

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30216

D.C. Docket No. 5:16-CV-1608

United States Court of Appeals
Fifth Circuit

FILED

February 7, 2018

Lyle W. Cayce
Clerk

DAMIEN FORD,

Plaintiff - Appellant

v.

JOHN DOE, Editor in Chief/Senior Editor; JANE DOE; K T B S,

Defendants - Appellees

Appeals from the United States District Court for the
Western District of Louisiana

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal.

It is ordered and adjudged that the appeal is dismissed as frivolous.

IT IS FURTHER ORDERED that Ford is BARRED from proceeding IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. See § 1915(g).

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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DAMIEN FORD,

Plaintiff-Appellant

v.

JOHN DOE, Editor in Chief/Senior Editor; JANE DOE; K T B S,

Defendants-Appellees

Appeals from the United States District Court
for the Western District of Louisiana
USDC No. 5:16-CV-1608

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

PER CURIAM:*

Damien Ford, Arkansas prisoner # 143035, moves for leave to proceed in forma pauperis (IFP) in his appeal of district court's dismissal of his suit as untimely with respect to his state law claims and for failure to state a claim under 42 U.S.C. § 1983 on which relief could be granted. His motion to file a supplemental brief is GRANTED. By filing his motion to proceed IFP, Ford 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). This court's

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

inquiry into a litigant's 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).

Ford has not shown that he has a nonfrivolous appellate claim. He does not address the district court's conclusion that his § 1983 claims failed because he did not name state actors as defendants. He has thus waived any challenge he may have had to this determination. See *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

For Ford's state law claims, we look to state law governing limitations. See *Cruz v. Louisiana ex rel. Dep't of Pub. Safety and Corr.*, 528 F.3d 375, 378 (5th Cir. 2008); *Fluor Eng'rs & Constructors v. So. Pac. Transp. Co.*, 753 F.2d 444, 448 (5th Cir. 1985). Ford's argument that his state law claims should be considered timely because he filed suit soon after he obtained a copy of the article is unavailing because he has not alleged fraud, see *Kassees v. Satterfield*, 303 S.W.3d 42, 45 (Ark. 2009), nor has he shown that he acted reasonably, see *Alexander v. La. State Board of Private Investigator Examiners*, 211 So. 2d 544, 562 (La. Ct. App.) , cert. denied, 221 So. 3d 855 (La. 2017). Because Ford has not shown that the district court erred in certifying that his appeal was not taken in good faith, his IFP motion is DENIED, and the appeal is DISMISSED AS FRIVOLOUS. See *Baugh*, 117 F.3d at 202; 5th Cir. R. 42.2. His motion to correct is likewise DENIED.

This dismissal and the district court's dismissal each count as a "strike" under 28 U.S.C. § 1915(g). See *Coleman v. Tollefson*, 135 S. Ct. 1759, 1761-64 (2015); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996). Ford has another strike in *Ford v. Ward*, No. 5:16-cv-340, 2016 WL 6476947 (E.D. Ark. Oct. 31, 2016). As he has now accumulated three strikes, Ford is BARRED

from proceeding IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. See § 1915(g).

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DAMIEN FORD

CIVIL ACTION NO. 16-cv-1608

VERSUS

JUDGE FOOTE

JOE DOE

MAGISTRATE JUDGE HORNSBY

J U D G M E N T

For the reasons assigned in the Report and Recommendation of the Magistrate Judge previously filed herein, and having thoroughly reviewed the record, no written objections having been filed, and concurring with the findings of the Magistrate Judge under the applicable law;

IT IS ORDERED that this civil action is **dismissed with prejudice** because (1) all asserted state law claims are untimely and (2) Plaintiff has not stated a claim under 42 U.S.C. § 1983 on which relief may be granted. All pending motions are hereby **DENIED** as **MOOT**. The Clerk of Court is directed to close this case.

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 10th day of

Feb, 2017.

ELIZABETH ERNY FOOTE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DAMIEN FORD

CIVIL ACTION NO. 16-cv-1608

VERSUS

JUDGE FOOTE

JOE DOE

MAGISTRATE JUDGE HORNSBY

REPORT AND RECOMMENDATION

Introduction

Damien Ford (“Plaintiff”) is a self-represented prisoner who is housed in an Arkansas prison. He commenced this action by completing a civil rights complaint form and filing it with an Arkansas federal court. The complaint alleged that Shreveport television station KTBS and its employees published a false and defamatory story about Plaintiff. The Arkansas court transferred venue to this court. After conducting an initial review of the complaint, it is recommended that the complaint be dismissed because (1) all state law claims are untimely and (2) KTBS and its employees are not state actors against whom a claim may be asserted under 42 U.S.C. § 1983.

Screening and Untimeliness

Plaintiff is proceeding in forma pauperis, so his complaint is subject to review under 28 U.S.C. § 1915. In pauper cases, the district court “shall dismiss the case at any time if the court determines that” the complaint is “(I) frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is

immune from such relief.” 28 U.S.C. § 1915(e)(2). A complaint is frivolous if it lacks an arguable basis in law or fact. Harper v. Showers, 174 F.3d 716, 718 (5th Cir. 1999).

A claim that is time barred is properly dismissed as frivolous under Section 1915(e)(2)(B)(I). Gonzalez v. Wyatt, 157 F.3d 1016, 1019-20 (5th Cir. 1998); Juarez v. Anderson, 598 Fed. Appx. 297, 298 (5th Cir. 2015). District courts may raise the defense of limitations sua sponte in an action under Section 1915, Gartrell v. Gaylor, 981 F.2d 254, 256 (5th Cir. 1993), but the court must afford the plaintiff fair notice and an opportunity to present her position. Day v. McDonough, 126 S.Ct. 1675 (2006). This Report and Recommendation provides Plaintiff with sufficient notice of and opportunity to respond to the possible dismissal of his case. See Magouirk v. Phillips, 144 F.3d 348, 359 (5th Cir. 1998) (sua sponte invocation of defense in Report and Recommendation satisfied due process).Cloud 9 Café & Catering

Libel/Defamation Claims

Plaintiff alleges that on July 12, 2012 he was charged in Arkansas with first-degree battery, second-degree battery and aggravated assault. The charges were in connection with an incident that occurred several weeks earlier when a child appeared to have been subjected to child abuse, and the child later died at his mother’s Texarkana area apartment.

Plaintiff complains that KTBS Channel 3 published a news report that began with the headline, “Two Charged in Toddler’s Death.” The article stated that a Texarkana man, Plaintiff, had been charged with causing the death of a toddler and the mother let it happen.

The article went on to specify the battery and assault charges and stated that the cause of death of the child was still undetermined. Plaintiff alleges that the article was false and defamatory because it asserted he was charged with the toddler's death, when he was charged only with assault and battery, and the article admitted that the cause of the child's death was undetermined.

Plaintiff's complaint attaches a copy of the KTBS article that was published on the stations website. The article does not have a publication date on it, but its context indicates that it was published soon after the criminal charges were instituted in July 2012. For example, it states that the two persons charged were in jail and still awaiting a court appearance to determine if bond would be set. Plaintiff did not commence this civil action until he mailed his complaint to the Arkansas federal court in October 2016, which was more than four years after the time of publication.

Plaintiff's complaint states at the end that he asserts claims are for libel and defamation of character, and Plaintiff refers to an unspecified Arkansas statute. There are two types of defamation cases under Arkansas law: (1) slander, which is for untrue spoken words; and (2) libel, which is for untrue written words. Patel v. Peoples, 2010 WL 1780650 (E.D. Ark. 2010), citing Dodson v. Allstate Ins. Co., 231 S.W.3d 711, 716 (Ark. 2006) and Northport Health Serv, Inc. v. Owens, 158 S.W.3d 164, 171 (Ark. 2004). The statute of limitations for spoken words claims is one year, and the limitations period for actions based on written libel is three years. Ark. Code Ann. § 16-56-105(5) (providing that a three-year

limitations period applies to “actions for libel”); Ark. Code Ann. § 16–56–104(3) (providing that a one-year statute of limitations period applies to “actions for words spoken slandering the character of another”). Wolfe v. Fayetteville School Dist., 600 F.Supp.2d 1011, 1024 (W.D. Ark. 2009).

The complaint and exhibits indicate that the KTBS article was published in approximately July 2012. Plaintiff did not commence this civil action until he mailed his complaint to the Arkansas federal court in October 2016, which was more than four years after the publication date. Accordingly, Plaintiff’s action for libel or defamation under Arkansas law is untimely. If Plaintiff attempted to assert his claim under Louisiana law, it would also be untimely under the one-year prescriptive period that applies to Louisiana defamation claims. Doughty v. Cummings, 28 So.3rd 580, 584 (La. App. 2nd Cir. 2009) (“Claims for defamation are delictual in nature and are subject to La. C.C. art. 3492’s one-year prescriptive period, which commences to run from the day injury or damage is sustained.”). All facts in the complaint indicate that the defamation claim is untimely, so it is recommended it be dismissed.

Section 1983 Claim

Plaintiff’s complaint is filed on a form provided to prisoners for use in filing complaints under 42 U.S.C. § 1983. The amended complaint (Doc. 10) that Plaintiff filed with this court after transfer is on a similar form and invokes the Eighth and Fourteenth Amendments in connection with the libel and slander claims.

Section 1983 provides a remedy for the deprivation of a constitutional right by a state actor or someone acting under color of state law. Lugar v. Edmondson Oil Co., 102 S.Ct. 2744 (1982). KTBS is a privately owned television station, not a state actor or agency, so no Section 1983 claim could lie against it or its reporters. See Laverne v. Dateline NBC, 597 Fed. Appx. 760 (5th Cir. 2015) (NBC was not a state actor but rather a private broadcasting corporation so not subject to Section 1983 claim); Payne v. City of Mobile Police Dep't, 2015 WL 9703356, *3 (S.D. Ala. 2015) (holding “Fox 10 News is not a state actor,” and collecting similar cases). There is, therefore, no basis for a claim under 42 U.S.C. § 1983.

Accordingly,

IT IS RECOMMENDED that this civil action be **dismissed with prejudice** because (1) all asserted state law claims are untimely and (2) Plaintiff has not stated a claim under 42 U.S.C. § 1983 on which relief may be granted.

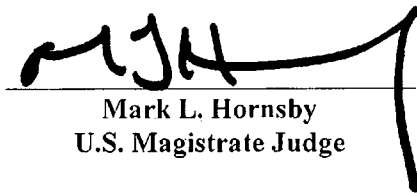
Objections

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R. Civ. P. 6(b). A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Counsel

are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 14 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED in Shreveport, Louisiana, this 24th day of January, 2017.



Mark L. Hornsby
U.S. Magistrate Judge

**Additional material
from this filing is
available in the
Clerk's Office.**
