United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5227 **September Term, 2017**

1:14-cv-01358-RC

Filed On: June 5, 2018

Lawrence U. Davidson, III,

Appellant

v.

United States Department of State, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Griffith, Srinivasan, and Wilkins, Circuit Judges

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing, and the motion to strike the appellee's brief and the response thereto, it is

ORDERED that the motion to strike be denied. See Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd., 647 F.2d 200, 201 (D.C. Cir. 1981) (per curiam) ("[M]otions to strike, as a general rule, are disfavored."). It is

FURTHER ORDERED AND ADJUDGED that the district court's orders filed July 7, 2015, September 2, 2016, and August 31, 2017 be affirmed. The district court properly dismissed appellant's claims seeking a writ of mandamus against the individual appellees in their official capacities, because appellant has not shown that he has a "clear right to relief," and that appellees had a "clear duty" to engage in commercial diplomacy with the government of Libya on his behalf. See In re Medicare Reimbursement Litig., 414 F.3d 7, 10 (D.C. Cir. 2005). And because appellant has not established that appellees were required to undertake such diplomacy, the district court also properly denied injunctive relief against appellees under Section 706(1) of the Administrative Procedure Act. See Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) ("[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.") (emphasis in

original). Further, appellant has not shown that the State Department's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A).

With respect to appellees in their individual capacities, appellant has not shown that the district court erred in dismissing the Bivens action for failure to state a claim. See Whitacre v. Davey, 890 F.2d 1168, 1172-73 & n.7 (D.C. Cir. 1989) (plaintiff must sufficiently allege constitutional violation in order to maintain Bivens action). To the extent appellant relies on 42 U.S.C. § 1983 to establish individual liability, Section 1983 applies only to officials acting under color of state law. See, e.g., Dist. of Columbia v. Carter, 409 U.S. 418, 424 (1973) ("[Section 1983] deals only with those deprivations of rights that are accomplished under the color of the law of 'any State or Territory.'").

Next, the district court properly granted summary judgment to the government as to appellant's claims under the Freedom of Information Act ("FOIA"). The district court correctly concluded that the State Department searches were "reasonably calculated to uncover all relevant documents." Morley v. CIA, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (internal quotation omitted). Further, appellant's arguments challenging the sufficiency of the Vaughn indexes and the adequacy of the supporting affidavits are without merit.

The district court also correctly denied appellant's motion to test the sufficiency of the answer, because appellant has not shown that appellees were required to answer the allegations in the complaint concerning the claims that were the subject of appellees' motion to dismiss. See Fed. R. Civ. P. 12(a)(4)(A).

Finally, appellant has forfeited any challenges to the remainder of the district court's decisions by failing to raise them on appeal. See United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 497 (D.C. Cir. 2004) ("Ordinarily, arguments that parties do not make on appeal are deemed to have been waived.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam