United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 11, 2021
Lyle W. Cayce
Clerk

No. 19-20683

KEVIN E. GILMORE-WEBSTER,

Plaintiff—Appellant,

versus

BAYOU CITY HOMEBUYERS, INCORPORATED, A TEXAS CORPORATION; RENTERS WAREHOUSE, L.L.C., A MINNESOTA COMPANY; TETRAD DEVELOPMENT, L.L.C., A TEXAS COMPANY; ACE REALTY PARTNERS, A TEXAS COMPANY; SOUTH LAND TITLE, L.L.C.,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-887

Before DAVIS, STEWART, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Kevin E. Gilmore-Webster argues the Southern District of Texas erred by dismissing his day-late amended complaint as untimely. He also

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

argues the Northern District of California—where he originally filed his complaint—is the proper venue for his case. As a threshold matter, Gilmore-Webster failed to establish either court's diversity jurisdiction. We would ordinarily remand, but doing so would be futile. So we affirm.

I.

Gilmore-Webster sued Bayou City Homebuyers, Inc. ("Bayou"), Tetrad Development, LLC ("Tetrad"), Ace Realty Partners, LLC ("Ace"), South Land Title, LLC ("South Land"), and Renters Warehouse, LLC ("Renters") in the Northern District of California.[1] Gilmore-Webster—a *pro se* plaintiff—preferred to litigate in his home state of California. But his claims revolved around a piece of property in Houston. Bayou, Tetrad, Ace, and South Land filed separate motions to dismiss (or, in the alternative, transfer), arguing the California district court lacked subject-matter jurisdiction, lacked personal jurisdiction, and was an improper venue. Renters also moved to dismiss for improper service of process, failure to state a claim, and improper venue. The California court agreed Gilmore-Webster failed to properly serve Renters. And it also agreed it lacked personal jurisdiction over Bayou, Tetrad, Ace, and South Land. But instead of dismissing Gilmore-Webster's claims, the California court ordered Gilmore-Webster to properly serve Renters, and it transferred the case to the Southern District of Texas.

Once in Texas, the defendants filed several more motions to dismiss. This time, Bayou, Ace, Tetrad, and South Land all contended Gilmore-

[1] Bayou, Tetrad, Ace, and South Land jointly filed their Red Brief. Though Gilmore-Webster included Renters in his notice of appeal, the district court's order did not dismiss his claims against Renters. And Renters did not file a responsive brief in this appeal. Therefore, we only address Gilmore-Webster's claims against Bayou, Tetrad, Ace, and South Land.

Webster failed to state a claim. And South Land argued Gilmore-Webster failed to properly serve it too. The Texas district court noted discrepancies in the parties' arguments regarding whether Gilmore-Webster served South Land. It also found that "at least some" of Gilmore-Webster's claims didn't meet the pleading standard outlined in Federal Rule of Civil Procedure 8. But instead of dismissing Gilmore-Webster's claims, it allowed him to amend his complaint. In its order dated August 5, 2019, the district court said Gilmore-Webster must (1) comply with Rule 8's pleading requirements and (2) show he timely served South Land or had good cause for his failure to do so. The court set the deadline for August 26. Its order included a warning: "*Failure to file such documents within twenty-one days will result in dismissal of Plaintiff's claims against Defendants Bayou City Homebuyers, Inc., Ace Realty Partners, Tetrad Development LLC, and South Land Title, LLC without further notice.*"

Twenty-two days later, on August 27, Gilmore-Webster filed his amended complaint. Noting the filing was untimely, the district court dismissed Gilmore-Webster's claims against Bayou, Tetrad, Ace, and South Land without prejudice.[2]

II.

First things first: We must assess jurisdiction. No federal court could hear Gilmore-Webster's claims without it. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited

[2] We take these facts from the record on appeal. Gilmore-Webster says there's more to the story. Although Gilmore-Webster contends his amended complaint should be considered timely because the district court clerk did not mail the district court's August 5 order to him until August 22, Gilmore-Webster did not move for such relief in the district court. We generally do not consider on appeal arguments that were not properly raised before the district court. *See Def. Distrib. v. Grewal*, 971 F.3d 485, 496 (5th Cir. 2020).

jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." (citation omitted)).

Federal district courts exercise diversity jurisdiction only when there is "complete diversity" between the litigants. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)). Complete diversity exists when "no party on one side [is] a citizen of the same State as any party on the other side." *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974). "The burden of pleading the diverse citizenship is upon the party invoking federal jurisdiction; and if the diversity jurisdiction is properly challenged, that party also bears the burden of proof." *Id.*

Gilmore-Webster chose to file in federal court, and he attempted to invoke the district court's diversity jurisdiction in his original complaint.[3] He claimed Renters was a Minnesota corporation and Bayou, Tetrad, Ace, and South Land were Texas corporations. As a California citizen himself, he concluded there was complete diversity between him and every defendant.

However, the defendants are *not* all corporations. Ace, Tetrad, and South Land are LLCs. And there's a different standard for establishing an LLC's citizenship. *See MidCap Media Fin., L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310, 314 (5th Cir. 2019). Whereas a corporation is "a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business," 28 U.S.C. § 1332(c)(1), "the citizenship of a[n] LLC is determined by the citizenship of all of its members," *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080

[3] Though Gilmore-Webster filed his complaint in the California district court, the jurisdictional facts he alleged didn't change when the case was transferred to Texas. *See Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570 (2004) ("It has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824))).

(5th Cir. 2008). So when a plaintiff chooses to sue LLC defendants in federal court, he "must specifically allege the citizenship of every member of every LLC." *Settlement Funding, L.L.C. v. Rapid Settlements, Ltd.*, 851 F.3d 530, 536 (5th Cir. 2017).

Gilmore-Webster did not allege the citizenship of each of Tetrad's, Ace's, and South Land's members. Instead, he followed part of the standard for establishing a *corporation's* citizenship by pleading each entity's principal place of business. Gilmore-Webster therefore failed to establish diversity jurisdiction.[4] And neither party points to record evidence suggesting diversity exists notwithstanding Gilmore-Webster's error. *Cf. MidCap*, 929 F.3d at 314 (noting we can "overlook [a party's] failure to plead diversity *if* [a party] can identify allegations and evidence in the record demonstrating diversity" (alterations in original) (quoting *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 919 (5th Cir. 2001))).

III.

Typically, we would remand for the district court to determine whether there is complete diversity among the litigants. But here, remand would be futile. Even if there is complete diversity, the district court had a valid basis for dismissing the amended complaint anyway: Gilmore-Webster untimely filed it. It does not matter that the district court's untimeliness dismissal rested on a non-jurisdictional ground while the lack of diversity is a jurisdictional one. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) (holding the district court can dismiss a complaint on

[4] Gilmore-Webster's proposed first amended complaint—which the district court rejected as untimely—includes the same jurisdictional facts. So the district court's rejection of the amended filing does not impact our analysis.

non-jurisdictional grounds without first establishing subject-matter or personal jurisdiction). A dismissal is a dismissal.

And here, the district court validly dismissed Gilmore-Webster's amended complaint as untimely. The district court ordered him to file that pleading by August 26. Gilmore-Webster postmarked it on August 26, and it reached the district court clerk the following day. That made it one day late. *See* FED. R. CIV. P. 5(d)(2)(A) (a paper not filed electronically is "filed" when it is received by the clerk).

Gilmore-Webster makes two attempts to avoid this result. Neither has merit.

First, he argues that he should get the benefit of the prison-mailbox rule. *See* FED. R. APP. P. 4(c)(1). That rule deems prisoners' filings "filed" when they are deposited in the prison-mail system. But as its name signifies, the prison-mailbox rule applies to *imprisoned* filers. It does not apply to *pro se* plaintiffs like Gilmore-Webster.

Second, he argues that the deadline for filing his amended complaint should have been extended under Federal Rule of Civil Procedure 60(a). The district court gave Gilmore-Webster 21 days to file his amended complaint in an order dated August 5. Gilmore-Webster argues, however, that the clerk delayed mailing that order until August 22 and that he did not receive it until August 26—the due date for the amended complaint. All of this, Gilmore-Webster contends, is fixable under Rule 60(a).

Under Federal Rule of Civil Procedure 60(a), a "court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." FED. R. CIV. P. 60(a). Rule 60(a) allows an appellate court to "correct errors, created by mistake, oversight, or omission, that cause the record or judgment to fail to reflect what was intended." *Warner v. City of Bay St. Louis*, 526 F.2d 1211,

1212 (5th Cir. 1976). Such a mistake must be "merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature." *Dura-Wood Treating Co. v. Century Forest Indus., Inc.*, 694 F.2d 112, 114 (5th Cir. 1982).

We've repeatedly denied Rule 60(a) relief when the errors at issue were substantive, not clerical. For example, in *Britt v. Whitmire*, we concluded Rule 60(a) did not apply when the district court purported to rule on a *partial* summary judgment motion—rather than a summary judgment motion to resolve all claims—because altering the judgment required "more than a mere correction of a clerical error by the district court" and would "clearly affect[] substantial rights of the parties." 956 F.2d 509, 515 (5th Cir. 1992). Likewise, in *Jones v. Anderson-Tully Co.*, we denied Rule 60(a) relief when the district court incorrectly described the boundary line of a plot of land because "[t]he mistake . . . affect[ed] the substantive rights of the parties . . . [and] [wa]s not clerical." 722 F.2d 211, 212–13 (5th Cir. 1984) (per curiam). And in *Warner v. City of Bay St. Louis*, we concluded Rule 60(a) did not apply when the district court entered an incorrect interest rate because "there [wa]s no allegation that this error [wa]s a typographical or transcribing mistake, or the mistake was an inadvertent one." 526 F.2d at 1212.

Rule 60(a) plainly does not apply here. Whatever else might be said about service of the district court's August 5 order, it was not a clerical error.

IV.

Finally, Gilmore-Webster argues that the case never should have left California in the first place. Liberally construing Gilmore-Webster's brief, he challenges the California court's decision to transfer the case to Texas. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (stating that courts hold *pro se* filings to "less stringent standards than formal pleadings drafted by lawyers").

We have no jurisdiction to consider that argument. If Gilmore-Webster had asked the federal district court in Texas to retransfer the case to California, we would have jurisdiction to review the Texas district court's decision. *See, e.g.*, CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3855 (4th ed.) [WRIGHT & MILLER]; *Ecker v. United States*, 575 F.3d 70, 76 (1st Cir. 2009). Here, however, Gilmore-Webster never challenged the transfer in Texas. Instead, he asks us to review the *California* district court's decision—and that we cannot do. We "lack jurisdiction to hear appeals challenging venue transfer orders issued by district courts in other circuits." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Am. Eurocopter Corp.*, 692 F.3d 405, 407 (5th Cir. 2012); *accord* 15 WRIGHT & MILLER § 3855 ("[T]he court of appeals in the circuit of the transferee court cannot review the action of the transferor court.").

AFFIRMED.