IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20066

BOB HIGDON

Plaintiff-Appellant,

v.

NELSON T. HENSLEY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 91-2651)

(March 1, 1995)

Before KING, GARWOOD, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Bob Higdon appeals from 1) the district court's order of referral of his claims against the trustee of his estate to the bankruptcy court, and 2) the district court's dismissal of his claims against all other defendants for failure to state a claim upon which relief could be granted. We dismiss Higdon's appeal from the district court's order of referral, and we affirm the

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[*]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 Pursuant to that Rule, the court has determined that this opinion should not be published.

judgment of the district court as to the other defendants who are appellees herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

In January of 1982, an involuntary petition under Chapter 7 of the Bankruptcy Code was filed against Higdon. Nelson T. Hensley was subsequently appointed as the trustee of Higdon's estate, and he has continued to act in that capacity. The major assets of the estate were various claims against multiple individuals and corporations.

On September 8, 1987, Higdon and Hensley entered into a written agreement providing that Higdon would be paid commission fees in exchange for his assistance with the prosecution of the estate's claims. On September 9, 1991, Higdon filed a complaint in the district court naming Hensley specifically, and identifying the other defendants as "John Doe" entities. In his complaint, Higdon essentially made breach of contract allegations.

On May 1, 1992, Higdon filed his First Amended Complaint and named the following parties as defendants: 1) Hensley; 2) Gillis, Walker, Drexler & Williamson; Walker, Drexler & Williamson; and Walker & Williamson -- all law firms in which Hensley formerly practiced law; 3) Les Cochran, Michael Mallia, and the law firm of Barnhart, Mallia, Cochran & Luther -- Higdon's lawyers during the bankruptcy proceedings; 4) Allied Bank of Texas; 5) Kem Thompson Frost, James J. Hansen, and the law firm of Winstead, McGuire, Sechrest & Minick -- Allied Bank's lawyers during Higdon's bankruptcy proceedings; 6) Travelers Indemnity Company -- a surety

for bonds covering Hensley; 7) Fidelity and Deposit Company of Maryland -- also a surety for bonds covering Hensley. In his amended complaint, Higdon alleged -- in a rather convoluted manner -- that certain of the defendants had committed torts and other improper acts, including breach of fiduciary duty, breach of the duty of good faith and fair dealing, breach of contract, negligence, tortious interference with contract, fraud, conspiracy, and violations of the Texas Deceptive Trade Practices Act ("DTPA").

The district court granted motions to dismiss for all of the defendants except Hensley. The motions were granted on the grounds that Higdon's claims were barred by the applicable statute of limitations, and because the court concluded that Higdon was "alleging legal conclusions and an assortment of disjointed and confusing occurrences which, in sum, are totally insufficient to state cognizable claims against any of the Defendants who have moved for dismissal." Pursuant to Federal Rule of Civil Procedure 54(b), the district court concluded that there was "no just reason for a delay in the entry of a Final Judgment on all claims of Plaintiff alleged against all Defendants except Nelson T. Hensley," and the court therefore dismissed Higdon's claims against the relevant defendants on the merits.

The district court allowed Higdon's claims against Hensley to proceed to a jury trial, but the court subsequently declared a mistrial, noting that:

> [t]he claims that you [Higdon] have made are broader and cover more matters than what you indicated to me on Friday afternoon was to be the issue tried in the case . . . . The kinds of claims that you have asserted against

> Mr. Hensley and the kinds of material that you have been developing through your accountant are going to take some time to develop, and they are matters that are uniquely pertinent to a review of the performance of the trustee in bankruptcy; and whether or not there has been any breach of duty or not, in addition to the question of breach of contract that I had understood the matter had been narrowed to, but which you have said is not the case.

The court subsequently referred Higdon's claims against Hensley to the bankruptcy court pursuant to 28 U.S.C. § 157(a),[1] noting that "[a]ll of the claims remaining in this case arise out of or relate to Higdon's bankruptcy proceedings." Higdon appeals from these district court actions.

II. ANALYSIS AND DISCUSSION

We initially note that Higdon is proceeding pro se on appeal, as he did in the district court. We liberally construe the allegations of a pro se litigant, see, e.g., Securities and Exch. Comm'n v. AMX, Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993), and we have made every effort to frame and to address his arguments as best as we can understand them.

A. Referral to the Bankruptcy Court

Higdon contests the district court's referral of his case to the bankruptcy court. He seems to argue that the referral was

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[1] The statute states the following:

> Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 U.S.C. § 157(a).

improper because the district court did not have bankruptcy jurisdiction over his case.

"Federal courts, both trial and appellate, have a continuing obligation to examine the basis for their jurisdiction. The issue may be raised by parties, or by the court *sua sponte*, at any time." MCG, Inc. v. Great W. Energy Corp., 896 F.2d 170, 173 (5th Cir. 1990). Federal circuit courts only have jurisdiction over three types of appeals: 1) final orders, see 28 U.S.C. §§ 158(d), 1291; 2) certain specific types of interlocutory appeals, such as those where injunctive relief is involved, see 28 U.S.C. § 1292(a)(1); and 3) appeals where the district court has certified the question as final pursuant to Federal Rule of Civil Procedure 54(b), see 28 U.S.C. § 1292(b). See Dardar v. Lafourche Realty Co., 849 F.2d 955, 957 (5th Cir. 1988). A final judgment is generally one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. See, e.g., Catlin v. United States, 324 U.S. 229, 236 (1945).

In Higdon's case, the district court's order merely refers his case to the bankruptcy court "for further proceedings" -- clearly indicating that the referral is only a preliminary step in Higdon's lawsuit against Hensley. The order does not end the litigation on the merits against Hensley; indeed, it expressly indicates that litigation on the merits will resume in the bankruptcy court. After the litigation is concluded in the bankruptcy court, and a final judgment is entered, Higdon will have an opportunity to challenge both the district court's and the bankruptcy court's

jurisdiction. For now, however, Higdon's challenge is not reviewable.

B. The Dismissals for Failure to State a Claim

The district court dismissed Higdon's claims against all of the defendants but Hensley because of the applicable statute of limitations and because Higdon did not allege sufficient facts upon which to state a claim. Higdon appears to contest these dismissals.[2]

Because the district court dismissed the claims under Federal Rule of Civil Procedure 12(b)(6), "we must accept all of the plaintiffs' well-pleaded allegations as true and give them the benefit of all reasonable inferences for the purposes of this review." Cross v. Lucius, 713 F.2d 153, 155 (5th Cir. 1983). A rule 12(b)(6) motion to dismiss is appropriate for raising a

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[2] We note that Higdon failed to even mention many of the defendants in the argument portion of his appellate brief. Generally, "[a] party who inadequately briefs an issue is considered to have abandoned the claim," Frious v. Phillips Petroleum Co., 948 F.2d 972, 974 (5th Cir. 1991), but given Higdon's pro se status, we infer a general challenge to the district court's dismissal of Higdon's claims against all of the relevant defendants.

In addition, because the district court entered his judgment of dismissal pursuant to rule 54(b), and because the court explicitly noted that "there is no just reason for delay in the entry of a Final Judgment," the judgment of dismissal is properly appealable. As we noted in Askanase v. Livingwell, Inc., 981 F.2d 807, 810 (5th Cir. 1993), "[w]hen an action involves multiple parties, any decision that adjudicates the liability of fewer than all of the parties does not terminate the action and is therefore not appealable ***unless certified by the district judge under Rule 54(b)***." (emphasis added). The district court clearly expressed his intent to enter the judgment under rule 54(b), and thus, the judgment of dismissal is final and appealable. See id.

statute of limitations defense when the facts comprising the defense appear on the face of the complaint. See id.

As mentioned, in his original September 9, 1991 complaint, Higdon named Hensley and various "John Doe" defendants. The inclusion of a "John Doe" defendant in the complaint, however, does not toll the statute of limitations until a named defendant is substituted, unless the requirements of Federal Rule of Civil Procedure 15(c)[3] are met. See Sassi v. Breier, 584 F.2d 234, 235 (7th Cir. 1978). The later substitution constitutes a change of parties within Rule 15(c), and the newly named defendant is treated as a new party. See Watson v. Unipress, Inc., 733 F.2d 1386, 1389-90 (10th Cir. 1984); Sassi, 584 F.2d at 235. Thus, the statute of limitations continued to run for all defendants except Hensley until the amended complaint was filed -- unless Higdon's amended complaint somehow "relates back" to the filing of the original complaint under Rule 15(c). See Hendrix v. Memorial Hosp., 776 F.2d 1255, 1257 (5th Cir. 1985); Watson, 733 F.2d at 1389; Sassi, 584 F.2d at 235.

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[3] Rule 15(c) provides in pertinent part:

> An amendment changing the party against whom a claim is asserted relates back if . . . within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Fed. R. Civ. P. 15(c).

Upon our review of the record, there is no evidence to indicate that the defendants named in Higdon's amended complaint, aside from Hensley, had received any notice of the September 9, 1991 institution of the action. In addition, there is no showing that the defendants, aside from Hensley, either knew or should have known that Higdon was targeting them as defendants, or that they would have been named as defendants but for a mistake concerning their identity. Because Higdon's amended complaint fails the requirements of Rule 15, it does not "relate back" to the date of the filing of the original complaint. Thus, for the purpose of evaluating limitations defenses against all defendants except Hensley, we look to the May 1, 1992 date of the amended complaint.

Even though Higdon appears to have pleaded a variety of actions, the statute of limitations for all of these claims is four years or less from the day the cause of action accrues. See Tex. Bus. & Comm. Code § 17.565 (providing a two-year limitations period for actions under the Texas Deceptive Trade Practices Act); Tex. Civ. Prac. & Rem. Code § 16.003 (providing a two-year limitations period for tort claims); id. § 16.004 (providing a four-year limitations period for contractual actions); id. § 16.051 (providing a four-year limitations period for all actions with no express limitations period); see also First Nat'l Bank v. Levine, 721 S.W.2d 287, 289 (Tex. 1986) (providing a two-year statute of limitations for tortious interference with contract claims).

Construing Higdon's amended complaint liberally, as we must, it appears that the actions and events complained about by Higdon

occurred between 1983 and 1987, with the exception of some claims against Hensley that arose in 1989. Thus, aside from the claims against Hensley, Higdon asserts no causes of action that accrued within the four years before the May 1, 1992 filing of his amended complaint. Accordingly, Higdon's claims against all defendants except Hensley are barred by the applicable statute of limitations, and as such, the district court was correct in granting the motions to dismiss.

In addition, to survive a rule 12(b)(6) motion, Higdon must allege specific facts, and not merely legal conclusions, to support a cognizable cause of action. Cf. Johnson v. Wells, 566 F.2d 1016, 1017 (5th Cir. 1978) ("[T]he mere statement in a complaint that the [defendant] has taken arbitrary and capricious action is not sufficient to state a claim upon which relief can be granted . . . . The application must set forth specific facts that would, if proved, warrant the relief he seeks."). Unfortunately, based upon our examination of Higdon's amended complaint, he appears to primarily allege legal conclusions in a variety of confusing occurrences that are insufficient to survive a motion to dismiss. Thus, even on this alternative ground, the district court's dismissal of the claims against all defendants but Hensley was proper.[4]

III. CONCLUSION

[4] We also agree that Higdon's emergency motions are moot, and consequently, the district court's denial of these motions was proper.

For the foregoing reasons, we DISMISS Higdon's appeal from the district court's order of referral, and we AFFIRM the judgment of the district court as to the other defendants. Costs shall be borne by Higdon.