

COPY

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

LARRY HENRY TOMPKINS,
Plaintiff,

v.

MILTON EUGENE DOUGLASS,
ATTORNEY, THE HON. ROBERT
BROTHERTON, AND THE HON.
ROY T. SPARKMAN,
Defendants.

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Civil Action No. 7-04CV-057-R

JUDGE JERRY BUCHMEYER

**DEFENDANT ROBERT BROTHERTON'S AND DEFENDANT ROY T. SPARKMAN'S
MOTION TO DISMISS**

TO THE HONORABLE JUDGE JERRY BUCHMEYER:

Defendant Judge Robert Brotherton and Defendant Judge Roy T. Sparkman, by and through the Attorney General for the State of Texas, submit this motion to dismiss for failure to state a claim upon which relief may be granted pursuant to FED. R. CIV. P. 12(b). They also ask the Court to deny Plaintiff Larry Henry Tompkins' request for declaratory relief.

I.

STATEMENT OF MATERIAL FACTS

Plaintiff is Larry Henry Tompkins. Defendants are Robert Brotherton, Presiding Judge, 30th District Court, Wichita County; Roy T. Sparkman, Presiding Judge, 78th District Court, Wichita County; and Milton Eugene Douglass, Attorney at Law.

On April 30, 2001, Tompkins filed a libel suit in Wichita County styled *Clampitt Retirement Community, et al. v. KAUZ-TV Channel 6, et al.*, Cause No. 154,895-C(B), 78th District Court, Wichita County. Tompkins brought the action against a Wichita Falls television station, a former

station manager, and three television reporters in state district court.

The originally drawn judge, Juanita Pavlick (Douglass), elected to recuse herself because of her marriage to the defendants' attorney, Milton Eugene Douglass. On March 20, 2002, Judge Brotherton signed an order transferring the case to Judge Sparkman. Plaintiff's First Amended Verified Complaint as of Right, para. 18. Judge Sparkman granted a partial summary judgment for the defendants on May 29, 2003, and a final summary judgment for the defendants on December 9, 2003. Exhibit A, Partial Summary Judgment; Exhibit B, Order; Plaintiff's First Amended Verified Complaint as of Right, para. 21. Tompkins did not appeal.

Tompkins alleges that during his state court trial, two or all three of the Defendants conspired to deny him his Due Process right to a timely notice and opportunity to appear regarding the selection or appointment of a new judge. Plaintiff's First Amended Verified Complaint as of Right, para. 24. He apparently believes "[h]ad Plaintiff herein been given notice and an opportunity to appear, he could and would have argued that only a non-local Texas judge would be able to adjudicate the state matter free of the pervasive public-opinion influence of the local Broadcast defendants." Plaintiff's First Amended Verified Complaint as of Right, para. 22. Tompkins seeks damages from Milton Eugene Douglass for violations of his civil rights under 42 U.S.C. § 1983 and for conspiracy under 42 U.S.C. § 1983. He also seeks declaratory judgment concerning the actions of Judge Brotherton and Judge Sparkman under 28 U.S.C. §§ 2201, 2202.

II. MOTION TO DISMISS

A. Standard of Review.

1. Lack of subject-matter jurisdiction.

A motion to dismiss under FRCP 12(b)(1) for lack of subject-matter jurisdiction seeks the dismissal of the lawsuit because the court lacks the authority to hear the dispute. *See generally U.S. v. Morton*, 467 U.S. 822, 828, 104 S.Ct. 2769, 2773 (1984) (subject matter jurisdiction defines the court's authority to hear a given type of case). Motions to dismiss for lack of subject-matter jurisdiction fall into two general categories: facial attacks and factual attacks. If an FRCP 12(b)(1) motion simply challenges the court's subject matter jurisdiction based on the sufficiency of the pleading's allegations, then the motion is a facial attack. *U.S. v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). In the facial attack, the district court will accept all material allegations of the complaint as true and construe them in the light most favorable to the nonmoving party. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974). If an FRCP 12(b)(1) motion denies or controverts the plaintiff's allegations of jurisdiction, then the motion is a factual attack. *Ritchie*, 15 F.3d at 598. The court of appeals reviews a dismissal for lack of subject-matter jurisdiction *de novo*. *Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168, 170 (5th Cir. 2002), *rev'd on other grounds*, 124 S.Ct. 1920 (2004).

2. Failure to state a claim upon which relief can be granted.

A motion to dismiss under FRCP 12(b)(6) for failure to state a claim upon which relief can be granted tests the formal sufficiency of the statement of claim for relief in the plaintiff's complaint. *Doe v. Hillsboro ISD*, 81 F.3d 1395, 1401 (5th Cir. 1996). It admits the facts alleged, but challenges the plaintiff's right to any relief based on those facts. *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir.

1995). A court should dismiss under FRCP 12(b)(6) only if it can determine with certainty that the plaintiff cannot prove any set of facts that would allow relief under the allegations in the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Appellate courts review dismissals under FRCP 12(b)(6) *de novo*. *Abrams v. Baker Hughes, Inc.*, 292 F.3d 424, 430 (5th Cir. 2002).

3. Declaratory judgment.

The district court has substantial discretion whether to decide or dismiss a declaratory judgment suit. *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57, 113 S.Ct. 2485, 2495 (1993). The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Aetna Cas. & Sur. Co. v. Sunshine Corp.*, 74 F.3d 685, 687 (6th Cir. 1996); *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994). It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed. If the court finds that a declaratory judgment is improper, it should dismiss the suit. *Preiser v. Newkirk*, 422 U.S. 395, 403-04, 95 S.Ct. 2330, 2335 (1975). District court decisions about the propriety of hearing declaratory judgment actions are reviewed for abuse of discretion. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-90, 115 S.Ct. 2137, 2144 (1995).

B. This Court lacks subject matter jurisdiction over Tompkins' claims.

Federal courts do not possess the authority to hear and determine every type of action. *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990). They can hear only those cases that are authorized by the Constitution and statutes enacted by Congress. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331 (1986). For the majority of cases brought under

federal-question jurisdiction, the suit “arises under” the federal law that created the cause of action. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808, 106 S.Ct. 3229, 3232 (1986).

The presence or absence of a federal question is governed by the “well-pleaded-complaint rule,” which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s complaint. *Rivet v. Regions Bank*, 522 U.S. 470, 475, 118 S.Ct. 921, 925 (1998). The well-pleaded-complaint rule confines the search for federal question jurisdiction to the face of the complaint. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10, 103 S.Ct. 2840, 2846 (1983). When evaluating federal question subject matter jurisdiction, the court must allow to proceed a claim containing the plausible assertion of a substantial federal right. *Hagans v. Lavine*, 415 U.S. 528, 537-38 (1974); *Bell v. Hood*, 327 U.S. 678, 682 (1946).

Tompkins’ complaint shows on its face that the instant controversy centers on a defamation lawsuit already adjudicated by a state court. He apparently seeks federal court review and intervention with a view toward somehow changing its outcome. But under the *Rooker-Feldman* doctrine,¹ “inferior federal courts do not have the power to modify or reverse state court judgments.” *Union Planters Bank Nat. Ass’n v. Salih*, 369 F.3d 457, 462 (5th Cir. 2004); *Reitnauer v. Texas Exotic Feline Found., Inc. (In re Reitnauer)*, 152 F.3d 341, 343 (5th Cir.1998). The Supreme Court has explained that “federal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify, or nullify final orders of state courts.” *Liedtke v. State Bar of Texas*, 18 F.3d 315, 317 (5th Cir.1994) (citations omitted). “If a state trial court errs the judgment is not void, it is to be reviewed and corrected by the appropriate state appellate court. Thereafter, recourse at the federal

¹ *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

level is limited solely to an application for a writ of certiorari to the United States Supreme Court.”
Id; See also *Carbonell v. Louisiana Dept. of Health & Human Resources*, 772 F.2d 185, 188-89 (5th Cir.1985).

Applying the *Rooker-Feldman* doctrine, the court does not have subject matter jurisdiction to hear this case. Tompkins is simply not entitled to judicial review of state court actions by a U.S. district court. This case should be dismissed under FRCP 12(b)(1).

C. Tompkins has failed to state a claim upon which relief can be granted.

Tompkins claims the originally drawn judge in his state court case, Juanita Pavlick (Douglass), elected to recuse herself. The gravamen of his complaint is that two or all three of the Defendants allegedly conspired to deny him his Due Process right to a timely notice and opportunity to appear regarding the selection or appointment of a new judge. Plaintiff's First Amended Verified Complaint as of Right, para. 24.

Under Texas law, judges may voluntarily recuse themselves "in proceedings in which their impartiality might reasonably be questioned." TEX.R.CIV.P. 18b. No motion by either party is a prerequisite to the application of this rule. This rule authorizes a voluntary recusal but does not speak specifically of the procedural steps to be utilized. TEX.R.CIV.P. 18a(c) also allows for voluntary recusal, in the event a party files a proper and timely motion, and sets out the necessary procedural steps the judge shall take to do so. "A fair reading of rules 18a and 18b suggests that in the event a judge should elect to recuse under either section, two things are required: (1) an order of recusal, and (2) a request to the administrative judge of the district to *assign* another judge to sit." *Dunn v. County of Dallas*, 794 S.W.2d 560, 562 (Tex.App.–Dallas 1990, no writ) (emphasis added). Since the new judge is *assigned* by the administrative judge, there is no absolute right to participate in a

hearing on the selection or appointment of a new judge. Tompkins cannot prove any set of facts that would allow relief under the allegations in his complaint.

Further, Judges are absolutely immune from liability for damages for judicial acts "that are not performed in clear absence of all jurisdiction, however erroneous the act and however evil the motive." *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir.), *cert. denied*, 492 U.S. 921, 109 S.Ct. 3250, 106 L.Ed.2d 596 (1989). Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial. *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218 (1967) ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly"). See also *Harlow v. Fitzgerald*, 457 U.S. 800, 815-819, 102 S.Ct. 2727, 2736-2739, 73 L.Ed.2d 396 (1982) (allegations of malice are insufficient to overcome qualified immunity). The case law makes clear that the immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. *Forrester v. White*, 484 U.S. 219, 227-229, 108 S.Ct. 538, 544-545 (1988); *Stump v. Sparkman*, 435 U.S. 349, 360, 98 S.Ct. 1099, 1106 (1978). Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Id.* at 356-357, 98 S.Ct. at 1104-1105; *Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335, 351 (1871).

The acts Tompkins complains of—reassigning a case to another judge and granting summary judgment in his state court case—are clearly judicial acts. Tompkins cannot recover damages from either Judge Brotherton or Judge Sparkman for these acts due to their judicial immunity. Any claims

for damages against Judge Brotherton or Judge Sparkman should be dismissed under FRCP 12(b)(6).

Admittedly, this absolute judicial immunity does not bar equitable relief such as declaratory judgment against state court judges. *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 1980-81, 80 L.Ed.2d 565 (1984); *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1219 (5th Cir.1991). Thus, further discussion is necessary to determine whether the Court should grant Tompkins' request for a declaratory judgment.

D. The Court should decline to render a declaratory judgment.

Since its inception, the Declaratory Judgment Act has been understood to confer discretion on federal courts in deciding whether to declare the rights of litigants. *Wilton v. Seven Falls Co.* 515 U.S. 277, 286 (1995). On its face, the statute provides that a court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). While a court enjoys substantial discretion, it is not unfettered. A court may not dismiss a request "on the basis of whim or personal disinclination." *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28-29 (5th Cir.1989) (quoting *Hollis v. Itawamba County Loans*, 657 F.2d 746, 750 (5th Cir.1981)).

In the instant case, Tompkins apparently seeks judicial declarations concerning purported errors on the part of two state trial court judges in his earlier lawsuit. Declaring the rights of the litigants in this litigation would not be appropriate for the following reasons:

First, a declaratory judgment action must satisfy the well-pleaded-complaint rule. *See City of Huntsville v. City of Madison*, 24 F.3d 169, 172 and n. 4 (11th Cir. 1994). As discussed above, Tompkins complaint does not establish the Court has subject-matter jurisdiction over his claims. In fact, it establishes the Court does not have this jurisdiction.

Second, a declaratory judgment is usually not available to resolve state law issues that are already pending before a state court. See *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942); *Magnolia Mar. Transp. Co. v. LaPlace Towing Corp.*, 964 F.2d 1571, 1581 (5th Cir. 1992). As the Supreme Court admonished in *Brillhart*, "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." 316 U.S. at 495, 62 S.Ct. at 1176.

Third, a declaratory judgment would not serve any useful purpose in clarifying and settling the legal relations in issue; it would only confuse the legal relations that have already been resolved. A declaratory judgment would not terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding; it would create uncertainty, insecurity, and controversy. Interference with the orderly and comprehensive disposition of the state court litigation in this case should be avoided. The discretionary jurisdiction conferred by the Declaratory Judgment Act should not be exercised by this Court in this case.

IV. CONCLUSIONS

The *Rooker-Feldman* doctrine precludes federal district court reviews of state court actions. Thus, this Court does not have subject matter jurisdiction to hear this case arising from the conduct of the Defendants in *Clampitt Retirement Community, et al. v. KAUZ-TV Channel 6, et al.* Judge Brotherton did not violate Tompkins' constitutional rights when he assigned Judge Sparkman to hear the *Clampitt Retirement Community* case. He merely followed the Texas Rules of Civil Procedure. Declaratory judgment would not be appropriate here because such a judgment would not serve any useful purpose in clarifying and settling the legal relations in issue and would not terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.

**IV.
PRAYER**

ACCORDINGLY, Defendant Judge Robert Brotherton and Defendant Judge Roy T. Sparkman pray that this Court grant their motion and dismisses all of Plaintiff is Larry Henry Tompkins' claims against them pursuant to FED. R. CIV. P. 12(b). Further, they ask this Court to decline rendering a declaratory judgment. Finally, they pray that this Court award them any other relief it deems just and proper.


Respectfully submitted,

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First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

DAVID A. TALBOT, JR.
Assistant Attorney General
Chief, Law Enforcement Defense Division



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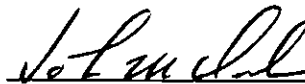
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I, JOHN M. ORTON, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing **DEFENDANT ROBERT BROTHERTON'S AND DEFENDANT ROY T. SPARKMAN'S MOTION TO DISMISS** has been served by placing same in the United States Mail on this the 14th day of September, 2004, addressed to:

Larry Henry Tompkins
1810 Ardath Ave.
Wichita Falls, TX 76301
Via CM/RRR 7003 1680 0001 3544 0682



JOHN M. ORTON
Assistant Attorney General

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

LARRY HENRY TOMPKINS,
Plaintiff,

v.

MILTON EUGENE DOUGLASS,
ATTORNEY, THE HON. ROBERT
BROTHERTON, AND THE HON.
ROY T. SPARKMAN,
Defendants.

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Civil Action No. 7-04CV-057-R

EXHIBIT A
PARTIAL SUMMARY JUDGMENT
CAUSE NO. 154,895-C(B)
MAY 29, 2003

FILED FOR RECORD
AT 2:00 o'clock P M

CAUSE NO. 154,895-C(B)

JUN 04 2003

CLAMPITT RETIREMENT
COMMUNITY, ET AL

VS.

KAUZ-TV CHANNEL 6, ET AL

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IN THE DISTRICT COURT OF
DONALDSON COUNTY, TEXAS
County Courts at Law
Wichita County, Texas

By _____ Deputy
WICHITA COUNTY, TEXAS



78TH JUDICIAL DISTRICT

PARTIAL SUMMARY JUDGMENT

BE IT REMEMBERED that the foregoing cause was transferred to this Court for trial and that the Court considered the Defendants' Motion for Summary Judgment and No Evidence Summary Judgment filed on March 26, 2002. The Court has received argument on the Motions for Summary Judgment and has considered the Summary Judgment evidence and Affidavits filed in support and in opposition thereof, as well as argument of counsel and now enters the following Partial Summary Judgment.

The Court hereby enters a Summary Judgment against the Plaintiffs on all of the claims concerning the 1998 broadcast for the reason that the same are barred by applicable statutes of limitations. Accordingly, all claims concerning the 1998 broadcast are dismissed.


RTT The Court enters a Summary Judgment against the Plaintiffs on all claims against the individual ~~Plaintiffs~~ *Dale Smith* *Howe Hill and Fred Childers* and those claims are dismissed. *RTT*

The Court enters a Summary Judgment against Retirement Hotels, Incorporated for all of its claims, and they are hereby dismissed.

The Court enters a Summary Judgment against all of the claims of Barbara Cagle and her claims are hereby dismissed.

The Motion of the Defendants for Summary Judgment against the claims of Larry Tompkins and his claims against Benedek Corporation, d/b/a KAUZ-TV Channel 6, ~~as well as~~ ^{RS} ~~his claims against Hoyt Hill and Fred Childers~~, are denied except as to any claims concerning the 1998 broadcast which is granted, the same having been dismissed.

ENTERED AND ORDERED this 29th day of May, 2003.



JUDGE PRESIDING

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

LARRY HENRY TOMPKINS,
Plaintiff,

v.

MILTON EUGENE DOUGLASS,
ATTORNEY, THE HON. ROBERT
BROTHERTON, AND THE HON.
ROY T. SPARKMAN,
Defendants.

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Civil Action No. 7-04CV-057-R

EXHIBIT B
ORDER
CAUSE NO. 154,895-C(B)
DECEMBER 9, 2003

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FILED FOR RECORD
AT 2:30 o'clock M

CAUSE NO. 154,895-C(B)

DEC 09 2003

CLAMPITT RETIREMENT
COMMUNITY, ET AL

VS.

KAUZ-TV CHANNEL 6, ET AL

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IN THE DISTRICT COURT OF
COUNTY COURTS AT LAW
Wichita County, Texas

By _____ Deputy

WICHITA COUNTY, TEXAS

ENTERED

78TH JUDICIAL DISTRICT

ORDER

BE IT REMEMBERED that on November 10, 2003, the Defendant's Motion for Summary Judgment and No Evidence Motion for Summary Judgment came on for hearing before this Court. Additionally, the Defendant presented its Motion to Strike the Affidavit of Charlie Steely. All matters were submitted to the Court for its consideration and the Court is of the opinion that the following Orders should be and they are hereby entered.

The Affidavit of Charlie Steely presented by the Plaintiff is stricken and considered of no effect.

The Defendant's various Motions for Summary Judgment are granted and the remaining claims of Larry Tompkins, Plaintiff, are dismissed with prejudice to the refile of same.

All costs of Court incurred in this cause are taxed against the party incurring such costs, for which let execution issue if not timely paid.

SIGNED on December 9, 2003.



JUDGE PRESIDING

COPY

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

LARRY HENRY TOMPKINS,
Plaintiff,

v.

MILTON EUGENE DOUGLASS,
ATTORNEY, THE HON. ROBERT
BROTHERTON, AND THE HON.
ROY T. SPARKMAN,
Defendants.

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Civil Action No. 7-04CV-057-R

ORDER

After considering Judge Robert Brotherton's and Defendant Judge Roy T. Sparkman's motion to dismiss for lack of subject-matter jurisdiction under FRCP 12(b)(1) and failure to state a claim upon which relief can be granted under FRCP 12(b)(6), the response, the pleadings, and arguments of counsel, the court GRANTS the motion and dismisses plaintiff's suit. Further, the court DENIES Plaintiff Larry Henry Tompkins' request for declaratory relief.

SIGNED on _____, 2004.

JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE