IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
October 25, 2017
Lyle W. Cayce
Clerk

No. 16-41654

PLAINSCAPITAL BANK,

Plaintiff - Appellee

v.

MICHAEL JAMES ROGERS,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:15-CV-249

Before KING, JONES, and ELROD, Circuit Judges.

PER CURIAM:*

Michael Rogers executed two notes totaling nearly two million dollars in face amount in favor of his brother's bank. That bank failed, and the Federal Deposit Insurance Company came to the rescue. The FDIC assigned the failed bank's assets, including the two notes, to PlainsCapital Bank, a state bank. PlainsCapital tried to collect on the two notes, but Rogers refused to pay. PlainsCapital sued Rogers in state court for breach of contract. But, during the course of that litigation, it discovered that the notes had been destroyed.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

PlainsCapital voluntarily withdrew its state court action and filed largely identical claims in federal court, asserting that it was a holder in due course under federal common law. Rogers moved to dismiss for lack of subject matter jurisdiction. The district court denied that motion and subsequently entered summary judgment in favor of PlainsCapital. We conclude that PlainsCapital's alleged federal holder in due course status does not give rise to federal-question jurisdiction over its state-law breach of contract claims. As a result, we REVERSE the district court's denial of Rogers's motion to dismiss, VACATE its grant of summary judgment, and REMAND with instructions to dismiss for lack of subject matter jurisdiction.

I.

Defendant–Appellant Michael Rogers's brother founded First National Bank ("FNB").[1] Rogers executed two promissory notes (the "Notes") in favor of FNB. In December 2002, he executed and delivered an unsecured note with a principal balance of $750,000. Then, in January 2003, he executed and delivered a secured note (which became unsecured in 2005) with a principal balance of $1.25 million. Rogers renewed the Notes annually. As of the most recent renewal in August 2013, Rogers had promised to pay a total of $1.95 million on the Notes. In January 2013, FNB decided to clear its vaults to save room for secured notes. It destroyed most (if not all) of its unsecured notes, including the two notes at issue here.

FNB failed in September 2013, and the Federal Deposit Insurance Company ("FDIC") took over as a receiver. The FDIC acquired FNB's assets

[1] This case involves a "facial," rather than "factual," attack on subject matter jurisdiction because Rogers's arguments rest entirely on the pleadings, rather than any additional evidence he has submitted to the court. *See Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015). Thus, we base our summary of the facts largely on the allegations of the complaint, which must be accepted as true for reasons we explain in greater detail below.

through a bulk transfer. It then assigned some of those assets, including the Notes, to Plaintiff–Appellee PlainsCapital Bank ("PlainsCapital") in another bulk transfer. PlainsCapital paid book value for the Notes (approximately $2.2 million). PlainsCapital claims that it did not know at the time that the Notes had been destroyed.

Rogers defaulted on the Notes, and PlainsCapital sued to collect, initially in Texas state court. PlainsCapital eventually moved for summary judgment in the state court proceedings. In response, Rogers argued that PlainsCapital could not be a holder in due course of the Notes under Texas law because they had been destroyed. After the state court denied its motion for summary judgment, PlainsCapital decided not to continue pursuing its case in state court and filed a motion to nonsuit. The court granted that motion, dismissing the case without prejudice.

PlainsCapital then filed a complaint in federal district court on June 4, 2015—one day before the state court granted its motion to nonsuit. Its complaint alleged breach of contract and requested attorneys' fees under Texas law. As relevant to this appeal, PlainsCapital alleged that the district court had subject matter jurisdiction "under 28 U.S.C. §1331 because this action arises under PlainsCapital's assigned rights from the FDIC (right to Federal Holder in Due Course status) that lie over state-law claims (Texas Holder in Due Course) that implicate significant federal issues." Rogers moved to dismiss the complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). He argued that diversity was lacking and that the case was a basic state-law breach of contract claim which did not raise a federal question. Concerning PlainsCapital's alleged status as a federal holder in due course, Rogers argued that the federal issue was not an element of breach of contract under state law. Rather, the federal holder in due course issue would arise only if Rogers showed that PlainsCapital was not a holder in due course

under state law and PlainsCapital sought to take advantage of what it perceived to be a more relaxed standard under federal law.

After the briefing on the motion to dismiss was complete but before the district court ruled on the motion, PlainsCapital moved for summary judgment. PlainsCapital argued that it was entitled to enforce the Notes under the federal holder in due course doctrine and under state law. With respect to the state-law grounds for recovery, PlainsCapital contended that it was entitled to enforce the Notes pursuant to Texas Business & Commerce Code § 3.309 because it acquired the Notes directly from the FDIC and because Rogers had admitted the authenticity of PlainsCapital's copies of the Notes.

The district court denied the motion to dismiss. *Plains Capital Bank v. Rogers*, No. 7:15-CV-249, 2016 WL 6902391, at *1 (S.D. Tex. Sept. 1, 2016). It began by noting that "courts have found federal-question jurisdiction over state-law claims where: (1) resolving a federal issue is necessary for the resolution of the state-law claim; (2) the federal issue is actually disputed; (3) the federal issue is substantial; and (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities." *Id.* at *2 (citing *Singh v. Duane Morris LLP*, 538 F.3d 334, 338 (5th Cir. 2008)). The court concluded that resolution of the federal issue was "necessary" because it found that "PlainsCapital is not entitled to enforce the Notes under Texas law." *Id.* at *3. Taking judicial notice of Rogers's state-court pleadings, the court found that Rogers actually disputed whether PlainsCapital qualified as a federal holder in due course. *Id.* at *4. The court then held that the dispute was substantial because of the strong interest in providing a federal forum for litigation concerning the federal common law of banking. *See id.* at *4–5. Finally, the court concluded that exercising jurisdiction would not upset the federal-state balance for three reasons: (1) the federal holder in due course doctrine was deeply rooted in federal common law; (2) Congress had broadly granted the

federal courts jurisdiction over actions to which the FDIC is a party; and (3) there would likely be very few cases similar to this one. *See id.* at *6.

Rogers initially tried to appeal that decision by seeking a writ of mandamus from this court, which we denied. Following that denial, Rogers did not file an answer or a response to PlainsCapital's motion for summary judgment. The district court entered summary judgment in PlainsCapital's favor. In doing so, the district court found that there was no dispute that PlainsCapital was the "owner and holder" of the Notes. It made no reference to the federal holder in due course doctrine.

Rogers timely appealed the district court's final judgment.

II.

We review de novo the denial of a motion to dismiss for lack of subject matter jurisdiction. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). In doing so, we apply the same standard as the district court. *Id.* "Where, as here, the movant mounts a 'facial attack' on jurisdiction based only on the allegations in the complaint, the court simply considers 'the sufficiency of the allegations in the complaint because they are presumed to be true.'" *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 533 (5th Cir. 2016) (quoting *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981)), *cert. denied*, 137 S. Ct. 1374 (2017). The party invoking the court's jurisdiction bears the burden of proving it. *Ramming*, 281 F.3d at 161.

III.

The district courts have federal-question jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Cases typically arise under federal law when federal law creates the plaintiff's cause of action. *See Gunn v. Minton*, 568 U.S. 251, 257 (2013). Although this accounts for the vast majority of federal-question cases, the Supreme Court has nonetheless identified a "slim category" of state-law claims

that give rise to federal-question jurisdiction. *See id.* at 257–58. "[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* at 258 (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)). Federal-question jurisdiction over state-law claims is by far the exception, not the rule. *See* Richard H. Fallon, Jr. et al., *Hart and Wechsler's the Federal Courts and the Federal System* 836 (7th ed. 2015) ("In cases lacking a federal cause of action, the Supreme Court has clearly upheld jurisdiction under § 1331 in only four instances . . . . Even in the lower courts, rather few decisions uphold jurisdiction in such cases." (footnote omitted)).

Regardless of which form the federal question takes, every complaint is subject to a basic gatekeeping principle: the well-pleaded complaint rule. *See Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 689–90 (2006). That rule counsels us to examine only "what necessarily appears in the plaintiff's statement of his own claim in the [complaint] . . . unaided by anything alleged in anticipation o[r] avoidance of defenses which it is thought the defendant may interpose." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 10 (1983) (quoting *Taylor v. Anderson*, 234 U.S. 74, 75–76 (1914)). "Thus, a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise . . . ." *Id.* Even an inevitable defense is insufficient to satisfy the well-pleaded complaint rule. *See Bernhard v. Whitney Nat. Bank*, 523 F.3d 546, 551 (5th Cir. 2008) (citing *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 772 (5th Cir. 2003)). In other words, "federal-question jurisdiction turns upon thrusts, not parries." *Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1027 (10th Cir. 2012).

A.

We start with the well-pleaded complaint rule.

PlainsCapital's complaint alleges two counts for breach of contract and a single count for attorneys' fees pursuant to Texas Civil Practice and Remedies Code § 38.001. In order to recover on a promissory note, a "plaintiff must prove: (1) the note in question; (2) the party sued signed the note; (3) the plaintiff is the owner or holder of the note[;] and (4) a certain balance is due and owing on the note." *Geiselman v. Cramer Fin. Grp.*, 965 S.W.2d 532, 536 (Tex. App.—Houston [14th Dist.] 1997, no writ) (citing *Bean v. Bluebonnet Savs. Bank FSB*, 884 S.W.2d 520, 522 (Tex. App.—Dallas 1994, no writ)). PlainsCapital alleged in its complaint that it was a federal holder in due course. On appeal, it argues that its complaint satisfies the well-pleaded complaint rule because it will need to prove that it is a federal holder in due course in order to establish the third element of its claim (i.e., it is the "owner or holder" of the Notes).

PlainsCapital conflates the terms "holder" and "holder in due course." A "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." Tex. Bus. & Com. Code § 1.201(b)(21)(A). By contrast, a party's status as a holder "in due course" merely "determines the applicable defenses which [a defendant] . . . may assert." *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 656 (Tex. 1990). The federal holder in due course doctrine likewise "bars the makers of promissory notes from asserting various 'personal' defenses against the FDIC." *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990). The doctrine extends holder in due course status to the FDIC regardless of "whether or not [it] satisf[ies] the technical requirements of state law." *Id.* at 1249. These protections extend to subsequent note holders. *See id.* at 1248.

What PlainsCapital must establish is that it is an "owner or holder."[2] PlainsCapital anticipates that it will have to do so by demonstrating that it is a federal holder in due course because it allegedly does not qualify as a holder or a holder in due course under state law. Just because PlainsCapital will have ultimately to take refuge in the mantle of the federal holder in due course doctrine does not suffice under the well-pleaded complaint rule. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) ("It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of [federal law] . . . ."). The mere "assert[ion] that federal law deprives the defendant of a defense he may raise" does not satisfy the well-pleaded complaint rule, *Franchise Tax Bd.*, 463 U.S. at 10, even if that will ultimately be "the only question truly at issue," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987).

The federal holder in due course doctrine does not establish the "owner or holder" element of PlainsCapital's breach of contract claims; rather, it deprives Rogers of certain state-law defenses he could otherwise raise. The assertion of federal holder in due course status was merely a response to anticipated defenses, not something PlainsCapital needed to allege to properly plead a breach of contract claim. The allegation of federal holder in due course status was the "parry," not the "thrust" of PlainsCapital's complaint. *Firstenberg*, 696 F.3d at 1027. It seems likely—perhaps inevitable—that the only point of contention between the parties during the later stages of the litigation would be PlainsCapital's status as a federal holder in due course. To determine federal-question jurisdiction, however, we look only to the well-

[2] As we explain in Section III.B of this opinion, PlainsCapital can also enforce the Notes by establishing that it is an *owner* of the Notes, rather than a holder. Even if PlainsCapital could not establish that it was a holder without resorting to federal law, it could alternatively establish that it was an owner under state law. *See* discussion *infra* Section III.B.

pleaded complaint without anticipating any defenses or responses that might eventually prove to be the core issue in the litigation. *See Caterpillar*, 482 U.S. at 393; *Franchise Tax Bd.*, 463 U.S. at 10–11. PlainsCapital's federal holder in due course allegations were not part of its "well-pleaded complaint" and did not establish federal-question jurisdiction. *See SMS Fin. JDC, LP v. Cope*, 685 F. App'x 648, 651 n.3 (10th Cir. 2017).

B.

Even assuming for the sake of argument that PlainsCapital satisfied the well-pleaded complaint rule, it would founder at the very first step of the *Grable* analysis. In order for a federal-law issue embedded in a state-law claim to establish federal-question jurisdiction, it must be "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. When state law provides an alternative ground for recovery, the federal issue is not "necessarily raised." *See Nevada v. Bank of Am. Corp.,* 672 F.3d 661, 675 (9th Cir. 2012) (citing *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 346 (9th Cir. 1996)); *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 490 (5th Cir. 2002) (holding that federal-question jurisdiction did not exist where complaint alleged "violation[s] of federal regulations *as well as* . . . violation[s] of state and local regulations" (citing *Willy v. Coastal Corp.*, 855 F.2d 1160, 1169–71 (5th Cir. 1988))); *cf. Bd. of Comm'rs of Se. La. Flood Prot. Auth.—E. v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 722–23 (5th Cir. 2017) (finding that federal issue was necessarily raised and distinguishing *MSOF* because of "[t]he absence of any state law grounding for" plaintiff's theory of negligence).

In this case, it was not necessary to raise the federal issue because there are independent state-law grounds for recovery. Texas law authorizes more than one class of persons to enforce negotiable instruments like the Notes. *See*

Tex. Bus. & Com. Code §§ 3.301, 3.309. That includes a "holder," *id.* § 3.301, which is a "person *in possession* of a negotiable instrument," *id.* § 1.201(b)(21)(A) (emphasis added). PlainsCapital cannot be a "holder" of the Notes because they were destroyed. However, Texas law also recognizes that an "owner" is entitled to enforce a note, even if the "owner" is not a "holder." *See Manley v. Wachovia Small Bus. Capital*, 349 S.W.3d 233, 240 (Tex. App.—Dallas 2011, pet. denied). Thus, a "'[p]erson entitled to enforce' an instrument" also includes "a nonholder in possession of the instrument who has the rights of a holder" and "a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3.309" of the Texas Business and Commerce Code. Tex. Bus. & Com. Code § 3.301. Section 3.309 provides for enforcement of lost, destroyed, or stolen instruments:

> (a) A person who is not in possession of an instrument is entitled to enforce the instrument if:
>
> > (1) the person seeking to enforce the instrument:
> >
> > > . . .
> > >
> > > (B) has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
> >
> > (2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and
> >
> > (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed . . . .
>
> (b) A person seeking enforcement of an instrument under Subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. . . . The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

Id. § 3.309.

In its motion for summary judgment, PlainsCapital argued that Section 3.309 provides a basis for recovery independent of the federal holder in due course doctrine. When it entered summary judgment, the district court found that PlainsCapital had provided evidence that it was "the owner and holder" of the Notes. The district court's opinion does not even mention the federal holder in due course doctrine. Because PlainsCapital had an independent state-law theory for recovery, federal law was not a *necessary* element of its claim. *See Bank of Am.*, 672 F.3d at 675.

In an about-face on appeal, PlainsCapital now argues that it is not eligible to recover under Section 3.309—even though it argued in its successful motion for summary judgment that it could enforce the Notes pursuant to that section. PlainsCapital contends that it cannot avail itself of Section 3.309 because neither the FDIC nor PlainsCapital had possession of the Notes when they were destroyed. In making that argument, PlainsCapital relies exclusively on cases decided prior to Section 3.309's amendment in 2005. That amendment expressly permitted a person to enforce a destroyed instrument if that person "has directly *or indirectly* acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred." Act of May 9, 2005, 79th Leg., R.S., ch. 95, § 6, 2005 Tex. Gen. Laws 157, 160–61 (codified at Tex. Bus. & Com. Code § 3.309) (emphasis added). PlainsCapital indirectly acquired the Notes from FNB (by way of the FDIC). Consequently, it is entitled to enforce the Notes under Section 3.309. *See* Timothy R. Zinnecker*, Extending Enforcement Rights to Assignees of Lost, Destroyed, or Stolen Negotiable Instruments Under U.C.C. Article 3: A Proposal for Reform,* 50 U. Kan. L. Rev. 111, 137–38 (2001) (discussing how the amendments to Section 3-309 of the Uniform Commercial Code permit enforcement by a subsequent transferee).

PlainsCapital could have sought—and in fact did seek—to enforce the Notes under state law without relying on the federal holder in due course doctrine. As such, that doctrine was not "necessarily raised."

C.

Finally, PlainsCapital contends that the FDIC assigned its right to sue in federal court to PlainsCapital. By statute, all civil actions "to which the [FDIC], in any capacity, is a party [are] . . . deemed to arise under the laws of the United States." 12 U.S.C. § 1819(b)(2)(A). According to PlainsCapital, the FDIC's assignment of the right to collect on the Notes also assigned the right to sue in federal court. Even if this argument had any merit, PlainsCapital failed to present it to the district court. As a general rule, we do not consider arguments advanced for the first time on appeal. *SCA Promotions, Inc. v. Yahoo!, Inc.*, 868 F.3d 378, 384 (5th Cir. 2017) (quoting *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007)). Although we must consider arguments about the absence of subject matter jurisdiction raised for the first time on appeal, we need not consider arguments *supporting* jurisdiction. *See Ceres Gulf v. Cooper*, 957 F.2d 1199, 1207 n.16 (5th Cir. 1992). Thus, PlainsCapital forfeited this argument, and we do not consider it.

IV.

Having concluded that the district court lacked subject matter jurisdiction, we REVERSE its denial of Rogers's motion to dismiss, VACATE its entry of summary judgment, and REMAND with instructions to dismiss for lack of subject matter jurisdiction.