

United States Court of Appeals For the First Circuit

No. 23-1518

THOMAS OLIVER,

Plaintiff - Appellant,

v.

JOSEPH LEONARD MICHAUD, Individual and Official Capacity; MARY SUSAN MCELROY, Individual and Official Capacity; JOHN JAMES MCCONNELL, JR., Individual and Official Capacity; WILLIAM EDWARD SMITH, Individual and Official Capacity; PATRICIA ANNE SULLIVAN, Individual and Official Capacity; LINCOLN DOUGLAS ALMOND, Individual and Official Capacity; GUSTAVO ANTONIO GELPI, JR., Individual and Official Capacity; JEFFREY ROBERT HOWARD, Individual and Official Capacity; WILLIAM JOSEPH KAYATTA, JR., Individual and Official Capacity,

Defendants - Appellees.

Before

Barron, Chief Judge,
Montecalvo and Rikelman, Circuit Judges.

JUDGMENT

Entered: August 14, 2023

Thomas Oliver, pro se, appeals from the district court's screening dismissal of his various claims against an individual and a number of federal judges. We have carefully considered Oliver's arguments and the record before the district court. To the extent not waived via insufficient development on appeal, we conclude that his claims of error are unpersuasive. See Woods v. Wells Fargo Bank, N.A., 733 F.3d 349, 353 (1st Cir. 2013) (review of dismissal for failure to state a claim under Rule 12(b)(6) is de novo); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

The district court correctly held that the judges named as defendants are absolutely immune under these circumstances. See, e.g., Nystedt v. Nigro, 700 F.3d 25, 32-33 (1st Cir. 2012); Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989) (per curiam). Furthermore, this court has long held that

A2-1

Petitioner never made any "claims of error," but instead clearly stated that what has been done is deliberate and criminal. Additionally, these three judges by their word choice, "the judges named as defendants," imply there is at least one non-judge defendant—Michaud—whom they then ignore in their judgment, or they really mean that all defendants are judges and thus contradict what Johnstone wrote about Michaud being "a private individual."

diversity may not be established in the negative. D.B. Zwirn Spec. Opp'ies Fund, L.P. v. Mehrotra, 661 F.3d 124, 125-26 (1st Cir. 2011) (per curiam). The dismissal of plaintiff's complaint is affirmed. Oliver's August 8, 2023 motion to vacate is denied. See 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc:

Thomas Oliver
Lauren S. Zurier

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JOSEPH LEONARD MICHAUD, Individual and Official Capacity; MARY SUSAN MCELROY, Individual and Official Capacity; JOHN JAMES MCCONNELL, JR., Individual and Official Capacity; WILLIAM EDWARD SMITH, Individual and Official Capacity; PATRICIA ANNE SULLIVAN, Individual and Official Capacity; LINCOLN DOUGLAS ALMOND, Individual and Official Capacity; GUSTAVO ANTONIO GELPI, JR., Individual and Official Capacity; JEFFREY ROBERT HOWARD, Individual and Official Capacity; WILLIAM JOSEPH KAYATTA, JR., Individual and Official Capacity,

Defendants - Appellees.

Before

Barron, Chief Judge,
Montecalvo and Rikelman, Circuit Judges.

ORDER OF COURT

Entered: August 16, 2023

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing is denied by the panel of judges who decided the case, as the petition fails to satisfy the standards for rehearing. See Fed. R. App. P. 35(b)(1).

As it appears that there may be no quorum of circuit judges in regular active service who are not recused who may vote on petitioner's request for rehearing en banc, the request for rehearing en banc is also denied. See 28 U.S.C. § 46(d); 1st Cir. Loc. R. 35.0(a)(1). In any event, a majority of judges in regular active service do not favor en banc review.

By the Court:

Maria R. Hamilton, Clerk

cc: Thomas Oliver, Lauren S. Zurier

A3-1

Per 28 U.S. Code § 46(d) "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum." Three of five judges—Barron, Kayatta, Gelpí, Montecalvo, and Rikelman—constitute that quorum. Petitioner is only suing two of these judges. The statement, "no quorum of circuit judges in regular active service....may vote on [P]etitioner's request for rehearing *en banc*," is 100% false. L. R. 35.0(a)(2), "the proceeding involves a question of exceptional importance," was completely ignored. Any sane everyday person would say that the commission of crimes by a judge would be "of exceptional importance." As much as all of the judges involved so far have tried their best to try to conceal the facts and evidence, Petitioner has been able to clear this hurdle by revealing both via the mechanisms mentioned earlier. The U.S. legal system cannot beat Petitioner fairly by using its own rules and laws, so it has to resort to crime in order to do so. He holds out hope that he will encounter someone with a conscience before this and the related cases finish. The lump under the proverbial rug is getting mighty big. This is precisely why the high court must intervene.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Thomas Oliver

v.

Case No. 23-cv-187-LM-AKJ

Joseph Leonard Michaud, et al.

REPORT AND RECOMMENDATION

Plaintiff Thomas Oliver, proceeding pro se, has filed a six-count complaint against nine defendants -- most of whom are federal judges -- alleging that, individually and collectively, they engaged in a widespread and long-running conspiracy to injure him, in violation of constitutional, statutory, and common law. Plaintiff's complaint has been referred to the undersigned magistrate judge for preliminary review, pursuant to 28 U.S.C. § 1915(e)(2).¹

Preliminary Review Standard

The federal in forma pauperis statute, 28 U.S.C. § 1915, is designed to ensure meaningful access to federal courts for persons unable to pay the costs of bringing an action. See Neitzke v. Williams, 490 U.S. 319, 324 (1989). When a party proceeds in forma pauperis, however, a court must "dismiss the

¹Because the defendants include all the District Judges and Magistrate Judges sitting in the District of Rhode Island, those judges recused themselves and the case was referred to this District. See Transfer Order (Doc. No. 5).

case at any time if" it determines that the action "is frivolous or malicious[,] . . . fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Dismissals under section 1915 are often made "prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering" meritless complaints. Neitzke, 490 U.S. at 324.

When considering whether a complaint states a claim for which relief may be granted, the court must accept the truth of all well-pleaded facts and give the plaintiff the benefit of all reasonable inferences. See Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 12 (1st Cir. 2011). A complaint fails to state a claim when it does not plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). An unrepresented plaintiff's complaint must be read liberally in this regard, see Donovan v. Maine, 276 F.3d 87, 94 (1st Cir. 2002), but must still contain "the crucial detail of who, what, when, where, and how" in order to provide fair notice of what the claims are and the grounds upon which they rest, Byrne v. Maryland, No. 1:20-cv-00036-GZS, 2020 WL 1317731, at *5 (D. Me. Mar. 20, 2020) (rec. dec.), aff'd, 2020 WL 2202441 (D. Me. May 6, 2020).

Factual Allegations

The origin of this lawsuit dates to 2014, when Mr. Oliver was granted a default judgment in Massachusetts state court against an individual not a party to this suit. Mr. Oliver alleges that defendant Michaud, apparently serving as the defaulted defendant's attorney, subsequently "illegally transformed" that judgment into a judgment for his client by contacting the court. Mr. Oliver further alleges that correspondence he received in September 2014 contains evidence that Michaud behaved illegally. The Massachusetts court entered judgment against Mr. Oliver in November 2015. Mr. Oliver's appeals were unsuccessful. See Compl. (Doc. No. 8) at 3-5.²

In February 2020, Mr. Oliver learned of a lien on property he owned in Rhode Island that stemmed from the previous

²See Oliver v. Parent, 102 N.E. 2d 427, 2018 WL 472642 (Mass. App. Ct. Jan. 19, 2018), aff'd 102 N.E. 2d 976 (Table) (Mass. Mar. 29, 2018). Of note, the decision of the Massachusetts Appeals Court indicates that the defaulted defendant's "contact" with the court was a timely motion to vacate the first default entered against the defendant. The trial court eventually entered default against Mr. Oliver because he failed to appear at the scheduled bench trial. Id., 2018 WL 472642, at *1. The court takes judicial notice of Mr. Oliver's prior lawsuits. See Aponte-Torres v. Univ. of P.R., 445 F.3d 50, 55 (1st Cir. 2006) (court in determining if complaint meets notice pleading standard may consider facts properly subject to judicial notice); see also Maher v. Hyde, 272 F.3d 83, 86 (1st Cir. 2001) (federal courts may take judicial notice of proceedings in other courts if relevant to matters at hand).

Johnstone states Michaud "illegally transformed" the judgment. Petitioner never used those exact 2 words in the complaint. Moreover, there were others involved, and her statement is a vast oversimplification and borderlines on untruthfulness. However, Johnstone's statement, "In February 2020, Mr. Oliver learned of a lien on property he owned in Rhode Island..." is 100% false. Petitioner has not owned the property since 2014, and nowhere in any document has Petitioner stated that he learned of this in "February 2020." Michaud's motion to vacate was filed ***nearly 9 years late*** and was in no way, shape, or form "timely." "The court takes judicial notice of Mr. Oliver's prior lawsuits" ...but cavalierly ignores all the crimes committed in them—M. G. L. c. 268 § 13B, for example.

Massachusetts judgment. In an attempt to shield the income-producing property, Mr. Oliver filed for bankruptcy protection in the Southern District of California. See In Re Oliver, No. 20-01053-CL7 (Bankr. S.D. Cal. Feb. 28, 2020). Mr. Oliver alleges that an "agent" of defendant Michaud violated the Bankruptcy Code's automatic stay provision by selling Mr. Oliver's property on June 10, 2021. Despite Mr. Oliver's protestations that he had been the victim of an organized conspiracy, the bankruptcy court declined to discharge Mr. Oliver's debts, including the original Massachusetts judgment. That decision, which Mr. Oliver here describes as "fraudulent," was affirmed by a Bankruptcy Appellate Panel. See In re: Oliver, Nos. SC-1151-SFB, SC-21-1182-SFB, 2022 WL 2290555 (B.A.P. 9th Cir. June 24, 2022).³

On April 29, 2022, Mr. Oliver, proceeding pro se and seeking in forma pauperis status, sued Michaud and several other defendants in the United States District Court for the District of Rhode Island. See Oliver v. Michaud, et al., No. 1:22-cv-354-MSM-LDA. The suit was based on the 2015 Massachusetts default judgment as well as Mr. Oliver's claim that he was illegally

³Mr. Oliver subsequently sued the United States Trustee and Bankruptcy Judge based on their actions in the bankruptcy case. The District Court granted the defendants' motions to dismiss. Mr. Oliver's appeal of that dismissal is pending. See Order of Dismissal, Oliver v. Mihelic, et al., No. 23-cv-01807-LL-DEB (S.D. Cal. Feb 8, 2022), appeal docketed, No. 22-55229 (9th Cir. Mar. 3, 2022).

deprived of rental income from property he owned. After first ordering that the complaint be served, Judge McElroy vacated the service order, and dismissed the case on preliminary review. See id. Feb. 7, 2023, Order of Dismissal (Doc. No. 6). Rather than appealing the decision, Mr. Oliver filed a petition for mandamus in the First Circuit Court of Appeals. See In re: Oliver, No. 23-1184 (appeal docketed Feb. 22, 2023). A panel of the Court of Appeals denied the petition. See id. Judgment (1st Cir. Mar. 8, 2023).

In this suit, Mr. Oliver has again sued Michaud, and as previously noted, see supra, n.1, has also sued the three District Judges and two Magistrate Judges assigned to the District of Rhode Island. He has also sued the three appellate court judges that denied his mandamus petition.

Analysis

Mr. Oliver has asserted six causes of action: 1) violation of constitutional rights⁴; 2) actual fraud/concealment; 3) civil conspiracy; 4) RICO against Michaud⁵; 5) RICO against the United

⁴Count 1 is asserted against all defendants except Judges Howard, Gelpi and Kayatta. The remaining counts, except for count 4, are asserted against all defendants.

⁵The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, et seq.

Michaud, likely knowing he was going to be sued by Petitioner for his illicit conduct, had taken preparatory steps to protect himself from suit and set up his PACER account to receive notifications of new case openings based on his name and Petitioner's name, which can be done according to PACER customer support. Once he got notification of the suit, he immediately contacted McElroy and/or the court, and McElroy "vacated" the order and then concocted the bogus ruling, which took almost two weeks to do. It's clear from the record, particularly the docket and the PFWOM, that nothing was done inadvertently in 1:22-cv-00354 but was carefully calculated.

States District Court for the District of Rhode Island⁶; 6)
intentional infliction of emotional distress.

A. Judicial Immunity

Mr. Oliver's claims against Judges McElroy, McConnell, Smith, Sullivan, Almond, Gelpi, Howard and Kayatta are barred by the doctrine of absolute judicial immunity and should therefore be dismissed. “[I]t is an axiom of black letter law that when a judge carries out traditional adjudicatory functions, he or she has absolute immunity for those actions.” Zenon v. Guzman, 924 F.3d 611, 616 (1st Cir. 2019). “Judicial immunity is appropriate unless a judge is carrying out an activity that is not adjudicatory.” Id. at 617. “[A]bsolute judicial immunity means not just immunity from damages, but immunity from suit altogether.” Id. at 617 n.10 (citation omitted).

Mr. Oliver's claims against these defendants indisputably arise from their actions taken in their adjudicatory capacities in his previous Rhode Island case. Indeed, this case is little more than a listing of the reasons why Mr. Oliver believes several other court rulings, including those by the instant defendants, were incorrect. Accordingly, the district judge should dismiss all claims asserted against the judicial defendants.

⁶Id.

Johnstone cites much case law, none of which addresses immunity for *criminal* behavior—the gravamen of this petition and its sister petition concurrently being filed. She states “this case is little more than a listing of the reasons why Mr. Oliver believes several other court rulings....were incorrect.” This case is a *lot* more than that. In fact, those “court rulings” *are* incorrect because they were obtained by fraudulent and criminal means, which is precisely what Petitioner is alleging—and supporting with evidence strewn everywhere—that crimes, such as 18 U.S. Code §§ 4, 1503, and 1512, have been committed. Many other federal and state criminal laws have been broken. See exhibits in the PFWOM and complaint, chapter 6 of *Our American Injustice System*, Petitioner's blog posts and websites, and stloiyf.com/complaint/complaint.htm#10_lies_in_just_1_ruling, for example.

B. Claims against defendant Michaud

1. RICO

To state a RICO claim, Mr. Oliver must allege four elements: "(1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity". Giuliano v. Fulton, 399 F.3d 381, 386 (1st Cir. 2005) (internal citations omitted). The statute defines "enterprise" as any "legal entity," such as an "individual, partnership, corporation, association" and "any other union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Also, where, as here, a plaintiff relies on predicate acts containing fraud, they are subject to Fed. R. Civ. P. 9(b)'s heightened pleading requirement. See New England Data Services, Inc. v. Becher, 829 F.2d 286, 288 (1st Cir. 1987) (stating, in civil RICO case, that Rule 9(b) has been strictly applied where fraud lies at the core of the claim).

Here, aside from conclusory and speculative allegations regarding defendant Michaud - many of which are controverted by the relevant court records, Mr. Oliver has failed to support his legal allegation with any particularized facts. Such conclusory assertions do not satisfy Rule 9(b). See Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 29 (1st Cir. 2004) (observing that claims for fraud typically must "specify the who, what, where, and when of the allegedly false or

Magistrate Johnstone claims that "aside from the conclusory and speculative allegations regarding defendant Michaud-many of which are controverted by the relevant court records, Mr. Oliver has failed to support his legal allegation with any particularized facts." This is a nonsensical statement. All allegations are speculative because the meanings of the words are nearly identical. Speculate: "form a theory or conjecture about a subject without firm evidence;" Allege: "an assertion of the truth of something, often without supporting evidence." Many allegations are supported by court records, but some aren't *because the records aren't all legitimate*. Ample facts are shown in the complaint on page 11, for instance (1:23-cv-00187). She can't say Petitioner "failed to support his legal allegation" simply because she wants to deny that he did because it implicates her colleagues and friends.

fraudulent representation"). Accordingly, this count should be dismissed for failure to state a claim for relief.

2. Constitutional violations

Defendant Michaud, a private individual, cannot be held liable for alleged constitutional violations. The United States Constitution "erects no shield against merely private conduct, however . . . wrongful." Blum v. Yaretsky, 457 U.S. 991, 1002 (1982). A private party can be held to be a state actor for purposes of § 1983 only under limited circumstances, none of which are present here. See Blum, 457 U.S. at 1004-05 (describing circumstances under which a private actor can be deemed to be a state actor for purposes of § 1983). The constitutional claims against defendant Michaud should, therefore, be dismissed for failure to state a claim for relief.

3. State law claims

Three of Mr. Oliver's claims against defendant Michaud -- actual fraud/concealment, civil conspiracy, and intentional infliction of emotional distress -- arise under state law. Subject matter jurisdiction over these claims may exist based on diversity of citizenship pursuant to 28 U.S.C. § 1332 or, if the requirements for diversity jurisdiction are not met, the court may exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1337(a). The court first addresses diversity jurisdiction.

Under the RICO count, the predicates constitute *much more* than only fraud. Petitioner has well pled RICO with predicates 18 U.S.C. §§ 1341, 1503, 1512, 1951, 1956, and 1957....in addition to fraud. Magistrate Johnstone next says that Michaud is a "private individual." He is actually a state court judge. Moreover, she completely ignores the other defendants' constitutional violations when recommending dismissal of constitutional claims. Lastly, Petitioner makes no § 1983 claims in the complaint whatsoever, so her constitutional analysis is misplaced.

Mr. Oliver describes himself as a "U.S. citizen residing and domiciled in the United States of America, but not in Rhode Island, Massachusetts, Maine, New Hampshire or Puerto Rico." Compl. (Doc. No. 8) at 2. As Judge McElroy found in Mr. Oliver's earlier suit, "[t]he plaintiff's caginess about where he lives comes at a price." Oliver v. Michaud, No. 1:22-cv-354-MSM-LDA, Order (Doc. No. 6) (D.R.I. Feb. 7, 2023). Simply saying that he is "not a citizen" of several states "is not sufficient to give jurisdiction in a . . . Court of the United States." D.B. Zwirn Special Opportunities Fund, L.P. v. Mehrotra, 661 F.3d 124, 126 (1st Cir. 2011) (quoting Cameron v. Hodges, 127 U.S. 332, 334 (1888)). Mr. Oliver must "plead jurisdiction in the affirmative," Cormier v. Securitas Sec. Servs., USA, Inc., 578 F. Supp. 3d 264, 266 (D.N.H. 2022) (citing D.B. Zwirn, 661 F.3d at 126). Having failed to do so, Mr. Oliver has failed to satisfy the requirements for diversity jurisdiction.

A federal court exercising original jurisdiction over federal claims also has "supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy" Swartz v. Sylvester, 53 F.4th 693, 703 (1st Cir. 2022) (quoting 28 U.S.C. § 1337(a)). "[I]n the usual case in which all federal-law claims are eliminated

Magistrate Johnstone is incorrect with diversity of citizenship. From *Cormier*, "This is because some persons and entities are considered 'stateless' or are treated as 'stateless,' a status which destroys diversity jurisdiction." Petitioner has repeated in multiple court filings that he is "a U.S. citizen residing and domiciled in the United States of America" and is therefore **not** stateless. In fact, all of the case law Johnstone (and McElroy before her) cites has to do with a person or entity not being domiciled in a *given* state. The major difference is that in **none** of the cases does the plaintiff add the preceding twelve quoted words, which affirm that a party is domestic, not stateless, and not foreign. Moreover, even though irrelevant based on the above logic, there is a split in the circuits since some allow pleading diversity in the negative even *without* the preceding twelve quoted words.

before trial, the balance of factors to be considered under the pendent jurisdiction doctrine ... will point toward declining to exercise jurisdiction over the remaining state-law claims.' ”

Zell v. Ricci, 957 F.3d 1, 15 (1st Cir. 2020) (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988)). In addition, “when all federal claims have been dismissed, it is an abuse of discretion for a district court to retain jurisdiction over the remaining pendent state law claims unless doing so would serve the interests of fairness, judicial economy, convenience, and comity.” Id. (cleaned up).

Here, with the case at its earliest stage, the court finds that this is the “usual case,” Zell, 957 F.3d at 15, and that none of the interests of “fairness, judicial economy, convenience, or comity would be served” by retaining jurisdiction over the state-law claim. See id. If the court accepts the recommendation to dismiss Mr. Oliver’s federal claims, it should decline to exercise supplemental jurisdiction over Mr. Oliver’s state law claims.

Conclusion

Based on the foregoing, the district judge should dismiss the claims against the judicial defendants based on judicial immunity. The federal claim against defendant Michaud should be dismissed for failure to state a claim. The court should decline to exercise supplemental jurisdiction over the state law

claims against defendant Michaud, and those claims should be dismissed for lack of subject matter jurisdiction, without prejudice to being filed in a court of competent jurisdiction.

Any objections to this Report and Recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). The fourteen-day period may be extended upon motion. Only those issues raised in the objection(s) to this Report and Recommendation are subject to review in the district court. See Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010). Any issues not preserved by such objection(s) are precluded on appeal. See id. Failure to file any objections within the specified time waives the right to appeal the district court's Order. See Santos-Santos v. Terres-Centeno, 842 F.3d 163, 168 (1st Cir. 2016)

Andrea K. Johnstone
Andrea K. Johnstone
United States Magistrate Judge

May 24, 2023

cc: Thomas Oliver, pro se