

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

GARY F. EMMERICK,

Plaintiff,

v.

STATE OF WISCONSIN and
COUNTY OF WOOD,

Defendants.

OPINION AND ORDER

12-cv-517-bbc

On April 4, 2012, I dismissed a previous case brought by plaintiff Gary Emmerick in which he alleged that the state of Wisconsin, Wood County and various other defendants violated his rights by seizing seven of plaintiff's horses, of whom at least some were killed and prosecuting him without a twelve-member jury. I dismissed the case because plaintiff's claims against the state of Wisconsin were barred by the Eleventh Amendment and he did not state cognizable claims against the remaining defendants.

Now plaintiff has filed a new complaint in which he raises similar claims, now naming just the state of Wisconsin and Wood County as defendants. Plaintiff seeks leave to proceed in forma pauperis. As with plaintiff's previous case, I conclude that he does not have the means to make an initial partial payment of the \$350 filing fee for this action. Because plaintiff is proceeding without prepayment of the filing fee, I must screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief

may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915(e)(2)(B). In addressing any pro se litigant's complaint, the court must accept plaintiff's allegations as true and construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Turning to plaintiff's allegations, I note that his claims against the state of Wisconsin are barred by the doctrine of sovereign immunity. The state is immune from suit under the Eleventh Amendment, which states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." The Supreme Court has drawn upon principles of sovereign immunity to construe the Eleventh Amendment to "establish that 'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.'" Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984) (quoting Employees v. Missouri Department of Public Health and Welfare, 411 U.S. 279, 280 (1973)). Thus, plaintiff cannot bring claims against the state of Wisconsin.

Plaintiff's new complaint clarifies the nature of his claims against defendant Wood County. Plaintiff alleges that his due process rights were violated by the taking of his horses. The Fourteenth Amendment prohibits state governments from depriving any person of his or her property "without due process of law." United States Const. Art. XIV. However, even if county officials intentionally or negligently seized and destroyed his property, the Supreme Court has held that such claims do not raise to a constitutional violation as long as the

government provides adequate post-deprivation procedures to remedy the loss of the property. Hudson v. Palmer, 468 U.S. 517, 533 (1984). The state of Wisconsin provides several post-deprivation procedures for challenging the alleged wrongful taking of property. In particular, Wis. Stat. § 810.01 provides a remedy for the retrieval of wrongfully taken or detained property, and chapter 893 contains provisions concerning tort actions to recover damages for wrongfully taken or detained personal property and for the recovery of the property. Because plaintiff has post-deprivation procedures available to him in state court, he cannot claim that the county deprived him of due process. Accordingly, plaintiff fails to state a due process claim, and this case must be dismissed.

ORDER

IT IS ORDERED that plaintiff Gary Emmerick is DENIED leave to proceed on his claims against defendants state of Wisconsin and Wood County. This case is DISMISSED with prejudice and the clerk of court is directed to close the case.

Entered this 24th day of October, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge