

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States District Court
Southern District of Texas
FILED

JAN 16 2018

David J. Bradley, Clerk of Court

No. 17-20066
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

November 7, 2017

Lyle W. Cayce
Clerk

COLLINS O. NYABWA,

Plaintiff-Appellant

v.

UNKNOWN JAILERS AT CORRECTIONS CORPORATION OF AMERICA,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-782

Before DAVIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Collins O. Nyabwa has moved for leave to proceed in forma pauperis (IFP). He seeks to appeal the district court's dismissal of his *Bivens*¹ complaint under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim upon which relief can be granted. In that complaint, Nyabwa claimed that unknown jailers employed by the Corrections Corporation of America violated his constitutional

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

¹ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

APPENDIX A

rights by falsely imprisoning him at a federal immigration detention center pending deportation proceedings that were based on his three Texas convictions for improper photography. After his deportation proceedings were terminated and he was released from detention, the Texas Court of Criminal Appeals held in an unrelated case that the improper photography statute was unconstitutional. *See Ex parte Thompson*, 442 S.W.3d 325, 351 (Tex. Crim. App. 2014). In this case, the district court determined that (1) Nyabwa failed to state a claim against the defendants because *Bivens* did not extend to a damages claim against private entities, and (2) Nyabwa failed to state a false imprisonment claim under Texas state law. It also denied his motions for recusal, a hearing regarding his recusal motion, and default judgment. The district court denied Nyabwa leave to proceed IFP because it certified that his appeal was not taken in good faith.

By moving for leave to proceed IFP on appeal, Nyabwa challenges the district court's certification that his appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry into his good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted). Nyabwa's motion for leave to file a supplemented or corrected appeal brief is GRANTED.

We review de novo a dismissal for failure to state a claim under § 1915(e)(2)(B)(ii). *See Ruiz v. United States*, 160 F.3d 273, 275 (5th Cir. 1998). A complaint fails to state a claim upon which relief may be granted when it does not contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

The district court properly determined that Nyabwa's complaint failed to state a claim upon which relief can be granted. Pursuant to *Minneci v. Pollard*, 565 U.S. 118, 124-25, 131 (2012), a federal prisoner cannot pursue a *Bivens* claim against the private company that operated the federal facility because where the challenged "conduct is of a kind that typically falls within the scope of traditional state tort law . . . , the prisoner must seek a remedy under state tort law" instead of under *Bivens*. As noted by Nyabwa, the Supreme Court in *Minneci* reaffirmed its earlier holding in *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001), that a federal prisoner cannot use *Bivens* "to allow recovery against a private corporation operating a halfway house under contract with the Bureau of Prisons." Nyabwa fails to provide any relevant explanation supporting his argument that *Malesko* or *Minneci* are not applicable here because he claims to be actually innocent. Nyabwa's reliance on 28 U.S.C. §§ 1495 and 2513 is misplaced because those statutes "come into play only after a defendant has succeeded in overturning his federal conviction and is seeking damages for wrongful conviction," and, as such, have no relevance here. *Freeman v. Johnson*, 79 F. App'x 3, 3 (5th Cir. 2003). To the extent Nyabwa seeks to invoke *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), we need not consider that argument because it is raised for the first time on appeal. See *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999). In any event, *Nelson* does not directly support his argument because that case did not involve a claim of false imprisonment.

The district court's determination, under supplemental jurisdiction, that Nyabwa failed to state a claim of false imprisonment under Texas state law is supported by relevant law. See *Wal-Mart Stores, Inc. v. Resendez*, 962 S.W.2d 539, 540 (Tex. 1998); *James v. Brown*, 637 S.W.2d 914, 918 (Tex. 1982); see also *Pete v. Metcalfe*, 8 F.3d 214, 218-19 (5th Cir. 1993). Because Nyabwa's

No. 17-20066

conclusory arguments for recusal were based on the district judge's actions in the course of judicial proceedings and failed to show that the judge had an actual personal bias or prejudice against him, the district court did not abuse its discretion by denying his recusal motions or his motion for a hearing on the recusal issue. *See Liteky v. United States*, 510 U.S. 540, 555 (1994).

Accordingly, Nyabwa has failed to show an error in the district court's certification decision and has not established that he will raise a nonfrivolous issue on appeal. *See Baugh*, 117 F.3d at 202; *Howard*, 707 F.2d at 220. Nyabwa's motion for leave to proceed IFP is DENIED, and his appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2.

Nyabwa is CAUTIONED that future frivolous, repetitive, or otherwise abusive filings will result in the imposition of sanctions, including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court or any court subject to this court's jurisdiction. He should review any pending appeals and actions and move to dismiss any that are frivolous, repetitive, or otherwise abusive.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20066

COLLINS O. NYABWA,

Plaintiff - Appellant

v.

UNKNOWN JAILERS AT CORRECTIONS CORPORATION OF AMERICA,

Defendant - Appellee

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

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 11/07/17 , 5 Cir., _____ , _____ F.3d _____)

Before DAVIS, CLEMENT, and OWEN, Circuit Judges.

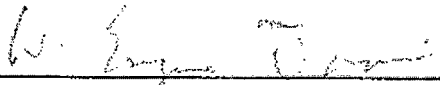
PER CURIAM:

- (X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
- () The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not

having voted in favor, (FED R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

- () A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

ENTERED

January 27, 2017

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COLLINS O. NYABWA,	§	
	§	
	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-16-782
	§	
UNKNOWN JAILERS AT CORRECTIONS	§	
CORPORATION OF AMERICA (CCA),	§	
	§	
	§	
Defendants.	§	

ORDER OF DISMISSAL

Plaintiff Collins O. Nyabwa ("Plaintiff"), a former state inmate and former federal immigration detainee proceeding *pro se* and *in forma pauperis*, has filed a complaint under Bivens v. Six Unknown Named Agents, 91 S. Ct. 1999 (1971), alleging that Unknown Jailers at the Corrections Corporation of America violated his civil rights by wrongfully detaining him. (Docket Entry No. 1).

Because plaintiff proceeds *in forma pauperis*, the Court is required to screen the complaint and dismiss any portion thereof if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2)(B).

I. Background

On July 29, 2011, Plaintiff was convicted of three counts of

APPENDIX B

"improper photography" in violation of § 21.15(b)(1) of the Texas Penal Code,¹ which prohibited "photograph[ing] or by videotape or other electronic means record[ing], broadcast[ing], or transmit[ting] a visual image of another at a location that is not a bathroom or private dressing room: (A) without the other person's consent; and (B) with intent to arouse or gratify the sexual desire of any person." Tex. Penal Code § 21.15(b)(1) (West 2007). Plaintiff entered a plea of guilty and was sentenced to one year in prison. After his sentence discharged in July 2012, he was released from state prison and transferred to the custody of United States Immigration officials.²

From July 2012 to November 2013, U.S. Immigration authorities held Plaintiff under mandatory detention a facility operated by the Corrections Corporation of America ("CCA") in Houston, Texas, because Plaintiff is a Kenyan national and had been convicted of improper photography under Texas law.³ In November 2013, Plaintiff was released from immigration custody "when an Immigration Judge terminated plaintiff's proceedings."⁴

On September 17, 2014, the Texas Court of Criminal Appeals held that the improper photography law under which Plaintiff was

¹ Docket Entry No. 1 ("Complaint") at 2.

² Complaint at 2.

³ Id.

⁴ Id.

convicted was "facially unconstitutional in violation of the freedom of speech guarantee of the First Amendment." Ex parte Thompson, 442 S.W.3d 325, 330 (Tex. Crim. App. 2014). On August 23, 2016, this Court granted Plaintiff's petition for habeas corpus relief and vacated Plaintiff's convictions. See Nyabwa v. Stephens, Civ. A. No. H-12-1152, at Docket Entry Nos. 95 & 96 (S.D. Tex. August 23, 2016).

Plaintiff alleges that Unknown Jailers at CCA are liable for damages under Bivens for violating his constitutional right to be free from false imprisonment. Plaintiff reasons that, because the United States Department of Homeland Security contracted with CCA to house immigration detainees, the Unknown Jailers, employees of CCA,⁵ should be held liable under Bivens as federal actors.⁶

Plaintiff also seeks a declaration of "actual innocence" and damages of \$5 million for his allegedly unlawful detention by the Unknown Jailers at CCA.⁷

II. Discussion

Plaintiff argues that Unknown Jailers employed by CCA wrongfully imprisoned him in violation of his constitutional

⁵ In Plaintiff's More Definite Statement, he alleges that the Unknown Jailers are "employees of CCA who illegally detained me." Docket Entry No. 12 at 6.

⁶ Complaint at 2.

⁷ Id. at 3-5, 6.

rights. Plaintiff, a Kenyan, alleges that the Unknown Jailers wrongfully detained him at CCA after he was transferred to immigration authorities for deportation proceedings from July 2012 to November 2013 because the statute under which he was convicted was later declared unconstitutional in 2014. Plaintiff argues that Bivens applies to the Unknown Jailers at CCA because their employer, a private corporation, has a contract with the federal government.

"Under Bivens, a person may sue a federal agent for money damages when the federal agent has allegedly violated that person's constitutional rights." Brown v. Nationsbank Corp., 188 F.3d 579, 590 (5th Cir. 1999). To state a viable Bivens claim, a plaintiff must allege facts to show that the defendants are federal officers acting under color of federal law and that the defendants violated the plaintiff's constitutional rights. See Bivens, 91 S. Ct. at 2004-05; Dean v. Gladney, 621 F.2d 1331, 1336 (5th Cir. 1980), cert. denied, 101 S. Ct. 1521 (1981).

The Supreme Court has addressed the application of Bivens to claims like Plaintiff's against personnel employed at a privately operated federal detention center and has concluded that the Court "cannot imply a Bivens remedy in such a case" and that the plaintiff "must seek a remedy under state tort law." Minneeci v. Pollard, 132 S. Ct. 617, 626 (2012); see also Eltayib v. Cornell Co., Inc., 533 F. App'x 414, 415 (5th Cir. Apr. 9, 2013) (mem. op.)

(stating that private corporations and their employees "cannot be liable as private actors under Bivens").

As in Minneeci, Plaintiff seeks damages from employees of a private firm, where their conduct allegedly amounts to a violation of constitutional rights and where such conduct--here, false imprisonment--typically falls within the scope of traditional state tort law. See id., 132 S. Ct. at 625. Accordingly, Plaintiff must pursue that cause of action under state tort law rather than under Bivens. Id. Therefore, Plaintiff's alleged Bivens claims against the Unknown Jailers at CCA are subject to dismissal for failure to state a claim for which relief may be granted.

Moreover, Plaintiff does not otherwise state a false imprisonment claim under Texas state tort law.⁸ "The essential elements of false imprisonment [under Texas law] are: (1) willful detention; (2) without consent; and (3) without authority of law." Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995) (quoting Sears, Roebuck & Co. v. Castillo, 693 S.W.2d 374, 375 (Tex. 1985)). If "an arrest or detention is executed under process which is legally sufficient in form and duly issued by a court of competent jurisdiction, an action for false imprisonment will not lie." James v. Brown, 637 S.W.2d 914, 918 (Tex. 1982);

⁸ Pursuant to 28 U.S.C. § 1367, this Court has supplemental jurisdiction over Plaintiff's related state law claims that form the same case or controversy as his asserted federal Bivens claim. See 28 U.S.C. § 1367(a).

accord Pete v. Metcalfe, 8 F.3d 214, 218-19 (5th Cir. 1993) ("A person has legal authority for detaining another where the detention is executed by virtue of legally sufficient process issued by a court of competent jurisdiction.").

There is no indication in either Plaintiff's original pleading or his More Definite Statement that there was any error in the form of the conviction order or the subsequent immigration order; Plaintiff's sole issue is that the improper photography statute under which he was convicted was later declared unconstitutional. There is no cause of action for false imprisonment against Unknown Jailers where the order of detention was facially valid. See United States ex rel. Bailey v. Askew, 486 F.2d 134, 135 (5th Cir. 1973) (holding that "a jailer cannot be held liable for an error in an order of commitment which is patently proper") (citation omitted); see also Mays v. Sudderth, 97 F.3d 107, 113 (5th Cir. 1996) (holding that officials "charged with executing a facially valid court order . . . 'should not be required to make the Hobson's choice between disobeying the court order or being haled into court to answer for damages.'" (quoting Patterson v. Von Riesen, 999 F.2d 1235, 1240 (8th Cir. 1993))).

The subsequent invalidation of a statute as unconstitutional does not change this result. "Until judges say otherwise, [officials] have the power to carry forward the directives of the state legislature." Lemon v. Kurtzman, 93 S. Ct. 1463, 1473

(1973); see also Pierson v. Ray, 87 S. Ct. 1213, 1218 (1967) ("Although the matter is not entirely free from doubt, the same consideration would seem to require excusing [a police officer] from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied."); Contreras v. Schiltgen, 122 F.3d 30, 32 (9th Cir. 1997), *on reargument*, 151 F.3d 906 (9th Cir. 1998) (holding that immigration officials are entitled to rely on a conviction as a basis for custody and eventual deportation until a plaintiff-detainee has successfully overturned that conviction).

Plaintiff discloses that he was held at CCA until "November 2013 when an Immigration Judge terminated plaintiff's proceedings." Docket Entry No. 1 at 2. There was no indication of any defect in any judicial order mandating Plaintiff's confinement until at least 2014, after Plaintiff had been released from custody in 2013. Under these circumstances, Plaintiff does not state a valid claim for which relief may be granted against the Unknown Jailers for false imprisonment. See, e.g., Nyabwa v. United States, --- Fed. Cl. ----, 2017 WL 80076, at *7 (Ct. Fed. Cl. Jan. 6, 2017) (Horn, J.) (noting that the detention was not improper because Plaintiff was released from the detention center a year before the penal statute was declared unconstitutional). Therefore, Plaintiff's claims against the Unknown Jailers must be dismissed for failure to state a claim for which relief may be granted. See 28 U.S.C.

§ 1915(e)(2)(B)(ii).

III. Claim for a Declaration of Actual Innocence

Plaintiff also requests a declaration of actual innocence. The federal Declaratory Judgment Act, 28 U.S.C. § 2201, does not create a substantive cause of action but, instead, is merely a procedural vehicle that allows a party to obtain an early adjudication of an actual controversy arising under other substantive law. See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 57 S. Ct. 461, 463 (1937). "Based on the facts alleged, there must be a substantial and continuing controversy between two adverse parties" in order for a declaratory judgment action to lie. Bauer v. Texas, 341 F.3d 352, 358 (5th Cir. 2003).

For the reasons explained above, Plaintiff has failed to assert any viable substantive claim for relief against the Unknown Jailers at CCA. Plaintiff argues that he has a right to compensation for his detention, but he fails to demonstrate the "existence of a judicially remediable right" to such relief. Schilling v. Rogers, 80 S. Ct. 1288, 1296 (1960). Accordingly, Plaintiff's request for a declaration of actual innocence is denied.

IV. Motions for Default Judgment

Plaintiff has also filed two motions for default judgment against the Unknown Jailers. Before a court may enter a default

judgment against a party, proper service of the summons and complaint on a defendant is required. See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 119 S. Ct. 1322, 1327 (1999). Court records indicate that the as-yet-unidentified Unknown Jailers have not been served with process. Additionally, even if Plaintiff had effected proper service, he is not automatically "entitled to a default judgment as a matter of right," particularly here, where he fails to state a claim for which relief may be granted. See Lewis v. Lynn, 236 F.3d 766, 767-68 (5th Cir. 2001) (affirming the district court's denial of default judgment where the plaintiff's claims were not viable). Accordingly, Plaintiff's motions for default will be denied.

V. ORDER

Based on the foregoing, it is hereby

ORDERED that Plaintiff's claims against Defendants Unknown Jailers at the Corrections Corporation of America are **DISMISSED** for failure to state a claim for which relief may be granted under 28 U.S.C. § 1915(e)(2)(B)(ii); it is further

ORDERED that Plaintiff's Motions for a Default Judgment against Unknown Jailers at the Corrections Corporation of America (Docket Entry Nos. 23 & 24) are **DENIED**; and it is

ORDERED that, for the reasons set forth in this Court's Order dated June 20, 2016, Plaintiff's Motion for Recusal (Docket Entry

No. 21) and Plaintiff's Motion for Hearing (Docket Entry No. 22) are **DENIED**. See Docket Entry No. 13 at 3-5.

The Clerk will enter this Order, providing a correct copy to all parties of record.

SIGNED at Houston, Texas, on this 24TH day of January, 2017.


EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE