IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 24, 2018
Lyle W. Cayce
Clerk

No. 17-10409

UNITED STATES OF AMERICA, EX REL., MICHAEL JAMISON, RELATOR; GREGORY DEAN TINNELL, RELATOR; EARNEST HUNTER, RELATOR; DOROTHY WILLIAMS, RELATOR,

Plaintiffs–Appellants,

v.

DEL-JEN, INCORPORATED,

Defendant–Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:13-CV-4616

Before OWEN, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM: *

Michael Jamison, Gregory Dean Tinnell, Earnest Hunter, and Dorothy Williams (collectively, Relators) brought a qui tam suit against Del-Jen, Inc. (Del-Jen), alleging four violations of the False Claims Act (FCA) related to Del-Jen's operation of the North Texas Jobs Corps Center (NTJCC), an educational facility funded by the Department of Labor (DOL). The district court dismissed Relators' first amended complaint, and they filed a second amended complaint

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

with leave and a third by agreement with Del-Jen. The district court again granted Del-Jen's motion to dismiss for failure to state a claim with sufficient particularity. Relators appealed and filed a motion to amend the record on appeal to include a subcontractor agreement to which Del-Jen was a party. We carried that motion with the case. We now deny the motion and affirm the district court's judgment.

I

At this stage of the proceedings, we assume all well-pleaded allegations in the complaint are true.[1] In August 2010, DOL awarded Career Opportunities, Inc. (COI) the contract to operate the NTJCC. COI then "immediately sub-contracted with [] Del-Jen for the operation of the NTJCC effective November 1, 2010." Relators allege that "COI was nothing but a fraudulent shell front company" used by Del-Jen's parent company to put it "into a government funded position."

Relators are former employees who worked at the NTJCC. They filed suit against COI and Del-Jen, alleging violations of the FCA and common-law fraud. The United States declined to intervene. The district court dismissed the claims asserted against COI in the first amended complaint under Federal Rule of Civil Procedure 12(b)(5) without prejudice. It dismissed the claims against Del-Jen under Rule 12(b)(6), concluding that the allegations in the complaint did not meet the heightened "particularity" pleading standard of Rule 9(b), but granted leave to amend.

Relators filed a second amended complaint, and then by agreement a third ("the complaint") against Del-Jen only and alleging only the FCA violations. The complaint alleges that various workers at the NTJCC submitted false enrollment, graduation, and job placement data to DOL. Of

[1] *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

those named, only Maria Martin is alleged to have been associated with Del-Jen. The complaint alleges that she worked at the NTJCC from October 2010 to November 2013, first as a Del-Jen employee, "then promoted to COI." It does not specify when this "promotion" occurred. It also alleges that Del-Jen "entered into a conspiracy with COI and others" to submit false data.

The district court scheduled a Rule 26(f) conference, and Del-Jen filed another motion to dismiss. At the conference, Del-Jen objected to the commencement of discovery until the district court ruled on its motion to dismiss. The district court granted the motion to dismiss without ruling on Del-Jen's discovery objection. The court concluded that the complaint did not comply with Rule 9(b)'s particularity requirement because none of the misconduct alleged could be imputed to Del-Jen. The court rejected Relators' claim that the complaint established that COI and Del-Jen were "alter egos" of one another. Relators did not request leave to amend their complaint, but the district court sua sponte ruled that no further opportunity to amend would be granted.

This appeal followed. Relators moved in this court to supplement the record on appeal with a motion for summary judgment filed in Texas state court that contains the subcontractor agreement between COI and Del-Jen.[2] Relators assert that this document supports their "theory of the companies being alter egos or conspirators."[3]

II

As a threshold matter we address Relators' motion to supplement the record on appeal. Federal Rule of Appellate Procedure 10 authorizes us to

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[2] Appellants Mot. to Supp. Elec. Record on Appeal, *United States ex rel. Jamison v. Del-Jen, Inc.*, No. 17-10409 (5th Cir. Aug. 24, 2017), ECF No. 20.

[3] *Id.* at 3.

correct an "omission or misstatement" in the record,[4] but barring extraordinary circumstances we "will not [] enlarge the record to include material not before the district court."[5] We reserve our discretion to do so for situations in which resolution of the underlying the "issue is not in doubt" and when declining to do so would be "contrary to both the interests of justice and the efficient use of judicial resources."[6]

Neither condition exists here. Even accepting as true Relators' belief that the proffered document would establish that Del-Jen and COI were alter egos of one another, the fact that it was not attached to the complaint means that it has no bearing on the issue of whether that theory was adequately pleaded.[7] Further, because Del-Jen objected to the commencement of discovery the proffered document was not subject to mandatory disclosure and thus not improperly withheld.[8] Because the document was not before the district court, is irrelevant to the issue on appeal, and was not improperly withheld, we deny the motion to supplement the record on appeal.

III

"A dismissal for failure to plead fraud with particularity under [Federal Rule of Civil Procedure] 9(b) is treated as a dismissal for failure to state a claim

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[4] FED. R. APP. P. 10(e).

[5] *Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984); *see also Trinity Indus., Inc. v. Martin*, 963 F.2d 795, 799 (5th Cir. 1992); *United States v. Flores*, 887 F.2d 543, 546 (5th Cir. 1989) (per curiam); *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1174 (5th Cir. 1985) (per curiam); *Kemlon Prods. & Dev. Co. v. United States*, 646 F.2d 223, 224 (5th Cir. 1981)

[6] *Gibson*, 744 F.2d at 405 n.3 (quoting *Dickerson v. Alabama*, 667 F.2d 1364, 1367 (11th Cir. 1982)).

[7] *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) ("In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto.").

[8] *See* FED. R. CIV. P. 26(a)(1)(C).

under Rule 12(b)(6)."[9] We review a dismissal for failure to state a claim de novo.[10] We "will not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts."[11]

"[A] complaint filed under the False Claims Act must meet the heightened pleading standard of Rule 9(b)."[12] Rule 9(b) states that "a party must state with particularity the circumstances constituting fraud"[13] and "requires, at a minimum, that a plaintiff set forth the 'who, what, when, where, and how' of the alleged fraud."[14] When a defendant is alleged to be vicariously liable for the actions of another, the plaintiff must develop "an attributed liability theory" to make out a FCA claim.[15]

We have yet to decide whether Rule 9(b) applies to such an attributed liability theory, or whether that theory must be pleaded only in accordance with Rule 8(a). Rule 8(a) requires only "a short and plain statement,"[16] but the allegations in the complaint must still be "plausible on [their] face" such that there is sufficient "factual content" for "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[17] "[A]

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[9] *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 204 (5th Cir. 2013) (per curiam) (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 n.8 (5th Cir. 2009)).

[10] *See, e.g.*, *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 266 (5th Cir. 2010).

[11] *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

[12] *Grubbs*, 565 F.3d at 185.

[13] FED R. CIV. P. 9(b).

[14] *United States ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 382 (5th Cir. 2014) (per curiam) (quoting *Steury*, 625 F.3d at 266) (internal quotation marks omitted).

[15] *Grubbs*, 565 F.3d at 192 ("Regarding the [employer] . . . the complaint fails because there is no indication that the [employer] itself acted with the requisite intent. . . . [Relator] did not plead, argue at the district court, or on appeal that the [employer] was vicariously liable for the actions of the [employees]. Without an attributed liability theory, no allegations in the complaint allow a reasonable inference that the [employer] had the requisite intent.").

[16] FED. R. CIV. P. 8(a)(2).

[17] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

formulaic recitation of the elements of a cause of action will not do."[18] We need not decide here whether Rule 9(b) applies because Relators' complaint fails under either pleading standard.

First, Relators argue that the complaint alleges the existence of a relationship between Del-Jen and COI that establishes that they were "alter ego[s]" of one another with "joint responsibility" over the NTJCC. However, the complaint states only that "COI was nothing but a fraudulent shell front company" used "to put . . . Del-Jen into a government funded position" and that Del-Jen "entered into a conspiracy with COI and others." These allegations are conclusory and fail to plead this theory even plausibly.[19]

Second, Relators argue that the complaint establishes Del-Jen's vicarious liability for the conduct of Maria Martin, who is alleged to have been a Del-Jen employee at some point between October 2010 and November 2013. In Texas, "an employer is vicariously liable for . . . an agent or employee acting within the scope of his or her agency or employment."[20] Without "a relationship between the parties giving rise to the right of control, one person is under no legal duty to control the conduct of another."[21] Relying only on the complaint, we have no way of knowing which of Martin's alleged acts could be attributable to Del-Jen as opposed to COI. Indeed, there is no way to determine whether Martin committed any misconduct while employed by Del-Jen at all, especially given that Del-Jen's subcontract to operate NTJCC did not begin until November 2010. The complaint thus does not permit the reasonable inference that "a relationship between [Martin and Del-Jen] giving

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[18] *Id.* (quoting *Twombly*, 550 U.S. at 555).

[19] *See, e.g.*, *Twombly*, 550 U.S. at 565 n.10.

[20] *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998).

[21] *Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993); *see Rodriguez v. Sabatino*, 120 F.3d 589, 592 (5th Cir. 1997) (quoting *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983)).

rise to the right of control"[22] existed such that that Del-Jen could be "liable for the misconduct alleged."[23]

Relators fail to allege plausibly—much less with particularity—that liability for any of the misconduct described in the complaint could be attributed to Del-Jen. The district court properly granted Del-Jen's motion to dismiss.

IV

We also affirm the district court's denial of leave to amend Relators' complaint. We review denial of leave to amend a complaint for abuse of discretion.[24] Rule 15(a) provides that "leave to amend shall be freely given when justice so requires,"[25] but only "applies where plaintiffs 'expressly requested' to amend."[26] Here, Relators did not request leave to amend their third amended complaint. "A party who neglects to ask the district court for leave to amend cannot expect to receive such a dispensation from the court of appeals."[27]

Further, a district court is justified in denying leave to amend when a plaintiff has "fail[ed] to cure deficiencies by amendments previously allowed."[28] The district court dismissed Relator's first amended complaint because it did not plead the FCA claims with particularity, and it dismissed the third

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[22] *Graff*, 858 S.W.2d at 920.

[23] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[24] *S&W Enters., LLC v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 535 (5th Cir. 2003).

[25] *United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 386 (5th Cir. 2003) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

[26] *Id.* at 387 (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (5th Cir. 1988)).

[27] *Id.*

[28] *Id.* at 386 (quoting *Foman*, 371 U.S. at 182).

amended complaint for the same reason. Therefore, denial of leave to amend was not an abuse of discretion.[29]

* * *

For the foregoing reasons, we DENY Relators' motion to supplement the record on appeal and AFFIRM the judgment of the district court.

[29] *Cf. Willard*, 336 F.3d at 387 (affirming denial of leave to amend where the plaintiff had "already had two opportunities to amend the complaint" and the district court had previously granted leave to amend "to cure the complaint's lack of specificity").