

UNITED STATES COURT OF APPEALS

August 16, 2019

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

CYNTHIA ORTIZ,

Plaintiff - Appellant,

v.

CHARLES PERRY; MATTHEW
POWELL; JACQUELYN PERRY,

Defendants - Appellees.

No. 19-5034
(D.C. No. 4:19-CV-00159-CVE-FHM)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **LUCERO, PHILLIPS, and EID**, Circuit Judges.

Cynthia Ortiz, proceeding pro se,¹ appeals the district court's dismissal of her complaint, pursuant to 28 U.S.C. § 1915(e)(2)(B). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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.

¹ Because Ortiz is a pro se litigant, we must construe her pleadings liberally. *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009). In doing so, however, this court neither “assume[s] the role of advocate for the pro se litigant” nor “relieve[s] the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

I.

Ortiz filed a civil complaint in the United States District Court for the Northern District of Oklahoma on March 22, 2019. The complaint named as defendants Charles Perry, Matthew Powell, and Jacquelyn Perry. In the complaint, Ortiz alleged several causes of action against the defendants, including breach of contract, intentional infliction of emotional distress, tortious interference, invasion of privacy, slander and defamation, conversion, and negligence. These causes of action all relate to Charles Perry's alleged harassment of Ortiz, beginning in about 2014. ROA at 8.

As the district court notes, however, this complaint is only the latest in a series of complaints Ortiz has filed against Charles Perry, and others, relating to the alleged harassment. In 2017, Ortiz filed suit against Charles Perry, Matthew Powell, and two other defendants, alleging wrongful arrest. *Cynthia Ortiz v. Charles Perry*, 17-CV-489-JHP-JFJ (N.D. Okla.). On motion by the defendants, the 2017 case was transferred to the Northern District of Texas, where the district court screened and dismissed the case pursuant to 28 U.S.C. § 1915(e). *Cynthia Ortiz v. Charles Perry*, 18-CV-137-C, Dkt. #180, at 2 (N.D. Tex. Dec. 7, 2018) (concluding plaintiff's claims were "frivolous, without merit, fanciful, conclusory and speculative").

In 2018, Ortiz filed suit in Oklahoma state court against Charles Perry, Matthew Powell, and others, alleging false arrest, tortious interference, malicious prosecution, assault and battery, intentional infliction of emotional distress, negligence, and slander. After the case was removed to federal court, the district court observed that "the facts

underlying [the 2018 suit] are part of the same transaction as [the 2017 suit].” *Cynthia Ortiz v. Charles Perry*, 18-CV-532-GKF-JFJ, Dkt. #52, at 15 (N.D. Okla. Feb. 1, 2019). Accordingly, the district court found the “judgment in [the 2017 suit to be] preclusive,” and it dismissed the case under Fed. R. Civ. P. 12(b)(6). *Id.* at 15. Because the federal district court declined to exercise jurisdiction over the remaining state law claims Ortiz originally filed as part of the 2018 suit, those claims remain pending in Oklahoma state court.

In the present lawsuit, Ortiz sought to proceed in forma pauperis, and the district court performed its screening of Ortiz’s complaint pursuant to 28 U.S.C. § 1915(e). The district court concluded that “in most aspects this case is simply an attempt to relitigate claims that were dismissed in the Northern District of Texas or that still remain pending in Tulsa County District Court.” *Dist. Ct. Op.* at 5. The district court then dismissed those claims “that are duplicative of claims that were previously dismissed with prejudice or that are pending in plaintiff’s current state court lawsuit,” finding those claims “frivolous or malicious” under § 1915(e)(2)(B)(i). *Id.* at 5–6. The district court separately analyzed Ortiz’s claims against defendant Jacquelyn Perry and dismissed them for failure to state a claim under § 1915(e)(2)(B)(ii). *Id.* (“Plaintiff has cited no authority that a wife has a duty to restrain her husband from harassing third parties . . . [and] has no basis under Oklahoma law.”). Ortiz timely appealed.

II.

When a litigant seeks to file suit “without prepayment of fees,” her suit is governed by the requirements of 28 U.S.C. § 1915. Section 1915(e)(2) requires the court

to “dismiss the case at any time if the court determines that the action . . . is frivolous or malicious [or] fails to state a claim on which relief may be granted.”² *Lister v. Dep’t of Treasury*, 408 F.3d 1309, 1312 (10th Cir. 2005) (quoting 28 U.S.C. § 1915(e)(2)). We review the district court’s dismissal of a complaint’s claims as frivolous for abuse of discretion. *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006). But we review de novo a district court’s dismissal of a pro se complaint for failure to state a claim. *Perkins v. Kan. Dep’t of Corr.*, 165 F.3d 803, 806 (10th Cir. 1999).

III.

Here, the district court did not abuse its discretion in dismissing those claims related to defendants Charles Perry and Matthew Powell as frivolous. “[R]epetitious litigation of virtually identical causes of action may be dismissed under [28 U.S.C.] § 1915 as frivolous or malicious.” *McWilliams v. Colorado*, 121 F.3d 573, 574 (10th Cir. 1997) (quotation marks omitted) (first alteration in original) (affirming district court’s dismissal of suit where “duplicative of earlier action”).

We agree with the district court that “in most aspects this case is simply an attempt to relitigate claims that were dismissed in the Northern District of Texas or that still remain pending in Tulsa County District Court.” Dist. Ct. Op. at 5. Below, the district court correctly observed that the 2017 complaint “contains all of the allegations of the complaint in this case.” *Id.* at 3. Though two incidents discussed in the newest

² Although 28 U.S.C. § 1915(e)(2)(B) refers to “prisoners,” this court has repeatedly concluded that § 1915(e)(2)(B) “applies to all in forma pauperis proceedings.” *Getachew v. Google, Inc.*, 491 F. App’x 923, 925 n.3 (10th Cir. 2012).

complaint—those relating to people named “Pinto” and “Mickey James”—allegedly occurred after Ortiz filed her 2017 complaint, Ortiz included those allegations in her 2018 complaint originally filed in state court. *See Cynthia Ortiz v. Charles Perry*, 18-CV-532-GKF-JFJ, Dkt. #52, at 3, 5, 15 (N.D. Okla. Feb. 1, 2019). And as discussed above, the 2018 complaint was dismissed on claim preclusion grounds. *See id.* As such, the district court below correctly concluded that the claims against Charles Perry and Matthew Powell in Ortiz’s most recent complaint qualified as “repetitious.” We therefore affirm the district court’s dismissal of those claims.

IV.

The district court did not err in dismissing Ortiz’s claims against defendant Jacquelyn Perry for failure to state a claim under § 1915(e)(2)(B)(ii). Dismissal for failure to state a claim “is appropriate only where it is patently obvious that the plaintiff could not prevail on the facts alleged,” and that an opportunity for amendment would be futile. *Whitney v. New Mexico*, 113 F.3d 1170, 1173 (10th Cir. 1997) (citations and quotations omitted).

Below, the district court separately analyzed Ortiz’s claims against Jacquelyn Perry, Charles Perry’s wife, noting that Ortiz’s inclusion of Mrs. Perry as a defendant amounted to the “one substantial difference between this case and plaintiff’s prior lawsuits arising out of the same facts.” Dist. Ct. Op. at 6. Ortiz alleges negligent infliction of emotional distress against Mrs. Perry, arguing that Mrs. Perry “failed to apply proper duty of care in clearly not spending enough time with her husband to keep him busy and away from [Ortiz].” ROA at 72.

We agree with the district court that the portion of Ortiz’s complaint directed at Mrs. Perry fails to state a claim upon which relief can be granted. First, the district court correctly noted that Oklahoma “does not recognize negligent infliction of emotional distress as an independent tort.” Dist. Ct. Op. at 6 (citing *Ridings v. Maze*, 414 P.3d 835, 837 (Okla. 2018)). Ortiz could recover emotional distress damages as part of a traditional negligence claim, but to do so, Ortiz would have to show that Mrs. Perry owed a duty to protect Ortiz from injury, Mrs. Perry failed to perform that duty, and an injury resulted. *Ridings*, 414 P.3d at 837. Ortiz, though, has failed to point to any authority for the proposition that “a wife has a duty to restrain her husband from harassing third parties or that a wife can be held liable for her husband’s intentional misconduct to third parties.” Dist. Ct. Op. at 6. Accordingly, we affirm the district court’s dismissal of Ortiz’s claims against Mrs. Perry for failure to state a claim.

V.

For the reasons set forth above, we AFFIRM the judgment of the district court. We also DENY Ortiz’s motion to proceed in forma pauperis, as she has failed to show the “existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal.” *DeBardleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991).

Entered for the Court

Allison H. Eid
Circuit Judge