[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-14426
Non-Argument Calendar

D.C. Docket No. 2:20-cv-14367-DMM

ROBERT ALLEN AUSTIN,

Plaintiff-Appellant,

versus

JUDGE,
JUDGE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(June 23, 2021)

Before WILSON, ROSENBAUM and ANDERSON, Circuit Judges.

PER CURIAM:

Robert Austin, proceeding *pro se*, appeals the district court's *sua sponte* dismissal with prejudice of his civil rights complaint as patently frivolous because the

appellees, two state court judges ("the judges"), were entitled to absolute judicial immunity from suit. The judges have moved for summary affirmance and to stay the briefing schedule. On appeal, Austin argues that the district court erred by dismissing his complaint because the judges lacked jurisdiction over his state court child support proceedings that they presided over.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).[1] An action is frivolous if it is without arguable merit in law or fact. *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002).

Pro se pleadings are held to a less stringent standard than counseled pleadings and, therefore, are liberally construed. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). We may affirm on any ground supported by the record. *Big Top Koolers, Inc. v. Circu-Man Snacks, Inc.*, 528 F.3d 839, 844 (11th Cir. 2008).

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[1] We are bound by cases decided by the former Fifth Circuit before October 1, 1981. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

We generally review *de novo* the dismissal of a complaint with prejudice for failure to state a claim. *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1066 (11th Cir. 2017). We accept the factual allegations as true and construe them in the light most favorable to the plaintiff, but the complaint must state a plausible claim for relief on its face. *Id.* Exhibits to a complaint are part of the complaint for all purposes. Fed. R. Civ. P. 10(c).

We review a district court's *sua sponte* dismissal for abuse of discretion. *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1335 (11th Cir. 2011). A district court abuses its discretion when it dismisses a complaint *sua sponte* without giving the plaintiff notice or an opportunity to respond, "unless amendment would be futile or the complaint is patently frivolous." *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1248 (11th Cir. 2015).

Judges enjoy absolute judicial immunity when they act in their judicial capacity as long as they do not act "in the clear absence of all jurisdiction." *Sibley v. Lando*, 437 F.3d 1067, 1070 (11th Cir. 2005) (quotation marks omitted). A judge acts in his or her judicial capacity by performing normal judicial functions, in chambers or open court, in cases pending before the judge. *Id.* In *Sibley*, the petitioner brought a civil rights action against the state court judges who imprisoned him due to his failure to pay child support as ordered. *Id.* at 1069-70. The district court dismissed Sibley's complaint for failure to state a viable claim on the ground that the state court judges were entitled to

absolute judicial immunity and, on appeal, we affirmed. *Id.* at 1069, 1071.

We grant the judges' motion for summary affirmance because there is no substantial question that the judges were entitled to absolute judicial immunity from civil suit. *See Groendyke Transp., Inc.*, 406 F.2d at 1162. Although the district court appeared to base its dismissal of Austin's complaint on frivolity, it also mentioned its authority to dismiss the complaint for failure to state a viable claim, and we may affirm on any ground supported by the record. *See Big Top Koolers*, 528 F.3d at 844. And here, the district court properly dismissed Austin's complaint *sua sponte* because he failed to state a viable claim for relief. *See Almanza*, 851 F.3d at 1066.

Austin's claims attacked the judges' entry of orders in his state child support proceedings, and there is no dispute that such actions constitute normal judicial functions. *See Sibley*, 437 F.3d at 1070. Moreover, the exhibits attached to Austin's complaint indicate that the judges were assigned to preside over his child support proceedings, and nothing in those exhibits or the complaint support a plausible finding that they were acting "in the clear absence of all jurisdiction." *See id.*; Fed. R. Civ. P. 10(c). Thus, the judges were entitled to absolute judicial immunity for their actions in that proceeding, and any claim Austin could have made otherwise would have been without arguable merit. *See Sibley*, 437 F.3d at 1070.; *Napier*, 314 F.3d at 531. For that reason, the district court properly determined that Austin's complaint was patently frivolous

and that *sua sponte* dismissal was thus appropriate. *See Surtain*, 789 F.3d 1239, 1248; *Napier*, 314 F.3d at 531.

In sum, because there is no substantial question that the district court properly dismissed Austin's complaint, and did not abuse its discretion by *sua sponte* dismissing it with prejudice, we GRANT the judges' motion for summary affirmance. *See Groendyke Transp., Inc.*, 406 F.2d at 1162. Accordingly, we DENY AS MOOT the accompanying motion to stay the briefing schedule.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 20-14367-CV-MIDDLEBROOKS/Brannon

ROBERT ALLEN AUSTIN,

Plaintiff,

v.

JAMES WALTER MCCANN and
ELIZABETH ROSE MCHUGH,

Defendants. /

***SUA SPONTE* ORDER DISMISSING CASE**

(Filed Nov. 1, 2020)

THIS CAUSE is before the Court *sua sponte*. Plaintiff Robert Allen Austin, proceeding *pro se*, initiated this lawsuit by filing a Complaint on October 19, 2020 against Circuit Court Judge James Walter McCann and Hearing Officer Elizabeth Rose McHugh. (DE 1). For the following reasons, this action is dismissed with prejudice.

BACKGROUND

In his Complaint, Plaintiff asserts that his action arises under 18 U.S.C. § 242.[1] (DE 1 at 3). Plaintiff also

[1] Section 242 prohibits "the deprivation of any right, privileges, or immunities secured or protected by the Constitution or laws of the United States" or the imposition of "different punishments, pains, or penalties, on account of [a] person being an alien,

appears to allege that this action arises under the Due Process Clause of the federal Constitution in connection with a state court proceeding. (DE 1 at 4). Specifically, Plaintiff claims that on May 26, 2020, Defendant Elizabeth Rose McHugh "[f]ailed to enforce a legal Court procedure of a criminal matter" in which Plaintiff was a party. (*Id.*). Plaintiff also alleges that on June 1, 2020, Defendant James Walter McCann "granted [Defendant McHugh] an unlawful Right to do Harm by signing a [sic] unlawful court Order that was not in compliance with" law. (*Id.*). In addition, Plaintiff claims that Defendants lacked jurisdiction over Plaintiff's property. (*Id.*). For these alleged violations, Plaintiff seeks $12.5 million from each Defendant and requests that Defendant McHugh be held in contempt. (DE 1 at 4). The exhibits attached to Plaintiff's Complaint indicate that the state court proceeding Plaintiff refers to concerned child support arrearages he owed as the respondent in that action. The May 26, 2020 proceeding Plaintiff complains of was held remotely before Child Support Enforcement Hearing Officer Elizabeth McHugh in the Circuit Court of the Nineteenth Judicial Circuit in and for St. Lucie County, Florida. (DE 1-1 at 11). The June 1, 2020 "unlawful court Order" was a Final Order on Recommendations of Hearing Officer by which Circuit Judge James W. McCann adopted Hearing Officer McHugh's Final Order on Report and Recommendation of the Hearing Officer. (DE 1-1 at 31, 33-34). Plaintiff apparently paid all arrearages by

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or by reason of his color, or race, than are prescribed for the punishment of citizens. . . ." 18 U.S.C. § 242.

June 5, 2020, thereby "effectively closing the case and terminating any need for further litigation between the parties." (DE 1-1 at 33). Thereafter, however, Plaintiff filed a flurry of motions, including one to hold Hearing Officer McHugh in contempt, and the Circuit Court denied all such motions or concluded that they were moot because they were all "either legally insufficient or [were] no longer necessary after the payment of the arrears." (*Id.*).

DISCUSSION

Ordinarily, prior to dismissing a civil action *sua sponte*, a district court "must provide the plaintiff with notice of its intent to dismiss and an opportunity to respond." *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1248 (11th Cir. 2015). However, when amendment "would be futile" or "the complaint is patently frivolous," a court may deviate from this mandate and dismiss a complaint without notice or an opportunity to amend. *See id.* "A claim is frivolous if it is without arguable merit either in law or fact." *Bilal v. Driver*, 251 F.3d 1346, 1349 (11th Cir. 2001); *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993) (per curiam) ("A district court may conclude a case has little or no chance of success and dismiss the complaint . . . when it determines from the face of the complaint that the factual allegations are 'clearly baseless' or that the legal theories are 'indisputably meritless.'") (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989))).

Moreover, a district court may dismiss a complaint for failure to state a claim based upon an affirmative defense that is "an obvious bar given the allegations," even if the defendant has not asserted the defense. *Sibley v. Lando*, 437 F.3d 1067, 1069-70 & n.2 (11th Cir. 2005) (affirming district court's dismissal of plaintiff's action against state trial and appellate judges in which plaintiff alleged violations of state and federal laws and sought $10 million from each defendant for failure to state a claim on judicial immunity grounds, although the defendants did not raise the defense). The Eleventh Circuit has consistently held that a district court's *sua sponte* dismissal of a claim as frivolous on absolute judicial immunity grounds is proper. *See Burlison v. Angus*, 737 F. App'x 523, 524 (11th Cir. 2018) (affirming district court's *sua sponte* dismissal of plaintiff's 1983 action against a state clerk of court as being "patently frivolous because its central claim was obviously barred by judicial immunity"); *McBrearty v. Koji*, 348 F. App'x 437, 438-39 (11th Cir. 2009) (affirming district court's *sua sponte* dismissal of *pro se* civil rights litigant's claims against state appellate judges, finding the claims "frivolous and vexatious" and the judges entitled to judicial immunity); *Redford v. Wright*, 378 F. App'x 987, 987-88 (11th Cir. 2010) (affirming district court's dismissal of *pro se* plaintiff's claim as frivolous because plaintiffs civil rights claim against a Georgia state court judge was barred by absolute judicial immunity).

Judges are entitled to absolute judicial immunity from civil actions for the performance of judicial acts

as long as they are not done in the clear absence of jurisdiction. *Roland v. Phillips*, 19 F.3d 552, 555 (11th Cir.1994). Normal judicial functions include events occurring in the judge's chambers or in open court and acts about cases pending before the judge. *Sibley*, 437 F.3d at 1070. "A judge does not act in the 'clear absence of all jurisdiction' when he acts erroneously, maliciously, or in excess of his authority, but instead, only when he acts without subject-matter jurisdiction." *McBrearty*, 348 F. App'x at 439. (quoting *Dykes v. Hosemann*, 776 F.2d 942, 94748 (11th Cir.1985)). Absolute judicial immunity extends to both cases seeking damages and injunctive relief against a judge. *See Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir.2000).

Here, Plaintiff's claims consist of: (1) an allegation that Defendant Circuit Court Judge James Walter McCann violated Plaintiff's civil rights by adopting Defendant McHugh's Report and Recommendation concerning the state court child support arrearages action; and (2) an allegation that Hearing Officer Elizabeth Rose McHugh violated a procedural rule in that underlying state court action. (DE 1 at 4). For these claimed violations, Plaintiff seeks money damages from both Defendants and requests that Hearing Officer McHugh be held in contempt. (*Id.*). As judicial officers of the Nineteenth Judicial Circuit Court in and for St. Lucie County, Florida, Defendants are entitled to absolute judicial immunity from civil suits for damages and injunctive relief for actions carried out in their judicial capacity. Nothing in the record indicates that Defendants lacked subject matter jurisdiction

over the child support arrearages action in which Plaintiff was the respondent. And the acts that Plaintiff challenges—Defendant McHugh's supposed violation of a procedural rule (which Plaintiff does not identify specifically) and Defendant McCann's entry of an order adopting the Report and Recommendations—were undertaken as part of the state court action in which Plaintiff was embroiled. Because the Defendants are entitled to absolute judicial immunity, Plaintiff's claim "is without arguable merit . . . in law" and therefore is frivolous. *Bilal*, 251 F.3d 1346 at 1349.

Accordingly, given that I am authorized to dismiss a "patently frivolous" cause of action without granting Plaintiff leave to amend the complaint, *Surtain*, 789 F.3d at 1248, it is hereby **ORDERED AND ADJUDGED** that:

(1) Plaintiff's Complaint (DE 1) is **DISMISSED WITH PREJUDICE**.

(2) The Clerk of the Court shall **CLOSE THIS CASE**.

(3) All pending motions are **DENIED AS MOOT.**

SIGNED in Chambers at West Palm Beach, Florida, this 30th day of October, 2020.

/s/ Donald M. Middlebrooks
Donald M. Middlebrooks
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-14426-CC

ROBERT ALLEN AUSTIN,

Plaintiff - Appellant,

versus

JUDGE,
JUDGE,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Sep. 1, 2021)

BEFORE: WILSON, ROSENBAUM and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
for the
Southern District of Florida

Robert Allen Austin,
Appellant

-v-

James Walter McCann
Elizabeth Rose McHugh,

Appeals Case No.
20 – 14426 - CC

APPELLANT ROBERT ALLEN AUSTIN PETITION FOR REHEARING EN BANC FOR ERROR IN LAW OR PROCEDURAL PROCESS

(Filed Jul. 2, 2021)

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TABLE OF CITATIONS

[-1-] RULE 35 STATMENT

I Robert Allen Austin bring to light to this appeals court decision on 6/23/2021

(1) Under Florida Rule of civil procedure rule 1.070(j) Summons; Time Limit. If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading and the party on whose behalf service is required does not show good cause why service was not made within that time, the action shall be dismissed without prejudice or that defendant dropped as a party on the court's own

initiative after notice or on motion. A dismissal under this subdivision shall not be considered a voluntary or operate as an adjudication on the merits under rule 1.420(a)(1).

(2) 1.420(a)(1)(a) Voluntary Dismissal. (1) By Parties. Except in action in which property has been seized or is in the custody of the court, an action, a claim, or any part of an action or claim may be dismissed by plaintiff without order of the court.

(3) Florida Supreme Court form 12.960. Motion for civil Contempt/Enforcement A copy of this form MUST be personally served by a sheriff or private process server or mailed, * e- mailed*, or hand delivered to any lather party(ies) in your case. (DE. 1 Exhibit 14, 15)

[-2-] (4) For the record on 5/26/2020 Magistrate Elizabeth McHugh did in fact deprive Robert Allen Austin of his rights under due process of law that is a protected right under the le Amendment as well as deprivation of rights under color of law and Circuit Judge McCann made it legal binding when he signed Magistrate Elizabeth McHugh court recommendation Granting former wife motion for civil contempt enforcement filed 10/28/2019 on 6/1/2020. (DE. 1 Exhibit 29, 30, 31)

(5) For the record I Robert Allen Austin filed on 5//27/2020 a motion for contempt of court against Magistrate Elizabeth McHugh that states on its face (full amount will be paid under duress therefore as to avoid a false imprisonment) (DE. 1 Exhibit 20)

(6) CONSENT of the parties cannot allow Subject Matter Jurisdiction to a Court unlike personal jurisdiction, which the court can obtain upon a party's consent or failure to object, lack of Subject Matter Jurisdiction is never waivable either the court has it, or it cannot assert it.

(7) Legal Definition of (Must)' is the only word that imposes a legal obligation on your readers to tell them something is Mandatory.

(8) Legal Definition of (Obligatory Mandatory) authority describes a source of law that is binding on the Court.

[-2-] **ARGUMENT**

On 6/23/2021 this Appeals court made a determination that is Arguable (1) On 5/26/2020 a scheduled hearing the State judges knowingly used consent to gain jurisdiction to enforce a pending motion for civil contempt/enforcement filed by former wife on 10/28/2019 without a legal executed Summons on file. The Florida Court lost jurisdiction to schedule a hearing of the filed motion by former wife for civil contempt/ enforcement on 2/24/2021. Being former wife failed to execute summons of the filed motion and I Robert Allen Austin on 5/26/2020 was convicted with that same motion filed by former wife on 10/28/2019 that was in clear absence of Subject Matter Jurisdiction to adjudicate. A copy of the motion for civil contempt/enforcement is required by Florida Supreme Court rule of procedure 12.960 to serve a copy to the

other party. There is no legal documented proof that I Robert Allen Austin was served a copy of the motion by required summons. And the Rule 35 Statement that is part of this petition for a rehearing satisfies this Appeals Courts Requirement of a plausible claim on its face. (2) Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so there can be no substantial question as to the outcome of the case.

* * *