

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-01924 (DME-KMT)

KENNETH L. SMITH,

Plaintiff,

v.

HON. MICHAEL L. BENDER, et al.,

Defendants.

MOTION FOR THE TAKING OF JUDICIAL NOTICE

Comes now plaintiff Kenneth L. Smith (“Smith”), *in propria persona*, who states as follows:

INTRODUCTION

Virtually every fact of legal consequence pertinent to the matter before the Court is an indelible part of the public record and as such, amenable to judicial notice pursuant to Fed. R. Evid. 201. Under the Rule, the taking of judicial notice is mandatory when requested by a party, Fed. R. Evid. 201(d), and notice may be taken at any stage of the proceeding. Fed. R. Evid. 201(f).

Under normal circumstances, many facts of this nature can be established by agreement of the parties in pretrial orders or in admissions in a defendant’s response. However, as Smith is seeking immediate declaratory and injunctive relief, and the defendants have chosen to file motions to dismiss, prompt establishment of these facts is in order.

Smith’s overarching purpose in requiring this Court to judicially notice these facts is to facilitate (a) a fair and just settlement and (b) the issuance of rulings calculated to minimize damages.

A. Legal Foundation

This Court may take judicial notice of court documents and matters of public record. *See e.g., Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996); *Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1994); *see also, Southmark Prime Plus, L.P. v. Falzone*, 776 F.Supp. 888, 892 (D.Del. 1991). It may also take notice of the existence and content of applicable constitutional or statutory provisions. *E.g., United States v. Lyon*, 397 F.2d 505, 513 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968). However, the Court does not, by taking judicial notice of the documents, accept the other courts' findings of fact as true. *Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003).

A matter that is properly the subject of judicial notice may be considered along with the complaint when deciding a motion to dismiss for failure to state a claim, and this consideration does not render the motion a motion for summary judgment. *MGIC Indemnity Corp. v. Wesiman*, 803 F.2d 500, 504 (9th Cir. 1986).

ARGUMENT

Smith's goal here is to establish those facts which, even under the most expansive reading of the doctrine ever attempted by the common-law, vanquish the defense of absolute judicial immunity raised by the Justices.¹ Simply put, when a judge acts without jurisdiction, his or hers is not a judicial act, for which judicial immunity is not available. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978).

¹ Defendants Michael L. Bender, Nathan B. Coats, Gregory J. Hobbs, Jr., Rebecca Love Kourlis, Alex J. Martinez, Mary J. Mullarkey, and Nancy E. Rice are referred to herein as "the Justices," and along with John W. Suthers, and Friedrich C. Haines, "the State Defendants."

A. Conflicted Judges Are Required To Recuse Themselves Under Colorado Statute.

To that end, Smith asks that the Court start by taking judicial notice of Colo. Rev. Stat. (hereinafter, “C.R.S.”) § 16-6-201 which states, in pertinent part, that “Any judge who knows of circumstances which disqualify him in a case shall, on his own motion, disqualify himself,” and “A judge of a court of record shall be disqualified to hear or try a case if: []He is in any way interested or prejudiced with respect to the case, the parties, or counsel.” Clearly, if a judge of record is a party defendant in tort, he² is “interested” with respect to the case, and is thus disqualified by statute from hearing or trying a case. Moreover, Colorado statutory law clearly places the burden on the judge to disqualify himself.

Additionally, this Court can take judicial notice of the Colorado Supreme Court’s published opinion in *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam) -- not for what it alleges, *Wyatt, supra*, but for what the Justices admit. First, it is a *per curiam* decision, which means that every Justice has ‘blood on the hands.’ Second, the Justices admitted therein:

The court is the defendant in this action. By operation of the Rule of Necessity, Canon 3 F., if all or a majority of the court has a conflict, the court must nonetheless hear the case.

Smith v. Mullarkey, supra., slip op. at 2 & fn. 1. The Justices have thus admitted that they (a) had a conflict of interest with respect to the case and (b) were cognizant of it. These statements are admissions against interest, admissible under Fed. R. Evid. 801(d)(2).

B. Colorado Court Of Appeals Judges “May Serve In Any State Court.”

Next, Smith asks this Court to take judicial notice of C.R.S. § 13-4-101, which states, in pertinent part: “Judges of the court of appeals may serve in any state court with full authority as pro-

² As the pertinent statutes are all written using the male pronoun, that convention will be used throughout this motion.

vided by law, when called upon to do so by the chief justice of the supreme court.” The words, “may serve in any state court,” are of paramount legal interest here, as this Court must also take judicial notice of the well-known fact that the Colorado Supreme Court is a state court. This is essential to establishing the fact that as many as sixteen other judges can hear an appeal where a majority of the justices of the Colorado Supreme Court are conflicted.

Similarly, this Court must also take judicial notice of Canon 3 of the Colorado Code of Judicial Conduct -- but again, not for what it says, but for what it is. Specifically, it is not “law,” in any way, shape, or form. It is a hortatory judge-made proclamation, which has no legal force or effect whatever: “By the ‘adoption’ or ‘approval’ of the canons of ethics the court did not intend to give them the force or effect of law.” *In re Hearings Concerning Canon 35 of Canons of Judicial Ethics*, 132 Colo. 591, 604, 296 P.2d 465 (Colo. 1956). Clearly, it cannot override Colorado constitutional or statutory law, and it cannot even overturn a binding appellate decision -- to say nothing of the Fourteenth Amendment. U.S. Const. art. VI, § 2, cl. 2. The ‘Rule of Necessity’ is thus not what Canon 3 declares it to be but rather, what the courts, in their wisdom, have already said that it is.

C. Under Colorado Law, Initial Appeals Are In the Province Of the Court Of Appeals.

This Court must also take judicial notice of C.R.S. § 13-4-102(1), which states in pertinent part: “Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts [with specific listed exceptions].” Similarly, this Court can take judicial notice of Smith’s bate-stamped Notice of Appeal, Exhibit A, which, together with the fact that an opinion was issued in *Smith v. Mullarkey, supra*, establishes the fact that Smith perfected a timely appeal in that court. Moreover, as it contains a

true and correct copy of the final judgment in the trial court, as it necessarily must, this Court can take judicial notice of the fact that *Smith v. Mullarkey*, *supra*, was not a matter (a) where a statute had been declared unconstitutional, (b) concerned actions of the state public utilities commission, (c) involved water rights, (d) or a writ of habeas corpus, (e) originated in county court, (f) involved the death penalty, or (g) was a summary proceeding involving election law. See C.R.S. § 13-4-102(1)(a)-(h). Thus, this matter was properly placed before the Colorado Court of Appeals.

D. The Jurisdictional Question Was Separate From the Substantive Question

Next, this Court must take judicial notice of C.R.S. § 13-4-110(1)(a), which provides: “When a party in interest alleges, or the court is of the opinion, that a case before the court of appeals is not properly within the jurisdiction of the court of appeals, the court of appeals shall refer the case to the supreme court. The supreme court shall decide the question of jurisdiction in a summary manner, and its determination shall be conclusive.” This Court must also take notice of an Order dated Aug. 16, 2005, Exhibit B, in which the Colorado Court of Appeals asked the Colorado Supreme Court to decide jurisdiction thereunder, and the Order dated Aug. 18, 2005, Exhibit C, accepting jurisdiction on behalf of the Court.

If there was any colorable dispute as to whether the jurisdictional question and the substantive question were two separate matters, it was resolved conclusively by Exhibit C. Of course, the problem for the Justices is that, while the Court had jurisdiction over the jurisdictional question, the Justices themselves could not exercise it, as they were disqualified from hearing the question by operation of statute. The Court’s acknowledgement of these indisputable facts, coupled with its dutiful application of binding Colorado precedent, leads inexorably to the conclusion that the Order granting jurisdiction over Smith’s appeal is null and void.

E. Documents Relating To the Proposed Order

This Court is further expected to take judicial notice of Smith's First Amended Complaint in the District Court, City and County of Denver (Exhibit D) and the Order issued by Melanie Kopperud Backes dated Apr. 14, 1999. *Exhibit E*. The latter is mostly significant for what it admits: as the document is styled "SUPREME COURT, STATE OF COLORADO," acts of the Hearing Panel are purportedly acts of the Supreme Court of Colorado. The Court cannot sit in independent judgment of the acts of its own duly-authorized agents. *See In re Murchison*, 349 U.S. 133 (1957).

F. Compliance with D.C. COLO.LCivR. 7.1:

Opposing counsel have been contacted via e-mail, but have not indicated whether they will oppose this Motion as of this writing.

CONCLUSION

This Court should take judicial notice of the above-referenced statutes and documents.

Respectfully submitted this 28th day of January, 2008.

/s/ _____
Kenneth L. Smith, in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401-7044
Ph: (303) 526-5451
faster_pussycat@earthlink.net

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2008, I served a copy of the foregoing (including all attachments) upon all parties herein by depositing it in the United States Mail, postage prepaid, and addressed as follows:

Marc A. Bonora
c/o United States Dept. of Justice
1225 - 17th St., Suite 700
Denver, Colorado 80202

Christine Wilkinson
c/o Colorado Attorney General
1525 Sherman Street, 7th Floor
Denver, Colorado 80203,

the last known mailing address.

Kenneth L. Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-01924 (DME-KMT)

KENNETH L. SMITH,

Plaintiff,

v.

HON. MICHAEL L. BENDER, et al.,

Defendants.

ATTACHMENTS TO MOTION FOR THE TAKING OF JUDICIAL NOTICE

The following exhibits to be judicially noticed in the above-referenced motion are provided, in the order of their appearance therein:

- Notice of Appeal, *Smith v. Mullarkey*, No. 04-CA-949 (Colo.App. filed May 14, 2004) (Exhibit A);
- Order, *Smith v. Mullarkey*, No. 04-CA-949 (Colo.App. Aug. 16, 2005) (Exhibit B);
- Order, *Smith v. Mullarkey*, No. 05-SA-238 (Colo. Aug. 18, 2005) (Exhibit C);
- First Amended Complaint and Jury Demand, *Smith v. Mullarkey*, No. 02-cv-0127 (Denver Dist. Ct. filed Nov. 7, 2003) (Exhibit D), and
- Order, *In re Application of Smith*, No. LX 98-24 (Colo. Apr. 14, 1999) (Exhibit E).

The following statutes to be judicially noticed in the above-referenced motion are provided, in the order of their appearance therein:

- Colo. Rev. Stat. (hereinafter, “C.R.S.”) § 16-6-201 (all Lexis 2008);
- C.R.S. § 13-4-101;
- Colorado Code of Judicial Conduct, Canon 3;
- C.R.S. § 13-4-102(1), and
- C.R.S. § 13-4-110(1)(a).