United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 21, 2018
Decided January 17, 2019

[SEAL]

Before

William J. Bauer, *Circuit Judge*
Michael S. Kanne, *Circuit Judge*

BARRY J. SMITH, SR., Plaintiff-Appellant,	] Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 18-2408 v.	]
UNITED STATES OF AMERICA, et al., Defendants-Appellees.	] No. 2:17-cv-01419-DEJ
	] David E. Jones, Magistrate Judge.

ORDER

The scope of our jurisdiction is limited to a review of the district court's order of June 26, 2018. That order denied Smith's motions to amend the complaint, for relief from the judgment, and to extend the time to appeal – the latter two motions having been filed on April 5, 2018, well after entry of judgment on January 30, 2018. The appeal – which was filed on June 28, 2018 – is now fully briefed, and ready for decision.

We have carefully reviewed Smith's briefs – which do not challenge the denial of the motion to extend time to appeal – and those of appellees. Based on this

review, we have determined that the district court did not error in denying Smith's motions.

Smith's motion for relief from judgment was not filed within 28 days of entry of judgment and therefore is treated as a Rule 60(b) motion. *Banks v. Chicago Board of Education*, 750 F.3d 663, 665 (7th Cir. 2014). And our review of the motion's denial is for an abuse of discretion, meaning that we will not disturb a district court's Rule 60(b) ruling unless we are convinced that "no reasonable person could agree with the district court." *Talano v. Northwestern Medical Faculty Foundation, Inc.*, 273 F.3d 757, 762 (7th Cir. 2001). Smith's attempt to persuade us that the district court abused its discretion falls well short of this mark.

And, since the district court denied Smith's Rule 60(b) motion – and did not vacate the judgment or otherwise reopen the case – the court also did not abuse its discretion in denying Smith's motion to amend the complaint. It is well settled that after a final judgment, a plaintiff may amend a complaint under Fed. R. Civ. P. 15(a) only "after . . . *the judgment has been set aside or vacated.*" *Vesely v. Armslist LLC*, 762 F.3d 661, 666-67 (7th Cir. 2014) (emphasis in original) (internal quotations omitted). Nothing more needs to be said.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARRY J. SMITH, SR.,

Plaintiff,

v. **Case No. 17-CV-1419**

UNITED STATES OF AMERICA, and STATE OF WISCONSIN,

Defendants.

DECISION AND ORDER ON MOTIONS

(Filed Jun. 26, 2018)

This Court dismissed plaintiff Barry J. Smith, Sr.'s *pro se* complaint against the United States of America and the State of Wisconsin on January 29, 2018. *See* Decision and Order on Motions to Dismiss, ECF No. 16. Judgment was entered the same day. *See* Judgment in a Civil Case, ECF No. 17. In his complaint, Mr. Smith challenged restrictions on his citizenship rights that result from his prior criminal conviction. *See* Civil Rights Complaint, ECF No. 1.

On February 27, 2018, Mr. Smith filed a motion for leave to amend pleading pursuant to Federal Rule of Civil Procedure 15(a)(2), along with a proposed amended complaint. ECF No. 18. The Court will deny this motion because judgment must be vacated before the Court can consider a motion to amend the pleading in a closed case. *Foster v. DeLuca*, 545 F.3d 582, 584

(7th Cir. 2008) (After a final judgment, a plaintiff may amend his complaint only after successfully moving to vacate or set aside a judgment under Federal Rule of Civil Procedure 59(e) or 60(b).).

After the United States of America argued that a motion for relief from judgment was necessary before a motion for leave to amend the complaint, Mr. Smith filed a motion under Rule 60(b)(6). Rule 60(b) of the Federal Rules of Civil Procedure enables a court to grant relief from a judgment only under the particular circumstances listed in the rule. *Russell v. Delco Remy Div. of Gen. Motors*, 51 F.3d 746, 749 (7th Cir. 1995). Those are:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable due diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

In his motion, Mr. Smith argues that it would be in the interests of justice to reopen this case and allow him to amend his complaint. *See* Motion Pursuant to Rule 60(b)(6) for Relief from Judgment, ECF No. 21. He

believes "the defendants [have] imposed conditions on plaintiffs liberty that prohibit his exercise of his Second and Fifth Amendment [sic] rights in violation of his liberty right pursuant to the Thirteenth Amendment, without a full and fair due process of law hearing pursuant to the Fifth and Fourteenth Amendments[.]" *Id.* at 1-2.

Simply mentioning multiple constitutional amendments does not make those amendments applicable to Mr. Smith's claims. As the Court concluded in its order on the motions to dismiss, there is no constitutional violation or due process required when some constitutional rights are abridged as a result of a criminal conviction. ECF No. 16 at 3. The Court clearly cited cases allowing the very limitations he complains of his in [sic] complaint. *Id.* at 3-5. Mr. Smith received due process as part of his criminal cases when he was convicted. Any claims Mr. Smith might try to bring in an amended complaint would be futile and, as a result, it is not in the interests of justice to reopen this case or allow Mr. Smith to file an amended complaint. The Court will deny Mr. Smith's motion for relief from judgment.

Finally, Mr. Smith filed a motion for extension of time to appeal on April 5, 2018. ECF No. 23. He submits that his motion for leave to file an amended complaint was filed on the twenty-eighth day after entry of the Court's order dismissing his complaint. He further argues that the motion tolled his time to file a notice of appeal because it was really a hybrid of a motion to amend a complaint under Federal Rule of Civil

Procedure 15(a) and a motion asking the Court to make additional findings under Federal Rule of Civil Procedure 52(b). A timely motion under Rule 52(b) stays the time for filing a notice of appeal until the Court disposes of the motion. Fed. R. App. P. 4(a)(4)(A)(ii). This argument fails, in part because Rule 52(b) does not apply to this case.

The Court could construe Mr. Smith's motion for leave to file an amended complaint as a motion under Federal Rule of Civil Procedure 59 or 60, which would have the same effect. *See* Fed. R. App. P. 4(a)(4)(A)(iv) and (vi). That would be futile, though, since Mr. Smith has not shown "excusable neglect or good cause" for an extension of time to file a notice of appeal, which is required under Fed. R. App. P. 4(a)(5)(A)(ii). The Court will deny Mr. Smith's motion for extension of time.

NOW, THEREFORE, IT IS HEREBY ORDERED that Mr. Smith's Motion for Leave to Amend Pleading, ECF No. 18, is **DENIED**.

IT IS FURTHER ORDERED that Mr. Smith's Motion for Relief from Judgment, ECF No. 21, is **DENIED**.

IT IS ALSO ORDERED that Mr. Smith's Motion for Extension of Time for Appeal, ECF No. 23, is **DENIED**.

Dated at Milwaukee, Wisconsin, this 26th day of June, 2018.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

BARRY J. SMITH, SR.,

Plaintiff,

v. **Case No. 17-CV-1419**

UNITED STATES OF AMERICA, and STATE OF WISCONSIN,

Defendants.

DECISION AND ORDER ON MOTIONS TO DISMISS

(Filed Jan. 29, 2018)

Plaintiff Barry J. Smith, Sr. filed a three-page *pro se* complaint on October 17, 2017, and paid the full filing fee. ECF No. 1. In his complaint, Mr. Smith names as defendants the United States of America and the State of Wisconsin, and he demands the full benefits of citizenship that are denied him because he is a convicted felon. *Id.* The State moves to dismiss Mr. Smith's complaint based on Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ECF No. 5 at 1. The United States also moves to dismiss Mr. Smith's complaint because it fails to state a claim under Rule 12(b)(6). ECF No. 8. For the reasons set forth below, the Court will grant defendants' motions to dismiss.

The matter was randomly assigned to this Court, and the parties subsequently consented to the full

jurisdiction of a magistrate judge. *See* 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73(b).

I. Lack of Subject Matter Jurisdiction

The State argues under Rule 12(b)(1) that this Court lacks subject matter jurisdiction over any claim for money damages because the State has sovereign immunity under the Eleventh Amendment. ECF No. 5 at 2. The State is correct, but Mr. Smith confirms in his response to the motion that he is not seeking money damages. ECF No. 6 at 6. Thus, the Court will not grant the State's motion to dismiss for lack of subject matter jurisdiction.

II. Failure to State a Claim

Rule 12(b)(6) empowers a party to "challenge the sufficiency of the complaint to state a claim upon which relief may be granted." *Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). To survive a motion to dismiss, a claimant must "state a claim to relief that is 'plausible on its face.'" *Adams v. City of Indianapolis*, 742 F.3d 720, 729 (7th Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim satisfies this pleading standard when there is "'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Adams*, 742 F.3d at 728 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A plaintiff is not required to plead particularized facts, but the factual allegations must "raise

a right of relief above a speculative level." *Twombly*, 550 U.S. at 555.

In his complaint, Mr. Smith challenges the limitations on his citizenship rights and other consequences that stem from his prior conviction of a crime. ECF No. 1. These include the right to keep and bear arms, the right to run for political office, being asked whether he has been convicted of a crime when testifying in court, and being denied employment opportunities based on his criminal history. *Id.* at 2-3. Mr. Smith believes that because he has served his sentence, in his criminal case he should no longer be subject to these conditions. *Id.*

This is not the first time Mr. Smith has filed a civil complaint in the Eastern District of Wisconsin challenging the consequences of his criminal conviction. In at least three cases, which were all dismissed, Mr. Smith named a variety of government entities and public officials and made complaints about his inability to keep and bear arms and his ineligibility to run for public office. *Smith v. United States of America, et al.*, No. 2:08-cv-00262-RTR (E.D. Wis.); *Smith v. The President of the United States of America, et al.*, No. 2:08-cv-00956-JPS (E.D.Wis.); *Smith v. Unite* [sic] *States Congress, et al.*, No. 13-cv-00206-CNC (E.D.Wis.).

In response to one of Mr. Smith's earlier civil complaints setting forth similar claims, United States District Judge J.P. Stadtmueller concluded that limitations on a felon's right to carry a firearm, vote, or hold public office "are well-recognized collateral

consequences of a felony conviction, and the constitutionality of those long-standing consequences are not legitimately disputed." *Smith*, No 2:08-cv-00956-JPS, ECF No. 25 at 4. Judge Stadtmueller also cited the applicable case law upholding limitations on felons' rights to keep and bear arms and vote. *Id.*

In *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008), the Supreme Court of the United States held that the Second Amendment does not bar prohibitions on possession of firearms by felons. Based on this precedent, Mr. Smith cannot maintain a claim that prohibitions on his ability to possess a firearm, or new criminal prosecutions if he does, violate his constitutional rights.

"[A] ban on felons running for elective office is valid if it is rationally related to a legitimate state interest." *Parker v. Lyons*, 757 F.3d 701, 707 (7th Cir. 2014). In *Parker*, the Seventh Circuit found that the State of Illinois had a legitimate state interest in barring felons from elective office. *Id.* The court went on to say that "even if a higher level of scrutiny applied to restrictions on the right of ex-felons to hold office, the claim would fail." *Id.* This is because "[t]he Supreme Court has held that states may deprive convicted felons of the right to vote – a right that, unlike [a felon's] interest in running for office, *is* fundamental and subject to strict scrutiny." *Id.* (citing *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974)) (emphasis in original). Mr. Smith may not maintain a claim that prohibiting him from running for and holding public office violates his constitutional rights.

Next, Mr. Smith seems to suggest that his right to self-incrimination is violated when he testifies in court and must truthfully answer when asked whether he has ever been convicted of a crime. ECF No. 1 at 2. The Court presumes that Mr. Smith is referring to Federal Rule of Evidence 609, Impeachment by Evidence of a Criminal Conviction. Rule 609 applies "to attacking a witness's character for truthfulness by evidence of a criminal conviction." The Federal Rules of Evidence are adopted and amended by the Supreme Court, and Rule 609 itself contains limitations regarding when and what evidence of a criminal conviction may be presented in court. This Court has trouble understanding how truthfully responding to a question about the number of criminal convictions one has had could undermine the Fifth Amendment's protection against being compelled to be a witness against yourself in a criminal case.

Mr. Smith broadly says that the defendants have denied him employment opportunities based solely on his previous conviction. ECF No. 1 at 3. His complaint has no factual details that could plausibly state a claim against defendants. In his brief in response to the United States' motion to dismiss, Mr. Smith indicates that he applied to work for the federal census in 2010, but he was denied employment based solely on his criminal conviction. ECF No. 12 at 7. Even if those facts were included in his complaint, Mr. Smith would not be able to state a claim against the United States. Title VII "provides the exclusive remedy for claims of discrimination in federal employment." *Brown v.*

General Svcs. Admin., 524 U.S. 820, 825 (1976); Mlynczak v. Bodman, 442 F.3d 1050, 1056-57 (7th Cir. 2006). But Title VII does not include protections against employment discrimination on the basis of felony convictions. 42 U.S.C. § 2000e-2(a).

Finally, within his complaint, Mr. Smith moves the Court to take judicial notice of his true identity as a "Descendant of American Slaves," as opposed to his official birth certificate in 1953 that said "Negro" and his current government identity as "African American" in 2017. ECF No. 1 at 3. The Court does not monitor the race of litigants so there is no need for the Court to take judicial notice in this case of how Mr. Smith self-identifies.

III. Conclusion

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion to Dismiss by State of Wisconsin (ECF No. 5) is **GRANTED**.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion to Dismiss by United States of America (ECF No. 8) is **GRANTED**.

IT IS FURTHER ORDERED that this action is **DISMISSED** with prejudice.

FINALLY, IT IS ORDERED that the Clerk of Court enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 29th day of January, 2018.

BY THE COURT:

s/ David E. Jones
DAVID E. JONES
United States Magistrate Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 11, 2019

[SEAL]

Before

WILLIAM J. BAUER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 18-2408

BARRY J. SMITH, SR.,
Plaintiff-Appellant,

v.

UNITED STATES
OF AMERICA, *et al.,*
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 2:17-cv-01419-DEJ

David E. Jones,
Magistrate Judge.

ORDER

On consideration of plaintiff-appellant's petition for rehearing and rehearing *en banc* filed on February 22, 2019, in connection with the above-referenced case, both of the judges on the original panel have voted to deny the petition for rehearing, and no judge in active service has requested a vote on the petition for rehearing *en banc.* It is, therefore, ORDERED that the petition for rehearing and petition for rehearing *en banc* are DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Barry J. Smith Senior,
Plaintiff,

V.

The United States of America, and The State of Wisconsin.
Defendants.

Case# 17-C-1419

CIVIL RIGHTS COMPLAINT

Jurisdictional Statement: This Court has original jurisdiction of this civil rights complaint arising under the Constitution and Laws of the United States of America.

Complaint: Plaintiff is a direct descendant of American slaves, hereinafter referred to as DAS. American slaves were not citizens and had no rights or privileges except such as those which the government might grant them. Plaintiff is denied citizenship because he has no rights or privileges except such as those which the government has granted and might grant to him.

Plaintiff's citizenship was taken as punishment for crimes of which he was convicted and sentenced according to the Thirteenth Amendment to the United States Constitution. That

punishment is a sentence to slavery for a definite period of time. Any definite period of time to which defendants sentenced plaintiff to slavery has definitely expired according to the Fifth, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States of America.

Defendants continue to punish plaintiff by denying to plaintiff the rights of citizenship Guaranteed to him by the Constitution of the United States of America. Defendants deny Plaintiff the citizenship right to keep and bear arms to protect himself, his family and his property; defendants deny plaintiff the citizenship right not to incriminate himself where he is forced to testify in court that he is a criminal by prosecutor and judge by answering the question, "have you ever been convicted of a crime?". Defendants continue to label plaintiff a criminal regardless of the fact that he has paid in full for his past crime and has not committed another; defendants deny plaintiff the citizenship right not to be punished twice for the same crime where they would put him on trial again based on a crime for which he has previously been punished when he exercises the otherwise lawful citizenship right to keep and bear arms; defendants deny plaintiff the citizenship right to a trial by jury where they exercise subjective discretion to deny plaintiff a fair opportunity to prosecute his case and/or where defendants subjectively

choose not to prosecute perpetrators of crime against plaintiff's family; defendants deny plaintiff the citizenship right to be free from slavery except as punishment for a crime whereof he has been duly convicted and sentenced; defendants deny plaintiff the citizenship right to equal protection of the law where defendants have denied and continue to deny plaintiff employment opportunities based solely on his previous condition of Thirteenth Amendment slavery; defendants deny plaintiff the citizenship right to equal protection of the law where they continue to deny plaintiff rights that are enjoyed by all citizens who are not serving a Thirteenth Amendment sentence to slavery; defendants deny plaintiff the citizenship right to run for and/or hold elected political office based solely on his previous condition of slavery.

Defendants have denied plaintiff the equal protection right to politically identify himself where his official birth certificate identified him a Negro in 1953, and defendants now identify him an African American in 2017; plaintiff moves the court take judicial notice plaintiff's true identity is Descendant of American Slaves, hereafter DAS.

Plaintiff demands a trial by jury.

Plaintiff demands full benefit of United States of America Constitution guaranteed

rights of Citizenship, and further requests whatever other remedies a jury finds he is entitled to.

Dated: September-26, 2017

By: /s/ Barry J. Smith Senior

Barry J. Smith Senior
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