

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

CHRISTOPHER JOHN KUBESH,

Petitioner,

ORDER

07-C-385-C

v.

JUDGE ROBERT H. RASMUSSEN,

Respondent.

In this civil action petitioner Christopher John Kubesh seeks an order from this court directing respondent Robert Rasmussen (a state court judge) to rule on a motion that petitioner has pending before him. Petitioner has requested leave to proceed in forma pauperis and has supported his request with an affidavit of indigency.

Although petitioner's income exceeds the amount that would automatically qualify him for pauper status, his affidavit indicates that he has a number of significant debts and expenses that exceed his income. Accordingly, I conclude that petitioner is unable to pay the fees and costs of instituting this lawsuit. (The return address on petitioner's complaint is a private residence, so it appears that petitioner is not a prisoner currently and is therefore not subject to the requirements of the Prison Litigation Reform Act.)

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the action is frivolous or malicious, fails to state a claim upon which relief may be granted or seeks monetary relief against a defendant who is immune from such relief, the case must be dismissed promptly pursuant to 28 U.S.C. §1915(e)(2).

Unfortunately for petitioner, I do not have the authority to compel the state court judge to issue a ruling in petitioner's case. Petitioner says that the state court judge's failure to act violates the due process clause of the Fourteenth Amendment to the Constitution. In the context of a civil action, violations of the Constitution must be enforced through 42 U.S.C. § 1983. But that statute excludes suits for injunctive relief against a judge "for an act or omission taken in such officer's judicial capacity." In other words, petitioner may not sue a judge for what petitioner perceives as a constitutional violation that the judge committed in the course of judicial proceedings.

Petitioner's complaint could be construed as seeking a writ of mandamus direction respondent to rule, but that theory would fare no better. A writ of mandamus can be issued in limited circumstances by a federal appellate court to direct a lower federal court to take a particular action. E.g., In re Blodgett, 502 U.S. 236 (1992) (declining to issue writ, but noting Court's authority to issue writ of mandamus for lower court's failure to render decision over three-year period). But a federal district court has no authority over a state

court in a civil case, which means that this court has no authority to issue a writ of mandamus against Judge Rasmussen. Van Sickle v. Holloway, 791 F.2d 1431, 1436 (10th Cir. 1986) (federal courts “have no authority to issue . . . a writ [of mandamus] to direct state courts or their judicial officers in the performance of their duties). Accord Blackman v. Taxdahl, 2007 WL 613862, *3 (E.D. Cal. 2007)(“[T]he State Superior Court is not a federal official. Thus, this Court is unable to grant Plaintiff the relief he seeks.”); Lia v. Leuck, 2007 WL 433346, *2 (D. Neb. 2007) (“Federal courts have no general power to compel action by state judicial officials.”)

Thus, if petitioner seeks to compel the state court judge to act, he must seek relief with the Wisconsin Court of Appeals. However, I do not recommend this course of action. A writ of mandamus will be issued only under “extraordinary” circumstances. State ex rel. Greer v. Stahowiak, 2005 WI App 219, ¶6, 287 Wis. 2d 795, 706 N.W.2d 161. To obtain such a writ in Wisconsin, the petitioner must demonstrate: 1) a clear legal right to relief; 2) a positive and plain legal duty on the part of the official or body to whom the writ is directed; 3) substantial damage due to the nonperformance of the duty; and 4) no adequate remedy at law. Mount Horeb Community Alert v. Village Bd. of Mt. Horeb, 2003 WI100, ¶9, 263 Wis. 2d 544, 665 N.W.2d 229. Because the decision when to issue a ruling is a matter committed to a court’s discretion, petitioner would not be entitled to a writ of mandamus unless the delay were extreme.

A review of the electronic records maintained on Wisconsin Circuit Court Access Program (<http://wcca.wicourts.gov>) reveals that petitioner's motion was fully briefed on March 30, 2007. Although four months may seem like a long time to a party waiting for an important decision, it could not be described as "extraordinary" under most circumstances. Compare New West, L.P. v. City of Joliet, – F.3d –, 2007 WL 1932802, *3 (7th Cir. 2007) (noting that decision had been pending in trial court for 27 months).

ORDER

IT IS ORDERED that this case is DISMISSED for lack of subject matter jurisdiction.

Entered this 23d day of July, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge