

JUN 15 2020



**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
DELTA DIVISION**

JAMES W. McCORMACK, CLERK
By: _____

PLAINTIFF DEP CLERK

EDRIN ALLEN

VS.

NO. 2:20-cv-132-BJM

**GIBBS FERGUSON in his official capacity as
City Attorney for McGehee; LARRY ALLEN
in his official capacity as Sheriff for Desha County;
SARAH FARRAR-PHILLIPS in her official
capacity as Chief Clerk of the 27th State District Court
(McGehee Department); and HENRY PENNY**

DEFENDANTS

**This case assigned to District Judge Miller
and to Magistrate Judge Harris**

COMPLAINT

Plaintiff Edrin Allen, through undersigned counsel, hereby brings this Complaint against Defendants Gibbs Ferguson, in his official capacity as City Attorney for McGehee, Arkansas (“City Attorney”), Larry Allen, in his official capacity as Sheriff for Desha County, Arkansas (“Sheriff”), Sarah Farrar-Phillips, in her official capacity as Chief Clerk for the McGehee Department of the 27th State District Court (“District Clerk”), and Henry Penny (“Landlord”), and states as follows:

INTRODUCTION

1. Plaintiff brings this lawsuit under 42 U.S.C. § 1983 to challenge the constitutionality of criminally prosecuting individuals for failing to vacate rental property under Arkansas Code Annotated § 18-16-101.

2. Arkansas Code Annotated § 18-16-101 impermissibly chills a defendant’s right to a trial, constitutes cruel and unusual punishment under both state and federal constitutions, and denies due process under state and federal constitutions by allowing a landlord to convert an otherwise civil landlord-tenant dispute into a criminal prosecution.

3. As a result of these violations, Plaintiff requests a temporary restraining order, preliminary injunction, and permanent injunction to enjoin Defendants from filing and pursuing charges against Plaintiff pursuant to ARK. CODE ANN. § 18-16-101, and a declaration that ARK. CODE ANN. § 18-16-101 violates both the United States Constitution and Arkansas Constitution.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the claims against the City Attorney, Sheriff, District Clerk, and Landlord pursuant to 28 U.S.C. §§ 1331(a) and 1343(a)(3). Plaintiff raises additional claims under Arkansas law. This Court has jurisdiction over the Arkansas claims under 28 U.S.C. § 1367. This Court has authority to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 and Rules 57 and 65 of the Federal Rules of Civil Procedure.

5. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events upon which the Complaint is based took place in this district.

6. Plaintiff's ability to enforce rights secured under the United States Constitution is conferred by 42 U.S.C. § 1983.

PARTIES

7. Plaintiff Edrin Allen is a natural person who resides in McGehee, Arkansas.

8. Defendant Gibbs Ferguson is the City Attorney for McGehee, Arkansas. The City Attorney is a city official elected pursuant to ARK. CODE ANN. § 14-43-314. The City Attorney has authority to prosecute misdemeanor offenses that occur within the municipality of McGehee in the name of the State of Arkansas. ARK. CODE ANN. § 16-21-115. Gibbs Ferguson (or his successor in office) is named in his official capacity as City Attorney for the city of McGehee. Again, Gibbs Ferguson is referred to herein as "City Attorney."

9. Defendant Larry Allen is the Sheriff of Desha County, Arkansas. The Sheriff is an elected county official who serves as the chief enforcement officer of the courts, conservator of the peace, and has custody of the county jail within Desha County. Deputies from the Desha County Sheriff's Office came to the Plaintiff's home three times in the weeks leading up to this suit, including the time when a deputy served the Plaintiff with the Notice to Vacate. These deputies were acting in their official capacity as agents of Larry Allen and the Desha County Sheriff's Office. Larry Allen (or his successor in office) is named in his official capacity as Sheriff for Desha County, Arkansas. Again, Larry Allen is referred to herein as "Sheriff."

10. Defendant Sarah Farrar-Phillips is the Chief Clerk for the McGehee Department of the 27th State District Court which covers Desha and Chicot Counties. Sarah Farrar-Phillips (or her successor in office) is named in her official capacity as Chief Clerk for the McGehee Department of 27th State District Court. Again, Sarah Farrar-Phillips is referred to herein as "District Clerk."

11. Defendant Henry Penny is Plaintiff's landlord for his home at 113 Pecan Street in McGehee, Arkansas. Again, Henry Penny is referred to herein as "Landlord."

FACTUAL ALLEGATIONS

FACTS RELATING TO PLAINTIFF EDRIN ALLEN

12. Plaintiff lives in a single-family home at 113 Pecan Street in McGehee, Arkansas.
13. Plaintiff entered into a written month-to-month lease agreement with Landlord in or around July 2019.
14. The agreed upon monthly rent payment is \$400 due on the first of each month.
15. Plaintiff lost his job as a factory worker on or around April 28, 2020.
16. The COVID-19 pandemic has interfered with the Plaintiff's attempts to find other stable work.

17. Plaintiff struggled to apply for unemployment benefits because of long lines at the Arkansas Department of Workforce Services. His application for unemployment benefits was ultimately denied.

18. Plaintiff is willing and able to work.

19. Plaintiff has not been able to pay his rent since April 2020.

20. In or around mid-May 2020, a Deputy from the Desha County Sheriff's Department came to the Plaintiff's home and verbally ordered him to move by the first of June 2020 due to his unpaid rent to Landlord.

21. Plaintiff responded that he could not be evicted without a court order.

22. On June 3, 2020, a Deputy from the Desha County Sheriff's Department came to the Plaintiff's home and served him with the Notice to Vacate. A copy of the Notice to Vacate is attached hereto as Exhibit A.

23. The Notice to Vacate, Exhibit A, appears on letterhead from the McGehee Department of the 27th State District Court in Desha County, Arkansas.

24. The Notice to Vacate, Exhibit A, warns Plaintiff that a warrant will be issued if he has not left his home after ten days.

25. The Notice to Vacate, Exhibit A, is signed by Landlord and District Clerk.

26. Landlord has threatened Plaintiff with police action; specifically that the Desha County Sheriff's Department will "put [the Plaintiff] out" at the end of the ten days if Plaintiff has not vacated.

27. On Friday, June 12, 2020, a Deputy from the Desha County Sheriff's Department came to Plaintiff's home and verbally ordered him to vacate.

28. That Deputy warned Plaintiff that Landlord would “be out there on Sunday” if he had not vacated yet.

29. To date, Plaintiff has not been served with a civil eviction lawsuit.

30. The ten days provided in the Notice to Vacate expired on Saturday, June 13, 2020.

31. To the best of Plaintiff’s knowledge, the State of Arkansas has not issued an arrest warrant, as required by ARK. CODE ANN. § 18-16-101.

32. Plaintiff continues to live in his home and does not have the means to move at this time; therefore, and based on the threats of police action discussed *supra*, prosecution is likely imminent.

STATUTORY BACKGROUND REGARDING “CRIMINAL EVICTION”

33. Arkansas is the only state in the country that criminalizes the eviction process.

34. Under Arkansas Code Annotated § 18-16-101 (the “Criminal Eviction Statute”), the landlord of a tenant who is one day late on rent may order the tenant to vacate the premises within 10 days. If the tenant fails to do so, he is guilty of a separate misdemeanor offense for each day he failed to vacate the premises following the expiration of the 10-day notice and must pay a fine of up to \$25 per day or offense. ARK. CODE ANN. § 18-16-101(b)(1)-(2).

35. Under the Criminal Eviction Statute, charges may be filed against the tenant solely on the grounds of a landlord’s statement that (1) the tenant did not pay rent on time and (2) the tenant failed to vacate the premises within the 10-day notice period.

36. Arkansas’s criminalization of tenant evictions lags behind the standards of decency of every other state in the country.

37. Every other state in the nation treats evictions as purely civil matters.

38. A bi-partisan, non-legislative commission charged by the legislature in 2012 with examining the former version of the Criminal Eviction Statute recommended its full repeal. Ark. Gen. Assembly Non-Legis. Comm'n For The Study of Landlord-Tenant Laws Rept at 17 (2012), *reprinted in* 35 U. ARK. LITTLE ROCK L. REV. 739 (2013).

39. The United States Department of Housing and Urban Development ("HUD") forbids the use of the Criminal Eviction Statute in HUD-funded rental housing. Ark. Gen. Assembly Non-Legis. Comm'n For The Study of Landlord-Tenant Laws Rept at 16.

40. Public housing providers may only use eviction methods which HUD has determined meet the basic elements of due process. 24 C.F.R. § 966.51.

41. The civil unlawful detainer method at Arkansas Code Annotated § 18-60-307 is the only eviction method in Arkansas with a positive due process determination from HUD at this time. *See* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *HUD Due Process Determination for the State of Arkansas* (1991), <https://www.hud.gov/sites/documents/GCH-0028LOPS.PDF>.

42. Arkansas state courts are increasingly finding that the Criminal Eviction Statute is unconstitutional and, therefore, unenforceable.

43. These decisions dramatically reduced the number of prosecutions under the Criminal Eviction Statute across Arkansas, such that prosecutions are now brought only in a few outlier jurisdictions.

44. The Arkansas General Assembly partially rejected the Criminal Eviction Statute by amending it in 2017; yet the amendment did not do away with the criminalization of the civil eviction process. ARK. CODE ANN. § 18-16-101 (2017).

45. The Criminal Eviction statute previously required a tenant to deposit the amount of rent the landlord alleged to be due into a registry of the court in order to plead “not guilty” and made it a Class B misdemeanor if a tenant failed to pay the fee.

46. Act 159 of 2017 eliminated the registry requirement and the Class B misdemeanor for failing to pay the registry fee.

47. The current version of the Criminal Eviction Statute, which reflects the 2017 amendment, mandates that a tenant is guilty of a misdemeanor if they stay past the expiration of the notice to vacate.

48. The Criminal Eviction Statute also mandates that each day a tenant fails to vacate the property is a separate offense.

49. For each offense, the statute authorizes the judge to impose a fine between \$1 and \$25.

50. The statute does not cap or otherwise limit either the number of convictions or total fines a defendant may face.

51. The fines are paid to the State, leaving open the possibility of a landlord to pursue a separate civil action against the tenant on top of the criminal charges imposed by the Criminal Eviction Statute.

COUNT ONE

Violation of Due Process Clause of Fourteenth Amendment

52. Plaintiff realleges and incorporates by reference all the allegations contained in the paragraphs above.

53. The Criminal Eviction Statute does not contain any mechanism to limit liability due to random or arbitrary factors that may delay an adjudication, meaning each day of delay from such factors increases the number of convictions and fines imposed on a defendant lessee.

54. The Criminal Eviction Statute violates the Fourteenth Amendment's guarantee of due process because a defendant who remains on the property after the 10-day notice period expires has no notice of how many charges they will ultimately face, nor any means of contesting additional convictions that result from delays in the criminal adjudication.

55. The Desha County Sheriff's Office, acting under color of law, also applies the Criminal Eviction Statute through a policy, practice, and procedure in which Sheriff or his agents attempt to collect or enforce a civil debt before the parties have an opportunity to be heard before a court of law.

56. The District Clerk and Landlord, jointly acting under color of law, issue Notice to Vacate letters on District Clerk letterhead before a formal civil or criminal proceeding has been initiated in a court of law.

COUNT TWO

Violation of Procedural Due Process under the Arkansas Constitution

57. Plaintiff realleges and incorporates by reference all the allegations contained in the paragraphs above.

58. The Arkansas State Constitution prohibits the state from depriving any person of life, liberty, or property without due process of law. ARK. CONST. art. II, § 21.

59. The Criminal Eviction Statute violates the right to procedural due process under the Arkansas Constitution because a defendant who remains on the property after the 10-day notice

period expires has no notice of how many charges they will ultimately face, nor any means of contesting additional convictions that result from delays in the criminal adjudication.

60. The Desha County Sheriff's Office, acting under color of law, also applies the Criminal Eviction Statute through a policy, practice, and procedure in which Sheriff or his agents attempt to collect or enforce a civil debt before the parties have an opportunity to be heard before a court of law.

61. The District Clerk and Landlord, jointly acting under color of law, issue Notice to Vacate letters on District Clerk letterhead before a formal civil or criminal proceeding has been initiated in a court of law.

COUNT THREE

Violation of Constitutional Right to Trial

62. Plaintiff realleges and incorporates by reference all the allegations contained in the paragraphs above.

63. The Criminal Eviction Statute impermissibly chills Plaintiff's due process right to trial guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States of America.

64. The plain language of the Criminal Eviction Statute mandates a finding of guilty when a tenant stays past the expiration of the notice; thereby depriving Plaintiff of his right to a trial by jury to determine his guilt or innocence.

65. Even if the Criminal Eviction Statute can be interpreted to allow for a finding of "willful" holding over by the tenant, those who maintain their innocence and insist on a trial but are ultimately found guilty will face an arbitrary and unlimited number of convictions and fines based on the time elapsed between the Notice to Vacate and trial.

66. This unfairly penalizes those who exercise their right to trial.

COUNT FOUR

***Violation of the Prohibition of Cruel and Unusual Punishment
Under The United States Constitution***

67. Plaintiff realleges and incorporates by reference all the allegations contained in the paragraphs above.

68. The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment.

69. Defendants' use of the Criminal Eviction Statute constitutes a cruel and unusual punishment.

70. Arkansas is the only state in the United States that treats failure to pay rent, a civil debt between private individuals, as a crime.

71. It is cruel and unusual to criminalize eviction proceedings as well as shackle the accused with an arbitrary number of criminal charges and fines based on the time it takes to proceed to trial.

COUNT FIVE

***Violation of the Prohibition of Cruel and Unusual Punishment
Under the Arkansas Constitution***

72. Plaintiff realleges and incorporates by reference all the allegations contained in the paragraphs above.

73. Article 2, section 9 of the Arkansas Constitution prohibits cruel and unusual punishments.

74. Criminalizing eviction proceedings and shackling the accused with an arbitrary number of criminal charges and fines for maintaining their innocence also constitutes a cruel and unusual punishment under the Arkansas Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks this Court to:

A. Enter a declaratory judgment declaring that Arkansas Code Annotated § 18-16-101 violates the United States Constitution and Arkansas law, as alleged in each of the applicable, enumerated counts;

B. Issue a temporary restraining order, preliminary injunction, and a permanent injunction prohibiting Defendants Ferguson and Allen, in their official capacities, from enforcing § 18-16-101 against Plaintiff Allen and prohibiting Defendant Farrar-Phillips from issuing notices to vacate based on the Arkansas Criminal Evictions statute;

C. A jury trial on any claims where one is available under federal and/or Arkansas law;
and

D. Grant such other relief as the Court deems just and equitable.

Dated: June 15, 2020

Respectfully submitted,



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COPY

COPY



27th STATE DISTRICT COURT-DESHA COUNTY ARKANSAS
McGEEHEE DEPARTMENT

to Edria Allen
113 Pecan St
McGehee, AR 71654

FROM Henry Penny

DATE June 1, 2020

NOTICE TO VACATE

YOU ARE HEREBY NOTIFIED THAT YOU HAVE 10 DAYS TO VACATE THE PROPERTY OF

113 Pecan St- Mc Gehee, AR

IF AFTER 10 DAYS YOU HAVE NOT VACATED THE PROPERTY A WARRANT WILL BE ISSUED.

X Henry Penny
PO Box 1272 Owner

McGehee, AR 71654
Mailing Address

Sarah Farrar Phillips

Sarah Farrar-Phillips, Chief Clerk
Tiffany Patterson, Deputy Clerk

SERVED THIS _____ DAY OF _____, 20____

EXHIBIT A