

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-01469-CMA-KLM

DAVID E. WILKENSON,

Plaintiff,

v.

STATE OF COLORADO, and
MESA COUNTY, COLORADO,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on **Defendant State of Colorado's Motion to Dismiss All Claims Asserted Against it in the Amended Complaint [#15]**¹ (the "State Motion") and Defendant "**Mesa County's**" **Motions to Dismiss Pursuant to Fed.R.Civ.P. [sic] 12(b)(2), 12(b)(5), and 12(b)(6) [#17]** (the "County Motion" and, collectively with the State Motion, the "Motions"). On August 5, 2013, Plaintiff filed a Response to the State Motion [#18]. On August 7, 2013, Defendant State of Colorado ("State") filed a Reply [#21]. On August 5, 2013, Plaintiff filed a Response to the County Motion [#19]. On August 12, 2013, Defendant Mesa County ("County") filed a Reply [#22]. The Motions are ripe for review. Pursuant to 28 U.S.C. § 636(b)(1) and D.C.COLO.LCivR 72.1C, the Motions have been referred to this Court for a recommendation regarding disposition [#20]. The Court

¹ "[#15]" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

has reviewed the Motions, the Responses, the Replies, the entire docket, and the applicable law, and is sufficiently advised in the premises. For the reasons set forth below, the Court respectfully **RECOMMENDS** that the Motions [##15, 17] be **GRANTED**.

I. Background

Plaintiff initiated this lawsuit on June 7, 2013. *See generally Compl. [#1]*. After reviewing the Complaint, the Court *sue sponte* struck the Complaint [#1] and ordered Plaintiff to file an amended complaint. The Court also advised Plaintiff of the pleading requirements of Fed. R. Civ. P. 8 and 9. *See generally Order Regarding Complaint [#12]*. Specifically, the Court advised Plaintiff "to provide a short and concise statement explaining what each defendant did to him, when each defendant did it, how each defendant's action harmed him, what specific legal right each defendant violated, and what remedy he seeks for each violation." *Id.* at 3. In response, Plaintiff filed his First Amended Complaint [#14]. The First Amended Complaint did little to clarify the factual allegations in support of Plaintiff's claims against Defendants. However, Plaintiff did add sections titled "Causes of Action against Defendant State of Colorado" and "Causes of Action against Defendant Mesa County." *First Am. Compl. [#14]* at ¶¶ 92-113. Plaintiff also delineated the relief he seeks. *Id.* at ¶¶ 114-129.

In short, Plaintiff's allegations relate to his 1996 domestic relations case which resulted in custody of his children being awarded to their mother. *Id.* at ¶¶ 4-6. Many of Plaintiff's allegations relate to actions taken in 1996 and 1997 relating to the domestic relations case. Plaintiff also states that the state court "destroyed the record of the case" and that his appeal regarding this claim was denied by the appellate court. *Id.* at ¶ 9.

However, he does not provide a time frame for these allegations. In addition, Plaintiff makes a variety of allegations against non-parties, including, among other people, Magistrate Jane Westbrook, Magistrate Cynthia Cyphers, and Mesa County Assistant County Attorney Valerie Robinson. See, e.g., *id.* at ¶¶ 19-30.

Plaintiff purports to bring claims against Defendant pursuant to 42 U.S.C. § 1983, and the First, Fifth, and Fourteenth Amendments. *Id.* at ¶ 50. However, he later clarifies that he is bringing a section 1983 claim for alleged violations of his First, Fifth, and Fourteenth Amendment rights. *Id.* at ¶ 54. Plaintiff also asserts that the Court has jurisdiction pursuant to 28 U.S.C. § 1331. *Id.* at ¶ 50.

II. Standard of Review

In the Motions, Defendants request dismissal pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(5), and 12(b)(6).

A. Federal Rule of Civil Procedure 12(b)(1)

The purpose of a motion to dismiss pursuant to Rule 12(b)(1) is to test whether the Court has jurisdiction to properly hear the case before it. Because “federal courts are courts of limited jurisdiction,” the Court must have a statutory basis to exercise its jurisdiction. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002); Fed. R. Civ. P. 12(b)(1). Statutes conferring subject matter jurisdiction on federal courts are to be strictly construed. *F & S Const. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). In addition, “[t]he burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction.” *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

A motion to dismiss pursuant to Rule 12(b)(1) may take two forms: facial attack or factual attack. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). When reviewing

a facial attack on a complaint, the Court accepts the allegations of the complaint as true. *Id.* By contrast, when reviewing a factual attack on a complaint, the Court “may not presume the truthfulness of the complaint’s factual allegations.” *Id.* at 1003. With a factual attack, the moving party challenges the facts upon which subject matter jurisdiction depends. *Id.* The Court therefore must make its own findings of fact. *Id.* In order to make its findings regarding disputed jurisdictional facts, the Court “has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing.” *Id.* (citing *Ohio Nat’l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990); *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987)). The Court’s reliance on “evidence outside the pleadings” to make findings concerning purely jurisdictional facts does not convert a motion to dismiss pursuant to Rule 12(b)(1) into a motion for summary judgment pursuant to Rule 56. *Id.*

B. Federal Rule of Civil Procedure 12(b)(2)

The purpose of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) is to test whether the Court has personal jurisdiction over the named parties. After a motion to dismiss has been filed, the plaintiff bears the burden of establishing personal jurisdiction over the defendants. *Behagen v. Amateur Basketball Ass’n*, 744 F.2d 731, 733 (10th Cir. 1984). The Court accepts the well-pled allegations (namely the plausible, nonconclusory, and nonspeculative facts) of the operative pleading as true to determine whether the plaintiff has made a *prima facie* showing that the defendants are subject to the Court’s personal jurisdiction. *Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008). The Court “may also consider affidavits and other written materials submitted by the parties.” *Impact Prods., Inc. v. Impact Prods., LLC*, 341 F. Supp. 2d 1186,

1189 (D. Colo. 2004). Any factual disputes are resolved in the plaintiff's favor. *Benton v. Cameco Corp.*, 375 F.3d 1070, 1074-75 (10th Cir. 2004).

The Due Process Clause permits the exercise of personal jurisdiction over nonresident defendants when two conditions are met. First, a defendant must have "minimum contacts" with the forum state. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Second, if sufficient minimum contacts are shown, "the Due Process Clause requires that [the Court] further consider whether the exercise of personal jurisdiction over [the] defendant would nonetheless offend traditional notions of fair play and substantial justice." *Impact Prods.*, 341 F. Supp. 2d at 1190.

C. Fed. R. Civ. P. 12(b)(5)

The Court may dismiss a case pursuant to Rule 12(b)(5) for insufficient service of process. A "Rule 12(b)(5) motion challenges the mode of delivery or the lack of delivery of the summons and complaint." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* 3D § 1353. In opposing a motion to dismiss for insufficient service of process, "plaintiff bears the burden to make a prima facie case that he has satisfied statutory and due process requirements so as to permit the court to exercise personal jurisdiction over defendant." *Allen v. United Properties & Const.*, No. 07-cv-00214-LTB-CBS, 2008 WL 4080035, at *9 (D. Colo. Sept. 3, 2008) (quoting *Fisher v. Lynch*, 531 F. Supp. 2d 1253, 1260 (D. Kan. 2008). "Effectuation of service is a precondition to suit . . ." *Jenkins v. City of Topeka*, 136 F.3d 1274, 1275 (10th Cir. 1998). Without proof of service, a court lacks personal jurisdiction over the defendant. *Okla. Radio Assoc. v. FDIC*, 969 F.2d 940, 943 (10th Cir. 1992). The plaintiff must demonstrate that the procedure employed by him to effect service satisfied the requirements of Rule 4 of the Federal Rules

of Civil Procedure. *Light v. Wolf*, 816 F.2d 746, 751 (D.C. Cir.1987).

D. Federal Rule of Civil Procedure 12(b)(6)

The Rule 12(b)(6) standard tests “the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true.” *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). To survive a Rule 12(b)(6) motion, “[t]he complaint must plead sufficient facts, taken as true, to provide ‘plausible grounds’ that discovery will reveal evidence to support plaintiff’s allegations.” *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “[P]lausibility refers to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiff[] [has] not nudged [his] claims across the line from conceivable to plausible.” *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (internal quotations and citations omitted).

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the alleged misconduct.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, “[a] pleading that offers ‘labels and conclusions’ or a formulaic recitation of the elements of a cause of action will not do. Nor does the complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (citation omitted). That said, “[s]pecific facts are not necessary[. Instead,] the statement need only give the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests[, and is not required to] include all facts necessary to carry the plaintiff’s burden.” *Khalik*, 671 F.3d at 1192.

“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678

