

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHARLES HURD, et. al,)
)
 Plaintiff)
)
 v.) Civil No. 04-166-B-H
)
 STATE OF MAINE, et al,)
 Defendant)

RECOMMENDED DECISION

This matter is before the court on the motion to dismiss filed by the State of Maine and other state defendants (Docket No. 13) and the motion to dismiss filed by Attorney John C. Walker (Docket No. 14 & 19).¹ I now recommend that the court **GRANT** both of these motions.

Statement of the Case

The plaintiffs in this action, Charles and Grace Hurd, are the parents of Noreen Strout. Strout has brought two recent actions in this court. The first, Strout v. State of Maine, Civil Docket No. 04-40, was a habeas corpus petition challenging her conviction, following a jury trial, for the state criminal offense of refusing to submit to arrest. The second case, Strout v. Greenwood, 105 Maki Lane, Certain Real Property, Civil Docket No. 04-162, was an action brought by Strout in an attempt to obtain physical possession of certain real property. Those two cases, like the present action brought by the Hurds, were filed against the backdrop of contentious protection from abuse and child custody

¹ The memorandum in support of the motion to dismiss was filed three weeks after the original motion contrary to the provisions of Local Rule 7(a), hence the reference to two separate docket numbers.

litigation that has been pending in the state courts for sometime, involving Loring Strout, Noreen Strout's former husband, and their minor children. An additional unrelated component of the matrix of state court litigation is a collection action commenced against the Hurds by defendant Walker on behalf of Palisades Collection, LLC to recover \$7,978.20 on a credit card debt. Against this backdrop the Hurds have brought the present complaint. (Docket No. 1.)

Their complaint consists of six counts.² Count I, arising under 42 U.S.C. § 1983, is against all defendants individually and alleges that Hurds have been deprived of their rights under the First, Fourth, Fifth, Seventh, Eighth, and Fourteenth Amendments of the United States Constitution. Count II is brought against the State of Maine, Governor Baldacci, Judge Rick E. Lawrence, Laura J. Nokes, and Elisa M. McAllister. Nokes and McAllister are court clerks in the South Paris District Court. The count is a due process and equal protection claim, captioned "Wrongful Removal of Children." It apparently relates to Noreen Strout's custody litigation with her husband that arose at a time when Strout was in Australia. The Hurds were unable to reach their daughter when Loring Strout commenced process against her, resulting in the children being removed from the "axiomatic custody of the Plaintiffs' daughter." (Compl. ¶ VI.14). Count IV asserts that the Hurds were denied the right of religious freedom and references the First and Fourteenth Amendments. It is unclear if it applies to only the state defendants or includes Walker.

The other three counts allege state law claims. Count III, captioned "Interference with Family Relations," is brought against the state defendants only. The claim is for the intentional infliction of severe emotional distress and relates to the custody dispute

² Count Seven is merely a claim for relief, seeking attorney fees pursuant to 42 U.S.C. § 1983.

involving the Hurds' granddaughters. Count V appears to be identical in its purpose. Finally, Count VI of the complaint is brought against all defendants and claims negligent/intentional infliction of emotional distress caused by all defendants, including Walker, brought about because of "conduct in deprivation of Plaintiffs rights to Trial by Jury." (Compl. ¶ VI.34).

Motion to Dismiss Standard

In the wake of Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 (2002), to survive a motion to dismiss for failure to state a claim a 42 U.S.C. § 1983 complaint,

need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." This statement must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957). State of mind, including motive and intent, may be averred generally. Cf. Fed.R.Civ.P. 9(b)(reiterating the usual rule that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally"). In civil rights actions, as in the mine-run of other cases for which no statute or Federal Rule of Civil Procedure provides for different treatment, a court confronted with a Rule 12(b)(6) motion "may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66 (1st Cir. 2004).

However, the First Circuit did not indicate that every pleading, even those utterly devoid of factual content, necessarily survives a motion to dismiss:

From this we intuit that, in a civil rights action as in any other action subject to notice pleading standards, the complaint should at least set forth minimal facts as to who did what to whom, when, where, and why--although why, when why means the actor's state of mind, can be averred generally. As we have said in a non-civil-rights context, the requirements of Rule 8(a)(2) are minimal-but "minimal requirements are not tantamount to nonexistent requirements." Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir.1988).

Second, in considering motions to dismiss courts should continue to

"eschew any reliance on bald assertions, unsupported conclusions, and opprobrious epithets." Chongris v. Bd. of Appeals, 811 F.2d 36, 37 (1st Cir.1987) (citation and internal quotation marks omitted). Such eschewal is merely an application of Rule 8(a)(2), not a heightened pleading standard uniquely applicable to civil rights claims. See Correa-Martinez, 903 F.2d at 52-53 (treating the general no-bald-assertions standard and the heightened pleading standard for civil rights cases as two separate requirements); see also Higgs, 286 F.3d at 439 (rejecting the idea of "special pleading rules for prisoner civil rights cases," but nonetheless requiring complaints to meet some measure of specificity). As such, we have applied this language equally in all types of cases. See, e.g., Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1st Cir.2002) (holding plaintiff to this standard in a bankruptcy action); LaChapelle, 142 F.3d at 508 (holding plaintiff to this standard in an action alleging breach of contract and intentional infliction of emotional distress). We will continue to do so in the future.

Id. In ruling on a motion to dismiss pursuant to Civil Rule of Procedure 12(b)(6), the court may consider certain documents outside the complaint, such as official public records, without converting a Rule 12(b)(6) motion to one for summary judgment. See Watterson v. Page, 967 F.2d 1, 4 (1st Cir. 1993). In the present case the state defendants have provided the court with copies of the docket entries in three cases filed in the South Paris District Court and those documents, in conjunction with this court's own records, have formed a part of the basis for this recommended decision.

Defendant Walker's Motion to Dismiss

The complaint mentions John C. Walker, Esq. by name at two points. In Paragraph V.13 plaintiffs complain that Walker filed an objection to their Notice of Removal for Jury Trial filed in the South Paris District Court. It is also alleged in Paragraph 3.8 that Walker in his "official capacity" "subjected and caused the deprivation of Plaintiffs civil rights and privileges secured by the United States Constitution." Walker is described as the authorized representative of a commercial entity known as the Law Offices of Howard Lee Schiff. In order to flesh out the details of the claim against

Walker attention needs be paid to Exhibit C attached to the state defendants' motion to dismiss, the docket sheet and pleadings in Palisades Collection LLC v. Grace and Charles Hurd, SOPDC-CV-2004-102.

Fortunately the state defendants have provided a concise history of the litigation in the South Paris District Court involving Palisades and the Hurds:

In a completely unrelated case, on August 18, 2004, the Hurds were served with a summons by Palisades Collection, LLC, initiating a collection action against the Hurds for roughly \$7,978. (Exh. C at 1, 8-13). On August 20, 2004, the Hurds filed an answer and counterclaim in that collection action, alleging malicious prosecution, intentional infliction of emotional distress, and negligent infliction of emotional distress. (Exh. C at 14). On August 24, 2004, Palisades Collection, by and through its attorney, co-defendant John C. Walker, filed a motion to dismiss the counterclaim. (Exh. C at 19). On August 30, 2004, the Hurds filed a Notice of Removal to Superior Court as to their counterclaim as well as an application to proceed without payment of fees, such as jury fees. (Exh. C at 20-23).

The court (Lawrence, J.) denied the Hurds' application to proceed without payment of fees by an order dated September 10, 2004. (Exh. C at 21). That is the only action by Judge Lawrence referred to in the Factual Allegations portion of the Complaint (though Judge Lawrence is not mentioned by name).

On September 15, 2004, Palisades Collection filed an objection to the Hurds' Notice of Removal. (Exh. C at 25). On October 4, 2004, the court (McElwee, J.) denied the attempted removal because the required fee had not been paid. (Exh. C at 20).

On or about September 14, 2004, the court sent the parties a Notice of Hearing on the Plaintiff's motion to dismiss the Hurds' counterclaim. (Exh. C at 24). Associate Clerk McAllister signed the Notice on behalf of the court. (Id.). This is the only mention of Associate Clerk McAllister in the "Factual Allegations" section of the Complaint. There is no allegation that the Notice is illegal or defective in any way.

The Hurds failed to attend the hearing that had been scheduled for October 18, 2004, on Palisades Collection's motion to dismiss the Hurds' counterclaim. (Exh. C at 2). The court (McElwee, J.) granted the motion and dismissed the Hurds' counterclaim. (Exh. C at 2, 19).

(State Defs.' Mot. Dismiss at 6-7.) In their exhibits filed in response to the state defendants' motion to dismiss the Hurds provide additional detail about this case and its

current status. Apparently motions for summary judgment were pending at the point the Hurds filed their response to the state defendants' motion. (Pls.' Resp. Mot. Dismiss Exs. 6, 7 & 8.)

The sole factual allegations against Walker are that he brought a lawsuit on behalf of a commercial entity against the Hurds and he then filed an objection to their notice of demand for jury trial. "In order to state a claim under § 1983, a plaintiff must show both the existence of a federal constitutional or statutory right, and a deprivation of that right by a person acting under color of state law." Rockwell v. Cape Cod Hosp., 26 F.3d 254, 256 (1st Cir. 1994) (citing Watterson, 987 F.2d at 7). As it pertains to Walker, the Hurds claim he caused a deprivation of their constitutional right to a jury trial in the debt collection action. Walker, as a private attorney, does not act under color of state law when he appears on behalf of private litigants in state court proceedings. See cf. Polk County v. Dodson, 454 U.S. 312, 325 (1981) ('[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding. '); Malachowski v. City of Keene, 787 F.2d 704, 710 (1st Cir. 1986) (refusing to find that a private attorney, court-appointed to represent a juvenile, acted under color of state law). The § 1983 action against Walker, based upon his representation of an adverse private litigant, fails to state a viable § 1983 claim.

The Hurds do allege in Paragraph 3.8 that Walker, "having knowledge of the wrongs conspired to be done as alluded to in 42 U.S.C. § 1985," refused to do anything to prevent those actions. That brief allegation does not begin to allege a conspiracy under § 1985. In fact the plain meaning of the words does not even allege that Walker was part of any conspiracy, merely that he had knowledge of the existence of an undefined

conspiracy. With respect to a claim under 42 U.S.C. § 1985(3), the First Circuit Court of Appeals has opined that an actionable § 1985(3) claim must allege that, one, the alleged conspirators possessed "some racial, or perhaps otherwise class-based, invidiously discriminatory animus," Griffin v. Breckenridge, 403 U.S. 88, 102 (1971), and, two, their alleged conspiracy was "aimed at interfering with rights ... protected against private, as well as official, encroachment." Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 34 (1st Cir. 1996)(citations omitted). The only class-based allegation is found in Count I, Paragraph VI.7 which alleges in conclusory fashion a lengthy pattern of arrests, detainment, and prosecution of individual citizens of Jewish descent. That allegation does not relate in any way to the deprivation of a jury trial in a civil action for collection of a debt or to John Walker. The complaint does not allege a 42 U.S.C. § 1985 conspiracy.

Nor do the Hurds articulate a state law tort claim against Walker. The allegation that Walker brought a lawsuit against them and opposed their asserted right to a jury trial does not rise to level of actionable intentional infliction of emotional distress. See, e.g., Colford v. Chubb Life Ins. Co. of Am., 687 A.2d 609, 617 (Me. 1996) (finding that defendant's actions involving requiring plaintiff to submit to painful medical examination, attending plaintiff's workers' compensation hearing and communicating with opposing attorney, canceling plaintiff's securities registration after making contrary assurances, and revoking the premium waiver on his life insurance causing plaintiff to lose insurance due to non-payment did not rise to the level of extreme and outrageous conduct). The tort of negligent infliction of emotional distress is only actionable in cases of bystander liability, where a special relationship exists between the parties, or where the

actor has committed another tort. Curtis v. Porter, 2001 ME 158, ¶ 19, 784 A.2d 18, 25-26. The complaint alleges none of those factors.

The complaint does not state a claim against Walker under either federal or state law and it should be dismissed as to him.

The State Defendants' Motion to Dismiss

1. The State of Maine

All section 1983 claims against the State of Maine fail because a state and its agencies are not "persons" under 42 U.S.C. § 1983. See Brown v. Newberger, 291 F.3d 89, 92 (1st Cir. 2002) (dismissing claims against Massachusetts trial courts and Department of Social Services brought by fathers claiming visitation rights regarding their children in cases where mothers obtained court orders barring such visitation). Likewise monetary claims brought directly pursuant to constitutional provisions such as the Fourteenth Amendment fail because the State has not abrogated its Eleventh Amendment immunity. Id. The claim against the State of Maine must be dismissed.

2. Governor Baldacci

Governor Baldacci is sued in both his individual and official capacity. The factual allegations of the complaint are devoid of any reference to actions taken by Governor Baldacci. A "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." Will v. Michigan Dep't. of State Police, 491 U.S. 58, 70-71 (1989). The official capacity monetary damages claims against the state's governor fail for the same Eleventh Amendment grounds as the claims against the state. It is true that injunctive relief may be sought against a state official in his or her official capacity pursuant to 42 U.S.C. § 1983. See id

at 71 n.10; Hawkins v. R.I. Lottery Comm'n., 238 F.3d 112, 116 n.5 (1st Cir. 2001).

However, the Hurds' complaint seeks as injunctive relief primarily remedies relating to court access. The factual allegations do not involve the office of the governor or any actions that the governor would directly control. Maine's Constitution clearly delineates the separation of powers amongst the branches of government. Me. Const. art. III, § 1 ("The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial."); id. § 2 (prohibiting a person belonging to one department from exercising any of the powers belonging to either of the other departments). There is no claim for injunctive relief against the governor.

The individual claims against Governor Baldacci fail simply because there are absolutely no factual allegations that he has had anything to do with these matters in any way. In Paragraph 3.4 the Hurds again make reference to 42 U.S.C. § 1985 vis-à-vis Governor Baldacci, but this conclusory assertion fares no better than the identical language invoked against Walker and it does not state a viable claim.

3. The state court clerks, McAllister and Nokes, and Judge Lawrence

In Paragraph V.12 of their factual allegations the Hurds allege that on September 15, 2004, they received a notice of hearing from the South Paris District Court signed by McAllister. They do not allege any factual allegations regarding Nokes. In their response to the motion to dismiss the Hurds elaborate regarding the two court clerks as follows, "the two Clerks of the South Paris Court identified bad faith and improper conduct, along with felonious alteration or falsification of the record, issuance of false arrests in order to interference (sic) with a Federal Civil Lawsuit; all of which will be brought out at trial." (Pls.' Resp. Mot. Dismiss at 16.) In the same memorandum they

fault Nokes for listening (presumably at a court hearing) “to Mr. Strout confess that he in fact had entered into a Contract with his ex-wife.” Id. at 15. These oblique factual assertions do not begin to provide the who did what, to whom, where, when, and why of a claimed constitutional violation. See Educadores Puertorriquenos en Accion, 367 F.3d at 68. The complaint against the two clerks should be dismissed for failing to state any claim.

The allegations against Judge Lawrence are spelled out in a bit more detail, especially when viewed under the lens of Exhibits A, B, and C filed with the defendants’ motion to dismiss and representing the docket records of three separate cases in the South Paris District Court. The only specific allegation in the complaint is that Judge Lawrence denied the Hurds’ application to proceed on their counterclaim without paying the required fees. On pages twelve and thirteen of their memorandum in opposition to the state defendants’ motion to dismiss the Hurds mention other rulings by Judge Lawrence in cases involving their daughter, Noreen Strout, specifically that he refused to hear a particular issue because he determined the matter to be res judicata and on another occasion he denied Noreen Strout’s Rule 60(b) motion. Judge Lawrence is also called to task for listening to the same “confession” as heard by clerk Nokes.

Unfortunately for the Hurds, the specificity of their complaints vis-à-vis Judge Lawrence satisfies me that the State is correct when it asserts that at least this portion of the complaint is barred under the Rooker-Feldman doctrine. See D.C. Ct. of Appeals v. Feldman, 460 U.S. 462, 476 (1992); Rooker v. Fid. Trust Co., 263 U.S. 413, 416 (1923). This doctrine prohibits federal district courts from reviewing state court judgments and if the federal claim was never raised in state court, it prohibits this court from ruling upon it

if it is inextricably intertwined with the state court claim. “A federal claim is inextricably intertwined with the state-court claims if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.” Rosenfeld v. Egy, 346 F.3d 11, 19 (1st Cir. 2003). The Hurds’ claims regarding the deprivation of their constitutional right to a jury trial and the assorted constitutional claims regarding the process afforded their daughter and grandchildren are exactly claims of this ilk. In fact the Hurds have themselves described it better than I can:

The nature of the case includes the wrongful removal of minor children from their natural custodial parent, false arrests and wrongful incarcerations of the natural parent in order to prevent that parent from maintaining a relationship with her minor children, and to prevent the parent from attending state court proceedings in which an ex-husband (absent constitutional or legal standing) was nefariously and erroneously awarded custody pursuant to Maine’s Protection from Abuse Statute (19-A M.R.S.A. § 4005; the constitutionality of Maine Protection from Abuse Order (19-A M.R.S.A. § 4005) whereby the state injected itself while at all times lacking personal-jurisdiction, further the State issued orders and decisions that were absent the constitutionally required standard “beyond a reasonable doubt” finding of abuse or neglect and erroneously used documents obtained in an illegal search and seizure of a private home, to terminate the parent-child/grandparent-child relationships, absent constitutional requirements and procedures outlined by the Supreme Court in Santosky v. Kramer, 455 U.S. 745, (1982); and the standard (requiring proof of substantial neglect or abuse beyond a “reasonable doubt” in proceedings in which termination of parental rights is sought).

(Compl. at 7-8) (Statement of Case). In my opinion this court has no alternative but to dismiss the claims against Judge Lawrence (and against any of the defendants in their official capacity) under the Rooker-Feldman doctrine.

Conclusion

Based upon the foregoing I recommend that the court **GRANT** defendant Walker’s motion to dismiss and dismiss all claims against him for failure to state a claim. I further recommend that the court **GRANT** the state defendants’ motion to dismiss,

dismissing all federal claims against them. I further recommend that the court decline to exercise jurisdiction over the state law claims involving the state defendants and dismiss those claims without prejudice as to whatever state remedies might be available to the Hurds.

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 of 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.

January 28, 2005.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

HURD et al v. MAINE et al

Assigned to: JUDGE D. BROCK HORNBY

Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK

Cause: 42:1983 Civil Rights Act

Date Filed: 09/17/2004

Jury Demand: Plaintiff

Nature of Suit: 440 Civil Rights:

Other

Jurisdiction: Federal Question

Plaintiff

CHARLES H. HURD

represented by **CHARLES H. HURD**
PO BOX 296
WEST PARIS, ME 04289
674-2437
PRO SE

Plaintiff

GRACE E HURD

represented by **GRACE E HURD**
PO BOX 296
WEST PARIS, ME 04289
674-2437

PRO SE

V.

Defendant

STATE OF MAINE

represented by **THOMAS A. KNOWLTON**
DEPT. OF ATTORNEY
GENERAL
6 STATE HOUSE STATION
AUGUSTA, ME 04333
Email:
thomas.a.knowlton@maine.gov
ATTORNEY TO BE NOTICED

Defendant

JOHN BALDACCI

represented by **THOMAS A. KNOWLTON**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

RICK E LAWRENCE

represented by **THOMAS A. KNOWLTON**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

LAURA J NOKES

represented by **THOMAS A. KNOWLTON**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

ELISE M MCALLISTER

represented by **THOMAS A. KNOWLTON**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JOHN C WALKER

represented by **JOHN C. WALKER**
LAW OFFICE OF JOHN C.
WALKER, P.A.
NORTHPORT PROFESSIONAL

BUILDING
1321 WASHINGTON AVENUE
PORTLAND, ME 04103
207/878-8070
Email: jwalklaw@zwi.net
ATTORNEY TO BE NOTICED