

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>ANTONE J. DIAS,</i>)	
)	
<i>Plaintiff</i>)	
)	
<i>v.</i>)	<i>Civil Docket No. 96-308-P-C</i>
)	
<i>SHARON A. BOGINS,</i>)	
)	
<i>Defendant</i>)	

RECOMMENDED DECISION TO DISMISS COMPLAINT
PURSUANT TO FED. R. CIV. P. 12(b)(6)

This proceeding came to my attention via the plaintiff’s written request for a telephonic discovery conference pursuant to Local Rule 26(b). The plaintiff alleges therein a “near-total refusal” by the defendant to comply with the applicable discovery rules. In connection with evaluating such a serious allegation, I undertook to review the plaintiff’s complaint, and the record in this proceeding, in their entirety. I have also reviewed decisions of two other federal courts in connection with previous and obviously related lawsuits filed by the plaintiff against the defendant. *See Dias v. Bogins*, 927 F. Supp. 18, 21 (D.N.H. 1995) (“*Dias II*”) (finding lawsuit to be “vexatious” and enjoining plaintiff from commencing additional federal lawsuits against defendant concerning allegedly slanderous statements at issue); *Dias v. Bogins*, No. CIV.A.94-1069, 1994 WL 243855 (E.D.Pa. Jun. 6, 1994) (“*Dias I*”) (dismissing action for lack of personal jurisdiction).

Based on my review of these documents, I do not rule on the request for a telephonic conference. Instead, in light of the extraordinary circumstances presented by this case, I recommend that the court act *sua sponte* to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure

to state a claim on which relief can be granted.

Dismissal under Rule 12(b)(6) is appropriate when “it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Although Rule 12(b)(6) requires the court to draw “all reasonable inferences in the plaintiff’s favor,” it is “not entirely a toothless tiger” and permits the court to reject “bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.” *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996) (citations omitted). In view of the broad mandate in the Federal Rules of Civil Procedure for the court to effect the “just, speedy, and inexpensive determination of every action,” Fed. R. Civ. P. 1, dismissal *sua sponte* is well within the court’s authority, particularly in a case where even at this preliminary stage in the proceeding it is “patently obvious that the plaintiff could not prevail,” *Wyatt v. City of Boston*, 35 F.3d 13, 15 n.1 (1st Cir. 1994); *Boschette v. Bach*, 925 F. Supp. 100, 101 (D.P.R. 1996); *see also Snyder v. Talbot*, 836 F. Supp. 26, 30 (D. Me. 1993).

The dispute between these two individuals, both of whom appear before this court *pro se*, presents precisely that sort of case where *sua sponte* dismissal serves the interest of justice. What appears to be a ceaseless and baseless quest by the plaintiff to find a federal court that will entertain his claims against the defendant began in the Eastern District of Pennsylvania, where the plaintiff filed a defamation action against her. *Dias I*, 1996 WL 243855 at *1. The complaint, alleging that the defendant “falsely told a mutual acquaintance that plaintiff had harassed and stalked her,” and that the acquaintance then wrote a “threatening letter” to the plaintiff, was dismissed for lack of personal jurisdiction. *Id.* at *1-*2.

Soon thereafter, the plaintiff filed suit against the defendant in the District of New

Hampshire, alleging “virtually the same set of facts presented in the Pennsylvania case.” *Dias*, 927 F. Supp. at 19. Fatal in that instance was the lack of subject matter jurisdiction, given the then-applicable requirement that the amount in controversy be in excess of \$50,000 for a federal court to hear a case in diversity. *Id.* The court described as “fatuous” the suggestion that the plaintiff could have suffered “even nominal damages” based on the telephone conversation at issue. *Id.* That determination did not end the matter, however. The plaintiff filed a motion to vacate the summary judgment entered in favor of the defendant, contending, *inter alia*, that the defendant and her counsel had committed “fraud, misrepresentation and perjury.” *Id.* The court rejected these assertions, the plaintiff reasserted them, and the defendant moved for a protective order to enjoin further federal litigation against her by the plaintiff. *Id.* at 20. The court granted this motion, permanently enjoining the plaintiff from “relitigating, or attempting to relitigate, by commencing any lawsuit in any federal court, against the defendant with respect to the allegedly slanderous statements made by defendant.” *Id.* at 22. In so doing, the court referred to the “vexatious nature of the plaintiff’s pursuit” of relief, his “vendetta” against the defendant, and the filing of papers that “far exceed[] the limits of dignity and decency.” *Id.* at 21-22.

The defendant now resides in Maine. Accordingly, and in what appears to be unabashed disregard of the protective order entered in the District of New Hampshire, the plaintiff has filed the instant complaint in this court. Indeed, it appears that the plaintiff has artfully sought to evade the protective order by endeavoring to metamorphose his allegations against the defendant. Where his first two lawsuits focused on an allegedly slanderous statement, made by the defendant to one Tony Soltani concerning stalking and harassment, *see Dias*, 1994 WL 243855 at *1; *Dias II*, 927 F. Supp. at 19, the present complaint seeks to shift the spotlight to what allegedly transpired thereafter.

The complaint refers to Soltani as the “owner” of a law office in New Hampshire and alleges that he sent a “threatening letter” to the plaintiff in which Soltani “purported to act as [the] defendant’s attorney,” followed up by a similar telephone call placed by Soltani to the plaintiff. Amended Complaint (Docket No. 2) at ¶¶ 7-8, 14; *see Dias I*, 1994 WL 243855 at *1 (noting plaintiff’s similar allegation in his previous defamation action). The plaintiff alleges that these communications violated the federal criminal statute enjoining the mailing of threatening communications, Pennsylvania statutes enjoining the unauthorized practice of law and the impersonation of a public servant, and New Hampshire criminal statutes concerning the simulation of an official notice, threatening and solicitation. Amended Complaint at ¶¶ 7-12, 16-17. The complaint also accuses the defendant of herself violating New Hampshire criminal statutes by threatening to commit a crime against the plaintiff’s property, taking substantial steps toward the commission of crimes and by causing Soltani to act as her agent. *Id.* at ¶¶ 18-20. The complaint accuses the defendant of having committed various federal and state crimes involving perjury, making false declarations before a court, subornation of perjury, witness tampering, improperly attempting to influence a judicial officer, racketeering, obstruction of justice, false swearing, and falsification of evidence, all in connection with the actions filed in the Eastern District of Pennsylvania and the District of New Hampshire. *Id.* at ¶¶ 21-28, 32-35, 36, 39-41, 50.

According to the plaintiff, all of the foregoing establishes a pattern of activity sufficient to warrant relief under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961 *et seq.* Amended Complaint at ¶¶ 26, 33, 55, 57-59. The complaint identifies the Soltani Law Office of Epsom, New Hampshire as the requisite criminal “enterprise.” *Id.* at 64; *see* 18 U.S.C. §§ 1961(4) (defining criminal “enterprise” for RICO purposes) and 1962

(enjoining establishment, operation, or receipt of income from RICO enterprise). Count I of the Amended Complaint therefore seeks RICO damages.

Whatever has transpired between these two parties -- and it appears that the roots of enmity reach back to a time when both were students at the same law school in New Hampshire, *see Dias II*, 927 F. Supp. at 19 -- the court can and should take judicial notice of previous determinations that the defendant has consistently though unsuccessfully attempted to cause the plaintiff simply to leave her alone. Whatever she has done in that regard is not a RICO conspiracy and I reject the bald assertions and unsupportable conclusions to the contrary in the Amended Complaint. I make the same determination as to the remaining counts in the complaint, which seek state-law damages for deceit (Count II), “perversion of the judicial process” (Count III), perjury (Count IV) and intentional infliction of emotional distress (Count V). With regard to Count II, which accuses the defendant of having deceitfully extracted money from the plaintiff in 1990 by claiming he had impregnated her, I note the previous observation by the District Court in New Hampshire that the plaintiff has evinced an “intent to harass defendant by bringing to light unrelated and irrelevant actions which may portray defendant in an unrespectable light.” *Dias II*, 927 F. Supp. at 21. Dismissal *sua sponte* under Rule 12(b)(6) of the entire complaint is not only appropriate, but perhaps among the more gentle responses the court might make to this relentless effort by one who is trained as an attorney to abuse the judicial process in a manner calculated to harass the defendant.

In so recommending, I am aware of the authorities suggesting that such a dismissal is nearly always appropriate only after the giving of notice and opportunity to be heard. *See Wyatt*, 35 F.3d at 15; *Snyder*, 836 F. Supp. at 30. In my view, it is “patently obvious the plaintiff could not prevail,” thus obviating the need for any further delay. *Wyatt, supra*. Moreover, the plaintiff has previously

had an opportunity to state his position fully *vis à vis* dismissal, in connection with a previous motion by the defendant to dismiss the action in light of the decision rendered in the District of New Hampshire.¹ As this court noted in *Snyder*, a prior opportunity to be heard on the relevant issues can satisfy any notice-and-opportunity prerequisites to dismissal. *Snyder*, 836 F. Supp. at 30. Finally, since my decision on the merits is only a recommended one, the plaintiff's right to a *de novo* determination upon his written objections to my recommendation will, if invoked by the plaintiff, provide him with ample notice and opportunity to be heard in connection with the result recommended here.

For the foregoing reasons, no action is taken on the plaintiff's request for a telephonic discovery conference, all discovery in this matter is **STAYED** pending the court's action on the decision recommended herein, and I recommend that the plaintiff's complaint be **DISMISSED** *sua sponte*.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 27th day of March, 1997.

¹ This court denied the motion on the purely procedural ground that the defendant had failed to provide a supporting memorandum as required by the Local Rules.

David M. Cohen
United States Magistrate Judge