11-4934-cv

United States Court of Appeals

for the

Second Circuit

YOEL WEISSHAUS,

Plaintiff-Appellant,

– v. –

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, STATE OF NEW YORK, NEW YORK STATE ASSEMBLY, NEW YORK STATE SENATE, STATE OF NEW JERSEY, NEW JERSEY STATE LEGISLATOR, NEW JERSEY STATE GENERAL ASSEMBLY, NEW JERSEY STATE SENATE, JOHN DOES 1 through 20, JANE DOE 1 through 20,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE
PORT AUTHORITY OF NEW YORK AND NEW JERSEY

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PRELIMINARY STATEMENT

The Port Authority of New York and New Jersey ("Port Authority") respectfully submits this brief in support of the District Court's dismissal of the underlying Complaint and to distinguish this action from *AAA v. The Port Authority of New York and New Jersey*, 2012 WL 362010 (S.D.N.Y. Feb. 6, 2012). Despite Appellant Yoel Weisshaus's ("Weisshaus" or "Appellant") attempts to litigate this case in the press (A84-89[1]), the Port Authority has never been served in this litigation and therefore jurisdiction has never been obtained over it. Since the Complaint was dismissed *sua sponte*, the majority of the documents included in Weisshaus's Appendix were not in the record before the District Court and are not a part of the record on appeal. Documents that are outside of the record which are not subject to judicial notice should be disregarded by this Court. [2]

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. The United States Court of Appeals for the Second Circuit has

[1] "A" followed by numerals refers to page in Weisshaus's Appendix.

[2] The Port Authority intends to file a motion to strike the non-record materials not subject to judicial notice in Weisshaus's Appendix ,and the portions of Appellant's Brief referring to those non-record materials. *See*, *Weisshaus v. Port Authority*, Docket Number 11-4934 (2d Cir. June 27, 2012). The motion will be be filed simultaneously with, or shortly after, the filing of the Port Authority's Brief.

appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294 based upon the District Court's final dismissal of the Complaint.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly dismissed the Complaint for failure to state a claim on which relief may be granted under 28 U.S.C. § 1915(e)(2)(B)(ii).

STANDARD OF REVIEW

A district court's *sua sponte* dismissal of a complaint under 28 U.S.C. § 1915(e) is reviewed *de novo*. *See Marvin v. Goord*, 255 F.3d 40, 42 (2d Cir. 2001).

STATEMENT OF THE CASE

On September 19, 2011, Weisshaus filed a Complaint *pro se* against the Port Authority, the States of New York and New Jersey, and the legislative bodies of each state challenging the Port Authority's toll increases on bridges and tunnels between New Jersey and New York (A7). On October 24, 2011, Judge Deborah A. Batts of the United States District Court for the Southern District of New York (the "District Court") dismissed the Complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii),(iii) for failure to state a claim upon which relief may be granted and on immunity grounds (A38-43). On October 29, 2011, Weisshaus sent a letter to the District Court seeking reconsideration of the dismissal of the Complaint

(A44-46). On November 16, 2011, Weisshaus filed a notice of appeal with the District Court, which excluded all claims against the State defendants (A49-50). On December 8, 2011, Chief United States District Judge Loretta A. Preska of the District Court denied Weisshaus's request for reconsideration, having construed his letter as a request for relief pursuant to Federal Rule of Civil Procedure 60(b) (A51-53). The Port Authority was never served with Appellant's Complaint and obtained a copy after learning of the case through reports in the media.

STATEMENT OF FACTS

Weisshaus, a resident of New Jersey, challenges the September 2011 toll increases at the Port Authority's bridges and tunnels between New York and New Jersey. Weisshaus is a deliberate and repeated toll violator who owes hundreds of dollars in tolls and fines to the Port Authority and apparently considers himself the victim of the Port Authority's efforts to collect on his numerous violations over the past three years. (A4, 29-37). Weisshaus heard about the proposed toll increases on August 5, 2011, the day of the Port Authority's initial press release announcing the proposed increases, while sitting in his car at a tollbooth (A85). According to the October 15, 2011 New York Post article in which Weisshaus is quoted, he is "seeking to enjoin the Port Authority from raising tolls without approval from both state legislatures, to have his current fines waived and to have his legal fees reimbursed." (A85).

The Port Authority, a bi-state governmental agency created by compact between the States of New York and New Jersey with the consent of the Congress of the United States, was created, in part, to better coordinate the terminal, transportation and other facilities of commerce in, about and through the Port of New York. *See* McKinney's N.Y. Unconsol. Law § 6401, *et seq.*, N.J.S.A. 32:1-1 *et seq*. The Port Authority is responsible for the construction, maintenance, operation, and control of all vehicular bridges and tunnels connecting New York and New Jersey, which lie within a 25-mile radius of the Statute of Liberty (the Bayonne Bridge, the Outerbridge Crossing, the Goethals Bridge, the Holland Tunnel, the Lincoln Tunnel and the George Washington Bridge) and the Port Authority Trans-Hudson Railroad ("PATH") (collectively, "interstate transportation network" or "ITN"). *See* McKinney's N.Y. Unconsol. Law § 6501, *et seq*., N.J.S.A. 32:1-118 *et seq.*

The Port Authority is governed by a Board of twelve Commissioners, with six appointed by the respective Governor of each state with the consent of that state's Senate. The actions the Commissioners take place at public meetings and are subject to gubernatorial review for a period of ten days. The governors may veto that action at any time during the ten-day period.

In operating the tunnels and bridges, the Port Authority is authorized to set and collect tolls at these facilities. *See* McKinney's N.Y. Unconsol. Law § 6501,

et seq., N.J.S.A. 32:1-118 *et seq.* On August 5, 2011, the Port Authority announced in a press release a proposed toll increase on its tunnels and bridges and a fare increase for the PATH train (A90-92). Although the press release did mention World Trade Center ("WTC") project expenditures as a part of the general financial strain on the Port Authority, it did not state that the proposed toll and fare increases would be used for that project. In fact, it cited several projects that are contingent upon the toll and fare increases (including replacing the suspender cables on the George Washington Bridge, replacement of the Lincoln Tunnel Helix, and raising the Bayonne Bridge) and the WTC was not one of them (A90-91). Every dollar generated by the toll and fare increases goes back into the interstate transportation network, which has had a negative cash flow for the past four years that is expected to continue despite the toll increases. *AAA v. The Port Authority*, 2012 WL 362010 at *2 (S.D.N.Y. Feb. 6, 2012).

On August 19, 2011, the Port Authority Board of Commissioners met and approved a modified toll increase schedule to take effect on September 18, 2011 *See Id.* at *1. After the Board of Commissioners approved and adopted the toll and fare increases, they were forwarded to the Governors of New York and New Jersey for review. The ten-day veto period expired and the increases went into effect on September 18, 2011. *Id.*

SUMMARY OF ARGUMENT

The District Court properly construed the Complaint as alleging constitutional violations under 42 U.S.C. § 1983. Although erroneously asserted under the First and Fifth Amendments, the District Court gave Weisshaus's Complaint a liberal interpretation and construed the Complaint as asserting a violation of the right to travel. The District Court correctly determined that the toll increases are not a proper basis for a right to travel claim because such nondiscriminatory burdens on interstate travel do not constitute a constitutional violation. Further, the District Court properly found that the Robinson-Patman Act is inapplicable. Although the District Court did not address Count III of Weisshaus's Complaint, it is plain that he did not state a claim for "unjust enrichment;" which is a harm normally addressed by the quasi-contractual claim for restitution. In short, despite the multitude of contentions made in Weisshaus's lengthy brief attempting to reinvent the contents of his Complaint, the District Court gave the Complaint a liberal reading and correctly determined that Weisshaus failed to state a claim upon which relief may be granted.

Weisshaus's appeal offers a litany of claims that go far beyond the reasonable scope of what could liberally be construed from his Complaint. It appears that Weisshaus is attempting to piggyback on the action filed by the Automobile Clubs of New York and New Jersey in *AAA v. The Port Authority*, by

arguing that his Complaint states a similar claim to that of AAA. There are some factual similarities between the actions in that both are based upon the toll increases that the Port Authority implemented in 2011. However, the legal claims asserted in the *AAA* action are entirely different than what can reasonably be construed from Weisshaus's Complaint.

The *AAA* action claims violations of the dormant Commerce Clause of the United States Constitution and the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("Highway Act")(33 U.S.C. § 508) (A102). On the other hand, Weisshaus's Complaint attempts to make out several "claims" by alleging violations of his First and Fifth Amendment right to travel, his right to public notice, harassment and penalties stemming from his own toll violations, the Robinson-Patman Act, unjust enrichment, and discrimination against low-income individuals such as himself. Essentially, the closest to cognizable claims that he asserted are individual civil rights violations under § 1983, particularly his right to travel. In short, although both AAA and Weisshaus challenge the same toll increases, the claims that the respective plaintiffs made regarding those increases are completely different. Therefore, this action is not analogous to *AAA* and was properly dismissed for failure to state a claim upon which relief may be granted.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT

A *pro se* complaint is to be read liberally by the District Court in order to determine whether a valid claim may be stated. *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991). Still, a District Court is obligated to dismiss an *in forma pauperis* complaint if it fails to state a claim upon which relief may be granted.[3] 28 U.S.C. § 1915(e)(2)(B)(ii). It should be noted that Cardozo School of Law Professor Lucille Roussin helped Weisshaus prepare his Complaint (A84). Moreover, his appellate brief includes a Rule 32 Certification by attorney Freddie J. Berg, which further demonstrates that Weisshaus has had the assistance of legal counsel.

In the action at hand, the Complaint cites several erroneous foundations for Weisshaus's claims, including: (1) alleged violations of his rights based upon invented First and Fifth Amendment rights; (2) the Port Authority's attempts to

[3] Additionally, although Weisshaus claims he was denied leave to amend his Complaint, the District Court fairly construed his October 29, 2011 letter requesting "leave to file a motion for reconsideration" as having been made pursuant to FRCP 60(b). (A44). Weisshaus cites SDNY Local Rule 6.3 on page 10 of his appellate brief, titled "Motions for Reconsideration or Reargument," further supporting the District Court's interpretation of the letter. Simply put, his letter does not ask for leave to file an amended complaint.

collect on his toll violations; (3) the alleged lack of signs at the toll plazas for the public hearings; (4) the Robinson-Patman Act; and (5) unjust enrichment. Read liberally, the Complaint is most fairly construed to assert a constitutional violation of Weisshaus's right to travel under § 1983. Even given a liberal reading, the Complaint does not make out claims based upon the Robinson-Patman Act, unjust enrichment, or public notice violations. Therefore, the District Court correctly focused largely on Weisshaus's purported right to travel claim.

A. Right to Travel

Although not explicitly provided for in the Constitution, the Supreme Court has recognized that the right to travel is a fundamental right. *United States v. Guest*, 383 U.S. 745, 757, 86 S. Ct. 1170, 1178, 16 L. Ed. 2d 239 (1966); *Williams v. Town of Greenburgh*, 535 F.3d 71, 75 (2d Cir.2008) (denial of access to a particular public facility did not constitute a right to travel violation). States and municipalities may not create barriers designed to discriminate against out-of-state citizens traveling to or through their state. *See Saenz v. Roe*, 526 U.S. 489, 500 (1999) (durational residency requirement for welfare benefits violated 14th Amendment right to travel). The Supreme Court found, "[t]he 'right to travel' discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily

present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz*, 526 U.S. at 500. Constitutional sources for an individual's right to travel have been found in the Privileges and Immunities Clauses of Article 4 and 14th Amendment and the Equal Protection Clause of the 14th Amendment. *See id*; *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 99 (2d Cir. 2009) ("Although the Supreme Court has suggested that "[t]he textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration, ... has proved elusive," *Att'y Gen. of N.Y. v. Soto–Lopez*, 476 U.S. 898, 902, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986), it has protected that right by invoking both the Privileges and Immunities Clause of the Fourteenth Amendment and the Equal Protection Clause.").

As found by the District Court, nondiscriminatory burdens placed upon travel have been found not to constitute a violation of the right to travel. *See Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007) ("As the District Court properly observed, " 'travelers do not have a constitutional right to the most convenient form of travel[, and] minor restrictions on travel simply do not amount to the denial of a fundamental right.'"); *Selevan*, 584 F.3d at 101 *citing Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999) ("Burdens placed on travel generally, such as gasoline taxes, or minor burdens impacting interstate travel, such as toll roads, do not constitute a violation of that right, however."). Further,

courts have found that burdens on a single mode of transportation do not constitute a violation of the right to travel. *Miller*, 176 F.3d at 1205. Moreover, it has been found that the simple fact that a toll or tariff on travel impacts a poor individual more than a rich traveler does not constitute a right to travel violation. *Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir. 1972) ("A rich man can choose to drive a limousine; a poor man may have to walk. The poor man's lack of choice in his mode of travel may be unfortunate, but it is not unconstitutional."). Put simply, "If every infringement on interstate travel violates the traveler's fundamental constitutional rights, any governmental act that limits the ability to travel interstate, such as placing a traffic light before an interstate bridge, would raise a constitutional issue." *Town of Southold*, 477 F.3d at 54, *citing Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991).

In this matter, the Complaint does not make out a claim for a violation of Weishauss's right to travel. The toll increases do not discriminate against the right of any state's citizens to travel, but rather were implemented in order to provide the necessary funds to facilitate such interstate travel. Weisshaus's Complaint does not claim or suggest that the tolls are discriminatory against citizens of any particular state or municipality, as typically found in right to travel cases. *See Selevan*, 584 F.3d at 100, *citing Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) ("[T]he Court observed in *Soto–Lopez* that its 'recent cases

[concerning the right to travel] have dealt with state laws that, by classifying residents according to the time they established residence, resulted in the unequal distribution of rights and benefits among otherwise qualified bona fide residents.'"). The only discrimination or classification Weisshaus alleges is that against low-income individuals ("these tolls are targeted to restrict minimum wage earners the right to travel" (A12)), but as cited above, the differential effect of uniform tolls on persons of different incomes by itself is not grounds for a right to travel claim as the Complaint does not suggest any claim based upon Weisshaus's citizenship. *See Saunders v. Port Auth. of New York*, 02 CIV. 9768RLC, 2004 WL 1077964 (S.D.N.Y. May 13, 2004) (distinguishing *American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987), in which a state applied a tax on all out-of-state vehicles, from the Port Authority's E-ZPass discount program, which the Court found "makes no comparable distinction between residents and non-residents.").

Further, since the Port Authority is a bi-state agency, the claim that it is interfering with the right to travel between the States of New York and New Jersey lacks a rational basis.

In short, nothing in the Complaint could be liberally construed to suggest that the toll increases deprive Weisshaus of privileges and immunities or equal protection of the law on one side of the Hudson River as opposed to the other.

Therefore, the District Court properly held that Weisshaus failed to state a right to travel claim under § 1983.

POINT II

THIS CASE IS SIGNIFICANTLY DIFFERENT FROM AAA V. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

The complaints filed by Weisshaus and AAA both challenge the Port Authority's 2011 toll increases. This is where the similarities between the cases end. The *AAA* complaint pleads violations of the dormant Commerce Clause and the Highway Act. Weisshaus's Complaint does not assert either of these claims. Rather, his Complaint complains of harassment by debt collectors regarding his toll violations, his poverty, unjust enrichment, price discrimination, and general constitutional violations most fairly construed as a right to travel claim. The Complaint does not mention or suggest a claim based upon the Commerce Clause and does not allege discriminatory commercial activity from which such a claim could be construed.

In Point II of his appellate brief, Weisshaus argues that his claims are "indistinguishable" from those in *AAA v. The Port Authority* simply because both complaints raise the erroneous notion that the toll and fare increases would be used for the WTC project. However, nothing in Weisshaus's Complaint suggests that this allegation was made in support of a dormant Commerce Clause or Highway

Act claim. As recognized by the District Court, *pro se* complaints are to be construed liberally to interpret "the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006). The strongest claim that Weisshaus's Complaint suggests is a violation of his constitutional right to travel. Weisshaus's brief argues against the use of tolls "for privileged projects not fundamental to the implied *rights to travel*, such as the development of The World Trade Center…" and that "[e]ven if some revenues raised will be used for reasonable use, the majority revenue will be spent on real estate development of the Port Authority, which does not outweigh the public's fundamental *right to travel*." (Weisshaus Brief, pp. 49-50) (emphasis added). This argument further validates the District Court's finding that his Complaint sought to advance a right to travel claim.

The Complaint is filled with numerous factual allegations, but fails to "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant[s are] liable for the misconduct alleged," *See Fuentes v. Tilles*, 376 F. App'x 91, 92 (2d Cir. 2010) (affirming *sua sponte* dismissal of complaint of *pro se* plaintiff proceeding *in forma pauperis* for failure to plead factual content allowing the court to a draw reasonable inference of liability), *citing Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (detainee's complaint failed to plead sufficient facts to state a claim). Essentially, Weisshaus's Complaint does not connect any of

his factual allegations, or "misconduct alleged," to cognizable legal claims. In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007), the Supreme Court held that under Rule 8 of the Federal Rules of Civil Procedure, unless a complaint pleads facts that on their face move the claims "across the line from conceivable to plausible, their complaint must be dismissed." Weisshauss's oblique and conclusory allegations regarding use of tolls to rebuild the WTC do not meet the pleading requirements to state a plausible claim under the Commerce Clause or the Highway Act.

In this regard, Weisshaus's action differs greatly from *AAA v. The Port Authority*. As in *Fuentes*, Weisshaus "sued defendants for alleged violations of myriad federal laws." 376 F. App'x at 91. Yet, a complaint needs to do more than present conclusory statements simply alleging that something is against the law because the plaintiff says so in order to state a claim for relief. The legal violations alleged in Weisshaus's Complaint are largely made up; there are no legal requirements for the legislatures of both States to approve toll increases, put "signs or posters at the toll plazas," or for the Port Authority to refrain from collecting toll violations because an individual has "income below or close to Federal Income Poverty Guidelines." In keeping with its holding in *Twombly*, the Supreme Court stated that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft*, 556 U.S. at 678. Here, the

District Court gave the *pro se* Complaint the liberal reading it was due and correctly determined that it failed to state a cognizable claim.

Finally, despite the failure of his Complaint to state a claim, Weisshaus's interests are adequately represented by AAA's lawsuit, which advances any cognizable legal claims that may arise from the toll increases. Therefore, any separate litigation by Weisshaus would be duplicative and unnecessarily burdensome upon the judicial system.

POINT III

THE COMPLAINT FAILS TO ASSERT A ROBINSON-PATMAN ACT CLAIM

Weisshaus's claim based upon the difference in tolls for E-ZPass and cash payers is completely absent from his Complaint and presented for the first time on appeal. As correctly observed by the District Court, his Complaint "does not allege any discrimination in pricing, and the statue has no apparent applicability to the facts presented in Plaintiff's Complaint." (District Court Oct 24, p. 4). The Complaint asserts that "jurisdiction is proper pursuant to the Robinson-Patman Act 15 U.S.C. § 13(f) prohibiting unjust enrichment through knowingly inducing or receiving discriminatory price[s]." (A13). Nothing in the Complaint suggests what this has to do with the toll increases. A liberal reading of the Complaint cannot construe a price discrimination claim under the Robinson-Patman Act,

which is meant to prevent discriminatory constraints on trade that lessen competition in the sale of commodities. *See* 15 U.S.C. § 13(a)(1997); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 169-70 (2006) ("The Act centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product."); *Great Atl. & Pac. Tea Co., Inc. v. F.T.C.*, 440 U.S. 69, 75-76 (1979) ("The Robinson-Patman Act was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers."). Nothing about the toll increases can reasonably be perceived to involve such conduct. In short, the Robinson-Patman Act is an antitrust law that applies to discrimination in the price of goods of "like grade and quality" that lessens competition in the market, not government services such as toll crossings. Clearly, Weisshaus's Compliant did not plead a claim under the Robinson-Patman Act and, regardless, the statute is inapplicable.

At any rate, the reason for different toll prices for E-ZPass and cash payers is abundantly clear and justified, as stated in the Port Authority's August 5, 2011 press release: the toll structure "focuses the greatest increase on cash users and trucks that cause the most traffic congestion and wear and tear," as well as the personnel costs of staffing toll collectors. (A90). Additionally, the Port Authority's E-ZPass discount program has been upheld by the Southern District.

Saunders v. Port Auth. of New York, 02 CIV. 9768RLC, 2004 WL 1077964 (S.D.N.Y. May 13, 2004) (finding that the program is a valid user fee and is not discriminatory on its face or in its effect). In short, nothing argued in Point III of Weisshaus's appellate brief could be liberally construed from his Complaint and the point is meritless anyway. Therefore, the District Court properly dismissed the Complaint for failure to state a claim under the Robinson-Patman Act.

CONCLUSION

For all of the foregoing reasons, the opinion and order of the District Court dismissing the Complaint should be affirmed.

Dated: New York, New York
June 27, 2012

Yours etc.

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Date: June 27, 2012

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