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UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

ALAN GELFAND, Plaintiff, v. UNITED STATES ATTORNEY GENERAL GRIFFIN BELL, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, WILLIAM H. WEBSTER, DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, STANFIELD TURNER, DIRECTOR OF THE NATIONAL SECURITY AGENCY, VICE ADMIRAL BOBBY INMAN, JACK BARNES, LARRY SEIGLE, PETER CAMEJO, DAVID JEROME, MARY ROCHE, DOUG JENNESS, SHARON CABANAS, PEARL CHERTOV, BRUCE MARCUS, SOCIALIST WORKERS PARTY, Defendants.	CASE NO. 79-02710 MRP(TX) SWP DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS DATE: November 19, 1979 TIME: 9:30 A.M.

TABLE OF CONTENTS

Statement 1

I. The Claim Against the SWP Under the First Amendment. 1

II. The Claim Against the SWP for Breach of Contract 5

III. The Claim Against the SWP Under 42 U.S.C. 1985(3) 6

IV. Failure to State Any Claim Against the SWP Upon Which Relief Can Be Granted 10

V. Conclusion 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

TABLE OF AUTHORITIES

Cases

page

Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972). 8

Blackman v. Stone, 17 F. Supp. 102 (S.D. Ill. 1936), vacated as moot, 300 U.S. 641 (1937) 4

Bradley v. Clegg, 403 F. Supp. 830 (E.D. Wisc. 1975) . 8

Cameron v. Brock, 473 F.2d 610 (6th Cir. 1973) 8

Dahl v. Republican State Committee, 319 F. Supp. 682 (W.D. Wash. 1970) 2

Fletcher v. Tuttle, 151 Ill. 41, 37 N.E. 683 (1894). . 4

Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975). 8

Griffin v. Breckenridge, 403 U.S. 88 (1971). 9

Kennedy v. H&M Landing, Inc., 529 F.2d 987, 989 (9th Cir. 1976) 3

Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975). 10

Lynch v. Torquato, 343 F.2d 370, 372 (3d Cir. 1975). . 3

Maxey v. Washington State Democratic Committee, 319 F. Supp. 673 (W.D. Wash. 1970) 2

Nixon v. Herndon, 273 U.S. 536 (1927). 4

Selzer v. Berkowitz, 459 F. Supp. 347 (E.D.N.Y. 1978) 9

Smith v. Allwright, 321 U.S. 649 (1944). 3

Terry v. Adams, 345 U.S. 461 (1953). 3

Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir. 1975), vacated as moot, 507 F.2d 216 (5th Cir. 1975) 8

Williams v. Gorton, 529 F.2d 668, (9th Cir. 1976). . . 3

Statutes

United States Constitution, First Amendment . . . . . *passim*
42 U.S.C. Section 1985(3). 6,7,8,9,10

Statement

Plaintiff's memorandum in opposition to the SWP's motion to dismiss fails to refute our showing that, even viewing the complaint in the light most favorable to him, and accepting his allegations as true, he has failed to state a claim against the SWP upon which relief can be granted. We will briefly address ourselves to the new authorities and arguments he advances in his opposition.

I. The Claim Against the SWP Under the First Amendment.

We showed in our Motion to Dismiss that there is no First Amendment right to remain a member of a voluntary political association while defying the requirements of membership (SWP mem. at 1-5). Gelfand does not attempt in his memorandum in opposition to contradict this well-established proposition. Instead, he tries to escape its force by arguing that, because his complaint accuses various SWP members of being government agents, the SWP is not a voluntary political association at all, but an "agency or quasi-agency of the U.S. government" (Pl. opp. at 7). From this conclusion, he suggests that the actions of the SWP constituted "state action", whereby he has been disenfranchized (Pl. opp. at 7-8).

We note in passing that the "government agency" thesis is ludicrous in light of the substantial public record on the SWP's opposition to the government, and the government's conduct toward the SWP (SWP mem. at 1-2 and n.8). It is well known that the SWP

is a sharp critic of the government, and that over a period of some forty years the government has blacklisted every leading member of the SWP, employed informers to accuse loyal SWP members of being government spies in order to disrupt the SWP and attempt to intimidate the membership, and attacked the party with a host of other "counterintelligence" techniques as part of what the FBI captioned its "SWP Disruption Program". The SWP has been suing the government since 1973 to enjoin these unlawful activities, and that lawsuit is widely acknowledged as one of the most effective legal efforts ever pursued to expose government repression against political activists.

But even taking as true Gelfand's malicious accusations against the SWP defendants, he is unable to explain how their alleged "manipulation" of the SWP thereby transforms the party into an agency or quasi-agency of the government for state action purposes. His reliance on Maxey v. Washington State Democratic Committee, 319 F. Supp. 673 (W.D. Wash. 1970) is misplaced. Maxey merely followed clearly delineated Supreme Court guidelines, in holding that all integral phases of state-created presidential election processes must conform to the one-man, one-vote principle. (In a companion case decided by the same court, it was further held that the election of state committee persons of a political party is not an integral phase of a state-created election process, and therefore that the court could not intrude on the party's election procedures. Dahl v. Republican State Committee, 319 F. Supp. 682 (W.D. Wash. 1970).) Nor do any of plaintiff's other authorities advance his specious argument. It is well established that the

actions of a political party, or of its officers, constitute "state action" limiting the right to suffrage only when they impinge on the citizens' rights to equality as electors of government representatives, and that,"/i/n contrast, the normal role of party leaders in conducting internal affairs of their party, other than primary or general elections, does not make their party offices governmental offices, or the filling of these offices state action ...." Lynch v. Torquato, 343 F. 2d 370, 372 (3d Cir. 1965). And compare Smith v. Allwright, 321 U.S. 649, 664-65 (1944); Terry v. Adams, 343 U.S. 461, 469-70 (1953).

Gelfand does not suggest that the SWP plays any integral role in the state or federal election machinery, or that it wields any administrative, rulemaking, accrediting, economic or commercial power over the public at large. In fact, he does not suggest that the SWP has erected the slightest obstacle to his expressing his "personal political ideas and feelings" whenever and wherever he chooses--except under the auspices of the SWP. Thus, his contention that the SWP is an "agency or quasi-agency of the U.S. Government" is legally and logically insupportable. On a motion to dismiss, the court must accept as true only well-pleaded allegations of fact, not ill-founded deductions and conclusions of law from the facts alleged. Williams v. Gorton, 529 F.2d 668, 670-671 (9th Cir. 1976); Kennedy v. H&M Landing, Inc., 529 F.2d 987, 989 (9th Cir. 1976).

Gelfand also asserts that "to deny plaintiff membership in the SWP is to deny him the right to participate in the political process" (Pl. opp. at 8) because "there is no party which holds to the

unique premises of the SWP" (Pl. opp. at 7). He is unable, however, to cite a single authority that supports this novel proposition. His citations to Blackman v. Stone, 17 F. Supp. 102 (S.D. Ill. 1936), vacated as moot, 300 U.S. 641 (1937), and Fletcher v. Tuttle, 151 Ill. 41, 37 N.E. 683 (1894), are inexplicable. The issue in those cases, which predated the integration in the federal system of courts of law and courts of equity, was whether a court of equity had jurisdiction to entertain a suit to protect "political" as opposed to "civil" rights. The reference to Nixon v. Herndon, 273 U.S. 536 (1927) is equally puzzling. Nixon established the principle that the Fourteenth Amendment forbids the states to deny the franchise on racial grounds by prohibiting blacks from voting in primaries. Nor do any of the broad propositions on the protection of federally created rights, culled from Supreme Court cases and law journals (Pl. opp. at 6 and 8) have the remotest bearing on the theory plaintiff advances.

Gelfand's argument, that his expulsion from the SWP denies him "the right to participate in the political process" because "no other party holds to the unique premises of the SWP" founders on the simple, undeniable fact that the SWP holds no monopoly power over its "unique premises". Even if it were "manipulated" by the SWP members he accuses of being agents, it has in no way inhibited him from advocating the SWP's ideas, or any other ideas, in any forum that chooses to hear him. On the other hand, if courts were to compel political associations to act as forums for the advocacy of ideas inimical to those of the group, there would be nothing left of the right of association. What Gelfand claims as a "First

Amendment right" is no less than the "right" to a captive audience consisting of the SWP membership, whose broad elected leadership has unanimously found his actions inimical to the association, and the expression of his "ideas" to be maliciously fabricated slanders aimed at injuring the group.

II. The Claim Against the SWP for Breach of Contract

As we demonstrated in our Motion to Dismiss, neither diversity nor any other ground has been alleged, or exists, to support federal jurisdiction of the contract claim. Gelfand has not even attempted to rebut our showing in his opposition to the motion. Further, Gelfand has neither alleged facts sufficient to indicate any breach of contract nor does his memorandum in opposition advance any serious rebuttal of our demonstration that in fact no contract was breached. Gelfand merely asserts that a "quick reading" of the SWP Constitution supports his claim (Pl. opp. at 3). This argument need not detain us, since our moving papers conclusively demonstrate the opposite (SWP mem. at 1-5, 15-16).

Finally, even if this court were the proper forum for the breach of contract claim, and even if Gelfand had succeeded in making out a prima facie case for breach of contract, the fact remains that no court could do more, should Gelfand prevail at a trial of the claim, than order him reinstated to membership to face rehearing on the charges against him (charges to which he fully admits) and a second expulsion, for violation of the basic norms of membership.

III. The Claim Against the SWP Under 42 U.S.C. 1985(3)

We demonstrated in our motion to dismiss that the 1985(3) claim is fatally defective as to the SWP defendants because, even taking Gelfand's allegations as true, they fail to show the requisite class-based animus, and fail to show that the SWP has deprived him of the equal protection of the laws, or equal privileges and immunities under the laws, or injured him in his person or property, an essential element of a 1985(3) action.

Gelfand's only response to our argument is to suggest that he belongs to a class of persons in the SWP "who have expressed a desire to know, or who wish to know, about the Government's infiltration into the SWP or its manipulation of the SWP and/or the activities of Joseph Hansen" (Pl. opp. at 10). Assuming *arguendo* that Gelfand is a member of such a class, and that the SWP has discriminated against that class, this contention does not advance by one iota the 1985(3) claim. Discrimination against the class he describes would not be invidious, for the simple reason that a political association has the right to require its members, as a condition of membership, not to express ideas the group considers inimical to its objectives. That requirement is a commonplace. No political activist organization could function otherwise.

We should also point out that Gelfand's pleadings contradict on their face his assertion that he was expelled for membership in a class that "expressed a desire to know" or "wished to know" about government infiltration of the SWP, or the "activities" of Joseph Hansen. Gelfand was not expelled for "asking questions" but for an

act: his intervention in the SWP's suit against the government with a brief that "questioned" the loyalty of Joseph Hansen, a plaintiff in that suit. This act was in deliberate defiance of the SWP's warnings that he would be expelled if he continued to "question" Hansen's loyalty. Gelfand's pleadings admit all these facts. See Complaint, paragraphs 14-16.

The cases plaintiff cites* (Pl. opp. at 10), to counter our showing that the 1985(3) claim against the SWP is defective, are distinguished by the very element lacking in Gelfand's complaint: the allegation of a deprivation of a clearly defined right. Thus, in Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973), plaintiff was arrested and jailed while distributing campaign literature on a public street, by the deputies of the local sheriff against whom he was campaigning. The court stated, "If a plaintiff can show that he was denied the protection of the law because of the class of which he is a member, he has an actionable claim under 1985(3)". In Azar v. Conley, 456 F.2d 1382, 1384 (6th Cir. 1972), plaintiffs alleged that they had been subjected to a campaign of severe intimidation and harassment in which public officials acquiesced by refusing to enforce the law. The court stated that "the injury to plaintiffs is clearly delineated" because the allegations showed a denial of equal protection of the law, stating

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*Plaintiff's insistence that there are other members of his "class" and his citation to cases to prove that a class may consist of a very limited group (Pl. opp. at 10 and 20), are evidently intended to divert attention from the focus of our argument. It is wholly irrelevant whether or not Gelfand is the sole member of the class in which he claims membership. What is decisive is that, even accepting his definition of his "class," the complaint shows no injury or deprivation of equal protection of the laws to that class by the SWP, under 1985(3).

that a 1985(3) conspiracy "must aim at a deprivation of the equal enjoyment of rights secured by law to all." In Glasson v. City of Louisville, 518 F.2d 899, 912 (6th Cir. 1975), police seized and destroyed the anti-Nixon sign plaintiff was displaying along the public route of the presidential motorcade, while permitting pro-Nixon signs. The court held that the police's actions were unmistakably "invidious" discrimination, that "struck at the very heart of the protection afforded all persons by the First and Fourteenth Amendments." In Bradley v. Clegg, 403 F. Supp. 830, 833 (E.D. Wisc. 1975), plaintiffs alleged that they were assaulted by "vigilantes" when public officials deliberately withdrew police protection from their picket line. While recognizing that picketing is an activity protected by the First Amendment, the court nevertheless dismissed the 1985(3) claim because the plaintiffs had failed to allege that "the purpose or effect of the defendants' conspiracy was to deprive any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, as required by 42 U.S.C. 1985(3)." In Westberry v. Gilman Paper Co., 507 F.2d 206, 215 (5th Cir. 1975), plaintiff alleged that the defendants had conspired to kill him and have him removed from his job for his criticisms of his employer. The court recognized a class,* but interjected a cautionary note even more apt to the case at bar: "There

* In citing Westberry, plaintiff neglects to complete the cite: Upon rehearing en banc the opinion was withdrawn and vacated as moot, and the case remanded with directions to the trial court to dismiss as moot so that it would "spawn no legal precedents", 507 F.2d at 216.

is no 'deprivation' of a 'right' where other constitutional provisions create a right in another party to act in a way which functionally creates barriers for a potential 1985(3) plaintiff. Perhaps most importantly, no one could sustain an action based upon every exclusionary act since the First Amendment creates a right of free association." Finally, the basis of the district court's decision in Selzer v. Berkowitz, 459 F. Supp. 347 (E.D.N.Y. 1978) was that the denial of tenure by a college was "state action". However, the allegations on which the finding of "state action" was based (presumably, state funding and/or regulation of the college by an elected board) are not mentioned in the opinion. In any event, the right to public employment, or to pursue a profession, obviously is not at stake in the case at bar.

In summary, the authorities plaintiff has cited in his opposition only highlight the fatal defects of his 1985(3) claim against the SWP. He has failed to show "invidious" discrimination, and he has failed to make a colorable showing that his expulsion caused him "injury to person or property" or deprived him of "having and exercising any right or privilege of a citizen of the United States", an essential element of a 1985(3) claim. "The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Membership in a political association while defying the basic requirements of membership is not a "right secured by the law" to anyone. Where there is "no legal right *per se* to be free of the discrimination", defendant's act "does not deprive [plaintiff] of the protection of the laws, and hence

is not actionable under Section 1985(3)." Lopez v. Arrowhead Ranches, 523 F.2d 924, 927 (9th Cir. 1975).

IV. Failure to State Any Claim Against the SWP Upon Which Relief Can Be Granted.

Gelfand has made only one claim for relief against the SWP: that the SWP be ordered to reinstate him to membership. His other claims for relief are directed squarely at the Attorney General and the Directors of the FBI, CIA and NSA, as follows: 1) That the Attorney General and the Directors of the FBI, CIA and NSA be ordered to reveal the identities of all informers, past and present, that it has deployed against the SWP; and 2) That the Attorney General, and the Directors of the FBI, CIA and NSA be enjoined from deploying informers against the SWP. (Complaint at 7-8.)

The SWP defendants have no quarrel with either of the claims for relief against the government. Should Gelfand succeed on those claims, the party would be the beneficiaries, since the SWP has been engaged in groundbreaking litigation against the government for the past six and a half years to compel it ~~to~~ reveal the identities of its informers against the SWP, and to enjoin it from deploying its informers and agents against the party.

As to the remaining claim for relief, that Gelfand be reinstated to membership, it has been amply demonstrated that his pleadings state no claim upon which that relief can be granted.

Conclusion

The motion to dismiss the complaint against the SWP defendants should be granted.

Respectfully submitted,

Margaret Winter

Margaret Winter
Attorney for SWP Defendants

Dated: November 14, 1979
New York, New York

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Affirmation of Service

I affirm that I served a copy of the foregoing Reply to Plaintiff's Opposition to Motion to Dismiss upon the plaintiff by mailing it by express mail, to his attorney Robert L. Allen, 6725 Sunset Blvd., Suite 421, Los Angeles, California 90028, this 14th day of November, 1979.

/s/ Margaret Winter
Margaret Winter

Affirmation of Service

I affirm that I served a copy of the foregoing Reply to Plaintiff's Opposition to Motion to Dismiss upon the United States Attorneys Office by hand delivering it to the Assistant U.S. Attorney for the Central District, this ____ day of November, 1979.

/s/ ______________________________