

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 11, 2023

Christopher M. Wolpert
Clerk of Court

BENJAMIN AYALA,

Plaintiff - Appellant,

v.

THE STATE OF NEW MEXICO; THE
UNITED STATES OF AMERICA; THE
DEPARTMENT OF HOMELAND
SECURITY; THE STATE OF TEXAS,

Defendants - Appellees.

No. 23-2013
(D.C. No. 1:22-CV-00979-MIS-KK)
(D. N.M.)

ORDER AND JUDGMENT*

Before **BACHARACH, KELLY, and MORITZ**, Circuit Judges.**

Benjamin Ayala, proceeding pro se and in forma pauperis, appeals from the district court’s dismissal of his case for lack of subject matter jurisdiction. Mr. Ayala filed suit pursuant to 42 U.S.C. § 1983 alleging uncertain civil rights violations on the part of the federal government, the Department of Homeland Security (DHS), New Mexico, and Texas. Noting that the complaint failed to demonstrate federal jurisdiction

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

or state a claim for relief, the magistrate judge instructed Mr. Ayala to amend his complaint. R. 43–46. Mr. Ayala filed an amended complaint and sought to transfer the case elsewhere. See R. 48–58. Recognizing many of the deficiencies had not been resolved, the district court dismissed the action without prejudice for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(h)(3), and denied the motion to transfer as moot. Ayala v. New Mexico, No. 22-cv-979, 2023 WL 418044, at *3 (D.N.M. Jan. 26, 2023). Exercising our jurisdiction under 28 U.S.C. § 1291, we affirm.

We review a district court’s dismissal for lack of subject matter jurisdiction *de novo*. Lindstrom v. United States, 510 F.3d 1191, 1193 (10th Cir. 2007). A litigant bears the burden of demonstrating federal jurisdiction over his claims by a preponderance of the evidence. Id. Although we construe *pro se* pleadings liberally, the burden remains on a *pro se* litigant to provide at least a factual basis for the claim that would support federal jurisdiction. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

The district court correctly determined that Mr. Ayala had not demonstrated jurisdiction over his claims. The amended complaint names the State of New Mexico, the State of Texas, the United States, and the Department of Homeland Security as defendants. Absent consent or congressional direction otherwise, the United States and the individual states are immune from suit. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994); Torres v. Tex. Dep’t of Pub. Safety, 142 S.Ct. 2455, 2461–62 (2022). Generously construed, Mr. Ayala’s appellate brief argues that § 1983 gives private plaintiffs the right “to sue the government for civil rights violations.” *Aplt. Br.* at 6. But while this may be a correct statement of law in a broad sense, it ignores the fact that § 1983 authorizes suit

against “person[s,]” 42 U.S.C. § 1983, not state or federal entities. See Will v. Mich. Dep’t of State Police, 491 U.S. 58, 67 (1989); Big Cats of Serenity Springs, Inc. v. Rhodes, 843 F.3d 853, 869 (10th Cir. 2016). Even under a liberal construction, the amended complaint pleads no facts indicating that the named defendants have consented to suit nor identifies any law suggesting that immunity does not bar Mr. Ayala’s claims. See Kikumura v. Osagie, 461 F.3d 1269, 1299 (10th Cir. 2006), overruling on other grounds recognized in Robbins v. Oklahoma, 519 F.3d 1242, 1246–47 (10th Cir. 2008) (suing immune defendant could not support subject matter jurisdiction).

Finding no basis to exercise jurisdiction over Mr. Ayala’s complaint, the district court properly dismissed the case without prejudice.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge