

August 22, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ERIC DRAKE,

Plaintiff - Appellant,

v.

SOMETIME SPOUSE, LLC,

Defendant - Appellee.

No. 19-6011
(D.C. No. 5:18-CV-00296-R)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **BRISCOE, McHUGH**, and **MORITZ**, Circuit Judges.

Plaintiff Eric Drake, appearing pro se, appeals from the district court's denial of his motion for default judgment, and from the district court's order dismissing his complaint pursuant to 28 U.S.C. § 1915(e)(2)(B). Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

On April 2, 2018, Drake initiated this action by filing a motion for leave to proceed in forma pauperis and a pro se civil complaint naming Sometime Spouse LLC (Sometime Spouse) as a defendant. The complaint alleged that Drake hired Sometime Spouse to paint 286 spindles, but that Sometime Spouse failed to paint the spindles in a professional fashion or to return the spindles to Drake upon request. Count One of the complaint alleged violations of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 41 et seq., and the Lanham Act, 15 U.S.C. § 1125. Count Two alleged deceptive and unfair trade practices under Oklahoma state law, as well as violations of the FTC Act. Counts Three through Eleven alleged various causes of action under Oklahoma state law, including fraud, negligence, and breach of implied contract. Count Twelve alleged a violation of 42 U.S.C. § 1981. Lastly, the complaint included a final, non-enumerated cause of action for intentional infliction of emotional distress.

The district court granted Drake's motion for leave to proceed in forma pauperis on April 5, 2018.

On July 23, 2018, Drake filed a motion for default judgment. The motion alleged that Sometime Spouse "failed to file a timely answer after being properly, promptly, and timely served." Dist. Ct. Docket No. 11 at 1.

On January 9, 2019, the district court issued an order denying Drake's motion for default judgment and dismissing the complaint in its entirety. The order noted that the district court had reviewed the complaint pursuant to 28 U.S.C.

§ 1915(e)(2)(B) “to determine whether any of the claims [we]re frivolous or malicious, fail[ed] to state a claim on which relief [could] be granted, or s[ought] monetary relief against a defendant who [wa]s immune from such relief.” Dist. Ct. Docket No. 14 at 1. The order in turn concluded that Drake’s “federal claims [could not] survive screening.” Id. More specifically, the order concluded that “[n]o private right of action exists under the [FTC] Act,” and that Drake’s Lanham Act claim failed because he was “a highly dissatisfied customer of Sometime[] Spouse, not a competitor suffering unfair competition due to Defendant’s trade practices.” Id. at 2. As for the § 1981 claim, the district court concluded that, although the complaint alleged that Drake was African American, it did not allege that Sometime Spouse “intended to discriminate against him or that any such discrimination interfered with a protected activity.” Id. at 3. The district court also declined to exercise supplemental jurisdiction over Drake’s state law claims. Finally, in a lengthy footnote on the last page of its order, the district court noted that Drake had previously filed two nearly identical actions against Sometime Spouse, the first in the United States District Court for the Western District of Texas and the second in the United States District Court for the District of New Mexico. The district court noted that the first action was dismissed for want of prosecution and that Drake voluntarily dismissed the second action. The district court concluded that, in light of these prior filings, Drake’s “filing of this action . . . was not in good faith and was frivolous.” Id. at 4 n.1. Consequently, the district court “revoke[d] his in forma pauperis status”

and directed that he “be required to pay the full appeal fee should he choose to appeal.” Id.

The district court entered judgment the same day. Drake has since filed a timely notice of appeal. He has also filed a motion with this court seeking leave to proceed on appeal in forma pauperis.

II

Where, as here, a plaintiff was allowed by the district court to proceed in forma pauperis, his complaint is governed by the requirements of 28 U.S.C. § 1915. Section 1915(e)(2)(B) requires a district court to “dismiss the case at any time if the court determines,” in pertinent part, “that . . . the action . . . fails to state a claim on which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

We review de novo a district court’s order dismissing a complaint under § 1915(e)(2)(B)(ii) for failure to state a claim on which relief may be granted. See Kay v. Bemis, 500 F.3d 1214, 1217 (10th Cir. 2007). In considering the dismissal of a complaint pursuant to § 1915(e)(2)(B)(ii), “[w]e employ the same standard of review . . . that we employ for Federal Rule of Civil Procedure 12(b)(6) motions to dismiss for failure to state a claim.” Kay, 500 F.3d at 1217. “In particular, we look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief.” Id. at 1218 (quotation marks omitted). Further, when dealing with a pro se complaint, we must construe the allegations in the complaint liberally. Id.

Having carefully examined and liberally construed Drake’s pro se complaint, we agree with the district court that the complaint fails to state valid claims for relief under the FTC Act, the Lanham Act, or § 1981. The district court correctly ruled that there is no private right of action under the FTC Act. See Am. Airlines v. Christensen, 967 F.2d 410, 414 (10th Cir. 1992). The district court also correctly concluded that the Lanham Act protects competitors rather than “deceived consumer[s],” and that Drake, as a consumer who allegedly purchased services from Sometime Spouse, failed to allege a claim for which relief could be granted under the Lanham Act. Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 137 (2014). Lastly, § 1981 provides that “all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a). As the district court correctly noted, Drake’s complaint quite clearly alleged that “he is African American,” but otherwise failed to allege that Sometime Spouse “intended to discriminate against him or that any such discrimination interfered with a protected activity.” Dist. Ct. Docket No. 14 at 2–3. Instead, the complaint alleged only that the president of Sometime Spouse made a racially disparaging comment when Drake threatened to file suit. We agree with the district court that this allegation is insufficient to state a claim for relief under § 1981.

We also conclude that the district court did not abuse its discretion in refusing to exercise supplemental jurisdiction over Drake’s state law claims. See Koch v. City of Del City, 660 F.3d 1228, 1248 (10th Cir. 2011) (outlining standard of review). A district court “may decline to exercise supplemental jurisdiction over a”

state claim “if . . . the district court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). Consistent with this statutory language, we have stated that “[w]hen all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims.” Smith v. City of Enid ex rel. Enid City Comm’n, 149 F.3d 1151, 1156 (10th Cir. 1998). The district court was aware of these authorities and acted accordingly. The district court did not err in declining to exercise supplemental jurisdiction over Drake’s state law claims.

Finally, we conclude that the district court did not err in finding that Drake’s filing of this action was “not in good faith and was frivolous,” and in turn revoking his in forma pauperis status. Dist. Ct. Docket No. 14 at 4 n.1.

The judgment of the district court is AFFIRMED. Drake’s motion for leave to proceed on appeal in forma pauperis is DENIED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge