

IN THE UNITED STATES DISTRICT COURT
IN THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION-DAYTON

FILED

FEB 21 2002

KENNETH J. MURPHY, Clerk
DAYTON, OHIO

MICHAEL A. GALLUZZO
PLAINTIFF,

CASE NO. C-3-01-174

VS.

Chief Judge Walter H. Rice

CHAMPAIGN COUNTY COURT
OF COMMON PLEAS,
DEFENDANT.

**PLAINTIFF MICHAEL A. GALLUZZO'S MOTION to STRIKE DEFENDANT'S
NEWLY-RAISED ALTERNATE THEORY for DISMISSAL RAISED OUTSIDE
of DEFENDANT'S MOTION to DISMISS and OUTSIDE the SCOPE of
MATTERS RAISED BEFORE MAGISTRATE MERZ at ORAL HEARING on**

January 9, 2002

and/or in the alternative

**PLAINTIFF'S REPLY and/or SUPPLEMENTAL RESPONSE to DEFENDANT'S
RESPONSE to OBJECTIONS filed on February 13, 2002, wherein DEFENDANT
CHAMPAIGN COUNTY COURT OF COMMON PLEAS REQUESTS
CONSIDERATION of their NEWLY-RAISED ALTERNATE THEORY for
DISMISSAL ASSERTING that there is NO CASE in CONTROVERSY and that
DEFENDANT is NOT a PROPER PARTY**

and

**PLAINTIFF'S REQUEST for ORAL HEARING to ADDRESS WHETHER
FEDERAL RULES of CIVIL PROCEDURE PERMIT SUPPLEMENTATION TO
DEFENDANT'S MOTION to DISMISS WITHOUT LEAVE of COURT**

Plaintiff Michael A. Galluzzo, for good cause shown, responds herein that Defendant Champaign County Court of Common Pleas' newly-introduced theory for dismissal should not be permitted without leave of court, and in the alternative, where leave was never requested, that such basis for dismissal be stricken from the record.

Motion to Strike

This Court should limit its decision to the matters raised by Defendant in their **Motion to Dismiss on Basis of Abstention Doctrine** pursuant to the objections of both parties to the report and recommendation made by Magistrate Merz.

Defendant did not inquire of Plaintiff, nor did Defendant request leave of Court pursuant to Local Federal Civil Rule 7.3 (Consent to Motions), to amend their Motion to Dismiss to introduce alternate theories of dismissal.

While Defendant counsel appears to have cleverly concealed their “*supplemental motion to dismiss*” by incorporating their newly-introduced theories under the instant “Defendant’s Response to Objections to Magistrate’s Report and Recommendation on Motion to dismiss on Basis of Abstention doctrine Filed on January 9, 2002”, Defendant Champaign County Court of Common Pleas *never* raised the issue that: **(1) there was no case in controversy and (2) that Defendant was not a proper party in their Motion to Dismiss on Basis of Abstention Doctrine.**

Nowhere were these matters addressed in Defendant’s Motion to Dismiss on Basis of Abstention Doctrine.

Further, Defendant implicitly waived their right to address these matters in their dismissal motion under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2); *i.e.*, lack of jurisdiction over the subject matter and lack of jurisdiction over the person¹, by failing to raise both issues in the instant dismissal motion.

Defendant not only failed to incorporate these defenses in their Motion to Dismiss on Basis of Abstention Doctrine, *but equally as important*, failed to incorporate these improperly-raised issues as affirmative defenses in their Answer of Defendant Champaign County Court of Common Pleas to First Amended Complaint. [See Defendant’s Answer to First Amended Complaint, pgs.5-6, First–Eighth Affirmative Defenses.]

¹ Defendant, a county court, is a statutory political subdivision under Title 28 USC 1331.

In fact, the *only* Affirmative Defense raised by Defendant in their Answer, pursuant to the defenses listed under section 12(b) of the Federal Rules of Civil Procedure, is their Fourth Affirmative Defense, specifically FedCivR 12(b)(6) that “Plaintiff has failed to state a claim upon which relief can be granted”

Nowhere does Defendant Champaign County Court of Common Pleas raise FedCivR 12(b)(1) or 12(b)(2) as an affirmative defense.

Furthermore, without inquiring of Plaintiff for permission to amend their dismissal motion and without proper leave of this Court, Defendant has attempted to introduce a *new basis for dismissal* other than their original sole basis for defense, their “basis of abstention”.²

To do so now; *outside of their Answer* (strike 1); *outside of their Motion to Dismiss* (strike 2); and *without requesting permission* of this Court (strike 3); is a *strikeout* by Defendant.

Where this is a procedural violation of federal civil rules, Defendant’s course of action should not be permitted.

REPLY and/or SUPPLEMENTAL RESPONSE to DEFENDANT’S NEWLY-RAISED ALTERNATE THEORY for DISMISSAL ASSERTING that there is NO CASE in CONTROVERSY and that DEFENDANT is NOT a PROPER PARTY

“Defendant admits jurisdiction of this Court pursuant to 28 U.S.C. 1331.” [See Defendant’s Answer to First Amended Complaint, pg. 1, Admission #1.] The fact that Defendant has admitted subject matter jurisdiction unequivocally defeats their newly raised argument that there is no case in controversy.³

² See Defendant’s Motion to Dismiss on Basis of Abstention Doctrine

³ Defendant admits jurisdiction under Title 28 USC 1331, but does deny that Title 28 USC 2201 confers jurisdiction. [See Admission #2.] Plaintiff recognizes that Title 28 USC 2201 does not confer jurisdiction,

Where Defendant retains jurisdiction⁴ and prospectively Plaintiff is subject to the same statutes and interpretation of such statutes, Plaintiff has standing. Defendant admits as such in their Admission #3 responding in part to Amended Complaint @ paragraph 8, “Defendant will admit jurisdiction only to the extent so admitted in Paragraphs 1...”.

Where Defendant is a proper party political subdivision under Title 28 U.S.C. 1331, then Defendant Champaign County Court of Common Pleas is a *proper* party defendant. See Alsager v. District Court of Polk County, Iowa, 515 F.2d 1160 (1975) where the Circuit Court of Appeals upheld that the county court was a proper party *and* that subject matter jurisdiction was proper where the Alsagers challenged the standards of Iowa’s domestic relations laws. [See Footnote 1 of Plaintiff’s Objections to the January 14, 2002 Report and Recommendations of the Magistrate.]

The precedent established by this Circuit Court of Appeals clearly renders meritless Defendant’s newly raised defenses for dismissal.

Directly on point with *Alsager*, Plaintiff Galluzzo challenged the standards of Ohio’s domestic relations laws, wherein pursuant to Planet Earth Entertainment, Inc. d/b/a Diamonds v. Edwards, 84 F. Supp. 2d 891 at 900 (S.D. Ohio 1999) citing VanHarken v. City of Chicago, 103 F.3d 1346 (7th Cir. 1997), subject matter jurisdiction is conferred where the second tenet of *Rooker-Feldman* is *not* satisfied and therefore *cannot* operate as a bar to Plaintiff Galluzzo’s constitutional challenge to Ohio law.

but provides a proper remedy, but this issue has no relevance where Defendant has already admitted jurisdiction under Title 28 USC 1331. [See Admission #1.]

⁴ [8.] A case in controversy exists where Plaintiff is subject to the continuing jurisdiction of the Champaign County Court of Common Pleas; the unconstitutional actions of Defendant’s agents and employees; and the facially unconstitutional laws as noted in this Complaint. Therefore prospectively, Plaintiff has standing to bring this action in Federal Court. [See First Amended Complaint @ paragraph 8.]

Additionally, Defendant Champaign County Court of Common Pleas asserts that it has no interest in this case, but even that argument is *disingenuous*, for the state has an interest in children under the age of majority who are subject to the continuing jurisdiction of the court pursuant to the doctrine of *parens patriae*. This doctrine is thoroughly discussed in Donald C. Hubin, PhD, *Parental Rights and Due Process*; Journal of Law & Family Studies, The University of Utah College of Law, Vol. 1, No. 2, 123-150.

Finally, Defendant asserts that the Attorney General of Ohio, and not a county court/prosecutor's office, should defend attacks on Ohio laws. The Attorney General has full knowledge of this suit. She was sent a copy of the Amended Complaint as required under Federal Civil Rules of Procedure and has chosen not to intervene with the Champaign County Prosecutor's office handling of the case. The fact remains that the Attorney General can waive 11th Amendment immunity at any point in the proceedings and add the State of Ohio as a third party defendant.

WHEREFORE, Plaintiff respectfully requests that Defendant's improper assertion of defenses not raised in their Answer or in their Motion to Dismiss be **STRICKEN** from the record, *or* **OVERRULED**, for Defendant Champaign County Court of Common Pleas is a proper party defendant who has already admitted to subject matter jurisdiction. Defendant's newly raised defenses are absolutely without merit.

Respectfully submitted,



Michael A. Galluzzo, Plaintiff
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND ACCURATE COPY OF THE FOREGOING WAS SERVED UPON **DEFENDANT CHAMPAIGN COUNTY COURT OF COMMON PLEAS** BY U.S. MAIL, POSTAGE PREPAID, THE 21st DAY OF FEBRUARY 2002.

A handwritten signature in black ink, appearing to read "Michael A. Galluzzo". The signature is written in a cursive style with a horizontal line drawn through the middle of the letters.

Michael A. Galluzzo