IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALAN DAVID McCORMACK,

Plaintiff,

v.

GERALD WRIGHT, MICHAEL J. GABLEMAN, BURNETT COUNTY CIRCUIT COURT,

Defendants.

OPINION AND ORDER

12-cv-483-bbc

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In an order entered on October 23, 2012, I dismissed plaintiff Alan David McCormack's complaint for failure to state a claim upon which relief may be granted. I concluded that (1) defendants Gerald Wright and Michael Gableman could not be sued under 42 U.S.C. § 1983 for acts taken in their judicial capacity; (2) defendant Burnett County Circuit Court was not a suable entity and even if plaintiff substituted Burnett County, his claim was really designed to enjoin the judges, which he could not do under § 1983; and (3) the court did not have jurisdiction to enforce state court procedural rules. Plaintiff has filed a motion to alter or amend the judgment, dkt. #10, in which he also asks to amend his complaint in various ways. He has also filed a "motion for non-joinder of defendant," which I interpret as a motion to amend to substitute Burnett County for Burnett County Circuit Court. I will deny both motions because plaintiff has identified no authority

contrary to my previous conclusions and his proposed amendments are futile.

First, in response to my first and second rulings, plaintiff seeks to amend his complaint to withdraw the request for monetary damages and to proceed against the defendants for injunctive relief under 42 U.S.C. § 1985(3) and § 1986, rather than under 42 U.S.C. § 1983. Plaintiff's proposal would avoid the problem with judicial immunity. Although the doctrine precludes a claim for monetary damages under these provisions as well as under § 1983, Byrne v. Kysar, 347 F.2d 734 (7th Cir.1965) (applying judicial immunity to § 1985(3)), it does not apply to claims for injunctive relief. Pulliam v. Allen, 466 U.S. 522, 541-42 (1984). Unlike § 1983, neither of these other provisions of the Civil Right Act include an express exclusion of suits for injunctive relief against judicial officers.

Nevertheless, plaintiff's amendment would be futile because he has not alleged sufficient facts to support a civil conspiracy claim under § 1985(3). To state a claim under § 1985(3), a plaintiff must allege, among other things, that there was "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Because plaintiff has not alleged any class-based discriminatory motive for the judges' actions or identified any discriminatory motive in his motion for reconsideration, he has not stated a claim under either § 1985(3) or § 1986. Hicks v. Resolution Trust Corp., 970 F.2d 378, 382 (7th Cir. 1992) ("Of course, in the absence of a viable claim under § 1985(3), a § 1986 claim cannot exist."). Because these claims would not survive screening, I will deny his motion to amend. Foster v. DeLuca, 545 F.3d 582, 584 (7th Cir. 2008) ("[A] district court may deny a motion to

amend if the proposed amendment fails to cure the deficiencies in the original pleading, or could not survive a second motion to dismiss.") (internal quotations omitted).

Second, in response to my previous ruling that I do not have the authority to enforce state court procedural rules, plaintiff cites the Rules of Decision Act, 28 U.S.C. § 1652, and numerous cases interpreting Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). He interprets these authorities as standing for the proposition that federal courts may apply state substantive laws. However, the Rules of Decision Act is not an independent source of federal court jurisdiction. It does not give federal courts a general power to enforce state laws. Rather, it instructs a federal court when to apply state or federal law in a civil claim over which the court already has jurisdiction for some other reason, such as when the parties are from different states under diversity jurisdiction, 28 U.S.C. § 1332. Erie, 304 U.S. at 78.

Finally, plaintiff seeks to remove his criminal case under 28 U.S.C. § 1443. Section 1443(1) allows a defendant to remove a state civil or criminal proceeding in which the defendant "is denied or cannot enforce . . . a right under any law providing for the equal civil rights of citizens of the United States." 28 U.S.C. § 1443(1). Despite the broad language of "any law providing for the equal civil rights of citizens," the "Supreme Court has interpreted [§ 1443] to apply only if the right alleged arises under a federal law providing for civil rights *based on race*." Indiana v. Haws, 131 F.3d 1205, 1209 (7th Cir. 1997) (citing Georgia v. Rachel, 384 U.S. 780 (1966)) (emphasis added). Because plaintiff makes no

allegations about race, he cannot use this removal provision.

ORDER

IT IS ORDERED THAT

1. Plaintiff Alan David McCormack's motion to alter or amend judgment and to amend the complaint, dkt. #10, is DENIED.

2. Plaintiff's "motion for non-joinder of defendant," dkt. #11, is DENIED.

Entered this 11th day of December, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge