

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA**

O. HOWARD MUMMAU,	)	CIVIL ACTION
	)	
	)	NO. 95-0988
Plaintiff	)	
	)	
vs.	)	
	)	
	)	
GRETA R. AUL, ESQ., and	)	
LAW FIRM of APPEL & YOST,	)	
	)	
	)	
Defendants	)	

**TROUTMAN, S.J.**

**M E M O R A N D U M**

O. Howard Mummau, an attorney representing himself as plaintiff in this action, has asserted claims for alleged violations of his Constitutional rights arising out of a protracted divorce proceeding in the Lancaster County Court of Common Pleas. Plaintiff had originally included among the defendants his former wife; an appraiser of property owned during the marriage; court reporters assigned to hearings that had been conducted during the divorce proceedings; and the Lancaster County Court of Common Pleas judge to whom the divorce action had been assigned. Pursuant to prior orders of this Court, the complaint against the judicial defendant was dismissed, (Doc. #14, entered May 25, 1995), and summary judgment was granted to one of the court reporters, (Doc. #29, entered May 1, 1996). Plaintiff voluntarily dismissed the action as to his former wife,

the real estate appraiser and the other court reporter. (Doc. #12, entered May 1, 1995).

Plaintiff's claims against the remaining defendants are based upon allegations that defendant Greta Aul, a partner in the defendant law firm who represented plaintiff's former wife in the divorce action, engaged in a conspiracy with the judge in that case to decide issues adversely to the plaintiff, resulting in a deprivation of his right to due process of law. Discovery in this matter has now been completed and the case is before the Court for decision on the remaining defendants' motion for summary judgment.

Defendants contend that plaintiff has uncovered no evidence to support his conspiracy claims and that the only suggestion of the alleged conspiracy arises from plaintiff's accusation that Aul told the judge in the divorce proceeding that he "owed" her a favorable decision on a pending motion. Otherwise, defendants assert that the only apparent basis for plaintiff's claims against them is his belief that decisions rendered in the divorce proceeding were so devoid of substantive legal merit or so contrary to established law that the orders to effect such decisions could only have been entered for improper reasons. Thus, defendants argue that they are entitled to summary judgment since plaintiff's legal arguments are insupportable and there are no facts which he can present to a jury to prove his claims.

Upon review of the record of this case in light of the legal standards applicable to motions for summary judgment and to claims asserted under 42 U.S.C. §1983, we conclude that the moving defendants are correct. Accordingly, for the reasons discussed herein, we will grant defendants' motion for summary judgment.

#### I. Legal Standards for Summary Judgment

Although familiar, the standards applicable to the Court's consideration of motions for summary judgment bear repeating. Summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P 56(c).

To defeat summary judgment, an issue of fact in dispute must be both genuine and material, i.e., one upon which a reasonable factfinder could base a verdict for the non-moving party and one which is essential to establishing the claim. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). The Court is not permitted, when considering a motion for summary judgment, to weigh the evidence or make determinations as to the credibility thereof. Our sole function, with respect to the facts, is to determine whether there are any disputed issues and, if there are, to determine whether they are both genuine and material. Id. The Court's consideration of the facts, however, must be in the light most favorable to the party opposing summary judgment and all reasonable inferences

from the facts must be drawn in favor of that party as well.

Tigg Corp. v. Dow Corning Corp, 822 F.2d 358 (3rd Cir. 1987).

In order to obtain a summary judgment, the proponent of the motion has the initial burden of identifying, from the sources enumerated in Rule 56, evidence which demonstrates the absence of a genuine issue of material fact. When confronted by a properly supported motion for summary judgment, the opposing party is required to produce, from the same sources, some contrary evidence which could support a favorable verdict.

Additionally, where the non-movant, usually the plaintiff, bears the burden of proof on the issue which is the subject of the summary judgment motion and is confronted by the defendant's argument that the facts established through the discovery process do not support the claim, that party must identify evidence of record sufficient to establish every element essential to the claim. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp., 812 F.2d 141 (3d Cir. 1987).

In order to defeat summary judgment, the party opposing the motion may not rest upon mere denials of the facts identified by the movant as supportive of its position, nor upon the vague and amorphous argument that the record somewhere contains facts sufficient to support its claims. Childers v. Joseph, 842 F.2d 689 (3d Cir. 1987). Instead, the party resisting the motion for summary judgment is required to identify

specifically the evidence of record which supports the claim and upon which a verdict in its favor may be based. Id. Thus,

[T]he mere existence of some evidence in support of the non-moving party will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the non-moving party on the issue.

Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1308 (3rd Cir. 1995).

If the movant succeeds in demonstrating that there are no genuine issues of material fact in dispute, or, as sometimes occurs, if the parties agree as to the essential facts, the Court must then be satisfied that the moving party is entitled to judgment as a matter of law. Obviously, it will avail the proponent of summary judgment nothing if the undisputed facts, considered in light of the legal standards applicable to the claim, do not support a judgment in its favor. Lease Navajo, Inc. v. Cap Aviation, Inc., et al., 760 F. Supp. 455 (E.D. Pa. 1991). McElyea v. Navistar, 788 F.Supp 1366 (E.D. Pa. 1991).

## II. Factual Background

There are no material facts in dispute in this action largely because plaintiff has not presented any facts which either establish any of the essential elements of his claim or demonstrate that there is a jury question with respect to any genuine or material issue of fact which could support the essential elements of his claims. Indeed, in response to the motion for summary judgment, plaintiff has not really attempted

to identify disputed facts. Rather, plaintiff has asserted only his conclusions that there are damaging inferences which might be drawn from the undisputed facts upon which he purportedly bases his claims. We will not, therefore, engage in an extensive recitation of specific orders which were issued and incidents which occurred during the divorce proceedings, since there is no dispute that such events occurred and that plaintiff contends that such occurrences support his claims. Many of the incidents and orders to which plaintiff refers, however, are material to this action only if plaintiff's unsupported characterizations of the hidden meanings of such incidents and the real reasons behind such orders are accepted. Thus, we will briefly set forth only so much of the factual background of this action as is necessary to place our discussion of the legal issues in context.

Plaintiff instituted divorce proceedings against Muriel J. Mummau, his former wife, in July, 1983. Although a decree of divorce was issued in 1992, final resolution of all economic issues incident to the divorce was not achieved until April, 1995. A particular impediment to such resolution was the disposition of real property, which included the marital residence and which plaintiff continued to occupy during the divorce proceedings.

At various times during the long pendency of the divorce action, each of the parties thereto accused the other of improper conduct. Muriel Mummau and her counsel, e.g., asserted

that plaintiff had deliberately prolonged the matter in order to remain in the marital residence without having to pay Muriel Mummau the fair value of her share of that property and flouted lawful orders of the court with impunity. Howard Mummau asserted that Muriel Mummau's counsel advised her client to take action that violated plaintiff's First Amendment right to privacy and to seek improper and legally untenable orders from the court. Plaintiff also asserted that all of the judges of the Lancaster County Court of Common Pleas, especially Wayne Hummer, who presided over the divorce action, were biased against him because of prior political activities and because of cases he took as an attorney in Lancaster County. For that reason, he petitioned the court to have the divorce action removed from Lancaster County or to have a judge from another county hear the case. Aul, on behalf of her client, Muriel Mummau, opposed Howard Mummau's petition, and it was subsequently denied by the court. The case, therefore, remained in Lancaster County before Judge Hummer.

Howard Mummau appealed the order denying removal of the action from Judge Hummer, as well as a number of other orders entered by Judge Hummer which he contended were incorrect, but all appeals were denied, dismissed or refused by the appellate courts of Pennsylvania and by the Supreme Court of the United States. Thus, all appealed orders remained effective and enforceable. Nevertheless, the instant action is based entirely upon plaintiff's contention that relief requested by Greta Aul as counsel for Muriel Mummau and orders entered with respect to

various issues in the divorce proceeding were improper, contrary to the law of Pennsylvania, and, therefore, the product of collusion between defendant Aul and Judge Hummer.

Plaintiff has identified only two extraneous facts, i.e., facts not allegedly discernible from Aul's motions or from orders entered in the divorce proceedings, that purportedly support his claims. The first is a remark made by Greta Aul during an argument before Judge Hummer. Plaintiff contends that Aul told Judge Hummer that he "owes" her a favorable decision, and, therefore, that some improper personal consideration must have been given to the judge for which Aul was seeking recompense. (See, Exh. A to Defendants' Motion for Summary Judgment, (Doc. #50), Deposition of O. Howard Mummau at 36, 37; January 20, 1993, letter to Greta Aul, Exh. P-2 to Aul Deposition, Doc. #50, Exh. B). Aul agrees that she made a remark somewhat similar to that which plaintiff alleges, but contends that she really stated, and meant, that the Judge owed her the consideration of reading her motion and considering the legal authority cited in support thereof and, therefore, should not dismiss out of hand the relief she requested. (Id, Aul Deposition at 55-57).

The only other information produced by plaintiff in opposition to summary judgment which he contends constitutes evidence of a conspiracy between Aul and Judge Hummer are time records for Greta Aul that assertedly reflect ex-parte communications with the court concerning the divorce action.

There is no dispute that the time sheets reflect work performed by Greta Aul, but defendants disagree with the meaning plaintiff ascribes to such records.

### III. Discussion

There are two essential elements of a §1983 civil rights claim: 1) deprivation of rights secured by the Constitution or laws of the United States, (2) by persons acting under color of state law. Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993). In order to establish liability for a Constitutional violation against a private party defendant, therefore, plaintiff must demonstrate that the defendant violated protected rights, and that the private party's actions were "fairly attributable" to the state, or that the state "significantly contribute[d] to the constitutional deprivation." McKeesport Hospital v. Accreditation Council, 24 F.3d 519, 523 (3rd Cir. 1994), quoting, Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed. 2d 482, 495 (1982); Jordan v. Fox Rothschild, 20 F.3d 1250, 1266 (3rd Cir. 1994).

Generally, three tests have been developed for determining whether the necessary state action is present when a §1983 claim is asserted against private parties, depending upon the circumstances which gave rise to the claim: (1) the exclusive function test, which is applicable where a private entity has exercised powers that are traditionally the exclusive province of the state; (2) the concerted action or nexus test, applicable

where a private party has acted in concert or with the substantial assistance of a state official; (3) the interdependence or "symbiotic relationship" test, which applies when the state is so involved in the function of a private entity that it is effectively a joint participant in the conduct of the private party. Mark v. Borough of Hatfield, 51 F.3d 1137, 1142 (3rd Cir. 1995); Groman v. Township of Manalapan, 47 F.3d 628, 639 (3rd Cir. 1995).

As noted, plaintiff in this action asserts that defendants acted under color of state law by virtue of a conspiracy with Wayne Hummer, the Lancaster County Court of Common Pleas judge to whom plaintiff's divorce action was assigned. Thus, plaintiff is relying upon the concerted action test to establish state action. In the context of this case, therefore, plaintiff is required to prove that Judge Hummer, the government actor, and the defendants were jointly involved in conduct which resulted in a violation of his constitutionally protected right to due process of law. Darr v. Wolfe, 767 F.2d 79 (3rd Cir. 1985). Plaintiff may meet his burden by demonstrating that by means of "a pre-arranged plan...[the government actor] substituted the judgment of private parties for [his] own official authority." Cruz v. Donnelly, 727 F.2d 79, 80 (3rd Cir. 1984)(Emphasis added).

The essence of concerted action is the agreement or pre-arrangement between the state and private actors "to inflict a wrong or injury upon another." Alexis v. McDonald's

Restaurants of Massachusetts, 67 F.3d 341, 356 (1st Cir. 1995) (dissenting opinion). Parallel but unconnected conduct by a state actor and private party does not constitute concerted action for purposes of imposing §1983 liability upon a private party. Rather, as stated by the Supreme Court in Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185, 189 (1980), the state actor and the private party must be "willful participant[s] in joint action." Thus, although liability for a §1983 claim based upon concerted action may be imposed upon the private party even when the state actor is immune from liability, as in the case of a judge, "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or joint actor with the judge." Id., 66 L.Ed.2d at 190.

The record in this case clearly demonstrates that the plaintiff is, indeed, attempting to impose liability upon his former wife's attorney and her law firm primarily because of the positions the attorney successfully took during the divorce proceedings. Reduced to its essence, plaintiff's argument in support of defendants' liability in this case appears to be that because Judge Hummer was biased against him and, therefore, was predisposed to decide legal issues in favor of his former wife, defendant Aul's insistence upon opposing plaintiff's view of the law and equities of the situation facilitated Judge Hummer's vendetta and provided him with the opportunity to deprive plaintiff of his rights. Thus, plaintiff appears to contend that

Aul's vigorous representation of her client provided Judge Hummer with the opportunity to make decisions adverse to the plaintiff and thereby to injure him.

Plaintiff also asserts that the legal positions taken by Aul, manifested in the advice given to her client, the relief requested on behalf of her client and the orders entered by the Judge in response to Aul's motions, petitions or requests were so blatantly wrong as to constitute proof of plaintiff's claims against Aul without resort to additional evidence. (See, e.g., Exh. A to Doc. #50, Mummau Deposition at 38, 39, 44, 48, 56, 58, 67, 69).

The entire tenor of plaintiff's deposition testimony suggests that he is actually asserting that both Aul and Judge Hummer disliked him, and, therefore, independently took positions that combined to cause him to fare worse than he thought he should in the divorce proceeding. He could point to no evidence of a conspiracy other than inferences which he drew from letters and other documents which he viewed as demonstrating the purported bias against him on the part of Aul and Judge Hummer. Plaintiff does not, however, appear to believe that Aul and Judge Hummer truly conspired against him in terms of reaching an actual agreement and proceeding to carry out a joint plan. Indeed, in response to questions addressed to plaintiff during his deposition to elicit the basis and proof for his claims, plaintiff described the conspiracy he alleged between defendant Aul and Judge Hummer as "a silent agreement", i.e.,

a pattern of acting, you don't have to prove a specific verbal agreement between people to prove a conspiracy, if you can show that there is a mode of operation, that there was an understanding and clearly then you have a shown a conspiracy an understanding to effect a certain result.

(Exh. A to Doc. #50, Deposition of O. Howard Mummau at 26).

Plaintiff did not explain, however, how such a "silent" understanding could come into existence without, at least, some knowledge on the part of each of the "co-conspirators" concerning the other's intentions. Plaintiff appears to be asserting, therefore, that although Aul and Judge Hummer acted independently, they each realized that the effect of their parallel actions was damaging to plaintiff and independently resolved to continue their own conduct, which they somehow understood as furthering and encouraging similar, albeit independent, conduct by the other "co-conspirator".

Under the applicable legal standards, such "evidence" fails to establish the necessary state action component of a §1983 claim. In the first instance, the inferences of wrongdoing that plaintiff draws from the orders, letters and course of conduct described by the plaintiff are plausible only if plaintiff's ultimate belief is accepted, i.e., that both Aul and Judge Hummer intended to injure plaintiff via the divorce proceeding rather than to vigorously and effectively represent a client and to decide the issues based upon their respective good faith beliefs that the legal positions taken and the orders entered comported with the law. Plaintiff is required, however,

to demonstrate that a jury could reach the ultimate conclusion of a conspiracy from reasonable inferences which may be drawn from the facts. He is not permitted to prove that his inferences are reasonable by assuming the truth of the ultimate conclusion that a conspiracy existed. A jury cannot reasonably base a verdict in favor of the plaintiff upon nothing more than suspicion and speculation concerning the purportedly true motives behind the conduct of Aul and Judge Hummer.

Moreover, since none of the orders which plaintiff cited to establish a conspiracy by inference were overturned on appeal, his arguments based upon the supposedly obvious and blatant legal errors contained in such decisions are completely meritless.

Finally, under the applicable legal standards for proving concerted action, plaintiff's characterization of a "silent agreement" between Aul and Judge Hummer is clearly insufficient. Plaintiff admittedly has no direct or reasonably probative circumstantial evidence of any actual or overt plan or agreement between Aul and Judge Hummer, and according to his own testimony, does not actually believe that there was such an agreement. Consequently, he has not produced evidence sufficient to establish an essential element of his claim. As noted, he relies only upon his own inferences from documents generated during the divorce proceedings and from two additional bits of "evidence", i.e., Greta Aul's purportedly damaging remark that Judge Hummer "owed" her something and the time records of Appel

and Yost which show some contact between Aul and various judges' chambers. Plaintiff, however, took no steps to develop such assertions of wrongdoing into actual evidence of a conspiracy during the discovery period in this case.

Aul noted in her deposition that the remark cited by plaintiff was made in open court in the presence of a number of other attorneys and that she had later questioned some of those attorneys regarding whether they believed she had conducted herself improperly. (Exh. B to Doc. #50, Aul Deposition at 56). Plaintiff, however, apparently took no statements from anyone present to corroborate the inference he drew from Aul's remark, or even to support his own version of the remark, which differs from Aul's recollection.

Similarly, Aul explained that the entries on her time sheets which reflect contact with various judges' chambers could have been contacts between her staff and the judges' staffs, or between her and judges' staff members, and, in any event, that she never spoke to Judge Hummer or to any other judge concerning the substance of any pending case, including the divorce action. (Id. at 16--24). Again, plaintiff preferred to oppose summary judgment by relying only upon the inference of concerted action which he draws from the existence of the time records alone and his conclusion that Aul and Judge Hummer sought to injure him through the divorce proceedings. Plaintiff did not procure, or apparently attempt to procure, any evidence which might have cast doubt upon Aul's explanation. Plaintiff did not, e.g., seek to

question members of any judges' staff or obtain affidavits or testimony from other attorneys to the effect that plaintiff's explanations are not credible in light of the standard procedures of the judges involved or for any other reason.

At his deposition, plaintiff mentioned two other attorneys whom he said could support his inferences of conspiracy between Aul and Judge Hummer, but neither deposed those attorneys nor provided transcripts of their prior testimony to which he referred. (See, Exh. A to Doc. #50, Mummau Deposition at 7--12).

In addition to plaintiff's complete failure to prove that defendants' actions were taken under color of state law, he has failed to establish that he was deprived of any right secured by the Constitution or laws of the United States. By his own admission, plaintiff is really attempting a collateral attack on state court decisions by means of this action. (Id. at 56). He is simply unable to accept that positions espoused by Aul, agreed to by Judge Hummer, and not reversed on appeal, are legally correct. (See, e.g., Id. at 54--55). He is, therefore, seeking another venue in which to vindicate his view of the law of Pennsylvania and to make Aul and her law firm pay for his perceived losses in the divorce proceeding. Indeed, his primary arguments in opposition to summary judgment are a rehashing of the arguments he made on various legal issues that arose during the divorce proceedings in an apparent attempt to demonstrate that such issues were wrongly decided, and, therefore, amount to a deprivation of due process. Plaintiff defines due process of

law, however, quite narrowly as decisions and legal positions which comport with his own view of the law. Virtually the entire deposition of Greta Aul is a legal debate between the attorneys on various points of law in which plaintiff asserts that each disagreement with Aul demonstrates her intent to deprive him of due process by arguing contrary to his position. At times, plaintiff seemed to completely lose sight of his obligation to prove a conspiracy with a state actor and lapses into argument that Aul's legal positions alone could support his civil rights claim against her. (See, e.g., Exh. A to Doc. #50, Mummau Deposition at 63--65; Exh. B, Aul Deposition at 113--118).

In short, plaintiff's "evidence" in support of his claims consists of nothing more than the public record of his divorce proceedings embellished by innuendo and speculation concerning the reasons that his interpretations of the law were not accepted by the court. He suggests, therefore, that he now be permitted to make such legal arguments to a jury and allow it to decide whether he or Aul and the judge who heard his divorce case correctly understand the law of Pennsylvania. Such arguments provide no evidence contrary to defendants' contention that there are no facts of record which support plaintiffs' claims, and, therefore, provide no basis for denying defendants' motion for summary judgment. In light of the complete absence of any evidence which would permit a reasonable jury to decide this case in favor of the plaintiff, we have no choice but to grant defendants' motion and enter judgment in their favor.

Consequently, an appropriate order to effect this decision will be entered.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

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LAW FIRM of APPEL & YOST, )  
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TROUTMAN, S.J.

O R D E R

And now, this                    day of                    , 1997, upon consideration of the defendants' Motion for Summary Judgment, (Doc. #50), and plaintiff's response thereto, **IT IS HEREBY ORDERED** that the motion is **GRANTED**.

**IT IS FURTHER ORDERED** that judgment is entered in favor of the defendants, Greta R. Aul, Esq. and the Law Firm of Appel and Yost, and against the plaintiff on all claims asserted in the complaint and first amended complaint.

**IT IS FURTHER ORDERED** that the action having now been terminated with respect to all defendants named in the complaint and/or amended complaint, there are no other matters to adjudicate in this action, and the Clerk, therefore, shall mark the above-captioned action **CLOSED** for statistical purposes.

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J.