

App. 1

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-50261
Summary Calendar

FREDERICK COLLINS FERMIN,
Plaintiff - Appellant

v.

PRIEST OF SAINT MARY-MARFA, TEXAS;
DIOCESE OF EL PASO, TEXAS,
Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:18-CV-327

(Filed Jul. 24, 2019)

Before JOLLY, HIGGINSON, and COSTA, Circuit
Judges.

GREGG COSTA, Circuit Judge:*

Frederick Collins Fermin sued the Diocese of El Paso and an unnamed priest for using a crucifix during his baptism in 1925. He alleges that the priest did so

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

App. 2

“in violation of God’s law,” citing, among other Bible verses, the Second Commandment’s prohibition of idolatry. *See* EXODUS 20:4. The district court granted the Diocese’s motion to dismiss for lack of subject matter jurisdiction, and we affirm.

Fermin says the district court had both diversity and federal question jurisdiction. *See* 28 U.S.C. §§ 1331, 1332. But he did not meet his burden of pleading facts in support of either. *See Howery v. Allstate Ins. Co.*, 243 F.3d 912, 919 (5th Cir. 2001). Diversity jurisdiction requires complete diversity of citizenship—that is, neither defendant can be a citizen of the same state as Fermin. *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991). Fermin fails to allege state citizenships for himself or the defendants. That “failure adequately to allege the basis for diversity jurisdiction mandates dismissal.” *Id.* at 805. Plus, as the district court observed, by all appearances there is not complete diversity: Fermin’s signature block on his complaint lists a San Antonio address, and the Diocese is presumably an El Paso resident.

Moving to federal question jurisdiction, we note that Fermin raises a First Amendment claim. That claim arises under federal law, so it survives a challenge to subject matter jurisdiction unless it is so “completely devoid of merit as not to involve a federal controversy.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (quoting *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 414 U.S. 661, 666 (1974)). But a First Amendment claim against a church and a priest cannot meet that low bar. The First Amendment

App. 3

constrains state action, not private conduct. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Churches and priests are not state actors. Indeed, if the First Amendment had any role to play in this case, it would be to warn us against delving into a dispute about religious doctrine. See *Serbian E. Orthodox Diocese for U.S. & Canada v. Milivojeovich*, 426 U.S. 696, 709 (1976).

We thus need not consider Fermin's argument that the district court erred in denying his motion for default judgment. The Diocese admits that it filed its answer two days late. But without subject matter jurisdiction, the district court could not have granted a default judgment even if one had been warranted. *Mitchell v. Texas*, 56 F.3d 1385, 1995 WL 337749, at *1 (5th Cir. 1995) (per curiam).

* * *

The district court's judgment is AFFIRMED.

**UNITED STATES DISTRICT COURT WESTERN
DISTRICT OF TEXAS EL PASO DIVISION**

FREDERICK COLLINS	§	
FERMIN,	§	
<i>Plaintiff,</i>	§	
v.	§	EP-18-CV-00327-DCG
DIOCESE OF	§	
EL PASO, TEXAS,	§	
<i>Defendant.</i>	§	

MEMORANDUM ORDER

(Filed Mar. 14, 2019)

Presently before the Court is Defendant Diocese of El Paso, Texas' "Motion to Dismiss" (ECF No. 11) filed on March 1, 2019.¹ Therein, Defendant alleges that the Court lacks subject matter jurisdiction over this matter and requests that the Court dismiss the case. Mot. at 5. Plaintiff Frederick Collins Fermin filed a Complaint asserting both diversity jurisdiction and federal question jurisdiction. Compl. at 1, ECF No. 1. By his Complaint, Plaintiff alleges that Defendant violated Christian laws and doctrines, entitling Plaintiff to

¹ The caption of the Complaint is unclear whether Plaintiff intended to sue both the Diocese of El Paso and an unnamed priest or if he only intended to sue the unnamed priest. However, Plaintiff served the Diocese, which answered, so the Court will construe the Diocese as the defendant because the priest is unnamed.

relief. *Id.* at 1–2. For the reasons that follow, the Court **GRANTS** Defendant’s Motion.

A motion pursuant to Rule 12(b)(1) “allow[s] a party to challenge the subject matter jurisdiction of the district court to hear a case.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (*per curiam*) (citing Fed. R. Civ. P. 12(b)(1)). The party asserting jurisdiction bears the burden of proving that jurisdiction exists. *Id.* If the party does not meet its burden, the court must dismiss the action. *See* Fed R. Civ. P. 12(h)(3). A court should only grant a motion to dismiss for lack of subject matter jurisdiction “if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief.” *Ramming*, 281 F.3d at 161 (citing *Home Builders Ass’n of Miss., Inc. v. City of Madison.*, 143 F.3d 1006, 1010 (5th Cir. 1998)).

First, the Court considers whether it has diversity jurisdiction. Where jurisdiction is premised upon diversity, 28 U.S.C. § 1332, the removing party bears the burden of establishing, by a preponderance of the evidence, both that the parties are diverse and that the amount in controversy exceeds \$75,000, exclusive of interest and costs. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008); *Garcia v. Koch Oil Co. of Texas Inc.*, 351 F.3d 636, 638 (5th Cir. 2003). In his Complaint, Plaintiff failed to plead both the amount in controversy and the citizenship of the parties. *See generally* Compl. However, based on his signature block, it appears that Plaintiff resides in San Antonio, Texas, seemingly making him a citizen of

App. 6

Texas. *See id.* at 3; *Alphonse v. Arch Bay Holdings*, 618 F. App'x 765, 767 (5th Cir. 2015) ("Citizenship is based on domicile, i.e., where an individual resides and intends to remain."). Defendant is also a citizen of Texas. Mot. at 4. Thus, both parties are citizens of Texas, so the Court does not have diversity jurisdiction over this matter.

Next, the Court considers whether it has federal question jurisdiction. "A district court has original federal question jurisdiction over 'all civil actions arising under the Constitution, laws, or treaties of the United States'" *Gutierrez v. Flores*, 543 F.3d 248, 251 (5th Cir. 2008) (quoting 28 U.S.C. § 1331). "Under the well-pleaded complaint rule, 'a federal court has original or removal jurisdiction only if a federal question appears on the face of the plaintiff's well pleaded complaint.'" *Id.* at 251–52. Plaintiff failed to plead any federal law basis supporting his allegations. *See generally* Compl. In his Response to the instant Motion, Plaintiff asserts that his claim arises under the First Amendment to the United States Constitution because he is petitioning the government for a redress of his grievance. Resp. at 1, ECF No. 14.² However, the First Amendment does not set the parameters of the Court's jurisdiction, and it cannot be a basis for jurisdiction in this case because Plaintiff is suing a private party. *DuBois v. Bradley*, No. CIV.A. H-13-0252, 2013 WL 3805751, at *4 (S.D. Tex. July 19, 2013) ("[T]he First Amendment does not

² In his Response, Plaintiff also appears to request that the Court strike Defendant's Motion and Answer as untimely. Resp. at 1. The Court, in its discretion, denies Plaintiff's request.

App. 7

regulate the conduct of private parties. In other words, the First Amendment only protects a person from the government, or a particular state actor, not from private citizens.” (emphasis removed and internal quotation marks omitted)).

Moreover, the First Amendment would have prevented the Court from asserting jurisdiction even if Plaintiff’s claim had a federal law basis. “The Supreme Court has recognized the right of religious organizations to control their internal affairs.” *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 (5th Cir. 2012). That right includes the freedom “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Id.* (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115-16 (1952)). This is because “it . . . would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.” *Watson v. Jones*, 80 U.S. 679, 728-29 (1871). Thus, “[i]t is a core tenet of First Amendment jurisprudence that, in resolving civil claims, courts must refrain from intruding upon internal matters of church governance.” *Sonnier v. Roman Catholic Diocese of Lafayette*, No. 6:16-CV-1229, 2017 WL 778153, at *4 (W.D. La. Jan. 18, 2017). Plaintiff’s allegations concern internal matters of church governance. Therefore, the Court is without jurisdiction to decide this dispute. Accordingly, the Court lacks subject matter jurisdiction over this matter, so it must dismiss the case.

App. 8

IT IS HEREBY ORDERED that Defendant Diocese of El Paso, Texas' "Motion to Dismiss" (ECF No. 11) is **GRANTED**.

IT IS FURTHER ORDERED that the Clerk of the Court shall **CLOSE** this cause after docketing the Final Judgment to be issued separately on this day.

So **ORDERED** and **SIGNED** this 14 day of **March 2019**.

/s/ David C. Guaderrama
DAVID C. GUADERRAMA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FREDERICK COLLINS	§	
FERMIN,	§	
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	EP-18-CV-00327-DCG
	§	
DIOCESE OF	§	
EL PASO, TEXAS,	§	
	§	
<i>Defendant.</i>	§	

FINAL JUDGMENT

In accordance with the Order issued this date in this action, the Court hereby enters, pursuant to Federal Rule of Civil Procedure 58, its Final Judgment disposing of this action in its entirety. There being no just cause for delay, this is a **FINAL** and **APPEALABLE** judgment.

IT IS ORDERED that Plaintiff Frederick Collins Fermin's Complaint (ECF No. 1) is **DISMISSED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that each side shall bear its own attorney's fees and costs. **IT IS MOREOVER ORDERED** that all pending motions, if any, are denied as **MOOT** and the Clerk of Court **SHALL CLOSE** this matter.

App. 10

**So ORDERED and SIGNED this 14th day of
March 2019.**

/s/ David C. Guaderrama
DAVID C. GUADERRAMA
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF TEXAS
DIVISION OF EL PASO**

FREDERICK COLLINS
FERMIN Plaintiff,

V.

PRIEST OF ST. MARY-
MARFA, TEXAS
79843 DIOCESE OF
EL PASO, TEXAS

CIVIL ACTION NO.
EP18CV00327

Defendant.

**COMPLAINT AGAINST ROMAN CATHOLIC
CHURCH'S PRIEST OF ST. MARY-MARFA-
DIOCESE OF EL PASO, TEXAS UPON BEING
BAPTIZED WITH GRAVEN IMAGE OF CHRIST
JESUS'S BODY ON A CROSS WHICH IS IN VIO-
LATION OF ISAIAH CHAPTER 42 VERSE 8, AND
EXODUS CHAPTER 20 VERSE 4 TO 6.**

1. Court's jurisdiction is First Amendment of U.S. Constitution and Title 28, U.S. Code Section 1331 and Section 1332. Venue is through being baptized at catholic church in 1925 at Marfa, Texas. Statute of limitation is based on allegation of conspiracy to interfere with Plaintiff's rights at age of 60 days. which is subject to delayed discovery rule of legal Texas doctrine.
2. Using Cross designed with likeness of Christ Jesus' body for communication or prayer with God is in violation of God's law pursuant to

App. 12

Isaiah chapter 42 verse 8, and Exodus chapter 20, verse 4 to 6.

3. Evidence that Christ Jesus did not die on a cross is the Holy Scriptures (Bible)
4. Part of complaint is all catholic nuns use cross for meditation and prayer which is disobedient to Christ Jesus's command for failure to comply with John chapter 8, verse 32.
5. key for litigation is god of this system of things, 2 Corinthians ch. 4, verse 4, that reads: "Among whom the god of this system of things has blinded the minds of the unbelievers that illumination of the glorious, good news about Christ who is the image of God might not shine through"
6. Upon petition, individual's prayer must use Christ Jesus's standard prayer in Matthew chapter 6, verse 9 to 13, **next is petitioner's request.**
7. It is Plaintiff's opinion that it is time for the General Public to use commonsense in the correct interpretation of the **Holy Bible**, and their prayer may be answered if it meets God's requirements.

**BISHOPS AND PRIESTS HAVE
DEFAULTED CODE OF PASTORAL
CONDUCT AND THEIR OATH OF OFFICE**

8. Plaintiff's demand for judgment, is based on defendant's false misleading method of communication with God, which constitutes

App. 13

conspiracy to interfere with Jehovah's laws and Christ Jesus' instructions which is personal injury to plaintiff **because of incompetent representative.**

9. Plaintiff's money damages are only the amount that is required to file lawsuit as demanded in 28 U.S.C. Section 1332 & court costs

Respectfully submitted,

/s/ Frederick Collins Fermin
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