

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

No. 18-50554
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
June 18, 2019

Lyle W. Cayce
Clerk

BURTON MAURICE KAHN, an Individual,

Plaintiff-Appellant

v.

ROBERT RIPLEY, an Individual,

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:17-CV-784

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM.*

This case is the latest round in a long-running dispute between former officers of Helvetia Asset Recovery, a Texas corporation that buys land and then sells it to developers. Plaintiff Burton Maurice Kahn was the company's president for about four years until he was ousted in 2013. Defendant Robert Ripley is the owner of the Bahamian corporation that is the sole shareholder of Helvetia. The prior court proceedings involve state court civil litigation filed

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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by both sides, a state criminal charge (later dropped) against Kahn, and Kahn's Chapter 7 bankruptcy in which all his nonexempt assets, including causes of actions, were sold to Helvetia.

The district court dismissed this latest lawsuit at the pleading stage under Rule 12. It concluded that the prior litigation and bankruptcy sale meant that Kahn did not have standing to assert economic injuries based on a supposed property interest in assets that other courts have already held he no longer owns. The court relatedly held that *res judicata* bars Kahn's claims like conversion that seek to recover property whose ownership was resolved in earlier cases. That left only Kahn's claim for personal injuries like mental anguish that he alleged resulted from Ripley's lying to law enforcement in violation of Texas Penal Code § 37.08. *See United States v. Basey*, 816 F.2d 980, 989 n.13 (5th Cir. 1987). Although the earlier litigation did not bar this claim, the district court concluded that Kahn did not allege enough details to state a plausible claim.

We agree in all respects. First, the district court did not err in determining that Kahn lacked standing to pursue most of the claims. The court correctly concluded that (1) Kahn's current claims relating to ownership of certain assets were interrelated to the claims decided against him in the prior state court proceedings and (2) that he sold his claims and interests in Helvetia to that company during his bankruptcy. Because Kahn did not have any legal interest in Helvetia, he could not show that he suffered any economic injury due to Ripley's alleged conversion of property. *See Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015).

Much of the same analysis supports the district court's additional conclusion that *res judicata* bars Kahn's attempt to revive claims related to those rejected in state court. Although *res judicata* is an affirmative defense

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generally not suited to resolution on the pleadings, dismissal under Rule 12(b)(6) is appropriate if the res judicata bar is apparent from the pleadings and judicially noticed facts. *See Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 n.2 (5th Cir. 2005); *see also Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994). The district court was allowed to take judicial notice of the public records in the three prior state court proceedings. *See Taylor v. Charter Med. Corp.*, 162 F.3d 827, 829 (5th Cir. 1998); *Cinel*, 15 F.3d at 1343 n.6. It is apparent from those state court records that the earlier rulings preclude Kahn's current claims. *See Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007).

That leaves Kahn's claim for false reporting of a crime that seeks compensation for personal injuries he allegedly suffered. We agree that the complaint does not allege sufficient detail to support a plausible claim for that relief.

Accordingly, we AFFIRM the judgment of the district court. Kahn's motion for sanctions is DENIED. Ripley's motion for sanctions is also DENIED. But whether to sanction Kahn is a close call, so Kahn is advised that further frivolous litigation may result in substantial sanctions under Federal Rule of Appellate Procedure 38 or this court's inherent authority and may include monetary sanctions and restrictions on access to federal courts.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

AUG 03 2018

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature] DEPUTY CLERK

BURTON MAURICE KAHN,

Plaintiff,

v.

ROBERT RIPLEY,

Defendant.

Civil No. 5:17-CV-784-OLG

ORDER

This case is before the Court on Plaintiff Burton Kahn's motion seeking reconsideration of the Court's Order entered on June 14, 2018, denying his motions for new trial and his previous motion for reconsideration of the Court's Order granting Defendant's motion for dismiss (docket no. 19). The Court finds that the motion should be DENIED.

Plaintiff's Complaint asserted a claim that Defendant violated Tex. Pen. Code § 37.08 by falsely stating to police that "Kahn was not president and Ripley was president" of Helvetia Asset Recovery, and a claim of conversion, which also appears to relate to statements that Defendant made to state law enforcement officials regarding Plaintiff's authority to control Helvetia's assets in September and October 2013—statements that Plaintiff asserts were false. Docket no. 1 at ¶¶ 93-95. This Court previously granted Defendant's motion to dismiss, based, *inter alia*, on a finding that the factual questions regarding Plaintiff's authority to control Helvetia's assets had been litigated and decided in prior state-court litigation between these parties, and were thus precluded from re-litigation in this Court. Docket no. 12 at 3-5. Since the alleged falsity of these statements is the factual core of both of Plaintiff's claims, the Court dismissed Plaintiff's claims for failure to state a claim upon which relief could be granted. *Id.*

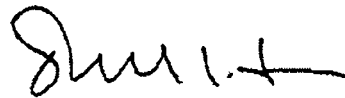
In his motion seeking reconsideration and his motion for new trial, Plaintiff asserted the same factual claim that the Court previously found to be precluded from further litigation: that “[a]ll the statements [in] paragraph 4 of Robert Ripley’s affidavit to police on [] July [2, 2015] are fabricated false and perjurious.” Docket nos. 17 at 3; 18 at 3. In the present motion seeking reconsideration, Plaintiff again argues that the Court’s preclusion analysis was flawed because, he maintains, prior state courts that litigated and decided Plaintiff and Defendant’s respective authority to control Helvetia’s assets in September and October 2013 did not review evidence documenting that Defendant Robert Ripley purchased the stock shares by which he became director of Puerto Verde Ltd, the Bahamian corporation that was Helvetia’s sole shareholder. Docket no. 20 at 3. Defendant thus continues to present the same factual contention that he has maintained throughout this litigation: That Defendant has supplied insufficient evidence, such as bank records or Puerto Verde Ltd. meeting minutes, documenting the transactions by which Ripley became Puerto Verde’s director, and that therefore Plaintiff’s authority as Helvetia’s President and Director continued beyond September 2013. *See, e.g.*, Docket no. 5 at 3-4.

Plaintiff’s arguments are unavailing. It is clear from the record in this case that the various state courts that have litigated Plaintiff’s claims of authority to control Helvetia’s assets and act on its behalf have all concluded that Plaintiff lacked that authority as of September 2013. Docket no. 4 at ¶¶ 4-9 (summarizing state court litigation). For instance, the June 2014 Final Judgment of the Bexar County District Court “found, among other things, that Kahn did not own Helvetia or its stock. Rather, the trial court determined the sole owner of Helvetia is Puerto Verde, Ltd. (“Puerto Verde”), which is owned by Robert Ripley.” *Kahn v. Helvetia Asset Recovery, Inc.*, 475 S.W.3d 389, 391 (Tex. App.—San Antonio 2015, pet. denied). This finding as to the ultimate factual issue of the parties’ respective authority to manage Helvetia—and thus as to the truth or falsity of Defendant’s statements regarding that authority to state law

enforcement officials—amounts to an implicit rejection of Plaintiff's factual assertions regarding why Defendant supposedly lacked authority as a director of Puerto Verde, Ltd., and, in turn, over Helvetia. Whether or not the state courts that previously litigated the parties' claims against each other gave explicit consideration to the various subsidiary factual issues that Plaintiff now seeks to raise, those courts' clear determination of the ultimate factual question at the core of Plaintiff's claims in this case—that Defendant falsely represented to state law enforcement officials that he, not Plaintiff, had authority over Helvetia's assets—precludes further litigation of that question.

It is therefore ORDERED that Plaintiff's motion seeking reconsideration (docket no. 20) is DENIED.

SIGNED this 3 day of August, 2018.




ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

JUN 14 2018

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY  DEPUTY CLERK

BURTON MAURICE KAHN,

Plaintiff,

v.

ROBERT RIPLEY,

Defendant.

Civil No. 5:17-CV-784-OLG

ORDER

This case is before the Court on Plaintiff Burton Kahn's Motion to Reconsider Order Dismissing Case (docket no. 17) and Motion for New Trial (docket no. 18). The Court finds that both motions should be DENIED.

Plaintiff's Complaint asserted a claim that Defendant violated Tex. Pen. Code § 37.08 by falsely stating to police that "Kahn was not president and Ripley was president" of Helvetia Asset Recovery, and a claim of conversion, which also appears to relate to statements that Defendant made to state law enforcement officials regarding Plaintiff's authority to control Helvetia's assets in September and October 2013—statements that Plaintiff asserts were false. Docket no. 1 at ¶¶ 93-95. This Court previously granted Defendant's motion to dismiss, finding that the factual questions regarding Plaintiff's authority to control Helvetia's assets had been litigated and decided in prior state-court litigation between these parties, and were thus precluded from re-litigation in this Court. Docket no. 12 at 3-5. Since the alleged falsity of these statements is the factual core of both of Plaintiff's claims, the Court dismissed Plaintiff's claims for failure to state a claim upon which relief could be granted. *Id.*

In his motion seeking reconsideration and his motion for new trial, Plaintiff now asserts the same factual claim that the Court previously found to be precluded from further litigation:

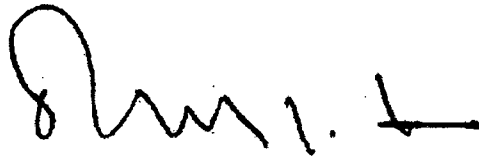
that "[a]ll the statements [in] paragraph 4 of Robert Ripley's affidavit to police on [] July [2, 2015] are fabricated false and perjurious." Docket nos. 17 at 3; 18 at 3.

Although Plaintiff's motions again dispute the truthfulness of several of the representations that Defendant made to the Bexar County District Attorney's Office in July 2015, Plaintiff's motions do not dispute that the accuracy of those representations, which go to the question of his authority in September and October of 2013 to transfer Helvetia's assets, have been litigated and decided in prior state-court litigation. And although Plaintiff's motions are accompanied by extensive documentary evidence not previously submitted to the Court, Plaintiff has made no showing that this evidence was previously unavailable to him, and, to the extent that it relates to the Court's assessment of the sufficiency of Plaintiff's pleading, it does so only by further showing that the factual issues that Plaintiff seeks to litigate in this case have been previously decided by state courts in prior litigation in which these parties were involved. *See, e.g.*, docket nos. 17-1 at 28-33, 70-74, 78-80, 88-105.

The Court therefore finds that Plaintiff has failed to show any error in the Court's judgment and is not entitled to relief under either Fed. R. Civ. P. 59(e) or 60(b).

It is therefore ORDERED that Plaintiff's Motion to Reconsider Order Dismissing Case (docket no. 17) and Motion for New Trial (docket no. 18) are DENIED.

SIGNED this 14 day of June, 2018.



ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE

FILED

APR 26 2018

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY CLERK

BURTON MAURICE KAHN,

Plaintiff,

v.

ROBERT RIPLEY,

Defendant.

Civil No. 5:17-CV-784-OLG

ORDER

This case is before the Court on Defendant Robert Ripley's Motion to Dismiss (docket no. 4). The Court finds that the motion should be GRANTED.

Background

This case arises from a dispute between former officers of Helvetia Asset Recovery, a Texas corporation whose sole shareholder was a Bahamian corporation, Puerto Verde Ltd. Docket nos. 4 at ¶ 1; 4-3 at 1-9, 11; 4-4 at 3. Defendant Robert Ripley is the sole owner of Puerto Verde, and Plaintiff Burton Kahn served as Helvetia's director and president between 2009 and August 2013. Docket no. 4 at ¶¶ 1-2. In previous litigation involving the parties and business entities involved in this case, courts found that, in September and October 2013, shortly after his termination as Helvetia's director and president, Plaintiff Kahn signed and filed three warranty deeds in Helvetia's name that purported to transfer the Key Largo subdivision—consisting of 215 lots and 55 occupied homes—to a company he owned, Paradiv, and transferred \$450,000 from Helvetia's bank accounts to accounts owned by him or his companies. Docket nos. 4 at ¶ 2-3; 4-4 at 4-5. Following these transactions, both Helvetia and Defendant Ripley initiated state-court litigation against Kahn, and Kahn, purporting to assert claims in the name of Helvetia, filed a state court lawsuit against Helvetia. This state court litigation resulted in judgements against

Kahn and sanctions awards against Kahn and his then-counsel, in which the various courts found that Plaintiff Kahn "filed a fraudulent court record or claim against real property owned by Helvetia"; that "Mr. Kahn knew his claim of ownership [of Helvetia] through a stock purchase in 2013 was groundless"; and that his assertions that Puerto Verde had never paid for its shares of Helvetia, or that Puerto Verde's purchase was rendered void by forgery, were without merit. Docket nos. 4 at ¶¶ 4-8. In April 2014, Kahn filed a pro se voluntary Chapter 7 bankruptcy petition, and the Chapter 7 Trustee in that proceeding subsequently moved for and obtained, over Kahn's objections, court authorization to sell Kahn's non-exempt assets, claims, and causes of action to Helvetia pursuant to 11 U.S.C. §§ 363 and 704, Fed. R. Bankr. P. 6004, and Local Bankruptcy Rule 6004. Docket no. 4 at ¶¶ 10-11. In July 2015, Defendant Ripley provided affidavit testimony to a criminal investigator with the Bexar County District Attorney's Office, which was subsequently used by the District Attorney's Office to obtain from a grand jury a True Bill of Indictment against Kahn. Docket no. 4 at ¶ 13. The basis for the indictment was Kahn's presentation of the September and October 2013 deeds to the county clerk, by which Kahn, purporting to act on behalf of Helvetia, purported to transfer the Key Largo subdivision to Paradiv. Docket no. 4 at ¶ 13. Kahn was arrested and prosecuted, and a trial was set for February 2017, but after Kahn's attorney requested a continuance of the trial date, the state presented a motion to dismiss, which was granted without prejudice, with the stated reason for dismissal being that "further investigation" was needed. Docket no. 4 at ¶ 14.

Plaintiff Kahn initiated this litigation months after the dismissal of the criminal charges against him. He asserts two claims against Ripley. First, he claims that he has suffered "legal costs and mental anguish" because Defendant Ripley, in violation of Tex. Pen. Code § 37.08, falsely stated to police that "Kahn was not president and Ripley was president[.]" Docket no. 1 at ¶ 93. Second, Plaintiff asserts a claim for conversion, alleging that Kahn owned, possessed or

had the right to immediate possession of personal property” and that “Ripley wrongfully exercised dominion of control over the property[.]” Docket no. 1 at ¶¶ 94-95.

In his motion to dismiss, Defendant Ripley argues that dismissal is warranted because, since “Kahn’s lawsuit . . . seeks to recover on claims that were sold to Helvetia[.]” Kahn lacks standing and the Court is therefore without subject matter jurisdiction, docket no. 4 at ¶ 19; because Kahn’s pleadings fail to state a plausible claim upon which relief can be granted, docket no. 4 at ¶¶ 22-25; because Plaintiff failed to adequately serve Defendant, docket no. 4 at ¶¶ 26-28; and because Kahn has not joined Helvetia despite asserting claims “that are actually owned by Helvetia” and seeks relief including an award of ownership of shares of Helvetia, docket no. 4 at ¶ 29. In response, Plaintiff Kahn, who is proceeding *pro se* in this action, reasserts his claim that he purchased 1000 shares of Helvetia stock in September 2013 and that Defendant Ripley was not a director of Puerto Verde. Docket no. 5 at 2-3. Plaintiff Kahn does not respond to the arguments raised in Defendant’s motion to dismiss other than to argue that Defendant was adequately served. Docket no. 5 at 4.

Legal Standards and Analysis

The Court agrees with Defendant that Plaintiff lacks standing because the factual core of his claims—Plaintiff’s allegation that Defendant wrongfully took control of Helvetia via a false claim to have been the director of Puerto Verde—is inextricable from the claims he asserted in prior state court litigation, which were considered and decided against him in multiple state court proceedings before, in the bankruptcy proceeding, he sold those claims to Helvetia. Prudential standing principles “require that a plaintiff ‘generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.’”

United States v. Johnson, 632 F.3d 912, 920 (5th Cir. 2011) (citing *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978)). Moreover, these factual claims have been

litigated to judgment and through appeals in no fewer than three distinct state court proceedings, and the record suggests that Plaintiff attempted to litigate these issues a fourth time in connection with the bankruptcy proceeding. Having been actually considered and decided in prior litigation between these parties and business entities that had the incentive and opportunity to vigorously litigate the parties' disputes regarding control of Helvetia's assets, it is clear from the pleadings and public records subject to judicial notice that further relitigation of these disputes, even setting aside considerations of standing and subject matter jurisdiction, is precluded. *Hall v. Hodgkins*, 305 Fed. App'x 224, 227 (5th Cir. 2008) (noting that, although preclusion arguments must generally be pleaded as affirmative defenses, preclusion may be analyzed at the motion to dismiss stage when the facts that give rise to it are clear from the pleadings and from public records of which the Court may take judicial notice).

The Court acknowledges that, although the factual core of Plaintiff's complaint seeks to relitigate—yet again—his authority as president of Helvetia to control its assets, at least some of the injuries alleged in his complaint are personal to him. Docket no. 1 at ¶ 93 (alleging that he suffered “legal costs and mental anguish including a heart attack with hospital stays”). Violations of Tex. Pen. Code § 37.08 may give rise to civil liability, *see United States v. Basey*, 816 F.2d 980, 989 n.13 (5th Cir. 1987) (citing *Santillana v. Williams*, 599 F.2d 634 (5th Cir. 1979) (*per curiam*)), but Plaintiff's complaint fails to plead facts drawing a causal link between either of his causes of action and this injury, other than to make a conclusory allegation that these injuries were “due to Ripley's false claims . . . [that he] swore to police.” Docket no. 1 at ¶ 93. And, although the injuries he alleges are personal and post-date the sale of his causes of action to Helvetia, the core of Plaintiff's Section 37.08 claim remains Plaintiff's contention that Defendant “uttered and/or published false and disparaging statements” when he represented to police that

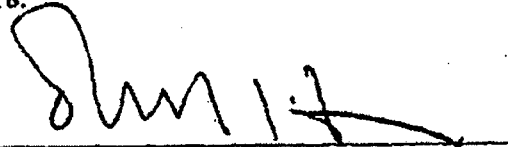
"Kahn was not president and Ripley was president"—a factual dispute central to the claims sold to Helvetia and squarely precluded from further relitigation.

The Court accordingly finds that Plaintiff's claims cannot proceed, and that it is not necessary for the Court to reach the parties' arguments regarding service of process or Defendant's arguments regarding joinder of a necessary party.

Conclusion and Order

It is therefore ORDERED that Defendant's Motion to Dismiss (docket no. 4) is GRANTED. The Clerk of the Court shall close this case upon entry of this Order.

SIGNED this 24 day of April, 2018.



ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50554

BURTON MAURICE KAHN, an Individual,

Plaintiff - Appellant

v.

ROBERT RIPLEY, an Individual,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 6/18/19, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, COSTA, and HO, Circuit Judges.

PER CURIAM:

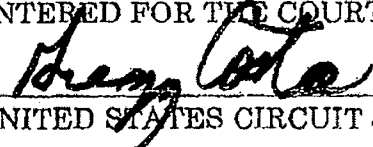
✓ The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

() The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having

voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

- () A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

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