IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD BOLTE,

Plaintiff,

v.

CAROL KOSCOVE, EDWARD J. O'BRIEN II, ROBERT DUNLAP, THERESA M. CISNEROS and EL PASO COUNTY,

Defendants.

OPINION AND ORDER

04-C-935-C

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In a relentless effort to recover his dignity and money lost in a judgment entered against him by a Colorado state court, plaintiff Richard Bolte filed this suit in federal court. Proceeding pro se, plaintiff seeks declaratory, injunctive and monetary relief from defendants Carol Koscove, Edward J. O'Brien II, Robert Dunlap, Theresa M. Cisneros and El Paso County. He contends that defendants violated his rights under the Fourteenth Amendment in a number of ways, such as by conspiring to deprive him of his property and liberty interests in practicing law and interfering with his right to contract with defendant Koscove. Defendants have moved to dismiss plaintiff's claims for lack of subject matter jurisdiction

under Fed. R. Civ. P. 12(b)(1), lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), improper venue under Fed. R. Civ. P. 12(b)(3) and failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). In addition, defendants have asked the court to impose sanctions on plaintiff pursuant to Fed. R. Civ. P. 11.

If, as defendants contend, plaintiff's case is brought to obtain judicial review of a Colorado state court's decision that plaintiff engaged in the unauthorized practice of law in Colorado, rather than as a suit brought to litigate a separate claim independent of the Colorado action, defendants are entitled to summary judgment. The Rooker-Feldman doctrine would deprive this court of jurisdiction to hear the case. Defendants are correct; plaintiff's suit is a misguided effort to overturn an adverse decision by a state court and must be dismissed because this court has no jurisdiction to hear it. I conclude also that plaintiff should have known that his suit was frivolous. Therefore, I will grant defendants' motion for Rule 11 sanctions.

For the sole purpose of deciding defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(1), I will accept as true plaintiff's allegations in the complaint. In addition, I will take judicial notice of the Colorado state and federal court decisions found in exhibits A and B of the affidavit of Lori M. Lubinsky and exhibits 1 and 2 attached to defendant Cisneros's brief in support of her motion to dismiss. It is permissible to take notice of such documents without converting the motion to one for summary judgment. Menominee Indian Tribe v.

Thompson, 161 F.3d 449, 455 (7th Cir. 1998).

ALLEGATIONS OF FACT

A. The Parties

Plaintiff Richard Bolte is a lawyer licensed to practice law in Wisconsin. Defendant Theresa M. Cisneros is a judge in District Court Division 8, County of El Paso, Colorado, who presided over the case of Carol Koscove v. Richard Bolte, Case No. 96-CV-2233, a contract dispute. Defendant Koscove was the owner of land and gas leases in Colorado and the plaintiff in the case before defendant Cisneros. Defendants Edward J. O'Brien II and Robert Dunlap are lawyers who represented defendant Koscove in Colorado. Defendant El Paso County is a municipal corporation licensed and empowered to conduct business in the state of Colorado.

B. The ARCO Case

On November 22, 1994, plaintiff entered into a written agreement with defendant Koscove to investigate and verify the accuracy of royalty payments due Koscove from the ARCO Oil Company arising out of her ownership of land in southern Colorado. Koscove knew that plaintiff was a Wisconsin lawyer, but her agreement with him did not require him to perform legal services, did not refer to him as a lawyer and did not give him authority to

act as her attorney. Instead, it gave plaintiff "power of attorney" to look at "whatever documents and records in whosoever's possession" pertained to "said mineral extraction and royalty payments and pursue the proper payment thereof."

Plaintiff commenced work under the agreement and uncovered valuable facts and critical evidence supporting the Koscove claim. Plaintiff advised Koscove to hire a lawyer to correct underpayments and collect on her claims. After Koscove hired oil and gas lawyer George Mueller in Denver, plaintiff turned over the results of his royalty investigation and worked with Mueller to define and develop Koscove's claims against ARCO. Koscove's case against ARCO began in July 1995 in the United States District Court for the District of Colorado. Mueller appeared as Koscove's attorney. Plaintiff was admitted *pro hac vice* to the court on January 5, 1996.

In March 1996, ARCO made a partial payment to Koscove of $1.9 million on her claim. Koscove paid plaintiff $388,013.23 under the percentage provisions of their agreement. Shortly thereafter, ARCO began paying Koscove monthly royalty payments, of which ten percent of the increases were owed to plaintiff. Koscove contacted her attorney in Colorado Springs, defendant O'Brien. Koscove and O'Brien conspired to attack plaintiff's Wisconsin bar license by accusing him of practicing law in Colorado without authorization.

C. The Colorado Case Against Plaintiff

Through defendant O'Brien, Koscove threatened plaintiff by telling him she would file a lawsuit against him alleging that he was unauthorized to practice law in Colorado if he refused to renounce the ARCO agreement. Plaintiff rejected Koscove's demand. Defendant O'Brien knew or should have known that making such a demand would violate plaintiff's licensing privileges and federal rights.

On September 9, 1996, Koscove hired defendant Dunlap to file suit against plaintiff in the district court in El Paso County, to recover all funds that Koscove had paid to plaintiff and to avoid her future obligations to plaintiff under the ARCO agreement. Koscove v. Bolte, Case No. 96-CV-2233. Defendant Cisneros presided over the case against plaintiff. Koscove alleged in her complaint that plaintiff had performed unspecified acts in Colorado that constituted the unauthorized practice of law and that Colorado state laws made the ARCO agreement unlawful, entitling Koscove to a refund of all money paid to plaintiff under the agreement plus costs and statutory treble damages. Koscove did not allege that plaintiff did not perform under the agreement or that he caused her to suffer any contract loss or other damages. Defendant Dunlap knew or should have known that filing a lawsuit against plaintiff violated plaintiff's licensing privileges and federal rights.

On the eve of trial, plaintiff moved to dismiss the case against him because of the absence of evidence to support Koscove's unauthorized practice of law claim. Defendant

Cisneros denied plaintiff's motion. Because Koscove's case was merely hypothetical, defendant Cisneros was without jurisdiction to hear the case. After the trial began, Cisneros allowed Koscove to reverse her position on certain documents and to introduce some of them at trial. Most of the documents were written by plaintiff and all of them related to Koscove's claim against ARCO. Koscove testified that plaintiff had provided her with facts supporting her claims against ARCO, but had not provided her legal advice with regard to the documents. No one testified that plaintiff gave Koscove any legal advice.

In his closing argument, plaintiff advised defendant Cisneros that 1) the record was devoid of any testimony, expert or otherwise, that showed that plaintiff's work for Koscove constituted the practice of law; 2) the contract was unambiguous and on its face did not call for plaintiff to practice law; 3) Spanos v. Skouras Theatres Corp., 235 F. Supp. 1 (S.D.N.Y. 1964), aff'd in part, rev'd in part, 364 F.2d 161, 169 (2d Cir. 1965), cert. denied, 385 U.S. 987 (1966) (holding that out-of-state attorney was "insulated" from in-state regulation for all purposes connected with and reasonably incident to federal matter) had identical facts and therefore was dispositive on the merits of plaintiff's case; 4) even if Cisneros had converted plaintiff's contract with Koscove into one for legal services, under Spanos, the contract was lawful in the federal matter because the federal court had admitted plaintiff *pro hac vice* under 28 U.S.C. § 1654 and it would be responsible for questioning plaintiff's ability to practice law in that court; 5) the federal courts had exclusive jurisdiction over plaintiff's

pro hac vice admission and all rights accruing therefrom including his right to compensation; 6) in Cowen v. Calabrese, 41 Cal. Rep. 441 (App. 1964), the court held that a state court would be acting outside its jurisdiction if it attempted to regulate the practice of law in federal courts or place any restrictions upon persons who might appear before federal courts in California; and 7) a state court has no power to decide a matter that Congress has given to the federal courts exclusively under 28 U.S.C. § 1654.

Despite the fact that all the documents and behavior considered at trial were part of a federal case in which plaintiff was admitted to practice *pro hac vice*, defendant Cisneros, on behalf of defendant El Paso County and in agreement with defendants O'Brien, Koscove and Dunlap, found that plaintiff engaged in the unauthorized practice of law. She based her decision on plaintiff's advice to Koscove about her potential claims for relief and potential damages and about the course of action to take regarding her complaint with ARCO. In an April 6, 1998, decision, defendant Cisneros stated that "what the contract required is legal services that [plaintiff Bolte] was not authorized to perform." Defendant Cisneros did not identify any ambiguities within the four corners of the contract or use parol evidence to explain, clarify or interpret the contract. As a result of Cisneros's findings, plaintiff lost the contract rights, privileges and benefits to which he was entitled under the ARCO agreement. Defendant Cisneros approved entry of a lien against plaintiff in Teller and El Paso Counties in Colorado. In addition, defendants forced the sale of plaintiff's real estate valued at

$237,000.

On April 16, 1998, plaintiff filed an action in the United States District Court for the District of Colorado, Bolte v. Cisneros, Case No. 98-CV-847, seeking to enjoin defendant Cisneros from entering final judgment, permitting any party to execute the judgment, issuing orders based on the decision or reporting the decision to the State Bar of Wisconsin or the Colorado bar. The court dismissed plaintiff's case *sua sponte* for failure to state a claim, deciding, among other things, that state law governed the question whether plaintiff had engaged in the unauthorized practice of law in Colorado. The court advised plaintiff that if he believed that the state court was without jurisdiction to hear the case, his remedy would be to file an appeal in the Colorado Court of Appeals.

Rather than following the federal court's advice to seek a remedy in the state courts, plaintiff filed a writ of mandamus to the United States Court of Appeals for the Tenth Circuit, Case No. 98-1141, seeking, among other things, an order directing the United States District Court to reverse its order of dismissal dated April 16, 1998 and reinstate his case against defendant Cisneros. The court of appeals denied the petition, noting that plaintiff had a remedy by way of appeal within the state court system, that the federal district court had no jurisdiction to entertain his attempt to attack a state court judgment even if the judgment was allegedly unconstitutional and that the court of appeals had no authority to issue a writ of mandamus to direct state courts or their judicial officers in the performance

of their duties.

On September 9, 1998, defendants, through defendant Dunlap, published and filed a defamatory ethics charge against plaintiff in Wisconsin with the Wisconsin Board of Attorneys Professional Responsibility, alleging that plaintiff had engaged in the unauthorized practice of law in Colorado. On November 12, 2003, defendant Dunlap testified against plaintiff during an Office of Lawyer Regulation hearing.

Plaintiff appealed defendant Cisneros's decision to the Colorado Court of Appeals. In Koscove v. Bolte, 30 P.3d 784 (Colo. Ct. App. 2001), the court of appeals affirmed Cisneros's decision that the agreement between Koscove and plaintiff was a contract for legal services, that plaintiff had engaged in the unauthorized practice of law and that the Colorado state court had jurisdiction over Koscove's unauthorized practice of law claim. In addition, the court of appeals agreed with defendant Cisneros's decision to deny plaintiff's motion to dismiss Koscove's case against him. Plaintiff appealed the court of appeals' decision to the Colorado Supreme Court, which ultimately denied certiorari on February 15, 2002. Koscove v. Bolte, 30 P.3d 784 (Colo. Ct. App. 2001), cert. granted, (Aug. 20, 2001), cert. denied as improvidently granted, (Feb. 15, 2002). Plaintiff appealed to the United States Supreme Court, which denied certiorari on February 19, 2002. Bolte v. Koscove, 534 U.S. 1128 (2002). Plaintiff filed his complaint in this court on December 10, 2004. He sought as relief an order preventing defendants from depriving him of his rights under the

Constitution, declaring that the Colorado state courts cannot enforce its laws against him in a manner repugnant to his constitutional rights, declaring that the state court's judgment against him is void, prohibiting any of the defendants from enforcing the judgment entered against him in the Colorado court, directing defendants to return any money obtained from him through wrongful supplemental proceedings and award him damages, costs and attorney fees for wrongful execution against his property, directing defendant Cisneros to recuse herself in any further proceedings and awarding him money damages to redress the injuries caused him by acts in violation of the Constitution, for libel, for intentional infliction of emotional harm and for the amounts due on the judgment against him in the Colorado state court and under his agreement with defendant Koscove.

OPINION

A. Subject Matter Jurisdiction

The threshold question is whether this court can exercise jurisdiction over plaintiff's claims. Defendants rely on the Rooker-Feldman doctrine in arguing that no such jurisdiction exists.

The Rooker-Feldman doctrine bars lower federal courts from exercising jurisdiction over claims seeking review of state court judgments, "because no matter how erroneous or unconstitutional the state court judgment may be, the Supreme Court of the United States

is the only federal court that could have jurisdiction to review a state court judgment." Taylor v. Federal National Mortgage Assn., 374 F.3d 529, 532 (7th Cir. 2004) (citing Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)). In a recent case, Exxon Mobil Corp. v. Saudi Basic Industries Corp., 125 S. Ct. 1517, 1521-22 (2005), the United States Supreme Court clarified the application of the doctrine, holding that it is confined to "cases brought by state court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and *inviting district court review* and rejection of those judgments." (Emphasis added.)

Although plaintiff's suit appears to be one that would be barred by Rooker-Feldman because he is seeking federal district court review of a state court decision, plaintiff argues that the doctrine does not apply for three reasons: first, he is challenging the jurisdiction and powers of the Colorado court to make its decision; second, his claims are for injuries suffered from the denial of due process and federal rights rather than from the state court decision itself; and third, he is alleging a conspiracy among the defendants to deprive him of his rights. Plaintiff relies on Nesses v. Shepard, 68 F.3d 1003 (7th Cir. 1995), a case in which the Court of Appeals for the Seventh Circuit suggested in dicta that if the people involved in a challenged court decision violated some independent right of the plaintiff's, "such as the right (if it is a right) to be judged by a tribunal that is uncontaminated by

politics, then [the plaintiff] can, without being blocked by the Rooker-Feldman doctrine, sue to vindicate that right and show as part of his claim for damages that the violation caused the decision to be adverse to him and thus did him harm." Id. at 1005. In a later case, Long v. Shorebank Development Corp., 182 F.3d 548 (7th Cir. 1999), the court of appeals held that Rooker-Feldman would not bar a district court from hearing the plaintiff's allegations that the defendants had violated provisions of the Fair Debt Collection Practices Act when they filed a complaint against the plaintiff to collect a rental debt they knew did not exist, used fraud to keep her from going to court to contest a baseless eviction complaint and told the court that she did not dispute the eviction. These claims could go forward because they did not put the state court's eviction decision directly at issue. The court found, however, that the plaintiff's claim of a due process violation was linked inextricably with the eviction decision, which deprived her of her home and led to the loss of her job and the custody of her child, and would have been barred by Rooker-Feldman had it not been for the fact that the defendants' misrepresentations had kept the plaintiff from raising in state court the claims she sought to raise in federal court. "The pivotal inquiry is 'whether the federal plaintiff seeks to set aside a state court judgment or whether he is, in fact, presenting an independent claim.'" Id. at 555. An independent claim is one that alleges an injury that was not caused by the state court judgment. Id.

Neither Nesses, 68 F.3d 1003, nor Long, 182 F.3d 548, helps plaintiff. His assertions

of lack of jurisdiction and denial of due process are not independent of the Colorado court's decision. They could not be evaluated without reviewing the Colorado court's actions. Any doubt about this is refuted by the arguments in his brief, which focus on the Colorado court's failure to rule in his favor, and by the request for relief in his complaint. He is seeking nothing less than the undoing of the entire decision, damages resulting from execution of the court's judgment and injunctive relief to protect him from further injury resulting from the decision. Long, 182 F.3d at 556 (plaintiff's due process argument not separate from state court eviction order and therefore bears close resemblance to cases in which Rooker-Feldman doctrine applies).

Plaintiff talks in vague terms about a conspiracy but he does not flesh out his allegations with facts that might show he has an independent claim. The only facts he alleges concern the validity of the state court judgment and reinforce the idea that his injury is a direct result of that judgment. More than a mere incantation of conspiracy or other violation of civil rights is required to escape the bar of Rooker-Feldman. Long, 182 F.3d at 557 ("[A] litigant may not attempt to circumvent the effect of Rooker-Feldman and seek a reversal of a state court judgment simply by casting the complaint in the form of a civil rights action.") (citing Ritter v. Ross, 992 F.2d 750, 754 (7th Cir. 1993)). See also Wright v. Tackett, 39 F.3d 155, 157 (7th Cir. 1994).

As a last ditch effort, plaintiff contends that defendant Cisneros arrived at her

decision by creating evidence that did not exist and by misapplying or ignoring the law, in particular the decision in Spanos. According to plaintiff, fraudulent decisions are void and therefore can be attacked at any time, in any court, either directly or collaterally. Plt.'s Br., dkt. #21, at 5. Again, in order to determine whether the Colorado state court's decision was fraudulent or unlawful, I would have to review that court's decision, in direct violation of the Rooker-Feldman doctrine. See also Taylor, 374 F.3d at 533 (type of relief granted when claim of fraud on the court succeeds is relief from judgment, that is, judgment is set aside).

Plaintiff has not demonstrated that this court has subject matter jurisdiction over his case. Therefore, I will grant defendants' motions to dismiss plaintiff's case on this ground. Doing so makes it unnecessary to address any of defendants' other grounds for dismissal.

B. Rule 11 Sanctions

Even though this court lacks subject matter jurisdiction in plaintiff's case, it may still impose sanctions pursuant to Fed. R. Civ. P. 11 because such a decision is not a judgment on the merits of an action. See, e.g., Willy v. Coastal Corp., 503 U.S. 131, 137-38 (1992) (lack of subject matter jurisdiction does not preclude district court from considering collateral issues, such as Rule 11 sanctions). Before moving for Rule 11(c) sanctions, a party must serve the opposing party with a motion and give the party 21 days in which to withdraw the questionable pleading. If the pleading is not withdrawn, the party may file its

motion with the court, having satisfied the rule's "safe harbor" requirement.

Defendant Cisneros has alleged that she served plaintiff on February 9, 2005, with a motion listing the grounds for his complaint's dismissal and requesting him to dismiss his complaint voluntarily. Dft.'s Mot. for Sanctions, dkt. #23, ¶12. She filed a similar motion with the court on March 7, 2005. Defendants Koscove, O'Brien and Dunlap filed their motion for Rule 11 sanctions with the court on March 14, 2005. Dfts.' Mot. for Sanctions, dkt. #29. On March 30, 2005, defendants Koscove, O'Brien and Dunlap wrote the court, stating that this court's Preliminary Pretrial Conference Order required plaintiff to file a response to defendants' Rule 11 motion by March 28, 2005 and that plaintiff had failed to do so. Because plaintiff does not deny that defendant Cisneros asked him to dismiss his complaint or face a Rule 11 motion, the motions described the grounds upon which this court should sanction plaintiff and plaintiff had adequate time to respond to defendants' motions for sanctions, I find that defendants' motions "complied substantially" with Rule 11. See, e.g., Nisenbaum v. Milwaukee County, 333 F.3d 804, 808 (7th Cir. 2003) (defendants' substantial compliance with Rule 11(c)(1)(A) entitled them to decision on merits of their request for sanctions under Rule 11).

Rule 11 is violated when a party signs a paper that is presented for an improper purpose, such as to harass his opponents or cause needless increase in the cost of litigation, or that contains claims unwarranted by existing law or not supported by a non-frivolous

argument for the extension, modification, or reversal of existing law. Fed. R. Civ. P. 11(b)(1) and (2); Burda v. M. Ecker Co., 2 F.3d 769, 773-74 (7th Cir. 1993). To find a Rule 11 violation, a court must make an objective inquiry to determine whether the petitioner "should have [known] that his position is groundless." Chicago Newspaper Publishers' Ass'n v. Chicago Web Printing Pressmen's Union No. 7, 821 F.2d 390, 397 (7th Cir. 1987). The inquiry under Rule 11 is objective; the court need not find that the petitioner acted in bad faith. National Wrecking Co. v. International Bd. of Teamsters, Local 731, 990 F.2d 957, 963 (7th Cir. 1993). If a court finds a Rule 11 violation, it may impose a sanction that includes directives of a non-monetary nature and an order to pay some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation. Fed. R. Civ. P. 11(c)(2).

It is indisputable that plaintiff should have known that his claims in this court were groundless. Plaintiff appealed Cisneros's decision through the Colorado state courts and to the United States Supreme Court as well as to the United States Court of Appeals for the Tenth Circuit. All along the way, these courts informed plaintiff that defendant Cisneros had jurisdiction to determine whether plaintiff engaged in the unauthorized practice of law and that federal district courts do not have jurisdiction to hear cases attacking state court judgments, even if the challengers contend that the state court's action was unconstitutional. Furthermore, defendants point out that in a February 16, 2005 order, I informed plaintiff

that he could not prevail on any claim that the Colorado state court judgments are void. Feb. 16, 2005 Order, dkt. #18, at 3. Despite these clear rulings, plaintiff filed a complaint in this court, arguing that defendant Cisneros's decision was wrong. His arguments may be slightly different (the conspiracy claim is a new twist), but the purpose of his lawsuit is the same.

What makes plaintiff's claims even more frivolous and remarkable is that he is trained in the law and should have known when to stop fighting. The United States Court of Appeals told him that any remedy lay in the Colorado state court system. The United States Supreme Court declined review of his case. At that point, plaintiff should have known that it was time to cut his losses and go home. Instead, he ignored the rulings of at least four courts and filed this meritless suit. His intransigence is ample ground for granting defendants' motions for Rule 11 sanctions. However, because defendants have not specified the amount of attorney fees and costs that they seek, I will defer a decision on the amount of the fees to allow the parties to be heard on this issue.

ORDER

IT IS ORDERED that

1. The motions to dismiss filed by defendants Carol Koscove, Edward J. O'Brien II, Robert Dunlap, Theresa M. Cisneros and El Paso County on the ground that this court lacks

subject matter jurisdiction over plaintiff Richard Bolte's claims are GRANTED;

2. The motions for sanctions filed by defendants Cisneros, Koscove, O'Brien and Dunlap pursuant to Fed. R. Civ. P. 11 are GRANTED;

3. Defendants may have until June 21, 2005, in which to file their bills of attorney fees and costs; plaintiff may have until July 5, 2005, in which to respond to the amount claimed.

Entered this 31st day of May, 2005.

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