

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**RALPH E. HICKS,**

**Plaintiff,**

**v.**

**MICHAEL LEESON, et al.**

**Defendants.**

**CIVIL ACTION**

**No. 03-2481-CM**

**MEMORANDUM AND ORDER**

Plaintiff filed the instant action on September 17, 2003. On January 9, 2004, defendant Jeff Baker filed a Motion to Dismiss (Doc. 32). That same day, defendants Ann Keary, Michael Leeson, Bill Storey, C.J. Sullivan, and Leslie Young also filed a Motion to Dismiss (Doc. 34). In their respective motions, defendants contend that this court lacks subject matter jurisdiction.

Plaintiff failed to timely respond.

On May 18, 2004, this court directed plaintiff to show cause, in writing, on or before May 24, 2004, why defendants' Motions to Dismiss (Docs. 32 & 34) should not be granted and further directed plaintiff to file a response to defendants' motions on or before May 24, 2004.

On May 19, 2004, plaintiff filed a Statement to Show Cause & Jurisdiction (Doc. 56). The court will therefore consider defendants' motions to dismiss.

**I. Standards**

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that

would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive, *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff, *Witt v. Roadway Express*, 136 F.3d 1424, 1428 (10th Cir. 1998). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

The court is mindful that plaintiff in this case appears pro se. Accordingly, while the court should liberally construe a pro se plaintiff's complaint, "the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations." *Northington v. Jackson*, 973 F.2d 1518, 1521 (10<sup>th</sup> Cir. 1992).

## **II. Facts**

This case involves claims brought by plaintiff against employees of his treatment provider, the Wyandot Mental Health Center (defendants Michael Leeson, Ann Keary, Bill Storey, C.J. Sullivan and Leslie Young, referred to as the "treatment provider defendants"), and his attorney in the Twenty-Ninth District Court of the State of Kansas, Wyandotte County, Case No. 1996-CT-0123, Jeffrey Baker. Plaintiff asserts claims of "medical malpractice" and "unlawful detainment" against defendants for allegedly forcing him to take injections of medication for an

illness which he claims he does not have and for violations of his “civil rights.” (Complaint ¶¶2 & 3).

The instant action arises from a case pending in the Twenty-Ninth District Court of the State of Kansas, Wyandotte County Probate Department (hereinafter referred to as the “probate court”) captioned *In the Matter of the Care and Treatment of Ralph Hicks*, Case No. 1996-CT- 0123. The probate court case is a proceeding under the Kansas Care and Treatment Act for Mentally Ill Persons, Kan. Stat. Ann. § 59-2945 *et seq.* On August 11, 2003, the probate court entered a Journal Entry of Review in Case No. 1996-CT-0123 (Journal Entry), a certified copy of which was filed under seal with the instant motions. Because this Journal Entry deals directly with the allegations of plaintiff herein, and because plaintiff referenced this order in his Complaint, the court takes judicial notice of the contents of Journal Entry. Fed. R. Evid. 201.

Plaintiff’s Complaint contains one factual allegation, which is as follows:

I have been forced to take injections of medication for an illness that I do not have by the Wyandotte Center Doctors & the probate court. They have tampered with the injection and caused me a heart attack and physical and emotional torment. The doctors have made repeated “spiritual” threats that they are going to kill me and they’re trying too.

(Complaint, III. State of Claim). Plaintiff asserts jurisdiction under 28 U.S.C. § 1343 for alleged medical malpractice” and “unlawful detainment.”

### **III. Discussion**

Generally, § 1343 provides for original jurisdiction in the United States district courts for civil actions based on an alleged violation of civil rights. Absent an allegation of deprivation of rights under color of state law or a violation of any act of congress which protects civil rights,

jurisdiction pursuant to § 1343 does not lie. *Howard v. State Dep't of Hwys. of Colo.*, 478 F.2d 581 (10<sup>th</sup> Cir. 1973). The court points out that, in his Complaint, plaintiff does not cite to any federal civil rights statute or United States Constitutional provision which he contends has been violated by defendants.

Even under the relaxed notice pleading standards of Rule 8, plaintiff's claim in this case for alleged "medical malpractice" cannot be construed as a civil rights claim upon which subject matter jurisdiction could be based under 28 U.S.C. § 1343. However, out of an abundance of caution, the court will address plaintiff's claim for "unlawful detainment" as if it had been brought as a claim under Section 1983, cognizant of the fact that: (1) plaintiff is *pro se*; (2) notice pleading is all that is generally required under Fed. R. Civ. P. 8; (3) in the context of a motion to dismiss all the well-pleaded facts of the Complaint must be accepted as true and construed in the light most favorable to the plaintiff; and (4) a claim for "unlawful detainment" under certain circumstances could potentially give rise to a claim under Section 1983.

To state a cause of action under 42 U.S.C. § 1983 for an alleged constitutional violation, the challenged conduct must constitute state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930-32 (1982); *Pino v. Higgs*, 75 F.3d 1461, 1464 (10<sup>th</sup> Cir. 1996). In the present case, plaintiff asserts no allegation that any individual treatment provider defendant took any action under color of state law. In the context of a § 1983 claim, the conduct of a private individual may only constitute state action if it is "fairly attributable to the state." *Pino*, 75 F.3d at 1465. A private individual's conduct is fairly attributable to the state if two conditions are met: "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a

rule of conduct imposed by the State or by a person for whom the state is responsible. Second, the private party must have acted together with or . . . obtained significant aid from state officials or engaged in conduct otherwise chargeable to the State.” *Id.* (citations omitted).

Reading the Complaint in the light most favorable to the plaintiff, his alleged deprivation is the receipt of medical treatment from the treatment provider defendants in the form of injections of medication. Although plaintiff is receiving his treatment because of his involvement with the probate court pursuant to Kan. Stat. Ann. § 59-2945 *et seq.*, the fact that a state procedure – including a civil commitment procedure – was involved does not render the actions of private individuals “state actions” for purposes of § 1983. *Scott v. Hern*, 216 F.3d 897, 906-907 (10<sup>th</sup> Cir. 2000). In short, plaintiff has not alleged a sufficient basis for the court to conclude that the treatment provider defendants were state actors and, as such, plaintiff’s claims against these defendants must fail.

Additionally, plaintiff’s claim against defendant Baker fails for the same reason. Defendant Baker was plaintiff’s court-appointed attorney for plaintiff’s involuntary commitment proceedings. To the extent plaintiff contends that defendant Baker violated plaintiff’s civil rights, plaintiff cannot state a claim. An attorney engaged in proceedings on behalf of a client is not acting under color of state law. *Gatlin v. Hartley, Nicholson, Hartley & Arnett, P.A.*, No. 99-2347-JWL, 1999 WL 1096039, at \*3 (D. Kan. Nov. 8, 1999).

Even assuming the defendants could be considered state actors subject to suit under § 1983, plaintiff’s claim fails. The court has taken judicial notice of the fact that a civil commitment case involving plaintiff is pending in state probate court and of the orders and

findings made by the probate court in that case. The Constitution allows a mentally ill patient to be forcibly medicated, where the patient has been found incompetent to make medical decisions, if the patient is dangerous to himself or others and the treatment is in the patient's medical interests. *Jurasek v. Utah State Hosp.*, 158 F.3d 506, 511 (10<sup>th</sup> Cir. 1998). Notably, the Journal Entry from the probate court, which addresses the "injections of medication" complained of by plaintiff in the instant action, was entered approximately one month prior to the commencement of the instant federal court action. *See id.* at 512 (a hospital may not rely on a commitment court's determination unless such an assessment was made close in time to the hospital's decision to medicate).

In this case, to the extent plaintiff is seeking to challenge the probate court's findings, the court lacks jurisdiction. Plaintiff's probate court case is a proceeding under the Kansas Care and Treatment Act for Mentally Ill Persons. This Act provides complete due process in the form of a civil trial prior to any commitment or treatment, including "injections." See Kan. Stat. Ann. § 59-2966, 2967 & 2976. Plaintiff had the right to be present at any hearings, to testify, to present and cross-examine witnesses and to be represented by counsel. *Id.* § 59-2966. The statute provides for periodic review. *Id.* § 59-2969. If plaintiff takes issue with the Kansas probate court's findings, plaintiff must request a review in that court or appeal the probate court's orders to the Kansas appellate courts. Plaintiff cannot collaterally attack the findings of the probate court in the federal court at this juncture. *Young v. Quasim*, 72 Fed. Appx. 541, 542 (9<sup>th</sup> Cir. 2003) (civilly committed detainee can not collaterally attack the constitutionality of his confinement by filing a § 1983 claim without proving that his conviction or sentence was reversed on direct

appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus). Plaintiff has failed to exhaust his administrative remedies through the state judicial system and, as such, this court lacks jurisdiction over plaintiff's claim. Defendants' motions to dismiss plaintiff's civil rights claim are granted.

Given that no federal question remains in this case and diversity jurisdiction does not exist, the court in its discretion declines to exercise supplemental jurisdiction over plaintiff's medical malpractice claim. To the extent plaintiff asserts such a claim, that claim is dismissed without prejudice. There being no claims left before the court, the court denies as moot the remaining pending motions.

**IT IS THEREFORE ORDERED** that defendant Jeff Baker's Motion to Dismiss (Doc. 32) and defendants Ann Keary, Michael Leeson, Bill Storey, C.J. Sullivan, and Leslie Young's Motion to Dismiss (Doc. 34) are granted. Plaintiff's Motion for Judgment (Doc. 38), defendant Baker's Motion to Strike (Doc. 44) and plaintiff's Motion for Order (Doc. 54) are denied as moot. This case is hereby dismissed.

Dated this 28<sup>th</sup> day of May 2004, at Kansas City, Kansas.

s/ Carlos Murguia  
**CARLOS MURGUIA**  
**United States District Judge**

