UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-9536
Summary Calendar

LEWIS E. JOHNSON,

Plaintiff-Appellant,

versus

PHELPS DUNBAR, ET AL.,

Defendants,

WILLIAM GUSTE, JR., in his capacity as Attorney General of the State of Louisiana, JOHN MAMOULIDES, District Attorney for Jefferson Parish, and RESOLUTION TRUST CORPORATION, as Receiver for Oak Tree Savings Bank, S.S.B., ET AL.,

Defendants-Appellees.

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LEWIS E. JOHNSON,

Plaintiff-Appellant,

versus

DUTEL & DUTEL, ET AL.,

Defendants,

RESOLUTION TRUST CORPORATION, as Receiver for Oak Tree Savings Bank, S.S.B., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA 92 217 c/w 665 B)

(January 27, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

In March 1991, Lewis E. Johnson, proceeding pro se, sued Dutel & Dutel and Dixie Savings & Loan (later Oak Tree Savings Bank) in state court for fraud, misrepresentation, forgery, and breach of contract. Johnson's "petition for damages" was vague, brief, and conclusory. According to the petition for damages, the two individual Dutels executed fraudulent acts of sale in 1975 for various parcels of property in Jefferson Parish, Louisiana. Johnson alleged that Dutel & Dutel and Dixie Savings & Loan appropriated the proceeds from the sale of the lots and that the "`Johnsons'" never received any accounting for these "unauthorized sales and mortgages." Johnson never claimed ownership of these lots in his petition or explained who they belonged to, or how they came under the control of the defendants. Johnson asserted that he was entitled to $10 million damages.

Johnson amended his state court petition in June 1991. The amendment does not clarify Johnson's complaint. In the "amended petition" Johnson claimed that "I Lewis E. Johnson and Park Manor Homes et al have been by `fraud' swindled out of millions of dollars by the below named `Dishonest Men' and their `Dishonest

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Act'." It is not evident how Johnson was related to Park Manor Homes. According to the amended petition Johnson sought to protect the investors of Oak Tree Savings from the unspecified fraud of the defendants.

In a separate state court action in December 1991, Johnson sued Phelps Dunbar, Brent B. Barriere, Harry Rosenberg, Robert S. Eitel and H. Moity, Dixie Savings (Oak Tree and RTC), Dutel & Dutel, First Commerce Corp., First Money Inc., First Commerce Realty (Eastover Corp.), Edwin Edwards, William Guste, John "Monoulidis" (Mamoulides), Judge Lawrence Chehardy, and Louis Shushan. This action contained far-fetched and unsupported allegations that the defendants caused his attorney in another case in the Eastern District of Louisiana, Johnson v. New England Insurance Co., No. 90-1556, to be "recalled as a parole violator (and/or fugitive)" to Missouri and that the defendants, in violation of an unspecified obligation to Johnson, failed to notify him that his other attorney was in the hospital. According to Johnson, the defendants took advantage of his situation and obtained a judgment in their favor without his being present. Johnson alluded to other various and unspecified "illegal acts" by the defendants. Johnson concluded his complaint by stating "I fear for my life because I have no protection from local, state or federal authorities."

In January 1992, Phelps Dunbar, Barriere, Rosenberg, Eitel, and Moity moved the district court to remove Johnson's action from the civil district court for the Parish of Orleans to the federal

district court. The Resolution Trust Corporation (RTC) is the receiver for Oak Tree Savings Bank which was declared insolvent by the Office of Thrift Supervision. The RTC filed the most comprehensive brief and refers to Johnson v. Phelps Dunbar as Johnson's second suit. Id. Johnson filed a third complaint, Lewis E. Johnson v. Resolution Trust Corporation in federal court on June 2, 1992. This complaint does not appear to be part of the record.

In March 1992 the district court consolidated Johnson's actions against Dutel & Dutel with his action against Phelps Dunbar. The former suit was removed by the RTC to the District Court for the District of Columbia in December 1991 after Oak Tree Savings Bank, formerly Dixie Savings & Loan, went into receivership. This case was transferred from the District of Columbia to the Eastern District of Louisiana in January 1992. In June 1992 the District Court for the Eastern District of Louisiana consolidated Johnson's action against Phelps Dunbar with his action against the RTC. Thus all three cases were consolidated.

Johnson's March 1992 "motion to amend and supplement the complaint and to add defendants" was purportedly filed by several plaintiffs and consisted of a document naming over 100 defendants and containing 32 pages of allegations. The Clerk of Court struck the amended complaint for not being signed by each of the plaintiffs, because the plaintiffs had not obtained leave of the court to file the amended complaint, and because non-pro-se parties were not represented by counsel. The Clerk of Court noted that

Johnson's motion to amend the original complaint remained scheduled for hearing before the magistrate judge.

The magistrate judge denied Johnson's motion to amend in April 1992. According to the magistrate judge, Johnson's motion violated Fed. R. Civ. P. 8(a) and 8(e)(1) for failing to provide a short and plain statement of the claim showing that the pleader was entitled to relief and for failing to have simple, concise, and direct averments in each pleading. The magistrate judge also determined that the motion violated Fed. R. Civ. P. 15(a) because it was "highly unlikely that [Johnson] omitted some 90 or so additional defendants or the numerous allegations arising from plaintiff's dealings with these defendants over the past two decades." Finally, the magistrate judge found that Johnson failed to comply with a statutory requirement that corporate plaintiffs "must demonstrate representation by an attorney qualified to practice before this court."

Johnson filed a "notice of appeal and/or objection" to the magistrate's ruling on his motion to amend. The district court held a hearing to consider the matter, but Johnson failed to appear. The court affirmed the magistrate's ruling denying Johnson's motion to amend.

The district court, in a Fed. R. Civ. P. 54(b) judgment filed in December 1992, granted the motion by RTC as receiver for Oak Tree Savings Bank to dismiss Johnson's complaint. The court stated that "[i]t is expressly determined by this Court that there is no just reason to delay in the entry of this judgment until final

determination of all the issues involved in the above-entitled action." The court issued similar Rule 54(b) judgments in favor of John M. Mamoulides, William Guste, Jr.,[1] and Lawrence A. Chehardy. Johnson appealed the Rule 54(b) motions granted in favor of Chehardy and Guste. This Court granted Guste's unopposed motion to dismiss as moot Johnson's appeal on November 18, 1992. Chehardy indicates that he was an appellee in case number 92-3879 and that this Court dismissed the appeal as frivolous on or about February 24, 1993. Chehardy believes that he is not a party to the current appeal.

On December 8, 1992, Johnson filed a notice of appeal from the Rule 54(b) judgment entered in favor of Guste, Mamoulides, and the RTC which appears to be timely only as to the RTC. It is not clear if this was an oversight on Johnson's part and he was attempting to appeal the judgment entered in the separate action, 92-2425, in favor of Guste on November 5, 1992. In his brief, Johnson attacks the judgments in favor of Mamoulides, Guste, Chehardy, and RTC as receiver for Oak Tree Savings. Mamoulides, Guste, and RTC have filed briefs; Chehardy has declined to do so.

OPINION

Johnson's appeal is limited to his argument that the district court abused its discretion by denying him the right to amend his

[1]The district court also ordered Johnson to submit an amended complaint within 15 days in what appears to have been a separate action by Johnson against Guste in civil action no. 92-2425. Johnson apparently did not reply. The district court granted Guste's motion to dismiss for failure to state a claim. Id. at 634.

original complaint. Analysis of this appeal is severely complicated by the plaintiff/appellant's inadequate pro se pleadings and brief. Although Johnson's notice of appeal appears to be untimely as to several of the parties, the Court has jurisdiction over this appeal because Johnson's notice of appeal was timely as to the RTC.

It is possible that Johnson, by amending his initial action against Dutel & Dutel in the state court, has already utilized his right to amend once, as of course, for purposes of Fed. R. Civ. P. 15(a). However, because this amendment was filed in the state court and before Johnson's actions were consolidated in federal court, we assume arguendo that Johnson still enjoyed a right to amend his action.

Johnson attempted to amend his complaint in March 1992. Under the Federal Rules of Civil Procedure:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed. R. Civ. P. 15(a). The original defendants in 92-0217 were Phelps Dunbar, Brent B. Barriere, Harry Rosenberg, Robert S. Eitel and H. Moity, Dixie Savings (Now Oak Tree and RTC), Dutel & Dutel, First Commerce Corp., First Money Inc., First Commerce Realty (Eastover Corp.), Edwin Edwards, William Guste, John "Monoulidis," Judge Lawrence Chehardy, and Louis Shushan.

A responsive pleading is "`a complaint, an answer, a reply to a counter-claim, an answer to a cross-claim, a third-party complaint, a third-party answer, and, pursuant to court order, a reply to an answer or third-party answer.'" Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 910 (5th Cir. 1993). The record is silent as to which of the parties, or whether any of them, filed responsive pleadings. Contained in the record are motions by William Dutel, Louis Dutel, Dutel & Dutel, Chehardy, Guste, Phelps Dunbar, Barriere, Rosenberg, Eitel, Moity, RTC, Shushan, and First Commerce Realty (Eastover Corp.) to dismiss Johnson's complaint for failure to state a claim or lack of subject matter jurisdiction. Johnson correctly points out that a motion to dismiss is not a responsive pleading. Albany Ins. Co., 5 F.3d at 911.

There is no record support indicating that any of the defendants answered Johnson's complaint and we assume for purposes of this appeal that none of the defendants did so. Thus, we further assume that Johnson's motion to amend was "as a matter of course" rather than "by leave of the court." See Whitaker v. City of Houston, 963 F.2d 831, 834 (5th Cir. 1992).

The denial of leave to amend a plaintiff's complaint is reviewed for abuse of discretion. See Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp., 992 F.2d 1398, 1403 n.8 (5th Cir. 1993). In ruling upon a permissive pleading, the district court may consider "`undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by

amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.'" Whitaker, 963 F.2d at 836 (quoting Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)).

In Avatar Exploration, Inc. v. Chevron, U.S.A., Inc., 933 F.2d 314, 315-17, 320-21 (5th Cir. 1991), this Court affirmed the district court's denial of a Rule 15(a) motion that was filed in response to a motion for summary judgment. "We . . . affirm denials of motions to amend when amendment would be futile." Id. at 321. Thus it appears that Rule 15(a) motions, even when "of course" may be denied as futile.

In Overseas Inns, S.A. P.A. v. United States, 911 F.2d 1146, 1150 (5th Cir. 1990), the Court upheld the denial of leave to amend under Rule 15(a) and applied the permissive pleading standard in a case where extensive prelawsuit and pretrial proceedings had taken place, the Government had filed a motion for summary judgment, and the plaintiff had not attempted to amend until about two-and-a-half years after filing its complaint. The Court also noted that the plaintiff had filed a motion for summary judgment prior to seeking to amend. Id. The Court ruled that the district court did not abuse its discretion by denying the plaintiff's motion to amend.

The Tenth Circuit has also held that the district court's decision to grant a plaintiff's motion to amend after the defendant had filed a motion for summary judgment was discretionary. Drake v. City of Fort Collins, 927 F.2d 1156, 1163 (10th Cir. 1991). In Drake the court ruled that it was proper to deny such a motion

where it was "apparent from plaintiff's motions that the requested amendments could not cure the defects in his complaint." Id.

Johnson's amended complaint contained the same allegations found in his action against Phelps Dunbar concerning the defendants' responsibility for having his attorney in an apparently unrelated case recalled as a parole violator and failing to notify him that his other attorney was in the hospital. The rest of Johnson's amended complaint contains allegations of pervasive and undocumented conspiracies among the defendants including extensive descriptions of the manner in which the defendants had stolen various property and financial instruments from the purported plaintiffs. According to Johnson, the plaintiffs had incurred damages exceeding $1 billion, including losses of $43 million of real property and $12 million of revenue. The pleadings in the amended complaint are vague, conclusory, unsubstantiated, and ultimately impenetrable.

The magistrate judge's ruling concerning Johnson's amended complaint, adopted by the district court, is instructive. As noted by the magistrate judge, the amended complaint is not in conformity with Rule 8(a)(2)'s requirement that the pleading contains "a short and plain statement of the claim showing that the pleader is entitled to relief." The magistrate judge also point out, that contrary to the instruction of Rule 8(e)(1), the pleadings in the amended complaint are neither concise, nor direct. Further, Johnson failed to state "the circumstances constituting fraud . . . with particularity." Rule 9(b). There is no support by affidavit

or document for any of his allegations. It is evident that Johnson's amended complaint could not cure the defects in his original complaint. The district court did not abuse its discretion by denying Johnson's amended complaint.

We AFFIRM the judgment of the Trial Court.