

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS LEE ANDERSON,

Plaintiff,

v.

MEMORANDUM and ORDER
07-C-212-S

THOMAS F. DUNNWARD, TIMOTHY J.
OLIVER, FRANK J. MAGILL, JR.,
DAVID J. SCHONE and JOHN R. TUNHEIM
Defendants.

Plaintiff commenced this civil action on April 12, 2007 by paying the filing fee. He entitled his compliant "Rule 27 Complaint for the Perpetuation of Testimony" but requests leave to amend to seek damages in tort.

On July 10, 2007 defendants Frank J. Magill and John R. Tunheim moved to dismiss plaintiff's complaint. This motion has been fully briefed and is ready for decision.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery

under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984).

FACTS

For purposes of deciding the motion to dismiss of defendants Frank J. Magill and John R. Tunheim the facts alleged in plaintiff's complaint are taken as true.

Plaintiff is an adult resident of Eau Claire, Wisconsin. Defendant John R. Tunheim is a United States District Judge for the District of Minnesota. Defendant Frank J. Magill is an Assistant United States Attorney for the District of Minnesota.

Although not completely clear it appears that plaintiff is complaining about conduct that occurred during the course of criminal prosecution against him in Minnesota. He seeks to obtain evidence of possible misconduct.

MEMORANDUM

Said defendants move to dismiss plaintiff's complaint for money damages on the basis of judicial immunity. Judges are immune from suit for money damages for acts taken in their judicial capacity except when they act in the clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349, 355-56, reh. denied, 436 U.S. 951 (1978). Plaintiff alleges that defendant Judge John Tunheim was acting in his judicial capacity. Accordingly, he is immune from suit for money damages.

A prosecutor has absolute immunity for initiating a prosecution and presenting the state's case. Imbler v. Pachtman, 424 U.S. 409, 431 (1976). Plaintiff alleges that defendant Frank Magill prosecuted a case against him. He is absolutely immune from a suit for money damages.

In his response plaintiff argues that he is seeking evidence of crimes he believes have been committed. Since there is no pending case or controversy plaintiff lacks standing to sue defendants Frank J. Magill, Jr. And John R. Tunheim. Accordingly, their motion to dismiss will be granted.

ORDER

IT IS ORDERED that the motion of defendants Frank J. Magill and John Tunheim to dismiss plaintiff's complaint is GRANTED.

Entered this 31st day of July, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge