

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action N^o 05-cv-01858-EWN-MJW

SEAN HARRINGTON

Plaintiff,

v.

MADELINE WILSON, *et al.*

Defendants

PLAINTIFF'S REPLY IN SUPPORT OF HIS FORTHWITH MOTION FOR PRELIMINARY
INJUNCTION AND FOR SANCTIONS

COMES NOW, Plaintiff, Sean Harrington, for the purpose of filing the within Reply in Support of his *Forthwith Motion for a Preliminary Injunction* (document [52-1](#)) and for an Order pursuant to Fed.R.Civ.P. 12(f) striking portions of Defendant Wilson's responsive pleading (document [62](#)). As grounds therefor, Plaintiff states as follows:

INTRODUCTION

As Defendant Wilson argues and would have it, her unfounded claims that she is "petrified" of an individual, who has no criminal record and has not lived in Colorado for five years, and thereby procuring an automatically-granted *ex parte* temporary civil restraining order, should create for her either a *Rooker-Feldman* or *Younger* abstention bar to Plaintiff's claims against her in federal court. It is precisely this threat to the Court's continuing jurisdiction that forms the basis of Plaintiff's application for forthwith prospective injunctive relief.

Defendant Wilson did not contest Plaintiff's legal conclusions that the facts, as pleaded, fall within the exceptions of the Anti-Injunction Act or that the Anti-Injunction Act's express authorization is available to this Court to enjoin certain proceedings that threaten this Court's

jurisdiction or under the so-called relitigation exception. In fact, defendant made no mention, whatever, of the Anti-Injunction Act, but rather attempted to litigate the merits of her latest County Court temporary restraining order in the federal court.

Indeed, Defendant Wilson urges this Court to substitute itself as the finder of fact for her [now-dismissed] Denver County Court restraining order case (see Df. Response at pp. 2 – 5) but, on the other hand, maintains that this Court has no jurisdiction to entertain any of Plaintiff's claims against her. Wilson has lost sight of the fact that she is not the Plaintiff in this matter but, rather, the defendant. She has been summoned before this honorable Court to answer charges of abuse of process and malicious prosecution, among other things, and will have an opportunity to assert affirmative defenses, if any, in a Motion for Summary Judgment or to the jury at the time of trial of this matter.

Although it may be appropriate for this Court to give some consideration to the underlying factual background to the instant case, the only question before this Court is whether Ms. Wilson's sham petitioning activities are: designed to threaten this Court's jurisdiction; designed to harass Plaintiff during his infrequent trips into Denver for appearances before this Court; or otherwise prejudicial to the administration of justice. For reasons more fully set forth hereinbelow, Plaintiff does not believe that this Court is called to evaluate the merits of her restraining order allegations dating back to the spring of 2000.

1. Paragraphs 1 through 12 of Wilson's Response include statements that Plaintiff never authored;¹ statements made by Plaintiff under psychiatric and medication-induced duress; unsupported hearsay; hearsay within hearsay;² and material representations created from whole-cloth by Wilson. Accordingly, Plaintiff denies the allegations of Paragraphs 1 – 12 in their entirety, and should not here address each allegation (paragraph-by-paragraph), because the instant Motion is the inappropriate forum to argue the claims and defenses of said scandalous allegations,

¹ For example, unbeknownst to Defendant Wilson, Plaintiff possesses a digital recording that disproves defendant's account of the alleged telephone contact. Df. Response at ¶ 10.

² For example, Plaintiff, who has not lived in Colorado since 2000, has not once ever spoken with any Glendale police officer[s] at any time before or since then and, therefore, knows not how it is possible for a Glendale officer to "recognize . . . Mr. Harrington's past conduct of threats." Df. Response at ¶ 11.

which are impertinent to the relief sought in the instant Motion. Plaintiff moves this honorable Court to strike Paragraphs 1 -12 therefrom, pursuant to Rule 12(f).

2. Paragraphs 1 through 12 of Wilson's Response assert disputed and unsupported claims, which have never been subject to cross-examination and are not the findings-of-fact of any court.³ Wilson does not, however, dispute the abuse-of-process findings adverse to her as contained in the Report of the State court-appointed special advocate, as set forth in Plaintiff's motion at ¶ 3, p. 2.

3. Wilson's allegations consist of transactions, which she claimed occurred in the spring and summer of 2000 (nearly six years ago). Df. Response at ¶¶ 1 - 7. However, Wilson has already argued in her *Motion to Dismiss Plaintiff's First Amended Complaint* (document 38) that these matters were settled and are now barred by *res judicata*. *See id.* at pp. 7 – 9. In fact, Wilson stipulated to vacate her August 2000 restraining order, which had been predicated on these very same dated allegations. *See* § 3.3 of Stipulated Agreement (document 47). Defendant is, therefore, not only barred from seeking affirmative relief under the principles of *res judicata*, but is also barred by the Invited Error doctrine, because she has urged this Court to apply *res judicata* to Plaintiff's causes of action (that she misperceived were based on these same dated transactions). Under the Invited Error doctrine, when a party assumes a certain position in a legal proceeding, he may not thereafter, simply because his interests have changed, assume a contrary position. *Davis v. Wakelee*, 156 U.S. 680, 689. The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.

4. Defendant's Paragraphs 1 through 12 consist of hearsay (and hearsay about hearsay) statements allegedly made by police officers, court clerks and other officials, which alleged statements are unsupported by any trial transcripts or even by affidavit. Dft. Response at ¶¶ 1, 5

³ . . . with the notable exception of defendant's introductory paragraph, which quotes Judge Zimmerman's findings that were based on facts outside the pleadings (apparently, upon consultation with Judge Tidball, down the hall) and included in his Order of Dismissal, which the State defendants have subsequently asserted was issued only under Rule 12(b), rather than Rule 56 and Rule 12(c).

& 11. As Plaintiff has generally and specifically alleged in his Second Amended Complaint, Wilson's outrageous allegations have always been supported by nothing other than her own insistence as to the truth of the matters, asserted from within the role of complaining witness (thereby divesting her of the Absolute Privilege that she asserted in her Motion to Dismiss (see document [38](#) at pp. 2, 6-7)).

5. Defendants assertion of disputed facts having taken place in the calendar year of 2005 (Df. Response at ¶¶ 7 -12) include claims that: (1) never happened or are factually inaccurate; (2) were wildly taken out of context and grossly misrepresentative; (3) concern First Amendment protected petitioning and/or information gathering activities; (4) are all supported by no evidence offered by Wilson in support of her allegations; and (5) are the subject of Plaintiff's claims for relief against Wilson in the instant case (and, therefore, should be reserved for the jury).

Legal Discussion

The Noerr-Pennington doctrine

Wilson attempts to bolster her claims with a fatally defective argument that Plaintiff is vexatious because he has chosen to exercise his First Amendment petitioning right to report her continuing abuse-of-process to the Colorado Supreme Court Attorney Regulation Advisory Committee⁴ and to report her violation of Tex.Fam.Code § 42.003 (aiding and abetting the concealment of the whereabouts of a minor child) to the Texas Bar.⁵ Wilson's mere implication that Plaintiff's petitioning falls under the sham exception is without merit (if that is, indeed, what she is arguing).

⁴ Wilson's claim that Plaintiff's grievances to the ARC have, "been investigated and dismissed," is false. Plaintiff has alleged that there never was an investigation and a prosecution was never initiated. 1st Amd. Compl. at ¶ 276; see also 1st Amd.Compl. ¶ 282 & 1st Amd. Apdx. H at ¶ 17 (regarding letter from clerk of the Colorado Supreme Court representing that Plaintiff's claims had all been disposed of under C.R.C.P. 251.9).

⁵ Wilson is licensed in Texas, as well as Colorado.

Petitioning falls under the sham exception when it is devoid of a basis in either fact or law. *Scott v. Hern*, 216 F.3d 897, 915 (10th Cir. 2000) (citing *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361, 1369 (Colo. 1984) (*en banc*)). Although Wilson denies that she is abusing the legal system, she does not deny that Plaintiff has stated a valid legal claim (as to the grievance filed with the ARC) and she does not deny that she has aided and abetted in concealing the whereabouts of a minor child in violation of the Texas statute (as to Plaintiff's consideration of pursuing that particular state law claim). So long as Plaintiff acted to obtain a government outcome (a decision, action, or refusal to act) rather than intended to harass or create undue delay, his petitioning was not a sham. *See Columbia v. Omni Outdoor Advertising, Inc.*, 499 US 365 (1991).

Wilson also argues that Plaintiff is undermining this Court's order staying discovery because he has indicated an interest in pursuing the Texas state law claim against Defendants Ryan and Wilson in a Texas district court. Dft. Response at ¶ 16. Nothing prevents Plaintiff from pursuing the Texas state law claim, notwithstanding the pendency of the instant suit on the same or similar set of facts. *See Kline v. Burke Const. Co.*, 260 U.S. 226, 43 S.Ct. 79 (1922) (Where an action is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded, since a controversy is not a thing, and a controversy over a mere question of personal liability does not involve possession or control *in rem*, and an action brought to enforce such liability does not tend to impair or defeat the jurisdiction of the court in which the prior action is pending).

In *Omni, supra*, the Supreme Court indicated that, in order to achieve the goal of minimizing intrusion on the First Amendment, proceedings that attack constitutionally protected petitioning activities must be dismissed by the court on motion, except in those rare instances when a plaintiff can prove the defendant's petitioning comes within the "sham" exception. Defendant Wilson has not met this burden and, therefore, her allegations regarding Plaintiff's legitimate petitioning activities, which were based in both fact and law, should be stricken.

The Rooker-Feldman doctrine

Defendant's argument that *Rooker-Feldman* should apply in the context of Plaintiff's Motion for a Preliminary Injunction does not fall within any cognizable contours of the doctrine.

Defendant argues that she “obtained a [temporary] restraining order against plaintiff in Colorado state court. Plaintiff seeks to collaterally attack the state court's [temporary] restraining order against plaintiff.” Df. Response at p. 7. However, Plaintiff neither complains of an injury actually and proximately caused by the State court’s axiomatic *ex parte* grant of a TRO, nor does he seek retrospective relief therefrom. Rather, Plaintiff is being injured by Wilson’s **continuing** abuse-of-process and malicious prosecution, which prospectively hangs over Plaintiff and his family like an ominous cloud and, which represents a persistent threat to the continuity of this Court’s jurisdiction over the case. Plaintiff sought this relief even before Wilson filed for this fifth, duplicative restraining order, because her abuse has been so predictable. See ¶ 208 of Plaintiff’s *First Amended Complaint* (“If not enjoined or deterred by this court, Ryan & Wilson will, by their own admission, continue to engage in abuses of process”). *Id.*

Moreover, as Defendant concedes, *Rooker-Feldman*, “bars a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights.” Dft. Response at p. 6. However, by definition, an automatically-granted *ex parte* **temporary** restraining order, procured by Wilson in advance of Plaintiff’s out-of-state arrival to the federal courthouse, is not a final (appealable) order. A final order is defined as one that, “ends the litigation on the merits and leaves nothing further to do but execute the judgment.” *Catlin v. United States*, 324 U.S. 229, 233 (1945). A hearing in the matter had been set for December 20th 2005. Therefore, Plaintiff could not have been seeking what amounts to “appellate review.”

For the same reason (and also because Wilson did not appear at the December 20th hearing), it cannot be said to have been an issue “actually decided,” another *Rooker-Feldman* characteristic. When a state court does not pass on the merits of the claims, as here, the “actually decided” test is not satisfied. *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 707 (10th Cir. 2004) (“Plainly, the merits of [plaintiff's] claims for relief . . . were not actually decided by the Oklahoma district court, which performed no merits analysis and dismissed [plaintiff's] appeal due to defective service of process”).

Finally, all of Defendant Wilson's temporary restraining orders have been procured through fraud (the basis of Plaintiffs Eighth and Ninth Claims for Relief). *Rooker-Feldman* does not apply to such orders. See *Sun Valley Foods Co. v. Detroit Marine Terminals, Inc.*, 801 F.2d 186, 188-89 (6th Cir. 1986) (Although a federal district court has no authority to review final judgments of a state court in judicial proceedings, . . . [a] federal court "may entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident, or mistake.") (quoting *Insurance Co. v. State of North Carolina*, 397 F.2d 586, 589 (4th Cir. 1968)); *United States v. McDonald*, 161 F.3d 4 (4th Cir. 1998) ("...actions alleging fraud upon the court ... attack the validity of a prior judgment, based on the theory that, 'a decision produced by fraud on the court is not, in essence, a decision at all and never becomes final.' ") (quoting 11 Wright and Miller, Federal Practice and Procedure § 2870 at 409 (1995); *Kenner v. Commissioner of Internal Revenue*, 387 F.2d 689, 691 (7th Cir. 1968)); see also Restatement (Second) of Judgments § 70(1), which provides for relief if the judgment: "(a) resulted from corruption of or duress upon the court or the attorney for the party against whom the judgment was rendered, or duress upon the party, or (b) was based upon a claim that the party obtaining the judgment knew to be fraudulent"; and see *Robinson v. Volkswagenwerk AG, Herzfeld & Rubin, P.C.*, 56 F.3d 1268, 1274 n. 6 (10th Cir.1995) ("we do not ignore the fact that fraud may provide a basis for relief from *res judicata*").

The Anti-Injunction Act and the All Writs Act

In Plaintiff's *Forthwith Motion for Preliminary Injunction* (document [52-1](#)), he argued that where a federal court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. See *Kline v. Burke Const. Co.*, *supra*. Obstructive conduct should be prospectively enjoined by a federal court whenever it is reasonably evident that a litigant is attempting or is likely to interrupt the orderly administration of justice in the federal court. See *Pathways, Inc. v. Dunne*, 329 F.3d 108 (2nd Cir. 2003) (To the extent that an operator of residential facilities for psychiatric patients sought injunctive relief to be free from future lawsuits or other obstructive conduct by a homeowners as-

sociation and its members, the claims were not barred by the Anti-Injunction Act). The Seventh Circuit observed in *Barancik v. Investors Funding Corp. of N.Y.*:

Unless the applicability of the statutory bar is determined by the state of the record at the time the motion for an injunction is made, a litigant would have an absolute right to defeat a well-founded motion by taking the very step the federal court was being urged to enjoin. Under defendant's reading of the statute, if a federal court took time for fair consideration of the merits of a request for an injunction, the court would deliberate at its peril; its authority to rule on the pending motion could be terminated by the action of one of the litigants. We consider this possibility unseemly.

489 F.2d 933, 937 (7th Cir. 1973). But while the Seventh Circuit held that the federal court has power to issue an injunction in this situation, it noted that the fact that a state proceeding has actually been commenced is a matter that the federal court should take into account in exercising its discretion to grant or deny an injunction. *Id.* at 938.

Plaintiff here argued that, because he had not yet been served, no proceedings had yet commenced. Pf's Mtn. at fn. 1, p. 3. Because Wilson's fifth and latest case has been abandoned (effective December 20, 2005), that remains true. The Anti-Injunction Act, which bars a federal court from staying a pending state court proceeding (unless the action falls within one of the three exceptions), does not preclude injunctions against the **prospective** institution of state court proceedings, but only bar stays of suits already instituted. *Newby v. Enron Corp.*, 302 F.3d 295 (5th Cir. 2002); *B & A Pipeline Co. v. Dorney*, 904 F.2d 996, 1002 n. 15 (5th Cir. 1990); *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 131 (5th Cir. 1990); *Philip Morris, Inc. v. Harshbarger*, 946 F.Supp. 1067, 1074 (D.Mass.1996); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 903 F.Supp. 16 (D.C.N.C. 1995).

In *Newby, supra*, the Fifth Circuit held that the All Writs Act endowed federal courts [that otherwise had jurisdiction over parties] with the power to limit a litigant's ability to use multiple lawsuits as an improper means of gamesmanship and harassment. *Id.* at 303. There, the plaintiff was a party in a federal securities fraud proceeding arising from the alleged securities fraud of Enron Corporation and affiliated parties. As the case was pending, the plaintiff's counsel filed at least seven additional law-suits throughout the state of Texas, and each case consisted of less than 50 plaintiffs (so that it would not be subject to Securities Litigation Uniform Standards Act of 1998 (SLUSA)). The *Newby* court stated:

As we will explain, the district court had the authority to compel lawyers properly before it from engaging in vexatious and needlessly harassing maneuvers that challenged judicial efforts to maintain the cooperative approach essential to preserving fair processes in the complex suit in federal court. . . . Although the Anti-Injunction Act is an absolute bar to any federal court action that has the effect of staying a pending state court proceeding unless the action falls within a designated exception, it does not preclude injunctions against a lawyer's filing of prospective state court actions." (citing *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 132 & n.8 (5th Cir. 1990)). "[I]t is widely accepted that federal courts possess power under the All Writs Act to issue narrowly tailored orders enjoining repeatedly vexatious litigants from filing future state court actions without permission from the court." *Id.* (citing Charles Alan Wright, et al., Federal Practice and Procedure § 2942, at 63-64 (2d ed. 1995)). "We have upheld an order enjoining a litigant from bringing any future litigation on any claim arising from a particular fact situation, where the litigant was abusing the court system by harassing his opponents. *Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir.1980). That order applied to both federal and state suits, and, unlike the injunction at issue here, did not invite the plaintiff to seek leave of the court to file suit. Similarly, federal courts also have the inherent power to impose sanctions against vexatious litigants. In *Chambers v. Nasco, Inc.*, [501 U.S. 32 (1991),] the Supreme Court upheld the imposition of sanctions against a litigant who had repeatedly engaged in bad-faith conduct. [*Id.* at 46.] The inherent power is limited and interpreted narrowly,[*Id.* at 42] and its reach is limited by its ultimate source--the court's need to orderly and expeditiously perform its duties.[*Id.* at 43; *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1360 (5th Cir. 1978).] Nonetheless, the Court held that resorting to the inherent power to sanction a vexatious litigant was appropriate where there was repeated bad-faith conduct that was beyond the reach of the Federal Rules of Civil Procedure.[*Chambers v. Nasco, Inc.*, 501 U.S. 32, 50-51 (1991)"]

WHEREFORE, for the reasons more fully set forth hereinabove, Plaintiff respectfully requests a preliminary and continuing injunction enjoining Defendant Wilson from filing any further duplicative civil restraining order cases against this Plaintiff. Plaintiff also requests any other relief that this Court deems proper in the premises.

Respectfully submitted this 21st day of December, 2005:

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CERTIFICATE OF SERVICE

I hereby certify that on December 21st 2005, I served the foregoing *Reply in Support of Plaintiff's Forthwith Motion for Injunction and Sanctions* by electronic mail to the following ECF participants.

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