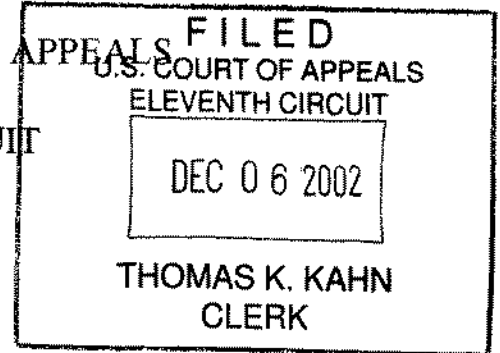


[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT



No. 02-13418
Non-Argument Calendar

District Court Docket No. 02-14049-CV-KMM

MARCELLUS M. MASON, JR.,

Plaintiff-Appellant,

versus

HIGHLANDS COUNTY BOARD OF COUNTY COMMISSIONERS,
DONALD L. GRAHAM,
U.S. District Judge,
FRANK J. LYNCH, JR.,
Magistrate Judge,
BRIAN KOJI,
MARIA SOROLIS,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 6, 2002)

PER CURIAM:

Pro se plaintiff-appellant Marcellus Mason, Jr., appeals the district court's dismissal of his complaint for failure to state a claim. Mason, who previously filed numerous lawsuits against his former employer, Highlands County, alleging race discrimination, re-asserts his discrimination claims in the instant complaint. Mason also claims § 1983, §1985 and § 1986 violations perpetrated by attorneys Koji and Soloris and Judges Graham and Lynch in relation to one of his previous suits against the county, 99-CV-14027. Mason alleges his First Amendment rights were violated by motions brought by the attorneys as well as recommendations and orders of the judges in 99-CV-14027. The district court dismissed the instant case for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). This appeal followed.

II. Discussion

We review the district court's decision to dismiss Mason's complaint pursuant to Rule 12(b)(6) de novo. Shands Teaching Hosp. and Clinics, Inc. v. Beech St. Corp., 208 F.3d 1308, 1310 (11th Cir. 2000).

A. Claims against Highlands County

Res judicata bars Mason's employment discrimination claims against the county. Under res judicata, "a final judgment on the merits bars the parties from re-litigating a cause of action that was or could have been raised in that action." In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001). Penalty dismissals under Federal Rule of Civil Procedure 41 (b) are considered to be a final judgment on the merits. See Orca Yachts v. Mollican, Inc., 287 F.3d 316, 319 (4th Cir. 2002); 18A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure* § 4440, at 205 (2002); Federal Rules of Civil Procedure 41(b) ("For failure of the plaintiff to prosecute or comply with these rules or any order of the court, a defendant may move for dismissal of an action . . . Unless the court in its order for dismissal otherwise specifies. . . a dismissal under this subdivision . . . operates as an adjudication on the merits.")

In several previous lawsuits, including 99-CV-14027, Mason claimed Highlands County engaged in race discrimination. The district court dismissed 99-CV-14027 under Rule 41(b) because of Mason's continual disregard for the court's orders and rules. This court affirmed the Rule 41(b) penalty dismissal of 99-CV-14027 in Mason v. Heartland Library Cooperative, 01-13664 (11th Cir. October 16, 2002). Therefore, because a final judgment on the merits has been

previously rendered on his race discrimination claims against Highlands County, res judicata bars Mason's re-assertion of those claims.

B. Section 1983, 1985, and 1986 claims stemming from 99-CV-14027

The district court correctly dismissed the claims against District Court Judge Graham, Magistrate Judge Lynch, and attorneys Kojos and Sorolis for failure to state a claim. Federal Rule of Civil Procedure 12(b)(6) allows dismissal of a claim if it is clear that, as a matter of law, no set of facts consistent with the pleadings could be proven that would entitle the plaintiff to relief. See Neitzke v. Williams, 490 U.S. 319, 326-27 (1989).

Viewing the facts in a light most favorable to Mason, we find that he fails to state a cognizable First Amendment claim against Judges Graham and Lynch that would entitle him to relief under § 1983, § 1985 or § 1986. Moreover, judges are entitled to absolute judicial immunity for all acts undertaken in their official capacity unless they acted in "clear absence of all jurisdiction." See Bolin v. Story, 225 F.3d 1234, 1239 (11th Cir. 2000). Neither party disputes that the alleged constitutional violations arose out of actions taken by Judges Graham and Lynch in their official capacities. While Mason alleges that the orders issued by both judges were "illegal and void ab initio" he fails to plead any facts that show that the judges did not act within their legitimate jurisdiction. Therefore, absolute

judicial immunity precludes § 1983, § 1985 and § 1986 claims against Lynch and Graham.

As to Mason's § 1983, § 1985 and § 1986 claims against Koji and Sorolis, the private attorneys who represented the county in 99-CV-14027, we also fail to find a cognizable constitutional claim. Despite Mason's arguments to the contrary, Koji's and Sorolis's acts of filing motions in federal court on behalf of the county does not constitute conduct that violates his First Amendment rights.¹ Because Mason simply fails to articulate a constitutional violation allegedly perpetrated by Koji and Sorolis, the district court correctly dismissed the claims against them.

III. Conclusion

Because *res judicata* prevents Mason from re-litigating his race discrimination claims against Highlands County and Mason fails to state a First Amendment claim against the judges and attorneys, we AFFIRM the order of the district court.

¹ Even if Mason had alleged conduct in his complaint that could possibly create a constitutional claim, Koji and Sorolis are private parties – not state actors who could be held liable under §1983, § 1985 or § 1986. See Rayburn *ex rel.* Rayburn v. Hogue, 241 F.3d 1341, 1347 (11th Cir. 2001).