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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (APRIL 2, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANDREW CLARKE,

Plaintiff-Appellant,

v.

RUSSELL R. MCMURRY, P.E.,
Commissioner of the Georgia D.O.T.,

Defendant-Appellee.

No. 18-13446

D.C. Docket No. 1:18-cv-01507-TCB

Appeal from the United States District Court
for the Northern District of Georgia

Before: Ed CARNES, Chief Judge, BRANCH, and Julie CARNES, Circuit Judges.

PER CURIAM:

Andrew Clarke appeals the district court's dismissal of his 42 U.S.C. § 1983 complaint. The complaint alleges that Russel McMurry, the Commissioner of the Georgia Department of Transportation, violated the Fourteenth Amendment's Equal Protection and Due Process Clauses by failing to ensure that the

Department reimburse Clarke, a former Department employee, for paying medical bills that he incurred after an on-the-job traffic accident. Clarke sued McMurry in his official capacity and sought $10,000,000 in damages. The district court dismissed the complaint on the basis of Eleventh Amendment sovereign immunity. This is Clarke's appeal.

We construe liberally Clarke's complaint because he is proceeding pro se, *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014), and we review *de novo* the district court's dismissal of Clarke's complaint, *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1277 (11th Cir. 1998).

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

Although the text of Eleventh Amendment does not say so, "it has long been settled that the amendment applies equally to suits against a state brought in federal court by citizens of that state." *James*, 157 F.3d at 1277 (citing *Hans v. Louisiana*, 134 U.S. 1, 18-19, 10 S. Ct. 504, 508 (1890)). "The state need not be formally named as a defendant for the amendment to apply; [a] state official[ ] sued in [his] official capacity [is] also protected by the amendment." *Id.*

This case does not present any "of the three situations in which there is a surrender of Eleventh

Amendment sovereign immunity." *Id.* at 1278 (quotation marks omitted). First, the State of Georgia did not "waive[ ] its Eleventh Amendment sovereign immunity and consent[ ] to suit in federal court." *Id.* Georgia has expressly reserved its sovereign "immunity with respect to actions" that are, like this one, "brought in [a] court[ ] of the United States." Ga. Code Ann. § 50-21-23(b). Second, Congress did not abrogate Georgia's sovereign "immunity when it enacted 42 U.S.C. § 1983." *Schopler v. Bliss*, 903 F.2d 1373, 1379 n.4 (11th Cir. 1990). And third, Clarke did not sue McMurry, "a state official[,] . . . for prospective injunctive relief to end a continuing violation of federal law." *James*, 157 F.3d at 1278. He sued McMurry for damages. As a result, Clarke's claims against McMurry "were, in effect, claims against the State of [Georgia], and, consequently, the defense of Eleventh Amendment sovereign immunity" barred those claims. *Id.*

AFFIRMED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (JULY 17, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANDREW CLARKE,

Plaintiff,

v.

RUSSELL R. MCMURRY, P.E.,
Commissioner of the Georgia Department of Transportation,

Defendant.

Civil Action File Number 1:18-cv-01507-TCB

Before: Timothy C. BATTEN, SR. United States District Judge.

This matter comes before the Court on Defendant Russell McMurry's motion [4] to dismiss Plaintiff Andrew Clarke's complaint and motion [5] to stay discovery, and Clarke's request for oral argument [13, 14].

I. Background

Clarke, proceeding prose, filed this action under 42 U.S.C. § 1983, alleging claims identical to those at issue in his earlier action, *Clarke v. McMurry*, No. 1:17-cv-3664-WSD (filed September 20, 2017). In the earlier action, Judge William S. Duffey granted Defendant's motion to dismiss based on Eleventh Amendment immunity, the statute of limitations, and failure to state a claim. [4-3].

Defendant has moved to dismiss this action based on collateral estoppel and for the same reasons that warranted dismissal of Clarke's earlier lawsuit.

II. Discussion

To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012). The Supreme Court has explained this standard as follows:

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted); *see also Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324-25 (11th Cir. 2012). Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to

relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555-56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiffs legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

"Res judicata comes in two forms: claim preclusion (traditional 'res judicata') and issue preclusion (also known as 'collateral estoppel')." *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1263 (11th Cir. 2011). Issue preclusion or collateral estoppel forecloses the relitigation of issues that have been previously litigated and decided. *CSX Transp., Inc. v. Bhd. Of Maint. of Way Emps.*, 327 F.3d 1309, 1316 (11th Cir. 2003). When the prior decision was made by a federal court, federal preclusion principles apply. *Id.* Under federal law, the following requirements must be_met before the doctrine applies:

> (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Id. at 1317 (quoting *I.A. Durbin*, 793 F.2d at 1549). Here, as discussed, the complaints in the two cases

are identical. Judge Duffey decided the earlier case on the merits, which are the same as those at issue in this case. Therefore, the determination of the merits of the earlier case clearly was a critical and necessary part of the judgment. Finally, Clarke had a full and fair opportunity to litigate the issues in the earlier lawsuit. Therefore, collateral estoppel is appropriate.

Even if the Court were not able to apply collateral estoppel, Judge Duffey's earlier order provides all the reasons necessary to dismiss this action on the merits. As the earlier order noted, and as McMurry expresses in his briefing, there are numerous reasons the Court could dismiss this action. The Court need not address all the reasons, however, because McMurry is immune from suit under the Eleventh Amendment to the U.S. Constitution.

It appears that Clarke intends to bring both § 1983 and state-law tort claims against McMurry in his official capacity. However, a § 1983 claim against McMurry in his official capacity is effectively a claim against the state because any monetary judgment would be paid by state funds. *See Jackson v. Dep't of Transp.*, 16 F.3d 1537, 1577 (11th Cir. 1994). "Absent a legitimate abrogation of immunity by Congress or a waiver of immunity in the state being sued, the Eleventh Amendment is an absolute bar to suit by an individual against a state or its agencies in federal court." *Gamble v. Fla. Dep't of Health & Rehabilitative Servs.*, 779 F.2d 1509, 1511 (11th Cir. 1986). "It is clear that Congress did not intend to abrogate a state's [E]leventh [A]mendment immunity in section 1983 damage suits." *Zatler v. Wainwright*, 802 F.2d 397, 400 (11th Cir. 1986). Further, article 1, section 2, paragraph IX of the Georgia Constitution expressly reserves its sovereign

immunity and, thus, has preserved immunity from tort liability unless the General Assembly expressly waives it. *Vaughn v. Georgia*, No. 1:11-cv-4026-RWS, 2012 WL 2458538, at *3 (N.D. Ga. June 27, 2012). There is no evidence that any legislation waives Georgia's sovereign immunity in this case.

Clarke's state-law claims are also barred by the Eleventh Amendment and sovereign immunity. Clarke's claims appear to be based on the alleged tortious acts by a state officer or employee such that they would be covered by the Georgia Tort Claims Act ("GTCA"), O.C.G.A. § 50-21-20, et seq. Although the GTCA provides that the state waives its sovereign immunity in state court actions, it does not waive immunity in federal courts. O.C.G.A. § 50-21-23(b) ("The state waives its sovereign immunity . . . only with respect to actions brought in the courts of the State of Georgia. The state does not waive any immunity with respect to actions brought in the courts of the United States."); *see also Jude v. Morrison*, 534 F. Supp. 2d 1365, 1373 (N.D. Ga. 2008) ("[A]n action against the State of Georgia cannot stand in this forum because the State of Georgia has not waived its sovereign immunity through the Georgia Tort Claims Act for actions brought in federal court."). Therefore, Clarke's state-law tort claims must be dismissed.

III. Conclusion

For the foregoing reasons, Defendant's motion [4] to dismiss is granted and Defendant's motion [5] to stay is denied as moot. Clarke's request for oral argument [13, 14] is denied. The Clerk is directed to close this case.

IT IS SO ORDERED this 17th day of July, 2018.

/s/ Timothy C. Batten Sr.
United States District Judge

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (JULY 18, 2018)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANDREW CLARKE,

Plaintiff,

v.

RUSSELL R. MCMURRY, P.E.,
Commissioner of the Georgia D.O.T.,

Defendant.

Civil Action File No. 1:18-cv-01507-TCB

This action having come before the court, Honorable Timothy C. Batten, Sr., United States District Judge, for consideration of Defendant's Motion to Dismiss, and the court having GRANTED said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is dismissed.

Dated at Atlanta, Georgia, this 17th day of July, 2018.

James N. Hatten
Clerk of Court

By: /s/ Janice Micallef
Deputy Clerk

SUPREME COURT
PRESS