

App. 1
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50766
Summary Calendar

FILED August 2, 2019

IRMA ROSAS,
Plaintiff - Appellant,

v.

SAN ANTONIO HOUSING AUTHORITY, also
known as SAHA; NRP GROUP, L.L.C.; UNION
PACIFIC RAILROAD; TEXAS RIOGRANDE
LEGAL AID, INCORPORATED; BEXAR
COUNTY, TEXAS; CITY OF SAN ANTONIO,

Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:18-CV-537

Before REAVLEY, JONES, and GRAVES, Circuit
Judges.

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PER CURIAM:*

We affirm the district court's judgment for the reasons explained by that court.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IRMA ROSAS,

Plaintiff,

v.

SAN ANTONIO
HOUSING
AUTHORITY ET AL.,

Defendants.

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Civil Action No.
SA-18-CV-537-XR

ORDER

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On this date the Court considered United States Magistrate Judge Henry J. Bemporad's Report and Recommendation in the above-numbered and styled case, filed August 10, 2018, (Docket no. 8) and Plaintiff Irma Rosas's objections thereto (Docket no. 10). After careful consideration, the Court ACCEPTS Magistrate Judge Bemporad's recommendation. The Court DENIES Plaintiff's Motion to Toll Statutes of Limitations (Docket no. 6) and DISMISSES this action as barred by limitations.

BACKGROUND

Plaintiff, acting pro se, filed her Complaint on May 31, 2018. Docket no. 1. Plaintiff was granted leave to proceed IFP on June 8, 2018. Docket no. 4. Plaintiff brought this action after she was evicted from her apartment located in the San Juan Square II ("SJS") multi-family housing complex in San Antonio, Texas. Plaintiff alleges that SJS is co-owned by Defendants the San

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Antonio Housing Authority (“SAHA”) and the NRP Group, LLC (“NRP”). Docket no. 5 at 1.

Plaintiff states she signed her first one-year lease on August 30, 2011. *Id.* Plaintiff alleges that NRP harassed her about her lease renewal in early June 2012, despite the fact that she was not required to provide an answer about renewal until June 30. *Id.* at 2. Plaintiff states she signed the “Annual Eligibility Certification” on June 5, 2012, but she refused to sign a second one-year lease at that time. *Id.* Plaintiff alleges she signed the second one-year lease with SAHA and NRP on June 21, 2012, under duress and when she had no source of income. *Id.* Plaintiff states that after she did not receive student loans in the fall of 2012 and found no employment, she fell behind on her rent. *Id.* at 3. Eviction proceedings began in June 2013. On January 22, 2014, Plaintiff alleges she returned to her apartment around 6:00 p.m. to find a “Notice of Surrendered / Seized Property” on her door, stating that “all of her belongings had been placed outside the property and her dog had been taken to the animal shelter.” *Id.* at 3.

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Plaintiff brings claims SAHA and NRP for providing sub-standard housing that she could not peacefully enjoy, adding to her electric and water costs, and forcing her to sign a second-year lease. *Id.* at 13. She brings claims against Defendant Union Pacific Railroad for affecting the peaceful enjoyment of her unit, disrupting her daily life, and affecting her physical and mental health. *Id.* She brings claims against Defendant Texas RioGrande Legal Aid, Inc. for denying an immediate remedy to signing a contract under duress. *Id.* She brings claims against Bexar County, Texas for denying her access to procedural due process, affecting her mental health, and evicting her, which resulted in her loss of property. *Id.* She brings claims against the City of San Antonio for forcing her to mutilate her dog and affecting her mental health. *Id.*

On June 8, 2018, Magistrate Judge Bemporad issued a Show Cause order in this case, requiring Plaintiff to demonstrate why her case should not be dismissed. Docket no. 4. The order explained that a two-year statute of limitations would apply to any state tort or related § 1983

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claim, and that a four-year statute of limitations would apply to any breach of contract claim. The latest date relevant to Plaintiff's allegations was in January 2014, and thus, it appeared that her filing a complaint on May 31, 2018, was beyond the applicable statutes of limitations. The order also explained that Plaintiff failed to state legal causes of action against Texas RioGrande Legal Aid, Inc. for refusing to provide her legal services.

On June 29, 2019, Plaintiff responded to the show cause order by filing her Motion to Toll Statutes of Limitations. Docket no. 6. First, Plaintiff states that she erroneously filed a cause of action in the United States District Court for the Northern District of Illinois on September 15, 2017, and that the case was dismissed without prejudice for lack of proper venue. *Id.* at 1; see *Rosas v. Abbott, et al.*, No. 1:17-CV-6660, Order (N.D. Ill. Feb. 14, 2018) (dismissing case without prejudice under 28 U.S.C. § 1406(a)). Second, Plaintiff alleges that "her mental health stood in her way and prevented timely filing after she was evicted on January 22, 2014." Docket no. 6 at 1. She alleges

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that she received mental health treatment for depression from 2004 to 2011, contemplated suicide on three occasions from 2011 to 2013, and was psychologically traumatized by her eviction and isolated herself in her mother's house without working from January 2014 to November 2017. *Id.* at 2. For these reasons, Plaintiff requests the Court to toll the statutes of limitations so that they may move forward with her claims. *Id.*

Magistrate Judge Bemporad issued his Report and Recommendation on this case on August 10 2018. Docket no. 5. Judge Bemporad found that Plaintiff's claims, construed as tort, related § 1983, and breach of contract claims, are time-barred and the Court should not equitably toll the statute of limitations. Judge Bemporad reiterated that Plaintiff's remaining claims should be dismissed for failing to state a legal cause of action.

Pursuant to Rule 72(b), the parties were given fourteen days to file written objections to the Report and Recommendation. Plaintiff timely filed

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an objection. Docket no. 8. On August 22, 2018, Plaintiff objects to Judge Bemporad's recommendation that this case should be dismissed because several of her claims are time-barred and that she should not benefit from equitable tolling.

LEGAL STANDARD

Where no party has objected to the Magistrate Judge's Report and Recommendation, the Court need not conduct a *de novo* review of it. See 28 U.S.C. 636(b)(1) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Report and Recommendation and determine whether it is either clearly erroneously or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989). On the other hand, any Report of Recommendation that is objected to requires *de novo* review. Such a review means that the Court

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will examine the entire record and will make an independent assessment of the law. The Court need not, however, conduct a *de novo* review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Commission*, 834 F.2d 419, 421 (5th Cir. 1987). Additionally, “[p]arties filing objections must specifically identify those finding objected to.” *Nettles v. Wainwright*, 677 F.2d 404, 410 n.8 (5th Cir. 1982).

Plaintiff filed her objection to the Magistrate Judge’s recommendations as to some of her claims being time-barred before the expiration of the fourteen-day deadline. As a result, the Court now conducts a *de novo* review of those claims.

ANALYSIS

When a plaintiff seeks to proceed in forma pauperis, a court, “shall dismiss the case at any time if the court determines” that the action or appeal is frivolous or fails to state a claim on which relief may be granted. 28 U.S.C. § 1915 (e)(2). An

action is “frivolous” if “it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

A district court may dismiss claims *sua sponte* under § 1915 if it is clear from the face of the complaint that the claims are barred by the applicable statute of limitations. *Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir. 1999). In this case, it is clear from the face of Plaintiff’s complaint that most of her claims are barred by the statute of limitations. The Court reads Plaintiff’s complaint to assert potential tort claims, breach of contract claims, and § 1983 violations. Under Texas law, there is a two-year statute of limitations for a plaintiff to bring suit for personal injury or injury to her personal property. TEX. CIV. PRAC. & REM. CODE. § 16.003; see also *Schneider v. [sic] Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264, 270 (Tex. 2004) (holding that the limitations period for nuisance claims is also two years). For § 1983 claims,¹ because there is no specific statute of limitations for such claims, courts should look to the most analogous state statute of limitations.

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Owens v. Okure, 488 U.S. 235, 239 (1989). In Texas, the analogous limitations period is the statutory two-year period applicable to personal injury claims. *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001). The statute of limitations to bring a breach of contract claims is four years. *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1142 (5th Cir. 1992); *see also* TEX. CIV. PRAC. & REM. CODE § 16.051.

Based on Plaintiff's complaint and response to the show cause order, her claims accrued at the latest in January 2014. Thus, when she filed her complaint on May 31, 2018, she filed it well beyond the applicable statutes of limitations, the longest which was four years. Plaintiff's only objection to the Magistrate Judge's finding that her claims are time-barred is that the litigants in the cases cited did not suffer from disabilities similar to those from which she allegedly suffers. This argument, however, is relevant to the questions of equitable tolling. Thus, the Court finds that Plaintiff's claims against SAHA, NRP, Union Pacific Railroad, Bexar

County, and the City of San Antonio are time-barred.

First, Plaintiff argues the applicable statute of limitations should be tolled during the pendency of her case in the Northern District of Illinois. Under Texas law, the applicable statute of limitations is suspended “between the date of filing an action in a trial court and the date of a second filing of the same action in a different court” if “(1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.” TEX. CIV. PRAC. & REM. CODE § 16.064(a). Although Plaintiff’s case in the Northern District of Illinois was dismissed for improper venue, for those claims with a two-year statute of limitations period, limitations ran in January 2016 at the latest. Plaintiff did not file her complaint in the Northern District of Illinois until September 2017. With regard to

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Plaintiff's breach of contract claim, which carries a four-year statute of limitations, she is not entitled to tolling under § 16.064 because she did not commence the case before this Court within sixty days of dismissal of the Illinois case. Thus, Plaintiff is not entitled to tolling under § 16.064.

Second, Plaintiff argues she is entitled to equitable tolling due to her mental health and because she was psychologically traumatized, isolated herself in her mother's house, and did not work. Equitable tolling is a court-created doctrine "that excuses a timely filing when the plaintiff could not, despite the exercise of reasonable diligence, have discovered all the information [she] needed in order to be able to fill [her] claim on time." *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 311 (Tex. 2010) (quoting *Taliani v. Chrans*, 189 F.3d 597, 597 (7th Cir. 1999)). Further, a court may equitably toll the limitations period for § 1983 claims, and "[b]ecause the Texas statute of limitations is borrowed in § 1983 cases, Texas' equitable tolling principles also control." *Rotella v.*

Pederson, 144 F.3d 892, 897 (5th Cir. 1998). The plaintiff bears the burden of showing that equitable tolling is warranted. *Id.* at 894-95.

Although Plaintiff argues for equitable tolling, the basis for her tolling argument due to her mental health is grounded in Texas law. “If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period.” TEX. CIV. PRAC. & REM. CODE § 16.001(b). A person is under a legal disability if the person is of “unsound mind.” *Id.* § 16.001(a)(2). Section 16.001(a)(2) is intended “to protect a person of unsound mind by insuring that a legally disabled person’s right to bring suit will not be precluded by a statute of limitations, prior to removal of the disability.” *Doe v. Catholic Diocese of El Paso*, 362 S.W. 3d 707, 722 (Tex. App. – El Paso 2011, no pet.) (citing *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 755 (Texas. 1993)). The statutory tolling provision applies to someone “who suffers from an inability to participate in, control, or

understand the progression and disposition of their lawsuit.” *Id.*

Plaintiff allegedly received mental health treatment for depression and contemplated suicide, but these claims do not entitle her to tolling because they took place from 2004 to 2011 and 2011 to 2013, respectively, and the cause of action did not accrue until 2014. Plaintiff alleges she was psychologically traumatized from her eviction, isolated herself in her mother’s house, and did not work from January 2014 to November 2017. The evidence shows, however, that Plaintiff did not suffer from an inability to participate in, control, or understand the progression of her lawsuit. Plaintiff was able enough to pursue her case by filing the first action in the Northern District of Illinois in September 2017, which included several claims similar to those that Plaintiff brings in this case. Plaintiff has provided no further evidence beyond the statements that she isolated herself in her mother’s house and did not work to demonstrate that she was of unsound mind such that she is entitled to tolling. Thus, the Court finds that

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Plaintiff is not entitled to statutory tolling, nor has she demonstrated that she is entitled to equitable tolling of any kind. Accordingly, Plaintiff's claims are barred by limitations.

Finally, the Court also dismisses Plaintiff's claim against Texas RioGrande Legal Aid, Inc. As discussed above, Magistrate Judge Bemporad ordered Plaintiff to show cause on her claim against Texas RioGrande Legal Aid, Inc. for refusing to provide legal services because Plaintiff failed to allege a legal duty owed by the agency. Plaintiff did not respond to the show order on this claim, and the Court now finds that Plaintiff fails to state a valid claim for relief against Texas RioGrande Legal Aid, Inc. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

CONCLUSION

For the foregoing reasons, the Court ACCEPTS the Magistrate Judge's recommendations. Plaintiff's Motion to Toll Statutes of Limitations (Docket no. 6) is DENIED.

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Plaintiff's claims are hereby DISMISSED WITH
PREJUDICE as barred by limitations and for
failure to state a claim. The Clerk is directed to
CLOSE this case.

It is so ORDERED.

SIGNED this 28th day of August, 2018.

_____/s/_____

XAVIER RODRIGUEZ
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 30 , 2019

MEMORANDUM OF COUNSEL OR PARTIES
LISTED BELOW:

No. 18-50766

Irma Rosas v. San
Antonio Housing
Authority, et al
USDC No. 5:18-CV-537

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Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the
mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____/s/_____
Renee S. McDonough, Deputy
Clerk
504-310-7673

Ms. Irma Rosas
Ms. Leigha Amy Simonton
Mr. John J. Stickney

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50766

IRMA ROSAS,
Plaintiff - Appellant

v.

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SAN ANTONIO HOUSING AUTHORITY, also
known as SAHA; NRP GROUP, L.L.C.; UNION
PACIFIC RAILROAD; TEXAS RIOGRANDE
LEGAL AID, INCORPORATED; BEXAR
COUNTY, TEXAS; CITY OF SAN ANTONIO,

Defendants - Appellees

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

ON PETITION FOR REHEARING EN BANC

(Opinion August 2, 2019, 5 Cir., ___, ___ F.3d ___)

Before REAVLEY, JONES, and GRAVES, Circuit
Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc
as a Petition for Panel Rehearing, the Petition for
Panel Rehearing is DENIED. No member of the
panel nor judge in regular active service of the
court having requested that the court be polled on
Rehearing En Banc (FED. R. APP. P. AND 5th CIR.

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R. 35), the Petition for Rehearing En Banc is DENIED.

() Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. 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 DENIED.

ENTERED FOR THE
COURT:

_____/s/____

UNITED STATES
CIRCUIT JUDGE

United States Court of Appeals
Fifth Circuit
Office of the Clerk

March 12, 2019

App. 21

Ms. Irma Rosas
6333 S. Laverne Avenue
Chicago, Illinois 60638

| | |
|--------------|--|
| No. 18-50766 | Irma Rosas v. San Antonio Housing Authority, et al USDC No. 5:18- CV-537 |
|--------------|--|

Dear Ms. Rosas,

We filed your brief. However, you must make the following corrections within the next 14 days. You may:

1. Send someone to this office to correct the briefs;
2. Send someone to pick up the briefs, correct and return them;
3. Send a self-addressed stamped envelope and we will return your briefs, (we will tell you the postage cost on request). You must then mail the corrected briefs to this office;
4. Send corrected briefs and we will recycle those on file.

You need to correct or add:

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Caption on the brief does not agree with the caption of the case in compliance with FED. R. APP. P. 32(a)(2)(C). Caption must exactly match the Court's Official Caption (See Official Caption below)

Certificate of interested persons, see 5TH CIR. R. 28.2.1.

Statement of Facts must be included in the Statement of the Case. A concise statement of the case setting out the facts relevant to the issues submitted for review, see FED. R. APP. P. 28(a)(6). The facts should be incorporated within, or as a subsection of, the 'Statement of the Case'. A separate 'Statement of the Facts' is not acceptable. Signature, see FED. R. APP. P. 32(d). Brief must be signed, as well as the certificate of service and certificate of compliance.

Sufficient number of paper copies to meet the seven (7) copy requirement. You must provide 7 additional copies. (see 5TH CIR. R. R. 31.1)

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We have not received 4 copies of the Record Excerpts required by 5TH CIR. R. 30.1.2.

Your appendix needs to be removed from the brief. The only attachments allowed to the briefs without leave of court are statutes, rules, regulations, etc. See FED. R. APP. P. 28(f).

Record References: Although your brief contains citations to the record, they are not in proper form. Every assertion in the briefs regarding matter in the record must be supported by a reference to the page number of the original record, whether in paper or electronic form, where the matter is found, using the record citation form as directed by the Clerk of Court. The use of "id" is not permitted when citing to the record on appeal. (See 5TH CIR. R. 28.2.2)

Sincerely,

LYLE W. CAYCE, Clerk

By: _____/s/_____

App. 24

Renee S. McDonough,
Deputy Clerk
504-310-7673