UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
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CLERK, US DIST COURT
WESTERN DIST. OF TEXAS

ALFRED E. EHM, *pro se*	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. SA: 06-CA-0103 (RF)
	§	
BOARD OF TRUSTEES of the SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,	§	
	§	
Defendant.	§	

MOTION TO DISMISS

TO THE HONORABLE ROYAL FURGESON:

Now comes the BOARD OF TRUSTEES OF VIA METROPOLITAN TRANSIT AUTHORITY OF SAN ANTONIO ("Board of Trustees"), Defendant in the above-styled and numbered lawsuit, and files this motion to dismiss based upon Rule 12 of the Federal Rules of Civil Procedure. In support thereof, Defendant respectfully states as follows:

I.

MOTION TO DISMISS BASED ON FAILURE TO SUE PROPER PARTY

1. The San Antonio Metropolitan Transit Authority d/b/a VIA Metropolitan Transit ("VIA") is a rapid transit authority organized under Chapter 451 of the Texas Transportation Code. TEX. TRANSP. CODE § 451.001 *et seq.* (Vernon 1999). As a public political entity under Chapter 451, VIA may sue and be sued. *Id.* § 451.054(c). VIA is governed by a Board of Trustees, the named Defendant in this cause. However, the Board of Trustees is not an entity capable of being sued as such and therefore lacks the capacity to be sued under Rule 9(a). *See* FED. R. CIV. P. 9(a). Because Plaintiff has sued an improper defendant, dismissal is proper under Rule 12(b)(7). *See* FED. R. CIV. P. 12(b)(7).

II.

MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND INEFFECTIVE SERVICE OF PROCESS OR, IN THE ALTERNATIVE, MOTION TO QUASH SERVICE OF PROCESS

2. Without valid service of process, this Court does not obtain personal jurisdiction over a defendant. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). When a plaintiff fails to effect valid service of process on a defendant, the court should dismiss the defendant. *See id.*; *Osorio v. Emily Morgan Enters. L.L.C.*, 2005 WL 589620, at *4 (W.D. Tex. 2005) (Rodriguez, J.) (unpublished) (copy attached). Courts in other jurisdictions have recognized that dismissal for lack of personal jurisdiction over the defendant is proper in this situation, even when the defendant had actual notice of the lawsuit. *Prewitt Enters., Inc. v. Organization of Petroleum Exporting Countries*, 353 F.3d 916, 924-25 (11th Cir. 2003); *Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 885 (8th Cir. 1996).

3. Resolving the issue of whether Plaintiff validly served Defendant in this cause requires that the Court apply Rule 4. *See* FED. R. CIV. P. 4. Plaintiff is responsible for serving the complaint, along with a summons, within the applicable time period. FED. R. CIV. P. 4(c)(1). Service on corporations or associations under Rule 4 is effected by delivering a copy of the complaint and summons to an officer or any managing, general, or other agent authorized to receive service of process. FED. R. CIV. P. 4(h)(1). Rule 4(e) provides that service of process may be accomplished under the law of the state where the Court is located or where service is effected. FED. R. CIV. P. 4(e)(1). Because the Court is located and service was attempted here, the Court must look to Texas law on service of process. FED. R. CIV. P. 4(e)(1), 4(h)(1).

4. Chapter 451 provides that VIA is a "public political entity and corporate body." TEX. TRANSP. CODE § 451.054(c). A plaintiff may effect service on a Texas corporation by serving its president, vice president, or any registered agent. TEX. BUS. CORP. ACT § 2.11(A)

(Vernon 1999). Sufficient service requires the Plaintiff serve "a true copy of the citation with a copy of the petition attached thereto." TEX. R. CIV. P. 106(a)(2). Texas allows for service using certified mail, return receipt requested; however, only the clerk of the court may bring about service using this method. TEX. R. CIV. P. 103, 106(a)(2).

5. Plaintiff mailed the Summons and Complaint directly to the Defendant using certified mail, return receipt requested. This action fails to satisfy Rule 4 and the relevant Texas rules governing service of process. FED. R. CIV. P. 4(e)(1); *Osorio*, 2005 WL 589620, at *4. As a result, the Court lacks jurisdiction over Defendant and the cause should be dismissed pursuant to Rule 12(b)(2). *Murphy Bros.*, 526 U.S. at 350; *Osorio*, 2005 WL 589620, at *5. Dismissal is also proper under 12(b)(5) because service of process was deficient, as set forth above. *Accord Osorio*, 2005 WL 589620, at *5.

6. The foregoing discussion presumes that Plaintiff intends to assert claims against the Defendant Board itself, rather than the Trustees individually or VIA. In order to properly sue the Board of Trustees as he appears inclined to do, Plaintiff must name the individual Trustees in their official capacities. If this was Plaintiff's intent – which is not at all clear from his Complaint – service was improper under Rule 4, since Plaintiff failed to serve the Trustees individually. While the Complaint names each of the Trustees in Paragraph III, it does so only as an afterthought and does not articulate actual claims against the individual Trustees. Regardless of Plaintiff's intended defendant, service was improper and dismissal is the appropriate remedy.

7. In the alternative, Defendant moves to quash service of the summons based upon Plaintiff's failure to effect proper service of process either on the Board or the individual Trustees. Mailing a summons to VIA does not amount to notice to the individual Trustees that they have been sued in their official capacity. When a plaintiff fails to successfully serve the

defendant, a motion to quash is proper and the Court should grant this relief. *See James Talcott, Inc. v. Allahabad Bank, Limited*, 444 F.2d 451, 466 (5th Cir. 1971); *Lasky v. Lansford*, 76 Fed. Appx. 240, 241-42 (10th Cir. 2003); *Thomas v. Furness Pac. Ltd.*, 171 F.2d 434, 434 (9th Cir. 1948). Further, when a court grants a motion to quash service as to the sole defendant, dismissal of all claims is appropriate, even when the plaintiff is *pro se*. *Lasky*, 76 Fed. Appx. at 241.

III.

MOTION TO DISMISS UNDER RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM

8. The aforementioned procedural infirmities aside, this cause must be dismissed because the Complaint fails to state a claim upon which relief can be granted. For the purposes of this motion, the complaint must be liberally construed in favor of the plaintiff and all the facts pleaded in the complaint must be taken as true. *Kane Enters. v. MacGregor (USA), Inc.*, 322 F.3d 371, 374 (5th Cir. 2003). While dismissal on this basis is a disfavored means of disposing of a case, district courts must grant dismissal when it is beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 365 (5th Cir. 2000). "The question is whether, in the light most favorable to the plaintiff and with every doubt resolved on his behalf, the complaint states any valid claim for relief." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999) (citing 5 CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 1357, at 601 (1969)).

9. In this Circuit, it is well-established that *pro se* complaints are held to less stringent standards than formal pleadings drafted by lawyers. *Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981). Regardless of whether a plaintiff is proceeding *pro se* or with counsel, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice

to prevent the motion to dismiss." *S. Christian Leadership Conf. v. Supreme Court of La.*, 252 F.3d 781, 786 (5th Cir. 2001) (citations and quotes omitted).

10. The essence of the Complaint is that the Defendant, VIA Board of Trustees, has violated federal law and, consequently, a number of other federal and state statutes and constitutional provisions. Specifically, Plaintiff alleges that the Defendant and its members are "subject to and legally required to comply with the *Right-to-Vote Law* of 1964, a judicial law laid down by the U.S. Supreme Court through *Reynolds v. Sims*, 377 U.S. 533 (1964) . . . ." Plaintiff's Original Complaint, ¶ 8. Plaintiff seeks declaratory relief, costs, and fees, contending that Defendant violates federal law because it does not subject its members to public elections. Plaintiff asserts that the VIA Board Members' refusal to stand for general elections is a violation of federal voting rights law, 42 U.S.C. § 1983, the Equal Protection and Due Process Clauses of the U.S. Constitution, Article I, Sections 3 and 9 of the Texas Constitution, and Chapter 39 of the Texas Penal Code (relating to a public servant's abuse of office or employment).

A. THE PRINCIPLE OF "ONE PERSON, ONE VOTE" APPLIES ONLY WHERE ELECTIONS ARE PROVIDED AND CASTS NO LIGHT ON WHEN A STATE MUST PROVIDE FOR ELECTION OF LOCAL OFFICIALS.

11. In his Complaint, Plaintiff focuses considerable attention on the "*One Person, One Vote Doctrine*" as articulated in *Reynolds* and its progeny. *See* Complaint, ¶ 9. The Supreme Court's opinions in *Reynolds* and its progeny firmly established the protections accorded the right to vote under the Equal Protection Clause of the Fourteenth Amendment. *See* 377 U.S. at 554-56. It was held that when a state or local government decides to select government officials by popular election, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that equal numbers of

voters can vote for proportionately equal numbers of officials. *See*, *Reynolds*, 377 U.S. at 575-576; *Hadley v. Junior College District*, 397 U.S. 50 (1970); *Sailors v. Board of Education*, 387 U.S. 105 (1967). *Reynolds* and its progeny were all cases where elections had been provided and cast no light on when a State must provide for the election of local officials. *Sailors*, 387 U.S. at 108. If we assume arguendo that where a State provides for an election of a local official, the requirements of *Reynolds* and its progeny must be met, we are still short of an answer to the present problem of whether the State of Texas may allow the VIA Board of Trustees to be appointed. Thus, the principle of "one person, one vote" and *Reynolds* and its progeny has no relevance here.

12. The federal Constitution does not confer the right to vote upon any one. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982); *Minor v. Happersett*, 21 Wall. 162, 178 (1875). "[T]he right to vote, per se, is not a constitutionally protected right." *Rodriguez*, 457 U.S. at 9 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973)). "The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments." *Pope v. Williams*, 193 U.S. 621, 632 (1904) (*overruled on other grounds, Dunn v. Blumstein*, 405 U.S. 330, 337 (1972)). The right to vote in any state is not a privilege springing from citizenship of the United States. *Id.*

13. A state is an autonomous political entity, "sovereign over matters not ruled by the Constitution." *Rodriguez, 457 U.S.* at 8 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974)). The privilege to vote in a state arises out of the jurisdiction of the state, to be exercised as the state directs and upon such terms as it finds proper. *Pope*, 193 U.S. at 632. Unless the state runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs. *Sailors*, 387 U.S at 109.

14. Political subdivisions of states such as counties and municipalities are not sovereign entities. *Sailors v. Bd. of Educ.*, 387 U.S. 105, 107 (1967) ("Political subdivisions of states . . . never were and never have been considered as sovereign entities.") (quoting *Reynolds*, 377 U.S. at 575). Political subdivisions of states are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them, and the number, nature, and duration of the powers conferred upon them and the territory over which they shall be exercised "rests in the absolute discretion of the State." *Id.* (citing to *Reynolds*, 377 U.S. at 575). They are subordinate instrumentalities, creatures of the state whose purpose is to effectuate state government function. *Id.* at 107-08.

15. In *Sailors* the Supreme Court found "no constitutional reason why state or local officers of [a] non-legislative character . . . could not be chosen by the governor, the legislature, or any other appointive means, rather than by an election", stating that "[v]iable local governments may need innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. At least as respects non-legislative officers, a State can appoint local officials or elect them or combine elective and appointive systems . . . ." *Sailors*, 387 U.S. at 108, 110-11. The Supreme Court did not pursue the distinction between non-legislative and legislative in *Hadley* because it was "unmanageable" since governmental activities "cannot easily be classified in the neat categories favored by civics texts." *Hadley*, 397 U.S. at 55-56 (citing *Avery v. Midland County*, 390 U.S. 474, 482 (1968)). Thus, the distinction was abandoned in *Rosenthal v. Board of Education of Central High School District No. 3 of the Town of Hempstead*, 385 F.Supp. 223, 226 (E.D.N.Y), *aff'd* 420 U.S. 985 (1975), where the court held that once it is determined that local officials are not selected by popular election, there is no need to determine whether they perform functions that are better defined as "legislative" or "administrative."

B. TEXAS, CLEARLY ACTING WITHIN ITS RIGHTS AS A STATE, HAS DECIDED THAT THE VIA BOARD SHALL BE APPOINTED.

18. Rapid transit authorities such as VIA are created by the Texas Legislature pursuant to Chapter 451 of the Texas Transportation Code. A rapid transit authority exercises public and governmental functions, namely to provide a public transportation system in the territory of the authority. TEX. TRANS. CODE §§ 451.052, 451.056. Management and control of an authority is vested in its board of trustees, which exercises no legislative functions. *Id.* §§ 451.053, 451.054. A board of trustees of a rapid transit authority is selected by appointment. *See* TEX. TRANSP. CODE ANN. § 451.502. This appointive method has previously withstood constitutional challenges based on the same "one person, one vote" theory advanced here. *See, e.g., City of Humble v. Metro. Transit Authority*, 636 S.W.2d 484 (Tex. App.—Austin 1982, writ ref'd n.r.e.). Section 451.501 establishes five initial Board Members, plus a number of additional members, based upon community population. *Id.* § 451.501(a). For VIA, there are six additional members, for a total of eleven. *See id.* § 451.501(e). Under the statute, the initial five members are appointed by the City Council, San Antonio's governing body. *See id.* § 451.502(a). The remaining VIA Board Members are appointed as follows:

> (1) two members appointed by a panel composed of:
>
> (A) the mayors of the municipalities in the authority, excluding the mayor of the principal municipality; and
>
> (B) the county judges of the counties having unincorporated area in the authority, excluding the county judge of the principal county;
>
> (2) three members appointed by the commissioners court of the principal county; and
>
> (3) one member, who serves as presiding officer of the board, appointed by a majority of the board.

Id. § 451.502(e).

C. THE METHOD FOR SELECTING VIA BOARD MEMBERS IS NOT UNIQUE, BUT IS WELL-KNOWN, FREQUENTLY UTILIZED, AND CONSTITUTIONALLY SOUND.

19. The appointive method for selecting VIA Board members is not unique, but is well known and frequently utilized. For example, the San Antonio Water System ("SAWS") Board of Trustees is appointed by majority vote of the San Antonio City Council. *See* City of San Antonio Ordinance No. 75686 Section 32.D. The City Public Service ("CPS") Energy Board of Trustees was initially appointed by the City Council, but vacancies on the Board are filled by a majority vote of the remaining Board members. *See* City of San Antonio Electric and Gas Systems Revenue Refunding Bonds, New Series 2005A. The appointive method for selecting the CPS Board was challenged in *Byrd v. City of San Antonio*, 587 F.2d 184, 185 (5th Cir. 1979) on the grounds that it deprived the plaintiffs of their right to vote, and constituted a denial of Equal Protection and the right to a Republican Form of Government. The district court dismissed the action, finding that each claim alleged was, as a matter of law, wholly without merit. *Byrd*, 587 F.2d at 185. The Fifth Circuit affirmed, stating that "There is no statute or constitutional provision which requires election or appointment by elected officials of the persons who carry out this proprietary and non-governmental function." *Id.* at 186 (citing *e.g., Sailors*, *Rosenthal*). Here, no statute or constitutional provision requires election of the persons who carry out VIA's non-legislative, governmental functions.

21. Plaintiff's Complaint should be dismissed because it fails to state a claim under the U.S. Constitution, the Voting Rights Act of 1964, and 42 U.S.C. § 1983, Chapter 39 of the Texas Penal Code, and Article I, Sections 3 and 9 of the Texas Constitution. Because neither Defendant nor any other body or entity associated with VIA has violated these laws, Plaintiff also fails to state a claim under the Texas Penal Code, Chapter 39. Because the process by which VIA Board Members are selected is constitutional and consistent with state and federal law,

Plaintiff is entitled to no declaratory relief under 28 U.S.C. § 2201. In fact, because Plaintiff fails to show even the possibility of future harm, he does not even have standing to seek declaratory relief under Section 2201. *Bauer v. Texas*, 341 F.3d 352, 357-58 (5th Cir. 2003).

22. Plaintiff has stated no claim under the Constitution or any statute. This suit is, by definition, frivolous, entitling Defendant to costs and fees under Rule 11. Plaintiff frequently sues other state and federal government entities and has developed a reputation as a "veteran pro se litigator who has filed numerous lawsuits, many of which have been repetitious or of doubtful legal merit." *Ehm v. Amtrak Bd. of Directors*, 780 F.2d 516, 517 (5th Cir. 1986). This case is no exception, and Defendant asks that the Court take this into account in considering its Motion.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests the Court:

(1) Dismiss this case with prejudice;
(2) Enter the proposed Order of Dismissal attached to this Motion as Exhibit A;
(3) Instruct Plaintiff not to file any additional frivolous suits against VIA, its Board of Trustees, or its officers and employees;
(4) Award Defendant its costs and attorney's fees; and
(5) Award Defendant any further relief to which it is otherwise entitled.

Respectfully submitted,

By: _____

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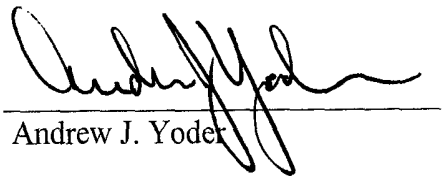
COUNSEL FOR DEFENDANT, BOARD OF TRUSTEES OF THE METROPOLITAN RAPID TRANSIT AUTHORITY OF SAN ANTONIO

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Motion to Dismiss** was served on Plaintiff, proceeding *pro se*, this 27th day of February, 2006, via certified mail, return receipt requested:

Alfred E. Ehm
170 Carousel Drive
San Antonio, TX 78227-4712



Andrew J. Yoder