

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 16, 2020

Christopher M. Wolpert
Clerk of Court

BENJAMIN VELAYO,

Plaintiff - Appellant,

v.

CHERYL FOX; KIMBERLY GRANT,

Defendants - Appellees.

No. 20-3143
(D.C. No. 2:20-CV-02279-KHV-JPO)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON, KELLY, and EID**, Circuit Judges.**

Benjamin Velayo, appearing pro se, appeals the district court's dismissal without prejudice of his complaint for lack of subject matter jurisdiction. Finding no error and exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I

Plaintiff-Appellant Benjamin Velayo filed a complaint against Defendants-Appellees Cheryl Fox and Kimberly Grant, alleging they violated his privacy rights. In his complaint, Velayo checked the box to assert subject matter jurisdiction under

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

28 U.S.C. § 1343, which vests original jurisdiction in the district courts over civil rights violations. However, because Velayo did not mention any federally protected civil rights that were violated by the defendants, he was ordered to show cause as to why his case should not be dismissed for lack of jurisdiction. Velayo responded to the order with additional factual allegations but again failed to identify a federal issue. Accordingly, the district court found no viable source of federal jurisdiction and dismissed his complaint without prejudice. Velayo timely appeals that dismissal.

We review de novo the district court's dismissal of a complaint for lack of subject matter jurisdiction. *Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 770 F.3d 944, 946 (10th Cir. 2014). It is the plaintiff's burden to establish subject matter jurisdiction. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002). When the plaintiff is proceeding pro se, as Velayo is, this court construes his pleadings liberally. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, this court "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

On appeal, Velayo asserts that the district court erred in dismissing his claims, but he does not put forth a legal argument to explain why the district court should have found it had jurisdiction. He does, however, contend the district court erred in considering events that took place at his old address, instead of his new address, which is where the facts alleged in his complaint occurred. Aplt. Br. at 4. This misstates the district court's judgment. The district court never made findings about

the events included in his allegations. It held only that Velayo's allegations were insufficient to demonstrate subject matter jurisdiction. ROA at 22.

While Velayo's filings are dense with facts, they do not mention which civil rights defendants allegedly violated or any applicable federal law. Thus, even under the liberal construction afforded to his action, we must agree with the district court that Velayo's complaint does not provide any plausible basis to conclude the defendants' actions violated a federal right and that, therefore, Velayo has not established subject matter jurisdiction.

We also deny Velayo's motion to proceed *in forma pauperis*. To proceed *in forma pauperis*, litigants must show a "reasoned, nonfrivolous argument on the law and facts in support of the issues raised in the action." *Lister v. Dept. of Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005). Since Velayo does not present any legal basis to support his claim against the defendants or to contest the lower court's dismissal order, his appeal is frivolous.

II

For the foregoing reasons, we AFFIRM the district court's dismissal of Velayo's complaint without prejudice and DENY his motion to proceed *in forma pauperis*.

Entered for the Court

Allison H. Eid
Circuit Judge

On June 4, 2020, Benjamin Velayo filed suit pro se against Cheryl Fox and Kimberly Grant, alleging that defendants violated his privacy rights. Civil Complaint (Doc. #1). Later that day, U.S. Magistrate Judge James P. O'Hara allowed plaintiff to proceed in forma pauperis, but ordered him to show cause why the Court should not dismiss this case for lack of subject matter jurisdiction. Order (Doc. #5). This matter is before the Court on Plaintiff's Response To Order To Show Cause (Doc. #7) filed June 11, 2020. For reasons stated below, the Court dismisses plaintiff's complaint.

Federal courts have limited jurisdiction. Blume v. Los Angeles Superior Courts, 731 F. App'x 829 (10th Cir. 2018). To proceed in federal court, plaintiff therefore has the burden to establish subject matter jurisdiction, which is ordinarily accomplished through diversity jurisdiction under 28 U.S.C. § 1332 or federal question jurisdiction under 28 U.S.C. § 1331. Id. (party asserting jurisdiction has the burden of establishing subject matter jurisdiction). Diversity jurisdiction exists where the parties have complete diversity of citizenship and the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332. Federal question jurisdiction exists where claims

arise under the Constitution, laws or treaties of the United States. 28 U.S.C. § 1331.

The Court has an independent duty to ensure that subject matter jurisdiction exists, and must dismiss the case “at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking.” Caballero v. Fuerzas Armadas Revolucionarias de Colombia, 945 F.3d 1270, 1273 (10th Cir. 2019). While the Court liberally construes a pro se plaintiff’s pleadings, it does not assume the role of his advocate, and it may not “supply additional factual allegations to round out a plaintiff’s complaint or construct a legal theory on a plaintiff’s behalf.” McCoy v. Kansas, No. 16-2129-JAR, 2016 WL 3549100, at *2 (D. Kan. June 30, 2016) (citations omitted); see Tatten v. City & Cty. of Denver, 730 F. App’x 620, 624 (10th Cir. 2018), cert. denied sub nom. Tatten v. City & Cty. of Denver, Colo., 139 S. Ct. 826 (2019).

Analysis

In his form Civil Complaint (Doc. #1), plaintiff checks the box to assert subject matter jurisdiction under 28 U.S.C. § 1343, which indicates that he alleges a civil rights violation.¹ Other than checking the box, plaintiff does not mention any civil rights that defendants allegedly violated or any applicable federal law. He merely states:

On March 23, 2020, I called Cheryl Fox to tell her, “Tell your friends not to bother me again.” She said, “I will.” It turned out to be a lie. About a week later she informed her friends my new address. I didn’t give her my new address. She saw it in the computer system so that means she violated my privacy rights.

Civil Complaint (Doc. #1) at 3–4.

Because these allegations did not establish subject matter jurisdiction, Judge O’Hara ordered plaintiff to show cause why the Court should not dismiss his claims. Order (Doc. #5) at 6. Plaintiff’s response proffers additional factual allegations, but it is entirely nonresponsive to the

¹ Plaintiff does not assert diversity jurisdiction.

issue of subject matter jurisdiction. He reiterates that defendants harassed him at his apartment complex, which was apparently in response to a lawsuit that he had filed against their friend. He further alleges that Cheryl Fox “did not comply twice to the Patients Privacy Safety Rule, because she gave my new address to her friends.” Plaintiff’s Response To Order To Show Cause (Doc. #7) at 1. Notably absent from this response is any discussion of subject matter jurisdiction: he does not mention which civil right defendants allegedly violated or any applicable federal law.² Thus, plaintiff has failed to establish subject matter jurisdiction, and the Court must dismiss his complaint.³ See Caballero, 945 F.3d at 1273 (Court must dismiss case whenever apparent that it lacks jurisdiction).

IT IS THEREFORE ORDERED that plaintiff’s Civil Complaint (Doc. #1) is **DISMISSED without prejudice**.

Dated this 6th day of July, 2020 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

² Plaintiff does not explain what the “Patients Privacy Safety Rule” is or its relevance to his allegations.

³ On June 4, 2020, Judge O’Hara denied plaintiff’s request for appointed counsel. Motion For Appointment Of Counsel And Declaration Of Good Faith Efforts To Obtain Counsel (Doc. #4); Order (Doc. #5). In his response to the order to show cause, plaintiff again requests appointed counsel because he cannot afford representation. Plaintiff’s Response To Order To Show Cause (Doc. #7) at 2. To the extent plaintiff is objecting to Judge O’Hara’s decision, the Court overrules that objection. Judge O’Hara explained that plaintiff failed to address any of the factors that the Court considers when appointing counsel, such as reasonably diligent efforts to obtain representation. In his response to the order to show cause, plaintiff again ignores these factors, and instead makes the same argument which Judge O’Hara rejected.