

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40721
(Summary Calendar)

LEWIS R. DANIEL,

Plaintiff-Appellant,

versus

JESS HAY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(3:93-CV-48)

(May 11, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

In this appeal from the district court's grant of summary judgment in favor of the Defendants-Appellees in a civil RICO suit under 18 U.S.C. §§ 1962, 1964(c), Plaintiff-Appellant Lewis R.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Daniel urges that the district court abused its discretion by failing to grant his motions for default judgment, and in concluding, in the posture of summary judgment, that the pleadings and evidence showed that Daniel could not meet the requirements of injury and causation necessary to maintain his civil RICO suit. Daniel has also filed a motion with this court to strike the Appellees' briefs. For the reasons set forth below, we deny Daniel's motion to strike and we affirm the district court's summary judgment rulings in favor of the Defendants, dismissing Daniel's action.

I

FACTS AND PROCEEDINGS

Proceeding pro se, Daniel filed suit against 20 present and former officers and directors of Lomas Financial Corporation, f/k/a Lomas & Nettleton Financial Corporation (Lomas defendants) and Standard & Poor's, a Division of McGraw-Hill, Incorporated (S&P). Daniel asserted civil RICO and state-law fraud claims. See 18 U.S.C. §§ 1962, 1964(c).

Daniel alleged that he had filed an earlier RICO suit, Daniel v. Lomas Realty, No. Ty-89-353-CA, renumbered 3:90-CV-0045, based on the purportedly unlawful foreclosure of Daniel's farm by Lomas. He had also filed an earlier civil rights suit based on the circumstances surrounding the foreclosure and his being prevented from returning to his former property. See Daniel v. Ferguson, 839 F.2d 1124 (5th Cir. 1988). We amended the district court's dismissal of the civil rights suit and dismissed it for want of

subject matter jurisdiction, to reflect our affirmance of a directed verdict for the defendants. We also vacated and remanded Daniel's state-law claims for the district court to determine whether to exercise jurisdiction over those claims. See id. at 1132.

Daniel alleged in the instant case that, in his suit against Lomas Realty (his first RICO suit), he filed for a default judgment based on the defendants' failure to plead or to defend; and that several days later Lomas filed for bankruptcy protection. Daniel also alleged here that Jess Hay, the C.E.O. of Lomas and one of the named defendants, issued a fraudulent statement on January 31, 1992, announcing that Lomas had emerged from bankruptcy when, in fact, Lomas remained in bankruptcy; and that S&P used this information in its published report on Lomas' financial condition. According to Daniel's allegations, Jon Newton, a Lomas director, bought 5,000 shares of Lomas stock for 31 cents per share; and based on the published information, allegedly fraudulent and designed to manipulate the price of Lomas stock, it jumped to 17-3/8 per share.

Daniel further alleged that when this fraud became public knowledge, the Lomas stock value would plummet, the corporation would have to liquidate, and Daniel would be unable to collect on his default judgment. In a subsequent filing, Daniel alleged that a stock analyst published a recommendation to sell Lomas stock; and that the stock dropped to 7-1/2 and 7-3/4 per share and continued its downward spiral as of December 1993.

Daniel alleged additionally that he relied on the emerged-from-bankruptcy information, and attempted to collect on the default judgment in his first RICO suit; but that he discovered that Lomas was still in bankruptcy.

The district court presiding over the first RICO suit ordered Daniel to keep the court informed of Lomas' bankruptcy status by filing a report every three months. Daniel stated that he has experienced difficulty in complying with this order. Daniel contended that all of the foregoing facts and surrounding acts by the named defendants constituted RICO acts and common law fraud. He sought more than \$55 million in damages.

The Lomas defendants and S&P filed various motions to dismiss based on Daniel's three purportedly flawed attempts to serve the defendants properly, but the district court eventually concluded that service was adequate. From time to time during the continuation of the litigation over service, Daniel filed motions for default judgment against the defendants. In many of his responses to the defendants' motions to dismiss, Daniel alleged that the attorneys for the defendants were filing fraudulent statements in district court and that these filings constituted additional RICO acts.

The Lomas defendants filed an answer, as did Jess Hay after he was properly served. S&P filed an amended motion to dismiss. The several answers and the amended motion included the defense that Daniel had failed to state a claim.

In its order settling the service issue, the district court

took judicial notice of the prior RICO suit, Daniel v. Lomas Realty, which had been stayed by the bankruptcy proceedings. That suit had been transferred to the district court's docket. The court noted that Daniel had filed six motions for default judgment in that suit, and that no relief had been granted.

The district court reviewed Daniel's complaint and, in light of its judicial notice of the prior suit, concluded that Daniel's RICO claims failed as a matter of law because his alleged injuries were insufficient as RICO damages and were speculative in nature. The court viewed Daniel's complaint as alleging two injuries: 1) the likelihood that he would be unable to collect damages in his first RICO suit, and 2) the court order that required him periodically to apprise the court of Lomas' bankruptcy status. The court also observed that Daniel's RICO claims failed for lack of a causal nexus between the defendants' alleged conduct and Daniel's alleged injuries.

As the district court looked beyond the parties' pleadings by taking judicial notice of the prior lawsuit, it determined (correctly) that its consideration of the present suit should be made in the posture of summary judgment. The court therefore gave the parties ten days to file appropriate briefs and evidence to support their respective positions on summary judgment.

Daniel responded by filing two affidavits. In the first he took issue with the wording of the court's order, stated conclusionally that he was damaged by the defendants' fraudulent misrepresentations purposefully made to manipulate the Lomas stock,

insisted that the court was using a double standard to the detriment of pro se litigants, asserted that default judgment was mandatory in the prior suit, and contended that he was damaged by the wrongful foreclosure of his farm. He also averred that the bankruptcy court had acknowledged that Daniel was a secured-interest creditor of Lomas as a result of Lomas' wrongful foreclosure of Daniel's property, and that this right as a creditor had been damaged by the stock manipulation. The exhibits attached to Daniel's first affidavit did not illuminate any issue of merit noted in the district court's order.

In his second affidavit, Daniel contended that S&P's summary judgment motion was meritless. He based this contention on his allegation that S&P was in procedural default for failing properly to serve its earlier motion to dismiss.

In response to the district court's order, S&P filed a motion for summary judgment, contending that Daniel's claims against it must fall because he had failed to allege the requisite injury and causation under civil RICO. The Lomas defendants filed their motion after obtaining leave of court to file for summary judgment beyond the time specified in the district court's order. They attached summary judgment evidence to their motion, including three affidavits, copies of pleadings from the earlier lawsuits between the parties or related parties, and copies of various orders from the bankruptcy proceedings.

Noting that Daniel had failed to produce any evidence to establish a genuinely disputed issue of material fact, the district

court held on the basis of the evidence and the record that Daniel's RICO claims failed as a matter of law due to insufficient allegations of causation and injury. The court concluded its rulings by dismissing Daniel's RICO claims and declining to exercise supplemental jurisdiction over the state-law claims.

Before timely filing his notice of appeal, Daniel submitted a filing consisting of a number of other papers. Although Daniel's purpose in making this filing is unclear, he appears to have been attempting to establish a "commercial lien" or a "military lien right" against Lomas and the Lomas defendants. This filing does not appear to be a motion pursuant to Fed. R. Civ. P. 59 or 60; and the district court failed to comment on the filing, thus impliedly deciding not to treat it as such a motion. Concluding that this filing has no effect on appellate review, we need not and therefore do not consider it further.

II

ANALYSIS

A. Motion to Strike Briefs

Daniel requests that we strike the briefs of appellees for the alleged misstatements of facts made by counsel, characterized by Daniel in his reply brief as "fraud" and "barratry." This is similar to what Daniel did in the district court when he responded to the defendants' motions to dismiss by pointing out alleged factual inaccuracies in the motions and characterizing them as acts of fraud and barratry. We find this motion frivolous and therefore deny it.

B. Default Judgment

Daniel posits that the district court erroneously solicited motions for summary judgment at a time when the defendants were in default and Daniel had filed notice of default against them. See Fed. R. Civ. P. 55. Indeed, Daniel insists that the defendants have been in procedural default since the beginning of the suit; and that S&P too was in procedural default for failure to serve properly its earlier motion to dismiss, and thereby lacked standing to file a summary judgment motion. In response, S&P and the Lomas defendants contend that Daniel misperceives the rule covering procedural default and ignores the filings made by the defendants.

"Rule 55(a) permits a default against a party when it 'has failed to plead or otherwise defend' itself." Sun Bank of Ocala v. Pelican Homestead & Savings Ass'n, 874 F.2d 274, 276 (5th Cir. 1989) (quoting Rule 55(a)). The Lomas defendants and S&P filed motions to dismiss based on improper service, and the Lomas defendants filed answers.

If a default judgment is sought against a party who has made an appearance, the district court, but not the clerk, may enter such a judgment. Sun Bank of Ocala, 874 F.2d at 276; Rule 55(b)(2).

The Federal Rules of Civil Procedure are designed for the just, speedy, and inexpensive disposition of cases on their merits, not for the termination of litigation by procedural maneuver. Default judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations.

Id. (footnotes omitted). A district court's discretion in

determining the matter receives deference on review. James v. Frame, 6 F.3d 307, 310 (5th Cir. 1993). In light of the defendants' filings in the district court, the difficulty Daniel experienced in attempting to achieve service of process, and the propriety of summary judgment as discussed below, we conclude that the district court did not abuse its discretion either in refusing to employ a remedy as drastic as default or in inviting motions for summary judgment.

C. Summary Judgment

Daniel challenges the district court's grant of the defendants' motions for summary judgment. "Summary judgment is proper if the movant demonstrates that there is an absence of genuine issues of material fact." Johnston v. City of Houston, Tex., 14 F.3d 1056, 1060 (5th Cir. 1994), Fed. R. Civ. P. 56(c). Review is de novo. McKee v. Brimmer, 39 F.3d 94, 96 (5th Cir. 1994).

Plainly, Rule 56 means what it says: "judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (citation omitted).

The initial summary judgment burden resides with the moving party to "demonstrate the absence of a genuine issue of material fact," but [the movant] need not negate the elements of the nonmovant's case." Id. (quoting Celotex Corp. v. Catrett, 477 U.S.

317, 323 (1986)). If this burden is met by the movant, then the burden shifts to the nonmovant to "go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." Id.

The primary focus of Daniel's complaint is on his RICO claims. Section 1964(c) provides for a private person "injured in his business or property by reason of a violation of section 1962" to sue for treble damages. 18 U.S.C. § 1964(c); see Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 495 (1985). "[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." Sedima, S.P.R.L., 473 U.S. at 496. Moreover, § 1964(c) requires the RICO conduct to be the "but for" and proximate cause of the injury. Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1316-18 (1992); Whalen v. Carter, 954 F.2d 1087, 1090-91 (5th Cir. 1992). The district court concluded that Daniel "failed to describe damages sufficient to state a RICO claim or actual or proximate causation of damages by defendants' alleged RICO predicate acts." Without expressly stating it, that court unquestionably concluded that Daniel lacked standing under civil RICO. See Whalen, 954 F.2d at 1090-91.

Daniel argued in the district court and now argues to us that, starting with publication of the allegedly fraudulent statements concerning Lomas' emergence from bankruptcy, the purported stock manipulation caused the price of the stock to skyrocket. Then, according to Daniel, the stock analyst's

subsequent published recommendation to sell caused the price to plummet, and the value of the stock continued to decline. Daniel impliedly contends that the "sell" recommendation was premised on the discovery that the Lomas-out-of-bankruptcy information was fraudulent.

As for injury, Daniel contends that he has been damaged by this stock manipulation because that makes unlikely the possibility that he will be able to collect on his default judgment from the earlier RICO lawsuit. He also contends that he has a security interest as a creditor of Lomas; and that he is under court order in the first RICO suit, stayed by the bankruptcy proceedings, to keep the court abreast of Lomas' bankruptcy status.

Notwithstanding Daniel's allegations to the contrary, the summary judgment evidence reflects that he has not obtained a default judgment in his first RICO suit, and that the bankruptcy court has disallowed and expunged his claims against Lomas. The district court took judicial notice of its own records, which reflect that no relief has been granted in the first RICO suit. Mowrey's affidavit related the status of the first RICO suit, and Barbara Nye's affidavit attests that, on Lomas' motion, the bankruptcy court disallowed Daniel's claim and has not ruled on his motion for reconsideration. Daniel's attempt to challenge the summary judgment evidence as to the bankruptcy court's order of disallowance by providing new allegations of the bankruptcy proceedings appears for the first time in the reply brief that he has filed with this court. As such, it is not properly before us

and we shall not consider it. See United States v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989).

Daniel's two alleged injuries^{SO}his having to keep the district court informed of Lomas' bankruptcy status, and his possible inability to collect on a filed motion for default judgment^{SO}are insufficient and too speculative to meet the statutory requirement of an injury to a person's "business or property." See 18 U.S.C. § 1964(c). Moreover, even if we assume *arguendo* that the injuries were sufficient, the defendants' conduct alleged to be RICO violations^{SO}manipulation of the stock price^{SO}does not create the requisite causation for the alleged injuries. See Holmes, 112 S. Ct. at 1318 (explaining proximate cause).

As the evidence shows that Daniel has not met the requirements of injury and causation necessary to bring a civil RICO suit, the district court did not err in granting summary judgment for the defendants. Daniel's motion to strike is DENIED, and the summary judgment dismissing his claims is AFFIRMED.