[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12974
Non-Argument Calendar

D.C. Docket No. 1:20-cv-21225-MGC

MAURICE ANTWAN GILBERT,

Plaintiff-Appellant,

versus

FLORIDA DEPARTMENT OF STATE,
MIAMI-DADE,
FLORIDA DEPARTMENT OF HIGHWAY
SAFETY & MOTOR VEHICLES,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 2, 2021)

Before NEWSOM, BRASHER, and ANDERSON, Circuit Judges.

PER CURIAM:

Maurice Antwan Gilbert, proceeding *pro se*, appeals the district court's order dismissing his complaint against various Florida state agencies with prejudice. The district court dismissed Gilbert's complaint after concluding that it lacked jurisdiction over the action under the Eleventh Amendment. Upon consideration, we affirm in part and remand in part.

I.

We presume familiarity with the factual and procedural history of this case and describe it below only as necessary to address the issues raised in this appeal.

In his complaint, Gilbert asserted an array of claims under 42 U.S.C. § 1983 and requested more than three billion dollars in damages. Gilbert's claims arise out of a series of traffic violations that led to the suspension of his driver's license and his subsequent arrest. Although he sued two departments of state government, Gilbert referred to both entities as the "State of Florida" throughout his complaint. The district court dismissed his complaint with prejudice, concluding that the state was immune from suit under the Eleventh Amendment. Gilbert appealed.

On appeal, Gilbert argues that the Eleventh Amendment does not bar his claims. He argues that the state is a debtor "and/or" foreign principal under the Uniform Commercial Code and that, because the state's principal place of business is within the territorial United States, it is subject to the district court's jurisdiction. Additionally, he contends that the state defaulted twice because it failed to timely

answer his complaint. The state responds that it is immune from suit under the Eleventh Amendment because it has not waived its immunity and Congress has not abrogated its immunity. The state asserts that its motion to dismiss was timely but argues alternatively that a lack of subject matter jurisdiction due to sovereign immunity may be raised for the first time on appeal. Gilbert replied, reiterating the arguments in his opening brief.

On the same day that he filed his reply brief, Gilbert filed "Appellant's Request to the Clerk for Default Judgment," in which he asserts that he is entitled to default judgment under Federal Rule of Civil Procedure 55(b)(1), and the non-existent "Federal Rules of Appellate Procedure 77(c)(2)(c)." He argues that, because he submitted an unrebutted affidavit, he is entitled to default judgment and that the Clerk should immediately freeze over three billion dollars in unspecified bank accounts belonging to the state of Florida.

II.

We review a district court's decision to dismiss a case based on Eleventh Amendment immunity *de novo*. *Ass'n for Disabled Americans, Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 956 (11th Cir. 2005). We construe *pro se* pleadings liberally and hold them to less stringent standards than those drafted by lawyers. *Jones v. Fla. Parole Comm'n*, 787 F.3d 1105, 1107 (11th Cir. 2015). But we will not "serve as *de facto* counsel for a party" or "rewrite an otherwise deficient pleading in order to

sustain an action." *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1168–69 (11th Cir. 2014) (quotation marks omitted).

The Eleventh Amendment precludes federal courts from exercising jurisdiction over "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Unless a state consents to be sued or Congress abrogates a state's sovereign immunity, federal courts lack jurisdiction over suits naming a state or one of its agencies as the defendant. *Stevens v. Gay*, 864 F.2d 113, 114–15 (11th Cir. 1989) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). "Although, by its terms, the Eleventh Amendment does not bar suits against a state in federal court by its own citizens, the Supreme Court has extended its protections to apply in such cases." *Abusaid v. Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 405 F.3d 1298, 1303 (11th Cir. 2005) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). A non-consenting state that is sued in federal court may raise Eleventh Amendment immunity as a defense for the first time on appeal. *Doe v. Moore*, 410 F.3d 1337, 1349 (11th Cir. 2005) (citing *Patsy v. Bd. of Regents*, 457 U.S. 496, 515 n.19 (1982)).

As an initial matter, we need not address whether the state's motion to dismiss was timely or whether Gilbert properly served his complaint on the state. Even if the state's motion was untimely, Eleventh Amendment immunity is a jurisdictional issue

that may be raised at any time, including for the first time on appeal. *See Moore*, 410 F.3d at 1349. Here, Gilbert sued the Florida Department of State and the Department of Highway Safety and Motor Vehicles. He referred to both entities as the "State of Florida" throughout his complaint. The state did not consent to be sued, and Congress did not abrogate its immunity in this regard. The state was, therefore, immune from suit by Gilbert and the district court lacked jurisdiction over this case under the Eleventh Amendment. Accordingly, we affirm the district court's dismissal.

However, because sovereign immunity applies, the district court lacked subject matter jurisdiction over the case, and it had no power to render a judgment on the merits. *See Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1235 (11th Cir. 2008). Thus, the district court should have dismissed the complaint without prejudice. We remand in part with instructions that the district court reenter its dismissal order accordingly.

Finally, the Federal Rules of Appellate Procedure do not provide for default judgments on appeal. *Pearce v. Clark Cty.*, 845 F.2d 329 (9th Cir. 1988). Because no such mechanism exists, and because Gilbert relies on a non-existent rule of appellate procedure, we deny his motion for default judgment.

The district court is **AFFIRMED IN PART AND REMANDED IN PART**, and Gilbert's pending motion for default judgment is **DENIED.**