

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STEVE DOUGLAS GARTIN,

Plaintiff,

v.

No. CIV-06-0350-ACT/LAM

MARLEEN LANGFIELD,
GARY CLYMAN,
HON. MARGIE ENQUIST,
HON. JUDY ARCHULETA,
HON. TINA LOUISE OLSEN,
CRISSY SCHAUDT,
STATE OF COLORADO,
1ST JUDICIAL DISTRICT,
DENNIS HALL,
THOMAS MILLER,
DONALD L. ESTEP

Defendant(s).

STATE OF COLORADO DEFENDANTS'
MOTION TO DISMISS OR FOR CHANGE OF VENUE

COME NOW Defendants Hon. Margie Enquist, Hon. Judy Archuleta, Hon. Tina Olsen, Chrissy Schaudt, Marleen Langfield, Gary Clyman, the State of Colorado, and the First Judicial District ("State Defendants"), by and through counsel, and pursuant to Fed.R.Civ.P. 12(b)(2) and (3) and 28 U.S.C. §1631 or 28 U.S.C. § 1404(a), move the Court for an Order dismissing this action for want of jurisdiction or, in the alternative, transferring venue to the District of Colorado.

1. Plaintiff Steve Douglas Gartin, appearing *pro se*, has filed a Complaint with this Court alleging that he sustained damages due to the violation of his constitutional rights by

Defendants. [Complaint at p. 18] The State Defendants in this case are Colorado state judges, a Colorado probation officer, and various employees of the Office of the Colorado Attorney General. Although the Complaint is not a model of clarity, it appears that Mr. Gartin is attempting to bring claims against all the Defendants, including the State Defendants, for their involvement in a criminal prosecution in Jefferson County, Colorado in 2000 or 2006.

2. Mr. Gartin is currently a resident of the State of New Mexico. [Complaint at p. 1] All the Defendants in the case are residents of the State of Colorado. [Complaint at pp. 1-3]. All the events cited by Mr. Gartin and all the alleged wrongful actions taken by Defendants occurred in Colorado. [Complaint at pp. 5-14]

3. Because all of the Defendants in this action are residents of the State of Colorado and because all of the events on which the Complaint is based took place in Colorado, there is an absence of personal jurisdiction over the Defendants, and the exercise of jurisdiction in New Mexico would violate due process. See, *United States v. Botefuhr*, 309 F.3d 1263, 1271 (10th Cir. 1998) (two requirements must be met for the exercise of personal jurisdiction by a federal district court: (1) the defendant must be subject to the jurisdiction of a court of general jurisdiction in the state in which the district court is located and (2) the exercise of personal jurisdiction must not offend the due process clause of the Fourteenth Amendment).

4. None of the Defendants in this action are subject to the jurisdiction of a court of general jurisdiction in New Mexico. None of the Defendants have committed an act set forth in New Mexico's long-arm statute, the causes of action do not arise out of any act set forth in the long-arm statute, and there are no contacts with the State of New Mexico to satisfy due process concerns. *Tercero v. Roman Catholic diocese of Norwich, Connecticut*, 48 P.3d 50, 54 (2002).

See, also, *Young v. State of Oklahoma*, No. 03-2180 (10th Cir. 2004)(copy attached). Therefore, this action should be dismissed based on the absence of personal jurisdiction over the Defendants.

5. Mr. Gartin's claim for damages are based on alleged violations of 42 U.S.C. § 1983 and other federal statutes. [Complaint at pp. 4, 18]. Nonetheless, Mr. Gartin asserts that this Court's jurisdiction is based on diversity of citizenship. [Complaint at p. 3]

6. Pursuant to 42 U.S.C. § 1391(a), a civil action founded upon diversity of citizenship may be brought only where all defendants reside, or where a substantial part of the acts or omissions giving rise to the claims occurred, or where a defendant is the subject of personal jurisdiction when an action is commenced if there is no district in which the action might otherwise be brought.

7. Pursuant to 42 U.S.C. § 1391 (b), a civil action not founded soled upon diversity may be brought only in the State where all defendants reside, where a substantial part of the events giving rise to the claims occurred, or where a defendant may be found if there is no district in which the actions may otherwise be brought.

8. Regardless of whether Mr. Gartin's case is based solely on diversity of citizenship or upon diversity of citizenship and the presence of federal claims, this Court is the improper venue for his action. Here, it is undisputed that all the Defendants reside in Colorado, and that all the events giving rise to Ms. Gartin's claims occurred in Colorado. Thus, the proper venue for this matter is Colorado, not New Mexico.

9. 28 U.S.C. § 1631 provides that "whenever a civil action is filed in a court . . . and the court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice,

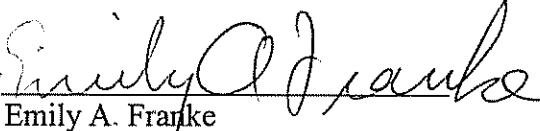
transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed.” Because all of the underlying events occurred in Colorado, the United States District Court is a court in which the action could have been brought at the time it was filed.

10. Moreover, this Court may order the transfer of a civil case to another district where it might have been brought for the convenience of the parties and witnesses and in the interest of justice. [28 U.S.C. § 1404(a)] In this case, all the Defendants either reside in Colorado or are public entities within the Colorado state or county government. All the events giving rise to Mr. Gartin’s claims occurred in Colorado, and presumably, all the witnesses in this case reside in Colorado.

11. The interests of justice would not be served by requiring Defendants and witnesses, all Colorado residents, to defend a lawsuit in New Mexico, which has no ties to the Defendants or to the claims raised by Mr. Gartin. Therefore, if the Court determines the case should not be dismissed, then the Court should transfer the case to the United States District Court for the District of Colorado.

WHEREFORE, based on the authorities and arguments cited above, the State Defendants request this Court to order either dismissal of this action or that venue in this matter transferred to the United States District Court, District of Colorado.

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District, and State of Colorado

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within State Defendants' Motion for Change of Venue upon all parties herein by e-mail and depositing same in the United States mail, first-class postage prepaid, this 18th day of May, 2006 addressed as follows:

Steve Douglas Gartin
P.O. Box 70185
Albuquerque, NM 87197
sheriffsteve@justice.com



Emily A. Franke

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

F I L E D
United States Court of Appeals
Tenth Circuit

APR 27 2004

SHANNON YOUNG,

Plaintiff - Appellant,

v.

STATE GOVERNMENT OF OKLAHOMA;
STEPHEN P. GRAY, individually; FORREST
DAVID NELSON, individually; KELLY
BURKE, individually; RUDY BRIGGS,
individually; BRUCE G. SEWELL, individually;
JOHN DOES, 1-12; JANE DOES, 1-12,

No. 03-2180

PATRICK FISHER

Clerk

District of New Mexico

(D.C. No. CIV-02-1577 LH/RHS)

ORDER AND JUDGMENT^(*)

Before **EBEL**, **MURPHY**, and **McCONNELL**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore submitted without oral argument.

Mr. Young appeals from the district court's dismissal of his complaint for lack of personal jurisdiction. Because we conclude that the district court lacked personal jurisdiction over the defendants and that the district court did not err or abuse its discretion in dismissing, rather than transferring, the case, we affirm the district court.

Background

In September 1999, Mr. Young was the defendant in a divorce proceeding in Oklahoma. The divorce decree was entered January 6, 2000. In May 2001, his ex-wife filed an application for citation for contempt, alleging failure to pay alimony and to abide by other requirements of the divorce decree. After a hearing on December 18, 2001, Mr. Young was found guilty of contempt and sentenced to sixty days in county jail. On December 28, 2001, Mr. Young paid \$3,900 to expunge his sentence, and was released from custody. Subsequently, Mr. Young's Oklahoma home was sold at a sheriff's sale, and the sale was confirmed by an Order of Disbursement on April 5, 2002.

Mr. Young filed suit *pro se* in the Federal District Court for the District of New Mexico against the

"Government of Oklahoma" and the judges, officers and attorneys involved in the divorce and contempt proceedings, alleging various constitutional violations. The defendants moved to dismiss for lack of personal jurisdiction. The district court found Mr. Young had failed to allege facts sufficient to confer personal jurisdiction under both the due process clause and relevant New Mexico law. Mr. Young appeals from this dismissal.

Discussion

Because Mr. Young appears *pro se*, we construe his arguments broadly. *See, e.g., United States v. Distefano*, 279 F.3d 1241, 1244 (10th Cir. 2002). Construed broadly, Mr. Young presents two arguments on appeal: first, that the district court erred when it found it lacked personal jurisdiction over the defendants; and second, that it abused its discretion in deciding to dismiss the case without prejudice rather than transferring the case pursuant to 28 U.S.C. § 1631. Neither argument has merit.

1. Personal Jurisdiction

We review the district court's determination of personal jurisdiction *de novo*. *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998). The plaintiff bears the burden of alleging and proving facts that support the exercise of personal jurisdiction, though in the absence of an evidentiary hearing, he need only make a prima facie showing of personal jurisdiction. *Id.* Two requirements must be met for a federal district court to assert personal jurisdiction over a defendant. *United States v. Botefuhr*, 309 F.3d 1263, 1271 (10th Cir. 2002). First, the defendant must be "subject[] to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1)(A). Second, "the exercise of personal jurisdiction must 'not offend the due process clause of the Fourteenth Amendment.'" *Botefuhr*, 309 F.3d at 1271 (quoting *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1074 (10th Cir. 1995)). Mr. Young has failed to allege facts sufficient to meet either requirement.

New Mexico applies a three part test to determine whether personal jurisdiction lies, asking: (1) whether the defendant committed an act or omission specifically set forth in the statute; (2) whether the cause of action arises out of that act or omission; and (3) whether the defendant has sufficient minimum contacts to satisfy due process concerns. *Tercero v. Roman Catholic Diocese of Norwich, Connecticut*, 48 P.3d 50, 54 (N.M. 2002). The statute has been interpreted to "extend[] the jurisdictional reach of New Mexico as far as constitutionally permissible." Thus, the personal jurisdiction inquiry largely collapses into the constitutional due process analysis. *See id.* at 54-55, 57.

Under the Constitution, the defendant must have sufficient minimum contacts with the forum state that allowing the action will not offend traditional conceptions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319-20 (1945). "It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denkla*, 357 U.S. 235, 253 (1958). "[T]he defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

In the instant case, the defendants lack the requisite minimum contacts with New Mexico. After reviewing the record and the briefs we conclude, as the district court did, that:

According to all allegations and proof before this Court, all of the Defendants reside in the State of Oklahoma, and all of the actions complained of occurred in the State of Oklahoma. There is nothing in

the record to indicate that any of the Defendants has ties to the State of New Mexico, with the exception of this lawsuit.

Mem. Opinion & Order of Dismissal Without Prejudice at 2. Moreover, aside from asserting that he does not concede the claim, Appellant's Reply Br. at 3, Mr. Young's briefs are devoid of any argument, factual or legal, that the defendants had sufficient contacts with New Mexico to allow the district court to exercise personal jurisdiction over them. We find the district court did not err in holding it lacked personal jurisdiction over defendants, and agree that the exercise of such jurisdiction in this case would violate the defendants' due process rights.

2. Transfer Under 28 U.S.C. § 1631

Mr. Young argues that even if the district court lacked personal jurisdiction, it should have transferred the case, pursuant to 28 U.S.C. § 1631, rather than dismissing the case without prejudice. Section 1631 reads in relevant part:

Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed or noticed for the court from which it is transferred.

28 U.S.C. § 1631.

Defendants argue Mr. Young waived any right to have the case transferred by not timely requesting transfer before the district court. For purposes of this case, we assume, without deciding, that the mandatory language of Section 1631 requires a court to consider the merits of transfer before dismissing a case for lack of jurisdiction, and that Mr. Young therefore cannot have waived his right to a transfer. *See Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) ("Although Miller did not move the district court to transfer the case, we have held that '[a] motion to transfer is unnecessary because of the mandatory cast of section 1631's instructions.'" (quoting *In re McCauley*, 814 F.2d 1350, 1352 (9th Cir. 1987))).

Mr. Young argues the word "shall" in Section 1631 mandates transfer in all cases where a lack of jurisdiction can be cured by transfer. However, this Court and others have interpreted the phrase "if it is in the interest of justice" to confer discretion on the trial court in making a decision to transfer an action or to dismiss without prejudice. *Botefuhr*, 309 F.3d at 1274 n.8; *see also Phillips v. Seiter*, 173 F.3d 609, 610 (7th Cir. 1999). We therefore review the district court's failure to transfer the case under Section 1631 for an abuse of discretion. *See, e.g., Paul v. I.N.S.*, 348 F.3d 43, 47 (2d Cir. 2003); *cf. Trierweiler v. Machol, Davis & Michael, P.C.*, 90 F.3d 1523, 1543 (10th Cir. 1996).

Factors considered in deciding whether a transfer is in the interests of justice include whether the claims would be barred by a statute of limitations if filed anew in the proper forum, *e.g. Haugh v. Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000) (citing *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997)), whether the claims alleged are likely to have merit, *e.g. Haugh*, 210 F.3d at 1150 (citing *Phillips*, 173 F.3d at 610), and whether the claims were filed in good faith or if, on the other hand, it was clear at the time of filing that the court lacked the requisite jurisdiction, *Trierweiler*, 90 F.3d at 1544 ("[I]t is not in the interest of justice to transfer where a plaintiff either realized or should have realized that the forum in which he or she filed was improper.").

In this case, even if we assume Mr. Young's complaint will be time-barred if refiled in Oklahoma, the other factors outweigh this consideration and render transfer not in the interests of justice. *See Haugh*, 210 F.3d at 1150-51 (finding lack of merit outweighed the fact that claims would be time-barred if not transferred).

First, Mr. Young's complaint is unlikely to have merit. *See id.* at 1150 ("[A] court is authorized to consider the consequences of a transfer by taking 'a peek at the merits' to avoid raising false hopes and wasting judicial resources that would result from transferring a case which is clearly doomed" (quoting *Phillips*, 173 F.3d at 610-11)). Essentially, Mr. Young complains of the results of an ordinary divorce proceeding and an ordinary contempt proceeding following failure to pay alimony. It is unlikely that any of Mr. Young's rights were violated by either proceeding and even if they were, it seems unlikely that Mr. Young will be able to show a lack of governmental immunity on the part of the state actors. Our "peek at the merits" of Mr. Young's case lead us to believe that to transfer Mr. Young's case would raise false hopes and waste judicial resources.

Second, Mr. Young, though appearing *pro se*, must have been aware that all the parties he attempted to sue had little or no contact with the state of New Mexico and that Oklahoma would be the proper forum. *See Keaveney v. Larimer*, 242 F.3d 389, 2000 WL 1853994, *2 (10th Cir. Dec. 19, 2000) ("Keaveney's pro se status does not excuse his obligation to comply with the procedural rules, including jurisdiction . . . This is not a case in which jurisdiction . . . turned on the existence of some elusive fact about which Keaveney made an erroneous guess. Rather, the error here is obvious" (internal citations and quotation marks omitted)). Mr. Young's failure to file his complaint in the proper forum cannot be excused as a good faith technical error, and therefore this second factor does not militate in favor of transfer.

Considering these factors in combination, we find transfer would not be in the interests of justice, and that therefore the district court did not err or abuse its discretion in ordering dismissal rather than transferring the case to the District of Oklahoma.

The judgment of the United States District Court for the District of New Mexico, dismissing Appellant's case for lack of personal jurisdiction over the Defendants, is **AFFIRMED**.

Entered for the Court,

Michael W. McConnell

Circuit Judge

FOOTNOTES

Click footnote number to return to corresponding location in the text.

*-This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

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