UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

EDWARD LITTLE	*	**CASE NO. 6:17-CV-00724**
VS.	*	**JUDGE ELIZABETH FOOTE**
THOMAS FREDERICK, et al	*	**MAGISTRATE JUDGE HANNA**

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SHERIFF'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Respectfully submitted,

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s/ Patrick McIntire
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MAY IT PLEASE THE COURT:

Plaintiff has filed this suit for injunctive and declaratory relief claiming that his bail for the charge of theft was set too high. However, Plaintiff actually bonded out of the jail on June 10, 2017. Sheriff Garber, though named as a defendant, has no real interest in this suit. The Sheriff does not set bail; that is a function of the Judges. Sheriff Garber stands ready to abide by any order this Court may issue regarding the proper amount of bail.

Plaintiff has sued former Chief Judge Kristian Earles for setting a bail schedule under article 315 of the Louisiana Code of Criminal Procedure. He has sued Commissioner Thomas Frederick for allegedly not taking account of Plaintiff's ability to give bail when holding the 72 hour hearing, though he does not allege that he personally requested a bail reduction. Plaintiff has also sued Sheriff Garber, alleging that deputies are aware that Commissioner Frederick does not consider ability to pay at the 72 hour hearings, but without alleging that the Sheriff or deputies have any ability to modify Plaintiff's bail amount or release Plaintiff in contravention of the Judge's bail order.

There are fundamental problems with this case. With respect to the claim against the Sheriff, Plaintiff has failed to state a claim for relief. Plaintiff's allegations make clear that it is the Judges who set the amount of bail, not the Sheriff, and that the Sheriff will adhere to whatever bail is set by the Judges. The Sheriff has no authority to lower Plaintiff's bail or release him without surety, which is the object of this suit. With respect to this Court's subject matter jurisdiction, there are two considerations: 1) Plaintiff has in fact bonded out at the original bail amount, raising an issue of his standing to sue; and 2) Plaintiff is asking this Court to intervene in an ongoing State criminal case, where Plaintiff is free to raise the propriety of his

bail setting and have any decision reviewed by the State Court of Appeal, the State Supreme Court, and the United States Supreme Court, if necessary.

A. Plaintiff Has Failed To State A Claim For Relief Against The Sheriff.

Under the Louisiana Code of Criminal Procedure, the Sheriff has no role in setting the amount of bail. Article 314 establishes the authority to fix bail. It allows "District courts and their commissioners" together with city or parish courts, mayor's courts and traffic courts, juvenile and family courts, and justices of the peace in certain circumstances to set bail. Nowhere is the Sheriff or any deputy authorized to set bail. Article 315 provides for schedules of bail, and states that such a schedule "may be fixed by a district court" for noncapital felonies, or by "a district, parish or city court" for misdemeanors. Article 319 allows "the court having trial jurisdiction over the offense charged" to increase or decrease the amount of bail. Perhaps most significantly for the Plaintiff, Article 325 allows for release without surety only "by order of the court."

The allegations of Plaintiff's Complaint are consistent with these code articles. Plaintiff does not allege that the Sheriff Garber set his bail too high or without proper consideration of his ability to post bail, or that the Sheriff was demanding additional security over and above that set by the State Court. On the contrary, in the third paragraph of the "Introduction" of the Complaint, Plaintiff alleges that "If he [Plaintiff] could pay the amount of money required by Commissioner Frederick, Sheriff Garber would release him immediately."

Plaintiff alleges that it is Commissioner Frederick who sets the initial secured financial conditions of release. (Doc. 1, par. 4, 20.) Plaintiff alleges that Judge Earles promulgated the bail schedule. (Doc. 1, par. 5.) Sheriff Garber is accused of "adhering to" the schedule and the

bail orders of the Court. (Doc. 1, par. 6.) Plaintiff alleges that deputies do not inquire whether an arrestee can pay the bail set by the schedule or by Commissioner Frederick (Doc. 1, par. 24), and further alleges that deputies are present for the 72 hour hearings where Commissioner Frederick allegedly does not consider ability to pay when setting bail (Doc. 1, par. 34); but Plaintiff makes no allegation that the Sheriff or the deputies have any authority to alter the amount of bail or release Plaintiff on terms contrary to the Court's order.

In paragraph 51 of the Complaint, Plaintiff identifies the common questions of fact that ostensibly support his class action request. Plaintiff improperly targets his allegations at the "Defendants" collectively, but a review of those allegations demonstrates that his claims are directed against the Judges who have the authority to set or modify his bail rather than at the Sheriff. Plaintiff first identifies the "practice of determining the amount of money necessary to secure post-arrest release without inquiry into ability to pay." As Louisiana law and Plaintiff's prior allegations make clear, both the determination of the amount and the inquiry into ability to pay are judicial functions. In somewhat redundant fashion, Plaintiff next alleges that consideration and findings of ability to pay are lacking, as is consideration of alternative, non-financial conditions for release. It is clear that it is the Judges who must consider and make findings on this issue when they set bail, not the Sheriff. Likewise, Plaintiff identifies the requirement for pre-determined amounts of money to be paid upfront as a common issue. Again, it is the Judges who determine the amount of money. If Plaintiff were to be released without surety under article 325, he would need to obtain a court order. Finally, Plaintiff identified the wait arrestees must endure "before being able to raise their inability to pay," though it is clear that they must raise this issue with the Judges, not with the Sheriff, and there is no allegation that the Sheriff controls the Court's schedule.

The prayer for relief is also significant. Plaintiff requests an injunction to require "an inquiry into and findings concerning the person's ability to pay any monetary amount set" and to require "inquiry into and findings concerning non-financial alternative conditions of release." The "inquiry," "findings" and "setting" functions are all functions of the Judges. The Sheriff does not set bail, and Plaintiff has not alleged that the Sheriff has any control over the issue in dispute.

Of course, when considering a Motion to Dismiss under Rule 12(b)(6), the Court must examine the Complaint to see if it pleads enough facts "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). To be plausible on its face, a Complaint must set forth enough factual content to allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. The right to the relief requested must rise above the speculative level. *Twombly*, 550 U.S. at 555. Conclusory allegations, unwarranted factual inferences, or legal conclusions should not be accepted as true. *In re Great Lakes Dredge & Dock Co., LLC,* 624 F.3d 201, 210 (5 Cir. 2010). However, well-pleaded facts must be taken as true, and all reasonable inferences must be drawn in favor of the plaintiff. *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 239 (5 Cir. 2009).

In setting forth his Complaint, Plaintiff sometimes makes his allegations against the Defendants collectively. For example, in the last paragraph of the Introduction, Plaintiff alleges that "the Defendants violate the Fourteenth Amendment to the United State Constitution when they set secured financial conditions of release . . ." Likewise, the class action allegations contained in paragraph 51 of the Complaint are made against the Defendants collectively. Plaintiffs allege that "Defendants have a policy and practice of determining the amount of money

necessary to secure post-arrest release without inquiry into ability to pay" and that "Defendants require that pre-determined amounts of money be paid upfront before they will release a person from jail." Again, in paragraph 64, the Complaint alleges that "Defendants violate Plaintiff's fundamental right to pretrial liberty by placing and keeping him in jail because he cannot afford to pay the monetary bail amount set without inquiry into and findings concerning ability to pay or non-financial alternative conditions." As the court stated in *Bank of America, N. A. v. Knight*, 725 F.3d 815, at 818 (7 Cir. 2013),

> The Rules of Civil Procedure set up a system of notice pleading. Each defendant is entitled to know what he or she did that is asserted to be wrongful. A complaint based on a theory of collective responsibility must be dismissed.

Such collective allegations, devoid of specific facts regarding particular parties, should be disregarded. *Cain v. City of New Orleans*, 2016 WL 2849498, at p. 4 (E.D. La. 2016).

The particular allegations against the Sheriff are that he has a policy of adhering to the bail schedule set by the Judges or the individual conditions of release set by Commissioner Frederick, demanding the amount of money set by the Court and not releasing those who are unable to meet the Court's conditions. (Doc. 1, par. 6, 20, 21.) The Sheriff is alleged to be the chief officer of the jail (Doc. 1, par. 18), and the collector and holder of deposited money bail sums (Doc. 1, par. 23). Plaintiff alleges that the "Sheriff's Department" does not inquire whether a person can pay the bail amount set by the Judges (Doc. 1, par. 24), and that "Sheriff's Department employees know that Commissioner Frederick does not consider ability to pay at the 72 hearings." (Doc. 1, par. 34.) Plaintiff also alleges that "Because Sheriff's Department employees regularly effect arrests in Lafayette Parish, they know that no inquiry into ability to pay is made before the 72 hearing." (Doc. 1, par. 35.) These allegations do not add up to a violation of Plaintiff's constitutional rights by the Sheriff.

The case that Plaintiff seems to be trying to make against the Sheriff is that the Judges were setting bail too high in some cases, that the Sheriff's employees witnessed such erroneous decisions and knew them to be made without proper consideration of all the requisite elements for setting bail, and that the Sheriff, as keeper of the jail, could in fact release arrestees whose bail was set too high by abandoning his policy of adhering to the orders of the Court, effectively substituting his own judgment on the proper amount of bail. In Plaintiff's case, he claims that the $3,000 bail was too high, but he could have met a lower amount of around $2,000. (See Doc. 1, par. 14, Plaintiff could pay $250 to a bondsman.) Of course, Plaintiff has now satisfied the $3,000 bail amount and has been released.

The problem with Plaintiff's claim against the Sheriff is clear: it requires the Sheriff to disobey the orders of the State Court, implementing his own judgment as to the correct amount of bail. This is an invitation to disorder. It is an utterly frivolous position that has been repeatedly rejected. The Fifth Circuit addressed the need to comply with court orders in the context of an injunction in the case of *U.S. v. Dickinson*, 465 F.2d 496 (1972), an appeal from a criminal contempt conviction. The court reasoned:

> We begin with the well-established principle in proceedings for criminal contempt that an injunction duly issuing out of a court having subject matter and personal jurisdiction *must be obeyed*, irrespective of the ultimate validity of the order.
> 465 F.2d at 509 (emphasis in original).

Quoting from an earlier case, the court noted that "Court orders have to be obeyed until they are reversed or set aside in an orderly fashion." *Id.* The Fifth Circuit went on to hold that "Absent a showing of 'transparent invalidity' or patent frivolity surrounding the order, *it must be obeyed* until reversed by orderly review or disrobed of authority by delay or frustration in the appellate process, regardless of the ultimate determination of constitutionality, or lack thereof." *Id.* Again, in *Matter of Hipp, Inc.*, 5 F.3d 109, 113 (5 Cir. 1993), the Court put the rule in these

terms: "It is too firmly established to admit of debate that an injunction issued by a court having subject matter and personal jurisdiction must be obeyed, regardless of the ultimate validity of the order." In dealing with an issue of civil contempt, this Court has held that "Our Order must be obeyed and cannot be ignored unless it is withdrawn or vacated." *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115 (W.D. La. 1984). The need for obedience to court orders was also addressed by the Louisiana Supreme Court in *Dauphine v. Carencro High School*, 2005-2005 (La. 4/21/03), 843 So.2d 1096. Much like the Federal Courts, the Louisiana Supreme Court found that "orders of the trial judge in the conduct of trials must be obeyed, irrespective of the ultimate validity of the order, unless the trial judge stays the order or ruling to permit a review." 843 So.2d at 1106.

The cases cited above arose in the context of temporary restraining orders and injunctions, where such disputes are most likely to occur, but nothing about the language or rationale of the decisions limits their application to injunctions. A decent respect for the law requires that the Sheriff abide by the orders of the Court. If Plaintiff's bail was set too high, the error should be corrected by the procedures for review found in the Code of Criminal Procedure, not by some unilateral decision of the Sheriff. Judge Vance in the Eastern District dismissed somewhat similar allegations leveled against Sheriff Gusman in the *Cain v City of New Orleans* case cited above at page 5. Plaintiff has no legitimate claim against the Sheriff for adhering to the bail set by the Court; his claim is against the Court that set the bail amount. Because the Sheriff does not, and should not, set the bail of which Plaintiff complains, Plaintiff has failed to state a claim against the Sheriff for which relief can be granted. Sheriff Garber must be dismissed.

B. This Court Lacks Subject Matter Jurisdiction Over This Case.

As noted above, Plaintiff has now bonded out of the jail, thus raising an issue of whether his claim for injunctive and declaratory relief to get his bail reduced is now moot. Also, the nature of this suit will have the Federal Court inject itself into an ongoing State criminal case based on an allegedly erroneous bail setting by the State Court, bypassing the normal channel for review of such decisions. These circumstances call for application of *Younger*[1] abstention.

1. Plaintiff's claim for equitable relief may be moot.

The fact that Plaintiff, though incarcerated when this suit was filed, has now posted bail and been released, raises the prospect that his claim is now moot. Analysis of the issue, however, is influenced by the class action allegations of the Complaint. Because a moot claim fails to satisfy the "case or controversy" requirement of Article III of the Constitution, Courts must address the issue, even if it is not raised by the parties. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329 (5 Cir. 2002).

In *Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553, 42 L.Ed.2d 532 (1975), the Court held that a case for injunctive and declaratory relief was not moot where a class action had been certified before the named plaintiff's claim became moot. In footnote 11, the Court observed that there may be cases where the named plaintiff's claim becomes moot before the district court has a reasonable opportunity to rule on the class certification, and that, depending on the circumstances, the class certification may be said to "relate back" to the filing of the complaint. Within a month, the Court decided *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), holding in footnote 11 that in circumstances of pretrial detention, which is temporary by nature, "the termination of a class representative's claim does not moot the claims of the unnamed members of the class." This exception to mootness in the class action realm is

[1] *Younger v. Harris*, 401 U.S. 37 (1971)

sometimes referred to as the "inherently transitory" exception. As the Sixth Circuit has noted, the focus is not so much on the length of time the named plaintiff's claim remains viable as on "the uncertainty about the length of time a claim will remain alive." *Wilson v. Gordon*, 822 F.3d 934, 945-946 (6 Cir. 2016).

In the present case, the mootness issue arises because of Plaintiff's own action: he posted bail within a week of filing this suit wherein he alleged that he could not post bail. Of course, one would not expect anyone to remain in jail any longer than he had to, but this case presents an unusual fact setting in that we do not know from the allegations of the Complaint what caused the delay in posting bail.[2] The circumstances could take this case out of the narrow class of cases where the inherently transitory nature of the claim for equitable relief requires application of an exception to mootness. Plaintiff ought to at least explain what happened.

2. This case calls for the application of *Younger* abstention.

As a general rule, Federal Courts are barred from enjoining State Court proceedings except as expressly authorized by Act of Congress, to aid its jurisdiction, or to effectuate its judgments. 28 U.S.C. 2283.[3] However, 42 U.S.C. 1983 is considered a statutory exception to this anti-injunction act. *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972). In the case of *Pulliam v. Allen*, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984), the Court found that the traditional doctrine of judicial immunity was no bar to an injunction against a State Court judge under section 1983, nor any bar to an award of attorney's fees against the judge under section 1988. Congress saw fit to modify that result in 1996 by amending section 1983 to

[2] Plaintiff was arrested on Saturday, June 3, and this suit was filed on Monday, June 5. The $400 filing fee required for this suit was enough to cover the bail bond fee to have Plaintiff released. Plaintiff posted bail and was released on Saturday, June 10.

[3] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

prohibit injunctive relief against a judicial officer for acts taken in a judicial capacity unless a declaratory decree was violated or declaratory relief is not available. Pub. L. 104-317, Section 309; 110 Stat 3853. Congress also amended section 1988 by that same statute to create an exception prohibiting an award of costs or attorney's fees against a judicial officer unless the action at issue "was clearly in excess of such officer's jurisdiction."

Regardless of the statutory authority to hear an injunction claim against a judicial officer, however, the Court held in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), that comity required the Federal Courts to exercise restraint in the issuance of injunctions against state criminal prosecutions; the irreparable injury at stake must be both great and immediate. The Court found that Mr. Harris, the criminal defendant, had the opportunity to raise his constitutional objections to the statute at issue in the State Court proceedings, that there was no suggestion that he was being prosecuted in bad faith, and that his injury was only that which was incidental to every criminal proceeding brought lawfully and in good faith. The Court reversed the judgment of the District Court which had granted the injunction. In the companion case of *Perez v. Ledesma*, 401 U.S. 82, 85, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971), the Court held that:

> Only in cases of proven harassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate.

The Court reversed the District Court's grant of an injunction suppressing evidence in the pending State Court prosecution. In the years since, the *Younger* abstention doctrine has been held to require three elements:

- An ongoing criminal proceeding, or a very limited class of civil proceedings (See, *Sprint Communications, Inc. v. Jacobs,* __ U.S. __, 134 S.Ct. 584, 187 L.Ed.2d 505 (2013);
- An important state interest at stake; and
- An adequate opportunity to raise the issue being litigated in the state proceeding.

Bice v. Louisiana Public Defender Bd., 677 F.3d 712, 716 (5 Cir. 2012).

In the present case, Plaintiff presents a claim that Commissioner Frederick did not properly consider his poverty when setting bail. Plaintiff does not allege that he has no recourse from the Commissioner's decision. Indeed, Louisiana Code of Criminal Procedure article 342 specifically allows for a reduction of bail for good cause. Plaintiff also does not contend that relief is unavailable from the Louisiana Court of Appeal. Article 343 of the Code of Criminal Procedure specifically provides that the supervisory jurisdiction of the Court of Appeal may be invoked if the Trial Court has improperly refused to reduce bail. The only reason Plaintiff seems to offer for not taking Commissioner Frederick's decision up before the District Judge is that a bail reduction hearing can take a week to get heard. (Doc. 1, par. 37.) Plaintiff would have this Court sit in the position of a court of appeal over the bail decisions of Commissioner Frederick.

With respect to the elements for *Younger* abstention, the first is clearly met. Criminal proceedings are commenced with the arrest and initial appearance of the defendant. *State v. Carter*, 94-2859 (La. 11/27/95), 664 So.2d 367. Thus, there is an ongoing criminal proceeding against Plaintiff. Obviously, the control and management of criminal court proceedings, including setting bail and matters of pretrial release, are important state interests, so the second element is met. Finally, Plaintiff could have requested a bail reduction hearing, and could have sought review by the Court of Appeal of any adverse decision. State law contemplates that the

ability of Plaintiff to give bail must be a factor in setting the amount of bail. LSA - C. Cr. P. art. 334(4). It is not as though the State Courts could disregard Plaintiff's alleged poverty. The burden is on the Federal plaintiff to establish that "state procedural law barred presentation of [its] claims." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (quoting *Moore v. Sims*, 442 U.S., at 432.). In this case, state procedural law allowed the presentation of Plaintiff's claim that bail was too high, but Plaintiff declined to request a bail reduction, opting instead to bring this Federal action for an injunction. Counsel for Plaintiff chose a complex and expensive Federal suit, where they might claim attorney's fees, over a straightforward motion for bail reduction in State Court. *Younger* abstention is appropriate in this case.

CONCLUSION

For all of the foregoing reasons, Plaintiff' suit against Sheriff Garber should be dismissed for failure to state a claim upon which relief can be granted, and for lack of subject matter jurisdiction. Sheriff Garber has no real interest in the outcome of this litigation regarding the propriety of the amount of bail, and stands ready, as Plaintiff has alleged, to abide by the orders of the courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2017, I presented the foregoing Sheriff's Memorandum in Support of Motion to Dismiss to the Clerk of Court for filing and uploading to the CM/ECF system, which will send notification of such filing to the following:

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