21-8022

ORIGINAL

Docket No.
In the Supreme Court of the United States

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WILLIAM DEW,

Petitioner,

v.

S. COLUMBIA TERRACE, LLC; THE RIVER CLUB

Respondents.

◆

FILED
MAY 16 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

◆

WILLIAM DEW,
Petitioner Pro Se
15B Columbia Terrace, Apt 2
Edgewater, NJ 07020
(201)496-6018
dew88@aol.com

QUESTIONS PRESENTED

1. Whether the district court may dismiss a non-prisoner pro se complaint *sua sponte* basis of factual deficiencies in complaint or must wait until defendant attacks lack of such details on motion to dismiss, an issue that has divided the Circuits, but seems to be interdicted by Neitzke v. Williams, 490 U.S. 319 (1989).

2. Whether the district court failed to apply the correct standard set forth by this Court to a pro se pleading alleging unlawful discrimination.

LIST OF PARTIES

In addition to the parties appearing in the caption of the case on the cover page:

Laura Martin Director of Edgewater NJ, Department of social services.

The Fair Housing Council of Northern New Jersey (FHCNNJ) housing investigators Suzanne E. Paletta and Helen Consiglio.

Maria Delacruz case worker for Bergen County Board of Social Services (BCBSS)

Adriana Tovar Housing Investigator for the Division on civil rights.

Kimberly A. Lawlor, Esq Mattleman, Weinroth & Miller, P.C.

Mark W. Welsh, Esq Northeast New Jersey Legal Services.

Stephanie Wiegand Esq. Partner Griffin Alexander, P.C.

LIST OF ALL PROCEEDINGS

In addition to the decisions below:

S. Columbia Terrace, LLC v, William Dew, No. LT 4355-19 Superior Court of New

Jersey. Judgment entered July 16, 2019.

WILLIAM DEW, Complainant-Appellant, v. S. COLUMBIA TERRACE, LLC, 2021 (N.J. Super. Ct. App. Div.), an appeal from the New Jersey Division on Civil Rights, Department of Law and Public Safety, Docket No. A-3800-19. Judgment entered August 18, 2021

Dew v. S Columbia Terrace LLC, No. HB08WT-67679 New Jersey Division on Civil Rights. Complaint Issued Oct 19, 2019 - Judgment entered April 29, 2020.

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IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeal is unofficially reported at 854 F. App'x 460 (3d Cir. 2021) and may be found in the Appendix at A2. The decisions of the district court are not officially reported and may be found in the Appendix at A8 et seq.

JURISDICTION

The Court of Appeals issued its decision on May 3, 2021. A petition for rehearing an rehearing en banc was denied on February 14, 2022. The 90 day period to file a petition for certiorari is May 14, 2022. Because May 14, 2022 is a Saturday, the last day to file is May 16, 2022, and may be accomplished by mailing on that date. Sup.Ct.R. 29 and 30.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1915

§ 1915. Proceedings in forma pauperis

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that

includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

28 U.S.C. § 1915A:

§ 1915A. Screening

(a) Screening.--The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
(b) Grounds for dismissal.--On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
(2) seeks monetary relief from a defendant who is immune from such relief.
(c) Definition.--As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

Fair Housing Act Sec. 804. [42 U.S.C. 3604]:

Discrimination in sale or rental of housing and other prohibited practices As made applicable by section 803 of this title and except as exempted by sections 803(b) and 807 of this title, it shall be unlawful--
(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

NJ Rev Stat § 2A:42-10.16a (2021)

1. a. In an eviction action for nonpayment of rent, pursuant to subsection a. of section 2 of P.L.1974, c.49 (C.2A:18-61.1), the court shall provide a period of three

business days after the date on which a warrant for removal is posted to the unit or a lockout is executed due to nonpayment of rent, for the tenant to submit a rent payment. A late fee shall not be imposed in excess of the amount set forth in the application for a warrant for removal if all rent due and owing is paid within the three business day period established by this subsection.

b. (1) A landlord shall accept all payments of rent made by a tenant within the three business day period established by subsection a. of this section and upon payment of the rent due and owing, within two business days thereafter, the landlord shall provide the court with written notice that the rent due and owing was paid. A copy of this notice shall be provided to the tenant.

(2) Upon receipt of the written notice as provided in this subsection, the court shall dismiss with prejudice the action for nonpayment of rent.

(3) If the tenant makes a timely payment within the three business day period established by subsection a. of this section, and the landlord fails to provide the court with written notice of the rent payment, the tenant may file a motion to dismiss with prejudice the action for nonpayment of rent upon notice to the landlord.

BRIEF SYNOPSIS STATEMENT

In the Township of Edgewater NJ, landlords refuse to rent apartments to members of a protected class and refuse to accept all forms of rental assistance. Their website is used to advertise nationally and internationally. Federally Funded rental assistance is not accepted at their community.

STATEMENT OF THE CASE\

Petitioner brought this action under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, et seq., prior to an agency arbitrary and capricious dismissal of a state complaint made solely upon state law grounds. The District Court granted Dew's application to proceed in forma pauperis, and then purported to screen his

complaint– even though it was not a prison-inmate complaint– and dismissed it with leave to amend. Dew filed a letter with exhibits which included an August 1, 2019, state court order directing the respondents to cooperate the social services and accept Dew's rental assistance and an amended complaint. In that complaint, Dew alleged that in 2015, a new landlord, S. Columbia LLC (SCT), purchased the building in which Dew had been renting an apartment and receiving state rental assistance they had refuse to cooperate with social services between March 2015 and 2019 by refusing to provide the necessary documents to social services that would allow him to continue to receive rental assistance immediately after it discovered he was (Black). Dew further alleged (SCT) discriminated against him based on his source of income and because "his race (Black) [was] also a factor in [its] adverse action," noting that it had not rented to Black or Hispanic tenants since purchasing the building in 2015. The District Court dismissed Dew's amended complaint, again without prejudice and with leave to amend.

Dew then filed a second amended complaint, the operative complaint here. He added a new defendant, the River Club, and alleged that when he was searching for housing in November 2019, that would allow him to use a Section 8 voucher within his community of Edgewater NJ, he entered the River Club's website and it steered him away from, by stating that it did not accept Section 8 housing vouchers, in their community which is also located in Edgewater NJ, subsequently the division on civil

rights issued a second verify complaint 100 days after the act of discrimination. In an order, the District Court dismissed Dew's second amended complaint with prejudice Before the conclusion of the division of civil rights investigation into the River Club.

Dew filed a motion for reconsideration, arguing that intervening change in control in the Law was passed in New Jersey currently known as (Title 46) several days after he filed his initial complaint and that S. Columbia should have accepted his subsidized housing voucher. He also claimed he could show discrimination under a disparate impact theory by, attaching (SCT) security deposit list with the amount of the tenants initial security deposit and the names of all the tenants in his rental building in 2015. He maintained the document proves in March 2015 the building was 97% racially diverse and 3% white, conversely by July 2020 it was 96% white and the Minority tenants had moved out under unspecified mysterious circumstances and that all of the new tenants in the building were white, which Dew argued was not representative Bergen County New Jersey or the Township of Edgewater New Jersey.

The District Court denied his motion. Dew timely appealed both the dismissal of his complaint and the denial of his motion for reconsideration. The Third Circuit affirmed in a conclusory unpublished decision and denied rehearing.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SUBSTANTIAL CIRCUIT SPLIT AS WHETHER THE DISTRICT COURT MAY DISMISS A NON-PRISONER PRO SE COMPLAINT SUA SPONTE BASIS OF FACTUAL DEFICIENCIES IN COMPLAINT OR MUST WAIT UNTIL DEFENDANT ATTACKS LACK OF SUCH DETAILS ON MOTION TO DISMISS

The question whether a district court may sua spone dismiss a non-prisoner pro se complaint is one that has divided the Circuits.

The Second Circuit, for example, reversed a district court's sua sponte dismissal of the plaintiff's pro se complaint as frivolous because "[s]o long as the in forma pauperis plaintiff raises a cognizable claim, dismissal on the basis of factual deficiencies in the complaint must wait until the defendant attacks the lack of such details on a Rule 12(b)(6) motion." In that Circuit, a district court may only dismiss an in forma pauperis action sua sponte if the action is "frivolous or malicious." See 28 U.S.C. § 1915(e)(2)(B)(I).

An action is "frivolous" in that Circuit when either: (1) "the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy;" or (2) "the claim is 'based on an indisputably meritless legal theory.' " Nance , 912 F.2d at 606 (quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989)). A claim is based on an "indisputably meritless legal theory" when either the claim lacks an arguable basis in law, Benitez v. Wolff, 907 F.2d 1293, 1295 (2d Cir.1990) (per curiam), or a dispositive defense clearly exists on the face of the complaint. See Pino v. Ryan, 49 F.3d 51, 53 (2d Cir.1995).

The Sixth Circuit holds that, if dismissal is to occur sua sponte under limited exceptions provided by the forma pauperis statute, governing frivolous claims, the trial court must explicitly state that statute is being invoked and that complaint is being dismissed as frivolous. Harris v. Johnson, 784 F.2d 222 (6th Cir. 1986).

In the Eighth Circuit, a district court lacks the authority to dismiss a case sua sponte before service of process is effected unless the complaint is frivolous. Porter v. Fox , 99 F.3d 271, 273 (8th Cir.1996) (observing that the Supreme Court of the United States has distinguished claims that are frivolous from claims that fail to state a claim (citing Neitzke v. Williams , 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989))). A sua sponte dismissal before the defendant has been served is "disfavored because the district court is cast in the role of a proponent for the defense, rather than an independent entity." Id. at 274 (internal quotation marks omitted). This service-of-process prerequisite includes the filing of responsive pleadings. Id. Thus, unless otherwise authorized by the Prison Litigation Reform Act ("PLRA"), there is "no support for the district court to conduct an initial review of all nonprisoner pro se fee-paid complaints under Rule 12(b)(6) before service of process and responsive pleadings." Id. (internal citation omitted). See also *Johnson v. Bloomington Police*, 193 F.Supp.3d 1020 (D.Minn.2016).

In contrast, the Third Circuit "hold[s] that a court may dismiss an in forma pauperis claim as frivolous if, after considering the contending equities, the court

determines that the claim is: (1) of little or no weight, value, or importance; (2) not worthy of serious attention; or (3) trivial." Deutsch v. United States, 67 F.3d 1080, 1082 (3d Cir. 1995). Similarly, the Fifth Circuit "[p]ermit[s sua sponte] dismissal of lawsuits that have 'no realistic chance of ultimate success.'" Pugh v. Parish of St. Tammany, 875 F.2d 436, 438 (5th Cir. 1989); cf. Redwood v. Council of the District of Columbia, 679 F.2d 931 (D.C. Cir. 1982) (sua sponte dismissal of a prisoner's civil actions is almost always less preferable than requiring at least some responsive answer from the government entity or official named as the defendant or respondent.).

The Third and Fifth Circuit view is plainly at odds with that of the Eighth Circuit and other Circuits. This case offers the opportunity to resolve that conflict. The Third and Fifth Circuit views do not comport with this Court's precedents.

This Court has instructed district courts to provide a brief explanation when dismissing under § 1915(d) "to facilitate intelligent appellate review." Boag v. MacDougall, 454 U.S. 364, 365 n. * (1982). See also Denton v. Hernandez, 504 U.S. 25, 33–35(1992); Besecker v. Illinois, 14 F.3d 309, 310 (7th Cir.1994) (per curiam); Levoy v. Mills, 788 F.2d 1437, 1438 (10th Cir.1986); Sills v. Bureau of Prisons, 761 F.2d 792, 794 (D.C.Cir.1985). The brief explanation should include a reference to the statute or its standard for dismissal. Harris v. Johnson, 784 F.2d 222, 224 (6th Cir.1986) ("[I]f a dismissal is to occur sua sponte under the limited exceptions

provided by section 1915(d), the trial court must explicitly state that the statute is being invoked and that the complaint is being dismissed as frivolous.").

Unfortunately, the district judge's failure to use the "frivolous" designation or even to cite § 1915(d) was deliberate for one reason: she intended to dismiss on the merits, thereby blocking Petitioner from filing a paid complaint later. "[A] § 1915(d) dismissal is not a dismissal on the merits, but rather an exercise of the court's discretion under the in forma pauperis statute." Denton, 504 U.S. at 34. "[T]he dismissal does not prejudice the filing of a paid complaint making the same allegations." Id. See also Brown v. Briscoe, 998 F.2d 201, 204 (4th Cir.1993).

Plainly sua sponte dismissal here was not permissible under this Court's precedents and the better reasoned decisions in the Second and Eighth Circuits.

II. THIS COURT HAS HELD WHEN AN EVICTION IS IN VIOLATION OF STATE REGULATIONS IT SHOULD BE REVERSED AND REMANDED.

New Jersey law makes it illegal for a landlord to refuse to rent to a person who has a Section 8 voucher or another type of housing assistance. N.J.S.A. 10:5-12(g). This applies to tenants who obtain Section 8 while already tenants in a house or apartment, and to tenants who are seeking to rent from a landlord for the first time. A landlord cannot refuse to accept rental assistance from a tenant and then turn around and sue to evict that tenant for nonpayment of rent. *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602, 725 A.2d 1104 (1999).

July 26, 2019 (SCT) called the Bergen County Board of Social Services

(BCBSS) and informed Dew's caseworker, they will not complete the necessary documents for Dew to receive rental assistance.

On August 1, 2019, the State Court issued an order directing (SCT) to cooperate with social services and submit the necessary documents for Dew to receive rental assistance.

III. THIS COURT HAS HELD WHEN DISTRICT COURTS ARE CONFRONTED WITH THE ISSUES TO APPEAL FEDERAL OR STATE LAW IN A LAWSUIT IT MUST APPLY STATE LAW ON ISSUES OF SUBSTANTIVE LAW.

The intervening change in controlling State law (NJ Rev Stat § 2A:42-10.16a) provides a quick and simple solution to this entire matter which the Third Circuit failed to consider.[" Such as change in intervening controlling law"] [" he cites no new federal law the District Court properly concluded that Dew did not rely on new evidence or new law in seeking reconsideration."]

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). The doctrine states that the federal courts, when confronted with the issue of whether to apply federal or state law in a lawsuit, must apply state law on issues of substantive law.

IV. Complaint Here is Sufficient

Courts are fairly uniform in concluding that section 1981, 1982 and Fair Housing Act claims all consist of the same prima facie elements: (1) that the plaintiff is a member of a racial minority; (2) that the plaintiff applied for and was qualified to rent certain property or housing; (3) that the plaintiff was rejected; and (4) that

the housing or rental property remained available thereafter). *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir. 1990); *Selden Apartments v. HUD*, 785 F.2d 152, 159 (6th Cir.1986); *Asbury v. Broyham*, 866 F.2d 1276, 1279 (10th Cir.1989); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir.1980). Given the uniformity of courts in dealing with the prima facie elements under each statute, the pleading requirements at the motion to dismiss stage are equally similar. *Pinchback* at 1451.

These allegations are made in the complaints that the court dismissed *sua sponte*. Indeed, a leading treatise has criticized the holding of the Third Circuit in this very case. 2 Federal Regulation of Real Estate and Mortgage Lending, Federal Reg. of Real Estate & Mortgage Lending § 12:64 (4th ed). Under this Court's decision in *Porter v. Lee*, 328 U.S. 246 (1946), a federal remedy was mandated irrespective of the determination of the New Jersey state agency.

Sua sponte dismissal was unwarranted under any theory.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: May 14, 2022

William Dew

WILLIAM DEW