

# United States Court of Appeals For the First Circuit

No. 18-1301

BHARANIDHARAN PADMANABHAN, MD PhD,

Plaintiff, Appellant,

v.

CAROL HULKA, M.D.; RACHEL NARDIN, M.D.; JAMES PAIKOS; ASSISTANT DA  
GEORGE ZACHOS; DEBRA STOLLER; SUSAN GIORDANO; MICHAEL HENRY; ROBIN  
RICHMAN; BRENT GIESSMANN, a/k/a Woody; GEORGE ABRAHAM; CANDACE  
LAPIDUS SLOANE; ROBERT BOUTON; KATIE MERRILL; STEVEN HOROWITZ;  
LORETTA KISH COOKE; MARIANNE E. FELICE; ADELE AUDET; JOSEPH  
GESMUNDO; BARRY LEVINE; ROBERT J. HARVEY; GERARD DOLAN; CHRIS  
CECCHINI; NAN BROWNE; MAURA TRACY HEALEY; LUCIAN LEAPE; WILLIAM  
KASSLER,

Defendants, Appellees.

Before

Howard, Chief Judge,  
Torruella, Lynch, Thompson,  
Kayatta and Barron, Circuit Judges.

## ORDER OF COURT

Entered: August 16, 2019

We treat the petition for rehearing en banc as including a request for panel rehearing. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing en banc be denied. Petitioner's request for recusal of Judges Torruella and Thompson is denied.

By the Court:

Maria R. Hamilton, Clerk

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CECCHINI; NAN BROWNE; MAURA TRACY HEALEY; LUCIAN LEAPE; WILLIAM  
KASSLER,

Defendants, Appellees.

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Before

Torruella, Thompson and Barron,  
Circuit Judges.

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## JUDGMENT

Entered: July 10, 2019

Bharanidharan Padmanabhan appeals from the district court's dismissal of his complaint for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6).

We review the grant of a motion to dismiss de novo. We "accept[] all well-pleaded facts as . . . true and draw[] all reasonable inferences in favor of [the non-moving party]." "We may augment these facts and inferences with data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice."

In undertaking our review, we first set aside legal conclusions and those factual allegations "too meager, vague, or

conclusory to remove the possibility of relief from the realm of mere conjecture." We then consider whether the remaining well-pleaded allegations are "sufficient to support the reasonable inference that the defendant is liable for the misconduct alleged."

Starr Surplus Lines Ins. Co. v. Mountaire Farms Inc., \_\_\_ F.3d \_\_\_, 2019 WL 1467052, \*6-7 (1st Cir. 2019)(citations omitted). We affirm.

We affirm the dismissal of the claims against the board members of the Massachusetts Board of Registration in Medicine ("BORIM") and staff member George Paikos for damages on the ground of absolute quasi-judicial immunity. See Bettencourt v. Bd. of Registration in Med., 904 F.2d 772, 781-785 (1st Cir. 1990). Appellant's reliance upon N.C. State Bd. of Dental Exam'r v. F.T.C., \_\_\_ U.S. \_\_\_, 135 S.Ct. 1101 (2015) is misplaced. To the extent that he contends that it precludes absolute immunity for BORIM members acting in a "quasi-judicial capacity," neither that case nor any other case that he cites supports that interpretation. See id. at 1115 (stating that the case does not "offer occasion to address the question" of immunity from damages liability for agency officials, including Board members). To the extent that Paikos was acting as Complaint Counsel during the BORIM's investigation of the complaint filed against Padmanabhan, he was providing legal analysis and advice on behalf of his client, the BORIM. In that role, as staff to the Board, Paikos is entitled to absolute immunity. See Bettencourt, 904 F.2d at 785. Absolute immunity also applies to the claims against the remaining BORIM staff members. See id. at 784-785.

The claims against the other Commonwealth defendants, Maura Healey, Chris Cecchini, Adele Audet, and Nan Browne are affirmed on claim preclusion grounds. We agree with the district court that Healey, Cecchini, and Audet were named in the complaint in Padmanabhan v. Healey, 159 F.Supp. 3d 220 (D.Mass. 2016), aff'd, No. 16-1159, 2017 WL 3404402 (1st Cir.), cert. denied, 138 S.Ct. 77 (2017), that resulted in a final decision, and that both cases involved "the same nucleus of operative fact." Memorandum and Order, Dkt # 56, p. 14. Although Browne was not named as a party to the prior federal case, she was sufficiently closely related to the named defendants for claim preclusion to apply to the claims against her. See Airframe Sys., Inc. v. Raytheon Co., 601 F.3d 9, 17 (1st Cir. 2010).

The claims against Carol Hulka, Rachel Nardin, and Lucian Leape are affirmed on the claim preclusion ground relied upon by the district court, based upon Padmanabhan v. City of Cambridge, et al., Norfolk CA No. 1482-CV-01410 (2017) ("Padmanabhan I"). We agree with the district court that "[t]his case and Padmanabhan I 'grow out of the same transaction' and 'seek redress for the same wrong.' . . . In both cases, plaintiff's claims arise out of the alleged use of a fraudulent report, fraudulent misrepresentations and collusion between BORIM and [Cambridge Health Alliance ("CHA")]." Memorandum and Order, Dkt # 56, p. 11. The allegations against these defendants in the present complaint either were or could have been raised in the amended complaint, filed in May 2015, in Padmanabhan I.

We affirm the dismissal of the claims against Joseph Gesmundo and Stephen Horowitz. Horowitz is entitled to immunity pursuant to Mass.Gen.Laws ch. 112, § 5. The complaint fails to state a plausible claim of bad faith or malice that would preclude such immunity. See Schatz v.

Republican State Leadership Committee, 669 F.3d 50, 58 (1st Cir. 2012)(stating that "to make out a plausible malice claim, a plaintiff must . . . lay out enough facts from which malice might reasonably be inferred"); Fed.R.Civ.P. 8(a)(2). With respect to Gesmundo, the complaint fails to plead sufficient facts to state a claim against him. See Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 68 (1st Cir. 2004) (stating that under "notice pleading standards, the complaint should at least set forth minimal facts as to who did what to whom, when, where, and why").

We affirm the dismissal of the claims against Barry Levine on the ground of absolute immunity. See Fisher v. Lint, 69 Mass. App. Ct. 360, 366 (2007) ("Statements made in the course of a judicial proceeding are absolutely privileged and cannot be used to support a civil liability even if the statements were uttered with malice or in bad faith.") and Watterson v. Page, 987 F.2d 1, 9 (1st Cir. 1993)(applying federal law and stating that "all witnesses at judicial proceedings have an absolute immunity from damages liability based on their testimony.").

Even if it could be established that Levine was a "complaining witness," as appellant argues, the Supreme Court has held that "a complaining witness cannot be held liable for perjurious *trial* testimony." Rehberg v. Paulk, 566 U.S. 356, 371 (2012)(emphasis in original). Padmanabhan's allegation that Levine conspired with the other defendants fails to satisfy the notice pleading standard under Rule 8(a)(2) and, therefore, does not preclude dismissal of the claims against him under Rule 12(b)(6). See San Filippo v. U.S. Trust Co. of New York, Inc., 737 F.2d 246, 256 (2d Cir. 1984)(stating that "it is imperative for courts to examine with great care any suit charging that prosecution witnesses conspired with the prosecutor, and to dismiss on pre-trial motion those that are clearly baseless.").

Padmanabhan appeals from the district court's denial of his motion for entry of default against defendant Kassler, "former Chief Medical Officer for Medicare's Boston Regional Office," who failed to answer the complaint, move to dismiss or appear in the litigation. Memorandum and Order, Dkt # 56, p. 21. Padmanabhan was "not entitled to a default judgment as of right." 10A Wright and Miller, Federal Practice and Procedure, § 2685. After a default judgment has been entered, the district court "may examine a plaintiff's complaint, taking all well-pleaded factual allegations as true, to determine whether it alleges a cause of action." Ramos-Falcon v. Autoridad de Energia Electrica, 301 F.3d 1, 2 (1st Cir. 2002); see also Feliciano-Hernandez v. Pereira-Castillo, 663 F.3d 527, 537 n.5 (1st Cir. 2011). There was no abuse of discretion in denying the motion for entry of default.

The dismissal of the claims against Kassler are affirmed for failure to state a claim due to inadequate pleading of necessary factual allegations. See Reves v. Ernst & Young, 507 U.S. 170, 183 (1993) ("one is not liable under [§ 1962(c)] unless one has participated in the operation or management of the enterprise itself.") and Feinstein v. Resolution Trust Corp., 942 F.2d 34, 41 (1st Cir. 1991)(stating that "each defendant in a RICO conspiracy case must have joined knowingly in the scheme and been involved himself, directly or indirectly, in the commission of at least two predicate offenses").

The defendants' immunity from Padmanabhan's claims for damages does not extend to his claims for declaratory and injunctive relief. See Bettencourt, 904 F.2d at 781 n.11. But, to the

extent that they are not moot, we need not address those claims because Padmanabhan has failed to sufficiently develop on appeal an argument specifically challenging their dismissal. See In re Financial Oversight and Management Bd. for Puerto Rico, 919 F.3d 121, 127 n.5 (1st Cir. 2019)(citing United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)).

There was no abuse of discretion in Judge Gorton's denial of plaintiff's motion to reconsider the reassignment of the case, pursuant to Local Rule 40.1(g)(5), either for failure to comply with the local rule or on grounds of judicial bias. See In re United States, 441 F.3d 44, 67 (1st Cir. 2006).

Appellant has filed an "Emergency Motion to Disqualify the Attorney General" from representing defendants-appellees. Appellees contend that he lacks standing to move to disqualify the Massachusetts Attorney General's Office on the grounds asserted. We agree. See Dupree v. Hardy, 859 F.3d 458, 463-464 (7th Cir. 2017)(holding that plaintiff, in § 1983 suit against state prison staff, lacked standing to move to disqualify defendants' attorneys on the ground that their appointment to defend the county violated state law). To the extent that this motion is not moot, it is dismissed for lack of standing.

Appellant's "Emergency Motion for Separate Merits Panel" and "Emergency Motion to Recuse Judges Thompson and Torruella" are denied. The cases on which appellant relies are inapposite. The grounds on which he relies do not warrant recusal. See Liteky v. United States, 510 U.S. 540, 555 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"); In re United States, 441 F.3d at 67 (noting the principle that a judge's rulings and statements in the course of proceedings before him or her rarely provide a basis for recusal under 28 U.S.C. § 455(a)).

The motion for sanctions against Assistant United States Attorney Susan M. Poswistilo is denied.

All other pending motions are denied as moot.

Affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:

Bharanidharan Padmanabhan  
Brian H. Sullivan  
Rebecca A. Cobbs  
Mark P. Sutliff  
Tory A. Weigand  
Lori Kathleen Vaulding  
Susan M. Poswistilo