IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 04-80669-CIV-ZLOCH/SNOW

STEWART GREENBERG,

Plaintiff,

v.

ELAINE GREENBERG;
JEFFREY COLBATH; and
FIFTEENTH JUDICIAL CIRCUIT
COURT OF FLORIDA, The Honorable
Edward Fine, Chief Judge,

Defendants.
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DEFENDANT JEFFREY COLBATH'S MOTION TO DISMISS VERIFIED COMPLAINT, MOTION FOR INJUNCTIVE RELIEF AND NOTICE OF REMOVAL

Defendant, JEFFREY COLBATH ("JUDGE COLBATH"),[1] by and through undersigned counsel and pursuant to Fed.R.Civ.P. 12(b)(6) and S.D.L.R. 7.1 hereby moves this Court for an order dismissing this action with prejudice. In support thereof, the Defendant states:

I. Plaintiff has failed to state a cause of action upon which relief can be granted under 28 U.S.C. §§1441 and 1446;

II. Plaintiff has failed to state a cause of action upon which relief can be granted under 42 U.S.C. §1983; and

III. Plaintiff has failed to state a claim for injunctive relief.

Statement of the Case

On or about July 16, 2004, the Plaintiff, proceeding *pro se*, filed the instant Verified

[1] The instant Motion to Dismiss pertains solely to Defendant JEFFREY COLBATH.

Complaint, Motion for Injunctive Relief and Notice of Removal against Defendant JUDGE COLBATH, in his official capacity as a Circuit Court Judge of the Fifteenth Judicial Circuit. The gravaman of the Plaintiff's complaint pertains to the action taken by JUDGE COLBATH, the presiding judge in the Plaintiff's marriage dissolution matter styled, Greenberg v. Greenberg, Case No: CD 98-9754 FZ, in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Specifically, the Plaintiff alleges that JUDGE COLBATH entered "[A] Contempt Order for arrearages of alimony . . . against [Plaintiff] on June 10, 2004 (Verified Complaint, paragraph 1) which resulted in an "impermissible infringement on U.S. Constitution, 14th and 4th Amendments, Due Process Clause, Right to Privacy, Right to be left alone, inter alia, pursuant to 42 U.S.C. 1983." (Verified Complaint, paragraph 10). Plaintiff avers federal jurisdiction based on 28 U.S.C. §§ 1331, 1441 and 1446 as well as 42 U.S.C. § 1983.

As relief, the Plaintiff seeks this Court to "take jurisdiction over this matter, . . . and enter an injunction barring . . . Jeffrey Colbath . . . from causing false and improper imprisonment of an individual." (Verified Complaint, page 3). Plaintiff seeks no monetary damages.

MEMORANDUM OF LAW

Standard for Motion to Dismiss

A motion to dismiss for failure to state a claim upon which relief can be granted is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus spare litigants burdens of unnecessary pretrial and trial activity. Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems Inc., 988 F.2d 1157 (8th Cir. 1993).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief. Conley v. Gibson, 355 U.S. 41 (1957). Factual allegations supporting a claim "must be plead with sufficient clarity so as to 'give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.'" Peterson v. Atlanta Housing Authority, 998 F.2d 904, 902 (11th Cir. 1993)(emphasis supplied by Circuit Court) quoting Conley, 355 U.S. at 47. All facts alleged in the complaint are accepted as true and construed in the light most favorable to the plaintiff except when the facts alleged are internally inconsistent or when they run counter to facts of which the court can take judicial notice. Gersten v. Rundle, 833 F.Supp. 906, 910 (S.D. Fla. 1993), cert. denied, 516 U.S. 1118 (1996)(citations omitted). Conclusory allegations and unwarranted deductions of fact need not be accepted as true. Id., citing Assoc. Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974). Moreover, when on the basis of a dispositive issue of law no construction of the factual allegations will support the cause of action, dismissal of the complaint is appropriate. Marshall County Bd. of Educ. v. Marshall County Gas Distr., 992 F.2d 1171, 1174 (11th Cir. 1993).

Finally, on a motion to dismiss for lack of subject matter jurisdiction, the Plaintiff has the burden of showing that he has properly involved the court's jurisdiction. Barton v. City of Eustis, 415 F.Supp. 1355, 1357 (M.D. Fla. 1976).

ARGUMENT

I. Plaintiff Failed to State a Cause of Action Upon Which Relief Can Be Granted Under 28 U.S.C. §§1441 and 1446

Title 28 U.S.C. §1441 provides in pertinent part that "any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." (emphasis added).

In the case at bar, the Plaintiff is seeking remove a civil action styled Greenberg v. Greenberg, Case No: CD 98-9753 FZ, which was filed in the Fifteenth Judicial Circuit. This civil action is the state divorce action between the Plaintiff and his former wife.

As clearly stated in 28 U.S.C. §1441, it is only the Defendant – and not the Plaintiff – who may remove an action from state court. Accordingly, the Plaintiff has wholly failed to state a claim for removal and the Verified Complaint should be dismissed in its entirety with prejudice.

II. Plaintiff Has Failed to State a Cause of Action upon Which Relief Can Be Granted Under 42 U.S.C. §1983

Standard for stating a claim under 42 U.S.C. § 1983

In order to state a cause of action under 42 U.S.C. §1983, the plaintiff must allege that the Defendant deprived him of a right, privilege or immunity secured by the Constitution of the United States, and that the Defendant acted under color of state law. Whitehorn v. Harrelson, 758 Ff.2d 1416, 1419 (11th Cir. 1985).

Civil rights actions require allegations which will indicate an affirmative causal connection between the state actor's conduct and the alleged deprivation of a constitutional right. See e.g. Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), cert. denied, 464 U.S. 932 (1983); McLaughlin v. City of LaGrange, 662 F.2d 1385 (11th Cir. 1981), cert. denied, 456 U.S. 979 (1982); Sims v. Adams, 537 F.2d 829, 831 (5th Cir. 1976). Plaintiff's Verified Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). JUDGE COLBATH submits that upon review of the Verified Complaint, it is obvious that this action is one that is "fatally flawed in [its] legal premise and destined to fail," and thus, is ripe for dismissal thereby sparing JUDGE COLBATH the "burdens of unnecessary pretrial

and trial activity." Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems Inc., 988 F.2d 1157 (8th Cir. 1993).

No Due Process Violation

Plaintiff has not been denied due process of law.[2] This Amendment provides two types of constitutional protection: substantive due process and procedural due process. McKinney v. Pate, 20 F.3d 1550, 1555 (11th Cir. 1994).

Substantive due process protects those rights that are considered "fundamental" or "implicit in the concept of ordered liberty." Id. at 1556 (quotation omitted). A violation of substantive due process is "complete when it occurs . . . the availability *vel non* of an adequate post-deprivation state remedy is irrelevant." Id. at 1557. Such fundamental rights are "protected against certain government actions regardless of the fairness of the procedures used to implement them." Id. (quotation omitted).

Though the Constitution does not explicitly mention a right to privacy, the United States Supreme Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.'" Carey v. Population Services Int'l., 431 U.S. 678, 684 (1977)(citation omitted). Specifically, the Supreme Court has found that the government may not unjustly interfere with personal decisions relating to marriage. Id. (citing Loving v. Virginia, 388 U.S. 1 (1967)(finding a state ban on interracial marriages unconstitutional). Unlike the statute in Loving which prohibited marriage between certain people, the Florida alimony statute does not in anyway prohibit marriage

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[2] The due process clause of the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV, §1.

or interfere with an individual's decision to marry. As such, the Plaintiff has failed to state a substantive due process claim.

As to procedural due process within the context of 42 U.S.C. §1983, the court must determine (1) whether the action deprives the individual of a constitutionally protected interest and (2) whether deprivation occurred without substantive or procedural due process. Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536 (11th Cir. 1994); see also Rymer v. Douglas County, 764 F.2d 796, 802 (11th Cir. 1985). In McKinney v. Pate, the Eleventh Circuit reiterated that "a procedural due process violation is not complete "unless and until the state fails to provide due process."" McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994)(quoting Zinermon v. Burch, 494 U.S. 113, 126 (1990)). "Only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitution violation actionable under Section 1983 arise." Id. Furthermore, the Eleventh Circuit has consistently held that a Section 1983 due process claim will not lie unless state procedures are inadequate. "The McKinney rule looks to the existence of an opportunity – to whether the state courts, if asked, generally would provide an adequate remedy for the procedural deprivation . . . If state courts would, then there is no federal procedural due process violation regardless of whether the plaintiff has taken advantage of the state remedy or attempted to do so." Horton v. Board of County Comm'rs of Flagler County, 202 F.3d 1297, 1300 (11th Cir. 2000).

In the case at bar, the Plaintiff fails to allege how, or even if, he sought redress from the June 10, 2004 contempt order and further, fails to allege how the state procedures were inadequate. Accordingly, the Plaintiff's claim for procedural due process violation fails as a matter of law.

III. Plaintiff Has Failed to State a Claim for Injunctive Relief

In order to prevail on a motion for a injunctive relief pursuant to Federal Rule of Civil Procedure Rule 65, the Plaintiff must demonstrate the following four factors: (1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. See McDonald's Corp. v. Robertson, 147 F.3d 1301 (11th Cir. 1998). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to the four requisites." Id. at 1306. A weakness in proof on one of the four factors may not be remedied by demonstrating corresponding strength in another; if a movant does not persuade the court that it meets the threshold on each factor, the court may not issue the injunction. United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983)(movant bears burden of persuasion on each factor in preliminary injunction test).

The purpose of injunctive relief is to prevent future harm. See United States v. Oregon Med. Soc'y, 343 U.S. 326, 333, 72 S.Ct. 690, 96 L.Ed. 978 (1952). In order to obtain injunctive relief, the movant must satisfy the court that there exists some cognizable danger of harm if the defendant is not enjoined from committing certain acts. See United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953) (party moving for injunctive relief must show "that there exists some cognizable danger of recurrent violation, something more than the mere possibility" of recurrence). Courts will not grant injunctive relief if the plaintiff demonstrates only a mere possibility of injury. See Baxter Int'l, Inc. v. Morris, 976 F.2d 1189, 1194 (8th Cir. 1992) ("[i]njunctive relief must be based on a real apprehension that future acts are not just threatened but

in all probability will be committed.").

In the case at bar, the Plaintiff's Verified Complaint clearly demonstrates that it was the Plaintiff's own actions which resulted in the issuance of the contempt order – namely that the Plaintiff was "in arrears on alimony in the amount of $99,486.64 as of April 30, 2004." Defendant contends that there is no potential threat to the Plaintiff, but assuming *arguendo* that the June 10, 2004 state court contempt order does pose a potential threat to the Plaintiff, any such potential threat of future harm to which the Plaintiff may be subjected is a direct result of his own actions and/or inactions. Plaintiff should not be permitted to flaunt his total disregard for state court orders only to thereafter allege vague and conclusory civil rights violations seeking this Court's intervention. Such a scenario is not the type of 'threat of future harm' to which injunctive relief is appropriate.

First, the Plaintiff must establish that there is a substantial likelihood of success on the merits. Plaintiff has failed to state any constitutional violation, this Court lacks subject matter jurisdiction over his claims, and his apparent displeasure with the contempt order issued by JUDGE COLBATH are not sufficient or indicative of demonstrating a substantial likelihood of success on the merits. Because the Plaintiff has not and cannot demonstrate a substantial likelihood of success on the merits, his claim for injunctive fails.

The Plaintiff wholly fails to establish the second and third factors, namely that irreparable injury will be suffered unless the injunction issues and that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party. Again, the June 10, 2004 contempt order was issued against the Plaintiff based upon his failure to pay court ordered alimony and as result, he has not and cannot demonstrate the second and third prongs necessary to state a claim for injunctive relief.

Finally, the Plaintiff must establish that the injunction, if issued, would not be adverse to the public interest. Here, the very issue of condoning the Plaintiff's blatant disregard and noncompliance with presumably valid state court orders (i.e., failure to pay alimony) and thereafter seeking federal civil rights remedies as a result of such noncompliance, is a direct and substantial threat to the public interest. This severe adverse public interest alone clearly demonstrates that the Plaintiff's request for injunctive relief must be denied with prejudice.

WHEREFORE, the Defendant, based upon the above stated facts and legal authority cited herein respectfully requests that this Court dismiss the Plaintiff's Verified Complaint with prejudice and for such other and further relief as this Court deems appropriate.

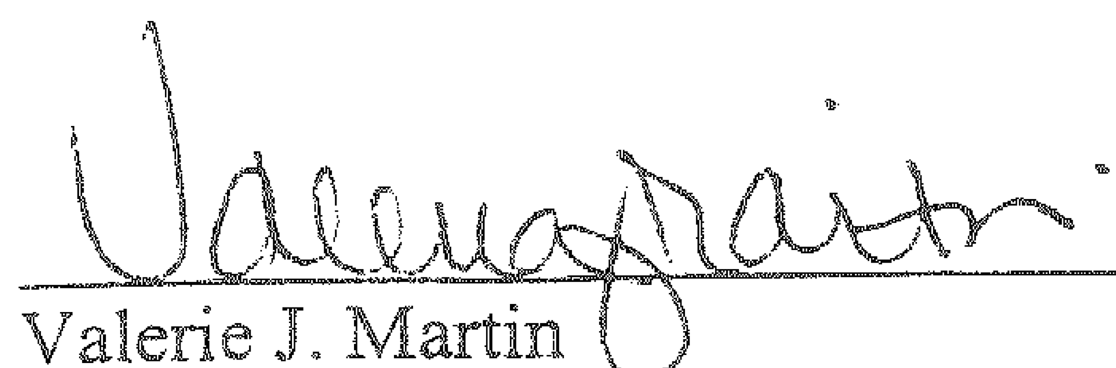
Respectfully submitted,
CHARLES J. CRIST, JR.
ATTORNEY GENERAL

Valerie J. Martin
Assistant Attorney General
Florida Bar No: 0124133

OFFICE OF THE ATTORNEY GENERAL
1515 N. Flagler Drive, Suite 900
West Palm Beach, FL 33401
Telephone: 561-837-5000
Facsimile: 561-837-5102

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Stewart Greenberg, Pro Se, 958 Eve Street, Delray Beach, Florida 33483 on this 12th day of August, 2004.



Valerie J. Martin