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APPENDIX A.

UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT  
FOUR (4) PAGES  
27 - 30 pgs.

APPX. A

# Appendix A

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

No. 18-20468  
Summary Calendar

United States Court of Appeals  
Fifth Circuit

**FILED**

August 23, 2019

Lyle W. Cayce  
Clerk

DENNIS C. DAVIS,

Plaintiff-Appellant

v.

FAYETTE COUNTY APPRAISAL DISTRICT; RICHARD MORING, Chief Appraiser; LINDA WAGNER, Mineral Data Clerk; PERDUE BRANDON FIELDER COLLINS & MOTT, L.L.P.; JOHN T. BANKS; A. DYLAN WOOD,

Defendants-Appellees

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Appeals from the United States District Court  
for the Southern District of Texas  
USDC No. 4:16-CV-1112

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Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

PER CURIAM:\*

Dennis C. Davis, Texas prisoner # 1597434, appeals the dismissal of his 42 U.S.C. § 1983 complaint in which he alleged that the defendants committed torts (e.g., intentional infliction of emotional distress) and violated the Texas Debt Collections Practices Act, the Fair Debt Collection Practices Act, and the Due Process Clause. He argued that the defendants engaged in improper debt

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

collection practices by proceeding with a fraudulent lawsuit against him for outstanding property and ad valorem taxes. The district court reasoned that Davis's claims were time barred and did not set forth grounds for relief and, thus, granted the defendants' motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). We review the dismissal de novo. *See Groden v. City of Dallas, Tex.*, 826 F.3d 280, 283 (5th Cir. 2016); *Price v. City of San Antonio, Tex.*, 431 F.3d 890, 892 (5th Cir. 2005).

Davis has not shown that the district court erred in concluding that his claims were untimely and that his § 1983 complaint failed to state a claim. *See Price*, 431 F.3d at 892; *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003). The predicate for Davis's causes of actions – and the incident that gave rise to the purported injuries that are the grounds for his claims – was the filing and prosecution of the tax lawsuit. His claims accrued when he was served with the tax lawsuit in April 2012, or, at the latest, when the suit was mooted in January 2013 by the execution of a release of judgment lien. *See Wallace v. Kato*, 549 U.S. 384, 388 (2007); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). His § 1983 complaint, which was filed in April 2016, was not timely under the applicable statutes of limitations. *See Owens v. Okure*, 488 U.S. 235, 249-50 (1989) (holding that, for § 1983 claims, federal courts use the limitations period for personal-injury actions); 15 U.S.C. § 1692k(d); TEX. CIV. PRAC. & REM. CODE § 16.003(a).

Davis seeks to invoke the discovery rule, which provides that the statute of limitations begins when the plaintiff discovered or should have discovered, in the exercise of reasonable care and diligence, the nature of the injury. *See Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988); *see also Wallace*, 549 U.S. at 394 (indicating that state law controls the tolling rules for § 1983 claims). However, even if the discovery rule applied, Davis has not shown that the tax

lawsuit did not alert him to the possible injury and the grounds for his causes of action. Because there was no meaningful lag between the allegedly wrongful conduct and Davis's awareness of the resulting harm, use of the discovery rule would not affect the timeliness of his claims. *See Comput. Assocs. Int'l., Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996); *Arabian Shield Dev. Co. v. Hunt*, 808 S.W.2d 577, 583, 585 (Tex. App. 1991).

Additionally, Davis argues that the limitations periods should have been tolled until he completed his appeal of the judgment in the tax lawsuit. He has not established, however, that the availability of appellate procedures affected when his causes of actions accrued. While Texas rules allow tolling if a plaintiff is precluded from seeking legal remedies due to the pendency of another legal action, *see Holmes v. Tex. A&M Univ.*, 145 F.3d 681, 684-85 (5th Cir. 1998), Davis has not established that the appeal was a predicate action for his § 1983 lawsuit, he had to finish his appeal before he could file a § 1983 action, tolling was required to protect him from taking contradictory positions, or his § 1983 complaint was contingent on the outcome of the appeal. *See Gillig v. Nike, Inc.*, 602 F.3d 1354, 1358 (5th Cir. 2010); *Rogers v. Ricane Enters., Inc.*, 930 S.W.2d 157, 167 (Tex. App. 1996).

Davis also argues that the district court improperly refused to allow him to amend his complaint after the defendants submitted responsive pleadings. We review the denial of leave to amend for abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The record supports that the district court reasonably could have found that the amendments – which sought to raise new legal theories and causes of action based on the same factual predicate underlying the claims in his original and first amended complaints – were dilatory and belatedly filed. *See Foman*, 371 U.S. at 182; *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 391 (5th Cir. 2005).

Also, the district court could plausibly have found that Davis's delay in offering the amendments prejudiced the defendants and imposed unwarranted burdens on the court. *See Wright*, 415 F.3d at 391. Further, because Davis only offered conclusory allegations and legal conclusions in his proposed amendments, the district court properly could have found that the amendments were futile. *See id.*; *Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States of America Co.*, 195 F.3d 765, 770–71 (5th Cir. 1999).

In light of the foregoing, the district court's judgment is affirmed. Davis's motion for the appointment of counsel is denied because the present case does not present the exceptional circumstances required for such an appointment. *See Ulmer v. Chancellor*, 691 F.2d 209, 212–13 (5th Cir. 1982).

The district court's dismissal counts as a strike for purposes of 28 U.S.C. § 1915(g). *See Adepegba v. Hammons*, 103 F.3d 383, 387–88 (5th Cir. 1996). Davis is cautioned that if he accumulates three strikes, he will not be able to proceed in forma pauperis in any civil action or appeal that is filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

AFFIRMED; MOTION DENIED; SANCTION WARNING ISSUED.

2)

APPENDIX B.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS  
NINE (9) PAGES  
31 - 39 pgs.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS

Appendix B



20180611-98

Dennis C Davis  
1597434 Lynaugh Unit  
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CLERK OF COURT  
P.O. BOX 61010  
HOUSTON, TEXAS 77208  
<http://www.txs.uscourts.gov>

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Date: Monday, June 11, 2018  
Case Number: 4:16-cv-01112  
Document Number: 44 (8 pages)  
Notice Number: 20180611-98  
Notice: The attached order has been entered.

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**ENTERED**

June 11, 2018

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

DENNIS C DAVIS, §  
§  
Plaintiff, §  
VS. § CIVIL ACTION NO. 4:16-CV-1112  
§  
FAYETTE COUNTY APPRAISAL §  
DISTRICT, *et al*, §  
§  
Defendants. §

**MEMORANDUM AND ORDER**

Dennis C. Davis, proceeding *pro se*, filed a civil rights complaint against the Fayette County Appraisal District (“FCAD”) and two of its employees, Richard Moring and Linda Wagner (collectively the “FCAD Defendants”), and Perdue, Brandon, Fielder, Collins & Mott, LLP, an outside law firm retained by FCAD, and two of its attorneys John T. Banks and Dylan Wood (collectively the “Law Firm Defendants”). Davis alleges that the defendants violated his constitutional, statutory, and common law rights by filing a lawsuit against him seeking payment of delinquent property and *ad valorem* taxes. This Court dismissed the original complaint *sua sponte* on the grounds that Davis failed to state a claim for relief. The Fifth Circuit remanded the case to this Court with instructions to give Davis an opportunity to remedy any deficiencies in his complaint.

On September 22, 2017, Davis filed an amended complaint. On November 20 and 21, 2017, the defendants filed answers to the amended complaint, and on February 16, 2018, filed motions to dismiss the amended complaint. Davis responded to the motions on May 25, 2018. For the reasons stated below, the motions to dismiss are granted, and the amended complaint is dismissed with prejudice.

## **I. Background**

On March 29, 2012, the Law Firm Defendants, representing the FCAD, filed suit against Davis in state court seeking recovery of delinquent property and *ad valorem* taxes on several parcels of land owned by Davis between tax years 2005 and 2010. Davis claims that the state court lawsuit was baseless because he sold the parcels of land and that Moring and Wagner knew or should have known that he was not the responsible party. He seeks compensatory and punitive damages under 42 U.S.C. § 1983, the federal Fair Debt Collection Practices Act (“FDCPA”), the Texas Debt Collections Act (“TDCA”), and for intentional torts under Texas law.

## **II. Legal Standard**

In reviewing a motion to dismiss under rule 12(b)(6), the complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir.1986). The standard of review under rule 12(b)(6) has been summarized as follows: "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 601 (1969).

## **III. Analysis**

Defendants argue that they are entitled to immunity, that Davis' claims are barred by the statute of limitations, and that the claims are without merit.

### A. Limitations

Davis raises both statutory claims under the TDCA and the FDCPA, and tort claims under Texas law and 42 U.S.C. § 1983. Section 1983 does not contain a statute of limitations, but borrows its limitations period from the forum state. *See, e.g., Harris v. Hegmann*, 198 F.3d 153, 156-57 (5<sup>th</sup> Cir. 1999). Under Texas law, the limitations period for a tort claim is two years. *See Stanley v. Foster*, 464 F.3d 565, 568 (5<sup>th</sup> Cir. 2006)(citing TEX. CIV. PRAC. & REM. CODE § 16.003(a)). The Texas and federal debt collection statutes contain their own limitations periods: One year for the FDCPA, 15 U.S.C. § 1692k(d), and two years for the TDCA, TEX. CIV. PRAC. & REM. CODE § 16.003(a), *Galindo v. Snoddy*, 415 S.W.3d 905, 911 (Tex. App. – Texarkana 2013).

Federal law controls the accrual of a claim. *Id.* “Under federal law, a section 1983 action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of the action.” *Id.* at 157 (internal citation and quotation marks omitted).

FCAD filed suit against Davis in the 155<sup>th</sup> District Court of Fayette County, Texas on March 12, 2012. Amended Complaint, at 6. Davis’ claims accrued no later than that date. Davis filed this suit no earlier than April 19, 2016, the date he executed his complaint.<sup>1</sup> *See* Docket Entry No. 1, at 5. Thus, Davis filed this suit more than four years after his claims accrued, and well outside the limitations period.

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<sup>1</sup> Davis is incarcerated in the Texas Department of Criminal Justice. Under the prison mailbox rule, a prisoner files a court document on the date he places it in the prison mail system. *See, e.g., Causey v. Cain*, 450 F.3d 601, 604 (5<sup>th</sup> Cir. 2006). Because Davis could not have submitted his complaint for mailing before he executed it, April 19, 2016, is the earliest possible date he could have filed his complaint.

Davis argues that the statute of limitations should be tolled because he was in some way prevented from filing suit by the pendency of the state court case against him. He cites no legal authority preventing him from filing suit while the state court case against him was pending.

Davis also argues that he could not file this federal suit while the state case was pending because he feared the *res judicata* effect that the first of the two cases to be decided would have on the other. That, however, was a strategic decision, not an impediment to filing a timely lawsuit.

Because Davis did not file this case until some four years after he knew or should have known of the defendants' alleged wrongs, all of Davis' claims against the defendants are barred by limitations. The motions to dismiss must be granted on this basis.

#### **B. Debt Collection Acts**

The TDCA regulates debt collection practices with regard to the collection of consumer debts owed to a creditor. TEX. FIN. CODE § 392.301. "Consumer debt" is defined as a debt owed for "personal, family or household purposes and arising from a transaction." *Id.* at § 392.001(2). "Creditor" is defined as a "party, other than a consumer, to a transaction or alleged transaction involving one or more consumers." *Id.* at § 392.001(3). Nowhere does the statute authorize an action against a government official or agency, or the agent of such official or agency, for efforts to collect past due taxes.

Davis tries to avoid this limitation by arguing that *ad valorem* taxes, as opposed to personal taxes, involve the calculation of market prices of minerals which, he apparently contends, constitutes a "transaction." He cites no authority so holding, and his attempt to constitute *ad valorem* taxes as "debt" within the meaning of the TDCA finds no support in the statutory language. Therefore, Davis fails to state a claim under the TDCA.

Similarly, the FDCPA defines “debt” as “any obligation . . . of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes . . . . 15 U.S.C.A. § 1692a (5). Thus, for the same reasons Davis fails to state a claim under the Texas statute, he also fails to state a claim under the FDCPA.

### C. Intentional Torts

Davis also sues for intentional infliction of emotional distress, and makes a variety of allegations contending that the tax claim and state court lawsuit were fraudulent.

#### 1. The FCAD Defendants

FCAD, Moring, and Wagner, contend that they are immune from suit for state tort claims. “[S]overeign immunity, unless waived, protects the State of Texas, its agencies and its officials from lawsuits for damages, absent legislative consent to sue the State.” *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). The State’s immunity extends to its political subdivisions, such as municipalities and municipal agencies. “Generally, municipalities and other government entities have governmental or sovereign immunity from private litigation.” *Knowles v. City of Granbury*, 953 S.W.2d 19, 23 (Tex. App. 1997). Davis points to no waiver of FCAD’s immunity from suit for his tort claim. Therefore, Davis’ state tort claim against FCAD and its employees Moring and Wagner must be dismissed.

#### 2. The Law Firm Defendants

Intentional infliction of emotional distress is a “gap-filler” tort, allowing recovery in the rare instances in which a defendant intentionally inflicts severe emotional distress in an unusual manner so the victim has no other recognized theory of redress. *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004). “Where the gravamen of a plaintiff’s complaint is really another tort, intentional infliction of emotional distress should not be available.” *Id.* Properly limited, the tort is not

available when the actor “ ‘intends to invade some other legally protected interest,’ even if emotional distress results.” *Id.* See also *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816-18 (Tex.2005).

*Lowe v. Hearst Commc'ns, Inc.*, 414 F. Supp. 2d 669, 675 (W.D. Tex. 2006), aff'd, 487 F.3d 246 (5th Cir. 2007). Because Davis' claim relies on an allegedly fraudulent lawsuit, his claim lies in fraud, not intentional infliction of emotional distress.

For common-law fraud a plaintiff must prove that (1) a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the representation was made with the intention that it be acted upon by the other party; (5) the party actually and justifiably acted in reliance upon the representation; and (6) the party suffered injury. *Ernst Young, LLP v. Pac. Mutual Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex.2001); *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 524 (Tex.1998).

*In re Enron Corp. Sec., Derivative & Erisa Litig.*, 762 F. Supp.2d 942, 966 (S.D. Tex. 2010).

Much of Davis' fraud claim revolves around his contention that he sold the property in question, and was thus not the owner at the time the tax lawsuit was filed. The facts, as acknowledged by Davis, demonstrate that this claim is meritless.

The lawsuit was filed on March 12, 2012. First Am. Complaint at 6. It sought payment of all delinquent taxes on four tracts of land for tax years 2005-2010. *Id.* at Exh. 3. Davis admits that the delinquencies on tracts 1, 2, and 4 were not satisfied until June of 2012. *Id.* at 7, Exh. 4. Therefore, the Law Firm defendants note, the allegations concerning Tracts 1, 2, and 4 were true at the time the suit was filed.

Davis contends that he sold Tract 3 in January 2008. The Law Firm Defendants point out that Davis was still liable for delinquent taxes on this tract for tax years 2005-2007. They further

note that, under Texas law, property taxes are the obligation of the owner of the land as of January 1 of the tax year. *See TEX. TAX CODE 32.07.* This makes Davis liable for the taxes on Tract 3 for tax year 2008, as well. The delinquency of Tract 3 was satisfied by a third ~~party~~<sup>owner</sup> on October 12, 2012, eight months after the suit was filed.

Davis also complains that the Law Firm Defendants harassed him by notifying him on September 14, 2012, that the case was scheduled for trial the following month. As the timetable set out above demonstrates, as of that date, the taxes were still owed. Davis makes no showing that the notification was false or unwarranted. *1424 paid June 22, 2012*

In sum, Davis fails to identify any material false representation by the Law Firm Defendants. Therefore, his claim of fraud is without merit.

#### **D. Constitutional Claims**

Finally, Davis makes vague allegations that his constitutional rights were violated by the defendants' actions. Giving the *pro se* pleadings a liberal construction, Davis appears to complain that his land was taken from him without due process. The facts noted above, however, make clear that this claim is without merit.

First, Davis received due process in the form of a court proceeding concerning the disputed taxes. Second, by Davis' own admission, he sold the land in question before the resolution of the lawsuit. Therefore, even if land was taken (and there is no indication that it was), it was not taken from Davis. He identifies no other harm suffered as a result of the defendants' actions. Therefore, Davis' constitutional claims fail. *united Judgment*

#### **E. Conclusion**

For the foregoing reasons, the defendants' motions to dismiss are granted, and the amended complaint is dismissed.

**ENTERED**

June 11, 2018

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

DENNIS C DAVIS,

Plaintiff,

VS.

FAYETTE COUNTY APPRAISAL  
DISTRICT, *et al*,

Defendants.

§  
§  
§  
§  
§  
§  
§  
§  
CIVIL ACTION NO. 4:16-CV-1112

**FINAL JUDGMENT**

For the reasons set forth in the Court's *Memorandum and Order* of even date, this case is  
DISMISSED with prejudice.

This is a FINAL JUDGMENT.

SIGNED on this 11<sup>th</sup> day of June, 2018.



Kenneth M. Hoyt  
United States District Judge

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