

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

LARRY HENRY TOMPKINS,
Plaintiff

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VS.

CIVIL ACTION NO.
7-04CV-057-R

MILTON EUGENE DOUGLASS
Defendant.

**DEFENDANT DOUGLASS' MOTION TO DISMISS AMENDED COMPLAINT WITH
SUPPORTING BRIEF**

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September 23, 2004

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Defendant.

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CIVIL ACTION NO.
7-04CV-057-R

**DEFENDANT DOUGLASS' MOTION TO DISMISS AMENDED COMPLAINT WITH
SUPPORTING BRIEF**

Defendant Milton Eugene Douglass ("Douglass"), pursuant to the Federal Rules of Civil Procedure and in lieu of filing his answer at this time, files the following:

1. Motion to dismiss for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1);
2. Motion to dismiss for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. Rule 12(b)(6); and
3. Request to deny declaratory relief.

1.

BACKGROUND

Introduction

1.1 Plaintiff's First Amended Verified Complaint as of Right¹ requests this Court to review and essentially reverse the state court rulings arising in a libel proceeding and award damages for the actions of the opposing lawyer and judges in that state court suit. Douglass requests this Court dismiss Plaintiff's Amended Complaint because: (1) this Court lacks subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine;² (2) Douglass is not a state actor, therefore, no claim exists through 42 USC §1983 or 42 USC §1985; and (3) the Court should decline to exercise its jurisdiction to grant declaratory relief.

Facts

1.2 Plaintiff is Larry Henry Tompkins, who was also a Plaintiff in a prior state court libel proceeding.³ Defendants are Douglass, an attorney who represented the prior state court defendants and the Honorable Robert Brotherton and the Honorable Roy Sparkman, state district judges who signed orders in the libel proceeding.

¹ Filed as Docket Sheet Document #6 and referred to herein as "Amended Complaint." A copy is attached as Exhibit 1 in the Joint Appendix (referred to as "Jt. App."). Plaintiff first filed his complaint only against Douglass. Douglass filed a Motion To Dismiss pursuant to Rule 12b in response to the issues raised. Plaintiff then filed and served the Amended Complaint adding the judges as Defendants and including claims for declaratory relief.

² The doctrine arises from two decisions; *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 44 S.Ct. 149, 150, 68 L. Ed. 362 (1923), holding that Federal district court's jurisdiction is strictly original; and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S. Ct. 1303, 1311 and 1315, 75 L. Ed. 2d 206 (1983), holding that Federal district courts do not possess the authority to review final state court judgments.

³ The libel suit was originally styled *Clampitt Retirement Community, et al. v. KAUZ-TV Channel 6, et al.* and filed as Cause No. 154,895-C in the 89th District Court, Wichita County. See Paragraph 10 of the Amended Complaint, Jt. App., Ex. 1, pp. 3-4.

1.3 In 2001, Tompkins filed suit in state district court in Wichita County seeking damages from a television station and some of its current and former managers and reporters. One or more state court defendants hired Douglass, a Wichita Falls attorney to defend the action. After the case was filed, Judge Juanita Pavlick properly elected to recuse herself because of her marriage to Douglass.⁴ Subsequently, Judge Brotherton signed an order transferring the case to Judge Sparkman.⁵

1.4 In the state court proceeding, Tompkins complained that improper procedures occurred in transferring the case to Judge Sparkman and moved to recuse both Judge Brotherton⁶ and Judge Sparkman.⁷ Rulings in the state court proceedings denied Plaintiff's objections and refused to recuse the judges.⁸ Subsequently, Judge Sparkman denied Plaintiff's requested relief by granting summary judgment.⁹ Tompkins did not appeal.

1.5 Tompkins asserts that all of the Defendants violated, or conspired to violate, his due process rights in denying him notice and opportunity to participate in the choice of a new judge.¹⁰ Tompkins contends that only a non-local judge should have adjudicated the state matter.¹¹

⁴ Paragraph 13 of the Amended Complaint, Jt. App., Ex. 1, pg. 5.

⁵ Order Assigning Case for Trial, Jt. App., Ex. 2, pg. 13.

⁶ Motion to Recuse Brotherton, Jt. App., Ex. 3, pp. 20-21, Paragraph 24 and pg. 22, Paragraph 30.

⁷ Motion to Recuse Sparkman, Jt. App., Ex. 4, pp. 28-31, Paragraphs 13 and 21.

⁸ Order Denying Motion to Recuse, Jt. App., Ex. 5, pg. 34 and Order Denying Motion to Recuse, Jt. App., Ex. 6, pg. 35.

⁹ Order, Jt. App., Ex. 7, pg. 36.

¹⁰ Paragraphs 24, 28, 31 and 34 of the Amended Complaint, Jt. App., Ex. 1, pp. 7-10.

¹¹ Paragraph 22 of Amended Complaint, Jt. App., Ex. 1, pg. 7.

1.6 Claiming Douglass owes the damages Tompkins lost in state court and for pain and anguish, Tompkins now casts his complaint as violations of his civil rights based on 42 USC §1983 and 42 USC §1985.¹² Seeking declaratory relief based on 28 USC §2201, 2202 Tompkins also requests a declaration as to the nature of the actions taken in the state court proceeding.¹³

2.

MOTION TO DISMISS: LACK OF SUBJECT MATTER JURISDICTION

Standard of Review

2.1 Motions to dismiss for lack of subject matter jurisdiction challenge the authority of the Court to hear the dispute presented through either a facial or factual attack upon the complaint. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). A facial attack occurs when the Defendant merely files a motion and a factual attack occurs when the motion also includes evidentiary materials. *Id.* If only a facial attack is made, then in determining the propriety of a motion to dismiss for lack of subject matter jurisdiction, the district court must accept as true the factual allegations of a plaintiff's pleadings. *Id.*

2.2 If a factual attack is made, the court is not required to give the presumptive truthfulness to allegations as with other motions to dismiss. *Evans v. Tubbe*, 657 F.2d 661, 663 (5th Cir. 1981). When faced with a factual challenge, the Court may weigh the evidence to determine whether it has the ability to hear the case. *Id.* The court will dismiss if the court lacks the power to adjudicate the case.

¹² Paragraphs 29, 32, 34 and 36 of Amended Complaint, Jt. App., Ex. 1, pp. 8-11.

¹³ Paragraph 26 of Amended Complaint, Jt. App., Ex. 1, pg. 7.

Rooker-Feldman Doctrine

2.3 The sum and substance of Plaintiff's Amended Complaint are that his rights to due process and damages were denied by incorrect state court rulings¹⁴ Plaintiff's suit rests on the contention that counsel and the judges in the state court conspired to act together when they failed to follow the Texas Rules of Civil Procedure.¹⁵

2.4 Federal district courts do not have subject matter jurisdiction to review state court proceedings. This rule is commonly known as the *Rooker-Feldman* doctrine. The Fifth Circuit has held:

“The Supreme Court has definitely established, in what has become known as the *Rooker-Feldman* doctrine, that federal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify, or nullify final orders of state courts.”

Weekly v. Morrow, 204 F.3d 613, 615 (5th Cir. 2000), citing *Liedtke v. State Bar of Texas*, 18 F.3d 315, 317 (5th Cir. 1994); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L.Ed. 2d 362, 44 S.Ct. 149 (1923), and *District of Columbia Court of Appeals v. Feldman*, 406 U.S. 462, 75 L.Ed. 2d 206, 103 S.Ct. 1303 (1983). The *Rooker-Feldman* doctrine is not limited to actions filed in federal court which explicitly request review of a state court decision, but also includes actions filed in federal court in which the constitutional claims are “inextricably intertwined with the state court’s grant or denial of relief.” *Hale v. Harney*, 786 F.2d 688, 691 (5th Cir. 1986). In applying the *Rooker-Feldman* doctrine, the federal courts are “to consider substance, not form: i.e., what the [federal] court really is being asked to review.” *Musslewhite v. State Bar of Texas*, 32 F.3d 942, 947 (5th Cir. 1994). A

¹⁴ See Paragraphs 24 and 26 of the Amended Complaint, Jt. App., Ex. 1, pp. 7-8.

¹⁵ See Paragraphs 13-36b of the Amended Complaint, Jt. App., Ex. 1, pp. 5-11.

plaintiff may not challenge a state court judgment by framing the complaint as a civil rights action. *Howell v. Supreme Court of Texas*, 885 F.2d 308, 311-312 (5th Cir. 1989).

2.5 *Richard v. Hoechst Celanese Chemical*, 355 F.3d 345 (5th Cir. 2003) supports dismissal of Plaintiff Tompkins' action. In *Richard*, the Plaintiff challenged the actions of counsel and Defendants in state court proceedings alleging collusion in the class certification procedures taken and sought damages claiming their constitutional rights of due process were being violated. *Id.* at 348. Richard complained that there were due process violations by reason of lack of notice and opportunity to participate. *Id.* at 349. The federal district court dismissed and the Fifth Circuit affirmed stating that the constitutional issues of due process were "inextricably intertwined" with the state court decision even though the complaint is cast in the form of a civil rights action. *Id.* at 351. The Fifth Circuit held:

"[a] Federal Court cannot examine the due process deficiencies . . . without disturbing the underlying judgment. . . ." *Id.*

2.5 Review of the specific claims raised by Tompkins reveals the following complaints on the failures of counsel and the state court to follow required procedures:

- a. Douglass failed to give notice to Tompkins of his presentation of a Motion and Order for Assignment of Judge;
- b. Judge Brotherton signed the Order Assigning Judge without notice to Tompkins and before a motion was actually filed of record; and
- c. Judge Sparkman issued his ruling dismissing the Plaintiff's state court claims when only a non-local Texas judge should have been assigned to hear the case.

Tompkins raised these issues by motions filed in the state court¹⁶ which were all overruled.¹⁷ Merely clothing these complaints as deprivations of federally protected rights does not vest this Court with jurisdiction to review the decisions made in state court. See, *Howell*, 885 F2d at 311.

2.7 All of Tompkins' claims have a common contention that arises from some procedural failure or aspect of the state court proceeding. Pursuant to the *Rooker-Feldman* doctrine, Plaintiff Tompkins cannot assert alleged constitutional claims now to obtain federal court jurisdiction to review a state court judgment. State courts are competent to adjudicate any federal constitutional claims which were raised by Plaintiff. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. at 483. To evaluate any claim requires this Court to review the state court judgment, a review which violates the confines of this Court's jurisdiction as established by the *Rooker-Feldman* doctrine.

2.8 Plaintiff Tompkins' attempted constitutional claims are inextricably intertwined with a challenge to the state court libel judgment and are insufficient to vest subject matter jurisdiction with this Court. Douglass respectfully requests this Court dismiss the actions for want of subject matter jurisdiction.

3.

MOTION TO DISMISS: RULE 12(B)(6)

Standard of Review

3.1 The complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim because the Plaintiff fails to plead a cognizable claim for civil rights violations. A complaint should not be dismissed under 12(b)(6) unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle the plaintiff to relief. *Campbell v. City of San Antonio*, 43 F.3rd

¹⁶ Motion to Recuse, Jt. App., Ex. 3, pp. 20-21, Paragraphs 4 and 25 and Ex. 4, pp. 26-31

¹⁷ Orders, Jt. App. Ex. 5, pg. 34 and Ex. 6, pg. 35.

973, 975 (5th Cir. 1995); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99 2 L.Ed 2d 80 (1957). In ruling on a 12(b)(6) motion, the district court must construe the allegations in plaintiff's complaint liberally in favor of a plaintiff and take all facts pleaded as true. *Kane Enterprises v. McGregor*, 322 F.3d 371, 374 (5th Cir. 2003). The court should accept the truth of the allegations or rely upon only those matters outside of the pleadings with respect to which there is no genuine issue of fact. See *Espinoza v. Missouri Pacific Railway Co.*, 754 F.2d 1247, 1249 (5th Cir. 1985). Although it is true that a plaintiff's pleadings are to be liberally construed in favor of the plaintiff in deciding a 12(b)(6) motion, a plaintiff must plead facts, not mere conclusional allegations to avoid dismissal. *Kane*, 322 F.3d at 374; *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). If a plaintiff merely asserts conclusionary allegations in the complaint, the district court should not just accept the allegations as true. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). Further, the Court may review documents attached to the motion to dismiss when they are central to the claim. *Kane*, 322 F.3d at 374. To avoid dismissal, however, the Plaintiff must plead specific facts giving fair notice of the Plaintiff's claim and show the pleader is entitled to relief. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 122 S.Ct. 992, 998, 152 L.Ed. 1 (2002); and *Guidry v. Bank of La Place*, 954 F.2d 278, 281 (5th Cir. 1992). Conclusory allegations masquerading as factual conclusions will not suffice to prevent a motion to dismiss. *In re Mastercard Int'l, Inc.*, 313 F.3d 257, 261 (5th Cir. 2002); *Kane*, 322 F.3d at 374.

Not Under Color of State Law or by State Actor

3.2 To establish a Section 1983 cause of action requires allegations and proof of the following three (3) elements:

1. deprivation of a right secured by federal law;
2. which occurred under color of state law, and

3. was caused by a state actor.

Victoria W. v. Larpenter, 369 F.3d 475, 482 (5th Cir. 2004).

3.3 The complaint must allege that conduct complained of be done under color of state law. *Id.* A private attorney who merely represents a client in a civil proceeding is not a person acting under the color of law. See *Polk County v. Dodson*, 454 U.S. 312, 318, 70 L.Ed 2d 509, 102 S.Ct. 445 (1981); *Hill v. McClellan*, 490 F.2d 859, 860 (5th Cir. 1974) overruled on other grounds, *Sparks v. Duval County Road Co.*, 604 F.2d 976, 983 (5th Cir. 1979) aff'd sub nom. *Davis v. Sparks*, 449 U.S. 24, 66 L.Ed 2d 185, 101 S.Ct 183 (1980). The actions of a private attorney are independent from the role of the state and the representation of a client in a private proceeding is not conduct chargeable to the state. *Id.*

3.4 With respect to the conduct of attorneys, actions done as private attorneys are not generally subject to suit under Section 1983. *Mills v. Criminal District Court #3*, 837 F.2d 677, 679 (5th Cir. 1988). Private attorneys, as a general rule, do not constitute state actors as to Section 1983 claims. *Id.* at 679.

No Facts State A Claim For Relief

3.5 Although private acts may support an action for liability through 42 USC. §1983, if there is joint action by an individual as a willing participant with the state as its agents, there must be a factual basis to support any such conspiracy charges. *Brinkman v. Johnson*, 793 F.2d 111, 112 (5th Cir. 1986); *Earnest v. Lowenbrett*, 690 F.2d 1198 (5th Cir. 1982). The conclusions stated by Tompkins that Douglass engaged in a conspiracy with the judges, without reference to facts, are not sufficient to state a claim. See, *Hale v. Harney*, 786 F.2d 688, 690-91 (5th Cir. 1986). Since all of the facts referenced by Tompkins or which could be referenced by Tompkins are inextricably intertwined in a review of the state court decision, no valid claim for relief exists. *Id.* Tompkins' claims all stem

from the conduct of Douglass in the state court proceeding and no statement of facts will change the character of the claim alleged. Accordingly, Plaintiff's complaint should be dismissed for failure to state a claim upon which it may be granted. See, *Id.* The actions of Douglass as opposing counsel for the parties in the state court proceeding fail to present a claim for which relief may be granted. Accordingly, Douglass seeks dismissal of this action and his costs and fees in responding to this action.

4.

REQUEST TO DENY DECLARATORY RELIEF

4.1 Tompkins seeks jurisdiction through a request for declaratory relief pursuant to 28 USC §2201, §2202.¹⁸ Federal courts have broad discretion to exercise jurisdiction over declaratory judgment suits. See, *Travelers Ins. Co. v. Louisiana Farm Bureau Federation*, 996 F.2d 774, 778 (5th Cir. 1993). Such discretion is not unfettered, however, and the district court should balance the purposes of the Declaratory Judgment Act with the factors relevant to abstention. *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590-591 (5th Cir. 1994).

Analysis of factors to be considered by the Court in exercising declaratory judgment jurisdiction¹⁹ include:

- a. Whether a state action exists in which the matters in controversy may be litigated (the libel suit presented a forum for complaints related to procedures or actions taken in that case);
- b. Whether the Plaintiff filed suit in anticipation of a lawsuit filed by Defendant (not applicable);

¹⁸ Paragraph 8 of Amended Complaint, Jt. App., Ex. 1, pg. 3.

¹⁹ *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590-591 (5th Cir. 1994).

- c. Whether the Plaintiff engaged in forum shopping in bringing the suit (Plaintiff failed to appeal the libel decision through the state court, instead choosing to complain in federal court);
- d. Whether possible inequities in allowing the declaratory Plaintiff to gain precedence in times or to change forums exist (Plaintiff is attempting to begin anew in a different suit rather than appeal the decision through the state court process);
- e. Whether the federal court is a convenient forum (The forum is convenient);
- f. Whether retaining the lawsuit in federal court will serve the purposes of judicial economy (Permitting a federal case permits duplicitous litigation); and
- g. Whether the federal court is being requested to construe a state judicial decree involving the same parties from the parallel state suit (Not to construe a decree but case does request court to construe or review actions from the state court proceeding).

These factors weigh in support of the Court's refusal to exercise its discretion to entertain this action. Douglass requests the Court dismiss the request for declaratory relief and award Douglass the fees and costs required to respond to this action.

5.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant Milton Eugene Douglass prays for the following relief:

1. this action be dismissed due to lack of subject matter jurisdiction pursuant to Rule 12(b)(1); and/or
2. this action be dismissed pursuant to Rule 12(b)(6) due to Plaintiff's inability to state a claim; and/or
3. this declaratory relief request be denied; and/or
4. Douglass be awarded attorneys' fees and costs for responding to this action; and/or
5. for such other and further relief as Defendant may be entitled to receive.

Respectfully submitted,

By *A. D'Lyn Davison*
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MILTON EUGENE DOUGLASS

CERTIFICATE OF SERVICE

This is to certify that on September 23, 2004, a true and correct copy of the foregoing was served upon the following counsel of record via U. S. Mail, Certified Mail, Return Receipt Requested.

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