

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

GABE (GABRIEL) HILLEL
KAIMOWITZ,

Plaintiff,

vs.

Case No. 1:16-cv-257-MW-GRJ

SUPERVISOR OF ELECTIONS;
JOHN HARKNESS, individually as
well as in his capacity as Florida
Bar executive director, and his
agents, employees, assignees,
including those who are judges;
EIGHTH JUDICIAL CIRCUIT BAR
ASSOCIATION, INC., (EJCBA) and
FLORIDA BLUE KEY, INC.,

Defendants.

**MOTION OF EIGHTH JUDICIAL CIRCUIT
BAR ASSOCIATION, INC. TO DISMISS**

MOTION

The Eighth Judicial Circuit Bar Association, Inc. ("EJCBA"),
pursuant to Rule 12(b), Federal Rules of Civil Procedure, moves the
Court to enter an order dismissing EJCBA from this action on the ground

that the Verified First Amended Complaint fails to state claims upon which relief can be granted.¹

MEMORANDUM OF LAW

On August 17, 2016, the Plaintiff filed a Verified First Amended Complaint (the “Complaint”) against the Supervisor of Elections of Alachua County, John Harkness, EJCBA and Florida Blue Key, Inc. (ECF 5) challenging the Florida law that provides that the names of unopposed candidates for county and circuit court judgeships should not be included on a ballot claiming that as a result, “control of the judicial system [is] in the hands of whites, Cuban-Americans and minorities other than the African-American ancestors of slaves” and deprives African-Americans of the opportunity to write in judicial candidates.² (Compl. at 18.) The

¹ The EJCBA waived service of process (ECF 25) and, although the Plaintiff has not complied with the Court’s order to file an Amended Complaint on the proper form, the Verified First Amended Complaint has not been dismissed and this motion is filed in accordance with the due date mandated by the waiver.

² The Plaintiff does not have standing in this case to assert the rights of “African Americans.” *Amnesty International, USA v. Battle*, 559 F.3d 1170, 1177-79 (11th Cir. 2009).

Complaint also appears to allege civil rights claims personal to the Plaintiff.

On August 29, 2016, the United States Magistrate assigned to the case entered an order requiring the Plaintiff to file an amended complaint on the proper form. (ECF 14.) The Magistrate, after summarizing the claims made in the Complaint, said that:

Despite the fact that Plaintiff names the Eighth Judicial Circuit Bar Association, Inc. (“EJCBA”), Florida Blue Key, Inc. (“FBK”) and John Harkness, the current Executive Director of the Florida Bar as defendants, there are no allegations in the First Amended Complaint plausibly alleging how any of these entities or individuals have any control or responsibility for the listing of names of judicial candidates on ballots for judicial elections in Alachua County. The gist of Plaintiff’s complaint is that the procedure for omitting the names of unopposed candidates is unconstitutional. The relief Plaintiff requests – an injunction directing the Supervisor of Election to list on the ballot the names of unopposed judicial candidates – has nothing to do with the EJCBA, FBK or Harkness because these defendants have no authority or control over the ballots utilized in judicial elections. (ECF 14 pp 3-4).

The order was affirmed by the United States District Court on September 8, 2016. (ECF 19.)

The Complaint is not a short and plain statement of the claims as required by Rule 8, Federal Rules of Civil Procedure.³ Particularly, “a civil rights complaint must state the conduct, time, place, and persons responsible for the alleged civil rights violations.” *Alston v. Pepper*, 989 F. Supp. 2d 372, 375 (D. Del. 2013). The only allegations in the Complaint relating to EJCBA are that EJCBA “is a non-profit corporation of **attorneys** and **judges** in the Florida Bar,” (Compl. ¶ 31), that “Defendant EJCBA, its agents, employees, and assignees, have barred Plaintiff from appearing *pro se* or **meaningfully** for others in the area circuit and county courts” (Compl. ¶ 99), and “as Harkness’ agents, the Defendants FBK and EJCBA and their Florida Bar members, have acted under color of state law to deprive Plaintiff of rights to exercise his First and Sixth Amendment guarantees and to deny him due process of law to

³ The complaint is a “shotgun” pleading which incorporates in each count all of the general allegations and all of the allegations of the prior counts, contrary to the rules of pleading. *Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp.*, 305 F. 3d 1293, 1295-96 (11th Cir. 2002). In *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F. 3d 955, 979 n.54 (11th Cir. 2008), the Eleventh Circuit said that “since 1985 we have explicitly condemned shotgun pleadings upward of fifty times.”

be heard meaningfully.” (Compl. ¶ 113.)⁴ The Complaint does not, however, detail the conduct the EJCBA allegedly engaged in, the time and place that it occurred, or identify the persons acting on behalf of the EJCBA that were responsible for the civil rights violations.

Count I purports to allege a claim under 42 U.S.C. § 1981. By its terms, § 1981 provides a private cause of action for discrimination by private actors and under color of state law, but to state such a claim, the plaintiff must allege (1) that he belonged to a racial minority, (2) an intent to discriminate on the basis of race by the defendant, and (3) discrimination concerning one or more activities enumerated in section 1981.⁵ *Pryor v. National Collegiate Athletic Ass’n*, 288 F.3d 548, 569 (3d Cir. 2002). Although the Plaintiff describes himself as “Jewish”

⁴ There are several other allegations that EJCBA members acted wrongfully, but the members are not identified and their actions are not attributed to the EJCBA (Compl. ¶¶ 97, 118).

⁵ i.e. The right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all the laws and proceedings for the security of persons and property as is enjoyed by white citizens.

(Compl. ¶ 105), there is no allegation that the EJCBA intended to discriminate against him because he was Jewish and, therefore, he has not stated a claim under § 1981. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993). *Johansson v. Emmons*, 2010 W.L. 55631 (M.D. Fla. 2010).

Count II and III attempt to allege claims under 42 U.S.C. § 1982 in which “state action” is a prerequisite. The Complaint contains a conclusory allegation that the EJCBA “acted under color of state law” (Compl. ¶ 113). But the EJCBA is a private, voluntary bar association (Compl. ¶ 31) and there are no facts alleged to show that it ever acted under color of state law with respect to the Plaintiff. Cf. *Hu v. American Bar Assoc.*, 334 Fed.App’x. 17 (7th Cir. 2009).⁶

⁶ The Plaintiff also references claims under “the self-enforcing Fifteenth Amendment” (Compl. ¶ 1) but this Amendment relates solely to actions “by the United States or by any state” and not private conduct, however discriminatory or wrongful. *Terry v. Adams*, 345 U.S. 461 (1953); *James v. Bowman*, 190 U.S. 127 (1903).

Count III and IV of the Complaint attempt to allege claims under 42 U.S.C. §§ 1985(2) and (3). To state a claim under these sections, the plaintiff must allege a plausible conspiracy to obstruct justice by intimidating parties, witnesses or jurors in a court of the United States or a conspiracy to deprive any person or class of persons of the equal protection of the law or the equal privileges and immunities under the law. The Complaint alleges that EJCBA barred plaintiff from appearing *pro se* or **meaningfully** for others in the area circuit and county courts (Compl. ¶ 99) and that “the conspirators” used threats and intimidation to stop Plaintiff from brining or pursuing lawsuits in the state and federal jurisdiction where UF is located and in “tourist-conscious Orlando” (Compl. ¶ 117). But the Counts fail to allege facts from which a conspiratorial agreement can be inferred. They amount to “nothing more than vague and conclusory assertions regarding the existence of a conspiracy which are insufficient to state a § 1985(3) claim.” *Forbes v. Reno*, 893 F. Supp. 476, 483 (W.D. Pa. 1995) *aff’d*, 91 F. 3d 123 (3d Cir. 1996).

In sum, the Verified First Amended Complaint is not a short and plain statement of the Plaintiff's claims, but is a "shotgun" pleading that fails to allege EJCBA's conduct or its time or place, including how EJCBA could have any role in the listing of judicial candidates on ballots for judicial elections or facts showing that the EJCBA was a "state actor," acted with the intent to discriminate on the basis of race or that EJCBA engaged in a conspiracy to deprive the Plaintiff of his civil rights.

CONCLUSION

The "claims" made against the Eighth Judicial Circuit Bar Association, Inc. are frivolous and the Bar Association should be dismissed with prejudice from the action.

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WORD COUNT CERTIFICATE

The undersigned hereby certifies pursuant to Local Rule 7.1(F) that the foregoing Motion and Memorandum, collectively, contain 1,602 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all CM/ECF participants.



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