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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ANDREW FLORES, et al.,

Plaintiffs,

v.

GINA M. AUSTIN, et al.,

Defendants.

Case No. 20-cv-0656-TWR-DEB

SUPPLEMENTAL REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT WITH PREJUDICE BY DEFENDANT JUDGE JOEL R. WOHLFEIL

Crtrm: 3A (Schwartz)
Judge: The Honorable Todd W. Robinson

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I. INTRODUCTION

Judge Wohlfeil moved to dismiss Plaintiffs' First Amended Complaint ("FAC") under absolute judicial immunity and Eleventh Amendment immunity, for lack of standing, and because the FAC fails to state a viable claim for relief. Plaintiffs' untimely opposition completely fails to address some of the fatal deficiencies of the FAC or overcome any of the valid legal grounds to dismiss Judge Wohlfeil from this case.

First, Plaintiffs do not dispute, and therefore concede, that: (1) they lack standing to bring this action against Judge Wohlfeil; and (2) there is no valid, cognizable claim for declaratory relief. Additionally, the opposition further confirms that judicial immunity and Eleventh Amendment immunity bar this action because Plaintiffs do not dispute that this action solely arises from rulings Judge Wohlfeil made in his capacity as a state court judicial officer while acting within his jurisdiction. Moreover, Plaintiffs' contention that they are seeking prospective injunctive relief is meritless because the FAC seeks to vacate the final judgments entered in *Cotton I* and *Cotton II*, which constitutes retrospective relief.

Finally, the opposition wholly supports Judge Wohlfeil's argument that Plaintiff Flores ("Flores") fails to state a viable § 1983 claim because he has not alleged a cognizable due process violation.[1] Both the FAC and opposition acknowledge the alleged due process violations arise from Flores' disagreement with Judge Wohlfeil's rulings which, as a matter of law, do not give rise to a due process claim under § 1983. Thus, because the FAC is riddled with incurable fatal defects, this Court should dismiss this action against Judge Wohlfeil without leave to amend, and with prejudice.

II. ARGUMENT

A. Plaintiffs Concede They Lack Article III Standing and There is No Viable Declaratory Relief Claim.

Plaintiffs have the burden of alleging specific facts establishing standing. *Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002);

[1] Only Flores asserts this claim for relief against Judge Wohlfeil.

Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Plaintiffs' failure to allege Article III standing was raised in Judge Wohlfeil's Motion to Dismiss ("MTD") (*see* MTD, ECF No. 27-1 at 11-13), but Plaintiffs have completely neglected to address this fatal defect. Plaintiffs' failure to address the standing issue constitutes a concession that they lack standing. *Kroeger v. Vertex Aerospace LLC*, No. CV 20-3030-JFW(AGRX), 2020 WL 3546086, at *10 (C.D. Cal., June 30, 2020) (plaintiff concedes to motion to dismiss arguments by failing to address them); *Pour v. Wells Fargo Bank*, No. 20-CV-02447 SBA, 2021 WL 1134419, at *5 (N.D. Cal., Feb. 22, 2021) (motion to dismiss granted based in part on plaintiff's failure to address substance of defendant's motion to dismiss). Because the FAC fails to allege facts demonstrating that Plaintiffs have standing, and they have not offered any argument or facts that would cure this pleading defect, dismissal of this action is required.

The opposition also fails to address Judge Wohlfeil's arguments that the declaratory relief claims fails as a matter of law because it cannot stand as an independent cause of action and it improperly seeks to redress wrongs that have already occurred. (*See* MTD, ECF No. 27-1 at 10-11.) Because it is undisputed that the declaratory relief claim is not viable, it should be dismissed with prejudice.

B. <u>This Action is Barred by Absolute Judicial Immunity and Eleventh Amendment Immunity</u>.

The opposition makes an unsuccessful, lackluster attempt to circumvent the absolute judicial immunity afforded to Judge Wohlfeil in this matter as well as Eleventh Amendment immunity. (*See* MTD, ECF No. 27-1 at 6-10.) Despite Plaintiffs' apparent concession that the claims against Judge Wohlfeil are exclusively based on acts he performed in his official judicial capacity, while acting within his jurisdiction, Plaintiffs contend that immunity does not apply because they are seeking prospective injunctive relief. (Opp'n, ECF No. 31 at 8:1-13.) Plaintiffs' argument is misplaced and unsupported.

First, "injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. Here, Plaintiffs have not alleged

that declaratory relief was unavailable. Moreover, that declaratory relief was available is demonstrated by the fact that appeals were filed in both *Cotton I* and *Cotton II*. *See Weldon v. Kapetan*, No. 117CV01536LJOSKO, 2018 WL 2127060, at *4 (E.D. Cal. May 9, 2018) ("declaratory relief" under § 1983 is available where litigant has the ability to appeal the judge's decisions); *see also La Scalia v. Driscoll*, No. 10-CV-5007, 2012 WL 1041456, at *7 (E.D.N.Y. Mar. 26, 2012); *Krupp v. Todd*, No. 5:14-CV-0525, 2014 WL 5165634, at *4 (N.D.N.Y. Aug. 10, 2014). Although the appeals were unsuccessful, they were available and utilized in both state cases.

Additionally, Plaintiffs' conclusory assertion that the relief sought in the FAC is prospective in nature is contradicted by the allegations of the FAC. Here, the declaratory relief Plaintiffs seek is retrospective in that they request this Court to void the judgments in *Cotton I* and *II* and order a new trial with a different judge. *Krupp*, 2014 WL 5165634, at *4. Plaintiffs' assertion that they are seeking "prospective relief to prevent [Judge] Wohlfeil from presiding over Cotton I to which Plaintiffs will be a party once the Cotton Judgments are declared void" (Opp'n, ECF No. 31 at 8:12-13) is nonsensical, completely speculative, and improbable given that the judgments in *Cotton I* and *II* are final. Moreover, because this request "is intertwined with asking the court to declare that a past constitutional or statutory violation occurred," it is barred by the doctrine of absolute judicial immunity. *Krupp*, 2014 WL 5165634, at *4; *see also La Scalia*, 2012 WL 1041456, at *8 (requests "for judgment declaring that [a defendant's] past conduct violated federal law are retroactive in nature and, thus, are barred by the doctrine of absolute judicial immunity") (quoting *B.D.S. v. Southold Union Free School Dist.*, Nos. CV-08-1319, CV-08-1864, 2009 WL 1875942, at *20 (E.D.N.Y. June 24, 2009)).

Similarly, the Eleventh Amendment also precludes actions seeking retrospective relief, including actions which seek to adjudicate the legality of past conduct. *Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326, 1337 (11th Cir. 1999). As set forth above, the relief sought by Plaintiffs is purely retrospective. Accordingly, the Eleventh Amendment also bars this action.

C. The FAC Fails to State a Viable § 1983 Claim Against Judge Wohlfeil.

As set forth in the MTD, the FAC fails to state a viable § 1983 claim because it does not allege facts demonstrating that Flores was deprived of a cognizable protected property interest or that he was denied adequate procedural protections. (MTD, ECF No. 27-1 at 13-14.) Although the opposition is disjointed and difficult to follow, Flores appears to contend that: (1) he has a cognizable property interest as the successor-in-interest to Richard Martin; and (2) he has not been afforded procedural protections because he "has not had his day in court" in that Judge Wohlfeil ruled again him on his motion to intervene, was biased against him, and the judgment was based on an illegal contract. (Opp'n, ECF No. 31 at 5-9.)

As an initial matter, Flores' purported "property interest" is unclear and completely speculative. In order to assert a due process claim, a plaintiff must have a "legitimate claim of entitlement … defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576 (1972). The FAC alleges that Flores is the "successor-in-interest" to Richard Martin, who "was an equitable owner of the Property" in that he "purchased the Property after Cotton canceled the agreement with Geraci." (FAC, ECF No. 17 at ¶¶ 153, 182.) Flores cites no authority to support his novel assertion that an individual who is the successor-in-interest to a disputed equitable property claim, that was the subject of state court litigation, in which a final judgment has been entered, constitutes a "legitimate claim of entitlement" for purposes of a due process claim.

Moreover, even if Flores could allege a cognizable property interest, the FAC clearly shows that Flores was provided due process procedural protections in that he filed a motion to intervene, which was ruled upon.[2] (FAC, ECF No. 17 at ¶ 182.) In addition, Flores could have sought review of the denial of his motion to intervene by filing an

[2] Because Flores was not a party in *Cotton I,* he cannot predicate his due process claims on a disqualification motion he did not file, the rulings related to the legality of the contract or the judgment in *Cotton I.*

appeal. *Bame v. City of Del Mar*, 86 Cal. App. 4th 1346, 1363 (2001) ("An order denying intervention is directly appealable because it finally and adversely determines the right of the moving party to proceed in the action.").

Finally, Flores' reliance on *Le Grand v. Evan*, 702 F.2d 415 (2d Cir. 1983) to support his argument that he was denied procedural protections is misplaced. *Le Grand* concerned the court clerks' refusal to accept various documents for filing. *Id.* at 416. Flores contends the finding that Judge Wohlfeil was not properly served with the disqualification motion is equivalent to rejecting motions for filing. This contention is meritless because: (1) Cotton filed the motion, not Flores and, (2) unlike *Le Grand*, the disqualification motion was accepted for filing and ruled upon. (FAC, ECF No. 17 at ¶¶ 187 & 189.) Clearly, Flores cannot allege that he suffered a due process violation and his § 1983 should therefore be dismissed.

III. CONCLUSION

As set forth above and in the MTD, this action against Judge Wohlfeil is precluded as a matter of law pursuant to the doctrines of absolute judicial immunity, Eleventh Amendment immunity, because Plaintiffs lack standing, and the FAC fails to allege a cognizable claim for relief. These defects cannot be cured by amendment. Accordingly, Judge Wohlfeil respectfully requests this Court to grant his motion to dismiss, without leave to amend, and enter a judgment of dismissal, with prejudice, in his favor.

Respectfully submitted,

SUSANNE C. KOSKI
Superior Court of California, County of San Diego

DATED:

May 7, 2021

By: __s/ Carmela E. Duke_____
CARMELA E. DUKE
Attorneys for Defendant, The Honorable Joel R. Wohlfeil, Judge of the Superior Court of California, County of San Diego

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PROOF OF SERVICE

[CivLR 5.4(c)]

I, PUI KATSIKARIS, declare that: I am over the age of eighteen years and not a party to the above-referenced case; I am employed in, or am a resident of, the County of San Diego, California where the mailing occurs; and my business address is: 1100 Union Street, San Diego, California.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

On May 7, 2021, I served the following document(s): **SUPPLEMENTAL REPLY IN SUPPORT OF DEFENDANT JUDGE JOEL R. WOHLFEIL'S**

MOTION TO DISMISS FIRST AMENDED COMPLAINT WITH PREJUDICE by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

N/A

I then sealed each envelope and deposited said envelope(s) in the U.S. Postal Pick up box, this same day, at my business address shown above, following ordinary business practices.

Additionally, pursuant to the Electronic Case Filing Administrative Policies and Procedures Manuel of this Court, Section 2.d.2, service has been effected on the parties below, whose counsel of record is a registered participant of CM/ECF, via electronic service through the **CM/ECF system:**

Andrew Flores Email: afloreslaw@gmail.com
(Plaintiff and Attorney for Plaintiffs Amy Sherlock and Minors T.S. and S.S.)

Gregory Brian Emdee Email: gemdee@kmslegal.com
(Attorney for Defendants Michael Weinstein, Scott Toothacre, Elyssa Kulas, Rachel M. Prendergast, and Ferris & Britton APC).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 7, 2021

PUI KATSIKARIS