UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Vidurek v. Koskinen

No. 18-2422-cv, United States Court of Appeals for the Second Circuit (October 15, 2019)

SUMMARY

Second Circuit affirmed dismissal of pro se taxpayers' suit against IRS and financial institutions, holding that sovereign immunity barred claims against the IRS and its employees because no statutory waiver applied (FTCA tax exception, failure to exhaust §7433 remedies). The court also upheld dismissal for insufficient service of process (mailing did not comply with Rule 4(e) or state law), failure to state a §1985(3) conspiracy claim (no plausible class-based animus), and failure to state RICO, §1983, or other federal claims against a private bank executive. The district court's filing injunction was not an abuse of discretion given the plaintiffs' extensive litigation history.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Pierre N. Leval; Raymond J. Lohier, Jr.; Richard J. Sullivan
JURISDICTION	Federal
DECIDED	October 15, 2019
DOCKET	18-2422-cv
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from an order of the United States District Court for the Southern District of New York granting motions to dismiss under Rules 12(b)(1), (5), and (6), declining supplemental jurisdiction, denying leave to amend, and imposing a filing injunction.
STANDARD OF REVIEW	Dismissal under Rule 12(b)(1): factual findings for clear error, legal conclusions de novo; under Rule 12(b)(5): abuse of discretion; under Rule 12(b)(6): de novo; filing injunction: abuse of discretion.
PRECEDENTIAL VALUE	unpublished
PARTIES	John Vidurek, Kimberly Vidurek v. John Koskinen, Brenda Dial, John/Jane Doe, J. Melendez, Maryellen Benecke, Linda Piack, Jeanette Willet, Daniel H. Schulman, Guy Chiarello, Mary Madden, Michael J. Quinn, Jack Dorsey, United States Internal Revenue Service

TOPICS

civil procedure · subject matter jurisdiction · sovereign immunity · service of process · motions to dismiss · tax · injunctions

PRACTICE AREAS

Tax · Civil Rights · Civil Procedure

QUESTIONS PRESENTED

1. Whether sovereign immunity barred claims against the IRS and its employees.
2. Whether service of process was insufficient under Rule 12(b)(5).
3. Whether the complaint stated a claim under 42 U.S.C. § 1985(3).
4. Whether claims against Michael Quinn were properly dismissed.
5. Whether the District Court abused its discretion in imposing a filing injunction.

HOLDINGS

1. The United States and its agencies and employees acting in official capacities are immune from suit absent an unequivocal statutory waiver. The Vidureks failed to identify any applicable waiver; the FTCA exception for tax claims and failure to exhaust administrative remedies under § 7433 precluded relief.
2. The Vidureks' service by mail did not comply with any method under Rule 4(e)(2) or relevant state law procedures, and they offered no colorable excuse for neglect.
3. The complaint failed to allege any racial or class-based invidiously discriminatory animus, which is an essential element of a § 1985(3) claim. The allegations of animus against the 'Tea Party' were conclusory.
4. Quinn was not a state actor; claims under §§ 241, 242, 1341 do not provide private rights of action; RICO claim failed to plausibly allege an enterprise; and no § 1983 claim pleaded.
5. The District Court properly considered the Eliahu factors and did not abuse its discretion in imposing a filing injunction.

KEY QUOTATIONS

> *"Absent an unequivocally expressed statutory waiver, the United States, its agencies, and its employees (when functioning in their official capacities) are immune from suit based on the principle of sovereign immunity."* (at 4)

> *"To survive a Rule 12(b)(1) motion to dismiss, then, 'the plaintiff bears the burden of establishing that her claims fall within an applicable waiver.'"* (at 5)

> *"[F]or an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes."* (at 9)

FACTUAL BACKGROUND

The IRS accused John Vidurek of not paying taxes for 2008 and 2009. The Vidureks alleged that the IRS falsely accused him and that banks illegally shared his financial information without consent.

PROCEDURAL HISTORY

The Vidureks filed a complaint in the Southern District of New York against the IRS, its employees, and officers of financial institutions, alleging civil rights violations, RICO violations, and state law claims. The District Court granted motions to dismiss, denied leave to amend, and imposed a filing injunction. The Vidureks appealed.

DISPOSITION

affirmed

CASES CITED

- Makarova v. United States, 201 F.3d 110 (2d Cir. 2000)
- Cty. of Suffolk v. Sebelius, 605 F.3d 135 (2d Cir. 2010)
- Aetna Cas. & Sur. Co. v. United States, 71 F.3d 475 (2d Cir. 1995)
- Dickerson v. Napolitano, 604 F.3d 732 (2d Cir. 2010)
- Meilleur v. Strong, 682 F.3d 56 (2d Cir. 2012)
- Carter v. Inc. Vill. of Ocean Beach, 759 F.3d 159 (2d Cir. 2014)
- Gleason v. McBride, 869 F.2d 688 (2d Cir. 1989)
- Keating v. Carey, 706 F.2d 377 (2d Cir. 1983)
- Graham v. Henderson, 89 F.3d 75 (2d Cir. 1996)
- Forest Park Pictures v. Universal Television Network, Inc., 683 F.3d 424 (2d Cir. 2012)
- Abbas v. Dixon, 480 F.3d 636 (2d Cir. 2007)
- Robinson v. Overseas Military Sales Corp., 21 F.3d 502 (2d Cir. 1994)
- Official Publ'ns, Inc. v. Kable News Co., 884 F.2d 664 (2d Cir. 1989)
- Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994)
- First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159 (2d Cir. 2004)
- Ciambriello v. Cty. of Nassau, 292 F.3d 307 (2d Cir. 2002)
- Eliahu v. Jewish Agency for Israel, 919 F.3d 709 (2d Cir. 2019)
- Happy Age Shops, Inc. v. Matyas, 513 N.Y.S.2d 710 (2d Dep't 1987)

OPINION

PER CURIAM.

18-2422-cv Vidurek v. Koskinen UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUMMARY ORDER RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF

APPELLATE PROCEDURE 32.1 AND THIS COURT=S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION ASUMMARY ORDER@).

A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL. 1 At a stated term of the United States Court of Appeals for the Second Circuit, 2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the 3 City of New York, on the 15th day of October, two thousand nineteen. 4 5 PRESENT: PIERRE N. LEVAL, 6 RAYMOND J. LOHIER, JR., 7 RICHARD J. SULLIVAN, 8 Circuit Judges.

9 --- 10 JOHN VIDUREK, KIMBERLY VIDUREK, 11 12 Plaintiffs-Appellants, 13 14 v. No. 18-2422-cv 15 16 JOHN KOSKINEN, Commissioner, IRS; 17 BRENDA DIAL, assumed robo-signer; 18 JOHN/JANE DOE, Tax Examiner MS 4388 ID 19 #1000099691; J. MELENDEZ, ID#0708622, 20 MARYELLEN BENECKE, Revenue Agent 21 ID#1001022543; LINDA PIACK, Revenue Agent, 22 IRS ID#1001023196; JEANETTE WILLET, Group 1 Manager, IRS; DANIEL H. SCHULMAN, Pres, 2 CEO, Pay Pal Holdings Inc.; GUY CHIARELLO, 3 Pres, First Data Merchant Serv Corp.; MARY 4 MADDEN, Pres, CEO Hudson Valley Credit 5 Union; MICHAEL J QUINN, Pres, CEO, 6 Rhinebeck Savings Bank; JACK DORSEY, Pres, 7 CEO, Square Inc.; UNITED STATES INTERNAL 8 REVENUE SERVICE, aka IRS, 9 10 Defendants-Appellees.

11 --- 12 13 FOR APPELLANT: John Vidurek, Kimberly 14 Vidurek, pro se, Hyde Park, 15 NY. 16 17 FOR APPELLEES: Charles S. Jacob, Christopher 18 Connolly, Assistant United 19 States Attorneys, for Geoffrey 20 S. Berman, United States 21 Attorney for the Southern 22 District of New York, New 23 York, NY, for the Internal 24 Revenue Service (“IRS”), John 25 Koskinen, Brenda Dial, 26 John/Jane Doe, J. Melendez, 27 Maryellen Benecke, Linda 28 Piatek, Janette Willet; 29 30 John W. Bailey, Bailey, Johnson 31 & Peck, P.C., Albany, NY, for 32 Michael J. Quinn; 2 1 John W. Peterson, Polsinelli 2 PC, Nashville, TN, for Guy 3 Chiarello; 4 5 Daniel C. Stafford, McCabe & 6 Mack, LLP, Poughkeepsie, NY, 7 for Mary Madden.

8 9 Appeal from an order of the United States District Court for the Southern 10 District of New York (Vincent L. Briccetti, Judge). 11 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, 12 AND DECREED that the judgment of the District Court is AFFIRMED. 13 John Vidurek and Kimberly Vidurek, pro se, appeal from a judgment of the 14 District Court (Briccetti, J.), granting the Defendants-appellees’ motions to dismiss 15 under Rules 12(b)(1), (5), and (6) of the Federal Rules of Civil Procedure, declining 16 to exercise supplemental jurisdiction over the Vidureks’ state law claims, denying 17 them leave to amend

their complaint, and imposing an injunction barring them 18 from filing future complaints absent court permission.

We assume the parties' 19 familiarity with the underlying facts and the record of prior proceedings, to 20 which we refer only as necessary to explain our decision to affirm. 3 1 1. Sovereign Immunity 2 The Vidureks sued the Internal Revenue Service (IRS) and several IRS 3 employees, as well as officers of financial institutions where the Vidureks held 4 accounts, alleging that the IRS falsely accused John Vidurek of not paying his 5 taxes in 2008 and 2009, and that the banks illegally shared his financial 6 information with the IRS without his consent.

The Vidureks alleged violations of 7 their civil rights and conspiracy to violate their civil rights under 18 U.S.C. §§ 241, 8 242, 1983, 1985, and 1986, as well as violations of and conspiracy to violate the 9 Racketeer Influenced and Corrupt Organizations Act (RICO). They also filed 10 federal claims of mail fraud and a Fourth Amendment violation, as well as state 11 law claims for trespass, fraud, negligence, vindictive recklessness, abuse of 12 process, and harassment.

13 As relevant to this appeal, the District Court granted the Defendants-appellees' 14 motions to dismiss, holding that the Vidureks' claims against the IRS and its 15 employees were barred by sovereign immunity, that all but one of the remaining 16 defendants were not properly served, and that the Vidureks failed to state a claim 17 against the remaining defendant, Michael J. Quinn, a top executive at one of the 4 1 financial institutions where the Vidureks had an account.

The District Court 2 further denied the Vidureks leave to amend their complaint, declined to exercise 3 supplemental jurisdiction over their remaining state law claims, and enjoined 4 them from filing additional complaints regarding their 2008 and 2009 tax liability 5 and subsequent lien absent court permission. 6 "The doctrine of sovereign immunity is jurisdictional in nature." Makarova 7 v. United States, 201 F.3d 110, 113 (2d Cir.

2000). When the district court 8 dismisses a claim under Rule 12(b)(1) of the Federal Rules of Civil Procedure for 9 lack of subject matter jurisdiction, we review its factual findings for clear error 10 and its legal conclusions de novo. Id. The district court "may refer to evidence 11 outside the pleadings," and "[a] plaintiff asserting subject matter jurisdiction has 12 the burden of proving by a preponderance of the evidence that it exists." Id. 13 "Absent an unequivocally expressed statutory waiver, the United States, its 14 agencies, and its employees (when functioning in their official capacities) are 15 immune from suit based on the principle of sovereign immunity." Cty. of 16 Suffolk v. Sebelius, 605 F.3d 135, 140 (2d Cir.

2010) (quotation marks omitted). 17 To survive a Rule 12(b)(1) motion to dismiss, then, "the plaintiff bears the burden 5 1 of establishing that her claims fall within an applicable waiver." Makarova, 201 2 F.3d at 113. 3 The Vidureks failed to satisfy this burden. Even if we construed their 4 complaint liberally to allege that any of the defendants were liable under the 5 Federal Torts

Claims Act, that act does not apply to "[a]ny claim arising in respect 6 of the assessment or collection of any tax." 28 U.S.C. § 2680(c); see Aetna Cas. & 7 Sur.

Co. v. United States, 71 F.3d 475, 477 (2d Cir. 1995). Similarly, a claim for 8 damages for unauthorized tax collection under 26 U.S.C. § 7433(a) required the 9 Vidureks to exhaust their administrative remedies before bringing an action in 10 federal court. See 26 U.S.C. § 7433(d)(1). But the Vidureks failed to demonstrate 11 that they exhausted their administrative remedies.

We therefore affirm the 12 District Court's dismissal of their claims against the IRS and its employees acting 13 in their official capacities. 14 2. Insufficient Service of Process 15 We review the District Court's "dismissal under Rule 12(b)(5) based on 16 insufficient service of process for abuse of discretion." Dickerson v. Napolitano, 17 604 F.3d 732, 740 (2d Cir.

2010). "[W]hen a defendant moves to dismiss under 6 1 Rule 12(b)(5), the plaintiff bears the burden of proving adequate service." Id. at 2 752 (quotation marks omitted). Rule 4(e) generally provides that individuals 3 may be served by either (1) following the relevant state law procedures for service 4 of the State where the district court is located or where service is made, or (2) 5 personal delivery, leaving a copy at the individual's dwelling or usual abode with 6 a person who resides there, or delivering a copy to an agent authorized to receive 7 process.

Fed. R. Civ. P. 4(e); see Fed. R. Civ. P. 4(i)(3). 8 In their affidavit of service, the Vidureks stated that they mailed the 9 defendants the "Summons[,] Action at law pages i-iv, pages 1-47[,] Memorandum 10 of Law in Support of Jurisdiction pages 1-10[, and] Affidavits" by "depositing a 11 true copy in the United States Post Office." Dist. Ct. Dkt. No. 4, at 1.

But these 12 methods of service do not satisfy any of the methods of service described in Rule 13 4(e)(2) or comply with the service procedures for any of the relevant States. See 14 Cal. Civ. Proc. Code §§ 415.10, 415.20, 415.30; Colo. R. Civ. P. 4(e), (g); N.Y. 15 C.P.L.R. §§ 308, 312-a(a); Utah R. Civ. P. 4(d)(1), (d)(2)(A).

We therefore agree 16 that the Vidureks' method of service was insufficient.1 1 The Vidureks argue that service was proper under N.Y. C.P.L.R. § 2103. But that provision applies to "papers," not the service of a summons and complaint. 7 1 The Vidureks also argue that they should have received an opportunity to cure 2 any errors in service of process. Their argument is without merit. "[W]e 3 generally will not reverse a district court's dismissal of an action for lack of 4 service unless the appellant can advance some colorable excuse for neglect." 5 Meilleur v. Strong, 682 F.3d 56, 61 (2d Cir.

2012) (quotation marks omitted). The 6 Vidureks have not presented a colorable excuse here. 7 3. Failure to State a Conspiracy Claim Under § 1985(3) 8 The Vidureks also challenge the District Court's dismissal of their claims 9 against the defendants under 42 U.S.C. § 1985(3) for conspiracy to interfere with 10 their civil rights and under 42 U.S.C. § 1986, which is predicated upon a valid 11 § 1985 claim.

Among other elements of a § 1985 claim, there must be some 12 “racial, or perhaps otherwise class-based, invidiously discriminatory animus 13 behind the conspirators’ action.” Carter v. Inc. Vill. of Ocean Beach, 759 F.3d 14 159, 164 (2d Cir. 2014) (quotation marks omitted). But even assuming that 15 actions animated by animus against the “Tea Party” and its members would 16 violate § 1985(3), but see Gleason v. McBride, 869 F.2d 688, 695 (2d Cir.

1989) See N.Y. C.P.L.R. § 2103; Happy Age Shops, Inc. v. Matyas, 513 N.Y.S.2d 710, 710 (2d Dep’t 1987). 8 1 (citing Keating v. Carey, 706 F.2d 377, 386–88 (2d Cir. 1983)), the Vidureks’ 2 allegations that the Defendants-appellees’ actions were motivated by such animus 3 are conclusory, as the District Court determined.

We therefore affirm the District 4 Court’s dismissal of both the § 1985 and § 1986 claims. See Graham v. 5 Henderson, 89 F.3d 75, 82 (2d Cir. 1996). 6 4. Failure to State a Claim Against Michael Quinn 7 The Vidureks also challenge the District Court’s dismissal of the remaining 8 claims against Quinn.

We review de novo the dismissal of a complaint pursuant 9 to Rule 12(b)(6), accepting the factual allegations of the complaint as true. Forest 10 Park Pictures v. Universal Television Network, Inc., 683 F.3d 424, 429 (2d Cir. 11 2012). A pro se complaint must be “liberally construe[d]... to raise the strongest 12 arguments it suggests.” Abbas v. Dixon, 480 F.3d 636, 639 (2d Cir.

2007). 13 We conclude that the District Court appropriately dismissed those claims 14 against Quinn that were based on alleged violations of 18 U.S.C. §§ 241, 242, and 15 1341, as well as RICO and 42 U.S.C. § 1983. Neither 18 U.S.C. § 242 nor 18 U.S.C. 16 § 1341 provides a private right of action. See Robinson v. Overseas Military Sales 17 Corp., 21 F.3d 502, 511 (2d Cir.

1994); Official Publ’ns, Inc. v. Kable News Co., 884 9 1 F.2d 664, 667 (2d Cir. 1989). Similarly, nothing in the language of § 241 suggests 2 that Congress intended to create a private right of action under that provision. 3 See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 4 164, 190 (1994). And as to Quinn’s alleged violation of RICO, we agree with the 5 District Court that the Vidureks did not plausibly allege that the individuals 6 shared a “common purpose” and “work[ed] together” to achieve this purpose.2 7 First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 174 (2d Cir.

2004) 8 (“[F]or an association of individuals to constitute an enterprise, the individuals 9 must share a common purpose to engage in a particular fraudulent course of 10 conduct and work together to achieve such purposes.” (quotation marks 11 omitted)).

We therefore also affirm the District Court's dismissal of both the 12 substantive RICO and RICO conspiracy claims against Quinn. See id. at 182. 13 Nor do we discern any error in the District Court's dismissal of the § 1983 claim 14 against Quinn. Such a claim requires that the "plaintiff... allege that he was 2 RICO makes it unlawful "for any person employed by or associated with any enterprise... to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity," and also makes it unlawful "for any person to conspire to violate" this provision.

18 U.S.C. § 1962(c), (d). 10 1 injured by either a state actor or a private party acting under color of state law." 2 Ciambriello v. Cty. of Nassau, 292 F.3d 307, 323 (2d Cir. 2002). As the District 3 Court held, the complaint does not plausibly allege that Quinn satisfied this 4 requirement. 5 5. Filing Injunction 6 We review the District Court's decision to impose a filing injunction for abuse 7 of discretion.

Eliahu v. Jewish Agency for Israel, 919 F.3d 709, 713 (2d Cir. 2019). 8 In deciding whether to impose such an injunction, district courts must consider: 9 "(1) the litigant's history of litigation and in particular whether it entailed 10 vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing 11 the litigation, e.g., does the litigant have an objective good faith expectation of 12 prevailing?; (3) whether the litigant is represented by counsel; (4) whether the 13 litigant has caused needless expense to other parties or has posed an unnecessary 14 burden on the courts and their personnel; and (5) whether other sanctions would 15 be adequate to protect the courts and other parties." Id. at 714 (quotation marks 16 omitted).

The District Court considered these factors here. While the District 17 Court recognized the Vidureks' pro se status, it determined that their extensive 11 1 litigation history meant that a filing injunction was the appropriate means of 2 protecting the court and other parties from further harassment and expense.

The 3 District Court did not abuse its discretion in reaching this conclusion. See id. at 4 713–16.3 5 We have considered all of the Vidureks' remaining arguments and conclude 6 that they are without merit. For the foregoing reasons, the order of the District 7 Court is AFFIRMED. 8 FOR THE COURT: 9 Catherine O'Hagan Wolfe, Clerk of Court 10 3The Vidureks also argue that the District Court issued the injunction without a hearing, in violation of their due process rights.

But they were on notice of the possibility of a filing injunction through Quinn's motion, and were afforded an opportunity to respond to that motion. 12