FILED
United States Court of Appeals
Tenth Circuit

June 26, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: DR. MILOS J. JIRICKO,

Petitioner.

No. 17-4094
(D.C. No. 2:16-CV-00132-DB-EJF)
(D. Utah)

ORDER

Before **TYMKOVICH**, Chief Judge, **HARTZ** and **HOLMES**, Circuit Judges.

Dr. Jiricko petitions for a writ of mandamus to redress alleged adjudicatory neglect by the district court and magistrate judge in the underlying action. He filed the action following the entry of summary judgment against him in a state suit brought to redress injuries he incurred as a result of a surgical procedure. Pivotal to the unfavorable result in state court was his failure to satisfy the requirements of the Utah Health Care Malpractice Act (UHCMA), Utah Code Ann. § 78B-3-401. In this federal action he asserted various claims against parties associated with the state case, including opposing counsel and two state judges, alleging in part that the UHCMA is unconstitutional. Most of his claims have been dismissed, but one alleging fraud on the court remains pending. Complaining that the constitutionality of the UHCMA has not been addressed in the proceedings, his mandamus petition asks us to: (1) resolve the issue in the first instance; (2) disqualify the district court judge and magistrate judge for bias; and (3) stay the proceedings in the meantime. We deny the petition.

There are three requirements to obtain a writ of mandamus: (1) "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires"; (2) "the petitioner must demonstrate that his right to the writ is clear and indisputable"; and (3) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1187 (10th Cir. 2009) (internal quotation marks omitted). Dr. Jiricko has not satisfied these requirements for any of the relief he seeks.

The traditional function of a writ of mandamus is "'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990) (quoting *Will v. United States*, 389 U.S. 90, 94 (1967)). Dr. Jiricko asks this court to rule directly on the constitutionality of the UHCMA. This request—that we arrogate to ourselves the disposition of a matter properly before the district court, rather than order the district court to resolve the matter in the first instance—is plainly inconsistent with the limited function of mandamus. But, construing his pro se petition liberally, we assume it encompasses an appropriate request that we order the district court to rule on the constitutionality of the UHCMA. We deny that request on the merits.

Thus far there has been no occasion for the district court to address the constitutionality of the UHCMA. In dismissing the state judges from the action, the court held they were absolutely immune to claims for damages and not proper parties to a declaratory-judgment claim regarding the constitutionality of the statute. It dismissed most of the claims against the private parties on the basis of a state judicial-proceedings

privilege, also obviating resolution of the constitutional challenge. If Dr. Jiricko objects to those rulings, he can appeal them following the entry of final judgment—a remedy that undercuts any preemptive resort to mandamus under the first requirement noted above, *see, e.g.*, *United States v. Copar Pumice Co.*, 714 F.3d 1197, 1210 (10th Cir. 2013); *Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 437 (10th Cir. 1996). Similarly, to the extent the remaining fraud-on-the-court claim implicates the constitutionality of the UHCMA, the issue can be addressed (or obviated by other legal considerations) in due course by the district court, also subject to subsequent appellate review. Indeed, cross-motions for summary judgment on the claim are now pending before the district court. In that regard, we note that Dr. Jiricko has not shown the sort of unjustified delay warranting issuance of a writ to compel an immediate ruling on the motions, for which briefing has only just been completed and/or is still underway. *Cf. Johnson*, 917 F.2d at 1284-85 (holding delay of fourteen months in ruling on habeas corpus petition, attributed solely to docket congestion, warranted mandamus relief).

As for disqualification of the district judge and magistrate judge, Dr. Jiricko has not demonstrated a clear and indisputable right to relief. His allegations center on their failure to issue a ruling on the constitutionality of the UHCMA—an omission which, as explained above, has thus far been the natural consequence of rulings based on other dispositive deficiencies in his claims. To the extent he objects to the substance and effect of those rulings, our cases make clear that "a motion to recuse cannot be based solely on adverse rulings." *Willner v. Univ. of Kan.*, 848 F.2d 1023, 1028 (10th Cir. 1988); *see also Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997) ("[A]dverse rulings cannot

in themselves form the appropriate grounds for disqualification."). His allegation that the district court judge "was in the past heavily involved with the Utah State government," Pet. at 5 n.2, and would consequently protect a state statute from challenge, is meritless. Leaving aside the facially dubious premise that a past association with state government would disqualify a judge from ruling on the constitutionality of any state legislation, the only cited instances of such association actually involved federal, not state, government positions. *See id.* (citing employment as chief of staff for Utah Senator Orrin Hatch and as U.S. Attorney for Utah). Finally, his complaint that the magistrate judge has not ruled on a motion to recuse herself does not provide grounds for us to preemptively interfere. The motion has been pending for less than two months.

Finally, Dr. Jiricko's request that we order the district court to stay proceedings until the constitutionality of the UHCMA is decided fails for reasons evident from what we have already said. Disposition of the last pending claim in the case appears to be imminent and it may not require resolution of the constitutional question in any event. Under the circumstances, the relief requested is neither needed nor appropriate, much less something to which Dr. Jiricko is indisputably entitled.

The petition is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk