

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 24, 2008

Elisabeth A. Shumaker
Clerk of Court

LAWRENCE L. KELLY,

Plaintiff-Appellant,

v.

TOPEKA HOUSING AUTHORITY,

Defendant-Appellee.

No. 07-3348
(D.C. No. 5:04-CV-04069-JAR-JPO)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MURPHY**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and
TYMKOVICH, Circuit Judge.

Lawrence L. Kelly appeals from the district court's denial of his motion to reopen. We have jurisdiction under 28 U.S.C. § 1291, and we dismiss this appeal as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i).

The Topeka Housing Authority (THA) terminated Mr. Kelly's federal low-income housing assistance because of a charge that his son was involved in

* After examining appellant's brief and the appellate record, this panel has determined unanimously to grant appellant's request for a decision without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

criminal drug activity at Mr. Kelly's residence. Mr. Kelly then filed a one-page complaint in the district court challenging the THA's decision on a number of grounds. The district court granted THA's motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. After a panel of this court affirmed, Mr. Kelly filed a motion to reopen the case, which the district court denied. Another panel of this court affirmed that decision on the basis of res judicata because, in his motion to reopen, Mr. Kelly had simply reiterated his underlying claims.

After his unsuccessful second appeal, Mr. Kelly filed yet another motion in the district court to reopen the case, arguing that the district judge had closed the case for no apparent reason and that he wanted a different judge to hear his claims. He also implied that the district judge, and the three judges of this court who affirmed the denial of his first motion to reopen, improperly restricted his ability to pursue his case. The district court denied the motion, stating that the case was closed and that Mr. Kelly "ha[d] articulated no basis for reopening the case, other than refusing to accept the judgment of this Court and the Tenth Circuit Court of Appeals." R., Doc. 50. Mr. Kelly has appealed from that order.

We treat Mr. Kelly's motion to reopen as based on Fed. R. Civ. P. 60(b) and review its denial for abuse of discretion. *See Sorbo v. United Parcel Serv.*, 432 F.3d 1169, 1177 (10th Cir. 2005). Because Mr. Kelly has proceeded pro se in

this court and the district court, we view his filings liberally, but we do not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

On appeal, Mr. Kelly again argues the merits of his claims, and also asserts that “[t]his 1st Amendment Charge of the U.S. Constitution ‘Due Process of The Law’ is against the four Judges that handled this case,” Aplt. Br. at 3, whom he apparently accuses of conspiring to show favoritism to the THA, failing to apply the proper law, and failing to consider evidence. But as the district court correctly stated, Mr. Kelly provided no arguable basis in his motion for reopening this case. He simply refuses to accept the judgment of the district court, affirmed by this court, that his complaint failed to state a claim for relief under Rule 12(b)(6). And his accusations of judicial misconduct are wholly speculative. Accordingly, we deem this appeal frivolous, deny Mr. Kelly’s application to proceed on appeal without prepayment of fees and/or costs, and DISMISS the appeal. *See* 28 U.S.C. § 1915(e)(2)(B)(i). We caution Mr. Kelly that further frivolous appellate filings in this matter may subject him to filing restrictions or other sanctions.

Entered for the Court

Michael R. Murphy
Circuit Judge