

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-00089-WDM-BNB

DAN YATES,
Plaintiff,

v.

ANGELA ARKIN, in her individual and official capacities,
MARY J. MULLARKEY, in her official capacity,
DOUGLAS COUNTY, a municipality,
DORIS TRUHLAR, an individual,
TRUHLAR & TRUHLAR, LLC, a Colorado Law Firm,
ELODE BRODBECK, an individual,
THE CHILD & FAMILY CENTER, INC. a Colorado corporation,
CLAIRE PURCELL, in her individual and official capacities, and
LOUISE YATES, an individual,
Defendants,

DEFENDANTS ANGELA ARKIN AND MARY J. MULLARKEY'S
MOTION TO DISMISS THE AMENDED COMPLAINT OR, ALTERNATIVELY, TO
ABSTAIN PURSUANT TO THE YOUNGER ABSTENTION DOCTRINE

Defendants Judge Angela Arkin and the Chief Justice of the Colorado Supreme Court, Mary J. Mullarkey, in her official capacity, ("State Court Defendants") by and through their attorneys, the Office of the Colorado Attorney General and First Assistant Attorney General Friedrich C. Haines, move pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) to dismiss the Amended Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Alternatively, if this Court determines that the Amended Complaint states claims that it has jurisdiction to hear, then State Court Defendants request that it abstain from hearing Mr. Yates's claims pursuant to the *Younger* abstention doctrine. In support of this Motion, State Court Defendants state as follows:

INTRODUCTION

Underlying Litigation in the State Courts

Plaintiff Dan Yates is the Respondent and Defendant Louise Yates is the Petitioner in a hotly contested dissolution of marriage and child custody action that was filed in the Douglas County District Court on October 12, 2001. Originally, Judge Jack F. Smith and Magistrate Louis Gresh presided in the case. Defendant Doris Truhlar was appointed by the court as Special Advocate on child custody issues on or about October 18, 2001, and, on or about November 21, 2001, Defendant Dr. Brodbeck was appointed, pursuant to stipulation of the parties, as a child psychologist to perform services related to child custody issues. Following the retirement of Judge Smith, in mid 2003 Judge Arkin took over the case as presiding judge.

Trial of the matter was held before Judge Arkin on January 5, 8, and 15, 2004, and Judge Arkin read permanent orders in a telephone hearing on January 16 and 19, 2004. Among other things, Judge Arkin ordered that the parents should have equal parenting time but that Louise Yates should have ultimate authority to make parenting decisions. Dan Yates appealed Judge Arkin's orders to the Colorado Court of Appeals in Case No. 04CA1310, and his appeal is still pending.

Plaintiff's Claims

In his Amended Complaint, Mr. Yates brings claims under 42 U.S.C. §1983 that he alleges arise from a "conspiracy" among the Defendants to deprive him of rights under the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. He alleges

tort claims under state common law, including claims for intentional infliction of emotional distress or outrageous conduct and for abuse of process. He also brings a claim against private Defendants for alleged unjust enrichment.

Although the Amended Complaint is lengthy, with 73 paragraph allegations, Mr. Yates has avoided allegations of facts tending to support the existence of a conspiracy. Mr. Yates is not entitled to an inference of a conspiracy merely from the appearance of parties in the underlying litigation in Judge Arkin's court, or from the appointment of a Special Advocate and other providers of professional services, or because the outcome was not according to Mr. Yates's wishes or expectations. See *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998) (unreasonable to infer a conspiracy from meetings in the normal course among faculty and administrators of a law school). With the exception of an allegation that Defendant Doris Truhlar removed Mr. and Mrs. Yates's minor child from his custody while acting under the authority of Judge Arkin, Mr. Yates does not allege any facts to support his claims that his rights were violated or that he has suffered any harm. He does not allege an agreement among Defendants to accomplish any specific objective, lawful or unlawful, or that there was any meeting of the minds on an objective or course of action. See *Scott v. Hern*, 216 F.3d 897, 918 (10th Cir. 2000) (listing elements of a claim of conspiracy). Mr. Yates also does not allege any unlawful overt act in furtherance of a conspiracy.¹ *Id.*

¹ In paragraph 23 of the Amended Complaint, Mr. Yates alleges that Judge Arkin, Doris Truhlar, Claire Purcell, and Elode Brodbeck "engaged in joint action to obstruct the criminal prosecution of Louise Yates and/or nullify the separate and collateral effect of the criminal prosecution of Louise Yates." Mr. Yates does not allege any conduct that obstructed a

The Amended Complaint thus violates the requirement of Fed.R.Civ.P. 8(a)(2) to present “a short and plain statement of the claim showing that the pleader is entitled to relief.”

Claims that Mr. Yates asserts against Judge Arkin and Chief Justice Mullarkey include his First Claim for Relief for damages under Section 1983, his Second Claim for Relief for outrageous conduct or intentional infliction of emotional distress, and his Fourth Claim for Relief for abuse of process. Although he does not separately enumerate it, he also seeks declaratory judgment against Judge Arkin and Chief Justice Mullarkey that Defendants have violated his federal constitutional rights. All of these claims should be dismissed for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted.

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction Of Plaintiff’s Claims.

A. Standard under Fed.R.Civ.P. 12(b)(1).

Federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so. *Castaneda v. Immigration and Naturalization Service*, 23 F.3d 1576, 1580 (10th Cir. 1994). “A court lacking jurisdiction ... must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking.” *Basso v. Utah Power and Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A motion to

criminal prosecution, and he does not allege harm that supposedly resulted from such conduct. As any action to prosecute violations of criminal law is brought by the State in the name of the People, Mr. Yates presumably lacks standing to assert any claim arising from a failure to prosecute Mrs. Yates. *See Winslow v. Romer*, 759 F.Supp. 670, 673 (D.Colo. 2001) (individuals lack standing to bring claims under federal criminal laws).

dismiss for lack of subject matter jurisdiction is decided under Fed.R.Civ.P. 12(b)(1). *Anderson v. State of Colorado*, 793 F.2d 262, 263 (10th Cir. 1986). On a facial challenge to the allegations of subject matter jurisdiction, the court presumes the well-pled facts alleged in the complaint to be true, *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002), but “the court need accept as true only the plaintiff’s well-pleaded factual contentions, not his conclusory allegations.” *See Full Draw Productions v. Easton Sports, Inc.*, 85 F.Supp.2d 1001, 1005 (D.Colo. 2000), quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). Where there is a challenge to facts upon which subject matter jurisdiction is based, “no presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.” *Mortensen v. First Federal Sav. and Loan Ass’n.*, 549 F.2d 884, 891 (3rd Cir. 1977).

B. Mr. Yates lacks standing to bring his claims in his own name.

On May 31, 2005, Mr. Yates filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code, Case No. 05-23295-SBB. On that same date, Mr. Yates filed his sworn Schedule B of personal property, but, although his claims in this case had accrued as of that date, he failed to list the claims that are asserted in this action. On July 12, 2005, the Trustee in Mr. Yates’s bankruptcy case filed a No Asset Report stating that any non-exempt property listed by the debtor under 11 U.S.C. Section 521(1) has not been administered and

has no realizable value. Mr. Yates received a discharge of his debts on September 21, 2005, and the case was closed as a no-asset case on October 7, 2005.

As a result of his bankruptcy case, and because his claims against Defendants in this action were unscheduled and therefore did not revert to Mr. Yates when his Bankruptcy Case was closed, *Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991), Mr. Yates has lost all rights to enforce the claims asserted in the Amended Complaint in his own name. *Id.*, *Clark v. Trilinear Corp.*, Case No. 00-5020, 2000 WL 1694299 (10th Cir. November 13, 2000).² Because Mr. Yates lacks standing to bring claims in his own name, his claims must be dismissed.

C. All Claims Against Chief Justice Mullarkey And Claims Against Judge Arkin In Her Official Capacity Are Barred By The Eleventh Amendment To The United States Constitution.

Chief Justice Mullarkey is expressly sued in her official capacity only. [Amended Complaint, ¶12.] Judge Arkin is sued in her official capacity as well as in her individual capacity. [Amended Complaint, ¶10.] The Eleventh Amendment to the United States Constitution provides that the judicial power of federal courts does not extend to actions against states by private parties. E.g., *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (collecting cases). “[A]n official-capacity suit against a state officer ‘is not a suit against the official but rather is a suit against the official's office. As such it is no different from a suit

² Pursuant to 10th Cir.R. 36.3, *Clark v. Trilinear Corp.* is cited because it has persuasive value on this issue, which does not appear to have been addressed in a published Tenth Circuit opinion, and will assist this Court in its consideration of this Motion. A copy of the *Clark* opinion is attached.

against the State itself.” *Hafer v. Melo*, 502 U.S. 21, 26 (1991), quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Thus, the Eleventh Amendment bars Mr. Yates’s suit against the State Court Defendants insofar as they are sued in their official capacities.

It is well established that, absent an unmistakable waiver by the State of its Eleventh Amendment immunity, or an unmistakable abrogation of such immunity by Congress, the Eleventh Amendment provides absolute immunity from suit in federal courts for states and their agencies. *Atascadero State Hospital v. Scalon*, 473 U.S. 234, 241, 243 (1985); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978). The Supreme Court has held that Congress did not abrogate Eleventh Amendment immunity when it enacted §1983. *Quern v. Jordan*, 440 U.S. 332, 345 (1979); see *Ellis v. University of Kansas Med. Ctr.*, 163 F.3d 1186, 1196 (10th Cir. 1998). There is no allegation that Colorado has waived its Eleventh Amendment immunity, and the Eleventh Amendment therefore bars Mr. Yates’s claims. *Id.* Even were there no claims for damages asserted in the Amended Complaint, there is no exception to Eleventh Amendment immunity that would permit Mr. Yates to proceed on his claim for declaratory judgment. *Smith v. Plati*, 56 F.Supp.2d 1195, 1202 (D.Colo. July 22, 1999) (*Ex Parte Young* exception “may not be used to obtain a declaration that a state officer has violated Plaintiff’s federal rights in the past”), citing *Puerto Rico Aqueduct v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

Chief Justice Mullarkey and Judge Arkin are sued for damages and declaratory relief in their official capacities. Because the federal courts are courts of limited jurisdiction whose power does not extend to private suits against states or state officials, the official capacity claims of the Amended Complaint must be dismissed.

D. This Court also lacks subject matter jurisdiction of state-law tort claims against State Court Defendants.

Plaintiff's claims arise from acts of the State Court Defendants taken in the performance of their duties as a judicial officers and within the course and scope of their respective employment by the State of Colorado. Accordingly, claims that "lie in tort or could lie in tort" against Judge Arkin and Chief Justice Mullarkey are governed by the Colorado Governmental Immunity Act, C.R.S. §24-10-101, *et seq.*, and, in particular, C.R.S. §24-10-105, §24-10-109, and §24-10-118. As a jurisdictional prerequisite to bringing any claim against state employees, Mr. Yates must file a notice of claim with the Attorney General within 180 days after discovery of his injury. C.R.S. §24-10-109(1); §24-10-118(2). Mr. Yates does not allege compliance with the notice requirement, and no notice of claim has been filed with the Attorney General's Office. Mr. Yates was present for reading of permanent orders on January 16 and 19, 2004, and he knew of his alleged injury no later than at that time. Mr. Yates was required to file his notice of claim no later than July 19, 2004. Strict compliance with the 180 day notice requirement is mandatory and failure to file the notice within 180 days requires dismissal of claims. *East Lakewood Sanitation District v. District Court*, 842 P.2d 233, 236 (Colo. 1992). Therefore, Mr. Yates's Second and Fourth

Claims for Relief against the State Court Defendants must be dismissed for lack of subject matter jurisdiction.³

II. Mr. Yates's Claims Against The State Court Defendants Should Be Dismissed For Failure To State Claims Upon Which Relief Can Be Granted.

A. Standard of review under Fed.R.Civ.P. 12(b)(6).

In ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the Court must “accept all well-pleaded allegations as true, and draw all reasonable inferences in favor of Plaintiff.” *E.g.*, *Kamplain v. Curry County Bd. Of Comm'rs*, 159 F.3d 1248, 1250 (10th Cir.1998). However, “the court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations.” *Full Draw Productions v. Easton Sports, Inc.*, 85 F.Supp.2d 1001, 1005 (D.Colo. 2000) quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). A motion to dismiss should be granted where “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, 45-46, (1957); accord *Johansen v. City of Bartlesville*, 862 F.2d 1423 (10th Cir. 1988).

B. Judge Arkin is entitled to absolute judicial immunity.

Even if this Court has subject matter jurisdiction to hear Plaintiff's claims, Judge Arkin is entitled to absolute judicial immunity from claims for damages.⁴ The doctrine of

³ Even if Mr. Yates had filed the required notice of claim, his tort claims do not come within any of the waivers of sovereign immunity set forth in C.R.S. §24-10-106(1) (2005).

⁴ To the extent that claims for damages may be asserted against Chief Justice Mullarkey arising from her judicial functions, she is also entitled to absolute judicial immunity.

Judicial Immunity gives absolute immunity from suits for damages for acts or omissions of judges and their employees taken in connection with their judicial functions. *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983); *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978); *Pierson v. Ray*, 386 U.S. 547, 553 (1967). “A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he had acted in the ‘clear absence of all jurisdiction.’” *Stump* at 356-57, quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872). While Yates makes conclusory allegations that certain actions were taken by Judge Arkin without jurisdiction, he does not and cannot allege that she was without jurisdiction to hear his and Louise Yates’s dissolution of marriage action or that Judge Arkin took any action in the “clear absence of jurisdiction.” The doctrine of absolute judicial immunity “defeats suit at the outset.” *Horwitz v. State Bd. of Medical Examiners of the State of Colorado*, 822 F.2d 1508, 1512 (10th Cir. 1987). Plaintiff’s claims should therefore be dismissed under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

C. The Amended Complaint fails to state a claim for relief under 42 U.S.C. §1983.

The State Court Defendants adopt and incorporate the arguments of Defendants Doris Truhlar, Truhlar & Truhlar, and Claire Purcell contained in Argument Sections 1 and 2 at pages 3 to 8 of the Truhlar Defendants’ Second Motion to Dismiss For Failure to State a Claim, Dkt. #79, and Defendant Purcell’s Second Motion to Dismiss For Failure to State a Claim, Dkt. #80, both filed on May 17, 2006. In addition, State Court Defendants, insofar as

they are sued in their official capacities, are not “persons” within the meaning of 42 U.S.C. §1983. *Hafer*, 502 U.S. at 26, quoting *Will*, 491 U.S. at 71.

III. In The Alternative, This Court Should Abstain From Hearing Mr. Yates’s Claims.

Mr. and Mrs. Yates’s dispute over custody of their minor child is a matter that is continuing in the state courts. Judge Arkin’s orders in the underlying dissolution of marriage and child custody action are the subject of an appeal brought by Mr. Yates in the Colorado Court of Appeals, Case No. 04CA1310. While State Court Defendants assert that this action must be dismissed for lack of subject matter jurisdiction and for failure to state claims upon which relief can be granted, if this Court determines that Mr. Yates has stated claims that it has jurisdiction to hear, this Court should abstain from hearing those claims pursuant to the *Younger* abstention doctrine.

In his action in this Court, Mr. Yates is attempting to interfere with ongoing Colorado state court proceedings by seeking damages and declaratory relief against parties, judges, and court-appointed professionals regarding constitutional issues in the state court proceedings. This is the very interference in pending state court proceedings that the *Younger* abstention doctrine is intended to prevent. When a state forum provides an adequate avenue of relief, federal courts should not interfere by granting the sort of relief that Mr. Yates is requesting. *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1267 (10th Cir. 2002). *Younger* requires that a federal court refrain from hearing an action over which it has jurisdiction “when [the] federal proceedings would (1) interfere with an ongoing state judicial proceeding (2) that

implicates important state interests and (3) affords an adequate opportunity to raise the federal claims.” *Joseph A.* at 1267, quoting *J.B. v. Valdez*, 186 F.3d 1280, 1291 (10th Cir. 1999). Once a court finds that the required conditions are present, abstention is mandatory. *Joseph A.* at 1267; see, e.g., *Amanatullah v. Colorado Bd. of Med. Examiners*, 187 F.3d 1160, 1163 (10th Cir. 1999) (“*Younger* abstention is non-discretionary; it must be invoked once the three conditions are met, absent extraordinary circumstances.”).

This case meets all three of the *Valdez* criteria. There is an ongoing state judicial proceeding that implicates an important state interest in promoting the best interests of children domiciled in the State of Colorado. The state courts afford an adequate opportunity for Mr. Yates to raise his federal constitutional claims. Therefore, this Court should abstain from hearing claims raised in this action.

CONCLUSION

For the foregoing reasons and upon the foregoing authorities, Defendants Judge Angela Arkin and Chief Justice Mary J. Mullarkey request that this Court dismiss all claims against them for lack of subject matter jurisdiction and for failure to state claims upon which relief may be granted. Alternatively, they request that this Court abstain from hearing Mr. Yates’s claims.

RESPECTFULLY SUBMITTED this 5th day of June 2006.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing Defendants Angela Arkin And Mary J. Mullarkey's Motion To Dismiss The Amended Complaint Or, Alternatively, To Abstain Pursuant To The Younger Abstention Doctrine upon all parties herein by E-Filing through the Court's ECF system and by depositing same in the United States mail, first-class postage prepaid, this 5th day of June 2006 addressed as follows:

Dan Yates
PO BOX 731
Parker CO 80134

s/Friedrick C. Haines
