

**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.

**REPLY TO RESPONSE TO MOTION TO DISMISS No. I:
DISMISSAL OF GOMEZ’S FOURTEENTH AMENDMENT EQUAL
PROTECTION AND PROCEDURAL AND SUBSTANTIVE DUE PROCESS CLAIMS**

Defendant, Eleventh Judicial District Court, through its attorneys Robles, Rael & Anaya, P.C. (Luis Robles, Esq.) and pursuant to Fed.R.Civ.P. 12(b)(6), states the following for its Reply to Response to Motion to Dismiss No. I: Dismissal of Gomez’s Fourteenth Amendment Equal Protection and Procedural and Substantive Due Process Claims:

I. GOMEZ’ EFFORTS TO REFOCUS THIS COURT’S EXAMINATION AWAY FROM THE FACTS ALLEGED IN HIS COMPLAINT AND TO HIS LEGAL CLAIMS IS IMPROPER.

In his response, Plaintiff, Kenneth Gomez (“Gomez”), takes issue with the manner in which Defendant stated the facts alleged in Gomez’ complaint. *See [Docket No.15, pp. 1-5]*. Gomez’ efforts are clearly unnecessary. This is so because Defendant has been faithful to the standard of review for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

To dismiss a complaint for failure to state a claim, this Court must “assume the truth of all well-pleaded facts in the complaint, and draw reasonable inferences therefrom in the light most

favorable to the plaintiff[.]” Dias v. City and County of Denver, 567 F.3d 1169, 1178 (10th Cir. 2009). In addition, “[t]he court’s function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff’s complaint alone is legally sufficient to state a claim for which relief may be granted” under Rule 8(a)(2). Smith v. United States, 561 F.3d 1090, 1098 (10th Cir. 2009) (quotation marks and citation omitted), cert. denied, --- U.S. ----, 130 S.Ct. 1142 (2010). While, generally, only the complaint and its allegations are considered in a motion to dismiss, documents referred to in the complaint may be considered at the motion-to-dismiss stage if they are “central to the plaintiff’s claim” and their authenticity is undisputed. Alvarado v. KOB-TV, LLC, 493 F.3d 1210, 1215 (10th Cir. 2007).

In reviewing a motion to dismiss, it is important to note “Federal Rule of Civil Procedure 8(a)(2) provides that a complaint must contain ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” Robbins v. Oklahoma, 519 F.3d 1242, 1246 (10th Cir. 2008). In the past, the courts “generally embraced a liberal construction of [this] pleading requirement,” and held “a complaint containing only conclusory allegations could withstand a motion to dismiss unless its factual impossibility was apparent from the face of the pleadings. . . .” Id. However, the Supreme Court has recently “clarified” this standard, stating that “to withstand a motion to dismiss, a complaint must contain enough allegations of fact ‘to state a claim to relief that is plausible on its face.’” Id. at 1247 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

Specifically, “[f]actual allegations must be enough to raise a right to relief above the speculative level,” Twombly, 550 U.S. at 555, so that “[t]he allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief.” Robbins,

519 F.3d at 1247. Under this standard, “a plaintiff must nudge his claims across the line from conceivable to plausible in order to survive a motion to dismiss.” Smith, 561 F.3d at 1098. Therefore, a plaintiff must “frame a ‘complaint with enough factual matter (taken as true) to suggest’ that he or she is entitled to relief.” Robbins, 519 F.3d at 1247 (quoting Twombly, 550 U.S. at 556).

In Twombly, the Supreme Court considered a class action complaint alleging a conspiracy to restrain trade by communication carriers. 550 U.S. at 548-51. The Supreme Court held a complaint’s “allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief.” Robbins, 519 F.3d at 1247. The Twombly Court explained this “does not impose a probability requirement at the pleading stage,” but “calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of “misconduct required for relief.” 550 U.S. at 556. As a result, the Court pointed out the complaint must provide “more than labels and conclusions” or merely “a formulaic recitation of the elements of a cause of action,” so that “courts ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’” Id. at 555 (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)). The Twombly Court concluded a “bare assertion” of the elements required to make a claim is not enough, but a claim needs “some further factual enhancement” to get it from “possibility” to the requisite “plausibility” required for relief. Id. at 556-57.

In its Motion, Defendant restated the facts supporting Gomez’ claims as follows:

Since 1963, judges of the Eleventh Judicial District have entered a series of judgments against Gomez. See [Docket No. 8-1, pp. 7 & 9 (Exhibit 1)]. According to Gomez, the judges who entered the judgments against Gomez have done so without the corporate surety bond required by State law. See [Docket No. 8-1, p. 3]. For the deprivation of his constitutional rights, Gomez claims that he is entitled to

damages in the amount of \$100,000.00. See [Docket No. 8-1, p. 7]. Despite spanning nine pages, these are all the facts which Gomez alleged in his Complaint. See [Docket No. 8-1, pp. 1-9].

See [Docket No. 11, p. 3].

Defendant's statement focuses on the *facts* alleged by Gomez, instead of the *legal arguments* raised in the complaint. See Twombly, 550 U.S. at 555 ("courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'"). Thus, Defendant's presentation of the facts is very much in keeping with the command of Twombly to focus on the facts. Therefore, Gomez' efforts to refocus this Court's examination away from the facts alleged in his complaint and to his legal claims is improper.

I. BASED ON THE CLEARLY ESTABLISHED LAW AND GOMEZ' IMPLIED CONCESSION, DEFENDANT IS ENTITLED TO THE DISMISSAL OF GOMEZ' FOURTEENTH AMENDMENT EQUAL PROTECTION AND PROCEDURAL AND SUBSTANTIVE DUE PROCESS CLAIMS.

In his Complaint, Gomez alleged the violation of his federal constitutional rights. See [Docket No. 1-3, ¶¶ 43-63]. More specifically, Gomez claims that Defendant violated his Fourteenth Amendment rights in the following manner:

[Defendant has] severely injured him by denying him constitutional rights under Sections 1, and 3, Fourteenth Amendment and all civil rights laws giving the said constitutional powers effect. In addition, said decisions and judgments have damaged his personal character without recourse, since there are no persons who have acquired title to positions as judges in any State of New Mexico courts of law, and since there are no courts of law to which he could appeal the non-competent judgments rendered.

See [Docket No. 8-1, p. 1]. Unfortunately, Gomez' Complaint does not elsewhere plead his claim with greater clarity. See [Docket No. 8-1, pp. 1-9].

In its motion, Defendant argued that this Court should dismiss Gomez's constitutional claims:

Even accepting all of Gomez' allegations as true for purposes of this Motion, Defendant is entitled to the dismissal of Gomez' Fourteenth Amendment procedural due process and equal protection claims. In the alternative, this Court should dismiss Gomez' Fourteenth Amendment claims because Defendant, Eleventh Judicial District Court, is not considered a "person" under 42 U.S.C. § 1983. The dismissal of Gomez' Fourteenth Amendment equal protection claim is proper because he failed to allege that Eleventh Judicial District Court judges treated him differently than similarly situated litigants who are before the court.

As a matter of law, Gomez' alleged loss of his "good reputations" fails to state an actionable Fourteenth Amendment claim under Paul v. Davis, 424 U.S. 985 (1976). The clearly established case law does not support Gomez' claim that Eleventh Judicial District Court judges' alleged intentional, though random and unauthorized, deprivation of Gomez' property (reputation) violated his Fourteenth Amendment procedural due process rights. For these reasons, this Court should dismiss Gomez' Fourteenth Amendment procedural due process and equal protection claims with prejudice.

See [Docket No. 11, pp. 1-2].

In his response, Gomez completely failed to address the legal merits of Defendant's motion:

III. FALLACIES OF DEFENDANT'S FOUR ARGUMENTS

A. There Argument I avers that Plaintiff's 42 U.S.C § 1983 claim must show his civil rights were violated under color of law. The Defendant is a 'state actor' and an arm of the state. Said § 1983 is simply one of several authorities giving effect to the power of the Fourteenth Amendment.

a. Surely, New Mexico Statutes do not require Plaintiff Gomez to be subordinate to certified felons as specified with utmost clarity in ¶ 8-1, pp. 3-4, and then escape the pain and peril of the Fourteenth Amendment and the authorities giving that constitutional power effect.

b. Legal Argument I, p. 4, 11 is therefore fatally flawed.

B. There Argument II avers that the equal protection clause does not

apply because Plaintiff Gomez did not show how he was treated differently.

a. Plaintiffs did show more than sufficient differences in ¶ 8-1, pp. 2-4; however, those paragraphs needed to be read to reveal that Plaintiff Gomez was subjected to decisions and judgments of certified felons holding positions as state public officers in Defendant District Court. Additionally, they were unlawful for not possessing titles thereto.

b. Surely, New Mexico Statutes do not require Plaintiff Gomez to be subordinate to certified felons as specified with utmost clarity in ¶ 8-1, pp. 3-4 and then simultaneously provide Plaintiff Gomez with the equal protection under the laws or simultaneously escape the pain and peril of the Fourteenth Amendment and authorities giving that constitutional power effect.

c. Legal Argument II, p. 7, 8, & 9, 11 is therefore also fatally flawed.

C. Defendant District Court's averments in Arguments III and IV in favor of Dismissal of Plaintiff Gomez' Fourteenth Amendment claims have no standing for similar reasons and as provided above and deserve no special pleadings to waste the Court's time. Arguments III and IV, like Arguments I and II are also flawed.

See [Docket No. 15, pp. 5-6].

Under the Local Rules, Gomez' failure to respond to Defendants' motion "constitutes consent to grant the motion." See, D.N.M.LR-Civ. 7.1(b) ("[t]he failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion."). Based on the clearly established law and Gomez' concessions, this Court should dismiss Gomez's Fourteenth Amendment procedural due process and equal protection claims with prejudice. See Kampa v. City of Albuquerque, CIV. No. 96-1572 LFG/DJS, slip op. at 1 (D.N.M. filed February 2, 1997) (citing D.N.M.LR-Civ. 7(b)).

WHEREFORE, Defendant respectfully requests that this Court grant its Motion to Dismiss No. I, dismiss Gomez' Fourteenth Amendment procedural due process and equal protection claims

with prejudice, award Defendant its attorney's fees and costs, and order all other relief which this Court deems just and proper.

Respectfully submitted,

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I hereby certify that on this
19th day of July 2010, the
foregoing was electronically
served through the CM/ECF
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/s/ Luis Robles
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