

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

LARRY HENRY TOMPKINS,
Plaintiff

§
§
§
§
§
§

VS.

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

MILTON EUGENE DOUGLASS
Defendant.

DEFENDANT'S MOTION TO DISMISS WITH SUPPORTING BRIEF

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ATTORNEYS FOR DEFENDANT

August 3, 2004

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IN THE UNITED STATES DISTRICT COURT FOR
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WICHITA FALLS DIVISION

LARRY HENRY TOMPKINS,	§	
Plaintiff	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	7-04CV-057-R
MILTON EUGENE DOUGLASS	§	
Defendant.	§	

DEFENDANT’S MOTION TO DISMISS 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 motions:

1. Motion to dismiss for insufficient service of process based on Rule 4(e), Rule 12(b)(2), and 12(b)(5);
2. Motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1);
and
3. Motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

Motion to Dismiss, Insufficient Service of Process

1. Introduction

1.1 Purported service of a summons (Exhibit “A”) was attempted by Plaintiff on Milton Eugene Douglass. The summons is directed as follows:

Gene Douglass, 1811 10th Street, Wichita Falls, Texas 76301.

2. Defective Service

2.1 Service is defective because Plaintiff did not comply with the procedures for any proper method of service, as follows:

- A. The attempted certified mail service was not served by an authorized individual.
- B. The attempted certified mail did not properly restrict the person to receive the certified mail.
- C. The receipt was not signed for by Gene Douglas.

2.2 The summons was sent by certified mail by Plaintiff through his agent, Charles Steely, rather than by the clerk, sheriff or constable. Plaintiff opted to send the complaint and summons by mail rather than serve it by personal delivery. Such service by mail through a private person is not authorized by Texas law nor by Rule 4 of the Federal Rules of Civil Procedure.

2.3 In addition to the problem that the complaint and summons were not forwarded by an authorized individual to serve by certified mail, service is also defective because it was not designated for delivery to the addressee only. In serving an individual by mail, that individual is the only person authorized to receive service.

2.4 Further, the complaint and summons were received and signed for by someone other than Gene Douglass. The complaint and summons were not delivered to a proper person thereby again failing to follow the procedures required for service by mail pursuant to the laws of Texas and/or Rule 4 of the Federal Rules of Civil Procedure.

3. Argument and Brief

3.1 Movant was not properly served with summons as required by Rule 4 of the Federal Rules of Civil Procedure. The motion to dismiss for improper service of process sets forth separate grounds establishing improper service: (1) improper person served process, i.e., service by Charles Steely is not authorized; (2) improper method of service, i.e., service by certified mail without delivery restricted to Gene Douglass is not authorized; and (3) improper person was served, i.e.,

another person signed the service of process by mail, not Gene Douglass individually. *Stokes v. Scott*, 2000 U.S. Dist. Lexis 4099, (N.D. Tex. 2000).

3.2 Federal Rule 4(e) provides that the complaint may be served on an individual in two separate ways. It may be served in accordance with the state law in which the district is located, FED. R. CIV. P. 4(e)(1); or it may be served by delivery personally or to the individual's usual place of abode, FED. R. CIV. P. 4(c)(2).

3.3 The return of summons reflects it was mailed by Charles Steely to Gene Douglass without restriction on delivery. Service of process by Plaintiff's certified mail through Charles Steely is not in compliance with the laws of Texas. Texas law authorizes three officials, the sheriff, constable or the clerk to serve process. TEX. R. CIV. P. 103. Charles Steely is not one of the officials authorized to deliver process. *Delta Steamships Lines v. Albano*, 768 F.2d 728, 730 (5th Cir. 2000); *Stokes v. Scott*, 2000 U.S. Dist. Lexis 4099, (N.D. Tex. 2000).

3.4 The method of service chosen by Plaintiff was by certified mail. As in *Stokes v. Scott*, 2000 U.S. Dist. Lexis 4099, (N.D. Tex. 2000), service by certified mail by someone other than an authorized person under Texas law or its representative is not sufficient either by Rule 4 of the Federal Rules of Civil Procedure or by Texas law. While Rule 103, Rule 106 and Rule 107 of the Texas Rules of Civil Procedure contemplate service by certified mail, the person authorized by these rules to make service is the clerk of the court, not a private person. See generally, *Kleppinger v. Associates Corp. of N. Am.*, 2003 U.S. Dist Lexis 17815 (N.D. Tex. 2003). The purported service by certified mail is insufficient under both federal law and Texas law.

3.5 As Plaintiff attempted to serve process by certified mail through Texas law, the Texas rules require that the return of citation (or summons) must contain the return receipt with the

addressee's signature. TEX. R. CIV. P. 107; *Stokes v. Scott*, 2000 U.S. Dist Lexis 4099 (N. D. Tex. 2000). The return receipt was not executed by Gene Douglass.

3.6 Actual notice of suit is insufficient to confer jurisdiction. *Id.* Because no proper service of process occurred as to Gene Douglass, the court lacks *in personam* jurisdiction. Accordingly, dismissal of the claims against Gene Douglass is warranted.

Motion to Dismiss - Rule 12(b)(1) and 12(b)(6)

4. Introduction

4.1 Plaintiff's complaint requests this Court to review and essentially reverse state court rulings arising in a libel proceeding, and requests damages against the opposing lawyer for his actions taken in that state court suit. Plaintiff's complaint should be dismissed with prejudice because: (1) this Court lacks subject matter jurisdiction to review state court proceedings pursuant to the *Rooker-Feldman* doctrine; and (2) Defendant Douglass is not a state actor and was not acting under the color of law, therefore, no claim exists through §1983 or §1985.

5.

Motion to Dismiss: Lack of Subject Matter Jurisdiction

5.1 ***Rooker-Feldman Doctrine.*** The sum and substance of Plaintiff's complaint are that the state court's decisions regarding libel were incorrect because opposing counsel failed to follow the Texas Rules of Civil Procedure. (See paragraphs 12-18 of the complaint). Plaintiff questions the actions of opposing counsel, Gene Douglass, and Plaintiff's complaint focuses on alleged incorrect rulings made by the state court. 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. Harvey*, 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 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). 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. Pursuant to the *Rooker-Feldman* doctrine, Plaintiff Tompkins’ complaint should be dismissed for lack of subject matter jurisdiction.

5.2 *Richard v. Hoechst Celanese Chemical*, 355 F.3d 345 (5th Cir. 2003) supports dismissal of Plaintiff Tompkins’ action. In *Richard*, parties to state court proceedings challenged the decision of the lower court and sought damages claiming their constitutional rights of due process were being violated. *Id.* at 348. The federal district court dismissed and the Fifth Circuit

affirmed stating that the constitutional issues were “inextricably intertwined” 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. Plaintiff Tompkins’ attempted constitutional claim is insufficient to vest subject matter jurisdiction with this Court. Plaintiff Tompkins seeks to reverse a state court judgment in this action; thus, this Court should dismiss for want of subject matter jurisdiction.

6

Motion to Dismiss: Rule 12(b)(6)

6.1 The complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim.

6.2 Defendant Douglass acknowledges the stringent standard for 12(b)(6) dismissals. 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. *Piraino v. United States Postal Service*, 69 F.Supp.2d 889, 894 (E.D. Tex. 1999), citing *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 accept the truth of plaintiff’s 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, the district court should not accept as true conclusory allegations in the complaint. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045. 1050 (5th Cir. 1982).

6.3 **Not Under Color of State Law or by State Actor.** 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).

6.4 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.*

6.5 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.

6.6 As a result, the actions of Defendant Douglass as opposing counsel for the parties in the state court proceeding do not present a claim for which relief may be granted. Accordingly, Defendant Douglass seeks dismissal of this action.

7
Prayer

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

1. this action be dismissed due to insufficient service of process;
2. this action be dismissed due to lack of subject matter jurisdiction pursuant to Rule 12(b)(1); and/or
3. this action be dismissed pursuant to Rule 12(b)(6) due to Plaintiff's inability to state a claim; and/or
4. for such other and further relief as Defendant may be entitled to receive.

Respectfully submitted,

By D. D'Lyn Davison
D. D'Lyn Davison by *Hank Rugeley*
State Bar No. 05590800 *and Corand*

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on August 3, 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.

Larry Henry Tompkins, Pro Se
1810 Ardath Avenue
Wichita Falls, Texas 76301
Certified Mail No. 7003 3110 0000 3564 0373
Return Receipt Requested

D. D'Lyn Davison
D. D'Lyn Davison *by Hank Ruzely*
with consent

PACW\TLIE\20301003[1].mtn dismiss.wpd

7-04CV-057-K

AO 440 (Rev. 8/01) Summons in a Civil Action

RETURN OF SERVICE

Service of the Summons and complaint was made by me ⁽¹⁾	DATE July 23, 2004	U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILED JUL 23 2004 CLERK, U.S. DISTRICT COURT Deputy
NAME OF SERVER (PRINT) CHARLES STEELY	TITLE N/A	

Check one box below to indicate appropriate method of service

- Served personally upon the defendant. Place where served: _____
- Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left: _____
- Returned unexecuted: _____
- Other (specify): CERTIFIED MAIL ; RETURN RECEIPT

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES \$ 24.88	TOTAL \$ 24.88
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DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on July 23, 2004 Charles Steely
Date Signature of Server

P.O. Box 2261 Wichita Falls
Address of Server
TX 76307

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

GENE DOUGLASS
1811 10th St.
Wichita Falls, TX
76301

COMPLETE THIS SECTION ON DELIVERY

A. Signature
 Agent
 Addressee
Kandi DeLeon

B. Received by (Printed Name)
Kandi DeLeon

C. Date of Delivery
7/19/04

D. Is delivery address different from item 1? Yes
 No
 If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number
(Transfer from service label) 7003 3110 0000 3595 3862 3862

EXHIBIT

tabbies

"A"

3