FILED
United States Court of Appeals
Tenth Circuit

September 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PEDRO DAVALOS,

Plaintiff - Appellant,

v.

TIFFANY GOSSETT; CARL STEINKE; KEITH BORDERLON; TERRY JACQUES; DEAN WILLIAMS; JOHN AND JANE DOES,

Defendants - Appellees.

No. 23-1024
(D.C. No. 1:22-CV-01921-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **EID**, and **CARSON**, Circuit Judges.

Pedro Davalos, a Colorado inmate proceeding pro se, appeals the district court's dismissal of his lawsuit for failure to follow the Federal Rules of Civil Procedure. Although this dismissal was without prejudice, we find we have jurisdiction under 28 U.S.C. § 1291 and we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I. BACKGROUND & PROCEDURAL HISTORY

Davalos originally filed this action in Colorado state court in June 2022. At the time, he was an inmate at Colorado's Limon Correctional Facility. Davalos alleged that certain prison employees and administrators violated his federal and Colorado constitutional rights in two ways. First, they gave him photocopies of his mail, instead of the originals, apparently as part of a policy to prevent inmates from receiving narcotics by means of paper coated or infused with such substances. Second, when prison officials disciplined him for allegedly having narcotic-infused paper, they denied his request to have the paper tested by an outside lab at his own expense.

The court cannot find anything in the record confirming when Defendant Dean Williams was served with process. The other four defendants were served on July 8, 2022. They all removed to Colorado federal district court on August 3, 2022, based on Davalos's allegations that they violated his federal constitutional rights.

Exercising its screening authority under 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c), the district court—via a magistrate judge—ordered Davalos to file an amended complaint clarifying his claims, such as identifying which defendants allegedly violated which rights. Davalos filed an amended complaint, but instead of clarifying his claims, he argued he was entitled to default judgment because defendants defaulted before they removed to federal court. Specifically, Colorado Rule of Civil Procedure 12(a)(1) requires a defendant to answer or respond within twenty-one days of service. In defendants' case, this deadline fell on July 29, 2022.

No defendant answered by that date, but, as noted above, all defendants removed to federal court on August 3, 2022. Thus, in Davalos's view, he already had a right to judgment in his favor.

The magistrate judge screened this complaint and held that the legal argument about default was meritless. The magistrate judge gave Davalos one more opportunity to file an amended complaint more clearly explaining his claims.

Davalos took the opportunity and filed a second amended complaint. He re-alleged the two claims from his original complaint and added a third claim challenging the constitutionality of the removal process to the extent it deprived him of the default judgment he believed he had obtained in state court.

The magistrate judge screened the second amended complaint and issued a recommendation. Regarding the first two claims, the magistrate judge recommended finding they still lacked important details needed to sort out which defendants allegedly violated which rights. As to the third claim, the magistrate judge recommended dismissal because removal was timely and proper. The magistrate judge ultimately recommended that "the action be dismissed without prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to comply with the pleading requirements of Rule 8." R. at 265.[1]

[1] Rule 41(b) permits dismissal for "fail[ure] to prosecute or to comply with [the Federal Rules of Civil Procedure] or a court order."

Davalos objected. His objection focused exclusively on the question of defendants' default in state court and the recommendation's assertion that removal had been timely and proper.

Reviewing the recommendation, the district court held that Davalos waived any objection he might have had to dismissal of his first two claims. As to the third claim, the district court reviewed the recommendation de novo and agreed that defendants had properly removed. The district court also cited decisions from other district courts holding that failing to timely answer in state court does not prevent a party from removing to federal court. The district court therefore adopted the recommendation and ordered "that the second amended Prisoner Complaint and the action are dismissed without prejudice." R. at 299 (citation omitted). The court entered final judgment the same day.

II. APPELLATE JURISDICTION

In general, we only have jurisdiction over "final decisions of the district courts." 28 U.S.C. § 1291. The district court's dismissal order was without prejudice. "A case dismissed without prejudice may or may not be a final appealable order, depending upon the circumstances." *Coffey v. Whirlpool Corp.*, 591 F.2d 618, 620 (10th Cir. 1979). Specifically, "we must examine whether the district court dismissed the complaint or the action. A dismissal of the complaint is ordinarily a non-final, nonappealable order (since amendment would generally be available), while a dismissal of the entire action is ordinarily final." *Mobley v. McCormick*, 40 F.3d 337, 339 (10th Cir. 1994) (citations omitted). "[W]e look to the language of

the district court's order, the legal basis of the district court's decision, and the circumstances attending dismissal to determine the district court's intent in issuing its order—dismissal of the complaint alone or actual dismissal of plaintiff's entire action." *Moya v. Schollenbarger*, 465 F.3d 444, 451 (10th Cir. 2006) (internal quotation marks omitted).

Looking at all these circumstances, we are convinced the district court intended to dismiss the entire action. In particular, the magistrate judge recommended dismissing the "action," R. at 265, and the district court chose to dismiss "the second amended Prisoner Complaint *and* the action," R. at 299 (emphasis added) (citation omitted). The district court also entered judgment. Thus, we have jurisdiction under 28 U.S.C. § 1291 to hear this appeal.

III. ANALYSIS

Although we have appellate jurisdiction, there is very little to decide on the merits. Davalos's opening brief does not address the district court's reasons for dismissing his first two claims (*i.e.*, his claims about receiving photocopies instead of original mail, and not being allowed to have alleged contraband tested by an outside laboratory at his own expense). He has therefore abandoned those claims. *See Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)).

This leaves Davalos's third claim, which is not really a claim. It is an argument for remand to state court. Construing his pleadings liberally given his pro se status, *see, e.g.*, *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008), we

view this as an argument that the district court never had jurisdiction over the first two claims.

Davalos's jurisdictional argument changed as the case progressed. In his second amended complaint, he alleged that removal was unconstitutional because defendants had already defaulted in state court. The magistrate judge treated Davalos's assertion as a simple procedural challenge and rejected it, concluding that removal was authorized and timely under the applicable statutes. The magistrate judge did not address Davalos's constitutional theory. Despite this disconnect, Davalos did not object to the recommendation on the ground that the magistrate judge misunderstood the challenge to removal, and he did not assert any arguments in support of his constitutional theory. Instead, he asserted new procedural defenses to removal, which the district court rejected.[2]

On appeal, Davalos returns to a constitutional argument, claiming removal deprived him of an alleged First or Fourteenth Amendment right to litigate under the Colorado Rules of Civil Procedure. But "[t]his court has adopted a firm waiver rule under which a party who fails to make a timely objection to the magistrate judge's findings and recommendations waives appellate review of both factual and legal questions." *Morales-Fernandez v. INS*, 418 F.3d 1116, 1119 (10th Cir. 2005). This applies to a general failure to object and to an objection that is not "sufficiently

[2] These new procedural defenses relied on the order in which he listed his claims in his original state court complaint and on the manner in which service of process was completed. Davalos does not re-raise these defenses here, so we need not consider them.

specific to focus the district court's attention on the factual and legal issues that are truly in dispute." *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Davalos's objection to the magistrate judge's recommendation said nothing about his constitutional challenge to removal. Thus, he has waived that argument.

This appears to dispose of all issues on appeal. However, parts of Davalos's brief suggest he means to challenge the district court's holding that a defendant who fails to timely answer in state court may still remove to federal court. We see no reason to reverse on that basis.

The deadline Congress set for removal from state court is thirty days from receipt of the complaint. 28 U.S.C. § 1446(b)(1). There is no exception for defendants who would be considered in default if they remained in state court, and creating such an exception would seem to contradict congressional intent. From the late 1880s until the late 1940s, the rule was essentially what Davalos requests: defendants were required to remove no later than the state-court answer deadline. *See* 24 Stat. 552, 553–54 (1887); 28 U.S.C. § 72 (1946). In 1948, however, Congress changed the deadline to twenty days after receipt of the complaint. *See* Pub. L. No. 80-773, ch. 89, 62 Stat. 869, 939 (1948) (codified at 28 U.S.C. § 1446(b)). In 1965, Congress extended the deadline to thirty days, *see* Pub. L. No. 89-215, 79 Stat. 887 (1965), as it remains today. Forbidding defendants from removing based on their failure to meet the state-court answer deadline would effectively require federal courts to follow an approach Congress abandoned in 1948. Thus, the district court

did not err in rejecting Davalos's assertion that defendants' failure to timely answer in state court precluded removal to federal court.

IV. CONCLUSION

We affirm the district court's judgment. We grant Davalos's motion to proceed on appeal without prepayment of costs or fees.

Entered for the Court

Allison H. Eid
Circuit Judge