FILED
United States Court of Appeals
Tenth Circuit

September 28, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: MATTHEW WILFRED ROBERTS; SHELLY D. ROBERTS,

Debtors.

FREEBIRD COMMUNICATIONS, INC. PROFIT SHARING PLAN; FREEBIRD COMMUNICATIONS, INC.; MICHAEL SCARCELLO,

Plaintiffs - Appellants,

v.

MATTHEW WILFRED ROBERTS; SHELLY D. GARZA-ROBERTS,

Defendants - Appellees.

No. 20-3182
(D.C. No. 2:20-CV-02132-JAR)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Plaintiffs Freebird Communications, Inc. Profit Sharing Plan, Freebird Communications, Inc., and Michael Scarcello filed an adversary complaint against Defendants Matthew Wilfred Roberts and Shelley D. Garza-Roberts in Defendants' Chapter 7 bankruptcy case, alleging that certain debts were nondischargeable under 11 U.S.C. § 523(a). The bankruptcy court entered orders (1) dismissing with prejudice Plaintiffs' Second Amended Complaint for failure to comply with Rule 8 of the Federal Rules of Civil Procedure and (2) denying Plaintiffs' "Motion to Substitute Revised Second Amended Complaint," Aplt. App., Vol. II at 471. We reverse both orders and remand to the bankruptcy court for further proceedings.

I.

Rule 8 states that "[a] pleading . . . must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), and that allegations "must be simple, concise, and direct," Fed. R. Civ. P. 8(d)(1). The purpose behind Rule 8 is to "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (ellipsis and internal quotation marks omitted). Rule 8 "applies in adversary proceedings." Fed. R. Bankr. P. 7008.

II.

Plaintiffs' initial adversary complaint was six pages long and contained 15 paragraphs, although it included as an exhibit a 68-page civil complaint that Plaintiffs had filed against Defendants and others in federal court. The adversary complaint

referenced the civil complaint and alleged that the claims made against Defendants constituted nondischargeable claims under § 523(a).[1] After Defendants filed a motion to dismiss that complaint, citing to Rules 8 and 9(b) of the Federal Rules of Civil Procedure,[2] among other rules, the bankruptcy court granted leave for Plaintiffs to file a First Amended Complaint and denied the motion to dismiss as moot.

Defendants moved to dismiss the First Amended Complaint as well, this time suggesting it was too long. *See* Aplt. App., Vol. I at 180 (observing that the amended complaint was "72 pages long and contain[ed] 166 numbered paragraphs"). They asserted that the First Amended Complaint failed to comply with Rule 8, arguing it "fail[ed] to contain a short and plain statement of the claims," *id.* at 177, and the allegations were "not simple, concise and direct," *id.* at 177, 180, 181. In addition to seeking dismissal for failure to comply with Rule 8, Defendants asserted that the complaint should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state any claims upon which relief could be granted.[3] The bankruptcy court granted the motion to dismiss without prejudice for violations of Rule 8, highlighting one overly long paragraph and one paragraph that was "awash

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[1] The adversary complaint also requested that the bankruptcy court "lift the stay" and "authorize Plaintiffs to proceed with [the civil] litigation against [Defendants]." Aplt. App., Vol. I at 23.

[2] This Rule imposes heightened pleading requirements for claims alleging fraud. *See* Fed. R. Civ. P. 9(b) ("[A] party must state with particularity the circumstances constituting fraud . . . . ").

[3] Rule 12(b)(6) applies in adversary proceedings. *See* Fed. R. Bankr. P. 7012(b).

with superfluous detail." *Id.* at 294-95. The court also said that "[t]he requests for relief . . . conflate[d] civil liability with nondischargeability." *Id.* at 295. The court granted leave for Plaintiffs to file a Second Amended Complaint.

After Plaintiffs filed their Second Amended Complaint, Defendants moved to dismiss it, arguing that it "violate[d] [Rule] 8 in the very same manner as did the First Amended Complaint." *Id.*, Vol. II at 380. They complained that the new complaint was "longer" and "more verbose," "compris[ing] 77 pages and 213 numbered paragraphs." *Id.* at 381. Defendants also asserted that the complaint should be dismissed for failure to state a claim under Rule 12(b)(6). They argued that the complaint did not set forth the elements of any of the exceptions to discharge in § 523(a); that the complaint conflated civil liability with nondischargeability and failed to state a nondischargeability claim; that the allegations of breach of fiduciary duty were insufficient under § 523(a)(4); and that the claims for nondischargeability under § 523(a)(19) failed to allege that there was a judgment, order, consent order, or decree entered against Defendants, as that subsection requires.

The bankruptcy court dismissed the Second Amended Complaint with prejudice for failing to comply with Rule 8, noting that the complaint was now five pages longer than the previously dismissed complaint, the overly long paragraph had grown even longer, and the requests for relief "continue[d] to conflate civil liability with exceptions to discharge." *Id.* at 393. Plaintiffs appealed to the district court.

The district court treated the bankruptcy court's dismissal with prejudice for failure to comply with Rule 8 as a dismissal under Rule 41(b) of the Federal Rules of

Civil Procedure.[4] The district court reversed and remanded, directing the bankruptcy court to consider the factors in *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992), for determining whether to dismiss a case with prejudice under Rule 41(b).

On remand the bankruptcy court considered the *Ehrenhaus* factors, concluded that Defendants' motion to dismiss should be granted for failure to comply with Rule 8, and dismissed the Second Amended Complaint with prejudice. The bankruptcy court also denied Plaintiffs' "Motion to Substitute a Revised Second Amended Complaint for the reasons stated in the [dismissal order]." Aplt. App., Vol. II. at 471. Plaintiffs appealed and the district court affirmed the bankruptcy court. This appeal followed.

III.

"In an appeal from a final decision of a bankruptcy court, we independently review the bankruptcy court's decision, applying the same standard as the . . . district court." *In re Millennium Multiple Emp. Welfare Benefit Plan*, 772 F.3d 634, 638 (10th Cir. 2014) (internal quotation marks omitted). "In doing so, we treat the . . . district court as a subordinate appellate tribunal whose rulings are not entitled to any deference . . . ." *Id.* (internal quotation marks omitted). We review for abuse of discretion the bankruptcy court's dismissal of Plaintiffs' Second Amended Complaint for failure to comply with Rule 8. *See Nasious v. Two Unknown B.I.C.E. Agents*,

[4] That Rule states: "If the plaintiff fails to . . . comply with these rules . . . , a defendant may move to dismiss the action or any claim against it." Fed. R. Civ. P. 41(b). Rule 41(b) "applies in adversary proceedings." Fed. R. Bankr. P. 7041.

492 F.3d 1158, 1161 (10th Cir. 2007) (reviewing for abuse of discretion dismissal under Rule 41(b) for failure to comply with Rule 8); *see also Wynder v. McMahon*, 360 F.3d 73, 79 (2d Cir. 2004) ("Dismissals for failure to comply with Rule 8(a), like dismissals under Rule 41(b), are reviewed for abuse of discretion.").

Plaintiffs contend that the district court abused its discretion in dismissing their Second Amended Complaint because it "satisfied the baseline standards of Rule 8." Aplt. Br. at 14 (boldface omitted). They say that "[t]he Bankruptcy Court below never found that any version of Plaintiffs' complaints was confused, ambiguous, vague, or otherwise unintelligible or that it overwhelms the defendants' ability to understand or to mount a defense." *Id.* at 16. They further explain that "the Bankruptcy Court's focus has been on the length of the pleadings and allegations it felt were 'superfluous'—allegations which, for the most part, were designed to respond to Defendant's contention that Plaintiffs have failed to plead fraud with particularity as required by Rule 9(b)." *Id.* at 16. Plaintiffs also assert that any disagreement the bankruptcy court had with Plaintiffs' prose did not mean that the Second Amended Complaint "fail[ed] to give Defendants notice of the claims against them, which is the relevant standard." *Id.* at 21. To the contrary, Plaintiffs argue that the Second Amended Complaint "give[s] Defendants fair and reasonable notice of the claims against them." *Id.* at 19.

We agree with Plaintiffs that the bankruptcy court abused its discretion by dismissing the Second Amended Complaint with prejudice because the complaint did

give Defendants fair notice of the claims against them and therefore complied with Rule 8.

While the length of a complaint can be problematic, length alone does not support dismissing a complaint with prejudice under Rule 8. *See United States ex. rel Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003). As *Garst* explained:

> Some complaints are windy but understandable. Surplusage can and should be ignored. Instead of insisting that the parties perfect their pleadings, a judge should bypass the dross and get on with the case. A district court is not authorized to dismiss a complaint merely because it contains repetitious and irrelevant matter, a disposable husk around a core of proper pleading.

Id. at 378 (internal quotation marks omitted). At the same time, however, *Garst* recognized that "[l]ength may make a complaint unintelligible, by scattering and concealing in a morass of irrelevancies the few allegations that matter." *Id.* And *Garst* ultimately affirmed the dismissal of the complaint in that case, noting that "Garst's lawyer filed documents so long, so disorganized, so laden with cross-references and baffling acronyms, that they could not alert either the district judge or the defendants to the principal contested matters." *Id.*; *see also id.* at 379 (observing that complaint was "400 paragraphs covering 155 pages, and followed by 99 attachments").

Here, the bankruptcy court did not find that the Second Amended Complaint was unintelligible. It did state, however, that Plaintiffs proceeded by "'scattering and concealing in a morass of irrelevancies the few allegations that matter.'" Aplt. App., Vol. II at 466 (quoting *Garst*, 328 F.3d at 378). We cannot agree with that description of the complaint. The Second Amended Complaint is long and includes repetitious and

irrelevant matter, but it also contains a core of proper pleading where it sets out the claims for relief that give defendants fair notice of the claims against them. It is possible to bypass the dross and ignore the surplusage in the complaint and focus on the nine claims for relief[5] that are set out at the end of the complaint.

The bankruptcy court also cited to *Mann v. Boatright*, 477 F.3d 1140, 1148 (10th Cir. 2007), explaining that "[i]t is not the Court's task to cobble together plaintiffs' wide-ranging accusations into a cogent claim for relief." Aplt. App., Vol. II at 466. But *Mann* is distinguishable from this case. The complaint in *Mann* contained only one "Claim for Relief" in 463 paragraphs on 83 pages and "neither identifie[d] a concrete legal theory nor target[ed] a particular defendant." 477 F.3d at 1148. That is not true for the complaint here. The Second Amended Complaint sets out nine separate claims for relief that allege specific legal theories. The claims also target particular defendants, with most of the claims alleging that Mr. Roberts is liable for certain actions he took, and with one claim asserting that both Defendants are liable. Finally, with the exception of the last two claims, all the claims allege that Defendants' liability for these claims should not be discharged under 11 U.S.C. §§ 523(a)(4), (6), or (19).

In discussing the claims for relief, the bankruptcy court stated that they "conflate[d] civil liability with exceptions to discharge." *Id.* at 393. But this cursory assessment would seem to speak to the legal plausibility of the claims under

[5] Although the first claim is identified as Count I and the last claim as Count X, there is no Count VII, so there are only nine, as opposed to ten, claims for relief.

Rule 12(b)(6), not to whether the complaint gave Defendants fair notice of the claims under Rule 8, *see Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) (explaining that to provide fair notice a complaint needs to make clear "*who* is alleged to have done *what* to *whom*").

Defendants now argue that they "object[ed] to plaintiffs' complaints because plaintiffs failed to give fair notice of their claims" and "Defendants could not respond and defend themselves due to plaintiffs' repeated filing of deficient complaints." Aplee. Br. at 27. But Defendants provide no record citations to show where they made these arguments to the bankruptcy court, and we can find no support for them in the documents submitted in the appendix on appeal. Moreover, Defendants *were* able to respond to the complaint—they moved for dismissal under Rule 12(b)(6), arguing that the complaint failed to state any claims upon which relief could be granted, and they gave specific reasons for why they believed the claims were legally deficient.

We have described the "harsh[] remedy" of dismissal with prejudice as "the death penalty of pleading punishments." *Nasious*, 492 F.3d at 1162. "Dismissal pursuant to [Rule 8] is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Wynder*, 360 F.3d at 80 (internal quotation marks omitted). That standard is not met here. Although "plaintiff[s'] submission is a model of neither clarity nor brevity, and we can sympathize with the [bankruptcy] court's displeasure with it, . . . it is sufficient to put the defendants on fair notice." *Id.* at 79.

"Plaintiff[s'] long submission does not overwhelm the defendants' ability to understand or to mount a defense." *Id.* at 80. Because the core of Plaintiffs' Second Amended Complaint is sufficient for purposes of Rule 8, the bankruptcy court's dismissal with prejudice was improper. *See id.* ("Because a Rule 41(b) dismissal would only be proper if the complaint did not pass muster under Rule 8, and because the complaint exceeds the Rule 8 floor, we find that the district court's order was an abuse of discretion.").

IV.

We reverse the bankruptcy court's dismissal of the Second Amended Complaint with prejudice. Because the bankruptcy court's order denying Plaintiffs' Motion to Substitute a Revised Second Amended Complaint was based on the reasons stated in its order dismissing the Second Amended Complaint, we also reverse that order. We remand this case to the bankruptcy court for further proceedings consistent with this decision. We deny as moot Defendants' motion to submit the case on the briefs.

Entered for the Court

Harris L Hartz
Circuit Judge