

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ROBERT-JOHN:FOTI, ET AL.,)
)
 Plaintiffs,)
)
 v.)
)
 OFFICER MCHUGH, ET AL.,)
)
 Defendants.)

COPY

NO. C 04-2567 PJH

San Francisco, California
Wednesday, November 10, 2004

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: ROBERT-JOHN:FOTI
(Foti) Plaintiff in pro per
General Delivery
Woodacre, California 94973

For Plaintiff: KENNETH AUGUSTINE
(Augustine) Plaintiff in pro per
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For Defendants: United States Department of Justice
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BY: TRACIE L. BROWN
Assistant United States Attorney

Reported By: Leo T. Mankiewicz, CSR 5297 RMR, CRR
Official Reporter

1 Wednesday, November 10, 2004

2 10:00 a.m.

3 **THE CLERK:** Simple action 04-2567, Foti versus
4 Officer McHugh. Your appearances, please.

5 **MS. BROWN:** Good morning, your Honor. Tracie Brown
6 for the defendants.

7 **THE COURT:** Good morning.

8 **MR. FOTI:** I am myself Robert-John:Foti.

9 **THE COURT:** Good morning.

10 **MR. AUGUSTINE:** Ken Augustine, appearing as myself.

11 **THE COURT:** Good morning.

12 **MR. AUGUSTINE:** Good morning.

13 **THE COURT:** And there are two other plaintiffs, or
14 just one?

15 **MR. FOTI:** There is one more, and he's not here.

16 **THE COURT:** He's not here, okay. You don't
17 expect --

18 **MR. FOTI:** We don't know why. The weather -- he's
19 pretty intimidated about the process that's going on
20 downstairs. He's been handcuffed, I've been manhandled. He
21 could have been here earlier, and not got access.

22 **THE COURT:** All right. That's all right, I've got
23 the papers. That's all I need. Have a seat.

24 All right, Ms. Brown, this is your motion to dismiss
25 for failure to state a claim and for lack of jurisdiction,

1 subject matter jurisdiction.

2 MS. BROWN: Yes.

3 THE COURT: I have reviewed the papers. Did you
4 wish to be heard further?

5 MS. BROWN: I think everything is set forth in the
6 papers. There's one thing I would like to address, your Honor,
7 which is that -- I don't know if you're aware of this -- I was
8 just served with a First Amended Complaint yesterday. I don't
9 know when it was filed, because I didn't get a Filed stamp
10 copy. I understand from Mr. Foti that he mailed it Monday, I
11 believe --

12 MR. FOTI: Yes, ma'am.

13 MS. BROWN: -- so it was probably filed, I presume,
14 yesterday.

15 THE COURT: I saw it just a few minutes ago.

16 MS. BROWN: Okay, I just received it yesterday
17 afternoon. It's substantially more lengthy, but I think the
18 same issues are raised, and I'm not sure how your Honor would
19 want to proceed on the pending motion to dismiss. I do believe
20 that the same legal issues obtain with respect to --

21 THE COURT: Why don't we get clarification first and
22 then you can address those specific arguments.

23 Mr. Foti, if you could, I received a copy of this
24 Amended Complaint just before we commenced this morning. Can
25 you tell me how -- if the causes of action are the same, and

1 how is it different than your other one? I have not had an
2 opportunity to read it.

3 **MR. FOTI:** There are added causes of action. One
4 under Title 18, 1591, which makes it a crime to interfere with
5 a court order, and I believe that when a hearing is set, that
6 we are ordered to be here, and 1591 addresses any interference
7 with the duty or a right under court order of the Court of the
8 United States. There are additional constitutional counts.

9 I would like to ask one question. We requested an
10 emergency hearing. Why was that not granted?

11 **THE COURT:** You requested an emergency hearing with
12 whom?

13 **MR. FOTI:** In the original Complaint, right on the
14 cover sheet.

15 **THE COURT:** An emergency hearing before this court?

16 **MR. FOTI:** Right, for injunctive relief.

17 **THE COURT:** Did you file.... You have to file a
18 formal motion for injunctive relief. Did you file a motion for
19 temporary restraining order or for preliminary injunction in
20 this case?

21 **MR. FOTI:** It's in the Complaint.

22 **THE COURT:** I didn't see such a motion.

23 **MR. FOTI:** No, there was no motion. It was just
24 contained in the Complaint. I was unaware that the Complaint
25 would not handle that issue.

1 **THE COURT:** No. No, I'm sorry, it did not put me on
2 notice that you were asking that we hear something before this
3 motion. Are you telling me that what you intended was that
4 your case be set -- your motion first, before the defendants'
5 motion, motion for a temporary restraining order?

6 **MR. FOTI:** Well, if you look on the cover sheet,
7 right next to our names, in bold type, of the original
8 Complaint, we requested an immediate emergency hearing, and
9 heard nothing back.

10 **THE COURT:** I don't know. I have no idea what
11 happened. Generally, we have separately filed motions. I
12 don't know how this was treated. We treated it simply as a
13 complaint. The Clerk's Office, when they get a motion for a
14 temporary restraining order, or something for some kind of
15 emergency injunctive relief, notifies us, sends us the
16 documents, and we handle it separately. Yours was treated
17 simply as a complaint. Since you have not filed any separate
18 papers, we would not call you in to court unless you put us on
19 notice that you wanted something other than just the relief
20 that you are seeking in your Complaint. I am sure that that's
21 how it was treated, is that you were seeking injunctive relief
22 in your Complaint.

23 If what you want, Mr. Foti, is to have a motion for
24 a specific kind of injunctive relief, you're going to have to
25 file a separate set of papers on that. Do you wish to be given

1 an opportunity to do that?

2 MR. FOTI: Well, in the opposition I did ask for --

3 THE COURT: Well, you can't do it --

4 MR. FOTI: -- declaratory relief.

5 THE COURT: You can't do it in an opposition.

6 MR. FOTI: Ma'am, I'm not a lawyer, please.

7 THE COURT: Okay.

8 MR. FOTI: I'm just trying to do the best I can.

9 THE COURT: I understand that.

10 MR. FOTI: Now, I believe that the scarce judicial
11 resources of the Court could be saved by issuing an order....
12 The whole case hinges on whether or not someone is required to
13 have a state-issued identification. If there's no requirement
14 for someone to have a state-issued identification to carry on
15 normal, everyday affairs like going to court, then there could
16 be no authority for the marshals downstairs to keep us out of
17 court because we do not have a state-issued identification; in
18 a nutshell.

19 THE COURT: That's how you frame the issue.
20 However, but the issue is also one of whether or not the United
21 States marshals or the Federal Protective Service have the
22 right to have regulations requiring that people entering the
23 federal building identify themselves in the way in which they
24 require, which is through a state-issued -- a
25 government-issued -- doesn't have to be the state, but it has

1 to be a government-issued identification card of some kind.

2 MR. FOTI: This issue has been litigated.

3 THE COURT: And are you saying that you want to
4 bring a motion on that regard? If you wish to bring a motion
5 for injunctive relief to get me to order the marshals to stop
6 doing that, then you have to file a separate motion. Today we
7 are here because you filed a Complaint; counsel for the
8 defendants has filed a motion to dismiss the Complaint for
9 failure to state a claim. So they are the moving party today.

10 A motion for injunctive relief means you're the
11 moving party, and you have to submit authority for whatever it
12 is that you're requesting that the Court do. That has not yet
13 been done. So I'm not here to rule on any requests that you
14 have. I'm here today to rule on the request of the government,
15 because they filed the motion.

16 MR. FOTI: To get off the track here, it appears to
17 me that they're trying to relitigate Bevins, they're trying to
18 relitigate Carey v. Nevada Gaming Commission, they're trying to
19 relitigate Hiibel.

20 Counsel has lied to you in their motion to dismiss,
21 leaving out key words, and the most egregious one is that the
22 fact that they say, off a court case, that there is no law that
23 requires or prohibits -- excuse me -- there's no law that
24 prohibits an officer from asking for or even demanding -- and
25 they end the quote there -- finish the sentence with

1 "identification," and put the period after "identification."
2 What they did was they left out the fact that the words they
3 omitted said that there's no law that prohibits them from
4 requiring a suspect's identification.

5 **THE COURT:** I've read your papers. You did include
6 that in there. But let's get back to what we're going to do
7 today. Today we have a motion by the defendants to dismiss
8 your initial Complaint. Yesterday you filed a First Amended
9 Complaint. I got a copy this morning; I have not read it. The
10 defendant needs clarification. You've indicated that you've
11 added causes of action, therefore, her motion wouldn't cover it
12 all.

13 So it's not necessary for us to go forward with the
14 motion on the initial Complaint, because you have, as a matter
15 of right, you have the right to file a first amended complaint
16 before the government has answered. So you've done that. So
17 this is the last complaint, however, that you can file
18 preventing the government from moving to dismiss.

19 I'm going to give them an opportunity to file any
20 kind of supplement to their -- to the motion that they've
21 already gotten on file, that would address any of the
22 additional causes of action that you've raised in your
23 Complaint. You will be given an opportunity to file an
24 opposition to that, and then I'll make a decision on it.

25 If you also wish to move for some kind of injunctive

1 relief now, that is, preliminary injunctive relief -- that's
2 generally a temporary restraining order or a motion for
3 preliminary injunction -- you can file a motion for either one
4 of those.

5 MR. FOTI: We can't do that orally right now, while
6 we're here?

7 THE COURT: No, no, you can't do that orally.

8 MR. FOTI: Because we can't even get in the
9 courthouse to file papers. We either have to do it by the
10 mail --

11 THE COURT: I'm sorry, there's nothing I can do
12 about that, Mr. Foti. There's nothing I can do about that. If
13 you wish to file a motion, it has to be done in writing. It's
14 simply not done orally, and you have to submit the authority.
15 You are trying to obtain an order requiring that I order the
16 marshals not to require identification. You need to provide
17 authority, in the law, for that proposition.

18 MR. FOTI: What authority? Here in America? What
19 authority is there to identify ourselves? Hiibel's gone
20 through that, Carey v. Nevada Gaming Commission.

21 THE COURT: Mr. Foti, then you just need to write it
22 in a paper. I'm not going to --

23 MR. FOTI: It is in the Complaint.

24 THE COURT: Okay. If you want to simply rely on the
25 Complaint and not file any additional papers, you may do so. I

1 will give the defense an opportunity to oppose any request for
2 preliminary injunctive relief that is found in the Complaint,
3 and then I'll make a decision on it.

4 **MR. FOTI:** In the meantime, we are kept out of the
5 courts to prosecute other cases. Ma'am, this thing is
6 escalating, and it's an important issue. I was kept out of
7 three hearings, where I --

8 **THE COURT:** And I'll decide it.

9 **MR. FOTI:** -- where I had to go downstairs --

10 **THE COURT:** Mr. Foti, I'll decide the issue as soon
11 as you put it before me in a way in which I can understand.
12 You have to put it in writing before me. As soon as you do
13 that, I'll decide the issue.

14 Now, if you don't want to file another motion, we'll
15 simply look at your Complaint; to the extent you're asking for
16 preliminary injunctive relief, I'll make a decision, on the
17 basis of what you've got in your Complaint, if that's what you
18 want to stand on.

19 **MR. FOTI:** Well, I think the First Amended Complaint
20 pretty much covers --

21 **THE COURT:** The one that you filed yesterday.

22 **MR. FOTI:** That we mailed on Monday, yes, ma'am.

23 **THE COURT:** All right, then, we'll look at that.

24 Then this is the schedule:

25 Ms. Brown, if you wish to file an opposition to any

1 request for a preliminary injunctive relief that's contained in
2 the November 9th filing, it shall be your -- your opposition
3 shall be filed within two weeks of today.

4 MS. BROWN: Okay.

5 THE COURT: All right, Mr. Foti, if you wish to
6 reply to her opposition, you have one week to do that; and a
7 decision will be made based upon the papers. There will be no
8 hearing.

9 With regard to the motion for -- the motion to
10 dismiss that's currently pending, the defendant may have two
11 weeks to supplement their motion, if you wish, based upon the
12 November 9th filing.

13 Mr. Foti, you may have two weeks thereafter to
14 submit an opposition to their supplemental motion that would
15 supplement the opposition you already filed; one week
16 thereafter for a reply, and it will be decided on the papers,
17 with no hearing.

18 Okay? All right, we'll issue a short order, we'll
19 plug in the exact dates, just so that you'll have the date for
20 the filings.

21 MS. BROWN: And with respect to the case management
22 conference that was also set --

23 THE COURT: The case management conference is
24 vacated. We will reschedule it as soon as we have resolved
25 Mr. Foti's motion and the defendant's motion, okay? All right.

THE COURT: We're adjourned.

LEO T. MANKIEWICZ, CSR, RMR, CRR
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CERTIFICATE OF REPORTER

I, LEO T. MANKIEWICZ, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. C 04-2567 PJH, Foti, et al. v. Officer McHugh, et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

A handwritten signature in cursive script, appearing to read "Leo T. Mankiewicz", is written over a horizontal line.

Leo T. Mankiewicz, CSR 5297, RMR, CRR

Tuesday, September 26, 2006