FILED
United States Court of Appeals
Tenth Circuit

October 15, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CFP ACQUISITIONS, INC.,

Plaintiff - Appellant,

v.

C. DAVID RHOADES, solely in his capacity as Receiver in the Receivership Estates of Lees Specialty Compounding, LLC, The Apothecary Shoppe, LLC, The Apothecary Shoppe of B.A., LLC, Getman-Apothecary Shoppe, LLC, and Lees Specialty Compounding, Inc.; FIFTH THIRD BANK, an Ohio banking corporation,

Defendants - Appellees.

No. 20-5073
(D.C. No. 4:18-CV-00602-TCK-JFJ)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **PHILLIPS**, and **CARSON**, Circuit Judges.

CFP Acquisitions, Inc. ("CFP"), appeals the district court's dismissal of its amended complaint against Fifth Third Bank, N.A. (the "Bank"), and C. David Rhoades in his capacity as receiver. The dispute concerns interests in Oklahoma pharmacies and the non-enforcement of covenants not to compete.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

CFP purchased interests in five Oklahoma pharmacies from the Bank through a receivership sale facilitated by Mr. Rhoades.[1] Although the proposed sale initially included the assignment of covenants not to compete with other pharmacies, the final agreement did not include these covenants. Mr. Rhoades and CFP then agreed that CFP could pay Mr. Rhoades to enforce the covenants.

After two pharmacies subject to the covenants violated them, CFP requested Mr. Rhoades to enforce the covenants on CFP's behalf. When he failed to do so, CFP brought breach-of-contract, equitable, and tort claims against the Bank and Mr. Rhoades. CFP never alleged that it made arrangements to pay Mr. Rhoades.

The district court dismissed CFP's amended complaint and denied its request to amend. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *The Receivership Suit*

The Bank loaned over $13 million to retain a secured interest in five Oklahoma pharmacies. Among the pharmacies' assets were covenants not to compete with pharmacies owned by LJS Holdings, Inc., and LJS's shareholders (the "Lees Parties"). In 2015, the Bank filed a receivership suit in federal court after the pharmacies defaulted on their loans.

[1] CFP was assigned the rights at issue by Marcain Properties, LLC ("Marcain"), after Marcain purchased the assets from the Bank. For ease of understanding, we refer to CFP throughout this order and judgment even though Marcain may have been the relevant actor at that time.

To facilitate the sale of the assets, the district court appointed Mr. Rhoades as the receiver. In this capacity, he negotiated a sale of the assets to CFP. The initial sale was memorialized in an asset purchase agreement (the "APA"). Among the assets to be sold were the covenants not to compete with the Lees Parties. The Bank and Mr. Rhoades filed a joint motion before the court to approve the sale.

The Lees Parties intervened in the receivership suit to object to the transfer of the covenants. A magistrate judge held a hearing to address the Lees Parties' objection and whether to approve the sale of the assets. During the hearing, the Bank's counsel informed the magistrate judge that it had decided not to assign the covenants, and the Lees Parties withdrew their objection to the sale.

The magistrate judge then submitted a report and recommendation to the district judge. It specified that the covenants would be excluded from the assets to be sold. The district judge accepted the report and recommendation and granted the motion to sell the assets. On May 6, 2016, the parties closed the sale, and CFP paid the $2.35 million purchase price.

B. *The Transition Services Agreement*

After the court approved the sale—but before the closing—Mr. Rhoades and CFP exchanged several messages regarding the covenants. Mr. Rhoades told CFP that it could engage him "to provide some consulting services . . . that should keep the non-competes in force." App. at 60 ¶ 19. The Bank's counsel then sent Mr. Rhoades an agreement that would "include the transition services part." *Id.* Mr. Rhoades forwarded the Transition Services Agreement (the "TSA") to CFP.

CFP then wrote Mr. Rhoades to emphasize the importance of the covenants, because without them, CFP would be buying "a lot of nothing." *Id.* at 60-61 ¶ 20. Mr. Rhoades wrote back and quoted the Bank's lawyers as stating that if the "[TSA] is in place . . . the estate needs to remain open for the receiver to complete his obligations under the TSA. As a result, the membership interest purchase agreement (which contain[s] the non-compete) remains in full force and effect . . . ." *Id.*[2]

Mr. Rhoades also wrote to the Bank regarding enforcement of the covenants. He explained that "[CFP] will sign the TSA," and "[i]f there is a challenge to the [Restrictive Covenants], then we will defend that." *Id.* at 61 ¶ 22 (emphasis removed).

On the same day as the closing, May 6, 2016, CFP and Mr. Rhoades signed the TSA. In pertinent part, the TSA provided that Mr. Rhoades, acting in his capacity as receiver:

> [S]hall provide services requested by [CFP] as necessary or desirable for the operation of the Pharmacies (the "Transition Services"). Notwithstanding the foregoing, the [receiver] shall not be required to incur any liabilities on behalf of [CFP] or act as agent for [CFP] unless specifically agreed to by the Parties in writing. . . . Prior to each request for Transition Services, [CFP] and the [receiver] shall agree, in writing, to the fees [CFP] shall pay the [receiver] for such Transition Services and a payment schedule for such fees to be paid on a monthly basis.

[2] The membership interest purchase agreement, signed by the Lees Parties and the pharmacies before the initiation of the receivership suit, contained the covenants not to compete.

Id. at 102.[3] As reflected in the quoted passage, CFP was expected to agree in writing with Mr. Rhoades before requesting any transition services, which included the enforcement of the restrictive covenants. *See id.* at 60 ¶ 19.

C. ***The District Court Proceedings***

When two pharmacies subject to the covenants began to violate them, CFP requested that Mr. Rhoades enforce the covenants on its behalf. After Mr. Rhoades failed to do so, CFP filed a petition against him and the Bank in state court. The Bank removed the case to federal district court based on diversity jurisdiction. CFP then amended its complaint.

The amended complaint brought claims for (1) breach of express and implied contract arising from the Bank's and Mr. Rhoades's failure to enforce the covenants; (2) equitable claims for estoppel, quasi-contract, and reformation based on the failure to enforce the covenants; and (3) tort claims for fraud, constructive fraud, and negligent misrepresentation, based on the Defendants' alleged misrepresentations regarding the enforceability of the covenants and the arrangements made to enforce the covenants.

The Bank moved to dismiss CFP's amended complaint under Federal Rule of Civil Procedure 12(b)(6). The district court construed the motion as filed on behalf of both the Bank and Mr. Rhoades. In its opposition, CFP said that "[i]f the allegations supporting CFP's claims stated in the [amended complaint] are to any extent infirm, CFP

[3] Also that day, Marcain received written permission from Mr. Rhoades to assign its interests in the pharmacies to CFP. App. at 163.

should be given leave to amend." App. at 140. After the Bank filed its reply, CFP moved to file a supplemental response, which it attached.

The district court dismissed all claims against both Defendants. CFP timely appealed.

II. **DISCUSSION**

CFP appeals the district court's (A) dismissal of its claims and (B) failure to address its motion to file a supplemental response opposing the motion to dismiss and its request to amend its complaint.

A. ***Rule 12(b)(6) Dismissal of the Amended Complaint***

We review de novo the dismissal of a complaint under Rule 12(b)(6). *Mayfield v. Bethards*, 826 F.3d 1252, 1255 (10th Cir. 2016). "We accept all well-pleaded factual allegations in the complaint as true, and we view them in the light most favorable to the nonmoving party." *Sinclair Wyo. Refin. Co. v. A&B Builders, Ltd.*, 989 F.3d 747, 765 (10th Cir. 2021) (quotations and alterations omitted). To survive a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Ordinarily, we consider "only the contents of the complaint when ruling on a 12(b)(6) motion." *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013).

But we will consider "documents incorporated by reference in the complaint [and] documents referred to in and central to the complaint, when no party disputes [their] authenticity." *Id.*

"[W]e may affirm the judgment on any ground supported by the record" as long as the plaintiff "had a fair opportunity to address that ground." *Nakkhumpun v. Taylor*, 782 F.3d 1142, 1157 (10th Cir. 2015).

"In diversity cases, the *Erie* doctrine instructs that federal courts must apply state substantive law." *Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152, 1162 (10th Cir. 2017). We therefore apply Oklahoma law to CFP's claims.

1. **CFP's Contractual Claims**

CFP brought breach-of-express-contract and breach-of-implied-contract claims against both the Bank and Mr. Rhoades.

a. *Breach of express contract*

To state a breach-of-contract claim, a plaintiff must allege "(1) formation of a contract; (2) breach of the contract; and (3) damages as a result of that breach." *Morgan v. State Farm Auto. Ins. Co.*, 488 P.3d 743, 748 (Okla. 2021).

The district court dismissed the breach-of-express-contract claim against the Bank because the amended complaint failed to allege the existence of an express contract between CFP and the Bank. The court also dismissed the claim as to Mr. Rhoades because the amended complaint failed to allege that Mr. Rhoades gave his written consent to assign the rights to CFP. CFP does not challenge the district court's dismissal

of its breach-of-express-contract claim against the Bank, Aplt. Br. at 18 n.10; Aplt. Reply Br. at 3, so we address only the claim against Mr. Rhoades.

CFP argues that the district court erred in dismissing its claim against Mr. Rhoades because it did not allege, as the court assumed, that Mr. Rhoades gave his written consent to the assignment of the rights to CFP. We affirm dismissal on the alternative ground that the amended complaint failed to allege there was a breach.

CFP failed to allege the second (breach) element. The TSA outlined how CFP could enlist Mr. Rhoades to enforce the covenants. It said that Mr. Rhoades would "provide services required by [CFP] as necessary or desirable for the operation of the Pharmacies." App. at 41. To trigger these services, CFP had to "agree, in writing, to the fees [CFP] shall pay [Mr. Rhoades] for such Transition Services and a payment schedule for such fees to be paid on a monthly basis" "[p]rior to each request for Transition Services." *Id.*

CFP did not allege that CFP and Mr. Rhoades agreed to a fee schedule in writing to enforce the covenants. Without this agreement to a fee schedule, Mr. Rhoades was not obligated to provide transition services, including enforcement of the covenants. Thus, CFP failed to allege a breach of contract by Mr. Rhoades.[4]

[4] In its reply, CFP doubts whether the TSA contemplated that enforcing the covenants was a transition service. Aplt. Reply Br. at 13. But CFP's amended complaint alleged that Mr. Rhoades told CFP's representatives that "[CFP] would engage myself and the Defendants to provide some consulting services . . . that should keep the non-competes in force." App. at 60 ¶ 19. The amended complaint then alleged that the Bank's counsel "transmit[ted] to [Mr. Rhoades] an agreement 'to include the transition services part.'" *Id.*

b. *Breach of implied contract*

In Oklahoma, an implied contract exists where the "existence and terms . . . are manifested by conduct." 15 Okla. Stat. § 133. "What distinguishes an implied contract from an express contract is the mode of its proof." *Dixon v. Bhuiyan*, 10 P.3d 888, 891 (Okla. 2000). Unlike express contracts, which are "evidenced by direct evidence of an actual agreement," implied contracts are "deduced from disclosed circumstances as well as the parties' relations." *Id.*

The district court dismissed CFP's breach-of-implied-contract claim against the Bank after concluding that CFP had not pled facts showing the existence of an implied contract. On appeal, CFP argues that under Oklahoma law, the existence of an implied contract is a factual question for a jury to decide. Aplt. Br. at 22-23. We again affirm on an alternative ground.[5]

Even assuming an implied contract existed between CFP and the Bank, CFP's claim fails for the same reason that its express contract claim against Mr. Rhoades fails—there was no breach. As alleged in CFP's amended complaint, Mr. Rhoades told CFP that the means by which CFP could request the enforcement of the covenants "was 'functionally approved' by [the Bank's counsel] and that [the Bank's counsel] was drafting [the TSA] to structure and implement this process." App. at 60 ¶ 19. So if the

[5] To the extent that CFP attempted to allege a breach-of-implied contract by Mr. Rhoades, that claim fails due to the existence of a written agreement governing their relationship—the TSA. *See Jones v. Univ. of Central Okla.*, 910 P.2d 987, 990 (Okla. 1995).

parties had agreed to an implied contract to enforce the covenants, its implementation terms were ultimately set forth in the TSA. Specifically, if CFP wanted to have the covenants enforced, it must first agree in writing to a fee schedule with Mr. Rhoades, who would then enforce the covenants as part of his transition services. The Bank provided the enforcement mechanism it agreed to provide and did not breach any agreement. We therefore affirm the district court's dismissal of CFP's implied contract claim against the Bank.

2. **CFP's Equitable Claims**

CFP also appeals the district court's dismissal of its quasi-contract, equitable and promissory estoppel, and reformation claims.

The district court dismissed CFP's equitable claims after determining that the agreement between Mr. Rhoades and CFP—the TSA—barred CFP from bringing equitable claims against Mr. Rhoades and the Bank. We affirm on the alternative ground that the amended complaint failed to allege at least one element of each claim.

a. *Quasi-contract*

Under Oklahoma law, a quasi-contract "is an implication of law . . . . imposed in order to adapt the case to a given remedy." *T & S Inv. Co. v. Coury*, 593 P.2d 503, 504 (Okla. 1979). A quasi-contract "is an obligation implied by law." *Welling v. American Roofing & Sheet Metal Co., Inc.*, 617 P.2d 206, 209 (Okla. 1980). It does not arise from the parties' agreement. *See First Nat'l Bank of Okmulgee v. Matlock*, 226 P. 328, 331 (Okla. 1924). To allege quasi-contract, a plaintiff must show (1) a benefit conferred upon the defendant by the plaintiff, (2) appreciation of the benefit by the defendant, and (3)

acceptance and retention by the defendant of the benefit under such circumstances that it would be inequitable to retain it without paying the value thereof. Okla. Unif. Jury Inst. § 23.10; *see also Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1035 (Okla. 2006).

The district court dismissed CFP's quasi-contract claim against the Bank by relying on the existence of the TSA governing CFP's relations with Mr. Rhoades. CFP urges that the court erred.

We affirm on the alternative ground that CFP's amended complaint failed to allege that the Bank received a benefit without compensating CFP. CFP agreed to purchase the assets without the covenants so long as there was a mechanism to enforce the covenants. The Bank and Mr. Rhoades provided the mechanism in the TSA, which called for CFP to agree in writing to a fee schedule with Mr. Rhoades. In turn, Mr. Rhoades would enforce the covenants. CFP thus received a benefit for foregoing the assignment of the covenants and has not alleged a quasi-contract claim.

b. *Estoppel*

To bring an equitable estoppel claim under Oklahoma law, a plaintiff must allege (1) "a false representation or concealment of facts;" (2) "made with actual or constructive knowledge of the real facts;" (3) "the party to whom it was made must have been without knowledge, or the means of discovering the real facts;" (4) the representation "must have been made with the intention that it should be acted upon;" and (5) "the party to whom it was made relied on, or acted upon it to his or her detriment." *Sullivan v. Buckhorn Ranch P'ship*, 119 P.3d 192, 202 (Okla. 2005). Similarly, to claim promissory estoppel, a

plaintiff must allege "(1) a clear and unambiguous promise, (2) foreseeability by the promisor that the promisee would rely upon it, (3) reasonable reliance upon the promise to the promisee's detriment and (4) hardship or unfairness can be avoided only by the promise's enforcement." *Russell v. Bd. of Cnty. Com'rs*, 952 P.2d 492, 503 (Okla. 1997).

As with its quasi-contract claim, CFP argues that the existence of its TSA contract with Mr. Rhoades does not foreclose it from bringing estoppel claims against the Bank. Aplt. Br. at 31. Again though, CFP did not allege a necessary element for either promissory or equitable estoppel—that it relied on a statement by the Bank or Mr. Rhoades to its detriment. *See Sullivan*, 119 P.3d at 202; *Russell*, 952 P.2d at 503. CFP's amended complaint alleged that the Bank and Mr. Rhoades agreed with CFP that, under the TSA, CFP would engage Mr. Rhoades to enforce the covenants after agreeing to a fee schedule in writing. But CFP never agreed to a fee schedule with Mr. Rhoades. Mr. Rhoades thus was not required to enforce the covenants. Neither he nor the Bank made any false statements or promises on which CFP relied to its detriment. CFP has thus failed to state an estoppel claim.

c. *Reformation*

Reformation of a contract is available "when the words that it contains do not correctly express the meaning that the parties agreed upon." *Thompson v. Est. of Coffield*, 894 P.2d 1065, 1067 (Okla. 1995) (quoting Corbin on Contracts § 614 (1960)). To plead reformation, a plaintiff must show (1) an "instrument representing an antecedent agreement which should be reformed, (2) mutual mistake or mistake by one party and inequitable conduct on the part of the other, which results in an instrument that does not

reflect what either party intended, and (3) proof of these elements by clear and convincing evidence." *Id.* at 1067-68 (footnote omitted).

The district court dismissed the reformation claim because the TSA governed the relationship between CFP and Mr. Rhoades, which in turn foreclosed CFP's reformation claim against the Bank. CFP argues this was error because the Bank was not a party to the TSA.

But CFP's reformation claim fails because no written instrument governs its relationship with the Bank, so there is nothing to reform. And in any event, CFP failed to allege any inequitable conduct by the Bank.[6] We therefore affirm the district court's dismissal of CFP's reformation claim against the Bank.

3. **CFP's Tort Claims**

CFP argues that its amended complaint alleged tort claims of fraud, constructive fraud, and negligent misrepresentation. The amended complaint purports to allege a single tort claim, but it alleges, under one heading, "fraud/constructive fraud/negligent misrepresentation" against the Bank and "negligent misrepresentation" against Mr. Rhoades. App. at 67. It is unclear whether CFP alleged one or multiple claims, but we give CFP the benefit of the doubt. *See Sinclair Wyo. Refin. Co.*, 989 F.3d at 765.

[6] It is not clear from its amended complaint or its briefs whether CFP attempted to allege a reformation claim against Mr. Rhoades. Even if it did, the claim fails because the TSA reflected the parties' agreement. Mr. Rhoades would enforce the covenants as part of his transition services only after the parties agreed in writing to a fee schedule.

To allege fraud, a plaintiff must state "(1) a false material misrepresentation, (2) made as a positive assertion which is either known to be false or is made recklessly without knowledge of the truth, (3) with the intention that it be acted upon, and (4) which is relied on by the other party to his (or her) own detriment." *Bowman v. Presley*, 212 P.3d 1210, 1218 (Okla. 2009). Constructive fraud, on the other hand, "does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose." *Patel v. OMH Medical Ctr., Inc.*, 987 P.2d 1185, 1199 (Okla. 1999). Constructive fraud thus "may be defined as any breach of a duty which, regardless of the actor's intent, gains an advantage for the actor by misleading another to his prejudice." *Id.*

To succeed on a negligent misrepresentation claim, a plaintiff must allege that the defendant (1) "in the course of his business, profession or employment, or in any other transaction which he has a pecuniary interest," (2) "supplies false information for the guidance of others in their business transactions," and (3) "if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Lopez v. Rollins*, 303 P.3d 911, 916 (Okla. Civ. App. 2013) (quoting Restatement (Second) of Torts § 552).

CFP made two allegations to support its fraud and misrepresentation claims. First, it alleged the Bank and Mr. Rhoades misrepresented that they could enforce the covenants under Oklahoma law. The district court dismissed any tort arising from this statement after determining that Oklahoma law permits the enforcement of such covenants. CFP has not challenged this determination on appeal. *See Acosta v. Foreclosure Connection, Inc.*, 903 F.3d 1132, 1137 n.2 (10th Cir. 2018).

Second, CFP alleged the Bank induced it to close the sale without the covenants by falsely promising to provide an enforcement mechanism. The district court dismissed CFP's tort claims arising from this misrepresentation (1) as time-barred under the statute of limitations, *see* 12 Okla. Stat. § 95(A)(3); and (2) based on Oklahoma's ban on assignment of tort claims not arising out of contract, *see* 12 Okla. Stat. § 2017(D).[7] CFP argues both these determinations incorrectly interpreted Oklahoma law.

Even assuming CFP's tort claims were not time barred and were assignable, CFP has failed to state a tort claim. As with its implied contract and equitable claims, CFP has failed to allege that it relied on any misrepresentation to its detriment. CFP's amended complaint states that the Bank and Mr. Rhoades represented to CFP that Mr. Rhoades would enforce the covenants after CFP agreed to a fee schedule with Mr. Rhoades. CFP and Mr. Rhoades formalized this agreement in the TSA. CFP then failed to avail itself of Mr. Rhoades's transition services. CFP's detriment resulted from its own failure to invoke the contract's required procedure—not from any misrepresentation by the Bank or Mr. Rhoades. CFP has therefore failed to state a tort claim.

B. ***CFP's Procedural Challenges***

Finally, we turn to CFP's two procedural challenges.

First, CFP challenges the district court's failure to address its motion to file a supplemental response to the Bank's motion to dismiss. But even though the district

[7] This is in reference to Marcain's assignment of its rights to CFP the day it closed the purchase of the assets and signed the TSA. *See supra* notes 1 and 3.

court did not explicitly resolve CFP's motion, it acknowledged the substance of the supplemental response in its order. *See* App. at 180 n.3. We therefore see no prejudicial error.

Second, CFP argues the district court erred when it failed to address CFP's request to amend its complaint in its opposition to the motion to dismiss. "We ordinarily apply the abuse-of-discretion standard when reviewing a denial of leave to amend." *Moya v. Garcia*, 895 F.3d 1229, 1239 (10th Cir. 2018).

CFP did not file a separate motion for leave to amend its complaint. Instead, it devoted one sentence (and provided two citations) in its opposition to the motion to dismiss to argue that "[i]f the allegations supporting CFP's claims stated in the [amended complaint] are to any extent infirm, CFP should be given leave to amend." App. at 140. "We have long held that bare requests for leave to amend do not rise to the status of a motion and do not put the issue before the district court." *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1283 (10th Cir. 2021). The district court therefore did not abuse its discretion by denying CFP's request without addressing it.

III. **CONCLUSION**

We affirm the district court's judgment.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge