

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OCT 19 1998

PATRICK FISHER
Clerk

ERNEST MICHAEL HERNANDEZ,

Plaintiff - Appellant,

v.

CHARLES EMMER, President CEO
ENT Federal Credit Union;
STEPHANIE ALVIDRES, Loss
Prevention; RANDY K. HARPER,
Chief, Collection Branch Automated
Collection System; JAN MOORE,
Loss Prevention Supervisor, and
WALTER A. HUTTON, JR., District
Director,

Defendants - Appellees.

No. 98-1037
(D.C. No. 97-Z-1348)
(D. Colo.)

ORDER AND JUDGMENT*

Before **PORFILIO, KELLY, and HENRY**, Circuit Judges.**

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Plaintiff-Appellant Ernest Michael Hernandez filed a pro se action against two I.R.S. officials and credit union personnel for alleged constitutional violations arising out of a tax levy. He appeals the district court's dismissal of his claims for lack of subject-matter jurisdiction¹ and for failure to state a claim upon which relief can be granted. Our review of a dismissal for lack of subject matter jurisdiction is de novo. See SK Finance SA v. La Plata County, 126 F.3d 1272, 1275 (10th Cir. 1997). Our review of a dismissal for failure to state a claim is likewise de novo; we take the facts alleged as true and liberally construe this pro se complaint. See Hall v. Bellmon, 935 F.2d 1106, 1109-10 (10th Cir. 1991). We affirm.

In January, 1997, the IRS served a Notice of Levy on the ENT Federal Credit Union, where Mr. Hernandez maintained an account, directing it to turn over monies to satisfy his federal tax delinquency. Mr. Hernandez urged the credit union not to comply, stating that "IRS rules/procedures do not carry the force of law; except when applicable to federal persons and/or persons under federal jurisdiction." The credit union complied. Mr. Hernandez then filed a complaint entitled Tort Claim, which he later amended, asserting the defendants had taken his property without due process and otherwise violated his rights under

¹ Pursuant to Fed. R. Civ. P. 12(b)(5), the district court also dismissed the action against the individual federal Defendants and the United States for insufficient service of process. I R. doc. 37 at 2.

the Fifth and Seventh Amendments to the Constitution. He claimed a total of \$9.4 million in damages from the defendants. In his pro se appeal, he argues the district court violated his Seventh Amendment right to jury trial by dismissing his case and that the district court should have recused.

Mr. Hernandez's suit against the individual IRS officers complains only of actions taken in their official capacity, and is thus properly considered a suit against the United States. See Atkinson v. O'Neill, 867 F.2d 589, 590 (10th Cir. 1989). The United States cannot be sued without its consent, and the terms of that consent define a court's subject-matter jurisdiction. See United States v. Dalm, 494 U.S. 596, 608 (1990); Atkinson, 867 F.2d at 590. Actions under 26 U.S.C. §§ 7432 and 7433 are "the exclusive remedy for recovering damages resulting from [tax collection] actions." 26 U.S.C. § 7433(a).² Mr. Hernandez has not alleged facts to support a claim under either section, and we have no subject-matter jurisdiction to consider his extra-statutory complaints. To the extent his complaint can be construed as a Bivens claim against the federal officers in their individual capacity, it will not lie because Congress has already established a scheme of safeguards and remedies for individuals harmed by

² Title 26 U.S.C. § 7433 was amended on July 22, 1998, but the amendment is not retroactive and does not affect this case. See Internal Revenue Service Restructuring and Return Act of 1998, Pub. L. No. 105-206, § 3102, 112 Stat. 685, 730-31 (1998).

unlawful tax collection. See Schweiker v. Chilicky, 487 U.S. 412, 422-23 (1988); Dahn v. United States, 127 F.3d 1249, 1254 (10th Cir. 1997); Wages v. IRS, 915 F.2d 1230, 1235 (9th Cir. 1990); National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1247-48 (10th Cir. 1989).

Mr. Hernandez's constitutional claims against the credit union Defendants also may not be maintained. We agree that a private actor's mere compliance with a lawful levy cannot fairly be characterized as the requisite governmental action. See Smith v. Kitchen, ___ F. 3d ___, 1997 WL 1018564, at *2 (10th Cir. 1997). We further note that 26 U.S.C. § 6332(e) discharges from liability any person complying with a levy. See Kane v. Capital Guardian Trust Co., 145 F.3d 1218, 1222-24 (10th Cir. 1998); Smith, 1997 WL 1018564, at *3; Kentucky ex rel. Union Pac. Ins. Co. v. Laurel County, 805 F.2d 628, 635 (6th Cir. 1986) (predecessor statute).

As for Mr. Hernandez's claim that the district court violated his Seventh Amendment rights, the court may not hold a jury trial on a suit over which it has no jurisdiction or for which a plaintiff has failed to state a claim on which relief can be granted.

Finally, Mr. Hernandez's claim that the trial judge should have recused herself pursuant to 28 U.S.C. § 455(a), (b)(1) and (4), raised for the first time on appeal, is "too little and too late." Hollywood Fantasy Corp. v. Gabor, 1998 WL

469672, at *14 (5th Cir. 1998). Mr. Hernandez’s argument is that he “believes there is a connection between [the] Judge . . . and Defendant’s [sic] Law Firm which carries [the] Judge[‘s] . . . deceased husband’s name.” Aplt. Br. at 14. This unverified statement is an insufficient basis on which to find a link between the law firm representing the credit union defendants and the trial judge. See Willner v. University of Kansas, 848 F.2d 1023, 1026-27 (10th Cir. 1988). Moreover, § 455 has a timeliness requirement, see id., 848 F.2d at 1028-29, and given that the law firm represented the credit union defendants from the outset, see I R. doc. 2, no reason has been advanced for the delay.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge