

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 21-0610

MARK DEMING,

Plaintiff and Appellant,

v.

JASON DEMING and KELLY DEMING,

Defendants and Appellees.

ANSWER BRIEF

On Appeal from the Montana Seventh Judicial District Court, Richland
County, The Honorable Katherine M. Bidegaray, Presiding District
Court Cause No. DV 21-51

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I. STATEMENT OF THE ISSUE PRESENTED IN THIS CASE

Did the District Court err in granting the Defendants'/Appellees' Motion to Dismiss?

II. STATEMENT OF THE CASE

In 2014, Appellant Mark Deming ("Mark") was convicted of sexually assaulting his then three-year-old granddaughter BD, daughter of Appellees Jason and Kelly Deming ("Jason" and "Kelly" individually) in Richland County Case No. DC-14-103, *State v. Mark Hiram Deming*.

In 2016, Jason and Kelly brought a civil suit against Mark on behalf of BD, which resulted in a mediated settlement agreement in Richland County Case No. DV-16-101, *B.D. by and through Deming v. Deming*. Mark appealed the District Court's Order in that case which resulted in the Court's ruling in *B.D. by and through Deming v. Deming*, 2020 MT 205N, 401 Mont. 556, 468 P.3d 815.

In addition to Case No. DV-16-101, Mark filed a civil suit in Richland County Case No. DV 2019-54, *Mark Deming v. Luke Savage and Associates, et al.*, against Jason and Kelly, making similar allegations as the present case. The District Court granted Jason and

Kelly's Motion to Dismiss in that case after Kelly and Mark filed their Motion to Dismiss in the present case. Mark again brought suit, this time in a federal civil cause in U.S. District Court for the District of Montana, Billings Division, in *Deming v. Deming*, CV 20-157-BLG-SPW, 2021 WL 1663798, (D. Mont. Apr. 28, 2021), containing similar allegations to the present case against Jason and Kelly. The case was dismissed for failure to state a claim on which relief may be granted. The present case is the third brought by Mark against Jason and Kelly.

In the present case, Mark's Complaint makes a rather disjointed series of allegations, some of which do not pertain to Jason or Kelly. Mark's allegations in the Complaint seem to fall under three categories, that Kelly and Jason committed theft of property; breached the settlement agreement causing fraud on the court; and violated of his constitutional rights under the U.S. and Montana Constitutions. Mark now appeals the District Court's Order to Granting Kelly and Jason Deming Motion to Dismiss his Complaint.

III. STATEMENT OF THE FACTS

In 2016, Jason and Kelly brought a civil suit on behalf of their daughter, BD, against Mark which resulted in a mediated settlement

agreement in Richland County Case No. DV-16-101, *B.D. by and through Deming v. Deming*. (Dkt. Doc. 5 Memorandum in Support of Defendants' Kelly and Jason Deming Motion to Dismiss). Mark appealed the District Court's Order in that case which resulted in the Court's ruling in *B.D. by and through Deming v. Deming*, 2020 MT 205N, 401 Mont. 556, 468 P.3d 815. The Court affirmed the District Court's Order to enforce the settlement agreement between the parties. *Id.* at ¶ 12.

In 2019, Mark filed a civil suit against Jason and Kelly, among others, in Richland County Case No. DV 2019-54, *Mark Deming v. Luke Savage and Associates, et al.*, making similar allegations as the present case. After Kelly and Mark filed their Motion to Dismiss in the present case, the District Court granted Jason and Kelly's Motion to Dismiss in DV 2019-54 on December 30, 2021. (Appendix A, ROA Listing Case No. DV-42-2019-0000054, Dkt. No. 31).

In 2020, Mark brought a federal civil cause in U.S. District Court for the District of Montana, Billings Division, in *Deming v. Deming*, CV 20-157-BLG-SPW, 2021 WL 1663798, (D. Mont. Apr. 28, 2021), containing similar allegations to the present case against Jason and

Kelly. (Dkt. Doc. 5 Memorandum in Support of Defendants’ Kelly and Jason Deming Motion to Dismiss). The case was dismissed for failure to state a claim on which relief may be granted. *Deming v. Deming*, CV 20-157-BLG-SPW, 2021 WL 1663798, at *5 (D. Mont. Apr. 28, 2021).

On June 17, 2021, Mark filed the Complaint in this matter. (Dkt. Doc. No. 1 Complaint). The Plaintiff alleged in his Complaint that the Defendants committed theft of personal property in excess of \$250,000; breached the settlement agreement, causing fraud on the court; and violated his constitutional rights guaranteed by the U.S. and Montana Constitutions. *Id.*

On page 3 of the Complaint, Mark outlines his purported legal claims and violations: violation of M.C.A. Section 45-6-301; violation of the U.S. Constitution, Amendments V and XIV; and violation of Montana Constitution, Article II, Sections 4 and 17. *Id.* Mark’s prayer for relief seeks the return of property, “compentory damages” (presumably “compensatory”) of \$650,000.00 and “primitive damages” (presumably “punitive”) of \$1,200,000.00. *Id.*

On August 5, 2021, Jason and Kelly filed their Motion to Dismiss and Memorandum in Support. (Dkt. Doc. Nos. 4 and 5, respectively).

Mark never filed a response to Jason and Kelly’s Motion to Dismiss. (Dkt.) On November 3, 2021, the District Court entered an Order Granting Jason and Kelly’s Motion to Dismiss. (Dkt. Doc. No. 8 Order Granting Defendants’ Kelly and Jason Deming Motion to Dismiss).

IV. STANDARD OF REVIEW

“We review *de novo* a district court's ruling on a motion to dismiss under Rule 12(b)(6).” *Barthel v. Barretts Minerals Inc.*, 2021 MT 232, ¶9, 405 Mont. 345, 496 P.3d 541 (citation omitted). “The determination that a complaint fails to state a claim upon which relief can be granted is a conclusion of law which this Court reviews for correctness.” *Stokes v. State ex rel. Mont. Dept. of Transp.*, 2005 MT 42, ¶ 6, 326 Mont. 138, 107 P.3d 494 (citation omitted).

V. SUMMARY OF THE ARGUMENT

Mark argues that the District Court erred in dismissing his pro se Complaint, which he alleges contained a legally sufficient complaint. In addition, Mark claims the District Court should have given Mark as a pro se litigant more leeway and more favorably construed his complaint. Finally, Mark asserts that his failure to file a response to Jason and Kelly’s Motion to Dismiss should not be grounds to dismiss his lawsuit.

However, The District Court correctly granted Jason and Kelly's Motion to Dismiss and dismissed the Complaint for failure to state a claim upon which relief may be granted. Pro Se Litigants are allowed some latitude in representing themselves, they must still follow procedural rules and make a cognizable claim.

VI. ARGUMENT

A. Mark's Failure to Respond to Jason and Kelly's Motion to Dismiss is Sufficient to Grant Their Motion to Dismiss.

Pursuant to the Montana Uniform District Court Rules, after the moving party files and serves a motion and brief upon the opposing party, "within fourteen days after service of the movant's brief, the opposing party shall file an answer brief which also may be accompanied by appropriate supporting documents." MT UDCTR Rule 2(b). The Montana Uniform District Court Rules also provide rules for failure to file briefs.

(c) Failure to File Briefs. Failure to file briefs may subject the motion to summary ruling. The moving party's failure to file a brief shall be deemed an admission that the motion is without merit. Failure to file an answer brief by the opposing party within the time allowed shall be deemed an admission that the motion is well taken. Reply briefs by movant are optional, and failure to file will not subject a motion to summary ruling.

Id. at 2(c) (emphasis in the original).

“ ‘It is reasonable to expect all litigants, including those acting pro se, to adhere to the procedural rules.’ ” *Cox v. Magers*, 2018 MT 21, ¶15, 390 Mont. 224, 411 P.3d 1271 (quoting *First Bank (N.A.)-Billings v. Heidema*, 219 Mont. 373, 376 (1986)).

In this case, Mark and Kelly filed their Motion to Dismiss and Memorandum in Support on August 5, 2021. (Dkt. Docs. 4 and 5, respectively). In the proceeding months, Mark filed a Motion for Setting Trial Date on September 7, 2021, and a Motion for Setting Court Date on October 14, 2021. (Dkt. Docs. 6 and 7, respectively). The District Court granted Jason and Kelly’s Motion to Dismiss on November 3, 2021. (Dkt. Doc. 8, Order Granting Defendant’s Kelly and Jason Deming Motion to Dismiss). At no time in the three months between the filing of the Motion and Court’s granting of the Motion to Dismiss did Mark file a response.

Counsel for Mark argues that the permissive term “may” in MT UDCTR Rule 2(c) should not allow the District Court’s Order to Dismiss to stand. Mark did not file an answer brief, which according to MT UDCTR Rule 2(c), “shall be deemed an admission that the motion is

well taken.” The District Court accepted Jason and Kelly’s Motion to Dismiss and Memorandum in Support, reviewed the file, exercised its discretion, and dismissed Mark’s Complaint. *Id.* The phrase “Failure to file briefs may subject the motion to summary ruling” is not synonymous with “Failure to file briefs *cannot* subject the motion to summary ruling.” Mark’s complaint can be dismissed solely upon his failure to file an answer brief.

B. Although Pro Se Litigants Are Allowed Some Latitude in Representing Themselves, They Must Still Follow Procedural Rules and Make a Cognizable Claim.

“While we generally encourage trial courts to make accommodations for parties choosing to represent themselves, such ‘flexibility cannot give way to abuse.’ ” *Cox*, 2018 MT at ¶15 (quoting *First Bank (N.A.)-Billings v. Heidema*, 219 Mont. 373, 376, 711P.2d 1384 (1986)). “Any latitude given to self-represented litigants ‘cannot be so wide as to prejudice the other party.’ ” *Id.* (quoting *First Bank (N.A.)-Billings* at 376). “ ‘It is reasonable to expect all litigants, including those acting pro se, to adhere to the procedural rules.’ ” *Id.* (quoting *First Bank (N.A.)-Billings* at 376).

As discussed above, Mark's failure to file an answer brief is a failure to adhere to procedural rules per *Cox* and prejudices Mark and Kelly. It would have been absurd for the District Court to hold a hearing on the Motion to Dismiss without an answer brief filed, as there would be no valid or existing counter argument from Mark. It would likewise have been absurd for the District Court to deny the Motion to Dismiss without a legally sound and persuasive response from Mark.

If the Court allows such wide latitude as Mark suggests, the courts would be flooded with pro se litigants with long laundry lists of frivolous claims, hoping the courts will meticulously comb over them and hobble together a possible claim on their behalf. Add to that Mark's proposition that pro se litigants should be excused from following procedural rules for filing answers, and the courts would be full of non-cognizable claims of which they cannot dispose. Such a system would breed vexatious litigation, which can be said to apply to Mark himself, considering this is the third case he has filed against Jason and Kelly.

1. Mark's Pro Se Complaint Failed to State a Claim Upon Which Relief May Be Granted.

“Under Rule 12(b)(6), the court must take all well-pled factual assertions as true and view them in the light most favorable to the claimant, drawing all reasonable inferences in favor of the claim. A claim is subject to M. R. Civ. P. 12(b)(6) dismissal only if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim.” *Anderson v. ReconTrust Co.*, 2017 MT 313, ¶8, 390 Mont. 12, 407 P.3d 692. The “complaint must state something more than facts which, at most, would breed only a suspicion that the claimant may be entitled to relief.” *Id.*

“An asserted claim is subject to dismissal if, as pled, it is insufficient to state a cognizable claim entitling the claimant to relief. M.R.Civ.P. 12(b)(6).” *Id.* “[A] motion to dismiss under Rule 12(b)(6), M.R.Civ.P., allows the District Court to only examine whether ‘a claim has been adequately stated in the complaint.’ Furthermore, the District Court's examination **is limited to the content of the complaint.**” *Stokes v. State ex rel. Mont. Dept. of Transp.*, 2005 MT 42, ¶ 7, 326 Mont. 138, 107 P.3d 494 (quoting *Plouffe v. State*, 2003 MT 62, ¶ 13)

(emphasis added). “[T]he Court is not required to take as true any allegations in the complaint that are legal conclusions.” *Barthel v. Barretts Minerals Inc.*, 2021 MT 232, ¶9, 405 Mont. 345, 496 P.3d 541. “The liberal notice pleading requirements of M. R. Civ. P. 8(a) and 12(b)(6) do ‘not go so far to excuse omission of that which is material and necessary in order to entitle relief.’” *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692.

Mark alleged in his Complaint that the Mark and Kelly committed theft of personal property in excess of \$250,000; breached the settlement agreement, causing fraud on the court; and violated his constitutional rights guaranteed by the U.S. and Montana Constitutions. (Dkt. Doc. No. 1). Later, in his Prayer for Relief, the claim for compensatory damages jumps to \$650,000 (presumably the theft of personal property). *Id.* The listing of items in Exhibit 5 of Mark’s Complaint does not add up to either sum. *Id.*

Mark’s Complaint makes a disjointed series of allegations, some of which do not pertain to Jason or Kelly. Mark’s allegations in the Complaint seem to fall under three categories, theft of property; breach of the settlement agreement causing fraud on the court; and violation of

his constitutional rights under the U.S. and Montana Constitutions. (Dkt. Doc. No. 1). On page 3 of the Complaint, Mark outlines his purported legal claims and violations: violation of MCA Section 45-6-301; violation of the U.S. Constitution, Amendments V and XIV; and violation of Montana Constitution, Article II, Sections 4 and 17. *Id.* Mark's prayer for relief seeks the return of property, "compentory damages" (presumably "compensatory") of \$650,000.00 and "primitive damages" (presumably "punitive") of \$1,200,000.00. *Id.*

Pursuant to *Stokes*, supra, a court's examination of a complaint is limited to the complaint's contents and must adequately state the plaintiff's claims. Here, Mark's Complaint makes numerous rambling allegations and lists of items related to his theft allegation. His allegations are based on the settlement agreement litigated in Richland County Case No. DV-16-101 and *B.D. by and through Deming v. Deming*, 2020 MT 205N, 401 Mont. 556, 468 P.3d 815. The contents of that agreement are not included as part of Mark's Complaint, and thus there is no basis for the allegations within the contents of his Complaint.

Mark cites *Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, ¶ 26, 369 Mont. 444, 299 P.3d 338 to purport that his Complaint meets the criteria for a claim of conversion. However, the Plaintiff in *Feller* actually alleged conversion in her complaint, not theft under criminal statute M.C.A. 45-6-301. Mark has no authority to bring a criminal cause of action.

There is no recognizable cause of action where a private citizen can file a lawsuit or make a claim against a private citizen for violations of his state or federal constitutional rights.

Mark's allegations of theft and U.S. and Montana Constitutional violations are not claims for a civil lawsuit. While Mark was a pro se litigant at the time he filed the Complaint, the court cannot be required to stretch the pleading rules to the point where they have to reimagine and construe all of the arguments to meet civil guidelines. As discussed above, stretching and construing a pro se litigant's claims to fit the proper pleading criteria prejudices the defendant. Pursuant to *Anderson*, supra, liberal notice pleading standards do not excuse omission of what is material and necessary for relief.

Mark's breach of contract claim, purportedly of the Settlement Agreement, is directly tied to his criminal theft allegations. If Mark has issues with the execution of the court-ordered Settlement Agreement, the proper remedy would be to file a motion for contempt of court and corresponding order to show cause in Richland County Case No. DV-16-101.

VII. CONCLUSION AND RELIEF SOUGHT

Based on the foregoing law and argument, the Court should affirm the District Court's dismissal of Jason and Kelly Deming's Motion to Dismiss in the above-entitled matter.

Respectfully submitted this 13th day of July, 2022.

By: /s/ Kari Lyn Jensen
KARI LYN JENSEN
Attorney for Defendants and Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double spaced, except for footnotes and quoted and indented material; Microsoft Word, and is 2,691 words, excluding Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix A.

Dated this 13th day of July, 2022.

By: /s/ Kari Lyn Jensen
KARI LYN JENSEN
Attorney for Defendants and Appellees

CERTIFICATE OF SERVICE

I, Kari Lyn Jensen, hereby certify that I have served true and accurate copies of the foregoing Appellees' Response to the following on July 13, 2022:

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Electronically signed by Kari Lyn Jensen
Dated: 07-13-2022

CERTIFICATE OF SERVICE

I, Kari Lyn Jensen, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-13-2022:

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