FILED
United States Court of Appeals
Tenth Circuit

August 22, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT CARRAWAY,

Plaintiff - Appellant,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant - Appellee.

No. 22-1370
(D.C. No. 1:21-CV-03201-PAB-SKC)
(D. Colo.)

ORDER AND JUDGMENT[*]

Before **PHILLIPS**, **MURPHY**, and **ROSSMAN**, Circuit Judges.

After his property was damaged by hail and wind, Robert Carraway filed an insurance claim with his provider, State Farm Fire and Casualty Company. State Farm inspected the property and extended coverage, but Mr. Carraway believed the estimate severely undervalued the loss he had suffered. Eventually, appointed appraisers valued the loss at a far-higher number. But State Farm declined to cover a depreciation amount based on

[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Mr. Carraway's failure to complete repairs during the two-year timeframe required by his insurance policy.

Mr. Carraway sued in federal district court in Colorado, alleging breach of contract as well as common-law and statutory bad faith claims. State Farm moved to dismiss, contending Mr. Carraway failed to include the basic factual allegations necessary to plausibly allege his three claims. The district court agreed and granted the motion, dismissing Mr. Carraway's case with prejudice and denying leave to amend.

Exercising our jurisdiction under 28 U.S.C. § 1291 and reviewing *de novo*, we conclude the district court properly dismissed Mr. Carraway's case. But because the record is unclear as to why the district court dismissed Mr. Carraway's case with prejudice, we vacate the district court's dismissal and remand for further proceedings.

I

A

Mr. Carraway's property in Larkspur, Colorado was protected under an insurance policy issued by State Farm.[1] The policy was a "replacement cost value homeowner's policy," covering "risks of direct physical loss or

[1] We draw the relevant background from Mr. Carraway's complaint, accepting as true all well-pleaded facts. *Mayfield* v. *Bethards*, 826 F.3d 1252, 1255 (10th Cir. 2016).

damage" to Mr. Carraway's property, including loss or damage caused by wind and hail. R.10 ¶ 6.

On July 5, 2019, Mr. Carraway's property suffered wind and hail damage during a storm; the loss included "damage to the Property's roof, gutters, HVAC unit, windows, and siding." R.10 ¶¶ 7-8. Mr. Carraway submitted an insurance claim to State Farm for the damage. After inspecting the property, State Farm prepared a repair estimate on October 14, 2020, and "extended coverage for the Claim for a replacement cost value of $21,353.58." R.10 ¶ 10.

Mr. Carraway, however, believed the State Farm estimate "severely undervalu[ed] the scope and cost of the Loss," "contained improper pricing," and failed to "account for certain elements required by both local building code and manufacturer's instructions." R.11 ¶¶ 11-12. So he hired a public adjuster, who then estimated the cost of repair at a sum over $90,000.

When State Farm and Mr. Carraway remained unable to agree on the valuation of the loss, Mr. Carraway invoked a provision of his policy permitting either party to "demand appraisal." R.11 ¶¶ 16-17. Both Mr. Carraway and State Farm appointed appraisers under the policy. On October 11, 2021, the appraisers issued an award setting the replacement cost value of the loss at $60,864.26, of which $12,604.78 "was identified as depreciation in the appraisal award." R.11 ¶ 19.

To recover this depreciation value, Mr. Carraway's policy required covered repairs to be completed within two years of the date of loss—i.e., by July 5, 2021. By the time the appraisers issued their award, however, that period had elapsed. Mr. Carraway blamed this delay on State Farm's "repeated failure to recognize the full scope of the Loss," and claimed he had "requested, on multiple occasions," that State Farm extend the deadline. R.12 ¶¶ 21, 25. According to Mr. Carraway's complaint, State Farm "repeatedly refused to extend the [deadline] and [] indicated that it will not pay the depreciation despite [its] actions and failure to properly adjust the Claim being the reason [Mr. Carraway] could not collect depreciation." R.12-13 ¶ 26.

B

On November 5, 2021, Mr. Carraway sued State Farm in Colorado state court. His complaint alleged three causes of action under Colorado law.

The first was for breach of contract, alleging State Farm's refusal "to pay the total amount of the loss due" "breached the contract of insurance." R.13 ¶¶ 31-32. The second alleged common-law "bad faith breach of an insurance contract." R.13. According to the complaint, State Farm "acted with knowledge of or reckless disregard to the fact that no reasonable basis existed for delaying and denying" Mr. Carraway's claim. R.16 ¶ 38. In doing

so, Mr. Carraway argued, State Farm breached its duty to him under an "implied covenant of good faith and fair dealing," R.13 ¶ 36, and engaged in conduct "considered Unfair Settlement Practices" under Colo. Rev. Stat. § 10-3-1104(1)(h), R.14 ¶ 37. The third cause of action alleged statutory bad faith. Specifically, Mr. Carraway alleged State Farm violated Colo. Rev. Stat. §§ 10-3-1115 and -1116, which bar those "engaged in the business of insurance from unreasonably delaying or denying payment of a claim for benefits owed to or on behalf of a first-party claimant." R.16 ¶ 41.

On November 29, 2021, State Farm removed the suit to the federal district court for the District of Colorado. *See* 28 U.S.C. § 1441 (permitting removal of civil actions from state courts to federal district courts).[2]

Shortly after the case was removed, State Farm's counsel conferred with Mr. Carraway's attorneys, sending a letter requesting Mr. Carraway amend his complaint. State Farm's counsel identified several purported deficiencies:

> We have concerns that the Complaint fails to state a claim as the alleged facts [do] not support a breach of contract, nor any unreasonable conduct by State Farm. It merely alleges a reasonably debatable value dispute occurred resulting in an appraisal. Further, [it] has a laundry list of generic, conclusory statements that State Farm has violated the Unfair Claims Settlement Practices Act or otherwise violated some standard of

[2] Mr. Carraway does not appear to have contested the removal to federal court.

> care. We can find no actual facts alleged in the Complaint to help us understand the nature of these claims.

R.46. If Mr. Carraway was willing to amend his complaint, State Farm proposed to "agree to an extension of time . . . to allow amendment." *Id.* at 47. Mr. Carraway's attorneys replied that their "complaint is in compliance with notice pleading standards," and declined to amend. *Id.* at 49.

State Farm moved on December 20, 2021, to dismiss the case for failure to state a claim. Fed. R. Civ. P. 12(b)(6). State Farm argued Mr. Carraway "failed to plead facts which, if true, would indicate that State Farm acted unreasonably" as required to plausibly allege bad faith or statutory unreasonable delay or denial. R.39. State Farm also contended Mr. Carraway had "pled no factual allegations demonstrating that the additional benefits sought . . . were covered by the Policy. Plaintiff fails to identify any specific provisions of the Policy at all, let alone which provisions State Farm breached." *Id.* at 41.

In response, Mr. Carraway argued all three causes of action in his complaint were "supported by facts that raise plausible claims for relief and so must survive" the motion to dismiss. *Id.* at 134. In the alternative, Mr. Carraway contended he should "be granted leave to amend the Complaint to include reference to the specific building codes and manufacturers'

instructions that [State Farm] unreasonably failed to consider in its adjustment of [Mr. Carraway's] claim." *Id.* at 135.

C

On September 26, 2022, the district court dismissed Mr. Carraway's claims with prejudice.

The district court first analyzed the breach of contract claim. While finding Mr. Carraway "has plausibly alleged that the policy creates a contract," the district court determined Mr. Carraway "failed to plausibly allege that [State Farm's] failure to pay the $12,604.78 in depreciation constituted a breach of the policy." R.159. According to the district court, Mr. Carraway similarly failed to plausibly allege his policy required State Farm to extend the repair deadline. Nor did he "identify any provision of the policy that [State Farm] breached by relying on its own damage estimate before the appraisal process and while the process was pending." *Id.* at 160. At bottom, the court concluded Mr. Carraway's "failure to plausibly allege that the policy required [State Farm] to provide coverage for depreciation – because [Mr. Carraway] did not complete repairs in time and failed to show that the policy required [State Farm] to extend the deadline – is fatal to his breach of contract claim." *Id.* at 163.

The same failure was "fatal to his bad faith claims." *Id.*

For his statutory bad faith claim, the district court explained, Mr. Carraway was required to plausibly allege State Farm acted in an unreasonable manner. Instead, State Farm's "reliance on its repair estimate constituted a reasonable basis for its coverage decision, and [Mr. Carraway] has failed to identify a policy term – or an industry standard – that required [State Farm] to act otherwise." *Id.* at 167. Mr. Carraway's "conclusory and boilerplate allegation that defendant 'unreasonably delayed and denied payment of benefits'" failed to persuade the district court otherwise. *Id.* at 166.

Mr. Carraway's common-law bad faith claim faltered for similar reasons. To sustain this claim, the district court explained Mr. Carraway had to show "(1) the insurer's conduct was unreasonable and (2) the insurer either had knowledge of or reckless disregard for the fact that its conduct was unreasonable." *Id.* at 167 (quoting *Travelers Ins. Co.* v. *Savio*, 706 P.2d 1258, 1275 (Colo. 1985)). The district court found both prongs unsatisfied. Mr. Carraway had "failed to plausibly allege the 'absence of a reasonable basis for [State Farm's] denial of policy benefits.'" *Id.* at 169 (quoting *Savio*, 706 P.2d at 1275). And he had "failed to plausibly allege that [State Farm] acted with knowledge or reckless disregard of any unreasonable conduct," beyond "'boilerplate' allegations" "without any factual development." *Id.* at 169-70.

Throughout its order, the district court found Mr. Carraway failed to identify applicable provisions and neglected to include policies or documents referred to.

In a footnote, the district court explained its rationale for denying Mr. Carraway's request to amend his complaint.[3] "Pursuant to the Local Rules . . . '[a] motion [to amend] shall not be included in a response or reply to the original motion. A motion shall be filed as a separate document.'" *Id.* at 172 n.4 (first alteration in original) (quoting D.C.COLO.LCivR 7.1(d)). The district court continued: "The Local Rules also require a party seeking to file an amended pleading to attach the proposed amended pleading. Plaintiff did not do so." *Id.* (citing D.C.COLO.LCivR 15.1(b)).

The district court then dismissed the case with prejudice, though it did not explain its rationale.

Mr. Carraway filed this timely appeal.

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[3] The failure to move for leave to amend pursuant to the rules permits, but does not *require*, a district court to deny leave. As we explain, the Federal Rules of Civil Procedure provide for amendment and the District of Colorado's Local Rules prescribe the process for seeking one. In *Albers* v. *Board of County Commissioners*, we described the balance between the "liberal policy"—encouraging courts to "freely give leave [to amend] when justice so requires"—and the "importance" of adhering to the amendment procedures: "[N]ormally a court need not grant leave to amend when a party fails to file a formal motion." 771 F.3d 697, 706 (10th Cir. 2014) (first alteration in original) (first quoting Fed. R. Civ. P. 15(a)(2); and then quoting *Calderon* v. *Kan. Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1186 (10th Cir. 1999)).

II

On appeal, Mr. Carraway first argues the district court erred in dismissing his claims under Federal Rule of Civil Procedure 12(b)(6). He contends he plausibly alleged breach of contract and statutory and common-law bad faith claims in accordance with the "'notice pleading' standard set forth in Fed. R. Civ. P. 8." Appellant Br. at 9. We disagree.

A

We review *de novo* the district court's grant of State Farm's motion to dismiss for failure to state a claim. *McAuliffe* v. *Vail Corp.*, 69 F.4th 1130, 1143 (10th Cir. 2023). To survive a motion for dismissal under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain 'only enough facts to state a claim to relief that is plausible on its face.'" *Chilcoat* v. *San Juan Cnty.*, 41 F.4th 1196, 1207 (10th Cir. 2022) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). When the complaint includes "well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 679 (2009).

Mr. Carraway's case was removed to federal court as a diversity action, so "we 'apply the substantive law of the forum state.'" *MTI, Inc.* v. *Emps. Ins. Co. of Wausau*, 913 F.3d 1245, 1248-49 (10th Cir. 2019) (quoting *Pepsi-Cola Bottling Co. of Pittsburg, Inc.* v. *PepsiCo, Inc.*, 431 F.3d 1241,

1255 (10th Cir. 2005)). Here, Mr. Carraway's claims arise under—and we therefore apply—Colorado statutory and common law.

B

We begin, like the district court, with Mr. Carraway's breach of contract claim. On appeal, Mr. Carraway maintains his complaint "clearly and unequivocally set forth all the elements of a *prima facie* claim for breach of contract." Appellant Br. at 14. We disagree and find no error.

To state a claim for breach of contract under Colorado law, Mr. Carraway needed to plausibly allege "(1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff." *W. Distrib. Co.* v. *Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (citations omitted).

Mr. Carraway falters at elements (2) and (3).

First, Mr. Carraway needed to plausibly allege his performance under the policy or justify his nonperformance (element (2)). The former option was unavailable because he did not complete the repairs within the two-year timeframe required. So, he had to rely on the latter. In other words, Mr. Carraway needed to plead facts explaining his failure to perform. He did not do so.

In his complaint, Mr. Carraway *did* allege he was prevented from completing repairs during the specific timeframe because State Farm undervalued his claim. And on appeal, his argument on this point continues to allege State Farm "took advantage of its own failure to investigate, adjust, and properly value the Loss." Appellant Br. at 13. However, the complaint never identifies a provision of the policy which barred Mr. Carraway from undertaking repairs before the value of the loss was determinatively assessed. Nor does he include any factual allegations which explain why his repair efforts were impossible, impractical, or otherwise impeded. On the face of the complaint, we can discern no plausibly alleged justifiable nonperformance.

Second, Colorado law required Mr. Carraway to plausibly allege State Farm's own failure to perform. Here, too, his allegations were insufficient.

In his complaint, Mr. Carraway claimed State Farm "fail[ed] to properly investigate the Loss," "undervalu[ed] the scope and cost of the Loss," and "refused to pay the total amount of the loss due" under the policy. R.11-13 ¶¶ 11-14, 26, 31. But Mr. Carraway's policy clearly tied the receipt of "any additional payments on a replacement cost basis" to the completion of "the actual repair or replacement . . . within two years after the date of loss." R.114. And as for Mr. Carraway's failure-to-investigate allegation, the complaint included no facts supporting this charge.

The district court did not err in dismissing Mr. Carraway's breach of contract claim.

C

We turn to Mr. Carraway's common-law bad faith claim. Mr. Carraway contends his complaint "plausibly alleged both elements of common law bad faith."[4] Appellant Br. at 16. We disagree.

As applied here, to state a bad faith claim under Colorado common law Mr. Carraway needed to plausibly allege State Farm (1) acted unreasonably under the circumstances; and (2) knew of, or had reckless

[4] Before independently evaluating the two bad faith claims, the district court observed Mr. Carraway's failure to plausibly allege breach of contract was "fatal to his bad faith claims." R.163. On appeal, Mr. Carraway argues his bad faith claims "can stand independent of his breach of contract claim." Appellant Br. at 16. As a general statement of law, we agree with Mr. Carraway.

Colorado courts distinguish between these two claims, and they do not rise and fall on the same facts. In *Dunn* v. *American Family Insurance*, 251 P.3d 1232, 1235 (Colo. App. 2010), the Colorado Court of Appeals explained "Colorado recognizes the viability of a claim of bad faith *even if* the express terms of the contract have been honored by the insurer." (Emphasis added); *see also Am. Fam. Mut. Ins. Co.* v. *Barriga*, 418 P.3d 1181, 1185 (Colo. 2018) ("[A] claim for breach of contract and a claim for unreasonable delay or denial of insurance benefits rely on two different sets of facts.").

Because the district court proceeded to separately assess the bad faith claims—independent of the breach of contract issue—this error has no effect on our disposition today.

disregard for, the unreasonableness of its actions. *Goodson* v. *Am. Standard Ins. Co. of Wisc.*, 89 P.3d 409, 415 (Colo. 2004).

Mr. Carraway did not plausibly allege either prong.

First, Mr. Carraway's complaint facially appears to plead a value dispute, not unreasonable conduct. Of the twenty examples provided to show State Farm "breached and continued to breach its duty," not one is supported by adequate factual allegations. For example, Mr. Carraway alleges State Farm "delay[ed] investigations of discrepancies and claims brought to [its] attention by [Mr. Carraway]." R.15 ¶ 37(r). But nowhere does Mr. Carraway explain when State Farm allegedly delayed investigations, what these investigations or discrepancies and claims were, how they were brought to State Farm's attention, or which provision of the policy might be implicated by this conduct. Nothing in the complaint addresses how State Farm's initial estimate—or the investigation that produced it—was *unreasonable*. *See Etherton* v. *Owners Ins. Co.*, 829 F.3d 1209, 1227 (10th Cir. 2016) ("[U]nder Colorado law, fair debatability can be a relevant but not necessarily a determinative factor as to whether the insurer acted reasonably.").

On the second element, knowledge or reckless disregard, Mr. Carraway failed to advance any factual allegation at all. Instead, this element features in his complaint only as a recitation of the legal standard.

See R.16 ¶ 38 ("In the course of evaluating [Mr. Carraway's] Claim, [State Farm] acted with knowledge of or reckless disregard to the fact that no reasonable basis existed for delaying and denying the Claim."). This is plainly insufficient.

The district court correctly dismissed Mr. Carraway's common-law bad faith breach claim.

D

Finally, we review the district court's dismissal of Mr. Carraway's statutory bad faith claim. Mr. Carraway argues the district court misapplied Colorado substantive law and held his complaint to an impermissibly heightened pleading standard. Appellant Br. at 18-29. Again, we discern no error.

To state a statutory bad faith claim, Mr. Carraway needed to plausibly allege State Farm (1) denied or delayed payment of a claim for benefits owed and (2) the denial or delay lacked a reasonable basis. *Barriga*, 418 P.3d at 1186; Colo. Rev. Stat. § 10-3-1115(1)(a).

Mr. Carraway's statutory claim falls at the same hurdles as his common-law claim. He simply has not alleged facts which plausibly articulate *unreasonableness*. Contending otherwise, Mr. Carraway points to certain specific allegations in his complaint. For example: "The coverage extended by Defendant for the Loss did not adequately address the hail

damage to the Property, severely undervaluing the scope and cost of the Loss." R.11 ¶ 11. But as State Farm persuasively explains, Mr. Carraway's complaint offered "only vague conclusions" that failed to "establish that State Farm *lacked a reasonable basis* for the conduct described." Appellee Br. at 22 (emphasis added); *see also* Colo. Rev. Stat. § 10-3-1115(2) ("[A]n insurer's delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action.").

Mr. Carraway also argues the district court "held [him] to a heightened pleading standard." Appellant Br. at 25. The record indicates otherwise and our review of the district court's order shows, instead, that the district court faithfully and correctly applied the basic requirements of *Twombly* and *Iqbal*. Holding Mr. Carraway's counseled complaint to those standards, we find it offers only conclusory allegations and "recitation[s] of the elements of a cause of action." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). It makes "naked assertion[s]," *Twombly*, 550 U.S. at 557, without the factual allegations needed "to raise a right to relief above the speculative level," *id.* at 555. To adhere to these standards is not to impose any heightened requirements on Mr. Carraway. It is to effect our law's requirement, at bottom, that a complaint state "enough factual matter (taken as true) to suggest" a *plausible* claim. *Id.* at 556.

III

Next, we turn to the district court's denial of leave to amend. On this point, Mr. Carraway invokes the Federal Rules of Civil Procedure, arguing district courts must liberally grant leave to amend "when justice so requires." Appellant Br. at 29 (quoting Fed. R. Civ. P. 15(a)(2)). The district court's denial was "contrary to the spirit of" the Federal Rules, he explains, and the record evinces "no [] reason for the denial of leave to amend" and "no reason stated by the court" for its decision. *Id.* at 30 (quoting *Triplett* v. *LeFlore Cnty.*, 712 F.2d 444, 446 (10th Cir. 1983)). We cannot agree.

A

We review the district court's decision to deny Mr. Carraway an opportunity to amend for an abuse of discretion. *Serna* v. *Denver Police Dep't*, 58 F.4th 1167, 1172 (10th Cir. 2023). We reverse the district court's decision on the matter only if it was "arbitrary, capricious, whimsical, or manifestly unreasonable." *Id.* (quoting *Brooks* v. *Mentor Worldwide LLC*, 985 F.3d 1272, 1282 (10th Cir. 2021)).

B

The Federal Rules permitted Mr. Carraway ample opportunity to amend as of right *and* by formal motion during the pendency of his case. Fed. R. Civ. P. 15. For 21 days after his complaint was filed and for 21 days after State Farm's response—in which State Farm (re)identified various

factual deficiencies—Mr. Carraway had the right to amend his complaint to cure the defects. Fed. R. Civ. P. 15(a)(1)(A)-(B). At all other times before the district court granted State Farm's motion to dismiss, Mr. Carraway could have amended his complaint with the approval of State Farm or the consent of the district court. Fed. R. Civ. P. 15(a)(2). He did not do so.

The District of Colorado's Local Rules detail the process for amendment. *See* 28 U.S.C. § 2071 (granting federal courts authority to "prescribe rules for the conduct of their business"); *Hollingsworth* v. *Perry*, 558 U.S. 183, 191 (2010) (explaining district courts' local rules "have 'the force of law'" (quoting *Weil* v. *Neary*, 278 U.S. 160, 169 (1929))). Those Rules provide parties "fil[ing] an amended pleading under Fed. R. Civ. P. 15(a)(1) or with the consent of the opposing party shall file a separate notice of filing the amended pleading and shall attach as an exhibit a copy of the amended pleading which strikes through . . . the text to be deleted and underlines . . . the text to be added." D.C.COLO.LCivR 15.1(a). Instead, Mr. Carraway's request to amend came in a short paragraph at the end of his response to State Farm's motion to dismiss.

Reviewing for an abuse of discretion, we cannot find it was "manifestly unreasonable" for the district court to deny Mr. Carraway leave to amend when he neither availed himself of prior opportunities to amend nor followed the rules to do so. *See Lambertsen* v. *Utah Dep't of Corrs.*, 79

F.3d 1024, 1029-30 (10th Cir. 1996) (finding no abuse of discretion where proposed amendment was untimely and failed to include copy of proposed amended complaint).

Mr. Carraway's arguments otherwise are unpersuasive. He claims "[s]imple failure to file a formal motion, or failure to attach a redlined amended complaint . . . is not sufficient" to justify denial of leave to amend. Appellant Br. at 30. To the contrary, we have consistently affirmed denials of leave to amend where—as here—leave was based on "fleeting request[s]" which "d[o] not identify with specificity" the basis for amendment. *Serna*, 58 F.4th at 1172.[5] And we have done the same where a party—as here—

[5] We reproduce in full Mr. Carraway's request for leave to amend the complaint as found in his responsive pleading to the motion to dismiss:

> Although the law does not require every relevant factual allegation to be included in a complaint, should the Court determine that the Complaint is not legally sufficient, Plaintiff requests leave to amend the Complaint. Pursuant to Federal Rule of Civil Procedure 15(a)(2), leave to amend a pleading "shall be freely given when justice so requires." Specifically, Plaintiff can add to the Complaint the fact that the Policy includes Ordinance or Law coverage . . . along with the specific building codes and manufacturers' instructions that Defendant unreasonably omitted in its valuation of Plaintiff's claim. These codes and instructions are already incorporated into the appraisal award's valuation of Plaintiff's claim, but should the Court deem it necessary, Plaintiff can include them in the Complaint as well.

R.141. Setting aside the lack of a formal motion, we note only one sentence in that paragraph identifies the purpose of the proposed amendment.

failed to follow the procedural rules for requesting amendments. *Id.*; *Brooks*, 985 F.3d at 1283 ("[B]are requests for leave to amend do not rise to the status of a motion and do not put the issue before the district court."); *Lambertsen*, 79 F.3d at 1029-30; *Glenn* v. *First Nat. Bank in Grand Junction*, 868 F.2d 368, 371 (10th Cir. 1989) ("A naked request for leave to amend asked for as alternative relief when a party has the unexercised right to amend is not sufficient.").

True, "we have said that failure to file a formal motion is not always fatal." Appellant Br. at 30 (quoting *Calderon* v. *Kan. Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1186 (10th Cir. 1999)). But the language of "not always" is the language of discretion, not proscription. And in *Calderon* itself, our observation was qualified:

> While in the spirit of Fed. R. Civ. P. 15(b) we have said that failure to file a formal motion is not always fatal, . . . in each of those cases there was readily apparent notice to opposing parties and to the court of both the desire to amend and the particular basis for the amendment in accord with the purposes of rule 7(b).

181 F.3d at 1186 (first citing *Brever* v. *Rockwell Int'l Corp.*, 40 F.3d 1119, 1130-31 (10th Cir. 1994); and then citing *Triplett*, 712 F.2d 444). From our caselaw, we distilled the holding "that a request for leave to amend"—in whatever form—"must give adequate notice to the district court and to the opposing party of the basis of the proposed amendment before the court is

required to recognize that a motion for leave to amend is before it." *Id.* at 1186-87. In reaffirming this requirement, we upheld a "district court's wide discretion to recognize a motion for leave to amend in the interest of a just, fair or early resolution of litigation." *Id.* at 1187 (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1194 (2d ed. 1990)). But we reiterated "[w]e do not require district courts to engage in independent research or read the minds of litigants." *Id.* (quoting *Brever*, 40 F.3d at 1131).

Under these circumstances, the district court did not abuse its discretion by denying the opportunity for amendment. *See Serna*, 58 F.4th at 1172. Like the plaintiffs in *Brooks*, Mr. Carraway and his attorneys apparently "made a strategic choice to stand by their 'primary position'"—that the complaint plausibly stated three claims—"and took none of the available avenues to amend their Complaint." *Brooks*, 985 F.3d at 1283. There, we found no abuse of discretion, concluding we would "not protect them from their own inaction." *Id.* We decline to do so here.

IV

Having affirmed the district court's dismissal of Mr. Carraway's complaint and its denial of leave to amend, we must still decide whether the district court erred in dismissing the complaint *with prejudice*. Mr. Carraway contends on appeal that "[t]he record shows only a single reason

for the District Court's denial of leave to amend: lack of formal motion," and that this reason, without more, cannot justify the separate decision to dismiss with prejudice. Reply Br. at 22. On the record before us, we agree.[6]

A

We review the district court's decision to dismiss with prejudice for an abuse of discretion. *United States ex rel. Stone* v. *Rockwell Int'l Corp.*, 282 F.3d 787, 809 (10th Cir. 2002).

The contours of our review vary depending on the basis for the district court's decision. Here, though, the district court did not say why it dismissed Mr. Carraway's complaint with prejudice. It footnoted its "prejudice" determination with a discussion of Mr. Carraway's request for amendment and his failure to follow the Local Rules. As we have explained, we discern no abuse of discretion in the denial of leave to amend. But "denial of leave to amend and dismissal with prejudice are two separate concepts." *Brereton* v. *Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006); *cf.*

[6] The district court's explanatory footnote included a cite to *Higgins* v. *City of Tulsa*, 103 F. App'x 648, 651 (10th Cir. 2004) (unpublished), for the proposition "a dismissal under Rule 12(b)(6) for failure to state a claim is generally *with* prejudice." This proposition appears to have been extracted, in part, from our opinion in *Sheldon* v. *Vermonty*, 269 F.3d 1202 (10th Cir. 2001), an arbitration case. But there we cautioned, "[a]s a general matter, a party should be granted an opportunity to amend his claims prior to a dismissal with prejudice." *Id.* at 1207 n.5.

McAuliffe, 69 F.4th at 1150-51 (affirming dismissal under Rule 12(b)(6) but remanding for district court to modify order to be without prejudice).

Because the district court's footnote and the parties' briefing all seem to tie the with-prejudice dismissal to Mr. Carraway's compliance (or lack thereof) with procedural rules, it may be that the dismissal with prejudice was a sanction for failure to observe the Local Rules. We now consider this possibility.

B

As a method of ensuring compliance with the rules of procedure, dismissal with prejudice is a "harsh sanction." *Nasious* v. *Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1162 (10th Cir. 2007) (quoting *Ciralsky* v. *CIA*, 355 F.3d 661, 669-70 (D.C. Cir. 2004)). When a district court dismisses a case with prejudice for rule violations, we have held it "*must* explain why it imposed the extreme sanction of dismissal." *Woodmore* v. *Git-N-Go*, 790 F.2d 1497, 1499 (10th Cir. 1986) (per curiam) (emphasis added); *see also Bud Brooks Trucking, Inc.* v. *Bill Hodges Trucking Co.*, 909 F.2d 1437, 1439 (10th Cir. 1990) ("[T]he district court should set forth in the record the justification for the sanction imposed."). Accordingly, we have required a district court "first consider certain criteria" "to exercise soundly its discretion in imposing such a result." *Nasious*, 492 F.3d at 1162. These criteria include "(1) the degree of actual prejudice to the defendant; (2) the

amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." *Olsen* v. *Mapes*, 333 F.3d 1199, 1204 (10th Cir. 2003) (quoting *Mobley* v. *McCormick*, 40 F.3d 337, 340 (10th Cir. 1994)); *see also Ehrenhaus* v. *Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) (identifying these "*Ehrenhaus* factors"). We have also explained sanctions must be imposed on the right party: "If the fault lies with the attorneys, that is where the impact of a sanction should be lodged. If the fault lies with the clients, that is where the impact of the sanction should be lodged." *Woodmore*, 790 F.2d at 1498 (quoting *In re Baker*, 744 F.2d 1438, 1442 (10th Cir. 1984) (en banc)).

Here, the district court did not explain its decision to dismiss with prejudice beyond reference to Mr. Carraway's failure to amend according to the Local Rules. It mentioned none of the *Ehrenhaus* factors in its order dismissing Mr. Carraway's case with prejudice. To be sure, "[t]he Federal Rules of Civil Procedure authorize sanctions, including dismissal . . . for failing to comply with court rules." *Gripe* v. *City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002) (citing Fed. R. Civ. P. 41(b)). But a district court still needs to assess whether sanctions are appropriate by reference to the *Ehrenhaus* analysis. The closest we can get here is the district court's

citation to *Barnett* v. *Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1236 (10th Cir. 2020)—for the proposition, "The court should not have to address repeated 'improvements' to the complaint"—and its reliance on Mr. Carraway's failure to comply with the local rules regarding amendment. R.172 n.4. Under the circumstances, and absent further explanation or justification from the district court, this is not enough to support a dismissal of Mr. Caraway's complaint *with prejudice*.[7]

V

We **AFFIRM** the district court's judgment insofar as it dismisses the case. But we **VACATE** the district court's dismissal of Mr. Carraway's claims with prejudice and **REMAND** for further proceedings.

ENTERED FOR THE COURT

Veronica S. Rossman
Circuit Judge

[7] On remand, the district court may again determine a with-prejudice dismissal is the appropriate disposition of this case. If so, it must explain why that is warranted here. *See, e.g.*, *Hardage* v. *James*, 211 F.3d 1278 (10th Cir. 2000) (unpublished) ("Accordingly, the district court's order of dismissal is hereby vacated and the case is remanded to the district court for further proceedings. If, upon remand, the district court again concludes that dismissal [with prejudice] is an appropriate remedy, it must state specifically why such a sanction is appropriate.") (capitalization omitted).

22-1370, *Carraway v. State Farm Fire and Casualty Co.*

MURPHY, J., Dissenting in Part and Concurring in Part.

The majority determines in Part II that the district court properly dismissed the complaint for failure to state a claim and in Part III that the district court properly denied leave to amend because appellant failed to avail himself of multiple opportunities to amend and follow the rules to do so. As a consequence, the dismissal with prejudice should have been affirmed. *See, e.g.*, *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1282–83 (10th Cir. 2021); *Albers v. Bd. Of Cnty Com'rs of Jefferson Cnty., Colo,* 771 F.3d 697, 706 (10th Cir. 2014); *Glenn v. First National Bank in Grand Junction,* 868 F.2d 368, 369–72 (10th Cir. 1989). Instead, the majority treats the dismissal as a sanction in Part IV and remands for failure to apply the proper criteria for imposition of a sanction. There is, however, no basis in the record, the district court's order, or the parties' briefing to treat the dismissal as a sanction. For these reasons, I dissent from Parts IV and V of the **ORDER AND JUDGMENT**, but concur in all other respects. I would affirm the district court's order.