IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JOHN B. HOLWAY, Plaintiff,	)	
v.	)	Civil Action No. 82-0763-A
WILLIAM HAMBLEN, et al., Defendants.	)	

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

Plaintiff has initiated a 42 U.S.C § 1983 and §1985 case against these defendants for injuries allegedly suffered as the result of a growing "conspiracy" amongst the Bar and members of the judiciary.

Holway was the owner of Cardinal Productions, Inc., a corporation operating under the name of Featherstone Theater. (Complaint ¶ 7). Holway subsequently sold the corporation to John Robert Tucker. Tucker gave Holway a security interest in the chattels, including all equipment in the Featherstone Theater. (Complaint ¶ 8). When Tucker defaulted on a note, Holway instituted a legal action and sought the right to remove the equipment. (Complaint ¶ 9). Jonathan England became involved because he was the landlord of Featherstone Square Shopping Center. A conveyance of the equipment was made by Tucker to England, and Holway claimed that this transfer was fraudulent. Defendant Percy Thornton, of the Circuit Court of Prince William County, was named in the present suit because in 1977 he presided over the case between Holway and England. Defendants Friedlander and Shoemaker represented England in that suit. (Complaint ¶¶ 15, 16, 17). Holway alleges that these two lawyers misinterpreted and "deliberate(ly) and fraudulently (told) untrue statement(s)" in that proceeding. Such statements stem from the attorneys' representations in court with regard to the meaning of a case and the nature of Virginia law. Holway tried to obtain

satisfaction for what he determined to be an injustice by requesting that a criminal prosecution be initiated against these two attorneys.

Defendants William Hamblen, Helen Fahey and Ronald Tydings allegedly joined the "conspiracy" at this point. Hamblen and Fahey, of the Commonwealth Attorney's office, refused to prosecute as the conduct complained of was not criminal in nature and Tydings, a committee member of the Virginia State Bar, was joined as he refused to investigate any further or take any disciplinary actions.

Judge Selwyn Smith, of the Circuit Court of Prince William County, heard the next case brought by Holway in which he tried to recover a rug. Holway subsequently requested that Judge Smith take action against Friedlander and Shoemaker for their "illegal, corrupt, dishonest, unworthy, and unprofessional conduct." (Complaint ¶ 40). Smith refused to do so and Holway consequently filed a suit in U. S. District Court. He appeared before Judge Albert V. Bryan, Jr. Judge Bryan apparently refused to let in evidence of the alleged "deception" by Friedlander, Shoemaker, and Thornton and ruled in favor of England. (Complaint ¶ 56). Holway alleges in his complaint that this action by Judge Bryan was part of the "conspiracy" and that he sincerely doubted that any judge was going to give him a fair trial.

II. LEGAL ANALYSIS

The Honorable Albert V. Bryan, Jr. has moved this court for dismissal under Fed. R. Civ. P. 12(b)(6) on the grounds that he is absolutely immune from liability under the cause of action alleged in the complaint. This court agrees. The actions taken by Judge Bryan are clearly within his official capacity. The plaintiff complains that Judge Bryan refused to let him introduce certain evidence and then "summarily dismissed the jury and ruled in favor of [one of the defendants in that lawsuit]." Under the test announced in Stump v. Sparkman, 435 U.S. 349 (1978), a judge is absolutely immune from liability in actions seeking monetary

damages. The Supreme Court noted with regard to immunity: "The governing principle of law is well established... As early as 1872, the Court recognized that it was 'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested him, [should] be free to act upon his own convictions...' Bradley v. Fisher, 13 Wall 335, 347 (1872)... Later we held that this doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the legislative record gave no indication that Congress intended to abolish this long-established principle. Pierson v. Ray, 386 U.S. 547 (1967)." Stump, id. at 355-356. The test to be applied is as follows: "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 has acted in the 'clear absence of all jurisdiction.'" Stump, id. at 356-357. It is clear that Judge Bryan's actions were within his judicial capacity and he did not act in the clear absence of all jurisdiction. Absolute immunity is therefore granted.

Similar analysis is necessary and dispositive with regards to Judge Thornton and Judge Smith. As taken from the complaint, Judge Thornton heard the original case and ruled in favor of England. Holway is attacking Judge Thornton's ruling as "fraudulent". Plaintiff bases his allegation upon his reading and understanding of a case used as authority in the suit. The complaint alleges only misconduct of the Judge sitting in his capacity as a Circuit Court Judge. Likewise, Judge Smith was added to the list of "conspirators" for his ruling in a subsequent case in Circuit Court and for statements made by the Judge from the bench. His actions fall within the absolute immunity defense as they were undertaken in his official capacity. For these reasons and in light of Stump v. Sparkman, the case is dismissed with regards to Judges Thornton and Smith.

William Hamblen and Helen Fahey are both attorneys in the Commonwealth Attorney's office. According to the Supreme Court's opinion in Imbler v. Pachtman, 424 U.S. 409 (1976), prosecuting attorneys are immune from liability in actions such as the one brought here. Althought Imbler speaks to the prosecutor's immunity for prosecuting, this court will make the logical extension and apply it to cases in which the prosecutor has exercised his or her discretion and has refused to prosecute. For the public policy considerations espoused in Imbler, such an extension is necessary and proper for the functioning of the Commonwealth Attorney's office. It is not alleged that Hamblen and Fahey engaged in conduct outside of their prosecutorial capacity and therefore the doctrine of prosecutorial immunity is applicable. Under 42 U.S.C. § 1983, § 1985 private citizens are given redress for the deprivation of rights. However, under neither the Constitution of the United States, nor the Amendments thereto, are citizens given the right to initiate or request initiation of criminal prosecutions. Such is left to the sole discretion of magistrates, prosecuting attorneys, and grand juries. There is no constitutionally guaranteed right to have such persons prosecute. Hence, there is no basis for a § 1983 or § 1985 suit. The 12(b)(6) motion is therefore granted as to Hamblen and Fahey.

Defendant Ronald Tydings also seeks dismissal under Fed. R. Civ. P. 12(b)(6). It was Tydings who informed Holway that after a preliminary investigation of his complaint against Messrs. Friedlander and Shoemaker, the Committee was dismissing the matter as the conduct questioned did not constitute "misconduct" under the Disciplinary Rules. In support of his motion to dismiss, Tydings offers two defenses. First, it is stated that Holway has no legal interest in a complaint filed with the Virginia State Bar, and second, Holway failed to meet the statute of limitations. As to the first point, Holway asserts that he has been deprived of property and of unspecified rights under § 1983 and § 1985 (Complaint ¶¶ 67, 69). Tydings first defense would be dispositive if no property right is in fact at issue.

This court holds that Holway does not have a property right in or legal interest in a complaint filed with the Virginia State Bar. Plaintiff was given a chance to file a Reply Brief, which he did, and based upon a careful reading of that brief and the Complaint, this court cannot discern any property right. As to the second defense, the statute of limitations does appear to bar the suit as brought against Tydings. Although this court does not base its dismissal solely on the statute of limitations, it is dispositive in and of itself. A federal court is to apply the limitation period provided by the state law for a closely analogous action. In Virginia, §8.01-243(A) is applicable to civil rights actions such as §§ 1983 and 1985. This section of the Code provides for a two-year limitation and since Tydings' alleged misconduct occurred in July of 1979, this action appears to be barred. See, Steward v. Norfolk, F. & D. Ry., 486 F. Supp. 744 (E.D. Va. 1980), aff'd, 661 F.2d 927 (4th Cir.); and Va. Code § 8.01-243(A) (Supp 1982). This is not a continuing violation as Holway asserts . It is alleged in the complaint that Tydings played a specific role in the "conspiracy", and that his part in it ended when he refused to investigate further. For these reasons, Tydings' 12(b)(6) motion is granted as there is no cause of action upon which relief can be granted.

This brings us to Mr. Friedlander and Mr. Shoemaker. Plaintiff has sued defendants under the Civil Rights Act and under 28 U.S.C. §§ 1331, 1343, and 1391. The case against Friedlander and Shoemaker is dismissed as the complaint does not adequately support the alleged jurisdictional base upon which Holway relies. To fall within §§ 1331, 1343 or 1391, the matter must arise under the Constitution, laws or treaties of the United States. Diversity jurisdiction is not pleaded in the complaint. For this suit to survive, it is necessary that Holway make a sufficient claim under 42 U.S.C. §§ 1983 or 1985. Based upon the facts as taken from the complaint and in light of recent Fourth Circuit and Supreme Court opinions, there is no claim upon which relief can be granted.

Under 42 U.S.C. §§ 1983, 1985, there are two threshold requirements that must be apparent from the complaint, in order for it to survive a motion of dismissal. The first requirement is that the plaintiff have suffered a deprivation of right secured by the Constitution or other law of the United States. The Civil Rights Act was intended to vindicate only federal rights determined under federal substantive law, not to be a remedy for ordinary state torts. It is true, however, that where the violation of state law allegedly causes a constitutional deprivation, a cause of action is stated. Plaintiff is claiming a violation of the Due Process requirements of the Fourteenth Amendment. Assuming, arguendo, that plaintiff passes the first requirement of a §§ 1983, 1985 suit, he does not survive the second.

It is clear from the volume of cases and commentary written on the Civil Rights Act that it is a prerequisite that the defendant(s) have acted (1) under "the color of state law", and (2) that there be state action. Recently, the Fourth Circuit Court of Appeals decided a § 1983 case that is closely analogous to the case at bar. The issue to be resolved in Lugar v. Edmondson Oil Co., Inc., 639 F.2d 1958 (1981), was whether a claimants' conduct, prejudgment attachment of plaintiff's property, constituted private action "under color of state law" within contemplation of 42 U.S.C. § 1983. In the initial action, the defendant company was sued for maliciously invoking the stateprejudgment attachment procedure which resulted in the seizure of Lugar's property under a levy. This levy was later set aside as not supported by the facts shown. Lugar claimed that the seizure by levy deprived him of property without due process of law. "The district court held, relying essentially upon Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), that the complaint did not allege a deprivation of property by "state action", and accordingly dismissed the action for failure of the complaint to allege a claim cognizable under § 1983." Lugar, id. at 1060-1061. The Court of Appeals affirmed "the dismissal of the action on the basis that the defendants' conduct as

alleged did not constitute private action under color of state law." Id., at 1061. Thus, it made a distinction between the "under color of" and state action requirements. In analyzing the case, the Fourth Circuit emphasized the following elements as most critical:

> First, [the issue] deliberately focuses inquiry upon whether the specific conduct directly chargeable to the § 1983 defendants was taken under color of state law, rather than upon whether the ultimate deprivation of right charged can be attributed to state action. Next, it emphasizes that the conduct directly chargeable to the § 1983 defendants is narrowly that of invoking, as private litigants, state judicial proceedings for the adjudication of a private controversy, and includes no earlier or later involvement of the § 1983 defendants with state officials other than as private litigants in those proceedings... It has become a commonplace that in the typical § 1983 case involving a claim of deprivation of a constitutionally secured right, the state action requirement necessitated by the Fourteenth Amendment's undergirding, and the under color of state law requirement necessitated by the statutory language ordinarily come to the same thing. Nevertheless there has been occasional recognition that this is not always so--that the two are separate, not necessarily congruent, but cumulative predicate elements of a prima facie § 1983 claim. Lugar, id. at 1062.

Next, the Court focused its analysis on three patterns into which, in its opinion, § 1983 litigation tends to fall. The first pattern is the "official act" case in which state action is apparent from the manner of the act. The second is when private actors alone are alleged to have engaged in conduct that has deprived a person of a secured right. In these situations no state official is involved, but the action is attributable to the state by virtue of decisions made or policies established. The third pattern involves the conduct of a private actor defendant who has allegedly combined actions with the acts of a state official at the enforcement or operational level. This pattern appears to be the one most closely analogous to Holway's complaint. For this type of case the Fourth Circuit has determined that the two requirements of "under color of state law" and of state action must be considered as separate and distinct. The state action requirement is to be found by

referring to the totality of the conduct leading to the injury, whereas the "under color of state law" requirement, concerned as it is with a special attribute of the specific conduct charged to a particular tortfeasor, is properly referred to the specific conduct. Lugar, id. at 1065 n.14. This court must therefore look at the specific conduct of Friedlander and Shoemaker as alleged in the complaint to determine if they acted "under color of state law". The Supreme Court in Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), stated that while a private person can be liable under § 1983, he must have acted "with the knowledge of and pursuant to" the state law in question, and must have been "jointly engaged with state officials," or put alternatively, "a willful participant in joint activity with the state or its agents." Adickes, id. at 161. In the complaint Holway asserts that the "fraudulent scheme" and "conspiracy" commenced when Friedlander undertook certain actions, in his capacity as England's attorney, to complete a conveyance to a third party. There is no state action or any pretense of action "under the color of state law" involved in these transactions. Judge Thornton, the next defendant to have had allegedly become a member of the "conspiracy" could possibly have provided the nexus necessary to fulfill the requirement of state action. This position, however, stretches the imagination. What simply and straightforwardly occurred was that Holway suffered an adverse ruling and has concocted a web of intrigue and conspiracy that he would have us believe reaches all levels of the judiciary and the bar. In the recent Supreme Court case of Dennis v. Sparks, 449 U.S. 24 (1980), the Court dealt with a § 1983 suit in which there was an alleged conspiracy between a judge and a private individual. The court noted: " Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge. But here the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge..." Dennis, id. at 28. [emphasis added]. The Court held that dismissal was inappropriate where the sole

argument made by the defendants was that because the judge had been awarded immunity, they likewise were immune. This is not the case here. The facts in Dennis show that the private persons had persuaded the judge to exercise his jurisdiction corruptly and to illegally issue an injunction against plaintiff's production of minerals. There is no allegation of or factual support for bribery of the judge in the case at bar and his rulings, unlike that in Dennis, has not been struck down as illegal.

The court in Lugar, supra stated with regards to the Dennis opinion:

> In the setting we consider, 'joint engagement or participation of private actor with state official implies such a usurpation or corruption of official power by the former or surrender of power by the latter that the independence of the enforcing official has been comprised to a significant degree and the official powers have become in practical effect shared by the two. Judged by this test it is plain that merely invoking a state's judicial process and thereafter participating in it solely as private litigant does not constitute joint engagement or participation by the private litigant with the state officials who then independently conduct and enforce that process. The private initiating act, and the official enforcement acts are in no realistic sense joint but are instead discontinuous and independent. Lugar, supra at 1069. [emphasis added].

Plaintiff, in this case, fails to show anything other than the unpleasant imposition of an adverse ruling and the mere allegation of a "conspiracy" between the Judge and the lawyers is not enough to state a claim under 42 U.S.C. § 1983 or § 1985.

Let the clerk send a copy of this memorandum to all counsel.

DATE: Oct. 26, 1982

Richard L. Williams
UNITED STATES DISTRICT JUDGE

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ORDER

This matter came before the court on October 1, 1982, on four oral motions to dismiss under Fed. R. Civ. P. 12(b)(6) and two written motions to dismiss, each made by the various defendants to this action. In addition, plaintiff made a motion to disqualify all Eastern District of Virginia judges from hearing this case. Plaintiff's motion to disqualify is DENIED for the reasons stated from the bench. Based upon oral argument and upon consideration of plaintiff's Complaint and Reply to Motions to Dismiss, each of the defendants' motions are hereby GRANTED for the reasons set forth in the accompanying memorandum opinion. Consequently, this case is dismissed .

Let the Clerk send a copy of this order to all counsel of record.

Date: Oct. 26, 1982

Richard L. Williams

UNITED STATES DISTRICT JUDGE