

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

LUDMYLA SKORYCHENKO TOMPKINS,

Plaintiff,

v.

MEMORANDUM and ORDER
06-C-0078-S

THE WOMEN'S COMMUNITY, JOHN M.
SCHELLPFEFFER and ANDREW W. SCHMIDT,

Defendants.

Plaintiff Ludmyla Tompkins filed this civil action against defendants Women's Community, John M. Schellpfeffer and Andrew W. Schmidt alleging that they violated her constitutional rights. On March 3, 2006 defendants Schellpfeffer and Schmidt moved to dismiss plaintiff's complaint. Pursuant to this Court's March 8, 2006 scheduling order, plaintiff's response to this motion was to be filed not later than March 23, 2006 and has not been filed to date.

On March 27, 2006 defendant Women's Community filed a motion to dismiss plaintiff's complaint. Plaintiff may respond to this motion not later than April 17, 2006.

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. Coney 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 the purposes of deciding this motion to dismiss the facts alleged in plaintiff's complaint are true.

Plaintiff, who is from the Ukraine, is an adult resident of Wausau, Wisconsin. Her husband physically abused her on May 7, 2005 and he was charged with a crime on May 9, 2005. On May 10, 2005 plaintiff's husband filed for a divorce.

On May 17, 2005 Wisconsin Judiciare assisted plaintiff in finding an attorney, defendant John Schellpfeffer, for her divorce. He subsequently moved to withdraw from her case.

Wisconsin Judiciare assisted her in finding another attorney, defendant Andrew Schmidt. Defendant Schmidt moved to withdraw from her case because "he was unwilling to advance the client's repugnant, imprudent and unreasonable divorce objectives."

MEMORANDUM

Defendants Schellpfeffer and Schmidt move to dismiss plaintiff's complaint against them for failure to state a claim for

relief under 42 U.S.C. § 1983. Plaintiff did not oppose this motion.

To state a claim under 42 U.S.C. § 1983 plaintiff must demonstrate that the defendants deprived her of a constitutional right while acting under state law. Adickes v. S.H. Kress and Co., 398 U.S. 144, 150 (1970). Attorneys do not act "under color of state law" for purposes of 42 U.S.C. § 1983 whether they are in private practice or are employed by a governmental entity, such as a public defendant. See Polk County v. Dobson, 454 U.S. 312, 318 (1981). Plaintiff cannot allege any facts that would support a claim that defendants Schellpfeffer and Schmidt were acting under color of state law when they represented her in her divorce proceeding. Accordingly, plaintiff's claim under 42 U.S.C. § 1983 must be dismissed against defendants Schellpfeffer and Schmidt.

ORDER

IT IS ORDERED that the motion of defendants Andrew W. Schmidt and John M. Schellpfeffer to dismiss plaintiff's complaint is GRANTED.

Entered this 31st day of March, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge