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October 13, 2004

Michael S. Gogola
2154 Wallace Drive
Waycross, Georgia 31503

Re: MICHAEL S. GOGOLA v. JAMES ZINGALE, et al.
Case No. 6:04-CV-417

Dear Mr. Gogola:

Enclosed in reference to the aforementioned case, for your records and review, please find the following documents.

1. Notice of Appearance of Counsel; and
2. Motion to Dismiss Amended Verified Complaint.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Lee", with a long horizontal flourish extending to the right.

Joseph H. Lee
Assistant Attorney General

JHL/km

Enclosures (2)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MICHAEL S. GOGOLA,

CASE NO. 2:04-CV-417

Plaintiff,

v.

JAMES ZINGALE, et al.,

Defendants.

-----/

NOTICE OF APPEARANCE OF COUNSEL.

Please take notice that the undersigned now makes an appearance as counsel for James Zingale, Executive Director of the Florida Department of Revenue, and the Florida Department of Revenue, specified Defendants in the subject cause. By so appearing, said Defendants do not waive, and expressly reserve any and all available defenses, including but not limited to those specified under Fla.R.Civ.P. 12. Please forward a copy of all pleadings and other documents to the undersigned.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General



/s/ Joseph H. Lee

Joseph H. Lee
Assistant Attorney General
Florida Bar# 0947040

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, was furnished via U.S. Mail to Michael S. Gogola, 2154 Wallace Drive, Waycross, Georgia 31503, on this the 13th day of October 2004.



/s/ Joseph H. Lee

Joseph H. Lee
Assistant Attorney General

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

MICHAEL S. GOGOLA,

CASE NO. 2:04-CV-417

Plaintiff,

v.

JAMES ZINGALE, et al.,

Defendants.

-----/

MOTION TO DISMISS AMENDED VERIFIED COMPLAINT.¹

COME NOW, James Zingale, Executive Director of the Florida Department of Revenue, and the Florida Department of Revenue, specified Defendants in the subject cause, by and through the undersigned counsel, who move to dismiss the Amended Verified Complaint, and in support thereof, submit the following Memorandum of Law.

MEMORANDUM OF LAW.

FACTS.

The facts, as alleged in the Amended Verified Complaint, are as follows.

¹ The prior Verified Complaint was served on James Zingale on or about September 29, 2004, though an Amended Verified Complaint has been submitted and accepted by the Court. Plaintiff has yet to produce a copy of the Amended Verified Complaint to either State of Florida Defendant, nor to the undersigned. On or about October 12, 2004, however, the undersigned checked PACER to determine the status of the cause, and discovered the Amended Verified Complaint. For judicial economy, the undersigned submits the subject pleading in response to the Amended Verified Complaint.

On November 6, 1969, Plaintiff and Sandra S. Gogola were married, and three children came from the marriage. At some unspecified time, Plaintiff and Sandra S. Gogola moved to Florida. On May 9, 1999, a Final Judgment of Dissolution of Marriage was entered by the state circuit court in the Twentieth Judicial Circuit. Pursuant to Chapter 61, Fla.Stat., the state court conducted an equitable distribution of property, and further ordered Plaintiff to pay alimony to Sandra S. Gogola until one of the parties dies, or until Sandra S. Gogola remarries.

Periodic orders of contempt have been entered for Plaintiff's failure to make such alimony payments, from time to time.

CLAIMS.

Plaintiff advances numerous claims herein, maintaining that Chapter 61, Fla.Stat., as relevant to alimony, is unconstitutional under the federal Constitution, as invading Plaintiff's right of privacy under the Fourteenth Amendment (Count I), as violating the Equal Protection provision of the Fourteenth Amendment (Count II), and as violating the Thirteenth Amendment's prohibition against involuntary servitude (Count III). Plaintiff further contends that Chapter 61, Fla.Stat., as relevant to alimony, is unconstitutional, under the Florida Constitution, as violating the right of privacy (Count IV), as violating equal protection (Count V), and as violating inalienable basic rights (Count VI). Plaintiff further claims that Chapter 61, Fla.Stat., as relevant to alimony, violates Florida Supreme Court precedent and public policy (Count VII).

DISCUSSION.

I. Standard.

This Court is bound, for the purposes of this review, to take the well-pleaded factual allegations in the complaint as true. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) *quoted in* Friedlander v. Nims, 755 F.2d 810, 813 (11th Cir. 1985) (*en banc*). In making this determination, the court must view the allegations of the complaint in the light most favorable to the plaintiff. Sofarelli v. Pinellas County, 931 F.2d 718, 721 (11th Cir. 1991). A motion to dismiss will be denied unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. Luckey v. Harris, 860 F.2d 1012, 1016 (11th Cir. 1988), *reh. denied en banc*, 896 F.2d 479 (11th Cir. 1989), *cert. denied*, 495 U.S. 957 (1990). In the case of a *pro se* action, moreover, the Court should construe the complaint more liberally than it would formal pleadings drafted by lawyers. Hughes v. Rowe, 449 U.S. 5, 9 (1980) (*per curiam*).

Although this Court must take all the factual allegations in the Complaint as true, this Court is not bound to accept as true a legal conclusion couched as a factual allegation. *See, e.g., Beck v. Interstate Brands Corp.*, 953 F.2d 1275, 1276 (11th Cir. 1992). “Although the court must take the allegations of the Complaint as true when reviewing motions to dismiss, we are not permitted to read into the Complaint facts that are not there.” Papasan v. Allain, 478 U.S. 265, 286 (1986).

II. The Rooker-Feldman doctrine mandates dismissal.

The Rooker-Feldman doctrine provides that federal courts, other than the United States Supreme Court, lacks jurisdiction to review the final judgments of state courts, if the following criteria are met: (1) the party in federal court is the same as the party in state court; (2) the prior state court ruling was a final or conclusive judgment on the merits; (3) the party seeking relief in federal court had a reasonable opportunity to raise its federal claims in the state court proceedings; and (4)

the issue before the federal court was either adjudicated by the state court or was inextricably intertwined with the state court's judgment. See Amos v. Glynn County Bd. of Tax Assessors, 347 F. 3d 1249, 1265 n. 11(11th Cir. 2003). Sub judice, all of the criteria are met: (1) the Plaintiff herein was a party to the prior state court dissolution of marriage proceedings; (2) the Final Judgment of Dissolution of Marriage was a final judgment on the merits of all related issues, including alimony; (3) Plaintiff had the opportunity to raise the federal challenges in state court from the time of dissolution throughout subsequent proceedings, involving, for example, Plaintiff's Motion for Declaratory Judgment and Injunctive Relief that Chapter 61 Post-dissolution Permanent Spousal Provisions Violate the Florida Constitution, see Amended Verified Complaint, Exhibit 3, and, indeed, Plaintiff argued at least some of the claims herein, see Amended Verified Complaint, Exhibit 3; and (4) the state court adjudicated the issues before the federal court, or the issues were inextricably intertwined with the state court's judgment as to the dissolution or marriage, or in subsequent orders directly relevant thereto, see Amended Verified Complaint, Exhibit 3.

Dismissal is proper.

III. In the alternative, the Court should abstain from presiding over the subject cause.

In the alternative to application of the Rooker-Feldman doctrine, the subject Defendants maintain that this Honorable Court should abstain from considering Plaintiff's Constitutional challenges herein, since the state court continues in presiding over dissolution of marriage proceedings, including, for example, modifications of alimony or support or contempt for failure to pay court ordered alimony or support payments. See Ankenbrandt v. Richards, 504 U.S. 689, 704-05 (1992).

IV. The challenges are without merit.

Initially, the subject Defendants note and emphasize that this Honorable Court should refrain from addressing the state law claims, to wit, arguments of unconstitutionality under the Florida constitution; an alleged violation of prior Florida Supreme Court case law; and a violation of Florida public policy, since such matters are uniquely of state law. If necessary, this Honorable Court should certify the state law questions to the Florida Supreme Court. See Mosher v. Speedstar Div. of AMCA Internat'l, Inc., 52 F. 3d 913, 916-17 (11th Cir. 1995).

Regardless, and for judicial economy, the subject Defendants argue as follows. As Chapter 61, Fla.Stat., is gender neutral, as to the award of alimony, the federal and state Constitutional challenges herein, based on equal protection, are utterly without merit. See In Re Crist, 632 F. 2d 1226 (5th Cir. 1980), cert. denied, 451 U.S. 986 (1981) and cert. denied, 454 U.S. 819 (1981). Moreover, no reasonable view of court ordered alimony suggests even a possible violation of the due process rights of privacy, under the federal and state Constitutions, since dissolution proceedings do not invoke the right to marry; that is, Plaintiff's view, to wit, that a dissolution of marriage, because it involves the termination of a marriage, invokes the same Constitutionally protected right as marriage, is fatally flawed. Similarly, the federal Constitution's prohibition against involuntary servitude, by and through the Thirteenth Amendment, is not even remotely invoked, simply because a possibility exists that an ex-spouse has to work to pay the court ordered payments. Finally, Chapter 61, Fla.Stat., does not violate public policy or prior case law, since the award of alimony may be proper, in given instances, and indeed, required by equity.

Dismissal is proper.

CONCLUSION.

For the reasons discussed above, the subject Defendants respectfully ask of this Honorable Court to dismiss the subject action.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General



/s/ Joseph H. Lee

Joseph H. Lee

Assistant Attorney General

Florida Bar# 0947040

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/s/ Joseph H. Lee

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Assistant Attorney General