IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO ex rel KENNETH GOMEZ,

Plaintiff,

vs. **No. CIV 10-00594 JP/LFG**

ELEVENTH JUDICIAL DISTRICT COURT,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S
VERIFIED MOTION FOR SUMMARY JUDGMENT UNDER RULE 56

Defendant, the Eleventh Judicial District Court, through its counsel Robles, Rael & Anaya, P.C. (Luis Robles, Esq.), hereby responds to Plaintiff's Motion for Summary Judgment Under Rule 56, *filed July 19, 2010 [Docket No. 33]* and Plaintiff's Memorandum Brief in Support of Verified Motion for Summary Judgment Under Rule 56, *filed July 19, 2010 [Docket No. 34]*:

Plaintiff has failed to establish that there is no genuine issue of fact or that he is entitled to judgment as a matter of law.

BACKGROUND

On June 16, 2010, Plaintiff, Kenneth Gomez, filed his Second Amended Complaint to Void Judgments, and for Writ of Quo Warranto ("Second Amended Complaint"). A copy of the Second Amended Complaint is attached to Defendant's Supplemental Exhibit to Notice of Removal, *filed June 28, 2010 [Docket No. 8]*, as *Exhibit A*. The factual substance of the Second Amended Complaint is an allegation that the judges of the Eleventh Judicial District Court have not been

bonded as required by New Mexico law. The Second Amended Complaint does not make allegations against the Defendant based on the Defendant's relationship with undersigned counsel or with judges of this Court and of the United States Court of Appeals for the Tenth Circuit.

On July 19, 2010, Plaintiff filed his Verified Motion for Summary Judgment under Rule 56 *[Docket No. 33]* ("Summary Judgment Motion") and his Memorandum Brief in Support of Verified Motion for Summary Judgment under Rule 56 *[Docket No. 34]* ("Memorandum Brief"). Summary Judgment Motion, p. 1, a. Plaintiff's summary judgment arguments are opaque. As best as Defendant is able to determine[1], they are as follows:

1. Judges of this Court and of the Tenth Circuit are engaged in a criminal conspiracy with the undersigned counsel and with Defendants. Summary Judgment Motion, p. 1, a; Memorandum Brief, pp. 1, 3, §§ I.b, III.
2. The undersigned was aware of Plaintiff's slurs that members of this Court were engaged in a criminal conspiracy from prior lawsuits. Summary Judgment Motion, p. 2, b.
3. Defendant does not have standing to defend this suit because while Defendant is the "real party in interest" Defendant lacks "capacity" to be sued. Summary Judgment Motion, p. 2, c; Memorandum Brief, pp. 1, 3, §§ I.a, III.
4. In removing the case, Defendant conceded that Plaintiff's civil rights have been violated. Memorandum Brief, pp. 1-3, §§ I.c - II.g.

[1] If this Court identifies important issues in Plaintiff's summary judgment arguments that Defendant has overlooked, Defendant asks that this Court order supplemental briefing.

5. This Court lacks jurisdiction. Memorandum Brief, p. 3, § III.

STANDARD OF REVIEW

Fed. R. Civ. P. 56(c)(2) states that summary judgment should be rendered "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact" and if "the movant is entitled to judgment as a matter of law." Thus the movant "bears the initial responsibility of informing the district court of the basis for its motion" and of "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,'" which it believes demonstrates the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323 (quoting Fed.R.Civ.P. 56(c)). Only if movant has made a prima facie showing that the material facts are not in dispute does the burden shift to the non-moving party to establish the existence of a genuine issue for trial. Matsushita Electric Industrial Co. v. Zenith Radio Corp, 475 U.S. 574, 586-87 (1986).

ISSUES OF FACT

Summary judgment requires the movant to affirmatively establish that "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c)(2), see also Celotex, 477 U.S. at 323. Plaintiff has not done so. Far from establishing that his facts are undisputed, Plaintiff has mostly failed to state the facts relevant to his summary judgment arguments at all.

The pleadings in this case do not establish that the facts are undisputed. Defendant's Answer, *filed June 28, 2010 [Docket no. 9]*, denied Plaintiff's allegations. On-file discovery and disclosures do not establish that the facts are undisputed. No such material is on file. Plaintiff's affidavits do

not establish that the facts are undisputed. Plaintiff has not filed any affidavits. The Summary Judgment Motion is "verified" and Plaintiff signed it before a notary.

Even assuming that this converts the Summary Judgment Motion into an affidavit in some sense, it does not convert the Summary Judgment Motion into an affidavit for summary judgment purposes. A summary judgment affidavit "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed. R. Civ. P. 56(e)(1). The Summary Judgment Motion does not meet any of these requirements. Most damningly, it does not affirmatively state that Plaintiff is competent to testify to the matters stated. See Federal Deposit Ins. Corp. v. Oaklawn Apartments, 959 F.2d 170, 175 n.6 (10th Cir. 1992) (stating that Rule 56(e) affidavits require an "affirmative showing of competency"); Avery v. Norfolk & W. Ry. Co., 52 F.R.D. 356, 359 (N.D. 1971) (holding that "verified pleadings seldom meet the standards of a 56(e) affidavit. Rule 56(e) provides that both supporting and opposing affidavits . . . show affirmatively that affiant is competent to testify." (citations omitted)); Glenborough New Mexico Associates v. Resolution Trust Corp., 802 F.Supp. 387, 395-96 (D.N.M. 1992) (striking an affidavit for failure to affirmatively state that the affiant was competent). The Memorandum Brief is not even "verified." Therefore, Plaintiff has not met its burden of showing that the material facts are undisputed.

In any case, the facts relevant to Plaintiff's summary judgment arguments are largely not even asserted in the Summary Judgment Motion and the Memorandum Brief, or elsewhere in Plaintiff's copious pleading. To take just one example, Plaintiff's allegation that judges of this Court have broken federal law and are engaged in criminal conspiracy requires factual evidence that the judges

had knowledge, intent, and committed specific overt acts. For a fuller discussion, see Defendants' Amended Reply in Support of Removal, *filed July 16, 2010 [Docket No. 22]*, pp. 16-19, § III. B. Plaintiff has not established or even alleged these factual predicates.

Plaintiff's Summary Judgment Motion must be denied because of its complete failure to identify the relevant facts and show with affidavits or other admissible evidence that these facts are not in dispute.

JUDGMENT AS A MATTER OF LAW

Plaintiff has also failed to show that he is established to judgment as a matter of law.

I. PLAINTIFF'S ARGUMENTS ARE NOT BASED ON THE ALLEGATIONS IN PLAINTIFF'S COMPLAINT.

The summary judgment procedure is meant to decide the claims raised in the pleadings. Yet the majority of Plaintiff's summary judgment arguments are not directed towards the claims raised in the pleadings. Plaintiff's slurs against members of this Court and against the undersigned are not part of the merits of this suit. Plaintiff cannot amend his complaint via the summary judgment process. See Gilmour v. Gates, McDonald and Co., 382 F.3d 1312, 1314 (11th Cir. 2004) (explaining that the liberal pleadings standard "does not afford plaintiffs with an opportunity to raise new claims at the summary judgment stage"). Plaintiff's arguments concerning the undersigned and judges of this Court and of the Tenth Circuit must be rejected on summary judgment on the grounds that they are outside the Complaint.

II. PLAINTIFF IS REPEATING CLAIMS THAT DEFENDANT HAS ALREADY REBUTTED.

Plaintiff has attacked the integrity of this Court and of the undersigned in other filings.

Defendant has explained the defects in Plaintiff's attack in its responses to those filings and now adopts those explanations by reference. Defendant's Amended Reply in Support of Removal, *filed July 16, 2010 [Docket No. 22]*, pp. 16-19, § III. B, Defendant's Response to Motion to Vacate Attorney-Client Privilege, *filed August 2, 2010 [Docket No. 39]*.

Plaintiff has tried to claim in prior filings in this litigation that the fact that he has raised similar allegations in other litigations entitles him to various kinds of relief in this litigation. Defendant has explained the defects in Plaintiff's claim in its prior filings in this litigation-principally, that Plaintiff never received a favorable ruling in those other litigations. See Defendant's Response to Plaintiff's Motion to Strike Defendant's Answer, *filed July 19, 2010 [Docket No. 35]*, pp. 10-11. Defendant now adopts those explanations by reference.

Plaintiff has tried to attack the jurisdiction of this Court in other filings. Defendant's Amended Reply in Support of Removal, *filed July 16, 2010 [Docket No. 22]*, pp. 15-20, § III. Defendant now adopts those explanations by reference.

Plaintiff has complained about this Court's order staying discovery. Defendant has defended the Court's order in other filings. See Defendant's Response to Objection to the Prejudicial Order Entered, the Untrustworthiness of Assigned Judges, and the Erroneous Caption of Case, *filed July 19, 2010 [Docket No. 29]*. Defendants now adopt that defense by reference.

In the Summary Judgment Motion and the Memorandum Brief, Plaintiff has not addressed any of Defendant's above-cited arguments or shown that they were in error.

III. DEFENDANT'S ALLEGED LACK OF STANDING DOES NOT ENTITLE PLAINTIFF TO SUMMARY JUDGMENT.

Plaintiff claims that Defendant lacks standing to sue because Plaintiff is suing on behalf of the State of New Mexico as a relator and Defendant is a subdivision of the State.

Plaintiff's claimed justification for his status as a relator comes from N.M. Stat. Ann. § 44-3-4 (1978). In relevant part, that statute states "[w]hen the attorney general or district attorney refuses to act, or when the office usurped pertains to a county, incorporated village, town or city, or school district, such action may be brought in the name of the state by a private person on his own complaint." Defendant is not a county, incorporated village, town or city, or school district. Plaintiff can only bring an action as a relator, therefore, if "the attorney general or district attorney refuses to act." Plaintiff has not shown by affidavit, by pleading, or otherwise, that he has made a formal complaint to the New Mexico attorney general or to the district attorney and that they refused to act. Plaintiff has therefore failed to establish the factual predicate that supports his claim that Defendant lacks standing to oppose him. See State ex rel. Huning v. Los Chavez Zoning Commission, 93 N.M. 655, 657, 604 P.2d 121, 123 (1979) (holding that since "plaintiffs have failed to show that an attorney general or district attorney has refused to act on their behalf" then "there is no authority in the plaintiffs to file this application in quo warranto").

Moreover, Plaintiff can only proceed as a relator with respect to an action brought under section 44-3-4. Plaintiff has also brought civil rights claims under 42 U.S.C. § 1983 et seq. Defendant's Amended Reply in Support of Removal, *filed July 16, 2010 [Docket No. 22]*, pp. 1-4, 1-3, pp. 6-8. These claims are brought on his own behalf, not as a relator on behalf of the State of

New Mexico.

Finally, Defendants are allowed to defend against section 44-3-4 claims brought in the name of the State of New Mexico. The purpose of a quo warranto action under section 44-3-4 is to "ascertain whether one is constitutionally authorized to hold the office he claims, whether by election or appointment." State ex rel. Anaya v. McBride, 88 N.M. 244, 247, 539 P.2d 1006, 1009 (1975). The purpose is not to automatically remove any challenged entity or individual without a chance for a hearing in court, which Plaintiff's interpretation would entail. Numerous New Mexico cases brought under section 44-3-4 against New Mexico state entities or officers have proceeded without any suggestion that the entities or officers were not allowed to defend themselves. See, e.g., State ex rel. New Mexico Judicial Standards Com'n v. Espinosa, 134 N.M. 59, 73 P.3d 197 (2003), Ex rel. Anaya, 88 N.M. 244. In fact, sometimes the entities or officers won. See State ex rel. Duran v. Anaya, 102 N.M. 609, 698 P.2d 882 (1985).

Plaintiff claims that Defendant cannot properly defend this lawsuit because Defendant's constituent offices are all vacant, since the judges of the Eleventh Judicial District are not really judges. Plaintiff's argument ignores that under New Mexico law, a quo warranto action is an admission that the judges possess and hold their offices. Territory ex rel. Hubbell v. Dame, 13 N.M. 467, 85 P. 473, 475 (1906) (stating that a quo warranto suit is an admission that the person sued is de facto in office), State ex rel. Northwestern Colonization & Imp. Co. of Chihuahua v. Huller, 23 N.M. 306, 168 P. 528, 532 (1917) ("Quo warranto, or a proceeding in the nature thereof, lies only against one who is in the possession and user of the office, or who has been admitted thereto."). Plaintiff cannot claim that Defendant's offices are vacant.

Finally, Plaintiff claims that judgment should be had against Defendant because Defendant lacks the capacity to be sued. If Defendant lacked the capacity to be sued under Fed. R. Civ. P. 17(b), as Plaintiff alleges, the remedy would not be summary judgment in Plaintiff's favor. The remedy would be dismissal of the suit against Defendant. See, e.g., Fugate v. Unified Government of Wyandotte County/Kansas City, KS., 161 F.Supp.2d 1261, 1266 (D.Kan. 2001) (dismissing suit because defendants lacked capacity to be sued).

IV. DEFENDANT DID NOT CONCEDE THAT PLAINTIFF'S CIVIL RIGHTS WERE VIOLATED BY REMOVING THIS CASE.

Plaintiff argues that Defendant has conceded that it violated his civil rights. How? By removing this case to federal court under 28 U.S.C. § 1443. Plaintiff's argument is ingenious but misstates Defendant's removal language and ignores the actual purpose and workings of removal.

Defendant did not remove this case pursuant to 28 U.S.C. § 1443. Defendant's Notice of Removal cited to 28 U.S.C. §§ 1441(b) (allowing removal for claims brought under federal laws) and 1446(a) (removal procedures). See Notice of Removal, *filed June 21, 2010 [Docket No. 1]*. Defendant's Amended Reply in Support of Removal, *filed July 16, 2010 [Docket No. 22]*, likewise only relied on sections 1441(b) and 1446(a). Defendant has not cited section 1443 in any filing.

In any case, Plaintiff fundamentally misunderstands section 1443 removal. Section 1443 states

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the

> United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

Section 1443 removal is meant to protect the civil rights of defendants, not the civil rights of plaintiffs. The first subsection allows defendants to remove prosecutions or litigations if the prosecutions or litigations are in contravention of defendants' civil right to equal treatment on the basis of race. In State of Ga. v. Rachel, 384 U.S. 780 (1966), the Supreme Court explained that in section 1443(1), "the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality." Id. at 792. The second subsection allows defendants who are federal officers to remove a prosecution or litigation if they are being prosecuted or sued for their execution of civil rights laws. See City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 823-24 (1966) (explaining that section 1443 subsection 2 "confers a privilege of removal only upon federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights"). Section 1443 removal is not meant to help plaintiffs and certainly is not a confession that a plaintiff's civil rights have been violated.

Plaintiff's section 1443 argument fails because Defendant did not remove under section 1443 and because a section 1443 removal is a statement that a defendant's civil rights are being violated, not a plaintiff's.

CONCLUSION

For the above-stated reasons, Plaintiff's Verified for Summary Judgment under Rule 56 should be denied.

Respectfully submitted,

ROBLES, RAEL & ANAYA, P.C.

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I hereby certify that on this 4th day of August 2010, the foregoing was electronically served through the CM/ECF system to the following:

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/s/ Luis Robles
Luis Robles