IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
March 12, 2020

Lyle W. Cayce
Clerk

No. 19-50555
Summary Calendar

MARK BRADFORD,

Plaintiff - Appellant

v.

NATIONWIDE INSURANCE COMPANY OF AMERICA; NATIONWIDE MUTUAL INSURANCE COMPANY; ON YOUR SIDE NATIONWIDE INSURANCE AGENCY, INCORPORATED; NATIONWIDE GENERAL INSURANCE COMPANY; NATIONWIDE INSURANCE COMPANY OF FLORIDA; DOES 1 THROUGH 999, INCLUSIVE; PCM LOGISTICS, L.L.C.,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-1067

Before JOLLY, JONES, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Mark Bradford appeals the dismissal with prejudice of his copyright infringement claims, contending that he sufficiently stated his claims and that, if not, he should be allowed to amend his complaint. We AFFIRM the judgment.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Bradford is a software developer who alleged in his original complaint many claims, including copyright infringement,[1] against the defendants. The district court granted motions to dismiss this claim for failure to allege infringement of any right under 17 U.S.C. § 106, but the court also granted Bradford leave to amend the complaint. He amended and reiterated his claim in a First Amended Complaint. Yet the district court found his pleadings no more intelligible because Bradford alleged a copyright in the WinSketch Nationwide Insurance product but pled proof only of copyright registrations for two other WinSketch-named products, registered in 1995 and 2004. Accordingly, the district court granted motions to dismiss, this time with prejudice, because Bradford had failed to allege plausibly that he owned a valid copyright to the newer product allegedly copied. Bradford then brought a Rule 59(e) motion, requesting, *inter alia*, leave to amend his complaint again. Finally, he sought conversion of that motion, if denied, into a Rule 60(b) motion, contending that he had newly discovered evidence of copyright registration. The district court denied relief, and Bradford timely appealed.

Review of a dismissal under Rule 12(b)(6) is de novo. *Lindquist v. City of Pasadena*, 525 F.3d 383, 386 (5th Cir. 2008). Review of a denial of Rule 59(e) relief or of Rule 60(b) relief is for abuse of discretion. *Schiller v. Physicians Res. Grp., Inc.*, 342 F.3d 563, 566 (5th Cir. 2003) (Rule 59(e)); *In re Isbell Records, Inc.*, 774 F.3d 859, 869 (5th Cir. 2014) (Rule 60(b)).

A copyright infringement claim has two elements: "(1) ownership of the copyrighted material and (2) copying by the defendant." *Computer Mgmt. Assistance Co. v. Robert F. DeCastro, Inc.*, 220 F.3d 396, 400 (5th Cir. 2000). On appeal, Bradford contends that he adequately alleged ownership of

[1] Over the course of litigation, Bradford has abandoned his other claims after the court rejected them.

copyrighted material that Nationwide and other defendants infringed. Specifically, he maintains that he plausibly alleged a copyright registration to the source code used in the product allegedly used by defendants. He criticizes the district court for failing to compare his redacted source-code exhibit, attached only to his original complaint, which allegedly show that all of the WinSketch-named products bear identical source code and therefore that the registrations he owns were valid copyrights for the WinSketch Nationwide Insurance product.[2] But even if the district court had this duty, which is dubious, Bradford's exhibit simply fails to name which product or copyright registration the source code pertains to.

The deficiencies pointed out by the district court go to more than mere semantics or misbranding. Inconsistencies in Bradford's own pleadings undermine the plausibility of his contention that the Winsketch Nationwide Insurance product is identical for copyright purposes with his two registered copyrights.[3]

Bradford's other arguments fail, too. He alleges that the court should have allowed "limited discovery of the alleged[ly] infringing source codes side by side," but his briefing on this point is unintelligible, leaving the point waived therefore. Bradford challenges denial of leave to amend again, but did not seek such leave before final judgment, and was on notice, from the court's first dismissal, of the need to make plausible allegations that he owned a copyright

[2] On their face, these allegations of identical source code for two copyrighted products make little sense, and fail to strengthen the plausibility of Bradford's allegations, because "[a]s a general rule only one copyright registration can be made for the same version of a particular work." 37 C.F.R. § 202.3 (2019).

[3] As the district court noted, Bradford's pleadings contend, for instance, that WinSketch 7.8.3 is within his registered products, but his declaration asserts it never existed. He also asserts in his brief that "there are a few versions of the [WinSketch] software but all use a substantial majority of the same source code if not all."

to the code underlying the WinSketch Nationwide Insurance program. To the extent an amendment would have been based on post-judgment correspondence with the Copyright Office, it is futile because the correspondence is self-serving (Bradford telling the Copyright Office the new copyright is based on identical source code with his previous registrations) and immaterial (post-dating events in litigation). Finally, he alleges judicial bias in vague terms without having petitioned for recusal. *Cf. Avdeef v. Royal Bank of Scot., P.L.C.*, 616 F. App'x 665, 671 n.5 (5th Cir. 2015) (deeming judicial impropriety claims waived for failure to petition for recusal). Bradford's contentions do not establish that the court abused its discretion in denying post-judgment relief.

The district court's dismissal with prejudice is **AFFIRMED**.