FILED
United States Court of Appeals
Tenth Circuit

July 11, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RODGER BLANCO,

Plaintiff - Appellant,

v.

FEDERAL EXPRESS CORPORATION, d/b/a FedEx Express, a foreign corporation,

Defendant - Appellee,

and

JUSTIN DIGBY, an individual; MATTHEW WAINER an individual,

Defendants.

No. 17-6212
(D.C. No. 5:16-CV-00561-C)
(W.D. Oklahoma)

ORDER AND JUDGMENT*

Before **MATHESON**, **McHUGH**, and **EID**, Circuit Judges.

In 2014 a FedEx employee stole about $380,000 worth of gold coins and gold bars from a package entrusted to FedEx for delivery. Almost two years later, the sender, Rodger Blanco, sued FedEx for negligent investigation and conversion. FedEx moved for summary judgment, which the district court granted principally because the contract of

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

carriage required Mr. Blanco to file suit within one year. In the alternative, the district court held that (a) Mr. Blanco's state-law claims were preempted by the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. §§ 1301, et seq., and (b) his conversion claim, even if timely, failed on the merits.

Mr. Blanco now appeals. Because we agree that Mr. Blanco's claims are time-barred, we affirm the district court's judgment on that basis alone and decline to reach either of the alternative grounds presented.

I. BACKGROUND

On May 9, 2014, Mr. Blanco dropped off a package containing 300 ounces of gold coins and gold bars at a FedEx[1] post in Redmond, Washington, for overnight delivery to a recipient in Oklahoma. The package made it intact only so far as FedEx's shipping facility in Oklahoma City, where a FedEx employee named Justin Digby ripped open the package and stole its contents. Months later, upon questioning from the United States Secret Service, Mr. Digby confessed to stealing Mr. Blanco's gold. Mr. Digby pleaded guilty to federal criminal charges and has since completed a term of incarceration in federal prison.

Although the package's contents were evidently worth hundreds of thousands of dollars, the airbill memorializing the shipment notes a declared value of just $1000. It is undisputed that the airbill and the FedEx Service Guide, which the airbill incorporates by

[1] "FedEx" is shorthand for the defendant-appellee Federal Express Corporation, an all-cargo air carrier operating under a certificate of authority granted by the U.S. Department of Transportation through the Federal Aviation Administration.

reference, together constitute the contract of carriage between Mr. Blanco and FedEx. Among other things, the FedEx Service Guide includes a provision extinguishing "any cause of action arising from the transportation of any package" if not filed within one year from the date of delivery of the shipment or from the date on which the shipment should have been delivered. Appellant's App'x at 120. Mr. Blanco's package should have been delivered on May 12, 2014, and Mr. Blanco did not file this action until April 19, 2016, more than a year later.

Mr. Blanco alleges two causes of action against FedEx: common-law negligent investigation and common-law conversion.[2] As for negligent investigation, Mr. Blanco alleges FedEx voluntarily undertook an investigation into his claim for lost or stolen goods. By voluntarily undertaking that investigation, FedEx allegedly owed a duty of care to Mr. Blanco, a duty FedEx breached "in conducting a slothful, incompetent investigation." Appellant's App'x at 194, ¶ 32. As for conversion, Mr. Blanco alleges that FedEx became liable for its employees' theft by ratifying their conduct, which it did by "imped[ing]" a criminal investigation, "or refus[ing] to share the information from [its own] investigation with law enforcement." Appellant's Br. 15. The district court granted summary judgment for FedEx, holding that Mr. Blanco's claims are subject to the contractual time bar and, in the alternative, preempted by the ADA, at least to the extent his claims arise under state law. *Blanco v. Fed. Express Corp.*, No. CIV-16-561-C, 2017

[2] Mr. Blanco's complaint also brought conversion claims against Mr. Digby and Matthew Wainer, another FedEx employee. Those claims are not before us on appeal. *See infra*, Part II.

WL 3496458, at *2 (W.D. Okla. Aug. 15, 2017). As a further alternative basis for its holding, the district court analyzed the merits of Mr. Blanco's conversion claim under federal common law, ultimately concluding that it failed as a matter of law. *Id.* at *3. The district court determined that the conversion claim, even if timely, would have been dismissed for failure to allege a "true conversion, i.e., where the carrier has appropriated the property for its own use or gain." *Id.* The district court did not opine on the merits of the negligent-investigation claim.

II. JURISDICTION

Our jurisdiction to hear this case was not initially clear due to a question about the finality of the district court's order.[3] In addition to his claims against FedEx, Mr. Blanco in the same complaint also brought claims against two of FedEx's former employees. *See supra*, note 2. Immediately prior to entering final judgment in favor of FedEx, the district court entered an order dismissing the individual defendants without prejudice. "As a general rule, we will not allow parties to manufacture finality by obtaining a voluntary dismissal without prejudice of some claims so that others may be appealed." *Spring Creek Expl. & Prod. Co. v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1015 (10th Cir. 2018) (internal quotation marks omitted). The individual defendants were dismissed without prejudice pursuant to different provisions of the Federal Rules of Civil Procedure. Mr. Digby's dismissal came about through Rule 41(a)(2); for Mr. Wainer, it was Rule 4(m). The latter rule provides that the court "must dismiss the action without

[3] Under 28 U.S.C. § 1291, our jurisdiction is limited to appeals from "final decisions" of the district courts in our circuit.

prejudice against" any defendant not served within ninety days after a complaint is filed "or order that service be made within a specified time." Because Mr. Wainer was never served, he is not a party to this case and his dismissal without prejudice does not defeat finality. *See Raiser v. Utah Cty.*, 409 F.3d 1243, 1245 n.2 (10th Cir. 2005); *Bristol v. Fibreboard Corp.*, 789 F.2d 846, 847 (10th Cir. 1986).

As to Mr. Digby, things were more complicated. We have said that a plaintiff's "efforts to seek review of without-prejudice dismissals under Rule 41(a)(2) raise issues of non-aggrievement and non-finality that generally bar appellate jurisdiction." *Brown v. Baeke*, 413 F.3d 1121, 1123 n.3 (10th Cir. 2005). "Because such a plaintiff may reinstate his action regardless of the decision of the appellate court, permitting an appeal is clearly an end-run around the final judgment rule." *Palmieri v. Defaria*, 88 F.3d 136, 140 (2d Cir. 1996). Of course, Mr. Blanco did not appeal the Rule 41(a)(2) dismissal as to Mr. Digby. He appealed only the district court's grant of summary judgment to FedEx. Under Federal Rule of Civil Procedure 54(b), when multiple parties are involved the district court may direct entry of final judgment as to one party (say, FedEx) but not another (say, Mr. Digby) so long as there is no just reason for delay. "Otherwise, any order or other decision, *however designated*, that adjudicates . . . the rights and liabilities of fewer than all the parties does not end the action as to any of the . . . parties . . . ." Fed. R. Civ. P. 54(b) (emphasis added). The district court in this case did not avail itself of Rule 54(b); instead, it entered a one-sentence judgment on behalf of FedEx and against Mr. Blanco without any elaboration.

After oral argument, we remanded this case to the district court for Mr. Blanco to obtain an order from the district court that can be considered a final decision. The district court has since entered a judgment dismissing Mr. Digby with prejudice, removing any question as to finality. Satisfied that we have jurisdiction under 28 U.S.C. § 1291, we now proceed to the merits.

III. ANALYSIS

A. *Standard of Review*

"We review the district court's summary judgment decision de novo, applying the same standards as the district court." *Punt v. Kelly Servs.*, 862 F.3d 1040, 1046 (10th Cir. 2017). Summary judgment is warranted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

B. *Discussion*

The district court determined that Mr. Blanco's claims were barred by the contract of carriage, which incorporated by reference a one-year limitations period contained within FedEx's Service Guide. Our review on appeal is narrow. Mr. Blanco does not dispute that the FedEx Service Guide is part of the contract governing his shipment. Nor does he dispute that its limitations clause is enforceable and applicable to any claims arising out of that contract. Mr. Blanco contests only the district court's conclusion that his claims in fact "arose from the transportation (or lack thereof) of Plaintiff's package." *Blanco*, 2017 WL 3496458, at *2.

In evaluating whether Mr. Blanco's claims are covered by the contract's limitations clause, we start with the text of that provision:

> Limitations on Legal Actions.
>
> > Any right you might have to damages, refunds, credits, recovery of reliance interests, disgorgement, restitution, injunctive relief, declaratory relief or any other legal or equitable relief whatsoever against us under any cause of action arising from the transportation of any package pursuant to the FedEx Service Guide shall be extinguished unless you file an action within one year from the date of delivery of the shipment or from the date on which the shipment should have been delivered.

Appellant's App'x at 120. That language is expansive. It mandates that "[a]ny right . . . under any cause of action . . . shall be extinguished" if not pursued within one year of the date of delivery or the date on which the shipment should have been delivered, which the parties agree is May 12, 2014. The limitations period, however, is circumscribed in one respect: it covers only those causes of action which "aris[e] from the transportation of a[ ] package." Thus, by the contract's plain terms, Mr. Blanco's suit is untimely to the extent it "aris[es] from the transportation" of his package. Whether Mr. Blanco's claims "aris[e] from the transportation" of his package is accordingly the critical question we must now decide.

The contract does not define "arising," so we use its ordinary or dictionary definition. *See, e.g.*, *Logan Cty. Conservation Dist. v. Pleasant Oaks Homeowners Ass'n*, 374 P.3d 755, 762 (Okla. 2016) ("Words must be viewed in the context of the contract and must be given their plain ordinary meaning." (internal quotation marks and alteration

omitted)).[4] In relevant part, the Oxford English Dictionary defines "arise" as: "Of circumstances viewed as results: To spring, originate, or result *from* (*of obsolete*)." *Arise*, Oxford English Dictionary, http://www.oed.com/view/Entry/10739 (last visited July 10, 2018). Black's Law Dictionary adds: "To originate; to stem (from) <a federal claim arising under the U.S. Constitution>." *Arise*, Black's Law Dictionary (10th ed. 2014).

Both dictionaries use the word "originate," suggesting the limitations clause should be interpreted to reach any and all causes of action Mr. Blanco might have against FedEx, no matter how remote from the transportation of his package, so long as the cause of action can in some way trace its origins to that event. That origin-based interpretation of "arising from" is in accord with the district court's analysis, which employed a simple and straightforward but-for test. *See Blanco*, 2017 WL 3496458, at *2 ("[B]ut for FedEx transporting the shipment of gold, Plaintiff would not have a claim for negligent investigation or conversion. Accordingly, Plaintiff's claims are time-barred and the claims against FedEx must be dismissed."). We do not decide whether the district court's but-for test is sufficient for all cases. Some causes of action may be so remote from the transportation of a package that they would not "aris[e] from the transportation of a[ ] package," even if in some attenuated sense the transportation of a package is a factual predicate without which the cause of action would not exist. Wherever the line is to be

[4] The parties disagree on the substantive law governing Mr. Blanco's claims. Mr. Blanco argues for Oklahoma common law; FedEx argues for federal common law. We need not decide. Instead, we will assume for purposes of analysis that the substantive law of Oklahoma applies, as Mr. Blanco urges. Because Mr. Blanco's claims fail under his preferred choice of law, we need not consider whether the result would differ under federal common law.

drawn, however, we have little difficulty concluding that the causes of action alleged here did arise from the transportation of Mr. Blanco's gold coins and gold bars. Mr. Blanco's claim, in essence, is that he entrusted a package to FedEx, the package was stolen, and then FedEx conducted a negligent investigation into the theft, thereby impeding a criminal investigation and making FedEx liable for conversion. In our judgment these claims can be fairly said to "aris[e] from the transportation of a[ ] package." That means they are covered by the contract of carriage's limitations period. Because there is no dispute that Mr. Blanco's claims were filed outside the time provided by contract, we conclude the district court was correct to grant summary judgment in favor of FedEx.

On appeal, Mr. Blanco argues the district court's analysis was contrary to ordinary principles of contract construction. But Mr. Blanco exhibits little interest in applying such ordinary contract principles himself. Rather than referring us to anything in the contract that might limit its scope, Mr. Blanco cites *Magnus Electronics, Inc. v. Royal Bank of Canada*, 611 F. Supp. 436, 440 (N.D. Ill. 1985), a case that interpreted the meaning of "transportation by air" as that phrase was used in the Warsaw Convention of 1929. The contractual language at issue here does not use the phrase "transportation by air" or involve the Warsaw Convention, and so *Magnus* is no aid in our quest to interpret the scope of the limitations clause to which Mr. Blanco and FedEx agreed.

Mr. Blanco also argues "the facts show that once [Mr. Digby] had stolen the [package], FedEx no longer had actual or constructive possession" of Mr. Blanco's property. Appellant's Br. 6. From that fact, Mr. Blanco concludes that his claims based on FedEx's "post-loss conduct . . . do not arise from FedEx's air transport of those

goods." *Id.* We are not persuaded. Put simply, FedEx need not have continuously possessed Mr. Blanco's package in order for Mr. Blanco's claims to "aris[e] from the transportation of [that] package." His claim, again, is that he entrusted a package to FedEx, the package was stolen, and then FedEx conducted a negligent investigation into the theft, thereby impeding a criminal investigation and making FedEx liable for conversion. These claims "aris[e] from the transportation of a[ ] package," regardless of when the package was stolen and FedEx's possession of it ceased.

IV. CONCLUSION

For the above reasons, we AFFIRM the district court's judgment on the basis that Mr. Blanco's claims were contractually time-barred. Because of our disposition, we need not and do not opine on the claims' underlying merits or whether they are preempted by federal law.

Entered for the Court

Carolyn B. McHugh
Circuit Judge