

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN HEFFERNAN : CIVIL ACTION
 :
 v. :
 :
 :
 ROBERT HUNTER, GEORGE BOCHETTO, :
 and BOCHETTO & LENTZ : NO. 97-6041

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

March 25, 1998

Plaintiff, John Heffernan ("Heffernan"), has alleged violations of 42 U.S.C. §§ 1985, and 1986, and wrongful use of civil proceedings, 42 Pa.C.S. §§ 8351, et seq. Defendants George Bochetto ("Bochetto") and Bochetto & Lentz ("B&L"), joined by defendant Robert Hunter ("Hunter"), have filed a motion to dismiss. The complaint fails to state a cause of action under §§ 1985, and 1986, so those claims will be dismissed with leave to amend the claim under § 1985(1). The court lacks independent subject matter jurisdiction for the wrongful use of civil proceedings claim, and it will also be dismissed unless Heffernan amends the complaint to state a cause of action under § 1985(1).

BACKGROUND

The factual background has been stated by Judge Waldman in Hunter v. Heffernan, 1996 WL 694237 (E.D. Pa. 1996). In January 1994, Heffernan, an investigator with the Securities and Exchange Commission ("SEC"), was assigned to investigate possible insider trading violations involving Independence Bancorp, Inc.'s ("Bancorp") possible merger with Corestates Financial Corp. ("Corestates"). During the investigation, Hunter, a director of

Bancorp, came under scrutiny.

In early February, 1994, Hunter was arrested and charged with molesting the eleven-year-old daughter of his former companion of five years, Joanne Kelly ("Kelly"). Kelly revealed information regarding the insider trading investigation to the Pennsylvania detective in the child molestation case. The Pennsylvania detective referred Kelly to Heffernan.

During the course of the insider trading investigation, Heffernan and Kelly began a social relationship that led to their marriage in May, 1995. Heffernan's relationship with Kelly violated SEC policy against maintaining an intimate personal relationship with a material witness in a pending investigation for which the agent was responsible. In August, 1994, recognizing the increasing seriousness of his relationship with Kelly, Heffernan requested to be relieved of his duties with respect to Bancorp and Hunter. The SEC transferred the investigation to the Northeast Regional Office in New York City.

Hunter filed a Bivens claim in federal district court on August 29, 1994. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). That action alleged Heffernan caused Kelly to leave Hunter and bring untrue child molestation charges against Hunter in an effort to extort millions from him by threat of civil suit. Hunter alleged that Heffernan provided confidential financial information obtained in the SEC investigation to Kelly in an effort to aid her civil action against Hunter. For instance, Hunter alleged that

Heffernan informed Kelly of a line of credit Hunter obtained, so that Kelly demanded \$3,000,000 in settlement of a possible civil claim for molestation. Hunter's lawyers in the Bivens action allegedly hired a private detective to obtain information on Heffernan and Kelly, and publicized the information to the media. Heffernan alleges that Hunter filed the Bivens claim to stop the SEC and Commonwealth from pursuing insider trading and child molestation investigations respectively.

Heffernan now claims that Hunter and his Bivens lawyers: used the Bivens action to impede Heffernan from discharging his duties through harassment, intimidation and threat, in violation of 42 U.S.C. § 1985(1); conspired to intimidate Heffernan from testifying as a witness in the SEC action, in violation of 42 U.S.C. § 1985(2)(first clause)¹; and wrongfully instituted civil proceedings, in violation of 42 Pa.C.S. § 8351. Defendants, filing a motion to dismiss, argue: Heffernan lacks standing; filing a complaint in court is not sufficient to create liability under § 1985; and filing a complaint is protected under the petition clause of the First Amendment. Heffernan filed a

¹ The complaint does not state whether Heffernan's action arises under the "first clause" or the "second clause" of § 1985(2). The first clause is aimed at conspiracies to intimidate or pressure witnesses, parties and jurors in the performance of their duties in any court of the United States. Brawer v. Horowitz, 535 F.2d 830, 840 (3d Cir. 1976). The "second clause" proscribes conspiracies to deny parties equal protection of the laws, and has been construed to require a class-based invidiously discriminatory animus. Id. In the response to the motion to dismiss, Heffernan concedes that the complaint does not seek damages under § 1985(2)(second clause). Consequently, the court will not consider the propriety of such claims.

response, and defendants replied. Defendants subsequently filed a supplemental memorandum to which Heffernan has responded.

DISCUSSION

I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). A motion to dismiss may be granted only if the court finds the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

II. Standing

Heffernan's complaint alleges that Hunter, Bochetto, and B&L conspired to violate his civil rights under 42 U.S.C. § 1985(1) by attempting to intimidate him in discharging his duties by harassment, intimidation and threat. Section 1985(1) provides, in relevant part, that "parties . . . may have an action for the recovery of damages" if they are injured because:

two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person . . . from discharging any duties [of any office, trust, or place

of confidence under the United States]; . . . or to injure him in his person or his property on account of his lawful discharge of the duties of his office[.]

42 U.S.C. § 1985(1). Defendants argue that because Heffernan had no stake in the insider trading charges, he does not have standing to assert a claim under § 1985(1). Lepley v. Dresser, 681 F. Supp. 418 (W.D. Mich. 1988). However, Lepley was a case under § 1983; section 1985(1) is expressly directed at federal officials.

An Assistant United States Attorney can maintain a cause of action under 42 U.S.C. § 1985(1) against individuals for defamation and injury to reputation. Windsor v. The Tennessean, 719 F.2d 155, 161 (6th Cir. 1984). Implicit in this holding is a determination that an Assistant United States Attorney has standing to bring the claim. The United States government cannot sue for a civil rights violation under § 1985(1), O'Mally v. Brierley, 477 F.2d 785, 789 (3d Cir. 1973); United States v. Biloxi Municipal School District, 219 F. Supp. 691, 694 (S. D. Miss. 1963), so the only person who would have standing is Heffernan himself. Heffernan has standing to complain of a conspiracy in violation of § 1985(1), if such a conspiracy did, in fact, occur.

But Heffernan does not have standing to claim injury under 42 U.S.C. § 1985(2)(first clause). Section 1985(2)(first clause) provides:

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States

from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror;

"the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. §§ 1985(2), (3).

The essential elements of a 1985(2) claim of witness intimidation are: "(1) a conspiracy between two or more persons (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiffs." Malley-Duff & Associates v. Crown Life Ins. Co., 792 F.2d 341, 356 (3d Cir. 1986) (quoting Chahal v. Paine Webber, 725 F.2d 20, 23 (2d Cir. 1984)), aff'd, 483 U.S. 143 (1987).

The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). "Going behind the plain language of a statute in search of a possible contrary congressional intent is a step to be taken cautiously even under the best of circumstances." American

Tobacco Co. v. Patterson, 456 U.S. 63, 75 (1982) (quoting Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 26 (1977)).

The plain language of 42 U.S.C. § 1985(2) prohibits conspiracies against "any party or witness" with respect to any United States court proceeding, and allows "any party" injured by such a conspiracy to sue for damages. It does not extend the right to sue to "any witness" injured thereby. The specific language of § 1985(2) "shows that Congress intended to provide a damage remedy only for litigants whose right to pursue a claim in federal court has been hindered by a conspiracy. . . . Otherwise the term 'witness' would have been contained in those remedial provisions." Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175, 1180 (7th Cir. 1989). The decisions to the contrary, see Brever v. Rockwell Int'l Corp., 40 F.3d 1119, 1125 n. 7 (10th Cir. 1994); Gerakaris v. Champagne, 913 F. Supp. 646, 650-51 (D. Mass. 1996), ignore the specific language of the statute limiting recovery to "the party so injured or deprived," and instead focus on the "history and goals of the statute," Gerakaris, 913 F. Supp. at 650-51. The language of the statute is clear and analysis of the statute's history and goals is unnecessary.

"Allegations of witness intimidation under § 1985(2) will not suffice for a cause of action unless it can be shown the litigant was hampered in being able to present an effective case." David v. United States, 820 F.2d 1038, 1040 (9th Cir. 1987). The issue of whether a potential witness in a possible federal action can bring a § 1985(1) claim does not appear to

have been directly addressed by the Court of Appeals for the Third Circuit. However, the Court of Appeals has noted the holding in David v. United States in Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). The plaintiff in Rode worked in the state police department under the supervision of her brother-in-law, a subsequent witness in a civil rights case. After citing David, the court declined to "adopt[] . . . a broad interpretation of section 1985(2)," that would extend the right to sue to individuals other than those directly impacted by a conspiracy to intimidate a witness. Rode 845 F.2d at 1207. Analysis of the statutory language, as well as the reference to David in Rode compels the conclusion that § 1985(1)'s protection extends only to those specifically enumerated in the statute: parties. The SEC is not a plaintiff in this action, and has not alleged that it was unable to pursue an action in federal court. "Since [Heffernan] has not shown [he] was a party to the actions in which [he] was intimidated, [he] can show no injury under [the first clause of] § 1985(2)." David, 820 F.2d at 1040.

III. Section 1985(1) Liability

Heffernan alleges that defendants filed the underlying Bivens action and "disseminated false and libelous information to the mass media about the plaintiff as part of a conspiracy" to hinder the discharge of his official duties. Defendants argue the mere filing of a complaint in court is insufficient to invoke liability under § 1985.

The filing of a complaint in court does not constitute

"force, intimidation or threat" sufficient to impose § 1985 liability. The First Amendment of the Constitution provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. This includes the right to complain to public officials and to seek judicial relief. Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988); McCoy v. Goldin, 598 F. Supp. 310, 314 (S.D.N.Y. 1984); see United Mine Workers v. Illinois Bar Assoc., 389 U.S. 217, 222 (1967) (the right "to petition for a redress of grievances [is] among the most precious of liberties safeguarded by the Bill of Rights" and is "intimately connected . . . with the other First Amendment rights of free speech and free press").

The right of access to the courts is one aspect of the right to petition. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). This right includes the right to complain to an official about that official's subordinates. Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1343 (7th Cir. 1977).

In Stern, individuals audited by the IRS complained about the auditor's actions to the auditor's supervisors; the auditor brought a § 1985 action in response. The court held that the auditor failed to state a claim under § 1985 because the individuals had the right to petition the government. Id. It is irrelevant that the exercise of the right to petition "might have the effect of causing professional injury to the official about

whom complaints are made, or even that the complainer may be aware of or pleased by the prospect of such injury. . . . [L]aws which actually affect the exercise of . . . [First Amendment] rights need not do so directly and overtly to be adjudged constitutionally offensive." Id.

In Stern, the individuals complained to Stern's superior. Here, Hunter filed the Bivens action in federal court, and Heffernan had "the protective machinery of due process hearings . . . with full opportunity to refute that which is unfounded." Id. at 1344. Filing a Bivens action against a government officer is not "force, intimidation, or threat" under § 1985 (1) and (2); to hold otherwise would chill the exercise of private parties' right to petition the government under the First Amendment.²

However, publication of specific defamatory statements can form the basis of a § 1985(1) action. As the Stern court stated, the Supreme Court's approach to civil rights statutes such as § 1985 is to "accord (them) a sweep as broad as (their) language." Id. at 1336 (quoting Griffin v. Breckenridge, 403 U.S. 88, 97 (1971)). Defamation has long been regarded as an injury to the person. Windsor, 719 F.2d at 161. Allegations of specific

² If filing a complaint in court could justify § 1985 liability, it would significantly impact lawyers' representation of their clients. Hunter believed there was evidence that Heffernan had violated his right to privacy by providing Kelly with information obtained during the course of the SEC investigation. Hunter's attorneys with whom he allegedly conspired were performing an ethical and statutory duty to act "with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Pa. R.P.C. 1.3, Comment.

defamatory statements to the mass media can constitute sufficient injury for § 1985(1) liability, if the dissemination was done as part of a conspiracy to injure Heffernan in the lawful discharge of his duties.

In Windsor v. The Tennessean, 719 F.2d 155 (6th Cir. 1983), Windsor alleged that certain parties conspired to print defamatory news articles subsequently delivered to Windsor's supervisor. The Windsor court held "that the first amendment right to petition for redress of grievances does not protect from section 1985(1) liability those who conspire intentionally to defame a federal official in order to effect that official's discharge." Windsor, 719 F.2d at 162.³ It cited White v. Nicholls, 44 U.S. (3 How.) 266 (1845), a libel suit by a federal customs officer for defamatory letters written to the President. An alleged conspiracy to disseminate false and libelous information to the media can form the basis of liability under § 1985(2).

But Heffernan has not specifically alleged the defamatory statements. A court need not credit a complaint's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1429-30 (3d Cir. 1997)(quoting Glassman v. Computervision Corp., 90 F.3d 617, 628(1st Cir. 1996)). When

³ Although the Windsor court found that the plaintiffs had stated a cause of action under 42 U.S.C. § 1985(1), it also held "that each [defendant had] a valid defense." Windsor, 719 F.2d at 162.

examining 12(b)(6) motions, courts have rejected "legal conclusions," "unsupported conclusions," "unwarranted inferences," "unwarranted deductions," "footless conclusions of law," and "sweeping legal conclusions cast in the form of factual allegations." Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1997). "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993).

Heffernan's only statements about the alleged defamation or slander were that: defendants "disseminated false and libelous information to the mass media about the plaintiff," (Complaint, ¶ 35, 37); and "arranged to provide [a film of Heffernan and Kelly] . . . as well as deliberately unverified and untruthful information to several media sources." (Pl. Memorandum of Law in Response to Motion to Dismiss, p. 6). These claims "rel[ying] on vague and conclusory allegations[,] do[] not provide 'fair notice' and will not survive a motion to dismiss." United States v. City of Phila., 644 F.2d 187, 204 (3d Cir. 1980). Heffernan's claim that the defendants conspired to injure him by making defamatory or libelous statements to the press will be dismissed without prejudice to amend the complaint to state a claim with sufficient specificity to survive a motion to dismiss.⁴

⁴ The parties have not addressed the issue, but they should be prepared to discuss at an appropriate time whether an

IV. Claims under Section 1986

Section 1986 provides for a private right of action against anyone who knew of a conspiracy in violation of § 1985 and failed to prevent the wrong. Brown v. Reardon, 770 F.2d 896, 905 (10th Cir. 1985); Loehr v. Ventura County Comm. College Distr., 743 F.2d 1310, 1320 (9th Cir. 1984); Silo v. City of Phila., 593 F. Supp. 870, 874 (E.D. Pa. 1984); Fishman v. De Meo, 590 F. Supp. 402, 406 (E.D. Pa. 1984). Section 1986 specifically provides:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented[.]

42 U.S.C. § 1986. Without a valid claim under § 1985, Heffernan cannot recover under § 1986. "Having failed to state a claim under § 1985[], a fortiori [Heffernan] failed to state a claim under § 1986." Brawer, 535 F.2d at 840. Heffernan's § 1986 claim will be dismissed without prejudice to renew should he amend the complaint to state a valid § 1985(1) claim for conspiracy to defame.

V. Wrongful Use of Civil Proceedings

Heffernan seeks to recover for wrongful use of civil proceedings in violation of Pennsylvania law, 42 Pa. C. S. A. § 8351. The court does not have an independent basis of

individual can conspire with his agent.

jurisdiction over this state claim because 28 U.S.C. § 1332 requires complete diversity of citizenship between the plaintiff and the defendants. Because Heffernan and several defendants are Pennsylvania citizens, there is not complete diversity, and there is no jurisdiction under § 1332.

Jurisdiction for this claim is based on 42 U.S.C. § 1367, granting federal courts the power to exercise "supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy under Article III." 42 U.S.C. § 1367. Section 1367(c)(3) allows district courts to decline to exercise supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction." 42 U.S.C. § 1367(c)(3). Unless Heffernan can amend his § 1985(1) claim for conspiracy to defame so that it survives a motion to dismiss, the claim for wrongful use of civil proceedings will be dismissed as well.

CONCLUSION

Heffernan brought this action under § 1985(1) and (2), § 1986, and 42 Pa.C.S. § 8351. The statute creates a cause of action for a party, not a witness, so Heffernan does not have standing to challenge defendants actions under § 1985(2). The First Amendment protects the right to petition the government for redress of grievances, and Heffernan's allegations regarding filing a lawsuit as "force, intimidation, or threat" under § 1985(1) will be dismissed. Heffernan has not specifically

alleged the basis of his claim that the defendants "disseminated false and libelous information to the mass media" to hinder him from doing his job. Such legal conclusions are not sufficient to withstand defendants' motion to dismiss Heffernan's § 1985(1) claim with leave to amend. There is no § 1986 claim in the absence of a valid § 1985 claim, Heffernan's § 1986 claim must be dismissed unless he successfully amends the complaint. The court does not have independent subject matter jurisdiction over Heffernan's Pennsylvania claim for wrongful use of civil proceedings; that claim will also be dismissed unless the complaint is amended to state a cause of action under § 1985(1).

An appropriate order follows.

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ORDER

AND NOW this 25th day of March, 1998, upon consideration of defendants motion to dismiss, plaintiff's response in opposition thereto, defendants' reply, defendants' supplemental memorandum in support of the motion to dismiss, and plaintiff's response to defendants' supplemental memorandum, it is **ORDERED** that:

Defendants' motion to dismiss is **GRANTED** with leave to amend within 10 days.

Norma L. Shapiro, J