Federal Rule of Appellate Procedure 24(a)(3)(A) that the appeal was not taken in good faith.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

By moving to proceed IFP, Tiner is challenging the district court's certification that the instant appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). In evaluating whether the appeal is taken in good faith, the relevant inquiry is "whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citations omitted). (Cite)

A district court's dismissal for lack of subject matter jurisdiction is reviewed de novo. *Williams v. Wynne*, 533 F.3d 360, 364 (5th Cir. 2008). "Federal courts are courts of limited jurisdiction; without jurisdiction conferred by statute, they lack the power to adjudicate claims." *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012). Federal question subject matter jurisdiction is granted in 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3), which provide district courts with original jurisdiction over civil actions that involve rights arising under the Constitution and federal laws. § 1331; § 1343(a)(3). (Cite)

Tiner relies on 42 U.S.C. § 1983, which requires him to prove that the defendants, while acting "under color" of any state law, deprived him "of any rights, privileges, or immunities secured by the Constitution and laws." § 1983. Tiner does not allege that the named defendants were acting under color of state law in conspiring to deprive him of his share of his father's estate. Nor does he allege that the defendants conspired with a state actor to deprive him of his rights. *See Hobbs v. Hawkins*, 968 F.2d 471, 480 (5th Cir. 1992). A district court is not required to entertain a complaint seeking recovery under the Constitution or laws of the United States if the alleged federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell* (Cite)

v. Hood, 327 U.S. 678, 682-83 (1946). Because Tiner failed to plead any facts demonstrating that the defendants acted under color of state law in depriving him of his share of his father's estate, he ~~failed~~ to plead and establish subject matter jurisdiction based on the existence of a federal question. *See id.*; § 1331; § 1343(a)(3). Therefore, the district court did not err in dismissing the § 1983 claims for lack of subject matter jurisdiction. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); FED. R. CIV. P. 12(h)(3).

Regarding Tiner's remaining claims, 42 U.S.C. § 1985(3) prohibits conspiracies to deprive any person of equal protection of the laws based on a "racial or class-based animus." *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 345 (5th Cir. 1981) (en banc). Tiner's allegations reflect that the defendants' actions were motivated by their desire for an economic gain. Because Tiner failed to allege facts demonstrating that the defendants participated in a race-based conspiracy, his allegations failed to provide a basis for federal jurisdiction under § 1985. *See id.* A valid § 1985 claim is a prerequisite to a viable 42 U.S.C. § 1986 claim. *See Bryan v. City of Madison, Miss.*, 213 F.3d 267, 276 (5th Cir. 2000). Thus, Tiner's § 1985 and § 1986 claims are "insubstantial and frivolous," and were properly dismissed for lack of subject matter jurisdiction. *Bell*, 327 U.S. at 682-83.

Tiner has not shown that his appeal is taken in good faith, i.e., that the appeal raises legal points arguable on their merits and thus nonfrivolous. *See Howard*, 707 F.2d at 220. Therefore, we DENY the IFP motion and DISMISS the appeal as frivolous. *See Baugh*, 117 F.3d at 202; *Howard*, 707 F.2d at 220; 5TH CIR. R. 42.2.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

THOMAS TINER #706290

V.

DANELLA COCKRELL, JIMMY
PEACOCK, JAMES MCDONALD,
and CYNTHIA JACKSON

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NO: 7:18-CV-00087-DC

ORDER DISMISSING CASE FOR LACK OF SUBJECT-MATTER JURISDICTION

BEFORE THE COURT is Plaintiff Thomas Tiner's (hereinafter "Plaintiff") Complaint against Danella Cockrell, Jimmy Peacock, James McDonald and Cynthia Jackson (hereinafter collectively referred to as "Defendants"). Plaintiff, filing *pro se*, claims a violation of his civil rights under 42 U.S.C. § 1983.

I. Subject-matter jurisdiction

Federal courts are courts of limited jurisdiction; without jurisdiction, they lack the power to adjudicate claims. *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286–87 (5th Cir. 2012) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Under Federal Rule of Civil Procedure 12(b)(1), a claim is "properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate" the claim. *In re FEMA Trailer*, 668 F.3d at 286–87. A court should consider whether it has subject-matter jurisdiction pursuant to Rule 12(b)(1) before addressing any claims on the merits. *Id.*

The Court has an initial and continuing independent obligation under Fed. R. Civ. P. 12(b)(1) to review and dismiss cases in which it lacks subject-matter jurisdiction, even in the absence of a challenge from any party. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Rule

12(b)(1) allows a court to dismiss the case whenever it appears the court lacks jurisdiction of the subject-matter. In fact, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3). It is well-established that dismissals for lack of subject-matter jurisdiction may be ordered *sua sponte*. *Arbaugh*, 546 U.S. at 506.

A district court can dismiss an action *sua sponte* for lack of federal subject-matter jurisdiction, even where the defendant makes no responsive pleadings and does not move to dismiss for want of subject-matter jurisdiction. 61A Am. Jur. 2d Pleading § 407; *see also Howard v. Lemmons*, 547 F.2d 290 (5th Cir. 1977). Federal courts must address jurisdictional questions whenever they are raised and must consider jurisdiction *sua sponte* if not raised by parties. *Rutherford v. Breathwite Marine Contractors, Ltd.*, 59 F. Supp. 3d 809 (S.D. Tex. 2014).

II. Federal question jurisdiction

Plaintiff has submitted his complaint to the Court without demonstrating that the Court possesses the appropriate jurisdiction. [docket number 1]. Federal question jurisdiction exists in cases “arising under the Constitution, laws, and treaties of the United States.” 28 U.S.C. § 1331. However, “federal courts are courts of limited jurisdiction,” and “it should be presumed that a cause lies outside of that limited jurisdiction.” *Gomez v. O’Reilly Auto. Stores, Inc.*, 283 F. Supp. 3d 569, 572 (W.D. Tex. 2017). Accordingly, there is a presumption against a broad construction of “arising under” in the context of § 1331. *See Kokkonen*, 511 U.S. at 377; *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S.Ct. 1562, 1573 (2016) (“Out of respect for state courts, this Court has time and again declined to construe federal jurisdictional statutes more expansively than their language, most fairly read, requires.”).

III. Diversity of citizenship

Additionally, Plaintiff can plead subject-matter jurisdiction under 42 U.S.C. § 1332. Subject-matter jurisdiction under § 1332 is valid when “the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . (1) citizens of different States.” 28 U.S.C. § 1332(a)(1). Here, Plaintiff has been at all times a resident of the State of Texas, as are all defendants. [docket numbers 1 & 7]. Regardless of the amount in controversy, § 1332 jurisdiction would be improper because there is not diversity of citizenship between the Plaintiff and the Defendants as Plaintiff resides in Huntsville, Texas, and all Defendants reside in either Odessa, Texas, or Crane, Texas.

IV. 42 U.S.C. § 1983

Plaintiff filed his complaint pursuant to 42 U.S.C. § 1983. In a § 1983 civil rights action, a plaintiff must show (1) the conduct complained of was committed by a person acting under color of state law, and (2) such conduct deprived the plaintiff of rights, privileges, or immunities secured by the law or the Constitution of the United States. 42 U.S.C. § 1983; *Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *James v. Tex. Collin Cty.*, 535 F.3d 365, 373 (5th Cir. 2008). A § 1983 action is a means to redress violations of federal law by state actors. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–85 (2002).

It would be improper for the Court to extend its jurisdiction to a case arising between private citizens that does not involve a federal question. *See Kokkonen*. Defendants in this case are Plaintiff’s older sister, two attorneys, and a CPA, all involving a dispute over an inheritance from Plaintiff’s late father. [docket number 7]. Defendants are not state actors and are therefore unable to act pursuant to color of state law pursuant to the requirements of 42 U.S.C. § 1983. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998) (inadequacy of federal claim

that failed to show defendant was a state actor required dismissal for lack of subject-matter jurisdiction). The Court therefore does not have subject-matter jurisdiction to hear the case.

V. 42 U.S.C. §§ 1985 and 1986

In a conclusory fashion, Plaintiff also states his complaint is brought under 42 U.S.C. §§ 1985, and 1986. [docket number 7 at 8]. A § 1985 concerns a conspiracy among Defendants to deprive Plaintiff of his civil rights. 42 U.S.C. § 1985. To state a cause of action under § 1985, a plaintiff must plead (1) a conspiracy of two or more persons, (2) who are motivated by a racial or otherwise class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by federal law to all, (4) which results in injury to plaintiff (5) as a consequence of an overt act committed by the defendants in connection with the conspiracy. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267–68, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993); *Griffin v. Breckenridge*, 403 U.S. 88, 102–03, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

A plaintiff asserting a private conspiracy claim under the first clause of § 1985(3) must show (1) that some racial or class-based discriminatory animus motivated the conspirator's actions, and (2) that the conspiracy aimed at interfering with rights that are protected under federal law from both private and official encroachment. *See, e.g., Bray*, 506 U.S. at 267–68, 113 S.Ct. 753; *see also Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995) (conspiracy claim is not actionable absent an actual violation of § 1983); and *Goldschmidt v. Patchett*, 686 F.2d 582, 585 (7th Cir. 1982) (“an actual denial of a civil right is necessary before a cause of action [for conspiracy] arises.”). Moreover, § 1985(3) is not a general federal tort statute and does not reach conspiracies motivated by economic or commercial animus. *See, e.g., United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 838, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983).

Plaintiff fails to properly plead a conspiracy in his complaint concerning these non-state actors whose acts were motivated by economic animus. [See docket numbers 1 & 7].

A § 1986 extends liability in damages to those persons “[w]ho, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 ... are about to be committed, and having power to prevent or aid in preventing the commission of the same, (neglect or refuse) so to do....” 42 U.S.C. § 1986. To grant relief under § 1986 requires the complaint to have a valid claim under § 1985. Plaintiff fails to make a conspiracy claim pursuant to § 1985; thus, his § 1986 claim also fails.

Plaintiff’s vague references to these various federal statutes is insufficient to support the exercise of federal jurisdiction. Mere assertions of a claim under a federal statute do not vest a court with federal question jurisdiction when the claim “is wholly insubstantial.” *Southpark Square Ltd. v. City of Jackson, Miss.*, 565 F.2d 338, 341 (5th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978). When Plaintiff’s causes of action are “obviously without merit,” as in this case, the court may find them “insubstantial and frivolous.” *Id.* at 342. Moreover, the Court has already determined it lacks subject-matter jurisdiction in its examination of Plaintiff’s § 1983 claim. Because the Court lacks subject-matter jurisdiction, it must dismiss the case in its entirety. *Arbaugh*, 546 U.S. at 514.

VI. Time-bar

In the alternative, the Court notes that Plaintiff’s claims stem from his father’s death and the disposition of the estate, which according to Plaintiff was “in or about 2014.” [docket number 7 at 6]. In Texas, the limitations period for a claim brought pursuant to § 1983 is determined by the general statute of limitations governing personal injuries. *Price v. City of San Antonio*, 431 F.3d 890, 892 (5th Cir. 2005). In relevant part, that statute provides that “a person must bring suit

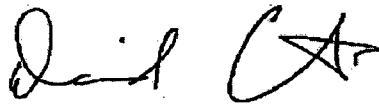
... not later than two years after the day the cause of action accrues.” Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 2005). Thus, any complaints brought in 2018 stemming from actions that took place in 2014 are arguably also time-barred.

VII. Conclusion

The Court finds that it does not have subject-matter jurisdiction, either under 28 U.S.C. §§ 1331 or 1332. All claims in this action should be dismissed with prejudice for all purposes because the Court does not have subject-matter jurisdiction. *Arbaugh*, 546 U.S. at 514. Alternatively, Plaintiff’s complaint may also be dismissed because he untimely filed it by waiting more than two (2) years after “the day the causation of action accrued.” Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a). This case is therefore **DISMISSED**.

It is so **ORDERED**.

SIGNED this 20th day of June, 2018.

A handwritten signature in black ink, appearing to read "David Counts", with a stylized star or flourish at the end.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

THOMAS TINER #706290

V.

DANELLA COCKRELL, JIMMY
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NO: 7:18-CV-00087-DC

FINAL JUDGMENT

On this day the Court entered an Order dismissing Plaintiff's case for lack of subject-matter jurisdiction. The Court now enters its Final Judgment pursuant to Federal Rule of Civil Procedure 58.

Accordingly, it is hereby **ORDERED** that Plaintiff's 42 U.S.C. § 1983 civil rights complaint is **DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION**.

It is also **ORDERED** that the above-captioned cause is **DISMISSED WITH PREJUDICE**, with the Parties to bear their own costs.

It is lastly **ORDERED** that all other pending motions, if any, are denied as moot.

It is so **ORDERED**.

SIGNED this 20th day of June, 2018.



DAVID COUNTS
UNITED STATES DISTRICT JUDGE

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