

pc

P-8

11A

VEXAD

CAUSE NO. 2016-31579

ALLEN "F" CALTON,

§
§
§
§
§
§

IN THE DISTRICT COURT OF

V.

HARRIS COUNTY, TEXAS

JASON NEWMAN, LAUREN TANNER,
AND BAKER BOTTS L.L.P.,

FILED
152ND JUDICIAL DISTRICT
By Daniel
District Clerk

AUG 10 2016

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND
TO DECLARE PETITIONER A VEXATIOUS LITIGANT
By _____
Harris County, Texas
Deputy

On May 13, 2016, Plaintiff, Allen "F" Calton (Calton), currently an inmate in the Texas Department of Corrections - Institutional Division (TDCJ-ID#1123880), filed a bill of review attacking this Court's January 20, 2015, Order granting the Defendants' Motion for Traditional and No Evidence Summary Judgment. Mr. Calton's attempts to appeal the January 20, 2015 order were unsuccessful. The judgment is now final for all purposes.¹

On July 14, 2016, Defendants, Jason Newman, Lauren Tanner, and Baker Botts L.L.P. (Baker Botts)², filed a motion to dismiss Mr. Calton's Petition for Bill of Review pursuant to Chapter 14 of the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 14.003. Baker Botts also asked the Court to declare Mr. Calton a vexatious litigant and prohibit him from filing future lawsuits without obtaining permission from a local administrative judge. The Court finds that Baker Botts's requests have merit.

BACKGROUND

The lawsuit upon which Mr. Calton's bill of review is based stems from pro bono legal services provided by Baker Botts to Mr. Calton. The United States District Court for the Southern District of Texas had appointed Baker Botts to represent Calton in an action against prison officials of the facility in which Carlton had been incarcerated. The gravamen of that suit

¹ Specifically the 14th Court of Appeals and the Texas Supreme Court.
² Mr. Calton has not yet served the Defendants in this this matter,

RECORDER'S MEMORANDUM
This instrument is of poor quality
at the time of imaging

was based on the prison officials' failure to take certain steps to prevent Mr. Calton's attempted suicide on September 19, 2008. *Calton v. Livingston*, No. 4:09-cv-02507 (S.D.Tex. 2009); *see also Calton v. Newman*, 2014-09348 (152nd Dist. Ct. Oct. 7, 2014). Although Mr. Calton did not prevail in that action, the court commended Baker Botts for its work in representing him.

Based on Baker Botts representation of him in Federal Court, Mr. Calton filed a legal malpractice lawsuit in this Court as trial court cause number 2014-09348. Months later, Mr. Calton filed another, virtually identical legal malpractice case months, which was consolidated with the first case. *Calton v. Newman*, 2014-37433 (152d Dist. Ct. June 27, 2014).

Subsequently, on January 20, 2015, the Court granted Baker Botts' motion for summary judgment in the consolidated action and dismissed Mr. Calton's claims with prejudice. Mr. Calton appealed.

On November 17, 2015, the court of appeals dismissed Mr. Calton's appeal for want of prosecution. *Calton v. Newman*, Case No. 14-15-00460-CV (Tex. App.—Houston [14th Dist.] May 22, 2015). Mr. Calton responded by filing a motion for rehearing and reinstatement of the appeal, which the court of appeals denied on December 8, 2015. Mr. Calton then filed a petition for mandamus to the Texas Supreme Court, which was denied on February 19, 2016. *In re Allen F. Calton*, Case No. 16-0018 (Tex. Jan. 6, 2016).

In response, Mr. Calton filed a petition for review of the appellate court's decision, which the Texas Supreme Court subsequently denied on April 22, 2016. *Calton v. Newman*, Case No. 16-0151 (Tex. March 1, 2016).

Mr. Calton has now filed this bill of review, in which he again raises the same arguments for a fourth time. Despite not having been served with this bill of review, Baker Botts filed a motion seeking dismissal of the action and to have Calton declared a vexatious litigant.

DEFENDANTS' MOTION TO DISMISS

The Court has reviewed Baker Botts's motion to dismiss, the record, pleadings, and appropriate authorities and finds it to have merit.

Consequently, the Court FINDS

- (1) Plaintiff, Allen "F" Calton, currently an inmate in the Texas Department of Corrections - Institutional Division (TDCJ-ID#1123880), filed the bill of review that is the basis of this case;
- (2) as discussed above, the issues presented in Mr. Calton's bill of review are substantially similar to claims that have been previously considered, found to be without merit and repeatedly rejected by state appellate courts;
- (3) the claims Mr. Calton presents in his bill of review are unsupported by the facts and the law;
- (4) Mr. Calton's claims in his bill of review have no realistic chance of ultimate success;
- (5) Mr. Calton's petition for bill of review meets the criteria of a frivolous claim. *See* TEX. CIVIL PRAC. & REM. CODE § 14.003(a)(2);
- (6) a trial court may dismiss an inmate's claims it finds to be frivolous. *See* TEX. CIV. PRAC. & REM. CODE §14.003(b);
- (7) a bill of review is only proper where "a party has exercised due diligence to prosecute all adequate legal remedies against a former judgment, and at the time the bill of review is filed, there remains no such adequate legal remedy still available because, through no fault of the bill's proponent, fraud, accident, or

mistake precludes presentation of a meritorious claim or defense.” *King Ranch, Inc.*, 118 S.W.3d at 751;

- (8) a petitioner must plead and prove the following elements to establish entitlement to a bill of review: (1) a meritorious claim or defense, (2) that the petitioner was prevented from making by the fraud, accident or wrongful act of his or her opponent or by official mistake and (3) the absence of fault or negligence of the petitioner. *Reynolds v. Reynolds*, No. 14-14-00080-CV, 2015 WL 4504626, at *2 (Tex. App.—Houston [14th Dist.] July 23, 2015, no pet.) (mem. op.);
- (10) Mr. Calton’s legal malpractice claim was previously adjudicated as being without merit;
- (11) in basing his petition entirely of an alleged “official mistake by the clerk” of the 14th Court of Appeals to send him an order, Mr. Calton has not and cannot establish any of the elements necessary for the trial court to issue a bill of review;
- (12) Mr. Calton has not and cannot show that he was prevented from presenting his appeal of the Court’s decision because of the clerk’s “mistake;”
- (13) the appellate court issued an order on June 26, 2015 giving Mr. Calton notice that he was required to pay for the clerk’s record and that if he failed to do so, the cause could be dismissed for want of prosecution;
- (14) Mr. Calton does not claim that he failed to receive the June order, or this Court’s orders sustaining the district clerk’s contests to his affidavits of indigency;
- (15) Mr. Calton’s petition has set forth no facts to support his contention that receiving the appellate court’s October order would have changed the outcome of the appeal;

- (16) Mr. Calton’s petition relies issues that have already been considered and adjudicated as being without merit by the appellate courts;
- (17) Mr. Calton did not make arrangements to pay for the clerk’s record and did not establish that he had permitted to proceed without paying for those records.
- (18) Mr. Calton did not make arrangements to pay for the clerk’s records;
- (19) The appellate court gave Mr. Calton proper notice that it would dismiss his appeal if he failed to provide the court with the records necessary to consider his appeal;
- (20) case law has held that “A party cannot use a bill of review as an additional remedy after that party has made a timely, but unsuccessful, appeal because that party cannot demonstrate that she has been prevented from making a claim or defense.” *Reynolds v. Reynolds*, No. 14-14-00080-CV, 2015 WL 4504626, at *3 (Tex. App.—Houston [14th Dist.] July 23, 2015, no pet.) (mem. op.);
- (21) Mr. Calton’s bill of review is an effort to re-litigate his alleged failure to receive the October Order, has no basis in law or fact, is unsupported by the facts, and has no chance of success;
- (22) Mr. Calton’s bill of review cannot be remedies by coercing procedural defects; and
- (23) Defendant’s motion to dismiss has merit and should be granted.

MOTION TO DECLARE PLAINTIFF A VEXATIOUS LITIGANT

Baker Botts also asks this Court to adjudicate Allen “F” Calton to be a vexatious litigant pursuant to Chapter 11 of the Civil Practice and Remedies Code. Case law has also clearly held that the vexatious litigant statutes applied to petitions for bill of review. *See Brown v. Texas Bd. of Nurse Exam’rs*, 194 S.W.3d 721, 722 (Tex. App.—Dallas 2006, no pet.).

VEXATIOUS LITIGANT STATUTE

The statute allows a court to find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the Plaintiff will prevail in the litigation against the Defendant and meets at least one of the three following criteria. (1) that in the previous seven-years the plaintiff has commenced, prosecuted, or maintained at least five litigations as a pro se litigant that have been: “(A) finally determined adversely to him; (B) permitted to remain pending at least two years without having been brought to trial or hearing; or (C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure[.]” TEX. CIV. PRAC. & REM. CODE § 11.054 (1) (A) – (C). (2) That “after the litigation has finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, pro se, either: (A) the validity of the determination; or (B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination.” TEX. CIV. PRAC & REM. §11.054 (2) (A) & (B). (3) Finally, a plaintiff may be adjudicated as a vexatious litigant if “the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.” TEX. CIV. PRAC. & REM. CODE §11.054(3). *See* TEX. CIV. PRAC. & REM. CODE § 11.054.

After reviewing Baker Botts’s motion to declare Mr. Calton a vexatious litigant, the record, pleadings, and the appropriate authorities and FINDS:

- (1) As discussed above, Mr. Calton has no reasonable probability of prevailing in this litigation. *See* TEX. CIV. PRAC. & REM. CODE § 11.054(1).
- (2) Mr. Calton has had a long history of filing frivolous lawsuits over his period of incarceration. As one federal court noted: “The Plaintiff Allen Calton is well

known for abuse of court.” *Calton v. Wright*, No. 6:14-cv-212-KNW (E.D. Tex. April 15, 2014) (listing the numerous “strikes” he had accumulated in federal court pursuant to 28 U.S.C. § 1915).

(3) In the last two years, Mr. Calton has had at least following five cases dismissed as frivolous or malicious:

a) *Calton v. Spisak*, No. 348-281, 946-15 (348th Dist. Ct., Tarrant County, Tex. Oct. 22, 2015) (dismissed as frivolous or malicious);

b) *Calton v. Baker*, No. 87-12151 (87th Dist. Ct., Anderson County, Tex. Oct. 21, 2014) (dismissed as frivolous or malicious);

c) *Calton v. Marshall*, No. 3-42179 (3rd Dist. Ct., Anderson County, Tex. June 6, 2014) (dismissed as frivolous or malicious);

d) *Calton v. Marshall*, No. 3-42122 (3rd Dist. Ct., Anderson County, Tex. Mar. 20, 2014) (dismissed as frivolous or malicious); and

e) *Calton v. T.D.C.J.*, No. 349-7147 (349th Dist. Ct., Anderson County, Tex. July 3, 2013) (dismissed as frivolous or malicious).

(4) As a pro-se plaintiff, Mr. Calton has continued to relitigate or attempted to relitigate this legal malpractice claim against Baker Botts long “after the litigation has finally determined against [him];” and

(5) As a pro se plaintiff, Mr. Calton has repeatedly relitigated or attempted to relitigate the validity of the Court’s previously decided issues of fact or law.

Accordingly, the Court FINDS Mr. Calton satisfies the criteria required to find him to be a vexatious litigant.

ORDERS

MOTION TO DISMISS

Finding the motion to dismiss pursuant to Chapter 14 of the Texas Civil Practice and Remedies Code to have merit, the Court GRANTS the Defendants’ motion to DISMISS Allen “F” Calton’s Bill of Review.

The Court also GRANTS Defendants' request that Allen "F" Calton be required to post security, and assesses all fees and costs against Mr. Calton. *See* TEX. CIV. PRAC. & REM. CODE §§ 14.006 & 14.007. Accordingly, the Court ORDERS the above case DISMISSED.

The Court FURTHER ORDERS Allen "F" Calton to pay all fees and costs incurred by the Defendants in this matter no later than sixty days after the date of this Order.

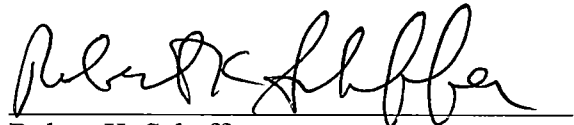
MOTION TO ADJUDICATE PLAINTIFF TO BE A VEXATIOUS LITIGANT

Finding Allen "F" Calton satisfies the requisite statutory criteria, the Court ORDERS Mr. Calton adjudicated to be a vexatious litigant. TEX. CIV. PRAC. & REM. CODE § 11.054.

The Court ORDERS Allen "F" Calton, as a vexatious litigant, to obtain permission from the appropriate local administrative judge before filing lawsuits in the future. TEX. CIV. PRAC. & REM. CODE § 11.101(a). If a local administrative judge grants Mr. Calton permission to file future lawsuits, the judge may require him to post security to cover the defendants' anticipated expenses to defend the lawsuit. TEX. CIV. PRAC. & REM. CODE § 11.055. If Mr. Calton fails to furnish the security within the ordered time, the Court will dismiss the case. *See* TEX. CIV. PRAC. & REM. CODE § 11.056.

The Court further ORDERS the Harris County District Clerk to transmit a copy of this Order to the Texas Office of Court Administration.

Signed August 10, 2016.


Robert K. Schaffer



I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this August 11, 2016

Certified Document Number: 71436765 Total Pages: 8

Chris Daniel, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com