FILED
United States Court of Appeals
Tenth Circuit

June 8, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARK CHRISTOPHER TRACY,

Plaintiff - Appellant,

v.

SIMPLIFI COMPANY, a Utah corporation; JENNIFER HAWKES, an individual; ERIC LEE HAWKES, an individual; JEREMY R. COOK, an individual; DAVID M. BENNION, an individual; and DOES 1-46,

Defendants - Appellees.

No. 22-4032
(D.C. No. 2:21-CV-00444-RJS)
(D. Utah)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ** and **ROSSMAN**, Circuit Judges.

Mark Christopher Tracy, proceeding pro se, appeals the district court's dismissal with prejudice of his civil-rights action for lack of standing. Mr. Tracy asserted claims under 42 U.S.C. §§ 1983 and 1985, alleging someone assigned the claims to an entity

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

through which Mr. Tracy does business. A magistrate judge recommended that the district court rule as follows: (1) that Mr. Tracy lacked standing to prosecute these claims because they were akin to personal-injury torts that, under Utah law, could not be assigned; (2) that because Mr. Tracy did not allege anything to support claims of his own, allowing him to amend his complaint would be futile; and (3) that the action be dismissed with prejudice.

The district court agreed with the magistrate judge's recommendation that the claims should be characterized as personal-injury torts that are unassignable under Utah law. It also concluded that Mr. Tracy failed to specifically object to the magistrate judge's determination that it would be futile to amend the complaint. Accordingly, the district court reviewed that determination for clear error and, finding none, concurred with that ruling, adopted the magistrate judge's report and recommendation, and dismissed the action with prejudice.

Ordinarily, we review de novo a district court's dismissal for lack of standing. *See Colo. Env't Coal. v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004). Here, however, Mr. Tracy has forfeited appellate review by failing to adequately brief any issue.

Federal Rule of Appellate Procedure 28(a)(8)(A) requires that an appellant's opening brief set forth "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." "Consistent with this requirement, we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). Our rules of procedure apply to counselled and

pro se parties alike. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).[1]

Mr. Tracy's opening brief expends three pages describing the factual background of this case. The "Argument and Authorities" section on the first issue—"Does state law determine if a federal civil right may be assigned?"—then begins by stating that two requirements must be met for Utah law to govern the disposition of this case:

> 1. [T]he federal laws are not adapted to the goal of protecting all persons in the United States in their civil rights, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law; and
>
> 2. Any assessment of the applicability of a state law to federal civil rights litigation must be made in light of the purpose and nature of the federal right. *Wilson v. Garcia*, 471 U.S. 261, 267 (1985) (citation omitted) (internal quotation marks omitted).

Aplt. Opening Br. at 5 (original brackets and ellipsis omitted). The section then abruptly concludes with the sentence: "The district court failed to apply these standards to the

[1] Mr. Tracy says we should afford his pro se materials a liberal construction, but he identified himself as an attorney in a prior appeal, *see United States ex rel. Tracy v. Emigration Improvement Dist.*, 717 F. App'x 778, 782 (10th Cir. 2017) ("Mr. Tracy, himself an attorney, should be able to adequately assess the risk of a conflict."); *see also* Aplt. App. at 212 (Mr. Tracy's Resp. to Show-Cause Order, identifying himself as an attorney), *United States ex rel. Tracy v. Emigration Improvement Dist.*, 717 F. App'x 778 (10th Cir. 2017) (No. 17-4062). We need not extend the liberal-construction rule to pro se pleadings filed by lawyers who elect to represent themselves. *See Mann v. Boatright*, 477 F.3d 1140, 1148 n.4 (10th Cir. 2007). Yet even if we liberally construed Mr. Tracy's materials, the outcome here would be the same. Mr. Tracy's reply brief protests that he is not subject to our appellate rules because he filed his opening brief on a pro se form, *see* Reply Br. at 15, but "this court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants," *Garrett*, 425 F.3d at 840 (brackets and internal quotation marks omitted). The use of the pro se form does not excuse compliance with the appellate rules aside from those regarding the format of the brief.

present case." *Id.* Later, in the part of the court form asking whether the court applied the wrong law, the brief states, in its entirety: "Since enactment of the Civil Rights Act of 1871, no federal court has ruled in a published decision that the assignment of federal civil rights is determined by state law. This legal conclusion is inconsistent with the legislative history of the Act." *Id.* at 6.

These arguments are inadequate to preserve appellate review. Mr. Tracy's opening brief does not cite the legislative history he references, nor does it cite the portions of the record on which he relies. It also fails to explain why the two requirements he cites for applying Utah law should govern this case or how they would favor his position if they did apply. "[This] court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record" on his behalf. *Garrett*, 425 F.3d at 840. "[C]ursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine." *Bronson*, 500 F.3d at 1105. We therefore reject Mr. Tracy's arguments on the first issue.

Faring no better are Mr. Tracy's arguments regarding the second issue—which complains that he was not permitted to file an amended complaint—and his assertion in paragraph 6 of his brief that the district court improperly imposed heightened pleading standards. His opening brief, although correctly citing Fed. R. Civ. P. 15(a)(2) for the proposition that the district court should freely give leave to amend when justice so requires, does not discuss the specifics of the situation in this case and, in particular, does not challenge the magistrate judge's determination that an amendment would be futile.

And that brief also fails to identify where the district court applied a heightened pleading standard and why that standard was incorrect. Insofar as Mr. Tracy's reply brief may add further argument on these issues, that argument comes too late. *See Cahill v. Am. Fam. Mut. Ins. Co.*, 610 F.3d 1235, 1239 (10th Cir. 2010) ("arguments first raised in a reply brief come too late").

On the other hand, we agree with Mr. Tracy that the complaint should have been dismissed without prejudice. The dismissal was predicated on his lack of standing, which means that the district court lacked Article III jurisdiction. A dismissal for lack of subject-matter jurisdiction should be without prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006).

For the foregoing reasons, we affirm the judgment below except that we remand to the district court to enter a dismissal without prejudice.

Entered for the Court

Harris L Hartz
Circuit Judge