

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

APR 24 1990

ROBERT L. HOECKER
Clerk

JAMES NAUM,)
Plaintiff-Appellant,)
vs.) No. 89-6353
HONORABLE WAYNE E. ALLEY,) (D.C. No. Civ-89-1526-W)
District Judge, JOHN DOE,) (D. Okla.)
JOHN ROE and KATHY DOE,)
Defendants-Appellees.)

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR and BALDOCK, Circuit Judges.**

Plaintiff-appellant, James Naum, filed this RICO action in the district court alleging Judge Wayne Alley unlawfully accepted a bribe from unknown employees of the Oklahoma Attorney General's office in exchange for dismissal of Naum's civil rights action under 42 U.S.C. § 1983. The district court dismissed Naum's complaint as meritless under 28 U.S.C. § 1915(d).

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause therefore is ordered submitted without oral argument.

We have reviewed Naum's appellate brief as well as the record designated on appeal, and agree substantially with the district court's reasons for dismissal set forth in its order of dismissal, a copy of which is attached hereto. Accordingly, we likewise dismiss the appeal as meritless pursuant to 28 U.S.C. § 1915(d).

APPEAL DISMISSED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED

OCT 05 1989

W. D. DENNIS
DISTRICT COURT

WE

BY DEPUTY

RE

JAMES NAUM, PE,)
Plaintiff,)
vs.)
HONORABLE WAYNE E. ALLEY,)
JUDGE; JOHN DOE; JOHN ROE;)
KATHY DOE,)
Defendants.)

CIV-89-1526-W

ORDER OF DISMISSAL

DOCKETED

Plaintiff, a state prisoner appearing pro se, has previously been granted leave to proceed in forma pauperis in filing his complaint, purporting to state a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 et. seq. For the reasons stated herein, the Court, upon preliminary review of the complaint, determines that the complaint must be dismissed pursuant to 28 U.S.C. §1915(d).

The initial responsibility of the Court on preliminary review of a complaint filed in forma pauperis is to determine whether the claims are frivolous, improper or obviously without merit prior to authorizing further proceedings at the expense of the taxpayers.

Phillips v. Carey, 638 F.2d 207 (10th Cir. 1981), cert. denied, 450 U.S. 985 (1981).

In his complaint, the Plaintiff names as defendants the Honorable Wayne E. Alley, United States District Judge, and certain unknown persons within the Oklahoma Attorney General's

Office, referred to by the Plaintiff as "John Doe", "John Roe" and "Kathy Doe". The basis of the Plaintiff's complaint is his disagreement with Judge Alley's earlier dismissal of the Plaintiff's civil rights action filed against the Oklahoma Department of Corrections pursuant to 42 U.S.C. §1983. Case No. CIV-89-1433-A (W.D. Okla. 1989). Plaintiff contends that Judge Alley must have accepted compensation from an unknown person or persons within the Attorney General's Office in order to dismiss the complaint.

In order to establish a RICO violation, a plaintiff must plead (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Pitts v. Turner and Boisseau Chartered, 850 F.2d 650, 652 (10th Cir. 1988) cert. denied, 109 S. Ct. 838 (1989); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 927 (10th Cir. 1987). Without addressing the sufficiency of the Plaintiff's allegations as to the first two elements of a RICO claim, it is clear that the Plaintiff has not alleged a "pattern" of racketeering activity. A "pattern" requires at least two acts of racketeering activity. 18 U.S.C. §1961(5). Here, Plaintiff has alleged only one act, the alleged act of Judge Alley accepting compensation in order to dismiss the Plaintiff's earlier civil rights action. Thus, dismissal of this RICO claim would be appropriate under Rule 12(b)(6) Fed. R. Civ. P. Pitts v. Turner & Boisseau, Chartered, 850 F.2d at 652. The Court is mindful however, that a complaint which fails to state a claim under Rule 12(b)(6) is not automatically frivolous within the meaning of 28

U.S.C. §1915(d). Neitzke v. Williams, 109 S.Ct. 1827 (1989).

Regardless however, Plaintiff's complaint against Judge Alley must also fail as the law is clear that a judge is absolutely immune from liability for his judicial acts. Stump v. Sparkman, 435 U.S. 349, 355-356 (1978); Van Sickle v. Holloway, 791 F.2d 1431, 1435 (10th Cir. 1986). The immunity applies even when the judge is accused of acting maliciously or corruptly. Stump v. Sparkman, 435 U.S. at 356. See also Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989); Gregory v. Thompson, 500 F.2d 59, 62 (9th Cir. 1974).

Judge Alley was clearly performing a "judicial act" in dismissing the Plaintiff's earlier civil rights action and thus he enjoys absolute immunity from the Plaintiff's claims. Van Sickle v. Holloway, 791 F.2d at 1436. As the Court in Sampson v. Washington Paint Co., (N.D. Ill. 1985)(available on Westlaw 1985 WL 3012) noted, there is a lack of reported cases applying the doctrine of judicial immunity to RICO claims. However, the Court there held that judicial immunity was properly asserted in a RICO action, relying in part on the case of Thillens, Inc. v. The Community Currency Exchange Association of Illinois, Inc., 729 F.2d 1128 (7th Cir. 1984) cert. dismissed, 469 U.S. 976 (1984), which held that two state legislators enjoyed immunity from a RICO action for actions taken within the sphere of their legislative duties. See also Cok v. Cosentino, 876 F.2d at 2. (Plaintiff's complaint contained a claim under RICO, and Court held judge immune from suit); Glick v. Gutbrod, 782 F.2d 754 (7th Cir.

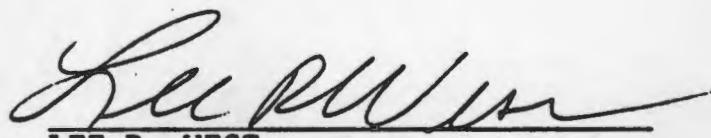
1986)(complaint alleged claims pursuant to both 42 U.S.C. §1983 and RICO, and the Court held that the defendant judge was absolutely immune from the claims); Wiley v. The Federal Land Bank of Louisville, 657 F. Supp. 964, 965 (S.D. Ind. 1987)(Farm Credit defendants were immune from RICO claims); Stich v. United States Department of Justice (D.D.C. 1987)(available on Westlaw 1987 WL 9237)(RICO does not waive sovereign immunity); see also Cooper v. Zions First National Bank, N.A. (D. Utah 1984)(available on Westlaw 1984 WL 2743).

While Congress has authority to abolish the absolute immunity defense to any cause of action it creates, Glick v. Gutbrod, 782 F.2d at 756, it has not done so in enacting the RICO Act. Thus, Judge Alley enjoys absolute immunity from liability for his judicial acts on this RICO claim, and dismissal is appropriate under 28 U.S.C. §1915(d). Neitzke v. Williams, 109 S.Ct. at 1833.

As noted, Plaintiff has also named "Doe and Roe" defendants. He then makes conclusory allegations that these unknown person or persons paid compensation to Judge Alley in order for the Judge to dismiss the Plaintiff's earlier §1983 civil rights action. While this Court would ordinarily allow the Plaintiff an opportunity to proceed with discovery in order to ascertain the names of the unknown defendants, the Court will not do so in this instance. It is clear from the face of the complaint that the Plaintiff has made these allegations without any foundation or factual basis. His allegations amount to only his biased belief that because his earlier §1983 civil rights lawsuit was dismissed, it must have

been because the Judge received compensation from the Attorney General's Office. Such allegations without any factual basis to support them do not deserve any more of this Court's attention. For all the above reasons, the complaint is dismissed. 28 U.S.C. §1915(d); Van Sickle v. Holloway, 791 F.2d at 1436.

IT IS SO ORDERED this 5th day of October 1989.



LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET
ON 10-5-89.