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

VANDER WARNER, JR., et al.,
Plaintiffs,

v.

MURIEL PATCH, et al.,
Defendants.

Civil Action No.
82-0485-R

MEMORANDUM

Plaintiffs are the pastor and members of the Grove Avenue Baptist Church, 8701 Ridge Road, City of Richmond, Henrico County, Virginia. Defendants have been picketing and demonstrating on Parham Road, adjacent to the church grounds, since the fall of 1980. On July 1, 1982, plaintiffs brought an action in Henrico County Circuit Court to enjoin the picketing and demonstrations. Defendants petitioned for removal to this Court pursuant to 28 U.S.C. § 1441(b). This Court has original jurisdiction of this action under 28 U.S.C. § 1331, so the removal pursuant to § 1441(b) is proper.

In their answer to the petition for injunction, defendants asserted a counterclaim against the plaintiffs, alleging that the plaintiffs had harassed the defendants while they demonstrated and picketed, that plaintiff Vander Warner, Jr. had known of such harassment and had made statements from the pulpit insulting and vilifying defendants, and that plaintiffs had conspired to deprive defendants of their first amendment rights of free speech and peaceful assembly. Defendants seek compensatory and punitive damages, as well as injunctive relief and costs, in their counterclaim. Plaintiffs now move for summary judgment against this counterclaim. Because resolution of this motion does not depend on any evidence, the Court will treat it as a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), Fed. R. Civ. P.

The only apparent federal claim defendants raise in their counterclaim is their allegation of conspiracy to deprive them of their first amendment rights. If this allegation states a federal claim, the Court can take pendent jurisdiction of the other claims. Thus, the Court will first examine the claim of conspiracy. The counterclaim provides no statutory basis for the claim; the Court must assume the claim is brought pursuant to 42 U.S.C. § 1985(3).[1]

While 42 U.S.C. § 1985(3) allows suits against conspiracies composed entirely of private individuals, see Griffin v. Breckenridge, 403 U.S. 88, 96 (1971),

the Fourth Circuit has limited that coverage. In Bellamy v. Mason's Stores, Inc. (Richmond), 508 F.2d 504, 506-07 (4th Cir. 1974), the court held that § 1985(3) does not extend to private conspiracies to violate first amendment rights. Subsequently, the Supreme Court held that § 1985(3) is unavailable to remedy a violation of rights under Title VII, 42 U.S.C. § 2000e et seq., because § 1985(3) merely "provid[es] a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached." Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 376 (1979). "Thus, Novotny can only mean that § 1985(3) provides no remedy for alleged violations of constitutional rights traditionally assertable against the state unless state action is involved." Amoco Oil Co. v. Local 99, IBEW, 536 F. Supp. 1203, 1215 (D.R.I. 1982).

Defendants have not alleged that any state official or agency is a party to the conspiracy alleged in their counterclaim. However, they assert that plaintiffs' use of the judicial system in bringing this suit constitutes the requisite state action. In District 28, UMW v. Wellmore Coal Co., 609 F.2d 1083, 1086-87 (4th Cir. 1979), the court reviewed the decisions of the Fourth Circuit and various other circuits that have addressed whether the act of bringing a state court suit involves state action. In all but one of those cases, the courts had found no state action. The one exception was Henry v. First National Bank, 595 F.2d 291, 299 (5th Cir. 1979), cert. denied, 444 U.S. 851 (1980), wherein the court had contrasted merely filing a civil suit with obtaining a judgment. The court had found that once the litigant could invoke the "full power and authority of the state" to enforce a judgment, state action was involved. Id. In the instant case, defendants, by their own action in removing the suit to federal court, ensured that the state court could not enter such a judgment. Thus, this case does not come within the one exception the Wellmore court recognized to the general rule that bringing a suit does not involve state action. 609 F.2d at 1086-87; accord, Lugar v. Edmonson Oil Co., 639 F.2d 1058, 1069 & n. 25 (4th Cir. 1981) (en banc), aff'd in part, rev'd in part on other grounds, 102 S. Ct. 2744 (1982). Because they have failed to allege any state involvement in the alleged conspiracy to violate their first amendment rights, defendants have failed to state a claim upon which relief can be granted in their conspiracy claim.[2] Accordingly, this claim will be dismissed.

Absent the conspiracy claim, the counterclaim does not assert a claim over which this Court has jurisdiction. The allegations of harassment and insulting and vilifying statements do not arise under federal law. The Court could

take pendent jurisdiction over these state law claims if the § 1985(3) claim were to be allowed. But once that claim is dismissed, the defendants are left to the state courts to assert their state law claims. Accordingly, the counterclaim in its entirety will be dismissed.

An appropriate order will issue.

Richard L. Williams
UNITED STATES DISTRICT JUDGE

Date oct. 20, 1982

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[1] 42 U.S.C. § 1985 (Supp. IV 1980) again codifies the subsections as § 1985(1), (2), and (3), as they had been designated in R.S. § 1980. The 1976 codification had changed the designations to § 1985(a), (b), and (c).

[2] The Court notes that defendants have also failed to allege that they constitute a class entitled to § 1985(3) protection. "[T]he antidiscrimination principle underlying § 1985(3) applies only to groups that require and warrant special federal assistance in protecting their civil rights." Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 720 (9th Cir.), cert. denied, 454 U.S. 967 (1981).