

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,

FIFTEENTH JUDICIAL CIRCUIT COURT OF FLORIDA,
The Honorable Edward Fine Chief Judge

Defendants.

**PLAINTIFF'S REPLY TO DEFENDANT CIRCUIT COURT'S MOTION TO DISMISS
VERIFIED COMPLAINT, MOTION FOR RELIEF AND NOTICE OF REMOVAL**

Plaintiff, STEWART GREENBERG, pro se, requests this court DENY Defendant Circuit Court's Motions to Dismiss Verified Complaint, Motion for Injunctive Relief and Notice of Removal. In support he states,

1. Plaintiff has pled all necessary elements for the causes of action alleged under 28 U.S.C. §§ 1441 and 1446.
2. Plaintiff has pled a cause for action for which relief can be granted under 28 U.S.C. §§ 1441 and 1446.
3. Plaintiff's pleading and inferences are sufficient to state a claim for injunctive relief.

Statement of the Case

Plaintiff accepts Defendant's version of the Statement of the case with the addition that the Plaintiff's initial pleadings included copies of the challenged Order on Former's Wife's Motion for Civil Contempt and the Final Judgment on Remand (of the Final Order of Dissolution of Marriage).

Plaintiff further notes Defendant's quote citing the pleadings is textually inaccurate but agrees that even with the inaccuracies it captures the essence, intent and spirit of the Plaintiff's pleading, i.e. "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)" Defendants Denial Motion page 2.

MEMORANDUM OF LAW

Defendant argues,

- a. Plaintiff fails to state a cause of action upon which relief can be granted under 28 U.S.C. §1441 and 1446,
- b. Plaintiff fails to state a cause of action upon which relief can be granted under 42 U.S.C. 1983.
- c. Plaintiff has failed to state a claim for injunctive relief.

Plaintiff argues,

- a. Pleadings contain all elements to support a claim and relief requested, i.e. declaratory and injunctive relief but no monetary damages under 28 U.S.C. § 1441 and 1446.
- b. Pleadings contain all elements to support a claim and relief requested, i.e. declaratory and injunctive relief but no monetary damages under 42 U.S.C. 1983.
- c. Pleading support injunctive relief as a remedy.
- d. As a pro se Plaintiff he is to be granted wide latitude to prevail in a Defendant Motion to Dismiss.

Standard for Motion to Dismiss

Plaintiff stipulates as to the applicability of the same case law offered by the Defendant to establish the standards to prevail on a motion to dismiss.

ARGUMENT

Adequacy of pleadings for a cause of Action under 28 U.S.C. 1441

Defendant argues that Plaintiff here is not the Defendant in the state court action therefore fails to state a cause of action for 28 U.S.C. 1441. This argument is aimed, not at a failure to state a cause of action, but at an alleged defect in compliance by the defendant with 28 U.S.C. 1441. Such an argument is a procedural not a jurisdictional argument.

28 U.S.C. 1441 Removal statute is a procedural and not a jurisdictional statute. The Defendant should have availed himself of 28 U.S.C. 1447 Remand provision if he felt there was a defect in the removal procedure pursuant to 28 U.S.C. 1441 or 1446..

Plaintiff broadly pled access to this court for removal under 28 U.S.C. 1441 Complaint Introduction). He later invoked this court's jurisdiction under 28 U.S.C. 1441 (a) (b). Because he also has a 42 U.S.C. 1983 cause of action the Plaintiff would have been even more accurate to invoke this court's jurisdiction under 28 U.S.C. 1441 (c), i.e.

"Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates."

When the Defendant, under color of state law, entered a contempt order, which the Plaintiff asserts denied him his civil rights it triggered a civil rights violation. The Plaintiff thus became an effective defendant in a ministerial action, i.e. a civil contempt proceeding. The Plaintiff thus removed the state action to this court based on this new 42 U.S.C. 1983 claim.

This additional claim, an alleged violation of a federal statute, invoked this court's jurisdiction under 28 U.S.C. 1441 (c) and 28 U.S.C. 1331.

28 U.S.C. 1441 is effectively a procedural statute. 28 U.S.C. 1441 (a) states,

"Except as otherwise expressly provided by Act of Congress, 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]

Remand, 28 U.S.C. 1447, would have been the proper method for the Defendant to challenge the instant claims. None of the Defendants chose to avail themselves of that

procedural remedy. See generally In Re: Bethesda Memorial Hospital, Inc. 123 F. 3d 1407 (11th Cir. 1997).

Adequacy of pleadings for a cause of Action under 42 U.S.C. 1983

All elements of a 42 U.S.C. 1983 cause of action are adequately pled.

“Sec. 1983. - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,...

The Defendant was acting under color of state law as a Judge of the Fifteenth Judicial Circuit Court of Florida when, in a ministerial role, he entertained a Civil Contempt Hearing and entered a Civil Contempt Order and an Arrest Order against the Plaintiff, thus denying him of his Liberty interest. These elements were pled. (C # 3, 7, 10, 11, 12).

The Plaintiff is entitled to put on evidence to support his claim that actions of the Defendant acting in a ministerial role impermissibly infringed his federal Liberty interest and 14th Amendment procedural due process rights.

The relief sought, a declaratory judgment on whether Florida Statutes “Dissolution of Marriage,” alimony provisions §61.08 et al, impermissibly infringe the federal Liberty Interest and the 14th Amendment Right to Privacy in the privacy protected zone of ‘personal decisions relating to marriage’ is relief within the power of this court and appropriate relief. He further seeks injunctive relief from imminent incarceration because of the improper Contempt and Arrest order which led to this claim. Again relief within the power of this court and appropriate

relief.

Substantive Due Process Violation

The essence of this claim is that Florida Statutes “Dissolution of Marriage,” alimony provisions, §61.08 et al, impermissibly infringe the Plaintiff’s federal liberty interest and 14th Amendment Right to Privacy in the Privacy Protected Zone of “personal decisions relating to marriage.”

Here the Defendant argues a standard to prevail on the merits instead of the standard to prevail on a Motion to Dismiss, i.e. standing and adequacy of the pleading to serve notice to the Defendants the claims, facts, injuries and relief they are expected to defend. The pleadings fulfill these requirements as noted in the cases cited under the Standard for a Motion to Dismiss section of this memorandum.

Were the plaintiff to argue more he would say there is a legally recognized Liberty Interest and a Right to Privacy in a Privacy Protected Zone of “personal decisions relating to marriage.” The scope of that zone is as yet undetermined. Cases offered on personal decisions relating to marriage ... to marry (Loving v. Virginia, 388 U.S. 1 (1967), inter alia) are recognized includes in the zone....Plaintiff seek to define the zone on the other end of the spectrum when a citizen makes the personal decision to dissolve a marriage. It cannot be disputed the plain meaning of the English of the words “personal decisions relating to marriage” encompasses personal decisions to marry, stay married, or to dissolve a marriage.

Procedural Due Process Violation

The Plaintiff’s pleadings allege the Hearing of Contempt, the Contempt Order and the Arrest Order are defective and impermissibly infringe his constitutional due process rights and

due process Right to Privacy.

Plaintiff need not exhaust his state court remedies to bring a federal question and 42 U.S.C. 1983 claim before this court.

Injunctive Relief

Plaintiff accepts the case law offered by the Defendants. Plaintiff argues each element,

Substantial likelihood of success on the Merits

The Contempt order at issue was attached to the Notice of Removal. Florida Law is lucid about the defects of the order which invalidate it. Because the challenged ministerial action of the Defendant is a defective order resulting in a civil rights claim it is more likely the Plaintiff will Prevail on the merits and thus Injunctive Relief is proper.

a. **The Contempt Order must contain a statement as to the source of funds available to purge the arrearage amount. Vazquez v Vazquez, 827 So. 2d 384 (Fla. 4th DCA 2002), Cleveland v. Cleveland, 841 So. 2d 648 (Fla. 4th DCA 2003).**

“The order did not make specific findings that the husband has the present ability to pay the purge and it did not identify the sources from which he could have obtained funds to comply with the temporary relief order. See Martyak v. Martyak, 873 So. 2d 405 (Fla. 4th DCA 2004); Vazquez v. Vazquez, 827 So. 2d 384 (Fla. 4th DCA 2002).” Hayden v Bieluch, Case No. 4d04-2789 (4th DCA Florida August 14, 2004)

The Hayden case simply reiterates two other 4th DCA cases (the Appellate Court for the Circuit Court in which the Defendant is a Circuit Court Judge). Another case, Cleveland, makes the same legal point.

b. **Hearing notice.** When Plaintiff is afforded the opportunity to put on evidence he will provide the court with the Notice of Contempt Hearing for the Contempt Order at issue. It will be shown to be defective.

FAILURE TO APPEAR AT THE HEARING

MAY RESULT IN THE COURT ISSUING A
WRIT OF BODILY ATTACHMENT FOR
YOUR ARREST. IF YOU ARE ARRESTED,
YOU MAY BE HELD IN JAIL UP TO 48
HOURS BEFORE A HEARING IS HELD.
Fla. Fam. L. R. P. 12.615(b).

The notice will be shown to not contain this notice as required by Fla. Fam. L.R.P.
12.615 (b) and Martyak v. Martyak, Case No. 4D04-4711 (4th DCA Fl. August 18, 2004).

These defects will show the Contempt and arrest Orders are defective, void and a
violation of the civil rights of the Plaintiff worthy of injunctive relief.

Irreparable harm

That an arrest order, albeit defective, can result in immediate incarceration represents
irreparable harm. This was pled at C. # 3, 10.

Injunctive relief v. Injury to movant

No harm whatsoever can accrue to the movant by granting injunctive relief for the
Plaintiff to be free from arrest and contempt proceedings while this court rules on the federal
question constitutional challenge to a state statute provision.

Against public interest

To not grant injunctive relief would in fact violate public policy. To incarcerate and
deny a citizen his Liberty predicated on a defective civil contempt hearing, order and arrest order
would be a flagrant violation of procedural due process.

Pro Se litigant

Because the Plaintiff is pro se, the Court has a higher standard when faced with a motion
to dismiss. White v. Bloom, 621 F.2d 276 makes this point clear and states:

“A court faced with a motion to dismiss a pro se complaint alleging violations of civil
rights must read the complaint’s allegations expansively, Haines v. Kerner, 404 U.S.

519, 520-21, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972), and take them as true for purposes of deciding whether they state a claim." Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263 (1972).

Moreover, "the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Bonner v. Circuit Court of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974)).

Thus, if this court were to entertain any motion to dismiss this court would have to apply the standards of White. Furthermore, if there is any possible theory that would entitle the Plaintiff to relief, even one that the Plaintiff hasn't thought of, the court cannot dismiss this case.

Prayer for Relief


WHEREFORE, Stewart Greenberg hereby requests this

- a. Court Deny Defendant's Motion to Dismiss Verified Complaint, Motion for Injunctive Relief and Notice of Removal, and
- b. Grant Injunctive relief to the Plaintiff against any state court action on these claims and prohibiting any state court from entertaining a Motion for or entering an Order for Contempt and or Commitment.
- c. Instruct all litigants to proceed.

PRAYER FOR RELIEF

WHEREFORE THE PLAINTIFF, STEWART GREENBERG, prays that the court hear his cry for relief, so that the actions of those granted the power to judge the People of Florida be uncloaked for the public to see so that neither the plaintiff, nor any Floridian be subjected to and fear false and improper imprisonment, and provide any other relief deemed appropriate.

Respectfully submitted,


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Dated: September 13, 2004

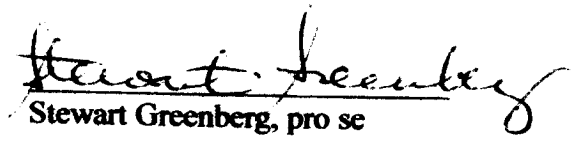
CERTIFICATE OF SERVICE

I hereby certify that on this 13th Day of September, 2004, I caused a true and accurate copy of the foregoing to be served in the manner specified on the following:

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